(2021) 08 SHI CK 0064

In the High Court Of Himachal Pradesh

Case No : First Appeal Order No. 42 Of 2013

Neelam Kumari And Others — APPELLANT

Vs

National Insurance Company — RESPONDENT

Date of Decision : 06-08-2021

Acts Referred:

Code Of Civil Procedure, 1908 — Order 11 Rule 12
Motor Vehicles Act, 1988 — Section 140, 146, 147, 147(1), 147(2), 147(5), 149, 149(2), 165, 165(1), 163A, 166, 173

Citation : (2021) 08 SHI CK 0064

Hon'ble Judges : Satyen Vaidya, J

Bench : Single Bench

Advocate : Jagdish Thakur, Vijay Chaudhary

Final Decision : Disposed Of

Judgement

Satyen Vaidya, J

1. This appeal has been filed under Section 173 of the Motor Vehicles Act, 1988 against the award dated 19.12.2012 passed by learned Motor

Accident Claims Tribunal, Fast Track Court, Chamba, H.P. (for short â?? Tribunalâ??) in M.A.C. No. 72/12/11 whereby the claim petition filed by

the appellants/claimants, was dismissed.

2. Brief facts of the case are that the appellants filed claim petition No.72/12/11 seeking compensation to the tune of Rs.8,00,000/- under Section 166

of the Motor Vehicles Act, 1988 (for short â??Actâ??) on account of death of Sh. Sunil Kumar S/o Sh. Dharam Pal in the capacity of his legal

representatives.

3. It was stated in the claim petition that the deceased was the owner of the vehicle involved in the accident and he himself was driving the vehicle.

The vehicle was insured with the respondent.

4. Respondent contested the petition on the grounds that the petition was not maintainable. Insured had intentionally made breaches of the terms and

conditions of the policy. The petition under Section 166 of the Act was not maintainable in view of the provisions of Section 147 of the Act. The

driver-cum-owner i.e. the deceased Sunil Kumar was not possessing valid and effective driving license to drive the vehicle at the time of the accident

and in case some license was produced, the same was bogus and fake having not been issued by the competent authority. The vehicle at the time of

the accident was being plied in violation of the Act and Rules framed thereunder besides other grounds. It was, however, averred in alternative

without admitting the liability that the petitioners were entitled for a limited amount of Rs.2,00,000/- only as per the terms, limits and conditions of the

insurance policy and that also before the special forum.

5. In rejoinder, the petitioners controverted the objections raised by the respondent in generality.

6. The learned Motor Accident Claims Tribunal below framed the following issues:

1. Whether deceased Sunil Kumar had died on 10.11.2020 on account of use of vehicle No.HP-01C-0116 (Taxi Alto) at about 9.15 P.M. near Lakar

Mandi, Dalhousie? OPP

2. If issue No.1 is proved in affirmative, whether the petitioners are entitled for the grant of compensation, if so, to what amount? OPP

3. Whether the petition is not maintainable as alleged? OPR

4. Whether the offending vehicle was being driven in violation of the provisions of Motor Vehicle Act and terms and conditions of Insurance Policy as

alleged? OPR

5. Whether the liability of the Insurance Company was restricted to Rs. Two Lacs in terms of Insurance Policy, as alleged? OPR

6. Whether the driver was not holding valid and effective driving licence to drive the offending vehicle as alleged? OPR

7. Whether four persons were traveling in vehicle as an unauthorized occupants or gratuitous passengers as alleged? OPR

8. Relief.

7. Issues Nos. 1, 2, 5 and 7 were answered in negative, whereas the issues Nos.

3, 4 and 6 were answered in affirmative. The claim petition was accordingly, dismissed.

8. The appellants/claimants examined five witnesses. Appellant No.1 appeared as PW-1 and reiterated the contents of the petition in her examination-in-chief by way of affidavit Ext.PW-1/A. In her cross-examination, nothing material could be elicited. PW-2 Tilak Raj submitted his examination-in-chief by way of affidavit Ext. PW-2/A. He stated, on oath, that he was one of the occupants of ill-fated vehicle at the time of the accident. He corroborated the version of PW-1. In cross-examination, he stated that in accident he received minor injuries, but he was not medically examined by the doctor. He had not got registered the FIR. He denied that the accident occurred on account of negligence of the deceased. PW-4 Sonu Kumar, through his examination-in-chief by way of affidavit Ext.PW-4/A reiterated the version of PW-1 and PW-2. In cross- examination, he stated that he had also received injuries in the accident and was medically examined. He admitted that he has not placed on record of the case any document in this regard. He denied that the accident occurred due to negligence of deceased Sunil Kumar.

9. PW-3 Dr. Vipan Thakur proved the copy of postmortem report Ext. PW-3/A and he was not cross-examined. PW-5 MHC Arun Kumar, Police Station, Dalhousie, District Chamba proved the factum of registration of FIR, a copy of which was exhibited as Ext.PW-5/A.

10. Respondent did not choose to lead any oral evidence. Learned counsel for the respondent placed on record documents i.e. copy of Insurance Policy Ext. R-1 and copy of Registration Certificate Ext. R-2. No further evidence was led on behalf of the respondent.

11. I have heard learned counsel for the parties and have also gone through the records of the case.

12. It has been submitted by the learned counsel for the appellants that the claim petition has been wrongly dismissed. It has been argued with vehemence that the findings recorded by the learned Tribunal below on issue No.6, were perverse as the respondent had failed to discharge the burden of proving the said issue. It has further been argued that the petition was maintainable under Section 166 of the Act and in alternative, award of Rs.2,00,000/- could not have been denied to the appellants in view of the

specific admission made by the respondent and also the law applicable in

the facts of the case.

13. Per contra, learned counsel for the respondent has submitted that the claim petition under Section 166 of the Motor Vehicles Act was not

maintainable in view of the provisions of Sections 147, 149 and 165 of the Act. According to him, a petition under Section 166 of the Act could be

maintained only in respect of the claim of third party and since, in the instant case, deceased himself was insured, he did not qualify to be termed as

third party. It has further been argued on behalf of the respondent that the award passed by the learned Tribunal did not suffer from any legal infirmity

and hence, deserves to be upheld.

14. In addition, it has also been contended on behalf of respondent that the Tribunal was not competent to grant relief, if any, arising out of personal

accident risk of insured as the same was justiciable only under the Consumer Protection Act before appropriate forum.

15. The record reveals that the respondent had taken a specific objection in the reply filed by it before the Tribunal, which reads as under:

â??4. That the driver-cum-owner of the vehicle bearing registration No. HP-01C-0116 (Taxi) alleged to be involved in the accident was not holding

valid and effective driving licence to drive such vehicle at the time of alleged accident and in case any licence is produced the same bogus and fake

license and having not been issued by any competent authority.â??

In rejoinder, the contents of para-4 of the preliminary objections were denied being incorrect. Issue No.6 was framed and the onus to prove the said

issue was rightly placed on the respondent.

16. Despite having raised a specific defence under Section 149 (2) of the Act, respondent did not lead any evidence to prove such issue in order to

avoid its liability. During the entire trial, no steps were taken by the respondent to seek information about the driving license, if any, possessed by the

deceased Sunil Kumar.

17. It is settled that the onus to prove breach of condition(s) off the policy of insurance is always on the insurer. Reference can be made to the

judgment passed by this Court in Surender Singh vs. Smt. Jai Manti Devi and others 2008 (2) Shim.L.C. 533, in which it was held as under:

â??12. The onus to prove the issue whether the Insurance Company was not liable to pay the awarded compensation for the reason that the driver of

the truck was not holding a valid driving license was heavy on the Insurance Company and rightly so fixed by the Tribunal.

[13] In Narcinva v. Kamat v. Alfredo Antonio Doe Martins, 1985 3 SCR 951, the Apex Court has held that the insured is under no obligation to

furnish evidence so as to enable the insurance company to wriggle out of its liability under the contract of insurance. Mere failure on the part of the

owner to produce the driving licence, when called upon to do so in the cross-examination would not discharge the burden and no adverse inference to

the effect that the driver did not have a valid licence can be drawn. The insurance company should have got evidence to substantiate its allegation.

Applying the test who would fail if no evidence is led, the Court held that it would be the insurance company.

[14] In National Insurance Co. Ltd. v. Swaran Singh and Ors., 2004 AIR(SC) 1531, the Apex Court has held that once the assured proves that the

accident is covered by the compulsory insurance clause, it is for the insurer to prove that it comes within its exception. The Insurance Company,

which alleges the breach must prove the same and is required to establish the said breach by cogent evidence. Failure to prove that there has been

breach of conditions of policy on the part of the insured, the insurance company cannot be absolved of its liability. The Insurance Company with a

view to avoid the liability must not only establish the available defences raised in the proceedings but must also establish the breach on the part of the

owner of the vehicle.â??

18. Similar view has been taken by this Court in Anita Abrol and others vs. Rishi Co-operative Societies Limited and others Latest HLJ 2009 (HP)

1342, wherein it was held as under:

â??9. The learned Motor Accident Claims Tribunal has erred in law by shifting the burden to prove whether there was breach of terms of the policy

or not upon the owner. It is settled law that it is for the Insurance Company to prove that there was breach of terms of the policy and the driver did

not have valid licence. In the present case the Insurance Company has not produced any evidence to prove the breach. The Counsel appearing for

respondent No. 3 had not produced any evidence. Respondent No. 3 has not filed any application seeking details of the driving licence issued in favour

of respondent No. 2.

10. Their Lordships of the Hon'ble Supreme Court in Narchinva V. Kamat and Anr. v. Alfredo Antonio Doe Martins and Ors., 1985 AIR(SC) 1281

have held as under:

â??15. To sum up the insurance company failed to prove that there was a breach of the term of the contract of insurance as evidenced by the policy

of insurance on the ground that the driver who was driving the vehicle at the relevant time did not have a valid driving licence. Once the insurance

company failed to prove that aspect, its liability under the contract of insurance remains intact and unhampered and it was bound to satisfy the award

under the comprehensive policy of insurance.â??

[11] It was necessary for the Insurance Company to give notice to the owner or the driver to give the details of the driving licence. The Insurance

Company has also not moved any application under Order 11 Rule 12 of the Code of Civil Procedure for production of document. The onus of proving

that the driver of the bus did not have the valid licence to drive the vehicle lied on the Insurance Company, because it was the Insurance Company

which sought to avoid its liability under the policy on the ground that the terms of the policy had been violated.

It was not sufficient for respondent No.3-company to make assertion that the driver was not holding driving licence without adducing necessary proof

and escape its liability under the policy. In the present case the driver was already arrayed as respondent No. 2. The requirement for holding the

owner vicariously liable is that the driver was in the employment of the owner. This fact has not been denied by the owner.â??

19. In view of the aforesaid legal position, the findings returned by the learned Tribunal below on issue No.6 cannot be sustained and are accordingly

reversed. It is held that respondent had failed to prove the breach of policy on the ground that the insured-cum-driver was not having valid and

effective driving license at the time of the accident.

20. On the question of non-maintainability of petition, learned counsel for respondent has placed reliance on the judgments Ramkhiladi and another vs.

United India Insurance Company Ltd. 2020 (1) ACJ 627, CMA No. 1848/2017, NIC Ltd. Vs. Rani and others, decided on 12.3.2020, New India

Assurance Company Ltd. Vs. Asha Rani, 2003, ACJ (1) (para 27), Oriental Insurance Company Ltd. Vs. Premlata Shukla, 2007 (13) SCC 476

(Paras 12-15), Oriental Insurance Company Ltd. Vs. Smt. Kamlo and others 2005, SLC 134 (HP) and Dhan Raj vs. New India Assurance Company

Ltd. 2004 (8) SCC 553.

21. Insofar as the claim under Section 166 of the Act raised by the appellants/ claimants is concerned, the same has been rightly denied by the learned

Tribunal. The conjoint reading of Sections 147, 149 and 165 of the Act, leads to inescapable conclusion that the claim under Section 166 of the Act on

behalf of the legal representatives of the deceased, who himself was owner of the vehicle was not maintainable. The Act provides for the right of

insured to be indemnified by the insurer against the third party risk. The only exception being in respect of the claims which arise out of the special

contract between the insured and insurer beyond the coverage of third-party risk.

22. There is no hesitation in holding that the claim of the appellants/claimants on account of death of Sunil Kumar was not maintainable as the

deceased Sunil Kumar was himself the owner-cum-driver of the vehicle involved in the accident and hence his legal representatives had stepped into

his shoes, therefore, were not entitled to seek indemnification from the insurer.

23. Now the question that remains to be decided is whether the Tribunal could have awarded a sum of Rs 2,00,000/- to the appellants/claimants on

account of special contract existing between the parties? It is not in dispute that respondent had received premium for insuring the ownerâ??s

personal risk to the maximum limit of Rs. 2,00,000/-.

24. The Act mandates the policy coverage of third-party risks but at the same time does not prohibit the insurer to enter into a special contract of

insurance with insured to cover risks of the persons and property over and above the statutory coverage as provided under Sections 146 and 147 of

the Act. The expression used in proviso (ii) to Section 147 (1) â??Provided that the policy shall not be required to cover any contractual liabilityâ?,

does not mean that the insurer is prohibited by the Act to enter into a special contract of insurance with the insured beyond the statutory limit

prescribed under the Act. In other words, Sections 146 and 147 of the Act, prescribe the minimum statutory requirement of the insurance policy

covering third party risks subject to the limits provided under sub section (2) of

Section 147. In addition, sub section (5) of Section 147 of the Act,

reads as under:

â??(5) Notwithstanding anything contained in any law for the time being in force, an insurer issuing a policy of insurance under this section shall be

liable to indemnify the person or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of

that person or those classes of personsâ??.

25. Section 165 of the Act enables the constitution of Tribunals. Sub section (1) of Section 165 of the Act cannot be said to be exhaustive for the

reasons that in explanation appended thereto, the claims under Sections 140 and 163A of the Act have also been included.

26. Sections 140 and 163A of the Act have their applicability even without proof of negligence, which otherwise is opposed to the very principle of

strict liability and vicarious liability under law of torts, on which rests the entire edifice of jurisdiction of Tribunals to award damages/compensation.

27. This Court is thus unable to concur with the contention raised on behalf of the respondent that even the claim of Rs.2,00,000/- on account of

personal accidental risk of the deceased covered under the policy Ext. R-1 was not maintainable before the Tribunal. Reference can be made to the

judgment rendered in Dhanraj vs. New India Assurance Company Ltd. and another AIR 2004 SC 4767 wherein Honâ??ble Apex Court has held as

under:

â??8â?¦In the case of Oriental Insurance Co. Ltd. v. Sunita Rathi and Ors. [1998 ACJ 121] it has been held that the liability of an Insurance

Company is only for the purpose of indemnifying the insured against liabilities incurred towards third person or in respect of damages to property.

Thus, where the insured i.e. an owner of the vehicle has no liability to a third party the Insurance Company has no liability also. [9] In this case, it has

not been shown that the policy covered any risk for injury to the owner himself. We are unable to accept the contention that the premium of Rs.

4,989/- paid under the heading ""Own damage"" is for covering liability towards personal injury. Under the heading ""Own damage"", the words ""premium

on vehicle and non-electrical accessories"" appear. It is thus clear that this premium is towards damage to the vehicle and not for injury to the person of

the owner. An owner of a vehicle can only claim provided a personal accident insurance has been taken out. In this case, there is no such

insurance.â??

28. Similarly, the Honâ??ble Supreme Court in National Insurance Company Ltd. Vs. Ashalata Bhowmik and others (2018) 9 SCC 801 in para-9,

has held as under:

â??9â?¦Therefore, the High Court was not justified in directing the appellant/ insurer to pay the compensation determined by the Tribunal. Since the

indemnification extended to personal accident of the deceased is limited to Rs.2,00,000/- under the contract of insurance, the respondents are entitled

for the said amount towards compensation. Hence, the appellant is directed to deposit the said sum of Rs. 2,00,000/- with interest @ 9 per cent per

annum from the date of the Claim Petition till the date of deposit with the Tribunal within a period of four weeks from today.â??

29. Even the judgment13 relied upon on behalf of the respondent in Ramkhiladi and another vs. United India Insurance Co. Ltd. and another 2020

ACJ, 627, the Honâ??ble Supreme Court has held in paras 5.9 and 6 as under:

â??5.9. Now, so far as the submission made on behalf of the claimants that in a claim under Section 163A of the Act mere use of the vehicle is

enough and despite the compensation claimed by the heirs of the owner of the motorcycle which was involved in the accident resulting in his death,

the claim under Section 163A of the Act would be maintainable is concerned, in view of the decision of this Court in Rajni Devi (supra), the aforesaid

cannot be accepted. In Rajni Devi (supra), it has been specifically observed and held that the provisions of Section 163A of the Act cannot be said to

have any application with regard to an accident wherein the owner of the motor vehicle himself is involved. After considering the decisions of this

Court in the cases of Oriental Insurance Co. Ltd. V. Jhuma Saha, 2007 9 SCC 263; Dhanraj (supra); National Insurance Co. Ltd. V. Laxmi Narain

Dhut, 2007 3 SCC 700 and Premkumari v. Prahlad Dev, 2008 3 SCC 193, it is ultimately concluded by this Court that the liability under Section 163A

of the Act is on the owner of the vehicle as a person cannot be both, a claimant as also a recipient and, therefore, the heirs of the owner could not

have maintained the claim in terms of Section 163A of the Act. It is further observed that, for the said purpose, only the terms of the contract of

insurance could be taken recourse to. In the recent decision of this Court in the case of Ashalata Bhowmik (supra), it is specifically held by this Court

that the parties shall be governed by the terms and conditions of the contract of insurance. Therefore, as per the contract of insurance, the insurance

company shall be liable to pay the compensation to a third party and not to the owner, except to the extent of Rs.1 lakh as observed hereinabove.

[6] In view of the above and for the reasons stated above, the present appeal is partly allowed to the aforesaid extent and it is observed and held that

the original claimants shall be entitled to a sum of Rs.1 lakh only with interest @ 7.5 per cent per annum from the date of the claim petition till

realization. In the facts and circumstance of the present case, there shall be no order as to costs.â??

30. Even this Court in ICICI Lombard General Insurance Company Ltd. Vs. Parul Sharma and others 2018 ACJ 635 has held as under:

â??21. The Apex Court in the case titled as Oriental Insurance Co. Ltd. versus Rajni Devi and others, 2008 ACJ 1441, held that where compensation

is claimed for the death of the owner or another passenger of the vehicle, the claim of the insurance company would depend upon the terms of the

insurance policy. It is worthwhile to reproduce paras 6 and 11 of the judgment herein:

6. It is now a well settled principle of law that in a case where third party is involved, the liability of the insurance company would be unlimited.

Where, however, compensation is claimed for the death of the owner or another passenger of the vehicle, the contract of insurance being governed by

the contract qua contract, the claim of the insurance company would depend upon the terms thereof.

7 to 10. Xx xxx xxx

11. According to the terms of contract of insurance, the liability of the insurance company was confined to Rs. 1,00,000 (rupees one lakh). It was

liable to the said extent and not any sum exceeding the said amount.

[22] Applying the test to the instant case, the insurance policy of the offending vehicle is on the record as Ext. R1E, the perusal of which does disclose

that the owner insured has paid extra premium covering the insurance of the owner to the extent of Rs. 2,00,000/. As discussed hereinabove,

deceased Vijay Sharma had stepped into the shoes of the owner, thus, his risk was covered to the extent of Rs. 2,00,000/ and the claimants, being the legal representatives of the owner, are entitled to compensation only in terms of the conditions contained in the insurance policy.

[23] Viewed thus, it is held that the claimants are entitled to compensation to the tune of Rs. 2,00,000/ with interest @ 7.5% per annum from the date

of the claim petition till its finalization.â??

31. Since the insurer had failed to prove the breach of conditions of the policy, as noted above, the claim of Rs.2,00,000/-on account of coverage of

personal risk under the policy in question should have been allowed in favour of the appellants/claimants. The impugned award dated 19.12.2012 is

thus modified to the extent that the respondent â?"National Insurance Company is liable to pay a sum of Rs.2,00,000/- to the claimants/appellants on

account of personal accidental coverage along with interest at the rate of 7.5% per annum from the date of filing of the petition. It is further held that

the amount so payable by the respondent to the appellants/claimants shall be apportioned in the following ratio:

(i) Appellants/claimants No.1 to 3 each shall be paid 25% of the award amount and ;

(ii) the remaining 25% shall be apportioned equally between the appellants/ claimants No.4 and 5

32. The appeal is accordingly disposed of in the aforesaid terms with no order as to costs. Pending miscellaneous application(s) if any, also stand

disposed of.

