
(1999) 08 SHI CK 0002
In the High Court Of Himachal Pradesh
Case No : F.A.O. (MVA) No. 69 of 1992

New India Assurance Co. Ltd.

APPELLANT

Vs

Anil Kumar and Others

RESPONDENT

Date of Decision : 10-08-1999

Acts Referred:

Motor Vehicles Act, 1988 — Section 96(2)(b)(i)(a)

Citation : (2000) 1 ACC 148 : (2001) ACJ 127

Hon'ble Judges : D. Raju, C.J.; L.S. Pant, J

Bench : Division Bench

Advocate : K.D. Sood, for the Appellant; Om Prakash, V.D. Khidta and Ajay Sharma, for the Respondent

Final Decision : Allowed

Judgement

L.S. Pant, J.—This appeal u/s 173 of the Motor Vehicles Act, 1988 has been filed by the New India Assurance Co. Ltd. (hereinafter for short "the appellant company") against the judgment and award dated 24.7.91 of Motor Accidents Claims Tribunal (3), Kangra at Dharamsala in M.A.C. Petition No. 25 of 1989, whereby total amount of compensation of Rs. 73,160 was awarded in favour of the claimant Anil Kumar for the injuries suffered by him in the accident.

2. The facts giving rise to the filing of the present appeal may briefly be stated as under:

On 5.3.89, claimant Anil Kumar hired a taxi bearing registration No. DAJ 3543 at Shahpur, District Kangra and he along with his mother and wife was travelling in the said taxi to Trilokpur. When the taxi (Maruti van) reached near a place known as Sihun at about 3.30 p.m., a Himachal Road Transport Corporation bus was coming from the opposite side being driven by respondent Harnam Singh, who stopped the bus on his left side of the road but respondent Balbir Singh driver of the van could not control his vehicle, as a result of which, the van struck against the stationary bus of the H.R.T.C. causing the accident. In the said accident

claimant suffered injuries on his body and his right leg was fractured. The claimant filed a claim petition before the Tribunal below alleging, inter alia, that the accident occurred due to rash and negligent driving of the van by its driver respondent No. 3 in this appeal despite the request made to him by the claimant's mother that he should drive the vehicle in question slowly. The claimant also alleged that due to the injuries sustained by him he remained as indoor patient for months together and had to spend lot of money on his treatment and that he has suffered permanent disability. He stated that during the period he remained under treatment, he could not attend to his business and suffered considerable loss in his income. On these premises, the claimant had made a claim of Rs. 5,16,735 as compensation.

3. The claim petition was contested and resisted by the owner of the vehicle Savitri Devi, respondent No. 1 herein and respondent No. 2 driver of the van. Both these respondents have admitted that their vehicle was hired by the claimant from Shahpur to Trilokpur but alleged that the accident in question had taken place due to rash and negligent driving of the bus by its driver respondent No. 5 herein. Respondent H.R.T.C. and its driver had denied their liability to pay the compensation to the claimant on the ground that the accident had not taken place due to rash and negligent driving of the bus by its driver but had occurred due to rash and negligent driving of the van by its driver.

4. The appellant company in its reply denied the liability to pay compensation on the similar ground as had been taken by the owner and driver of the van. In addition, the appellant company stated that respondent driver of the van was not holding a valid licence at the material time and that the vehicle was insured as private van and not as public vehicle for carrying passengers for hire or reward, therefore, the appellant company was not liable to indemnify the insured in case the vehicle was used by her in violation of the terms and conditions of the insurance policy.

5. On the controversial pleadings of the parties, the Tribunal settled the following issues:

(1) Whether the accident, in question, took place driving of Maruti van No. DAJ 3543 driven by Balbir Singh, respondent No. 2, as alleged? ... OPP

(2) Whether the accident in question took place due to rash and negligent driving of bus No. HPK 2026 driven by Harnam Singh, respondent No. 5, as alleged? ... OPP

(3) To what amount of compensation, the petitioner is entitled and from whom? ... OPP

(4) Award/Relief.

6. The parties went to trial and led their oral and documentary evidence to substantiate their respective claims and counterclaims. The Judge of the Tribunal on an appraisal of the entire evidence on record, recorded findings on issue No. 1

against driver of the van holding him negligent in driving the vehicle in question on the relevant day. Against issue No. 2 the finding was in negative meaning thereby that the driver of the H.R.T.C. bus was not found negligent in driving the vehicle and causing the accident. Consequently, the claim petition was allowed and a total amount of compensation of Rs. 73,160 was awarded in favour of the claimant and against the owner, driver of the van in question and appellant company, jointly and severally and further that the entire amount of compensation awarded shall have to be paid by the appellant company as the van in question was insured with it. The Tribunal below also awarded interest at the rate of 12 per cent per annum from the date of filing of the claim petition till the date of payment or deposit in case the amount so awarded was not paid within 60 days from the date of the award. Feeling aggrieved and dissatisfied with the judgment and award of the Tribunal below, the appellant company has filed the present appeal.

7. Mr. K.D. Sood, learned counsel for the appellant company, has vehemently contended that the vehicle was insured as a private vehicle and not as commercial vehicle or public vehicle which could be used for hire or reward and as such the insured has violated the terms and conditions of the policy and, therefore, the appellant company is not liable to pay any compensation to indemnify the insured. He has taken us through the terms and conditions of the policy of insurance Exh. R-I. In support of his submissions, he has relied upon National Insurance Co. Ltd. Vs. Ganesan and Others, ; Pushpabai Purshottam Udeshi v. Ranjit Ginning and Pressing Co. 1977 ACJ 343 (SC); New India Assurance Co. Ltd. and Another Vs. Kamalabai and Others, ; Rama alias Shaheeda Bi Vs. Aabid Hasan and Others, .

8. Per contra, Mr. Om Prakash, learned counsel appearing on behalf of respondents owner and driver of the van in question, has contended that the defence put forth by the appellant company was not open to it as the vehicle in question was insured for third party risk and, therefore, the liability of the appellant company has rightly been fixed by the Tribunal below. He next contended that the defence so raised by the appellant company in this court was not taken by it in its written statement filed before the Tribunal below and, therefore, the appellant company cannot be permitted to raise this plea in this appeal. He further contended that the basic purpose of policy of insurance is to indemnify the insured for the third party risk and not to frustrate the terms and conditions of the policy of insurance. In support of his submissions, he has placed reliance on B.V. Nagaraju Vs. M/s. Oriental Insurance Co. Ltd., Divisional Officer, Hassan, Shivraj Vasant Bhagwat Vs. Smt. Shevanta Dattaram Indulkar and another, ; Manjit Singh Vs. Rattan Singh and Others, and United India Insurance Co. Ltd. v. Tilak Ram 1985 ACJ 481 (HP).

9. We have given our best consideration to the rival contentions of the learned counsel for the parties.

10. So far as the reasonings and conclusion arrived at by the Tribunal below

holding the driver of the van in question rash and negligent in driving the vehicle and causing the accident are concerned, there is no challenge to those findings by either side in this appeal and, therefore, to that extent the findings of the Tribunal below have attained finality. Admittedly, the accident had taken place on 6.3.1989 when the Motor Vehicles Act, 1988 was not in force and the case is covered under the Motor Vehicles Act, 1939. The relevant sections which cover the present controversy between the parties are Sections 95 and 96 of Motor Vehicles Act, 1939. Section 95 deals with the requirements of policy and limits of liability. Section 96 of the Act imposes duty on insurer to satisfy judgment against the person insured in respect of third party risk. The appellant company relied upon the exclusion clause in the insurance policy and the provisions of Section 96 (2) (b) (i) (a) of the said Act. This exclusion clause in the policy Exh. R-1, is as follows:

Limitations as to use: Use only for social, domestic and pleasure purpose and for the insured's business. The policy does not cover use for hire or reward or for organised racing, pace-making, reliability trial, speed-testing, the carriage of goods (other than samples) in connection with any trade or business or use for any purpose in connection with the motor trade. The policy is in respect of private car.

11. The two questions which arise for consideration in this appeal are, firstly, whether the appellant company is entitled to invoke the provisions of Section 96 (2) (b) (i) (a) of the said Act, and, secondly, whether the above quoted exclusion clause in the insurance policy absolves the appellant company of any liability in the present case.

12. In order to appreciate the first contention of the learned counsel for the appellant company it is necessary to refer to the relevant provisions of the said Act. Section 96 (2) (b) (i) reads as under:

(2) No sum shall be payable by an insurer under Sub-section (1) in respect of any judgment unless, before or after the commencement of the proceedings in which the judgment is given, the insurer had notice through the court of the bringing of the proceedings, or in respect of any judgment so long as the execution is stayed thereon pending an appeal; and an insurer to whom notice of the bringing of any such proceedings is so given shall be entitled to be made a party thereto and to defend the action on any of the following grounds, namely:

(a) xxx xxx xxx (b) that there has been a breach of a specified condition of the policy, being one of the following conditions, namely:

(i) a condition excluding the use of the vehicle--

(a) for hire or reward, where the vehicle is on the date of the contract of insurance a vehicle not covered by a permit to ply for hire or reward.

13. This clause, inter alia, uses the expression "for hire or reward" where the vehicle is on the date of contract of insurance a vehicle not covered by a permit

to ply for hire or reward, and in the present case, admittedly, the van involved in the accident was a private vehicle and was not permitted to ply for hire or reward as a taxi.

14. In *United India Insurance Co. Ltd. v. Tilak Ram* 1985 ACJ 481 (HP), the then learned Chief Justice of this court while interpreting the words and phrases--"licence" more specifically "driving licence" held that a person holding a learner's driving permit will cover a person who holds a "driving licence" or a "learner's driving permit" since both of them were issued in accordance with law by the Licensing Authority and duly authorise a person who holds either to drive a motor vehicle in a public place subject to conditions attached to each. This decision has been overruled by the Apex Court in *New Indian Assurance Co. Ltd. Vs. Mandar Madhav Tambe and others*, holding that when a vehicle in question was driven by a person holding learner's licence, the insurance company would not be liable to pay the compensation to the victim particularly when the policy of insurance specifically provided that the insurance company, in the event of an accident, would be liable only if the vehicle was being driven by a person holding a valid driving licence or a permanent driving licence "other than a learner's licence". Their Lordships proceeded to hold that the decision of the learned single Judge of the Himachal Pradesh High Court in *United India Insurance Co. Ltd.* "s case (supra) to the extent to which he had taken a contrary view must be held to have been incorrectly decided.

15. In *Skandia Insurance Co. Ltd. v. Kokilaben Chandravadan* 1987 ACJ 411 (SC), while interpreting the provisions of Section 96 (2) (b) (ii) the court observed in para 12 of the report as under:

(1) On a true interpretation of the relevant clause which interpretation is at peace with the conscience of Section 96, the condition excluding driving by a person not duly licensed is not absolute and the promisor is absolved once it is shown that he has done everything in his power to keep, honour, and fulfil the promise and he himself is not guilty of a deliberate breach.

(2) Even if it is treated as an absolute promise, there is substantial compliance therewith upon an express or implied mandate being given to the licensed driver not to allow the vehicle to be left unattended so that it happens to be driven by an unlicensed driver.

(3) The exclusion clause has to be "read down" in order that it is not at war with the "main purpose" of the provisions enacted for the protection of the victims of accidents so that the promisor is exculpated when he does everything in his power to keep the promise.

Their Lordships further held in para 14 of the report as under:

(14) Section 96 (2) (b) (ii) extends immunity to the insurance company if a breach is committed of the condition excluding driving by a named person or persons or by any person who is not fully licensed, or by any person who has

been disqualified for holding or obtaining a driving licence during the period of disqualification. The expression "breach" is of great significance. The dictionary meaning of "breach" is "infringement or violation of a promise or obligation". (See Collins English Dictionary). It is, therefore, abundantly clear that the insurer will have to establish that the insured is guilty of an infringement or violation of a promise that a person who is duly licensed will have to be in charge of the vehicle. The very concept of infringement or violation of the promise that the expression "breach" carries within itself induces an inference that the violation or infringement on the part of the promisor must be wilful infringement or violation. If the insured is not at all at fault and has not done anything he should not have done or is not amiss in any respect how can it be conscientiously posited that he has committed a breach? It is only when the insured himself places the vehicle in charge of a person who does not hold a driving licence, that it can be said that he is "guilty" of the breach of the promise that the vehicle will be driven by a licensed driver. It must be established by the insurance company that the breach was on the part of the insured and that it was the insured who was guilty of violating the promise or infringement of the contract. Unless the insured is at fault and is guilty of a breach the insurer cannot escape from the obligation to indemnify the insured and successfully contend that he is exonerated having regard to the fact that the promisor (the insured) committed a breach of his promise. Not when some mishap occurs by some mischance. When the insured has done everything within his power inasmuch as he has engaged a licensed driver and has placed the vehicle in charge of a licensed driver, with the express or implied mandate to drive himself it cannot be said that the insured is guilty of any breach. And it is only in case of a breach or a violation of the promise on the part of the insured that the insurer can hide under the umbrella of the exclusion clause.

16. In the case before the Apex Court, the facts of the case were that the accident in question took place on 14.11.1964. The truck had come from Barejadi and unloaded at Baroda. The driver had gone for bringing snacks from the opposite shop leaving the engine running. The ignition key was in the ignition lock and not in the cabin in the truck and the driver had handed over control of the truck to the cleaner. On these facts the driver having been grossly negligent in leaving such a truck with its running engine in the control of the cleaner, and this being the immediate cause of the accident, the owner of the truck, viz., the insured was held vicariously liable along with the driver and cleaner. The Apex Court in these facts and circumstances of the case held that u/s 84 of the Act, there was an implied mandate to the licensed driver not to place a non-licensed person in charge of the vehicle, there was also a statutory obligation on the said person not to place it in charge of an unlicensed driver and if the employer had employed a licensed driver, who was in charge of the vehicle had committed a breach of the condition, it could not, therefore, in any case be considered as a breach on the part of the insured and mere breach of the exclusion clause in the insurance policy not by the insured but by his licensed driver did not absolve the

insurance company of liability. Their Lordships also proceeded to observe that what needs to be established was commission of breach by the insured, unless the insured was at fault and was guilty of breach, the insurance company could not escape the liability and it was also held that in that case insured had done everything in his power by engaging a licensed driver with an express/implied mandate to drive the vehicle by him.

17. In *B.V. Nagaraju Vs. M/s. Oriental Insurance Co. Ltd.*, Divisional Officer, Hassan, the question whether the alleged breach of carrying humans in a goods vehicle more than the number permitted in terms of insurance policy, was held not so fundamental a breach so as to afford to the insurer to eschew liability altogether. It was observed that ancillary to the question was the poser: whether the terms of the policy of insurance need be construed strictly or be read down to advance the main purpose of the contract as viewed by the court in *Skandia Insurance Co. Ltd. v. Kokilaben Chandravadan* 1987 ACJ 411 (SC). In Nagaraju's case, the terms of the insurance policy were that the insured vehicle was entitled to carry 6 workmen, excluding the driver whereas 9 workmen were carried in the vehicle when the said vehicle met with an accident. In that case, it was nobody's case that the driver of the insured vehicle was responsible for the accident. In fact, it was not disputed that the outcoming vehicle had collided head on against the insured vehicle, which resulted in the damage. Their Lordships held that merely by lifting a person or two or even three, by the driver or the cleaner of the vehicle, without the knowledge of the owner, could not be said to be such a fundamental breach that the owner should in all events, be denied indemnification and the misuse of the vehicle was somewhat irregular though, but not so fundamental in nature so as to put an end to the contract, unless some factors existed which, by themselves, had gone to contribute to the causing of the accident, and in that case because damage was caused to the vehicle by the other vehicle and no injuries were caused to the workmen and the Apex Court found no such contributory factor on the part of the driver of the vehicle. In the peculiar facts and circumstances of the case, the Apex Court held that the terms of the policy must be read down so as to serve the main purpose of the policy as the presence of 9 persons (when up to 6 were permissible), irrespective of their being employees or not, had not contributed in any manner to the occurring of the accident as also when the claim did not relate to any injuries to those 9 persons.

18. In the light of the judgments of the Apex Court referred to above, even if all Sub-clauses of Section 96 (2) (b) (i) (a) are read (i) on the one hand and (ii) on the other, Clause (i) relating to the using of the vehicle itself; whereas (ii) relates to the person driving the vehicle and that more than permitted number of persons cannot be carried in goods vehicle is not a condition permitted as exclusion clause by the Act as such, whereas Sub-clause (i) specifically stipulates the breach of a condition mentioned in Clause (a) as one of the grounds on which the insurer can defend the action against it in respect of liability for compensation. Therefore, the decision in *B.V. Nagaraju Vs. M/s. Oriental*

Insurance Co. Ltd., Divisional Officer, Hassan, was in the peculiar context of a condition imposed by the policy and not specifically permitted by the Act and the ratio, therefore, does not directly apply to the case in hand.

19. So far as the proposition of law settled in *Skandia Insurance Co. Ltd. v. Kokilaben Chandravadan* 1987 ACJ 411 (SC), is concerned, the principle laid down was in the peculiar context of the case where the vehicle was entrusted by owner to licensed driver and he only by his lapse/ slackness made it possible for cleaner to drive and, therefore, no breach by the insured. It is in that context the reading down was permitted of the clause in the insurance contract. If the present stand for respondent in the case in hand is to be accepted, it would amount to even cast not only reading down the condition of policy but also the very statutory provisions of Section 96 (2) (b) (i), which will not be permissible in law. In this connection we may usefully rely on the judgment of the Supreme Court in *New Indian Assurance Co. Ltd. Vs. Mandar Madhav Tambe and others*, wherein the provisions of Section 96 (2) (b) (ii) came up for consideration and as an obvious construction found, held that the insurance company is not liable.

20. After analysing the factual and legal position for the purpose of deciding the present case, the vehicle is not covered by a permit to ply for hire or reward and it was a private vehicle not carrying any passenger for hire or reward. It is the owner of the vehicle herself who gave the vehicle/ allowed the vehicle to be used as taxi to carry passengers for hire or reward and, therefore, it cannot be said that she has not committed breach of condition of the policy which is the same as the one not permitted by the statutory provisions. The appellant company has established that the breach was on the part of the insured and we find that it was the insured who was guilty of violating the terms or infringement of the contract by handing over a private vehicle for using it as taxi for hire or reward which is a fundamental breach of specified condition of the policy and the exclusion clause u/s 96 (2) (b) (i) (a) shall expressly apply in the case in hand denying the respondent owner of the vehicle indemnification by the appellant company.

21. The other judgments referred to above relied upon by the learned counsel for the respondent owner of the vehicle shall have no application in the peculiar facts and circumstances of the present case and, therefore, they have been only noticed and referred to by us. Consequently, the appellant company is exonerated from its liability to pay the amount of compensation awarded by the Tribunal below to the claimant Anil Kumar and we hold that it is the liability of the respondent owner of the private vehicle to pay total amount of compensation along with interest at the rate of 12 per cent per annum from the date of institution of the claim petition till payment or deposit, awarded by the Tribunal below to the claimant. All the contentions of the learned counsel for the claimant are not tenable.

22. For all the reasons stated herein-above, the appeal is allowed accordingly, and the award of the Tribunal below is modified to the extent indicated above.

Parties are left to bear their own costs.