
(2012) 08 DEL CK 0175
In the Delhi High Court
Case No : Mac. App. 482 of 2009

New India Assurance Co. Ltd.

APPELLANT

Vs

Mohinder Singh and Others

RESPONDENT

Date of Decision : 14-08-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 173
Motor Vehicles Act, 1988 — Section 149(2), 149(2)(a)(i)(ii), 149(2)(a)(ii), 181, 4
Penal Code, 1860 (IPC) — Section 279, 338

Citation : (2012) 08 DEL CK 0175

Hon'ble Judges : G.P. Mittal, J

Bench : Single Bench

Advocate : Kanwal Chaudhary, for the Appellant; B.K. Mishra, for the Respondent

Judgement

G.P. Mittal, J.—The Appeal is directed against a judgment dated 17.07.2009 whereby while awarding a compensation of Rs. 8,46,000/- along with interest @ 7.5% per annum in favour of the First Respondent Mohinder Singh, the Appellant's plea of conscious breach of the policy on the part of the owner and avoidance of liability by the Insurance Company was rejected. It is urged by the learned counsel for the Appellant that it was established on record that the Respondent No. 2 (Mandip Singh), the driver of the two-wheeler involved in the accident, was aged about 16 years at the time of the accident. He was thus not qualified to hold any driving licence. He was challaned for an offence u/s 4 read with Section 181 of the Motor Vehicles Act, 1988(the Act) apart from causing the accident by his rash and negligent driving. The owner did not lead any evidence as to how the driver was entrusted with the two-wheeler. Thus, the Appellant Insurance Company successfully proved the breach of the terms of the policy. The Motor Accident Claims Tribunal(the Tribunal) erred in making the Appellant liable to pay the compensation. The learned counsel for the Respondent, however, supported the judgment and states that the Insurance Company failed to prove willful and conscious breach of the terms of the policy. Thus, it could not avoid liability. While dealing with the Appellant's liability, the Claims Tribunal held

as under:

It was the contention on behalf of the respondent No. 3 that Insurance Company was not liable to pay any amount since there was a breach of terms and conditions of the Insurance Policy Ex.R3W1/1 by the insurer in as much as he allowed the insured vehicle to be driven by the respondent No. 1 who was a minor on the date of accident and was not holding any DL. In his testimony while making such a deposition, reliance was placed upon an admission of R-1 made before the Court and which was reflected in the proceedings sheets dated 08.09.2008. In support of his averment, the respondent No. 3 relied upon *National Insurance Company Ltd. v. Kusum Rai*, II 2006 CPJ 8 (SC) and *United India Insurance Co. Ltd. Vs. Rakesh Kumar Arora and Others*, .

Perusal of the record, specially the proceeding sheet dated 08.09.2008 reveals that on that date counsel for R-1 and R-2 appeared and after filing his Vakalatnama sought time to file the WS. It was further recorded in the order sheet that R-1 had submitted that he was 16 years of age and was not having any DL. Perusal of the record of the subsequent order sheet dated 16.10.2008 reveals that Sh. A.P. Singh counsel for R-1 and R-2 withdrew his Vakalatnama stating that R-1 and R-2 was not cooperating with him. It may be mentioned that on 08.09.2008 respondent No. 1 had not entered an appearance himself and therefore, there was merely a submission made by the counsel for R-1 and R-2 which was recorded in the order sheet by the predecessor of this Court. There was never an overt admission on the part of R-1 about him being a minor on the date of accident and not possessing a DL, ever given on record. R-1 never entered the witness box himself nor was he ever summoned as a witness on behalf of R-3 so that he may have been asked any question about his age or him possessing any DL. It may also be mentioned that R-3 i.e. Insurance Company never bothered to even issue any notice to R-1 or R-2 to produce the DL of R-1 in order that an adverse inference could now be taken against respondent No. 1.

In *NIC v. Kusum Rai*, the ratio is clear that in a case where R-1 was not holding any DL at all the Insurance Company would not be liable. In the second judgment i.e. *United India Insurance Company Ltd. v. Rakesh Kumar*, which was cited by the Insurance Company, in a case where the offending vehicle was being driven by a minor who was 15 years of age and was not possessing the DL, the said minor had appeared in the witness box as RW1 wherein he admitted that he was aged 15 years and was not having a DL, and it was only then that it was held that there was a breach of Insurance Policy by respondent No. 2 in allowing a minor to drive the vehicle and therefore, the Insurance Company was discharged from all liability.

However, in the case in hand, respondent No. 1 never entered the witness box himself nor was he summoned as a witness on behalf of R-3 nor did he make any oral or written statement himself before the Court which could be taken to be a final statement that respondent No. 1 was a minor at the relevant time and was not holding any DL. The Insurance Company failed to discharge the initial burden

to prove that R-1 was not having any DL and in this scenario the mere submission which was made by erstwhile counsel for R-1 and R-2 in the Court, just in the passing, cannot be treated to be the correct picture. Therefore, Insurance Company cannot be discharged of its liability.

2. I have before me the written statement filed by the Appellant Insurance Company. In para 2 of the preliminary objections, the Appellant actually stated that the Respondent Mandip Singh at the time of the accident, was aged 16 years and was thus a minor. The Respondent No. 3 (herein) thus committed breach of the terms of the policy as contained in Section 149(2)(a)(ii) of the Act. These allegations were not refuted by the Respondents No. 2 and 3 (the driver and the owner) of the vehicle. As has been mentioned by the Claims Tribunal, the counsel for the Respondent No. 2 made a statement before the Claims Tribunal on 08.09.2006 that the Respondent No. 2 (herein) did not possess any licence and that he was aged 16 years at the time of the accident. The Respondent No. 2 is now trying to get out of that statement contending that the counsel was changed and this statement was made without any authority. Even if the statement of counsel is excluded, there is sufficient material on record to show that the Respondent No. 2 was a minor and did not possess a valid driving licence at the time of the accident. First of all as stated earlier, the averments made in the written statement filed by the Appellant Insurance Company were not refuted by the Respondents No. 2 and 3 (the driver and the owner). A certified copy of the report u/s 173 of the Code of Criminal Procedure proved as Ex.PW3/224 shows that the Second Respondent apart from being prosecuted u/s 279 and 338 Indian Penal Code was also prosecuted for an offence u/s 4 read with Section 181 of the Act for driving a vehicle without attaining the age of majority. There was no rebuttal to the document Ex.PW3/24. Further, the Appellant Insurance Company examined R3W1 Ashutosh Gupta, Dealing Assistant of Appellant Insurance Company. He proved the certified copy of the policy Ex.R3W1/1. He deposed that the Second Respondent was a minor at the time of the accident and that this fact was admitted by him on 08.09.1996 before the Claims Tribunal. This part of R3W1's testimony was not challenged in the cross-examination by the Second and the Third Respondent. Thus, it was amply proved that the Second Respondent was a minor at the time of the accident and was incompetent to hold a driving licence and drive a vehicle. The Appellant Insurance Company, therefore, successfully proved the breach of the terms of the policy.

3. The Respondent No. 3, owner of the vehicle did not come forward to give any explanation as to the circumstances under which the vehicle was entrusted to the Second Respondent. It is true that initial onus is on the Insurance Company to prove that there is willful breach of the terms of the policy on the part of the insured. It is not a case where the vehicle is driven by a thief or a receiver of stolen property on whom the owner may not have any control. It is also not the Respondent No. 3's case that the Respondent No. 2 got possession of the vehicle in the circumstances beyond his control. In the circumstances, the Appellant

Insurance Company having discharged the initial onus, it was for the Respondent No. 3 to establish the circumstances under which the vehicle was entrusted to the Respondent No. 2. The Respondent No. 3 having failed to do so, the Insurance Company has proved that there was a willful and conscious breach of the terms of the policy. I am supported in this view by a judgment of a Learned Single Judge of this Court in *New India Assurance Company Ltd. v. Sanjay Kumar & Ors.*, ILR (2007) 11 DL 733, relevant portion of the report is extracted hereunder:

22. Thus, where the insurance company alleges that the term of the policy of not entrusting the vehicle to a person other than one possessing a valid driving licence has been violated, initial onus is on the insurance company to prove that the licence concerned was a fake licence or was not a valid driving licence. This onus is capable of being easily discharged by summoning the record of the Licencing Authority and in relation thereto proving whether at all the licence was issued by the authority concerned with reference to the licence produced by the driver. Once this is established, the onus shifts on to the assured i.e. the owner of the vehicle who must then step into the witness box and prove the circumstances under which he acted; circumstances being of proof that he acted bona fide and exercised due diligence and care.....

4. Thus, it is established that there was conscious and willful breach of the terms of the policy by the Respondent No. 3 and the Appellant could avoid its liability vis-a-vis the insured (Respondent No. 3). But, this is no longer *res integra* that even in case of conscious breach of the terms of the policy, the liability of the insurer to satisfy the award in the first instance is statutory.

5. The issue of satisfying the third party liability even in case of breach of the terms of insurance policy is settled by three Judge Bench report in *Sohan Lal Passi Vs. P. Sesh Reddy and others*, . As per Section 149(2) of the Motor Vehicles Act (the Act), an insurer is entitled to defend the action on the grounds as mentioned u/s 149(2)(a)(i)(ii) of the Act. Thus, the onus is on the insurer to prove that there is breach of the condition of the policy. It is well settled that the breach must be conscious and willful. Even if a conscious breach on the part of the insured is established, still the insurer has a statutory liability to pay the compensation to the third party and will simply have the right to recover the same from the insured/tortfeasor either in the same proceedings or by independent proceedings as the case may be, as ordered by the Claims Tribunal or the Court. The question of statutory liability to pay the compensation was discussed in detail by a two Judge Bench of the Supreme Court in *Skandia Insurance Co. Ltd. Vs. Kokilaben Chandravadan and Others*, where it was held that exclusion clause in the contract of Insurance must be read down being in conflict with the main statutory provision enacted for protection of victim of accidents. It was laid down that the victim would be entitled to recover the compensation from the insurer irrespective of the breach of the condition of policy. The three Judge Bench of the Supreme Court in *Sohan Lal Passi* analyzed

the corresponding provisions under the Motor Vehicles Act, 1939 and the Motor Vehicles Act, 1988 and approved the decision in *Skandia*. In *New India Assurance Co., Shimla Vs. Kamla and Others etc. etc.*, , the Supreme Court referred to the decision of the two Judge Bench in *Skandia*, the three Judge Bench decision in *Sohan Lal Passi* and held that the insurer who has been made liable to pay the compensation to third parties on account of issuance of certificate of insurance, shall be entitled to recover the same if there was any breach of the policy condition on account of the vehicle being driven without a valid driving licence. The relevant portion of the report is extracted hereunder:

21. A reading of the proviso to sub-section (4) as well as the language employed in sub-section (5) would indicate that they are intended to safeguard the interest of an insurer who otherwise has no liability to pay any amount to the insured but for the provisions contained in Chapter XI of the Act. This means, the insurer has to pay to the third parties only on account of the fact that a policy of insurance has been issued in respect of the vehicle, but the insurer is entitled to recover any such sum from the insured if the insurer were not otherwise liable to pay such sum to the insured by virtue of the conditions of the contract of insurance indicated by the policy.

22. To repeat, the effect of the above provisions is this: when a valid insurance policy has been issued in respect of a vehicle as evidenced by a certificate of insurance the burden is on the insurer to pay to the third parties, whether or not there has been any breach or violation of the policy conditions. But the amount so paid by the insurer to third parties can be allowed to be recovered from the insured if as per the policy conditions the insurer had no liability to pay such sum to the insured.

23. It is advantageous to refer to a two-Judge Bench of this Court in *Skandia Insurance Co. Ltd. Vs. Kokilaben Chandravan and Others*, . Though the said decision related to the corresponding provisions of the predecessor Act (Motor Vehicles Act, 1939) the observations made in the judgment are quite germane now as the corresponding provisions are materially the same as in the Act. Learned Judge pointed out that the insistence of the legislature that a motor vehicle can be used in a public place only if that vehicle is covered by a policy of insurance is not for the purpose of promoting the business of the insurance company but to protect the members of the community who become suffers on account of accidents arising from the use of motor vehicles. It is pointed out in the decision that such protection would have remained only a paper protection if the compensation awarded by the courts were not recoverable by the victims (or dependants of the victims) of the accident. This is the *raison d'être* for the legislature making it prohibitory for motor vehicles being used in public places without covering third-party risks by a policy of insurance.

24. The principle laid down in the said decision has been followed by a three-Judge Bench of this Court with approval in *Sohan Lal Passi Vs. P. Sesh Reddy and others*, .

25. The position can be summed up thus:

The insurer and the insured are bound by the conditions enumerated in the policy and the insurer is not liable to the insured if there is violation of any policy condition. But the insurer who is made statutorily liable to pay compensation to third parties on account of the certificate of insurance issued shall be entitled to recover from the insured the amount paid to the third parties, if there was any breach of policy conditions on account of the vehicle being driven without a valid driving licence.....

6. Again in *United India Insurance Company Ltd. Vs. Leheru and Others*, , in para 18 of the report the Supreme Court referred to the decision in *Skandia, Sohan Lal Passi and Kamla* and held that even where it is proved that there was a conscious or willful breach as provided u/s 149(2)(a) (ii) of the Motor Vehicle Act, the Insurance Company would still remain liable to the innocent third party but may recover the compensation paid from the insured. The relevant portion of the report is extracted hereunder:

18. Now let us consider Section 149(2). Reliance has been placed on Section 149(2)(a)(ii). As seen, in order to avoid liability under this provision it must be shown that there is a "breach". As held in *Skandia* and *Sohan Lal Passi* cases the breach must be on the part of the insured. We are in full agreement with that. To hold otherwise would lead to absurd results. Just to take an example, suppose a vehicle is stolen. Whilst it is being driven by the thief there is an accident. The thief is caught and it is ascertained that he had no licence. Can the insurance company disown liability? The answer has to be an emphatic "No". To hold otherwise would be to negate the very purpose of compulsory insurance.....

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20.If it ultimately turns out that the licence was fake, the insurance company would continue to remain liable unless they prove that the owner/insured was aware or had noticed that the licence was fake and still permitted that person to drive. More importantly, even in such a case the insurance company would remain liable to the innocent third party, but it may be able to recover from the insured. This is the law which has been laid down in *Skandia, Sohan Lal Passi* and *Kamla* cases. We are in full agreement with the views expressed therein and see no reason to take a different view.

7. The three Judge Bench of the Supreme Court in *National Insurance Co. Ltd. Vs. Swaran Singh and Others*, again emphasized that the liability of the insurer to satisfy the decree passed in favour of the third party was statutory. It approved the decision in *Sohan Lal Passi, Kamla* and *Leheru*. Paras 73 and 105 of the report are extracted hereunder:

73. The liability of the insurer is a statutory one. The liability of the insurer to satisfy the decree passed in favour of a third party is also statutory.

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105. Apart from the reasons stated hereinbefore, the doctrine of stare decisis persuades us not to deviate from the said principle."

8. This Court in MAC APP. No. 329/2010 Oriental Insurance Company Limited v. Rakesh Kumar and Others and other Appeals decided by a common judgment dated 29.02.2012, noticed some divergence of opinion in National Insurance Co. Ltd. Vs. Kusum Rai and Others, , National Insurance Co. Ltd. Vs. Vidhyadhar Mahariwala and Others, ; Ishwar Chandra and Others Vs. The Oriental Insurance Co. Ltd. and Others, and Premkumari and Others Vs. Prahlad Dev and Others, and held that in view of the three Judge Bench decision in Sohan Lal Passi(supra) and Swaran Singh, the liability of the Insurance Company vis-?-vis the third party is statutory. If the Insurance Company successfully proves the conscious breach of the terms of the policy, then it would be entitled to recovery rights against the owner or driver, as the case may be.

9. In view of forgoing discussion, I am of the view that the Insurance Company has successfully proved the breach of the terms of the policy, but it would perform its statutory obligation to satisfy the award so far as it relates to Respondent No. 1 (the victim). The Appellant Insurance Company shall be entitled to recover the amount of compensation paid in execution of this very judgment without having recourse to independent recovery proceedings.

10. The amount deposited by the Appellant Insurance Company shall be disbursed to the First Respondent in terms of the order passed by the Claims Tribunal, which the Appellant shall have the right to recover as stated earlier.

11. The Appeal is allowed in above terms.

12. Statutory amount of Rs. 25,000/- deposited shall be refunded to the Appellant Insurance Company. Pending Applications stand disposed of.