
(2009) 10 AHC CK 0023
In the Allahabad High Court
Case No : F.A.F.O. No. 2936 of 2009

New India Assurance Co. Ltd.

APPELLANT

Vs

Nadeem Akhtar and Others

RESPONDENT

Date of Decision : 05-10-2009

Acts Referred:

Insurance Act, 1938 — Section 64VB

Motor Vehicles Act, 1988 — Section 147, 147(1), 147(3), 147(5), 149

Citation : (2010) 5 AWC 4621

Hon'ble Judges : Satya Poot Mehrotra, J;Rajesh Chandra, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Satya Poot Mehrotra and Rajesh Chandra, JJ.—The present appeal has been filed by the insurance company u/s 173 of the Motor Vehicles Act, 1988 against the award dated 22.5.2009 whereby Rs. 1,69,940 with interest @ 6% has been awarded as compensation to the claimants-respondents on account of the death of Akhtar in an accident which took place on 23.4.2005 at around 4.00 a.m. in the morning wherein Canter No. U.P.-23-B-2043 collided with a Truck.

2. The Motor Vehicles Accident Claims Tribunal framed five issues.

Issue No. 1 was in regard to the factum of accident having taken place on account of rash and negligent driving by the driver of the aforesaid vehicle, namely, Canter No. U.P.-23-B-2043. The Tribunal decided the said Issue in the affirmative.

Issue No. 2 was as to whether the vehicle in question was insured with the insurance company/appellant and as to whether the driver of the vehicle was having a valid and effective driving licence on the date of accident. The Tribunal held that the vehicle in question was insured with the insurance company/appellant on the date of the accident. However, it was held that the driver of the vehicle in question was not having valid and effective Driving Licence on the date

of accident.

Issue No. 3 was as to whether the claim petition was bad for non-joinder of necessary parties. The said Issue was decided against the opposite parties in the claim petition.

Issue No. 4 was as to whether the deceased was travelling in the vehicle in question as gratuitous passenger in an unauthorized manner which was violative of the terms and conditions of the insurance policy. The Tribunal decided the said Issue in the affirmative in favour of the insurance company/appellant. It was held that the vehicle in question was being used for commercial purposes, and the same was against the terms and conditions of the insurance policy.

Issue No. 5 was as to whether the claimants-respondents were entitled to get compensation as against the opposite parties in the claim petition jointly or separately. It was held by the Tribunal that the claimants/respondents were entitled for compensation amounting to Rs. 1,69,940 with interest @ 6%. However, the compensation was not payable by the insurance company/appellant but was payable by Mahmood Hasan, owner of the vehicle in question-respondent No. 3 herein.

3. The insurance company/appellant has filed the present appeal impugning the aforesaid award.

4. We have heard Shri Dhananjay Awasthi, learned Counsel appearing for the insurance company/appellant and perused the record.

5. The impugned award has, inter alia, directed that even though the amount of compensation is not payable by the insurance company/appellant, the insurance company/appellant would deposit the amount within 60 days of the award, and the insurance company/appellant would be entitled to recover the same from the owner of the vehicle in question, i.e., respondent No. 3 herein.

6. It is submitted by Shri Dhananjay Awasthi, learned Counsel appearing for the insurance company/appellant that having decided Issue Nos. 2 and 4 in favour of the insurance company/appellant, the Tribunal erred in directing the insurance company/appellant to deposit the amount of compensation and recover the same from the owner of the vehicle in question, i.e., respondent No. 3 herein.

7. We have considered the submissions made by Shri Dhananjay Awasthi, and we find ourselves unable to accept the same.

8. Sub-section (5) of Section 147 of the Motor Vehicles Act, 1988 lays down as under:

147. Requirements of policies and limits of liability:

(1) to (4)...

(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 persons.

The above provision, thus, provides that an insurer issuing a policy of insurance u/s 147 of the Motor Vehicles Act, 1988 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 persons.

9. Section 149 of the Motor Vehicles Act, 1988, in so far as is relevant, provides as follows:

149. Duty of insurers to satisfy judgments and awards against persons insured in respect of third party risks.-(1) If, after a certificate of insurance has been issued under Sub-section (3) of Section 147 in favour of the person by whom a policy has been effected, judgment or award in respect of any such liability as is required to be covered by a policy under Clause (b) of Sub-section (1) of Section 147 (being a liability covered by the terms of the policy) (or under the provisions of Section 163A) is obtained against any person insured by the policy, then, notwithstanding that the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy, the insurer shall, subject to the provisions of this section, pay to the person entitled to the benefit of the decree any sum not exceeding the sum assured payable thereunder, as if he were the judgment-debtor, in respect of the liability, together with any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.

(2) to (7)....

10. The above-quoted provision shows that in case any judgment or award in respect of the liability as is required to be covered by a policy under Clause (b) of Sub-section (1) of Section 147 (being a liability covered by the terms of the policy) or under the provisions of Section 163A is obtained against any person insured by the policy, then the insurer shall pay to the person entitled to the benefit of the decree any sum not exceeding the sum assured payable thereunder, as if he were the judgment-debtor, in respect of the liability, together with the amount of costs and interest. This will be so even though the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy.

11. In view of the aforesaid provisions, we are of the view that the direction given by the Tribunal directing the insurance company/appellant to make deposit of the amount of compensation and recover the same from the insured person, i.e., the owner of the vehicle in question-respondent No. 3 herein, does not suffer from any infirmity.

12. The above conclusion is supported by the decisions of the Apex Court:

In *Oriental Insurance Co. Ltd. v. Inderjit Kaur and Ors.* AIR 1998 SC 588, their Lordships of the Supreme Court opined as under (paragraph 7 of the said AIR):

7. We have, therefore, this position. Despite the bar created by Section 64VB of the Insurance Act, the appellant, an authorised insurer, issued a policy of insurance to cover the bus without receiving the premium therefor. By reason of the provisions of Sections 147 (5) and 149 (1) of the Motor Vehicles Act, the appellant became liable to indemnify third parties in respect of the liability which that policy covered and to satisfy awards of compensation in respect thereof notwithstanding its entitlement (upon which we do not express any opinion) to avoid or cancel the policy for the reason that the cheque issued in payment of the premium thereon had not been honoured.

(Emphasis supplied)

This decision thus supports the conclusion mentioned above on the basis of Sections 147 (5) and 149 (1) of the Motor Vehicles Act, 1988.

In *National Insurance Co. Ltd. Vs. Swaran Singh and Others*, their Lordships of the Supreme Court held as follows (paragraph 105 of the said AIR):

105. The summary of our findings to the various issues as raised in these petitions is as follows:

(i) Chapter XI of the Motor Vehicles Act, 1988 providing compulsory insurance of vehicles against third-party risks is a social welfare legislation to extend relief by compensation to victims of accidents caused by use of motor vehicles. The provisions of compulsory insurance coverage of all vehicles are with this paramount object and the provisions of the Act have to be so interpreted as to effectuate the said object.

(ii) An insurer is entitled to raise a defence in a claim petition filed u/s 163A or Section 166 of the Motor Vehicles Act, 1988, inter alia, in terms of Section 149 (2) (a) (ii) of the said Act.

(iii) The breach of policy condition e.g., disqualification of the driver or invalid driving licence of the driver, as contained in Sub-section (2) (a) (ii) of Section 149, has to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards the insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by a duly licensed driver or one who was not disqualified to drive at the relevant time.

(iv) Insurance companies, however, with a view to avoid their liability must not only establish the available defence(s) raised in the said proceedings but must also establish "breach" on the part of the owner of the vehicle; the burden of proof wherefore would be on them.

(v) The Court cannot lay down any criteria as to how the said burden would be

discharged, inasmuch as the same would depend upon the facts and circumstances of each case.

(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards the insured unless the said breach or breaches on the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insurer u/s 149 (2) of the Act.

(vii) The question, as to whether the owner has taken reasonable care to find out as to whether the driving licence produced by the driver (a fake one or otherwise), does not fulfil the requirements of law or not will have to be determined in each case.

(viii) If a vehicle at the time of accident was driven by a person having a learner's licence, the insurance companies would be liable to satisfy the decree.

(ix) The Claims Tribunal constituted u/s 165 read with Section 168 is empowered to adjudicate all claims in respect of the accidents involving death or of bodily injury or damage to property of third party arising in use of motor vehicle. The said power of the Tribunal is not restricted to decide the claims inter se between claimant or claimants on one side and insured, insurer and driver on the other. In the course of adjudicating the claim for compensation and to decide the availability of defence or defences to the insurer, the Tribunal has necessarily the power and jurisdiction to decide disputes inter se between the insurer and the insured. The decision rendered on the claims and disputes inter se between the insurer and insured in the course of adjudication of claim for compensation by the claimants and the award made thereon is enforceable and executable in the same manner as provided in Section 174 of the Act for enforcement and execution of the award in favour of the claimants.

(x) Where on adjudication of the claim under the Act the Tribunal arrives at a conclusion that the insurer has satisfactorily proved its defence in accordance with the provisions of Sections 149 (2) read with Sub-section (7), as interpreted by this Court above, the Tribunal can direct that the insurer is liable to be reimbursed by the insured for the compensation and other amounts which it has been compelled to pay to the third party under the award of the Tribunal. Such determination of claim by the Tribunal will be enforceable and the money found due to the insurer from the insured will be recoverable on a certificate issued by the Tribunal to the Collector in the same manner u/s 174 of the Act as arrears of land revenue. The certificate will be issued for the recovery as arrears of land revenue only if, as required by Sub-section (3) of Section 168 of the Act the insured fails to deposit the amount awarded in favour of the insurer within thirty

days from the date of announcement of the award by the Tribunal.

(xi) The provisions contained in Sub-section (4) with the proviso thereunder and Sub-section (5) which are intended to cover specified contingencies mentioned therein to enable the insurer to recover amount paid under the contract of insurance on behalf of the insured can be taken recourse to by the Tribunal and be extended to claims and defences of the insurer against the insured by relegating them to the remedy before regular Court in cases where on given facts and circumstances adjudication of their claims inter se might delay the adjudication of the claims of the victims.

(Emphasis supplied)

Proposition Nos. (vi) and (x), reproduced above support the conclusion that the direction given by the Tribunal in the award impugned in the present case is in accordance with law.

In *National Insurance Co. Ltd. v. Laxmi Narain Dhut* 2007 (2) TAC 398 : 2007 (2) ACCD 709 : 2007 (5) AWC 5394 (SC), their Lordships of the Supreme Court considered the decision in *National Insurance Co. Ltd. v. Swaran Singh* (supra) and held as under (paragraph 35 of the said TAC):

35. As noted above, the conceptual difference between third party right and own damage cases has to be kept in view. Initially, the burden is on the insurer to prove that the licence was a fake one. Once it is established the natural consequences have to flow.

In view of the above analysis the following situations emerge:

- (1) The decision in *Swaran Singh*'s case (supra) has no application to cases other than third party risks.
- (2) Where originally the licence was fake one, renewal cannot cure the inherent fatality.
- (3) In case of third party risks the insurer has to indemnify the amount and if so advised to recover the same from the insured.
- (4) The concept of purposive interpretation has no application to cases relatable to Section 149 of the Act.

The High Courts/Commissions shall now consider the matter afresh in the light of the position in law as delineated above.

The appeals are allowed as aforesaid with no order as to costs.

(Emphasis supplied)

In view of the above decision, it is evident that in case of third party risks, the decision in *National Insurance Co. Ltd. v. Swaran Singh and Ors.* (supra) would apply, and the insurer has to indemnify the amount to the third party and

thereafter may recover the same from the insured.

In *Prem Kumari and Ors. v. Prahlad Dev and Ors.* 2008 (1) TAC 803 : 2008 (1) ACD 132 : 2008 (5) AWC 4529 (SC), their Lordships of the Supreme Court have reiterated the view expressed in *National Insurance Company Limited v. Laxmi Narain Dhut* case (supra) explaining the decision in *National Insurance Company Limited v. Swaran Singh and Ors.* (supra), and held as under (paragraphs 8 and 9 of the said TAC):

8. The effect and implication of the principles laid down in *Swaran Singh's* case (supra) has been considered and explained by one of us (Dr. Justice Arijit Pasayat) in *National Insurance Co. Ltd. Vs. Laxmi Narain Dhut*, . The following conclusion in para 38 are relevant:

38. In view of the above analysis the following situations emerge:

(1) The decision in *Swaran Singh's* case (supra) has no application to cases other than third party risks.

(2) Where originally the licence was a fake one, renewal cannot cure the inherent fatality.

(3) In case of third-party risks the insurer has to indemnify the amount, and if so advised, to recover the same from the insured.

(4) The concept of purposive interpretation has no application to cases relatable to Section 149 of the Act.

9. In the subsequent decision in *The Oriental Insurance Company Limited Vs. Meena Variyal and Others*, which is also a two Judge Bench while considering the ratio laid down in *Swaran Singh's* case (supra) concluded that in a case where a person is not a third party within the meaning of the Act, the insurance company cannot be made automatically liable merely by resorting to *Swaran Singh's* case (supra). While arriving at such a conclusion the Court extracted the analysis as mentioned in para 38 of *Laxmi Narain Dhut* (supra) and agreed with the same. In view of consistency, we reiterate the very same principle enunciated in *Laxmi Narain Dhut* (supra) with regard to interpretation and applicability of *Swaran Singh's* case (supra).

(Emphasis supplied)

13. In view of the above, it is evident that the Tribunal did not commit any illegality in directing the insurance company/appellant to make deposit of the amount of compensation and recover the same from the insured person, i.e., the owner of the vehicle in question-respondent No. 3 herein.

14. After making the deposit of the amount, as directed by the impugned award, it will be open to the insurance company/appellant to recover the same from the insured person, i.e., the owner of the vehicle in question-respondent No. 3 herein by moving appropriate application before the Tribunal in this regard.

It is made clear that in case the claimants-respondents or the owner of the vehicle in question/respondent No. 3 herein files an appeal against the impugned award, it will be open to the insurance company/appellant to contest the same on the grounds legally open to it.

The amount of Rs. 25,000 deposited in this Court while filing the present appeal will be remitted to the Tribunal for being adjusted towards the amount to be deposited by the insurance company/appellant, as per the directions given in the impugned award.

Subject to the aforesaid observations, the appeal filed by the insurance company/appellant is dismissed. However, on the facts and in the circumstances of the case, there will be no order as to costs.