

(2008) 09 GUJ CK 0105

In the Gujarat High Court

Case No : First Appeal No. 789 of 2008 with Civil Application No. 2394 of 2008
in First Appeal No. 789 of 2008

New India Assurance Co. Ltd.

APPELLANT

Vs

Rameshbhai Gopalji Lakhani and Others

RESPONDENT

Date of Decision : 17-09-2008

Acts Referred:

Motor Vehicles Act, 1988 — Section 10, 10(2), 145, 147, 147(3)

Citation : (2008) 3 GLH 467

Hon'ble Judges : H.K. Rathod, J

Bench : Single Bench

Advocate : Megha Janis 1, for the Appellant; H.M. Prachchhak for Defendant(s)
2 - 3, for the Respondent

Final Decision : Dismissed

Judgement

H.K. Rathod, J.

Draft amendment is allowed. Appellant to carry out the same within a period of two days and supply the amended copy of appeal to other side.

1. Heard learned advocate Ms. Megha Jani for appellant - Assurance Co. In the present appeal, the appellant -Assurance Co. has challenged the award passed by MAC Tribunal, Porbandar in MACP No. 93 of 1999 dated 31.5.2006 whereby the claims Tribunal has awarded Rs. 62,730/- with 7.5% interest in favour of respondents claimants.

2. Learned advocate Ms. Jani has raised contention before this Court that claims Tribunal has failed to appreciate that the person driving the vehicle was not holding driving licence on the date of accident -6.7.1998. The driving license of the driver of the motorcycle at Exh-42 shows that the license was issued for the first time on 25.4.2000 after the accident took place. She further submitted that neither the claimant nor the owner of the vehicle has succeeded in establishing that the driver was holding a valid driving licence when the accident happened.

Therefore, in view of absence of any driving licence, the Tribunal ought to have held that there was breach of terms and conditions of policy and ought to have exonerated the Insurance Co. She also raised contention that as per the policy, only a person holding an effective driving licence at the time of accident and who is not disqualified from holding for obtaining such a licence is entitled to drive the vehicle insured. This condition is violated in facts of this case. She also raised contention that the claims Tribunal has committed an error in holding that Insurance Co. would be liable to pay compensation in view of the Apex Court's decision in case of National Insurance Co. Ltd. Vs. Swaran Singh and Others, and also committed an error in appreciating the ratio of the aforesaid case. She also submitted that each and every case, even when there is a patent breach of terms and conditions of policy, the Insurance Co. would still be liable to pay compensation and indemnify the insured. She also submitted that quantum awarded by the claims Tribunal is on higher side. The Parag D. Karia in his deposition vide Exh.41 has admitted before the claims Tribunal that looking to the date of birth -11.3.1982 he was minor at the time when the accident occurred. Meaning thereby she canvassed the submission that minor is not qualified to have the driving licence according to Motor Vehicle Rules. She relied upon the decision of Apex Court in support of her submissions in case of The Oriental Insurance Company Limited Vs. Meena Variyal and Others, . She relied upon Para. 6, 8 and 13 and pointed out that in case when a clear breach established from the record that driver of the vehicle was not holding valid driving licence at all then, Insurance Co. should not be held liable for payment of compensation. She also submitted that in the recent decision of Meena Variyal (supra), the decision in case of Swaran Singh (supra) has been clarified and distinguished by the Apex Court. She also relied upon the decision of Apex Court in case of Sardari and Others Vs. Sushil Kumar and Others, . Except that, no other submission is made by learned advocate Ms. Megha Jani.

3. I have considered the submissions made by learned advocate Ms. Jani and also considered the decisions which have been cited by learned advocate Ms. Jani. I have also perused the award passed by claims Tribunal, Porbandar. The accident occurred on 6.7.1998 at about 1.00 p.m., when applicant was going to his house from Mahendra & Brothers, Sutarwada, on his bicycle on left side with a slow speed. When he reached near railway station road, opposite Harish Sweet-Mart, at that occasion, opponent No. 1 came with Hero-Honda Motorcycle No. GJ-11-H-6742 with rash and negligent driving and dashed with the claimant and claimant received the injuries of fracture in various part of the body. The claimant was immediately admitted to Bhavsinhji Hospital at Rajkot and remained as an indoor patient for about 12 days and thereafter, for 9 months, he remained under the treatment. The claimant has claimed Rs. 80,800/- before the claims Tribunal. The opponent Nos. 1 and 2 have not remained present, though notice was served. The appellant - Insurance Co. has filed its written statement vide Exh.17 raising contention that opponent No. 1 was not having licence at all at the time when the accident occurred. Thereafter, the claims Tribunal has

framed the issue vide Exh.20. The claims Tribunal has come to the conclusion that held 15% negligence of the claimant and 85% negligence of opponent No. 1. Thereafter, the claims Tribunal has discussed the evidence on record for deciding the quantum of compensation. Thereafter, the claims Tribunal has examined the arguments canvassed by Insurance Co. in Para. 12. Vide Exh.33, the insurance policy was produced by appellant before the claims Tribunal. The period of insurance policy from 11.5.1998 to 21.5.1999 which includes the date of accident - 6.7.1998. Learned advocate Ms. Megha Jani has not disputed the fact that claimant is a third party, who is met with an accident by opponent No. 1. The only contention is that in light of the facts that opponent No. 1 was not having driving licence, whether the Insurance Co. can be held liable for payment of compensation or not. The claims Tribunal has considered that looking to the date of birth - 11.3.1982, at that occasion the opponent No. 1 was 16 years and 4 months, therefore, naturally he is not qualified to possess valid driving licence on the date of accident. The claims Tribunal has considered the decision of Apex Court in case of United India Insurance Co. Ltd. v. Lehu and others reported in 2003 GLR 1771 and also considered Section 149(4) and in the case of National Insurance Co. Ltd. v. Kamla reported in 2002 GLR 916 and advocate of the appellant - Insurance Co. has relied upon the decision of Apex Court reported in 1989 (2) UJ 659 and 2002 (2) GLH 50. Over and above, the claims Tribunal has considered the decision of Apex Court in case of Swaran Singh (supra) and considering the aforesaid decision, the claims Tribunal has come to the conclusion that it is a liability of the Insurance Co., if in case of breach of terms and conditions of the insurance policy by opponent No. 1 not having the licence to pay the compensation to the claimant - third party and then, to recover from the owner insured. Therefore, accordingly award has been passed with a direction to pay the compensation to the claimant of Rs. 62,730/-.

4. In this case, the claimant is a third party dashed by opponent No. 1, who was not having driving licence at all and not qualified to possess the driving licence. Learned advocate Ms. Jani heavily relied upon the decision of Apex Court in case of Meena Variyal (supra). The facts of that case are totally different than the facts of present case. The liability of the Insurance Co. in case of death of regional manager of company which owned the car when it dashed against a tree. The claimant deposed that car was being driven by the driver and deceased was a passenger. The driver who was in the card lodged the FIR stating that deceased was driving the car at the time of accident. The Insurance Co. seeks to avoid its liability on the ground that policy did not cover the employee of the owner company who was driving the car, deceased was not a third party in terms of the policy or in terms of the Act, Act did not provide for statutory coverage of such a person, there was no special contract and deceased did not possess a driving licence. These are the facts that statutory liability is not of the Insurance Co. because the deceased was not a third party but, he was an employee of the co. and there was no special contract to have the risk of such employee and therefore, the Insurance Co. raised the contention. But, the entire decision of

Apex Court based on the facts and on these facts, decision of Apex Court in case of Swaran Singh (supra) has been considered by the Apex Court. Therefore, the reliance which has been placed by learned advocate Ms. Jani is not helpful to her that looking to the facts of present case, the Insurance Co. is not liable.

5. The Apex Court has in case of The Oriental Insurance Company Limited Vs. Meena Variyal and Others, , in Para. 14 has observed as under :

"14. It is difficult to apply the ratio of this decision to a case not involving a third party. The whole protection provided by Chapter XI of the Act is against third party risk. Therefore, 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 the Swaran Singh (supra) ratio. This appears to be the position. This position was expounded recently by this Court in National Insurance Co. Ltd. Vs. Laxmi Narain Dhut, . This Court after referring to Swaran Singh (supra) and discussing the law summed up the position thus:

"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.

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

We are in respectful agreement with the above view."

5.1 Therefore, the ratio which has been decided and laid down in aforesaid decision is relevant. Other paragraphs are only discussion of law and therefore, this decision which has been heavily relied upon is not applicable to the facts of this case because in this case, claimant is third party admitted by Ms. Jani that risk of third party is covered.

6. Similarly, the Apex Court has in case of Sardari and Others Vs. Sushil Kumar and Others, , in Para. 6, observed as under :

"6. Although, in terms of a contract of insurance, which is in the realm of private law domain having regard to the object for which Section 147 and 149 of the Act had been enacted, the social justice doctrine as envisaged in the preamble of the Constitution of India has been given due importance. The Act, however, itself provides for the cases where the insurance Company can avoid its liability. Avoidance of such liability would largely depend upon violation of the conditions

of contract of insurance. Where the breach of conditions of contract is ex-facie apparent from the records, the Court will not fasten the liability on the Insurance Company. In certain situations, however, the Court while fastening the liability on the owner of the vehicle may direct the Insurance Company to pay to the claimants the awarded amount with liberty to it to recover the same from the owner."

6.1 In the aforesaid decision, the Apex Court has considered that in certain situation, however, the Court while passing the liability on the owner of the vehicle may direct the Insurance Co. to awarded the amount with liberty to recover the same from the owner.

7. Recently, the Apex Court has examined very question in case of Oriental Insurance Co. Ltd. v. Zaharulnisha & Others reported in 2008 AIR SCW 3251. Relevant observations of the said decision are in Para.10, 14, 15, 16, 17,18 and 19 which are quoted as under :

"10. In order to appreciate the rival contentions of the learned counsel for the parties, the legal question that needs to be considered by us is : Whether the appellant insurance company could be held liable to pay the amount of compensation for the default of the scooterist who was not holding licence for driving two wheeler scooter but had driving licence of different class of vehicle in terms of Section 10 of the MV Act?

14. Sub-section (1) of Section 149 casts a liability upon the insurer to pay to the person entitled to the benefit of the decree "as if he was the judgment debtor", that is, the Statute raises a legal fiction to the effect that for the said purpose the insurer would be deemed to be a judgment-debtor in respect of the liability of the insurer in respect of third party risks.

15. It is beyond any doubt or dispute that u/s 149

(1) of the MV Act, insurer, to whom notice of bringing of any proceeding for compensation has been given, can defend the action on any of the grounds mentioned therein. A three- Judge Bench of this Court in National Insurance Co. Ltd. Vs. Swaran Singh and Others, has extensively dealt with the meaning, application and interpretation of various provisions, including Ss. 3(2), 4(3), 10(2) and 149 of the MV Act. In paragraph 47 of the judgment, the learned Judges have held that if a person has been given a licence for a particular type of vehicle as specified therein, he cannot be said to have no licence for driving another type of vehicle which is of the same category but of different type. As for example, when a person is granted a licence for driving a light motor vehicle he can drive either a car or a jeep and it is not necessary that he must have driving licence both for car and jeep separately. In paragraph 48, it is held as under: "Furthermore, the insurance company with a view to avoid its liabilities is not only required to show that the conditions laid down u/s 149(2)(a) or (b) are satisfied but is further required to establish that there has been a breach on the part of the insured. By reason of the provisions contained in the 1988 Act, a

more extensive remedy has been conferred upon those who have obtained judgment against the user of a vehicle and after a certificate of insurance is delivered in terms of Section 147(3). After a third party has obtained a judgment against any person insured by the policy in respect of a liability required to be covered by Section 145, the same must be satisfied by the insurer, notwithstanding that the insurer may be entitled to avoid or to cancel the policy or may in fact have done so. The same obligation applies in respect of such a liability but who would have been covered if the policy had covered the liability of all persons, except that in respect of liability for death or bodily injury."

16. The judgment proceeds to hold that under the MV Act, holding of a valid driving licence is one of the conditions of contract of insurance. Driving of a vehicle without a valid licence is an offence. However, the question herein is whether a third party involved in an accident is entitled to the amount of compensation granted by the Motor Accidents Claims Tribunal although the driver of the vehicle at the relevant time might not have a valid driving licence but would be entitled to recover the same from the owner or driver thereof. It is trite that where the insurers, relying upon the provisions of violation of law by the assured, take an exception to pay the assured or a third party, they must prove a willful violation of the law by the assured. In some cases, violation of criminal law, particularly violation of the provisions of the MV Act, may result in absolving the insurers but, the same may not necessarily hold good in the case of a third party. In any event, the exception applies only to acts done intentionally or "so recklessly as to denote that the assured did not care what the consequences of his act might be". The provisions of sub-sections (4) and (5) of Section 149 of the MV Act may be considered as to the liability of the insurer to satisfy the decree at the first instance. 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.

17. The learned judges having considered the entire material and relevant provisions of the MV Act and conflict of decisions of various High Courts and this Court on the question of defences available to the insurance companies in defending the claims of the victims of the accident arising due to the harsh and negligent driving of the vehicle which is insured with the insurance companies, proceeded to record the following summary of findings.

(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) 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 driver or invalid driving licence of the driver, as contained in Subsection (2)(a)(ii) of Section 149, have 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 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 duly licensed driver or one who was not disqualified to drive at the relevant time.

(iv) The insurance companies are, 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 said burden would be discharged, inasmuch as the same would depend upon the facts and circumstance 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 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 insured 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 fulfill 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 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 Section 149(2) read with Subsection (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 Subsection (4) with proviso thereunder and Subsection (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 of by the Tribunal and be extended to claims and defences of insurer against 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.

18. In the light of the above-settled proposition of law, the appellant insurance company cannot be held liable to pay the amount of compensation to the claimants for the cause of death of Shukurullah in road accident which had occurred due to rash and negligent driving of scooter by Ram Surat who admittedly had no valid and effective licence to drive the vehicle on the day of accident. The scooterist was possessing driving licence of driving HMV and he was driving totally different class of vehicle which act of his is in violation of Section 10(2) of the MV Act.

19. In the result, the appeal is allowed to the limited extent and it is directed that the appellant insurance company though not liable to pay the amount of compensation, but in the nature of this case it shall satisfy the award and shall have the right to recover the amount deposited by it along with interest from the owner of the vehicle, viz. Respondent No. 8, particularly in view of the fact that no appeal was preferred by him nor has he chosen to appear before this Court to contest this appeal. This direction is given in the light of the judgments of this Court in National Insurance Co. Ltd. Vs. Baljit Kaur and Others, and Deddappa and Others Vs. The Branch Manager, National Insurance Co. Ltd., ."

8. In view of the aforesaid decision of the Apex Court and considering the

identical facts which are available in facts of present case and looking to the finding and reasoning given by the claims Tribunal and also taking into consideration the decision in case of United India Insurance Co. Ltd. v. Lehu and others reported in 2003 GLR 1771 and National Insurance Co. Ltd. v. Kamla reported in 2002 GLR 916 and Swaran Singh (supra), according to my opinion, in case of third party, Insurance Co. is liable to pay the compensation to the claimant to have the right to recover from the insured because a breach committed by insured gives the right to the Insurance Co. to recover the amount of compensation from the owner. Therefore, contentions which are raised by learned advocate Ms. Jani cannot be accepted and same are rejected.

9. The claims Tribunal has rightly assessed the income and also rightly considered the medical evidence which was admitted by the Insurance Co. vide Exh.14 and from 30% disability it was reduced to 15% and looking to the monthly salary of Rs. 1800/-, yearly it comes to Rs. 3240/- and looking to the age 35 years, multiplier of 15 has been rightly applied and Rs. 48,000/-towards loss of future income and pain, shock and suffering and transportation and actual loss, the claims Tribunal has rightly awarded Rs. 73,800/- and considering 15% negligence, it was reduced to Rs. 11,070/-and net amount comes to Rs. 62,730/-. The claims Tribunal has not committed any error even assessing the income and awarding the compensation and it cannot be considered in any manner on higher side. Therefore, there is no substance in the present appeal. Accordingly, present appeal is dismissed. The amount of Rs. 25,000/-deposited with this Court for the purpose of appeal shall be transmitted to the Tribunal concerned. As the First Appeal No. 789 of 2008 is dismissed, no order is necessitated in Civil Application No. 2394 of 2008. Accordingly, Civil Application No. 2394 of 2008 is disposed of.