
(2010) 08 P&H CK 0011
In the Punjab And Haryana At Chandigarh
Case No : F.A.F.O. No. 2879 of 2000

New India Assurance Co. Ltd.

APPELLANT

Vs

Tek Chand Gupta and others

RESPONDENT

Date of Decision : 24-08-2010

Acts Referred:

Motor Vehicles Act, 1988 — Section 149(2), 149(5), 163A, 166

Citation : (2011) ACJ 2468 : (2012) 1 TAC 938

Hon'ble Judges : K. Kannan, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Kannan, J.—The insurance company is in appeal challenging the liability cast on the insurer on the ground that the driver of the bus, who was found to be responsible for the accident in its collision with the scooter, could not have been made liable at all in view of the fact that the driver of the bus did not have a valid driving licence. The learned senior counsel points out that the licence was valid for the driver up to 7.7.1998 and it was renewed only in December 1998. The accident had taken place on 28.8.1998 and since the driver did not have a valid driving licence, the insurance company could not be made liable at all. I have no difficulty in accepting the plea that the insurer is not liable to indemnify the insured for breach of terms of policy. When I hastened to pass the order for satisfying the claimants and provide for a right of recovery, the learned senior counsel presses for a detailed reasoning on the plea that the insurer shall not be liable to satisfy the claimant at all, in the first place.

2. Learned counsel refers to decisions of the Apex Court in Ram Babu Tiwari Vs. United Indian Insurance Co. Ltd. and Others, Ishwar Chandra v. Oriental Insurance Co. Ltd., 2007 ACJ 1067 (SC); Bhuwan Singh Vs. Oriental Insurance Company Ltd. and Another, ; Malla Prakasarao v. Mallan Junan, (2009-1) 153 PLR 406 and National Insurance Co. Ltd. Vs. Vidhyadhar Mahariwala and Others, The reliance on these decisions to the effect that the insurance company is not

liable, addresses merely one side of the story. It is not all. In the manner of answering a claim for a third party, the breach of the terms of the policy u/s 149(2) cannot be seen in isolation. It should be seen with reference to section 149(4) proviso and section 149(5) of the Motor Vehicles Act. The first decision which dealt with elaborately on the fact of section 149 (4) and (5) is the decision in *New India Assurance Co., Shimla Vs. Kamla and Others etc. etc.,* . The issue relating to the liability of the insurer in the case of a violation of terms of the policy to satisfy a third party claim and obtain a right of recovery against the insured for the violation of the terms of the policy was considered in a three Member Bench of the Hon''ble Supreme Court in *Sohan Lal Passi Vs. P. Sesh Reddy and others,* . The decisions in *Kamla (supra)* as well as in *Sohan Lal Passi (supra)* were again considered in *National Insurance Co. Ltd. Vs. Swaran Singh and Others,* The judgment of the Hon''ble Supreme Court in *Swaran Singh's* case in paras 96, 97 and the ultimate para summing up the law in para 102 are instructive. They are reproduced hereunder:

(96) It is, therefore, evident from the discussions made hereinbefore that the liability of the insurance company to satisfy the decree at the first instance and to recover the awarded amount from the owner or driver thereof has been holding the field for a long time.

(97) Apart from the reasons stated hereinbefore, the doctrine of stare decisis persuades us not to deviate from the said principle.

(102) 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) Insurer is entitled to raise a defence in a claim application filed u/s 163-A 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 conditions, e.g., disqualification of 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 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, 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 wherefor 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 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 insured unless the said breach or breaches of 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.

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(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 to 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.

3. In Swaran Singh's case (supra), the Hon''ble Supreme Court actually addressed a similar contention which is now being taken that in the case of a fake driving licence, the insurance company was found to be not liable but still the court was posing the question to find whether a third party claimant must suffer for such cause. The Hon''ble Supreme court held that the issue of making the insurer liable in the first place and to provide for a right of recovery had obtained a status of a stare decisis and it would not be possible to make a complete exclusion of liability for the insurer.

4. The confusion from the Bar arises by reference to some judgments where the courts have held that the insurance company shall not be liable for violation of terms of the policy. The breach of terms of the policy that would include the entrustment of a vehicle to a person, who was not duly licensed, is certainly a

defence which is available and it is certainly a circumstance which will exclude the liability of the insurer. All the decisions of the Hon''ble Supreme Court and this court which the learned counsel points out are cases where the insurance company was found not liable, taking into account the provision of section 149(2). I venture to suggest that not in one case was ever an issue of a right of recovery from the insured put to question. The point of law is so well established that it will be naive to suggest that there could be no right to recovery.

5. Even in a recent decision in National Insurance Co. Ltd. Vs. Parvathneni and Another, where the issue of right of recovery provided in some cases was doubted, it was not a case which had doubted the law laid down by the Hon''ble Supreme Court in New India Assurance Co., Shimla Vs. Kamla and Others etc. etc., Sohan Lal Passi Vs. P. Sesh Reddy and others, or National Insurance Co. Ltd. Vs. Swaran Singh and Others,). It is perfectly possible to contend that there is no policy of insurance at all and there was no insurance cover and, therefore, the insurer is not liable. In such a situation, the question of making the insurer to pay the amount to the claimant may not arise at all. Instances could be when there was no policy of insurance or a case where the policy did not cover the particular type of risk. It is quite another to contend that there is a valid policy for a particular situation that makes available a right of enforcement of claim against the insurer and when the insurer contends that notwithstanding the right, on account of the breach of the terms of the policy by the insured, it shall not be liable. In the latter situation by the fact that there was a valid policy to cover the particular type of risk, the insurer is bound to satisfy the claims of the third party. The defence u/s 149(2) can only make available a right of recovery against the insured. This distinction is too fundamental to miss. Insurance company ought to know this in every case and shall not vex courts to press for a detailed judgment in every case to reiterate this position.

6. I have no doubt in my mind that the proposition which is sought to be advanced does not fit with the scheme of the Motor Vehicles Act and the insurance company is certainly liable for the claim arising out of the accident. The appeal by the insurance company denying liability to even satisfy the claims of a third party is untenable in law. For what it has proved before the Tribunal that the driver did not have a valid driving licence and the licence had expired at the relevant time, the insurer shall have merely a right of recovery against the owner-insured after satisfying the award. The award of the Tribunal is modified and it is allowed only to this extent.