

(2006) 05 J&K CK 0014

In the Jammu And Kashmir High Court

Case No : CIMA No. 141 Of 2002 and CIMA No. 176 Of 2002

New India Assurance Co.Ltd.; Asha Ram and others

APPELLANT

Vs

Vaishno Devi and others

RESPONDENT

Date of Decision : 05-05-2006

Acts Referred:

Motor Vehicles Act, 1988 — Section 147, 149

Citation : (2006) 3 JKJ 6 : (2006) 2 SriLJ 595

Hon'ble Judges : J.P.Singh, J

Bench : Single Bench

Advocate : Raghu Mehta, R.K.Gupta, R.K.Bhatia, Advocates appearing for the Parties

Judgement

1. One Bachan Lal met with an accident on 28.10.1993, allegedly caused by rash and negligent driving of tractor bearing Chassis No. 933401598

and Engine No. 391301/93 DO 572 driven by Som Dutt and owned by Asha Ram, which is said to be insured with New India Assurance

Company. Claim for compensation was lodged by Bachan Lal by filing claim petition No. 92 of 1994. During the pendency of this claim petition,

Bachan Lal succumbed to the injuries resulting in filing of another claim petition by Vaishno Devi and others who were dependents on the earnings

of Bachan Lal. This claim petition came to be registered as claim petition No. 14 of 1995.

2. The Tribunal directed the contest of the claim petition on the following issues:

i) Whether death of Bachan Lal was due to injuries which sustained by him in vehicular accident with involvement of vehicle bearing Chassis No.

933401598, Engine No. 391301/93 DO 572 at village Parnoo, which was being driven by respondent No. 1 in a rash and negligent manner while

under employment of respondent No.2 ? OPR

ii) In case issue No. 1 is proved in affirmative, whether petitioners are legal heirs of deceased entitled to claim compensation? OPP.

i) In case issue No.2 is proved, whether petitioners are entitled to get compensation, if so, how much, from whom and in what proportion? OPP.

iv) Whether at the time of occurrence, the driver of offending vehicle was not holding a valid driving license ? OPR3

v) Whether the claim petition is timebarred?OPR3 vi) Relief.

3. The Insurance Company produced Karnail Singh Clerk, Licensing Authority Ambala; DevRaj Clerk, Regional Transport Office, Jammu;

Bishamber Nanda Branch Manager, New India Assurance Company, Kathua; besides Charan Dass, Sr. Assistant, Divisional Office, New India

Assurance Company, Pathankot, to prove that the driver of the offending tractor did not hold a genuine, valid and effective driving license. Asha

Ram, owner, did not produce any evidence in rebuttal. Accordingly, the Tribunal decided issue No.4 in favour of Insurance Company and against

the owner holding that license of Son; Dutt, driver, was fake and invalid. Finding substance in the claim petition on the strength of evidence led in

support thereof, the Tribunal allowed the claim petition holding the claimants entitled to an amount of Rupees three lacs ninety four thousand

alongwith interest at the rate of 9% per annum. On the basis of the finding returned in favour of the Insurance Company, the Tribunal directed the

Company to pay the awarded amount to the claimants and thereafter recover it from the owner of the vehicle.

4. Aggrieved by the award of the Tribunal, Asha Ram filed C.I.M.A. No. 176/2002, whereas New India Assurance Company preferred

C.I.M.A. No. 141/2002.

5. Sh. Raghu Mehta, learned counsel for the owner, submits that the Insurance Company had failed to prove that the license held by the driver was

fake, in that, the evidence produced by the Company was irrelevant besides being deficient to hold that the driving licence held by Som Dutt was

fake.

6. Sh. R. K. Gupta, learned counsel for the Insurance Company, on the other hand, submits that besides discharging the initial onus of proof of the

issue regarding licence being fake, the Insurance Company had led sufficient

evidence before the Tribunal, which evidence, learned counsel submits had neither been rebutted nor contradicted in any such manner on the basis whereof even an inference would be drawn that the licence was not fake. Learned counsel submits that because of the omission to produce evidence, the original licence or the driver of the vehicle, to prove the genuineness of the licence, a presumption had to be drawn against the holder of the licence that had the original licence been produced and driver appeared as witness in the case, the things would have gone against the driver. Sh. R. K. Gupta refers to a judgment delivered by this Court in 'New India Assurance Company Ltd. V/s Mst. Neelam Goyal and others in CIMA Nos.75/2000, 76/2000, 77/2000 and 78/2000, on 01.12.2005 to support his submission.

7. I have considered the submissions of learned counsel for the parties on the issue.

8. Submission of Sh. Raghu Mehta that the evidence produced by the Insurance Company did not conclusively prove that the licence held by the driver was fake, proceeds on the premise that the original records of the Licensing Authority issuing the licence had not been produced by the Insurance Company, which had relied only on a verification certificate marked as ""KS"" by the Tribunal and in the absence of original records, the finding of the Tribunal cannot be justified.

9. I have gone through the statement of Karnai Singh, concerned Clerk, Licensing Authority, Ambala. His statement clearly demonstrates that besides proving the certificate issued by the office, the witness had categorically proved that the original records which had been brought by the witness before the Tribunal, did not indicate the issuance of the licence in favour of the driver. This witness had categorically deposed that the licence in question was fake and had not been issued by the concerned authority. This witness has not been cross-examined by the owner on this aspect of the matter and the emphatic statement of this witness that licence was fake, goes unchallenged.

10. The Tribunal had, after analyzing the evidence produced on this aspect of the matter, proceeded to hold as under

From the perusal of the evidence led by the respondent Insurance Company, it appears that the respondent No. 1, the driver of the offending

vehicle, tractor was having a fake driving licence. The record keeper of licencing authority, Amballa has clearly proved that the driving licence,

which the offending driver was having in his possession was not issued from his office. This licence was shown to be a duplicate and was fake. The

R.T.O. Jammu as per the statement of Dev Raj, a clerk in the said office, licence No.20789, which was renewed by it was issued from outside the

State. According to his record, the driving licence bearing No. 20789 was in the name of Nar Bhadur s/o Kanchan Bhadur. Renewal will not

clothe a fake driving license with genuineness. For the foregoing reasons, the issue is decided in favour of the respondent No.3.

11. Sh. Raghu Mehta tried to build his argument on the premise that the Tribunal had erred in treating the date of renewal of licence as the number

of the licence. Although the Tribunal appears to have erred in noticing the alleged renewal date of licence as number of the licence yet this omission

would not nullify the positive evidence of Karnaii Singh that the licence was fake. Renewal of a fake licence would not result in rendering the fake

licence, a genuine and valid licence.

12. I agree with the submission of Sh. R. K.. Gupta when he submits that the Company had discharged the initial proof of proving that the licence

was fake and the onus thereafter shifted on to the owner of the vehicle to prove that the licence held by the driver employed by the owner was a

valid driving licence. This onus having not been discharged by the owner, goes a long way in proving that the licence of the driver was fake. It

would be relevant to refer to what was held by me in CIMA Nos.75/2000, 76/2000, 777 2000 and 78/2000 (supra):

Facts, which were exclusively in the knowledge of the owner and driver of the vehicle, were not, thus, placed on records to rebut the case set up

by the Insurance Company that the driver of the vehicle did not hold a valid driving licence. Much is sought to be made by the owner from the

statement of Shri Vipin Kumar, General Clerk, Licensing Authority, Hamirpur, when the witness informed the Tribunal that there are three

Licensing Authorities in the Hamirpur Division. Existence of other two Licensing Authorities in Hamirpur Division does not, in any way, weaken the

case set up by the Insurance Company because these Licensing Authorities, according to the statement of the witness, have specifically been

named as Licensing Authority Bursar, and Licensing Authority, Nadaun. These Authorities carry different nomenclature than the nomenclature of

the main Licensing Authority, i.e., Licensing Authority, Hamirpur. No benefit, thus, could be derived by the owner because of there being three

Licensing Authorities in Hamirpur Division.

Plea of Shri Bhatia that in the absence of records of other two Licensing Authorities, it cannot be held that the Insurance Company had discharged

the onus of proof of Issue which lay heavily on it, is without merit. A party supposed to be possessed of a document and in the present case, an

important document like driving license, on the basis whereof, a driver gets right to drive a vehicle, having not been produced before the Tribunal

for its examination, deprives the owner/driver of the vehicle to urge that the driver did hold a valid driving licence at the time of the accident. Shri

Bhatia submitted that provisions of the Evidence Act, do not apply to proceedings under Motor Accidents Claims Tribunal and in that view of the

matter, onus of proof, cannot be shifted on to the driver.

I am not impressed with this submission of Shri Bhatia.

Even if one were to hold that Evidence Act is not, as such, applicable to the proceedings before Motor Accidents Claims Tribunal, yet it cannot be

conceived that principles underlying various provisions of the Evidence Act, which are based on CASUS CONSCIENTIAE and fair play, cannot

be ignored in proceedings before a Motor Accidents Claims Tribunal.

Section 169 of the Motor Vehicles Act, 1988 and Rule 324 of the J and K Motor Vehicle Rules, 1991, provide the status of a Civil Court to the

Motor Accidents Claims Tribunal. The Act and the Rule (supra) supply powers of a Civil Court to the Tribunal in adjudicating claims under the

Act. Adjudication, in terms of Section 168 of the Act, would require decision on rival contentions of the parties. Adjudication may, thus, depend

on affidavit, documentary or oral evidence. In such cases, therefore, principles underlying various provisions of the Evidence Act, cannot be given

a go by, though strict application of the Evidence Act may not be desirable. In nutshell, adjudication of a cause has to be on the preponderance

of probabilities on the basis of material or evidence, be that evidence on affidavit, documentary or oral evidence produced or adduced by the

parties in a cause before a Claims Tribunal. A party to a litigation, who is under

law entitled to the possession of a document cannot, thus, be permitted to avoid placing such documents before the Tribunal, so as to resolve an Issue pending before it, particularly when the existence, authenticity or validity of such document is in question. Silence on the part of such party in the matter, coupled with his omission to produce such documents, cannot be countenanced except on justifiable grounds supporting such nonproduction. Nonproduction of evidence or documents by such party would entail adverse inference against such party.

13. It would be advantageous to refer to para 10 of National Insurance Company Ltd., New Delhi v. Jugal Kishore' reported as AIR 1988 SC 719, which reads, thus:

10. Before parting with the case, we consider it necessary to refer to the attitude often adopted by the Insurance Companies, as was adopted even in this case, of not filing a copy of the policy before the Tribunal and even before the High Court in appeal. In this connection what is of significance is that the claimants for compensation under the Act are invariably not possessed of either the policy or a copy thereof. This Court has consistently emphasized that it is the duty of the party which is in possession of a document which would be helpful in doing justice in the cause to produce the said document and such party should not be permitted to take shelter behind the abstract doctrine of burden of proof. This duty is greater in the case of instrumentalities of the State such as the appellant who are under an obligation to act fairly. In many cases even the owner of the vehicle for reasons known to him does not choose to produce the policy or a copy thereof. We accordingly wish to emphasise that all such cases where the Insurance Company concerned wishes to take a defence in claim petition that its liability is not in excess of the statutory liability it should file a copy of the insurance policy along with its defence. Even in the instant case had it been done so at the appropriate stage necessity of approaching this Court in Civil Appeal would in all probability have been avoided. Filing a copy of the policy, therefore, not only cuts short avoidable litigation but also helps the Court in doing justice between the parties. The obligation on the part of the State or its instrumentalities to act fairly can never be overemphasised.

14. In view of the facts and legal position referred to hereinabove, I, do not find

any substance in the submission of Sh. Mehta to interfere with the finding of the Tribunal on issue No.4, which finding is, accordingly, affirmed.

15. It now needs to be examined as to whether or not the Insurance Company should be called upon to satisfy the award to recover it later from the owner. It would be profitable to refer to Sections 147 and 149 of the Motor Vehicles Act, 1988, to find answer to the question. Sections 147 and 149 read, thus:

147. Requirement of policies and limits of liability. (1) In order to comply with the requirements of this Chapter, a policy of insurance must be a policy which

(a) is issued by a person who is an authorized insurer; and

(b) insures the person or classes of persons specified in the policy to the extent specified in subsection (2)

(i) against any liability which may be incurred by him in respect of the death of or bodily injury to any person, including owner of the goods or his

authorized representative carried in the vehicle or damage to any property of a third party caused by or arising out of the use of the vehicle in a

public place; (ii) against the death of or bodily injury to any passenger of a public service vehicle caused by or arising out of the use of the vehicle in

a public place: (2) (3) (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 these classes of persons. 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 subsection (3) of Sec. 147 in favour of the person by whom a policy has been

effected, judgment or award in Cl. (b) of subsection (1) of Sec. 147 (being a liability covered by the terms of the policy) or under the provisions of

Sec. 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 there under, as if he were the judgmentdebtor, 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)

(3)(4) Where a certificate of insurance has been issued under subsection (3) of Sec. 147 to the person by whom a policy has been effected, so

much of the policy as purports to restrict the insurance of the persons insured thereby by reference to any conditions other than those in Cl. (b) of

subsection (2) shall, as respects such liabilities as are required to be covered by a policy under Cl. (b) of subsection (\) of Sec. 147, be of no effect

(5)

(6)

(7) No insurer to whom the notice referred to in subsection (2) or subsection (3) has been given shall be entitled to avoid his liability to any person

entitled to the benefit of any such judgment or award as is referred to in subsection (1) or in such judgment as is referred to in subsection (3)

otherwise than in the manner provided for in subsection (2) or in the corresponding law of the reciprocating country, as the case may be.

Section 147 (1) mandates an Insurance Company to pay the person/s entitled to the benefit of a decree or an award notwithstanding that it has

become ""entitled to avoid or cancel or may have avoided or cancelled the policy"". The words 'subject to the provisions of this Section' occurring in

Section 149 do not state anything more or give any higher right to the Insurance Company. On the contrary, it negates avoiding of liability by the

Insurance Company. The Insurance Company unless absolved of its liability on any one or the other ground specified in subsection (2), must,

therefore, pay to those to whom it is liable to pay in terms of Section 149 of the Motor Vehicles Act. It can, therefore, be concluded that the

Insurance Company must First pay THEN recover. Such appears to be the intention of the Parliament in enacting this welfare legislation so that the

holder of a decree or award for compensation may not have to run after an owner who may resort to one or the other tactics to avoid payment of

compensation to the insured/claimants of the deceased. This view finds support from 'National Insurance Co. Ltd. V/s Angori Bai and others'

reported as 2005 ACJ 75.

16. Sh. Raghu Mehta then contended that the owner was not required to hold a roving inquiry to find as to whether or not the driver engaged by

him had held a genuine driving licence and all that was required to be done by the owner had been done by him in the present case, and in that

view of the matter no liability can be fastened on the owner. Learned counsel relies on 'United India Insurance Company Ltd. V/s Lehu and

others' reported as AIR 2003 Supreme Court 1292, to support his submission. I would refer to what had been held by the Hon'ble Supreme

Court in para 20 of the case, which is reproduced hereunder:

20. When an owner is hiring a driver he will therefore have to check whether the driver has a driving licence. If the driver produces a driving

licence which on the face of it looks genuine, the owner is not expected to find out whether the licence has in fact been issued by a competent

authority or not. The owner would then take the test of the driver. If he finds that the driver is competent to drive the vehicle, he will hire the driver.

We find it rather strange that Insurance Companies expect owners to make enquiries with RTO's, which are spread all over the country, whether

the driving licence shown to them is valid or not. Thus where the owner has satisfied himself that the driver has a licence and is driving competently

there would be no breach of Section 149(2)(a)(ii). The Insurance Company would not then be absolved of liability. 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's, Sohan Lal Passi's

and Kamla's case (AIR 1987 SC 1184, AIR 1996 SC 2627). We are in full agreement with the views expressed therein and see no reason to take

a different view.

17. True, it is, that an owner is not expected to hold an inquiry before engaging a driver as to whether or not the driving licence was fake. At the

same time, it is expected that the owner must satisfy himself that the driver had a valid driving licence and had the competence in driving the vehicle.

If it ultimately turns out that the licence was fake, the Insurance Company would

continue to remain liable unless proved that the owner insured was aware or had noticed that the licence was fake and still permitted that person to drive the vehicle.

18. The facts and circumstances of the present case indicate that a specific plea was raised by the Insurance Company in its additional pleas, which plea reads, thus:

That the answering respondent cannot be held liable to pay any compensation because the alleged driver is not holding a valid licence because

verifications from the different licencing Authorities are on the files/record declared to be licences are fake. As such, the answering respondent

cannot be fastened with any liability as per the terms and conditions of the policy.

19. The owner of the vehicle has not cared to file any additional pleadings to rebut this plea of the insurer. The owner does not appear to have

raised any such plea on the basis whereof he may derive benefit from the judgment of the Supreme Court (supra).

20. The records, on the other hand, indicate that the driver of the vehicle is noneelse than the son of owner and in this view of the matter the owner

cannot derive any benefit from the judgment of the Hon'ble Supreme Court cited by Sh. Raghu Mehta.

21. For all what has been said above, I do not find any merit in CIMA No. 176/2002 the appeal of Asha Ram, the owner of the vehicle. The

appeal filed by the Insurance Company i.e. CIMA No. 141/2002 succeeds to the extent that it shall first satisfy the award to recover it later from

the owner and for this purpose, the award of the Tribunal shall stand modified to the extent that the insurer would be entitled to execute the award

so as to recover the amount which the insurer pays to the claimants for and on behalf of the owner. The execution proceedings as and when taken

by the Insurance Company would be expedited by the Tribunal and if need be, the money paid by the Insurance Company to the third party shall

be recovered by attachment and sale of the assets of the owner of the vehicle and by taking such other measures as may be permissible under law.

22. Both these appeals are, accordingly, disposed of on the above terms.

23. Registrar Judicial of this Court shall release the amount deposited by the Insurance Company in this Court in favour of the claimants along with

interest accrued thereon.