
(2001) 03 BOM CK 0084
In the Bombay High Court
Case No : First Appeal No. 895 of 1992

New India Assurance Company	Vs	APPELLANT
Balu Ganba Dorage and Others		RESPONDENT

Date of Decision : 02-03-2001

Acts Referred:

Evidence Act, 1872 — Section 101
Motor Vehicles Act, 1988 — Section 165

Citation : (2002) ACJ 1093 : (2001) 2 ALLMR 534 : (2001) 3 BomCR 780

Hon'ble Judges : R.M. Lodha, J

Bench : Single Bench

Advocate : A.K. Chaphekar, for the Appellant; D.C. Khairnar, for the Respondent

Final Decision : Dismissed

Judgement

R.M. Lodha, J.—By this first appeal the insurer viz. New India Assurance Company challenges the award dated 6-4-1992 passed by the Motor Accident Claims Tribunal. Pune against them.

2. Mr. A.K. Chaphekar, learned Counsel for the appellants insurer assailed the award passed by the Tribunal only on one ground namely, that the insurer-appellant was not liable under the policy of insurance since the driver of the autorickshaw which was insured with the insurer-appellant held no driving licence to drive the said vehicle.

3. The brief facts of the case are as under :

The respondent No. 1 herein is the original claimant and he filed claim application before the Motor Accident Claims Tribunal, Pune praying for compensation in the sum of Rs. 50,000/- from the opponents viz. Shri Janardan S. Waichal (respondent No. 2 herein-original opponent No. 1), New India Assurance Company (appellant herein-original opponent No. 2). Mrs. Seeta Babaji Bhondekar (respondent No. 3 herein-original opponent No. 3), National Insurance Company Ltd. (respondent No. 4 herein-original opponent No. 4),

Hona Namdeo Tidke (respondent No. 5 herein-original opponent No. 5) and Sambhaji Baburao Bhondekar (respondent No. 6 herein-original opponent No. 6). The claimant averred in the claim application that on 12-9-1988 at about 5 p.m. he was pillion rider on scooter bearing registration No. MVT/5239. His friend the opponent No. 6 was driving the scooter. When they approached a sharp turn near village Rule, an autorickshaw bearing No. MTA-4550 came in a high and excessive speed and over took the scooter on which claimant was riding on a pillion seat and turned suddenly to its wrong side without giving any signal. Opponent No. 6 was also driving the scooter in a high speed. As a result of dash given by autorickshaw to the scooter, the claimant fell down and suffered fracture of his right knee. The claimant was taken to Khanapur hospital and then to Vadgaon Treemurti Hospital for treatment. The claimant averred that the accident took place because of rash and negligent driving of scooter and the autorickshaw. The claimant claimed compensation of Rs. 50,000/- for the permanent disability suffered by him. The opponents filed separate written statements. The present appellant (opponent No. 2) and insurer of autorickshaw inter alia set up the plea that the driver of the autorickshaw was not having driving licence. On the basis of pleadings of the parties, the tribunal framed issues and after recording the evidence held that the accident occurred due to rash and negligent driving of the two drivers namely the scooter and the autorickshaw and that claimant suffered injuries on account of the said accident. The tribunal awarded the compensation of Rs. 28,000/- inclusive of no fault liability along with interest and apportioned liability to the extent of 80% upon the autorickshaw and the insurer of the autorickshaw and 20% upon the owner of the scooter.

4. The learned Counsel appearing for the appellant-insurer referred to the evidence of Sudhakar Ramchandra Bhosale (witness No. 1 for the opponent No. 2 insurer) and submitted that on the basis of the said deposition it is established that the driver of the autorickshaw was driving the vehicle without licence and since there was breach of terms and conditions of the insurance policy, the insurer was not liable. The hub of the deposition of Sudhakar R. Bhosale is that on the spot at the time of accident the autorickshaw driver was not having licence. The said witness is police constable was attached to Velha outpost. He deposed that he enquired from autorickshaw driver about the driving licence and found that he was not in possession of driving licence. The said witness has also referred to the criminal case pending against the autorickshaw driver. I am afraid the evidence led by the insurer is not sufficient to prove that the autorickshaw driver was not holding any driving licence to drive the vehicle. The deposition of the said witness does not sufficiently discharge the burden placed upon the insurer in that regard.

5. In National Insurance Co. Ltd. Vs. Gonti Eliza David and others, , the Division Bench of this Court in respect of burden of proof on the insurance company to prove that driver was not holding a valid licence observed thus :

"4. Mr. Murthy, the learned Counsel for the company, has placed reliance on the decision in *N. Palaniswamy v. Ramaswamy*, in which a similar plea regarding placing of the burden on the insurance company to prove that the driver did not have a valid licence at the relevant time, was negated by the Division Bench of the Madras High Court. It appears to us that the facts of the *N. Palaniswamy*'s case can easily be distinguished from those of the present case. In *N. Palaniswamy*'s case the appellants had not even disclosed the name of the driver or the address of the driver, and hence, the Court found that the insurance company had no means of verification whether the driver had a valid licence or not. In the present case, the company had made no secret about the identity of the person who was driving the vehicle, and hence it was obligatory on the part of the insurer to do their best to ferret the truth from the company by asking them to produce the relevant record regarding the qualifications of the driver appointed by them or to serve a set of interrogatories for eliciting the above information. We would not wish to be thought that we expect the insurer to scan through the entire records of the Motor Vehicles Department to prove that the driver of the vehicle did not hold a proper licence at the time of the accident or at any time before. But the least the insurer could have done is to cross-examine Police Sub Inspector, Bhagwan, who deposed about the prosecution of the driver for rash and negligent driving and bring it on record that the driver is also being prosecuted for driving without a valid licence.

5. Not that the insurer's travails would have ended with such an admission from the Police Sub Inspector, because, as the expression "has held a licence" shows his liability persists to cover the case of a once licensed driver who forgot to renew his licence. A driver would, none-the-less, remain a driver even though his licence had expired a few days before unless he has been disqualified from obtaining a fresh licence. The legislature in its wisdom has extended an umbrella protection to the victim or those claiming under him even in a case of an unlicensed driver, provided he had held a valid licence some time in his life in the remote past."

6. The Apex Court in *Narcinva V. Kamat and Another Vs. Alfredo Antonio Doe Martins and Others*, of the report held thus :

"12. It is contended on behalf of the insurance company that the second appellant did not have a valid driving licence. It is the insurance company which complains that there has been a breach of one of the important terms of the contract of insurance as evidenced by the policy of insurance (the whole of was not shown to us) and that the second appellant who was shown to be driving the vehicle at the relevant time, did not have a valid driving licence to drive the pick-up van. The insurance company complains of breach of a term of contract which would permit it to disown its liability under the contract of insurance. If a breach of a term of contract permits a party to the contract to not to perform the contract, the burden is squarely on that party which complains of breach to prove that the breach has been committed by the other party to the contract. The test

in such a situation: would be who would fail if no evidence is led. The language and the format in which issue Nos. 7 and 8 have been cast by the Tribunal clearly casts the burden of proof on the insurance company. Not an iota of evidence has been led by the Insurance company to show that the second appellant did not have a valid driving licence to drive the vehicle. Mr. J. Sharma, learned Counsel who appeared for the appellant urged that a question was asked in the cross-examination of the second appellant whether he would produce his driving licence, and that as he failed to produce the same an adverse inference must be drawn against him that he did not have a valid driving licence. The High Court has recorded a finding in this behalf which may first be extracted in its own words :

"Mr. Cardoso's contention proceeds on a misreading of Clause (b) indented above, which brings to the forefront that the person driving the vehicle must be in the insured's employ and further, being in such employment was driving the vehicle on the order of the insured or with his permission. In this case, the very first premise is missing for the simple reason it is not even the second appellant's case that he was ever in the employment of the first appellant firm but was at all material times a partner thereof. Even if the first appellant held a valid driving licence, Clause (b) would not absolve him from liability for payment, if the van had been driven by him at the relevant time."

The High Court took no notice of the fact that the van belonged to the firm and every partner for that reason would be the owner of the property of the firm because the firm is not a legal entity in the sense in which the company under the Companies Act has a juristic personality. Firm is a compendious name for the partners. And the High Court limited its enquiry to ascertain whether the first part of the condition is satisfied viz. whether the driver was in the employ of the insured. It completely overlooked the second clause that the driver appellant No. 2 was driving with the permission of the insured, the firm in this case. Two clauses are disjointed by a disjunctive or. On a proper analysis and interpretation of the term of contract of insurance, the insurance company cannot escape the liability if (a) the insured himself was driving the vehicle or (b) the driver is in the employment of the insured and is driving on the order of the insured or (c) he is driving with his permission. The words with his permission does not qualify the expression is in the insured's employ. The clause can be properly read thus : any other person with insured's permission. This ought to be so because a friend can always be permitted if he has a valid driving licence to drive a friend's car. If in every such situation where the person driving the vehicle is not shown to be the insured himself or someone in his employment, the contract of insurance would afford no protection and the insurance company having collected the premium would wriggle out of a loophole. Therefore, the proper construction of this condition must be to read it as stated hereinbefore.

14. The last question is whether he had a valid driving licence. The High Court has not recorded a clear cut finding on this point. The finding of the Tribunal is

more evasive than the one by the High Court. Mr. Sharma did not dispute that the second appellant had a driving licence. His grievance is that he having failed to produce the same when called upon to do so in the cross-examination, an adverse inference be drawn against him that he did not have a valid licence to drive a pick-up van. The submission fails to carry conviction with us. The burden to prove that there was breach of the contract of insurance was squarely placed on the shoulders of the insurance company. It could not be said to have been discharged by it by a mere question in cross-examination. The second appellant was under no obligation; to furnish evidence so as to enable the insurance company to wriggle out of its liability under the contract of insurance. Further the R.T.A. which issues the driving licence keeps a record of the licences issued and renewed by it. The insurance company could have got the evidence produced to substantiate his allegation. Applying the test who would fail if no evidence is led the obvious answer is the insurance company.

15. To sum up the insurance company failed to prove that there was a breach of the term of the contract of insurance as evidenced by the policy of insurance on the ground that the driver who was driving the vehicle at the relevant time did not have a valid driving licence. Once the insurance company failed to prove that aspect, its liability under the contract of insurance remains intact and unhampered and it was bound to satisfy the award under the comprehensive policy of insurance."

7. Though in the present case the insurer produced the police constable who conducted the investigation, but his evidence at best shows that the autorickshaw driver was not in possession of driving licence on the spot. Nothing beyond can be read in his deposition. There is nothing on record that the insurer asked the owner of autorickshaw to produce the relevant record regarding qualification of the driver appointed by him. It also does not appear that the insurer served set of interrogatories upon the owner for eliciting the information about driver's licence though the identity of the driver was fully known. It is true that it is not for the insurer to go to each and every transport authority to find out whether driver involved in the accident held licence or not, but minimum expected of them was no seek complete information from the owner about driver's licence and for production of the relevant record regarding qualification of the driver. For all these reasons, it cannot be said that the insurer was able to discharge its burden of proving that the driver of the autorickshaw had no driving licence.

8. No other point was argued by the learned Counsel for the appellant. First appeal has no merit and is dismissed.

9. The stay order obviously stands discharged upon the disposal of appeal.