
(2020) 07 J&K CK 0056
In the Jammu And Kashmir High Court
Case No : CMAM No. 04 Of 2008

Oriental Insurance Co. Ltd	Vs	APPELLANT
Fazi And Others		RESPONDENT

Date of Decision : 15-07-2020

Acts Referred:

Motor Vehicles Act, 1988 — Section 173
Evidence Act, 1872 — Section 101

Citation : (2020) 07 J&K CK 0056

Hon'ble Judges : Sanjay Dhar, J

Bench : Single Bench

Advocate : J. A. Kawoosa, Hilal A. Wani, Mian Tufail

Final Decision : Disposed Off

Judgement

Sanjay Dhar, J

1) The instant appeal under Section 173 of the Motor Vehicles Act is directed against the award 31.10.2007 passed by Motor Accidents Claims Tribunal, Srinagar (for brevity the Tribunal).

2) Before coming to the instant appeal, let me give a brief background of the facts that have led to the filing of this appeal.

3) As per the facts narrated by the claimants before the Tribunal, on 02.11.1996 deceased Ghulam Hassan Dar was knocked down by a vehicle bearing registration No.JK01/7761, that was being driven rashly and negligently by its driver, Bashir Ahmad Mir, respondent No.8 herein. The accident resulted in death of the deceased. The claimants comprising widow, sons and daughters of the deceased (respondents 1 to 7 herein) filed a claim petition before the Tribunal claiming compensation of Rs.44, 90,000/.

4) The driver and owners of the offending vehicle (respondent No.8 to 11 herein) contested the claim petition by filing the objections, whereby they pleaded that

the offending vehicle was covered by a policy of insurance issued by Oriental Insurance Company.

5) The claim petition was contested by the appellant insurance company by filing its reply thereto, wherein, inter-alia, it was pleaded that the offending vehicle was not insured with it at the time of the accident and that the policy of insurance, reference whereof was made by the owners in their reply, is fake and fabricated.

6) On the basis of respective pleadings of the parties, the Tribunal framed the following issues:

1. Whether on 2.11.1996, respondent No.1 Bashir Ahmad Mir, was driving vehicle No.JK01/7761 rashly and negligently as a result of which at Satpokran Khrew it hit one pedestrian Ghulam Hassan Dar who sustained fatal injuries and later on succumbed to the same? OPP

2. Whether the offending vehicle is not insured with respondent No.5, as the cover note is fake, forged and fictitious one and as such the Insurance Company cannot be held liable to indemnify the insured and compensate the petitioners? OPR-5

3. Whether the driver of the offending vehicle was not holding a valid driving license on the date of accident and as such the Insurance Company cannot be saddled with the liability? OPR-5

4. In case issue No.1 is proved in affirmative, to what amount of compensation the petitioners are entitled to, from whom and in what proportion? OPP

5. Relief

7) The Tribunal, after recording evidence of the parties, passed the impugned award dt.31.10.2007 whereby all the issues were decided in favour of the claimants and a sum of Rs.4,36,999/ along with interest @ 6% was awarded in their favour. It was further directed that the award shall be satisfied by the appellant insurance company. It is this award, which is under challenge before this Court by way of the instant appeal.

8) The appellant has challenged the award mainly on the ground that the finding of the Tribunal on issue No.2 is perverse and against the evidence on record, inasmuch as the appellant insurance company has, after leading cogent and convincing evidence, succeeded in proving that the policy of insurance produced by the owners before the Tribunal is fake and fabricated. It has been further contended that the person who, as per the contention of the owners of the offending vehicle had issued the policy of insurance, was neither an agent nor an employee of the appellant insurance company and, as such, he was not authorized to issue the policy of insurance on behalf of the appellant insurance company. On this ground, it is urged that the contract of insurance has not come into existence between the owner of the offending vehicle and the appellant

insurance company, particularly when the premium has not been received by the Company.

9) On the other hand, learned counsel for the respondents have contended that the finding on issue No.2 returned by the Tribunal is based on evidence and that the same does not deserve to be interfered with.

10) I have heard learned counsel for the parties and perused the grounds of appeals, the impugned award and the record of the Tribunal.

11) The only question that falls for determination in this case is as to whether the finding of the Tribunal that the insurance company, despite having succeeded in showing that the insurance policy has not been issued by it, is liable to pay compensation to the claimants, is legally sustainable.

12) The burden of proving the fact that the offending vehicle was covered under a policy of insurance, in the first instance, lies upon the owner/insured because it is the owner/insured who asserts that the vehicle belonging to him is covered under the insurance policy. It is a settled rule of evidence that the burden rests upon the party who asserts the affirmative of the issue. It is fixed at the beginning of the trial on the basis of the assertions made in the pleadings. Once the owner gives particulars of the policy of insurance or places on record a copy of the policy, his burden gets discharged and the burden to prove the fact that the policy of insurance has not been issued shifts on the insurance company. Thus, the burden of proof does not remain constant but it shifts as soon as the party, upon whom the burden lies, produces its evidence giving rise to a presumption in his favour. When insurance company succeeds in showing that the policy of insurance, which has been produced on record by the owner, is fake and fabricated, the burden again shifts upon the owner to rebut this evidence. It is not always easy to determine as to on what particular point the onus shifts from one party to other and vice versa but at the conclusion of the trial, when the issues come to be adjudged, it has to be seen whether the initial onus, which Section 101 of the Evidence Act casts upon the party asserting a fact, has been discharged or not. The amount of evidence required to shift the burden of proof depends upon facts and circumstances of each case.

13) Having set out the legal position on the burden of proof and the onus of proof, let us now proceed to decide the controversy involved in this case.

14) The respondents/owners of the offending vehicle have clearly stated in their reply before the Tribunal that the vehicle in question, at the time of the accident, was duly insured with the appellant insurance company vide Insurance Policy No.23423/31/96/00159. They have also placed on record the original certificate of insurance (passbook) and a copy of cover note. Thus by doing so, the respondents/owners discharged their initial burden to prove that the vehicle in question was insured with the appellant insurance company. However, the appellant insurance company, in its reply before the Tribunal, contended that the cover note as well as certificate of insurance is fake and fabricated. The appellant

insurance company denied the insurance of the offending vehicle with it. It was also contended that the insurance company has not received any premium for issuing the alleged policy of insurance nor the said policy has been issued by it.

15) During the trial of the case before the Tribunal, the respondent Bashir Ahmad Bhat, owner of the offending vehicle, examined himself as a witness to prove that the vehicle in question was covered by an insurance policy issued by the appellant insurance company whereas in rebuttal, the insurance company examined its Assistant Manager, Mohammad Mehraj-ud-din.

16) On the basis of the statements of aforesaid two witnesses the Tribunal, while deciding issue No.2, came to the conclusion that the insurance company cannot escape its liability to indemnify the insured. In order to examine the correctness of the conclusion drawn by the Tribunal, it is necessary to analyze the statements of respondent Bashir Ahmad Bhat and Assistant Manager of appellant insurance company, Mohammad Mehraj-ud-din.

17) According to respondent Bashir Ahmad Bhat, he had purchased the offending vehicle from one Abdul Salam Dar, in whose name he purchased a policy of insurance from one Mr. M. K. Wali from his office at Indira Nagar, Srinagar. He has admitted that he did not go to the office of appellant insurance company nor did he verify the veracity of the insurance policy purchased by him.

18) On the other hand, Mohammad Mehraj-ud-din, Assistant Manager Oriental Insurance Company has, on the basis of record of the company, deposed that the Insurance Policy No.23423/31/96/00159 has not been issued in the name of Abdul Salam Dar but the same stands issued in the name of Ab. Rehman Bangroo. He has categorically stated that the vehicle in question was not insured with the appellant insurance company. He has also stated that the cover note in question is fake. This witness has further stated that Mr. M. K. Wali was a surveyor and not an employee or agent of the appellant insurance company.

19) From an analysis of the oral and documentary evidence on record, it comes to the fore that the policy of insurance placed on record reflects the name of Abdul Salam Dar as the insured but the said person has not come to the witness box to state as to how the policy has been issued in his name and from whom he has purchased the same. According to respondent Bashir Ahmad Bhat, the policy was purchased by him in the name of Abdul Salam Dar from one Mr. M. K. Wali. It is an admitted fact that respondent Bashir Ahmad Bhat has not purchased the policy from the office of the appellant insurance company and he has not verified the authority of Mr. M. K. Wali to issue the policy of insurance. The witness produced by the appellant insurance company has clearly stated that the policy of insurance in question has not been issued by the Company and the policy number reflected in the certificate of insurance produced on record pertains to some other person and not to the owner of the offending vehicle. From his statement it has also come to the fore that Mr. M. K. Wali was a surveyor and not an employee or agent of the appellant insurance company. From these

established facts, it is safe to conclude that the policy of insurance under reference has not been issued by the appellant insurance company nor has the same been issued by any authorized agent or employee of the company.

20) The Tribunal, with aforesaid proved facts on record, has misdirected itself by holding that, in spite of policy of insurance being fake and fabricated, the insurance company is liable to indemnify the insured. The Tribunal in holding so has relied upon the case law which does not apply to the facts of the instant case. The case law, which find reference in the impugned award, pertain to the instances where fake cover note or policy of insurance had been issued by authorized agent or employee of the insurance company. It is in those circumstances that the Courts went to hold that the insured in said cases have taken all the precautions by purchasing the insurance policy from authorized agent/employee of the insurance company and there was no fault on his part if such authorized agent/employee of the company had failed to deposit the premium of insurance with the Company and issued fake cover note/policy of insurance.

21) In the instant case, the facts that have been established on record are somewhat different, inasmuch as the fake policy of insurance has not been issued either by any authorized agent of the appellant insurance company or by any employee of the company. The policy of insurance in the instant case, as per owner's own version, has not been issued by one Mr. M. K. Wali, the surveyor, who was an employee of the appellant insurance company nor an agent authorized to issue cover note/insurance policy on behalf of the appellant insurance company. In such circumstances, when the contract of insurance on behalf of appellant insurance company has not been signed by any of its employees or authorized agent, the company could not have been saddled with the liability to indemnify the owner of the offending vehicle.

22) Upon consideration of the material brought on record before the Tribunal, both oral as well as documentary, this Court has no hesitation in reaching the conclusion that the appellant insurance company had successfully established before the Tribunal that the policy of insurance and the cover note with regard to the offending Tipper that were produced before the Tribunal, were in fact fake documents. An award cannot be based upon a fake policy of insurance. This Court has, in the case of *New India Assurance Co. Ltd. Vs. Ali Mohd. Dar and Ors*, reported in 2019 (3) JKJ 235, observed that fraud destroys the sanctity of judicial proceedings, hence an award based upon it is liable to be set aside.

23) In the above circumstances it was not open to the Tribunal to fix the liability of indemnification of the owner upon the appellant insurance company particularly when no contract of insurance had come into existence between the owner of the offending vehicle and the insurance company. By holding the appellant insurance company liable to satisfy the award, the Tribunal has landed itself into a grave error.

24) For the foregoing discussion the impugned award, to the extent it holds the appellant insurance company liable to satisfy the award, is set aside. Respondents No. 8 to 11 herein, the driver and the owners of the offending vehicle shall be liable to satisfy the award jointly and severally. The appeal stands disposed of accordingly.

25) Record of the Tribunal along with a copy of this judgment be sent back.