

(2012) 05 DEL CK 0635

In the Delhi High Court

Case No : MAC. APP. No. 613 of 2009

Oriental Insurance Co. Ltd.

APPELLANT

Vs

Rekhaben and Others

RESPONDENT

Date of Decision : 08-05-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 12 Rule 8
Motor Vehicles Act, 1988 — Section 149(2)

Citation : (2012) 05 DEL CK 0635

Hon'ble Judges : G.P. Mittal, J

Bench : Single Bench

Advocate : Pradeep Gaur with Mr. Shashank Sharma, Mr. Amit Gaur and Ms. Mauri Gaur, for the Appellant;

Final Decision : Dismissed

Judgement

G.P. Mittal, J.—The Appellant Oriental Insurance Co. Ltd. impugns a judgment dated 18.09.2009 whereby a compensation of `7,40,000/- was awarded in favour of the Respondents No. 1 to 3 for the death of one Jagdishbhai Patel who died in a motor accident which occurred on 06.06.2006. On the basis of evidence adduced by the parties, the Claims Tribunal held that the accident was caused on account of rash and negligent driving of vehicle No. HR-55A-2277 by the Respondent No. 4 (Anil Poddar). The offending vehicle was owned by Sanjay Saini(Respondent No. 5) and was insured with the Appellant Insurance Company.

2. During hearing of the Appeal, the finding on negligence and quantum of compensation is not disputed by the Appellant.

3. The sole ground urged on behalf of the Appellant Insurance Company is that the Appellant successfully proved the breach of the terms of policy as envisaged u/s 149(2)(a)(i)(c) of the Motor Vehicles Act i.e. the vehicle being a transport vehicle was being driven without a permit. In spite of this, the Appellant Insurance Company was made liable to pay the compensation and even the recovery rights were declined.

4. It was proved on record that a notice under Order XII Rule 8 CPC was served upon the owner who failed to produce the permit in the Court as required in the notice. As per Section 149(2)(a), an insurer is entitled to defend the action on the grounds as mentioned u/s 149(2)(a)(i) of the Act. Thus, the onus is on the insurer to prove that there is breach of the condition of the policy. It is well settled that the breach must be conscious and willful. Even if a conscious breach on the part of the insured is established, still the insurer has a statutory liability to pay the compensation to the third party and will simply have the right to recover the same from the insured/tortfeasor either in the same proceedings or by independent proceedings as the case may be, as ordered by the Claims Tribunal or the Court. The question of statutory liability to pay the compensation was discussed in detail by a two Judge Bench of the Supreme Court in *Skandia Insurance Co. Ltd. Vs. Kokilaben Chandravadan and Others*, where it was held that exclusion clause in the contract of Insurance must be read down being in conflict with the main statutory provision enacted for protection of victim of accidents. It was laid down that the victim would be entitled to recover the compensation from the insurer irrespective of the breach of the condition of policy. The three Judge Bench of the Supreme Court in *Sohan Lal Passi Vs. P. Sesh Reddy and others*, analyzed the corresponding provision under the Motor Vehicles Act, 1939 and the Motor Vehicles Act, 1988 and approved the decision in *Skandia (supra)*. In *New India Assurance Co., Shimla Vs. Kamla and Others etc. etc.*, the Supreme Court referred to the decision of the two Judge Bench in *Skandia(supra)*, the three Judge Bench decision in *Sohan Lal Passi(supra)* and held that the insurer who has been made liable to pay the compensation to third parties on account of certificate of insurance issued, shall be entitled to recover the same if there was any breach of the policy condition on account of the vehicle being driven without a valid driving licence. The relevant portion of the report is extracted hereunder:

21. A reading of the proviso to sub-section (4) as well as the language employed in sub-section (5) would indicate that they are intended to safeguard the interest of an insurer who otherwise has no liability to pay any amount to the insured but for the provisions contained in Chapter XI of the Act. This means, the insurer has to pay to the third parties only on account of the fact that a policy of insurance has been issued in respect of the vehicle, but the insurer is entitled to recover any such sum from the insured if the insurer were not otherwise liable to pay such sum to the insured by virtue of the conditions of the contract of insurance indicated by the policy.

22. To repeat, the effect of the above provisions is this: when a valid insurance policy has been issued in respect of a vehicle as evidenced by a certificate of insurance the burden is on the insurer to pay to the third parties, whether or not there has been any breach or violation of the policy conditions. But the amount so paid by the insurer to third parties can be allowed to be recovered from the insured if as per the policy conditions the insurer had no liability to pay such sum to the insured.

23. It is advantageous to refer to a two-Judge Bench of this Court in *Skandia Insurance Co. Ltd. Vs. Kokilaben Chandravadan and Others*, Though the said decision related to the corresponding provisions of the predecessor Act (Motor Vehicles Act, 1939) the observations made in the judgment are quite germane now as the corresponding provisions are materially the same as in the Act. Learned Judge pointed out that the insistence of the legislature that a motor vehicle can be used in a public place only if that vehicle is covered by a policy of insurance is not for the purpose of promoting the business of the insurance company but to protect the members of the community who become suffers on account of accidents arising from the use of motor vehicles. It is pointed out in the decision that such protection would have remained only a paper protection if the compensation awarded by the courts were not recoverable by the victims (or dependants of the victims) of the accident. This is the *raison d'être* for the legislature making it prohibitory for motor vehicles being used in public places without covering third-party risks by a policy of insurance.

24. The principle laid down in the said decision has been followed by a three-Judge Bench of this Court with approval in *Sohan Lal Passi Vs. P. Sesh Reddy and others*,

25. The position can be summed up thus:

The insurer and the insured are bound by the conditions enumerated in the policy and the insurer is not liable to the insured if there is violation of any policy condition. But the insurer who is made statutorily liable to pay compensation to third parties on account of the certificate of insurance issued shall be entitled to recover from the insured the amount paid to the third parties, if there was any breach of policy conditions on account of the vehicle being driven without a valid driving licence.

5. Again in *United India Insurance Company Ltd. Vs. Leheru and Others*, in para 18 of the report the Supreme Court referred to the decision in *Skandia*(supra), *Sohan Lal Passi*(supra) and *Kamla*(supra) and held that even where it is proved that there was a conscious or willful breach as provided u/s 149(2)(a) (ii) of the Motor Vehicle Act, the Insurance Company would still remain liable to the innocent third party but may recover the compensation paid from the insured. The relevant portion of the report is extracted hereunder:

18. Now let us consider Section 149(2). Reliance has been placed on Section 149(2)(a)(ii). As seen, in order to avoid liability under this provision it must be shown that there is a "breach". As held in *Skandia* and *Sohan Lal Passi* cases the breach must be on the part of the insured. We are in full agreement with that. To hold otherwise would lead to absurd results. Just to take an example, suppose a vehicle is stolen. Whilst it is being driven by the thief there is an accident. The thief is caught and it is ascertained that he had no licence. Can the insurance company disown liability? The answer has to be an emphatic "No". To hold otherwise would be to negate the very purpose of compulsory insurance.

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20.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, Sohan Lal Passi and Kamla cases. We are in full agreement with the views expressed therein and see no reason to take a different view.

6. The three Judge Bench of the Supreme Court in National Insurance Co. Ltd. Vs. Swaran Singh and Others, again emphasized that the liability of the insurer to satisfy the decree passed in favour of the third party was statutory. It approved the decision in Sohan Lal Passi (supra), Kamla (supra) and Leheru (supra). Para 73, 103 and 105 of the report are extracted hereunder:

73. 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.

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

7. This Court in MAC APP. No. 329/2010 Oriental Insurance Company Limited v. Rakesh Kumar and Others and other Appeals decided by a common judgment dated 29.02.2012, noticed some divergence of opinion in National Insurance Co. Ltd. Vs. Kusum Rai and Others, , National Insurance Co. Ltd. Vs. Vidhyadhar Mahariwala and Others, ; Ishwar Chandra and Others Vs. The Oriental Insurance Co. Ltd. and Others, and Premkumari and Others Vs. Prahlad Dev and Others, and held that in view of the three Judge Bench decision in Sohan Lal Passi(supra) and Swaran Singh(supra), the liability of the Insurance Company vis-?-vis the third party is statutory. If the Insurance Company successfully proves the conscious breach of the terms of the policy, then it would be entitled to recovery rights against the owner or driver, as the case may be.

8. Turning to the instant case, the Appellant's plea is that, a notice under Order XII Rule 8 CPC was duly served upon the owner requiring him to produce the permit to show that the vehicle in question was being driven for a purpose as stipulated in the permit. The owner (Respondent No. 5) failed to produce the permit and, therefore, an inference ought to have been drawn against the Respondent No. 5 that the vehicle was being used in violation of the purpose stipulated in the permit.

9. I would not agree with the contention raised on behalf of the Appellant. The

service of notice under Order XII Rule 8 CPC simply entitled the Insurance Company to lead secondary evidence in respect of the document sought to be produced. In case of a driving licence when the driving licence is not produced, the Insurance Company cannot know the place wherefrom the driver might have obtained a driving licence. In case of a permit, the Insurance Company is always aware of the name of the transport authority where the insured vehicle is registered. It can summon the record from the concerned transport authority to prove the breach of the condition of the policy for using a vehicle without permit or for a purpose not allowed by the permit. The Appellant Insurance Company did not make any effort to summon the record from the concerned transport authority to prove that the vehicle was being plied for a purpose other than the one specified in the permit issued by the concerned transport authority. The Appellant, therefore, failed to establish any breach of the terms of the policy to avoid liability to indemnify the insured.

10. The Appeal is devoid of any merit; the same is accordingly dismissed. The statutory amount of `25,000/- shall be refunded to the Appellant Insurance Company.