
(2012) 09 DEL CK 0543
In the Delhi High Court
Case No : MAC App. 701 of 2011

Oriental Insurance Company Ltd.

APPELLANT

Vs

Jai Chand and Others

RESPONDENT

Date of Decision : 04-09-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 12 Rule 8
Motor Vehicles Act, 1988 — Section 149(2)(a), 149(2)(b), 166

Citation : (2012) 09 DEL CK 0543

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

Bench : Single Bench

Advocate : Abhishek Kumar, with Mr. Punit Vinay, for the Appellant; A.S. Rawal, for R-3 and R-4, for the Respondent

Final Decision : Allowed

Judgement

G.P. Mittal, J.—In this Appeal, the Appellant Oriental Insurance Company Limited seeks recovery rights for a compensation of Rs. 3,75,000/- awarded in favour of Respondents No. 3 and 4 for the death of their minor daughter Hemlata, who died in a motor vehicle accident which occurred on 27.12.2004. Question that falls for determination is, if the owner of a vehicle fails to produce the driving licence of the driver inspite of service of notice under Order XII Rule 8 CPC, whether an inference of willful breach of terms of policy can be drawn against the insured?

2. A Claim Petition u/s 166 of the Motor Vehicles Act, 1988 (the Act) was filed by Respondents No. 3 and 4 alleging that their daughter Hemlata, aged 21/2 years died in a motor vehicle accident involving Tata Tempo No. UP-14H-3216. It was alleged that the accident resulted because of rash and negligent driving by the Respondent No. 2 (Ganpati Rai). Respondents No. 1 and 2 (the owner and driver of the offending vehicle) preferred not to contest the proceedings before the Claims Tribunal despite sufficient service. They were, therefore, ordered to be proceeded ex-parte.

3. The Insurance Company in its written statement took up the plea that if the driver was not holding a valid driving licence to ply the said vehicle, the Insurance Company would have no liability to pay the compensation.

4. On 15.02.2011 a statement was made by ASI Srinivas, IO of the case (before the Claims Tribunal) that the driver did not produce any driving licence to drive the offending vehicle till the time he filed the charge sheet in the criminal Court. The Appellant Insurance Company examined Pradeep Kaushik, its Administrative Officer as R3W1. He proved policy as Ex.R3W1/1 containing the relevant condition regarding driving of the vehicle by a driver having a valid driving licence. He further proved copy of the notice dated 07.01.2011 Ex.R3W1/2 written to the First Respondent (owner of the vehicle) to produce the driving licence of the driver. Postal receipt was also proved as Ex.R3W1/3. R3W1's testimony remained unrebutted and uncontroverted as Respondents No. 1 and 2 were ex-parte.

5. Admittedly, no notice under Order XII Rule 8 CPC was issued to the driver by the Appellant Insurance Company to produce the driving licence.

6. Learned Single Judge of this Court in *New India Assurance Co. Ltd. v. Sanjay Kumar and Ors.*, ILR 2007(II) Del 733 , referred to *National Insurance Co. Ltd. Vs. Swaran Singh and Others*, ; *United India Insurance Company Ltd. Vs. Leheru and Others*, , *New India Assurance Co., Shimla Vs. Kamla and Others etc. etc.*, ; *Sohan Lal Passi Vs. P. Sesh Reddy and others*, ; and *Skandia Insurance Co. Ltd. Vs. Kokilaben Chandravadan and Others*, and analysed the law with regard to the liability of the Insurer vis-?-vis the Insured and third parties and summarized the legal position as under:-

(a) Where the offending vehicle is admittedly an insured vehicle, limited to the terms of the policy of insurance, the insurance company is obliged to take over the liability of the assured and pay the sum awarded by the Tribunal to the claimant.

(b) Where the insurance company alleges breach of the terms and conditions of the policy of insurance and Section 149 (2)(a) of the M.V. Act, 1988 is attracted, on proof of violation of a breach of a specified condition of a policy, the insurance company would still be liable to pay the sum awarded to the claimants but would be entitled to recovery rights against the assured, meaning thereby, on proof of having satisfied the award in favour of the claimant would be entitled to recover the said amount from the assured.

(c) Where the policy is avoided on proof of facts which attracts Section 149(2) (b) of the M.V. Act, 1988, the liability of the insurance company to pay under the policy of insurance stands avoided vis-a-vis even the third parties, meaning thereby the Tribunal would have no power to direct recovery against the insurance company.

(d) Mere breach of the conditions of the policy would not entitle the insurance

company to either avoid liability to pay or have recovery rights against the assured unless the insurance company additionally proves that the assured, knowingly and consciously breached the terms of the policy or by proving facts evidencing conduct of acting so recklessly as to denote that the assured did not care what the consequences of his act might be.

7. The learned Single Judge further held that although the onus is on the Insurer to prove that there was breach of condition of policy, but once the record of the Licensing Authority is summoned to prove that the driver did not possess a valid driving licence, the onus would shift on the Insured (the owner of the vehicle) who must then step into the witness box and prove the circumstances under which he acted and handed over the vehicle to the driver. Paras 22 to Para 24 of the report are extracted hereunder:-

22. Thus, where the insurance company alleges that the term of the policy of not entrusting the vehicle to a person other than one possessing a valid driving licence has been violated, initial onus is on the insurance company to prove that the licence concerned was a fake licence or was not a valid driving licence. This onus is capable of being easily discharged by summoning the record of the Licensing Authority and in relation thereto proving whether at all the licence was issued by the authority concerned with reference to the licence produced by the driver. Once this is established, the onus shifts on to the assured i.e. the owner of the vehicle who must then step into the witness box and prove the circumstances under which he acted; circumstances being of proof that he acted bona fide and exercised due diligence and care. It would be enough for the owner to establish that he saw the driving licence of the driver when vehicle was entrusted to him and that the same appeared to be a genuine licence. It would be enough for the owner, to discharge the onus which has shifted on to his shoulders, to establish that he tested the driving skill of the driver and satisfied himself that the driver was fit to drive the vehicle. Law does not require the owner to personally go and verify the genuineness of the licence produced by the driver.

23. Where the assured chooses to run away from the battle i.e. fails to defend the allegation of having breached the terms of the insurance policy by opting not to defend the proceedings, a presumption could be drawn that he has done so because of the fact that he has no case to defend. It is trite that a party in possession of best evidence, if he withholds the same, an adverse inference can be drawn against him that had the evidence been produced, the same would have been against said person. As knowledge is personal to the person possessed of the knowledge, his absence at the trial would entitle the insurance company to a presumption against the owner.

24. That apart, what more can the insurance company do other than to serve a notice under Order 12 Rule 8 of the CPC calling upon the owner as well as the driver to produce a valid driving licence. If during trial such a notice is served and proved to be served, non response by the owner and the driver would fortify

the case of the insurance company.

8. The owner of the vehicle has not come forward with any explanation that he had seen Respondent No. 2's (the driver's) driving licence before employing him or that he (Respondent No. 2) had taken any driving test. The owner may not always have control over the driver of the vehicle and may not be always in a position to produce the driving licence of the driver. He could have lost or misplaced copy of the driving licence available with him. But, he must come forward to give an explanation once he is asked by the insurer to produce the driving licence of the driver. This having not been done in the instant case, an inference of conscious and willful breach of the terms of the policy can be drawn against the First Respondent.

9. It is well settled that once the insurer establishes a willful breach of the terms of the policy on the part of insured, it shall have the right to recover the compensation paid to the victim/his legal representatives under statutory liability. (See: Sohan Lal Passi Vs. P. Sesh Reddy and others, ; Skandia Insurance Co. Ltd. Vs. Kokilaben Chandravadan and Others, ; and New India Assurance Co., Shimla Vs. Kamla and Others etc. etc.,).

10. In view of foregoing discussion, the Appeal is allowed and the Appellant Insurance Company is granted recovery rights to recover the compensation from the First Respondent (owner of the vehicle).

11. The compensation, if any, already deposited in favour of the Respondents No. 3 and 4 shall be released to them forthwith.

12. The statutory deposit of Rs. 25,000/-, if any, shall be refunded to the Appellant. Pending Applications stand disposed of.