

(2016) 10 BOM CK 0001
In the Bombay High Court
Case No : First Appeal No. 99 of 1999

Oriental Insurance Company Ltd.

APPELLANT

Vs

Smt. Balubai Shivaji Dabhade

RESPONDENT

Date of Decision : 03-10-2016

Acts Referred:

Motor Vehicles Act, 1988 — Section 149(2), Section 173

Citation : (2017) 1 ACC 202 : (2017) 2 ALLMR 672 : (2017) 2 MhLJ 405 :
(2016) 4 TAC 712

Hon'ble Judges : Dr. Shalini Phansalkar Joshi, J.

Bench : Single Bench

Advocate : Mr. Ketan Chothani i/b. M.G. Barve, Advocates, for the Appellant; Mr. Neetesh V. Kalantri, Advocate, for the Respondent Nos. 1 and 2; Mr. Rahul D. Motkari, Advocate, for the Respondent No. 3

Final Decision : Dismissed

Judgement

Dr. Shalini Phansalkar Joshi, J. - This appeal takes an exception to the judgement and order dated 14th October 1998 passed by the Motor Accidents Claim Tribunal (MACT), Nashik in MACP No. 257 of 1991. The appellant is the Insurance Company.

2. The facts of the appeal can be stated in brief as follows:-

On 21st May 1990 the deceased Shivaji Pandharinath Dabhade was working as a labourer over tractor bearing No. MH-15-B-6804 owned by respondent No. 7. He met with a fatal accident when original opponent No. 2 was driving the said tractor and as a result of rash and negligent driving on the part of Opponent No. 2, the trolley turned turtle and deceased came under the trolley. At the time of accident, the deceased was running the age of 25 years. The original claimant No. 1 is wife and claimant No. 2 is the daughter of the deceased who was born two months after the death of deceased. They filed claim petition before the tribunal for compensation, which came to be resisted by the original opponent No. 1. Admitting that tractor trolley was owned by him but denying the

knowledge relating to how the accident took place and who was responsible for the same. In the alternate it was submitted that the tractor was duly insured with opponent No. 3 and hence there was no liability of opponent No. 1 to deny the compensation. As to the income of deceased, it was denied that the deceased was earning Rs. 1500/- per month. It was further contended that if any thing has happened due to the act of opponent No. 2, then, opponent No. 2 was personally liable for the same.

3. Opponent No. 2 has denied that the accident has occurred due to his negligence. It was contended that the deceased was leading the manure in the trolley at his own risk.

4. As regards the Opponent No. 3, insurance company, a specific contention was raised to the effect that the driver of the vehicle was not having valid licence and in view thereof there was breach of the terms and conditions of the insurance policy, hence, insurance company needs to be absolved of the liability and responsibility.

5. On these respective pleadings of the parties, the tribunal framed necessary issues. The claimant No. 1 led her own evidence and mainly relied upon the copy of the complaint, Exh.51 and the copy of panchanama Exh.15. Opponent No. 2, the driver also entered into the witness box and produced a photocopy of the driving licence issued by the R.T.O. at Dehradun. Insurance Company, however, did not lead any oral evidence. In the light of the evidence led before the Tribunal, the Tribunal was pleased to hold that the insurance company has failed to discharge the burden to prove that the driver of the vehicle was not having valid driving licence. Accordingly, the Tribunal held both the owner of the vehicle and also the insurance company jointly and severally liable to pay the claim amount of Rs. 96,400/- with interest.

6. This judgement of the tribunal is challenged by the insurance company on the only ground that there was no evidence worth the name to show that the driver of the vehicle was having any valid licence. It is urged that in the complaint Exh.51, certified copy of which was relied upon by the claimant themselves, it was clearly stated that the Driver was not having valid driving licence and hence offence under section 3 read with section 181 of the Motor Vehicles Act was registered against the driver. By placing reliance on the judgement in the case of Oriental Insurance Company v. Premlata Shukla and Ors., reported in (2007) 13 S.C.C. 476, it is urged that when the claimants themselves are relying upon the certified copy of the F.I.R./complaint, then contents thereof are ipso facto proved and claimants cannot rely upon them partially. It is urged that the party which has brought the documents on record cannot later contend that other portion of document has not been proved.

Hence, according to the learned Counsel for the appellant, when the contents of the complaint are clear enough to show that driver of the vehicle was prosecuted for not having valid licence and no valid licence was otherwise also proved on

record either by the claimants or the owner or the driver himself, the trial court has committed an error in holding that the onus was on the insurance company to prove that the driver was not having valid licence and as the insurance company has not discharged the said onus, the insurance company is also jointly and severally liable to pay the compensation.

7. Secondly, learned Counsel for the appellant has invited attention of this Court to the fact that the driver has initially not appeared nor filed any written statement. Only when the witness summons was issued and coercive process of bailable warrant was issued against him, he appeared but he did not produce the copy of his valid licence. It is urged that it was for him to do so but he has failed to do so. He has only produced the photocopy of his driving licence alleged to be issued by the RTO Authority at Dehradun.

8. Thirdly, it is submitted that the insurance company has taken a search as to whether the Driver was having valid licence. Considering that he has produced the photocopy of licence issued by the R.T.O. of Deharadun, one M/s. B.S. Bharadwaj and Company was directed to take search and investigate the matter. The said company issued a letter dated 24th December 1998, to show that no such valid licence was issued from the R.T.O. Deharadun in the name of the Opponent No. 2, the driver-Kailash S/o. Sukhdev Dabhade.

9. The learned Counsel for the appellant has further invited my attention to the Motor Claim Form filed by the owner. It is submitted that the issuing authority of the license mentioned therein is "RTO Nashik".

Thus, according to the learned Counsel for the appellant, there is absolutely no consistency as to whether any such driving licence was issued actually and if there was one, by which R.T.O. It is submitted that if there was no valid licence, as can be seen in this case, even from bare perusal of the complaint, then, the insurance company is required to be exonerated from the total liability, in view of section 149(2) of the M.V. Act.

In the appeal the affidavit is filed on record to submit that this factum needs to be considered for absolving the insurance company from the liability.

10. Per contra, the learned Counsel for the Opponent No. 1, the vehicle owner has relied upon the decision of the Apex Court in the case of (i) National Insurance Co. Ltd. v. Geeta Bhat and Ors. reported in A.I.R. 2008 S.C. 1837 wherein it was held that notwithstanding the fact that licence possessed by the driver is fake one, the insurance company would not be absolved from the liability of reimbursement for the final amount of compensation payable by third party to the traveller. It was further held in this authority that the owner of the vehicle is not expected to verify the genuineness of the licence from the transport authority. Only thing he is expected is to make reasonable enquiry and nothing more than that. Reliance is placed on the decision in National Insurance Co. Ltd. v. Laxmi Narain Dhut (2007) 3 S.C.C. 700 in which the Apex Court has held that in case of third party risk the insurer has to indemnify the amount and

if so advised to recover the same from the insured.

11. The second decision relied upon by the learned Counsel for the Opponent No. 1 is reported in the case of Pepsu Road Transport Corporation v. National Insurance Company, A.I.R. 2014 S.C. 305, wherein the Hon'ble Supreme Court has held that "in a claim for compensation it is certainly open to the insurer under section 149(2)(a)(ii) to take a defence that the Driver of the vehicle involved in the accident was not duly licenced. Once such a defence is taken, the onus is on the insurer. But even after it is proved that the licence possessed by the driver was a fake one, whether there is liability on the insurer is the moot question. As far as owner of the vehicle is concerned, when he hires a driver, he has to check whether the driver has a valid driving licence.

Thereafter, he has to satisfy himself as to the competence of the driver. If satisfied in that regard also, it can be said that the owner had taken reasonable care in employing a person who is qualified and competent to drive the vehicle. The owner cannot be expected to go beyond that, to the extent of verifying the genuineness of the driving licence with the licensing authority before hiring the services of the driver. However, the situation would be different if at the time of insurance of the vehicle or thereafter the insurance company requires the owner of the vehicle to have the licence duly verified from the licensing authority or if the attention of the owner of the vehicle is otherwise invited to the allegation that the licence issued to the driver employed by him is a fake one and yet the owner does not take appropriate action for verification of the matter regarding genuineness of the licence from the licensing authority."

Having regard to this legal position and the facts of the case, it has to be held that in the instant case, barring the averment in the complaint that the driver was not having a valid licence and hence a complaint was lodged against him along with other offences for offence under section 381 of the M.V. Act, there is no other evidence on record to show as to what happened to the said complaint; whether any charge sheet was filed and if yes then whether the driver was tried for this offence and held guilty. Therefore, even if the complaint as relied upon, at the most shows that there was allegation in the complaint that the driver was not having valid licence. Except for that nothing more can be inferred.

12. As regards the investigation report of the search conducted by the said Bharadwaj and Company, no such certificate issued by the R.T.O. Dehradun is produced on record to show that the driving licence on which the Opponent No. 2 has relied upon, was totally false or fake one. Thirdly, in the claim form it was stated that the licence was issued by the R.T.O. Nashik. The insurance company has not produced any documents on record to show that the R.T.O. Nashik has made inquiry and found that no such licence was issued in the name of the Opponent No. 2.

13. Needless to state that as the insurance company is coming before the court with a specific plea that the driver was not having valid licence and hence, there

was breach of insurance policy, the burden obviously therefore was on insurance company to prove that the driver does not have valid licence. Appellant company should have discharged that burden by carrying out necessary investigations and inquiries with R.T.O. Nashik or Dehradun and not on the basis of some letter issued by private investigator.

14. In such circumstances, I do not find that the Tribunal has committed any error in holding the insurance company liable along with the owner for payment of compensation amount to the claimants. The appeal therefore is devoid of merits. Hence stands dismissed. In the circumstances, parties to bear their own costs.