

(2009) 12 DEL CK 0081

In the Delhi High Court

Case No : MAC App. No. 175 of 2005 and CM No. 3988 of 2005

Oriental Insurance Company Ltd.

APPELLANT

Vs

Smt Kamlesh and Others

RESPONDENT

Date of Decision : 04-12-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 12 Rule 8
Motor Vehicles Act, 1988 — Section 149, 181, 3

Citation : (2011) ACJ 131

Hon'ble Judges : Vidya Bhushan Gupta, J

Bench : Single Bench

Advocate : Joy Basu and Madhurendra Kumar, for the Appellant; Nemo, for the Respondent

Final Decision : Dismissed

Judgement

V.B. Gupta, J.—Appellant-Insurance Company has filed this appeal against judgment dated 8th November, 2004, passed by Motor Accident Claims Tribunal Delhi (for short as "Tribunal").

2. Brief facts of this case are that on 6th August, 1997, deceased Joginder Singh, along with his brother Rajinder was coming back on his two-wheeler scooter No. DDP 3020, which was driven by Sh. Rajinder. When they reached the crossing of Arya Samaj Road, Karol Bagh, the scooter was hit from rear left side by another two-wheeler scooter No. DL4SR 2364, driven by respondent No. 7, in a rash and negligent manner. Due to the impact, scooter fell down and deceased received fatal injuries.

3. Vide impugned judgment, Tribunal awarded compensation of Rs. 11,40,000/- (Eleven lakhs forty thousand only.), to be paid by the appellant- Insurance Company.

4. Notice of this appeal was issued to the respondents. Initially, counsel for all respondents (except respondent No. 7) appeared. Later on, he absented. As far

as respondent No. 7 (driver of offending vehicle) is concerned, his service was dispensed with vide order dated on 23rd August, 2005, passed by this Court.

5. Only question to be seen in this appeal is as to whether driver of offending vehicle was having a valid driving licence or not.

6. It is contended by learned Counsel for appellant that driver of the offending vehicle did not have a valid and effective driving licence. No driving licence was produced by the driver and owner of the vehicle. Non-furnishing of driving licence or not disclosing the details of the driving licence lead to an adverse inference.

7. It is further contended that appellant had done everything within its power to ascertain the details of the driving licence. The owner was issued a statutory notice under Order 12 Rule 8 of Civil Procedure Code, 1908 for furnishing copy of driving licence but there was no response. It has also come on record that the owner of the offending vehicle had never seen the driving licence of the driver. Thus, the owner was negligent in permitting the driver to drive the insured vehicle. Appellant could not have been saddled with any liability, as there was clear breach of the terms and conditions of the insurance policy.

8. In support, learned Counsel for appellant referred the decision of Supreme Court in National Insurance Co. Ltd. Vs. Swaran Singh and Others, .

9. Appellant-Insurance Company, in its written statement nowhere took any specific plea to the effect that driver of the offending vehicle, was not holding a valid driving licence. The plea taken with regard to driving licence is as under:

17. In reply to para 17 of the petition it is submitted that the answering respondent had issued a Policy bearing No. 272300/31/97/40317 for the period 19.11.96 to 18.11.97 insuring vehicle bearing Engine No. 83826 and Chassis No. 39127 on the representation of Smt. Kavita to be the registered owner but unless it proved that vehicle No. DL-4SR-2364 is the insured vehicle and respondent No. 1 was holding a valid driving licence and driving under the authority and control of the insured. No liability can be imposed on the answering respondent.

10. Section 149 of the Motor Vehicle Act, 1988 (for short as "Act") provides as follows;

149. Duty of insurers to satisfy judgments and awards against persons insured in respect of third party risks.-

(1) x x x

(2) No sum shall be payable by an insurer under Sub-section (1) in respect of any judgment or award unless, before the commencement of the proceedings in which the judgment or award is given the insurer had notice through the Court, or as the case may be, the Claims Tribunal of the bringing of the proceedings, or in respect of such judgment or award so long as execution is stayed thereon

pending an appeal; and an insurer to whom notice of the bringing of any such proceedings is so given shall be entitled to be made a party thereto and to defend the action on any of the following grounds, namely:

(a) x x x x

(i) x x x x

(ii) a condition excluding driving by a named person or persons or by any person who is not duly licensed, or by any person who has been disqualified for holding or obtaining a driving licence during the period of disqualifications;

11. In *Swaran Singh (Supra)* the Court observed;

In each case, on evidence led before the claim Tribunal, a decision has to be taken whether the fact of the driver possessing licence for one type of vehicle but found driving another type of vehicle, was the main or contributory cause of accident. If on facts, it is found that the accident was caused solely because of some other unforeseen or intervening causes like mechanical failures and similar other causes having no nexus with the driver not possessing requisite type of licence, the insurer will not be allowed to avoid its liability merely for technical breach of conditions concerning driving licence.

12. Similarly, in *Narcinva V. Kamat and Another Vs. Alfredo Antonio Doe Martins and Others*, , it was observed;

When the Insurance Company complains of a breach of the term of contract, which would permit it to disown its liability under the contract of insurance, the burden is squarely on the Insurance Company 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 such evidence is led.

13. There could be no doubt that in order to escape liability, not only it should be proved that the driver of the vehicle was not having a licence at the time of the accident, but also the insurance company should prove that the driver was disqualified from holding or obtaining a licence or never had any licence at all. Merely proving that on the date of the accident, the driver did not have a licence, is not enough to hold that the insurance company is not liable for claim. The onus of proving that the driver of the vehicle never had a licence or was disqualified from holding a licence is on the insurance company. A driving licence is expected to be with the driver and not with the owner of the vehicle. Thus, mere non-production of licence is not enough to discharge the burden of the insurance company.

14. When Insurance Company takes the plea that it is not liable to pay compensation or to indemnify the insured as the driver was not holding a valid licence for driving the vehicle on the date of the accident and the vehicle was being driven in breach of the terms of the policy, the Insurance Company has to discharge the burden by placing legal and cogent evidence before the Tribunal.

15. As already stated above, the appellant has not taken any specific plea in its written statement with regard to the driving licence. Be that as it may be, (Ms Kavita) the owner of offending vehicle has appeared in the witness box as R3W1. She in her statement has stated that she does not know if the driver was having driving licence or not. She never enquired from him about his driving licence nor she ever seen one. Other witness R3W-2 Om Kant, has brought the certified copy of the charge-sheet filed against the driver of the offending vehicle.

16. Merely, because the owner has not enquired about the driving licence from the driver, it does not mean that the driver was not having a valid driving licence.

17. Now coming to notice under Order 12 Rule 8 of the Civil Procedure Code, purported to have been issued by the appellant for furnishing a copy of driving licence, this notice has not been proved at all.

18. As far as filing of charge sheet in Criminal Case is concerned, there is nothing on record to show as to what happened ultimately in the criminal case. Simply filing of the charge-sheet in a criminal case does not lead us anywhere.

19. In *Deepak Kumar v. National Insurance Co. Ltd.* M.A.C. App. No. 139/2007, decided on 07.02.2008, this Court observed;

It is settled legal position that it is for the insurer to produce evidence on record and to satisfy the Tribunal that there is a willful breach of the terms and conditions of the policy by the insured. The Apex Court has already taken a view that mere absence, fake or invalid driving licence or disqualification of the driver for driving the vehicle at the relevant time are not in themselves defenses available to the insurer against either the insured or the third parties and to avoid its liability towards the insured, the insurer has to prove on record that there was negligence on the part of the insured in fulfilling the terms and conditions of the policy, and the insured has failed to exercise reasonable care in the matter of fulfilling such conditions. Merely because the driver was challenged under Sections 3/181 of the M.V. Act in itself would not suffice to prove that the driver of the offending vehicle was not having a valid driving licence. May be on the relevant date of the accident the driver might not have been found possession of the licence which could have invited his prosecution for violating Section 3/181 of M.V. Act but this does not necessarily lead to an inference that the driver was not having a valid driving licence at all. The claimants in the compensation case did not implead the driver of the offending vehicle in the claim petition and in such circumstances it was the bounder duty of the insurer to have served a notice under Order 12 Rule 8 to summon the driving licence from the driver or owner of the offending vehicle and also could have taken steps to summon the driver as a witness in the case. The respondent insurer has failed to take any such steps".

20. In *National Insurance Compnay Limited v. Boya Rodda Lingamma and Ors.* II (2008) ACC 664, the Court held;

If the appellant wanted to avoid its liability on the ground that the driver of the offending vehicle was not having a valid driving licence or a driving licence, it should have adduced evidence to show that the driver was not having driving licence or a valid driving licence, by summoning the records from the Road Transport Authority or other otherwise, because the burden to establish that it is not liable to pay the compensation payable under the policy issued by it, for breach of conditions by the insured, is on the insurer.

21. Trial court in respect of driving licence observed:

It is no doubt ture, that the challan which was filed against respondent No. 1 was also u/s 3/181 Motor Vehicles Act i.e. he was found to be without driving licence at the time of accident. However, merely because the challan had been filed does not mean that it stands proved that RW-1 was not holding a valid driving licence. There is no notice served U/o 12 R 8 by Respondent No. 3 or the deriver to produce the driving licence. The respondent No. 1 may not have been found that the driving licence at the time of accident that does not imply that he was infact not holding any valid driving licence. The Respondent No. 4 may not have enquired about the driving licence of respondent No. 1 but again, that does not show that respondent No. 1 was not holding any valid driving licence. The respondent No. 3 has not been able to prove that respondent No. 1 was not holding a valid driving licence at the time of accident and thus it has not been able to prove that it is not liable to pay compensation.

22. I do not find any reason to disagree with the findings of the Tribunal. There is no ambiguity or infirmity in the impugned judgment. The present appeal under these circumstances is not maintainable and same is hereby dismissed.

23. On 16th March, 2005, at the time of filing of appeal, appellant was directed to deposit the entire award amount and fifty per cent was ordered to be released to the claimants subject to the terms and conditions imposed by the trial court.

24. Thereafter, vide order dated 29th November, 2005, awarded amount deposited before the Tribunal was to be kept in a fixed deposit, initially for a period of six months and fixed deposit to be renewed from time to time till further order.

25. Since this appeal has been disposed of, the amount lying in the fixed deposit be paid to the claimants, in the manner and proportion as made by the Tribunal, after expiry of period of appeal.

26. Parties shall bear their own costs.

27. Trial court record be sent back.