

(2014) 02 PAT CK 0023

In the Patna High Court

Case No : Miscellaneous Appeal No. 241 and 289 of 2004

Shakuntala Devi, Devendra Dubey, and Birendra Dubey

APPELLANT

Vs

Dashrath Prasad Singh and The Divisional Manager, New
India Assurance Company Limited
 The Divisional
Manager, New India Assurance Company Limited Vs
Shakuntala Devi, Devendra Dubey, Birendra Dubey and
Dashrath Prasad Singh

RESPONDENT

Date of Decision : 10-02-2014

Acts Referred:

Motor Vehicles Act, 1988 — Section 166

Penal Code, 1860 (IPC) — Section 149, 149(2), 149(2)(a)(ii), 279, 304A

Citation : (2014) 3 PLJR 51

Hon'ble Judges : Amaresh Kumar Lal, J

Bench : Single Bench

Advocate : Mukesh Prasad Singh in MA No. 241 of 2004 and Mr. Bimlesh Kumar Jha in MA No. 289 of 2004, for the Appellant; Bimlesh Kumar Jha, Advocate for the Respondent No. 2 in MA No. 241 of 2004 and Mr. Mukesh Prasad Singh, Advocate for the Respondent Nos. 1 to 3 in MA No. 289 of 2004, for the Respondent

Judgement

Amaresh Kumar Lal, J.—M.A. No. 241/2004 has been filed by the claimants-appellants against the judgment and award dated 18.03.2004 and 27.03.2004 respectively passed by the 3rd Additional District Judge-cum-Motor Accident Claims Tribunal, Muzaffarpur in Claim Case No. 100/2002 for setting aside/modifying the order for enhancement of the amount of compensation. M.A. No. 289/2004 has been filed by the Insurer-appellant, the New India Assurance Company Limited for setting aside the aforesaid judgment and award dated 18.03.2004 and 27.03.2004 respectively passed by the 3rd Additional District Judge-cum-Motor Accident Claims Tribunal, Muzaffarpur in Claim Case No. 100/2002 on the ground that the insurer is not liable to pay the amount of compensation.

2. Since both the appeals arise out of the same judgment and award, as such, both the appeals have been heard together and are being disposed of by this common judgment.

3. The case of the claimants, in brief, is that on 25.04.2001, the deceased Raja Thakur was standing on the flank of the road and was waiting for a vehicle for going to Darbhanga. In the meantime at about 8.00 A.M., a truck bearing registration no. BR-1G-5725 being driven rashly and negligently came there in a high speed and dashed the deceased Raja Thakur, aged about 50 years causing his death on the spot. The deceased was doing milk business and had also cultivation business and he used to earn Rs. 2500/- per month. He died living behind his widow and two sons. The claim application to this effect was filed u/s 166 of the Motor Vehicles Act for grant of compensation. Dashrath Pd. Singh, owner of the vehicle neither appeared in the case nor filed any written statement. The insurer of the vehicle, in question, appeared and filed written statement admitting that the vehicle, in question, was insured by the New India Assurance Company Limited. After leading evidence on behalf of both the parties, the impugned judgment has been passed holding that the claimants are entitled to get Rs. 1,17,000/- as compensation from the insurer of the vehicle, out of which, Rs. 50,000/- has already been paid to the claimants as interim compensation by the insurer. Now, the claimants are entitled to get Rs. 67,000/- with interest @ 9% per annum since the filing of the claim application till its realization from the insurer.

4. The learned counsel for the appellants-claimants has submitted that the deceased Raja Thakur was an agriculturist and doing milk business also, which has been proved by A.W. 1, A.W. 2 and A.W. 5 who are the widow and two sons of the deceased. In support of the contention regarding the agricultural land, rent receipts (Exbts. 1, 2 and 3) have also been filed. Thus, there was no occasion for the learned Tribunal to disbelieve the statement of these witnesses that the deceased was earning Rs. 2500/- per month in spite of that the learned Tribunal has calculated the compensation on notional income of the deceased. The age of the deceased has been estimated as 50 years, as such, 13 multiplier should be used according to Schedule IV of the Motor Vehicles Act.

5. He has further submitted that the future prospect of the deceased should also have been taken into consideration. In support of his contention, he has relied upon a decision in the case of Smt. Sarla Verma and Others Vs. Delhi Transport Corporation and Another, . He has also referred decisions in the case of National Insurance Co. Ltd. Vs. Swaran Singh and Others, in the case of Rajesh and Others Vs. Rajbir Singh and Others, and in the case of Reshma Kumari and Others Vs. Madan Mohan and Another,

6. He has further submitted that since the vehicle was insured by the New India Assurance Company Limited, as such, the insurer is liable to indemnify the award. In support of his contention, he has relied upon a decision in the case of United India Insurance Company Ltd. Vs. Leheru and Others,

7. On the other hand, the learned counsel for the Insurer New India Assurance Company Limited has submitted that admittedly the vehicle was insured by the Company but the owner of the vehicle has violated the terms and conditions of the policy and has allowed the vehicle to be plied by a person, who had no valid licence to drive the vehicle.

8. It appears from the final form (Ext. 6) that Arun Kumar Yadav was driving the vehicle at the time of occurrence.

9. He has further submitted that the Insurance Company got enquired into the matter as to whether the driver had driving licence or not. The investigator was asked by the Regional Manager of the New India Assurance Company to verify the driving licence no. 381/1996 of Arun Kumar Yadav from the office of District Transport Officer, Patna and in pursuant thereto, the Investigator has reported that the aforesaid driving licence no. 381/96 was granted to Shiv Kumar Prasad for driving the LMV only and in the opinion of the Investigator, the aforesaid licence produced by the driver Arun Kumar Yadav is false and fake. This letter has been marked as Exbt. A. The office of the District Transport Officer, Patna vide memo no. 1891 dated 31.03.2003 has also written to the investigator regarding driving licence no. 381/96 showing that the driving licence stands in the name of Sri Shiv Kumar Prasad, son of Ram Pravesh Rai, Anand Bazar, Danapur, Patna (Ext. B).

10. It appears from both these documents that Arun Kumar Yadav, the driver of the offending vehicle had no driving licence. Since the owner of the vehicle has allowed a person to drive the vehicle without licence, as such, it has violated the terms and conditions of the insurance policy and hence, the insurer is not liable to indemnify the liability of the owner. In support of his contention, he has relied upon decisions in case of Premkumari and Others Vs. Prahlad Dev and Others, , in the case of Oriental Insurance Co. Limited Vs. Prithvi Raj, and in the case of Oriental Insurance Company Ltd. Vs. Leelawati Devi and Others,

11. He has further submitted that in any view of the matter, if the amount is paid by the insurer the amount is liable to be recovered from the owner of the vehicle. In support of his contention, he has relied upon a decision in the case of New Indian Assurance Co. Ltd. Vs. Roshanben Rahemansha Fakir and Another,

12. On perusal of the record, it appears that A.W. 2 and A.W. 5 have stated that their father, deceased Raja Thakur @ Shivam Dubey had income from agriculture and milk business, whereas, A.W. 1 and A.W. 2 have stated that the deceased had a monthly income of Rs. 2500/- per month and deceased was maintaining the family. In their cross-examination, they have stated that there is no documentary evidence to show the income of the deceased.

13. It appears that due to this fact, the learned Tribunal has held that the deceased had no fixed income, as such; the notional income has been estimated for the purpose of calculating the income of the deceased.

14. A.W. 2 has specifically stated that his father was cultivating four acres of land and had also milk business.

15. It appears from the rent receipts (Exts. 1, 2 and 3) that the deceased had agricultural land.

16. Considering this facts and circumstances, the income of the deceased is estimated as Rs. 2400/- per month.

17. A.W. 1, A.W. 2 and A.W. 5 have stated that the deceased was 50 years of age. The certificate of Mukhiya (Ext. 4) also shows that the deceased was aged about 50 years, whereas, the post-mortem report (Ext. 7) shows that the age of deceased was about 65 years, as such, the learned Tribunal has also held that the deceased was aged about 50 years and I do not find any ground to interfere with the finding of the Tribunal.

18. The age of the deceased is estimated as 50 years. The monthly income of the deceased is estimated as Rs. 2400/- per month. Thus annual income of the deceased comes to Rs. 2400 X 12 = Rs. 28,800/-. Out of which, 1/3rd is deducted for personal expenses of the deceased, which comes to Rs. 19,200/- per annum. Thus, the annual dependency on the deceased comes to Rs. 19,200/- which is multiplied by the appropriate multiplier 13, which comes to Rs. 2,49,600/- to which Rs. 2000/- is added for funeral and Rs. 10,000/- for loss of estate and Rs. 10,000/- for loss of consortium. Thus the claimants are entitled to get Rs. 2,71,600/-. Rs. 50,000/- has already been paid by the insurer to the claimants. Thus, the claimants are entitled to get Rs. 2,21,600/-

19. Now, the question arises as to who will pay the amount of compensation. It is admitted fact that the offending vehicle was insured by the New India Assurance Company Limited, the appellant in M.A. No. 289/2004.

20. It appears from the written statement of the insurer that no specific pleading has been made that the vehicle was plying by a person who had no driving licence. But during the trial, the insurer came to know from the charge-sheet submitted by the police (Ext. 6) that Arun Kumar Yadav was plying the vehicle and charge-sheet has been submitted against him for the offence punishable under Sections 279 and 304A of the Indian Penal Code. The driving licence has been verified by the investigator and has reported vide (Ext. A) that the driving licence no. 381/96 claimed to be of Arun Kumar Yadav, but the aforesaid driving licence no. 381/96 was granted to Shiv Kumar Prasad for driving the LMV only and in the opinion of the Investigator, the aforesaid licence produced by the driver Arun Kumar Yadav is false and fake. The office of the District Transport Officer, Patna vide memo no. 1891 dated 31.03.2003 has also written to the investigator regarding driving licence no. 381/96 showing that the driving licence stands in the name of Sri Shiv Kumar Prasad, son of Ram Pravesh Rai, Anand Bazar, Danapur, Patna (Ext. B) and was valid for 5.02.1999 to 4.02.2001.

21. The Tribunal has discussed all these facts but has not given any finding as to

whether the owner had engaged a person as a driver who had no valid licence. The insurer has not been able to prove as to whether the owner of the vehicle engaged the driver to ply the vehicle knowingly that the driver had no valid licence. This fact has not been proved by the insurer and in view of the decision in the case of United India Insurance Company Ltd. Vs. Leheru and Others, , the learned Tribunal has held that the insurer is liable to pay the amount of compensation. In this case, it has been held that insurer must establish that there was a breach on the part of the insured, merely showing that the person driving at the time of accident was not duly licensed is not sufficient. It is better to quote paragraph 18.

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. The injured or relatives of the person killed in the accident may find that the decree obtained by them is only a paper decree as the owner is a man of straw. The owner himself would be an innocent sufferer. It is for this reason that the legislature, in its wisdom, has made insurance, at least third party insurance, compulsory. The aim and purpose being that an insurance company would be available to pay. The business of the company is insurance. In all businesses there is an element of risk. All persons carrying on business must take risks associated with that business. Thus it is equitable that the business which is run for making profits also bears the risk associated with it. At the same time innocent parties must not be made to suffer or loss. These provisions meet these requirements. We are thus in agreement with what is laid down in the aforementioned cases viz. that in order to avoid liability it is not sufficient to show that the person driving at the time of accident was not duly licensed. The insurance company must establish that the breach was on the part of the insured.

22. In the present case, the owner has not appeared and the insurer has failed to prove that the owner had willfully breached the condition of Insurance policy or the contract of insurance where the driver's licence is found to be fake has been considered by the three Judges of the Hon'ble Supreme Court in the case of National Insurance Co. Ltd. Vs. Swaran Singh and Others, which is as follows:

It may be true as has been contended on behalf of the petitioner that a fake or forged licence is as good as no licence but the question herein, as noticed hereinbefore, is whether the insurer must prove that the owner was guilty of the wilful breach of the conditions of the insurance policy or the contract of insurance. In Leheru Case the matter has been considered in some detail. We are

in general agreement with the approach of the Bench but we intend to point out that the observations made therein must be understood to have been made in the light of the requirements of the law in terms whereof the insurer is to establish wilful breach on the part of the insured and not for the purpose of its disentitlement from raising any defence or for the owners to be absolved from any liability whatsoever. We would be dealing in some detail with this aspect of the matter a little later

23. The summary of the finding has been mentioned at page 341 (paragraph 110) of the aforesaid judgment. The relevant is quoted below:

(iii) The breach of policy condition e.g. disqualification of the driver or invalid driving licence of the driver, as contained in subsection (2)(a)(ii) of Section 149, has to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards the insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by a duly licensed driver or one who was not disqualified to drive at the relevant time.

(iv) Insurance companies, however, with a view to avoid their liability must not only establish the available defence(s) raised in the said proceedings but must also establish "breach" on the part of the owner of the vehicle; the burden of proof where for would be on them.

(v) The court cannot lay down any criteria as to how the said burden would be discharged, inasmuch as the same would depend upon the facts and circumstances of each case.

(vi) Even where the insurer is liable to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards the insured unless the said breach or breaches on the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insurer u/s 149(2) of the Act.

24. In the case of Premkumari and Others Vs. Prahlad Dev and Others, and in the case of Oriental Insurance Co. Limited Vs. Prithvi Raj, relied upon by the Insurer does not help in the facts and circumstances of the case as in that case it was proved that the driver had fake licence and owner has failed to exercise reasonable care in matter regarding use of vehicle by a duly licensed driver or by a driver not disqualified from driving at the relevant time; but in the case in hand, the insurer has not been able to prove that the owner had engaged a

person, who had no driving licence or has failed to exercise reasonable care in the matter regarding use of the vehicle who had no licence. Both these decisions are not helpful to the insurer.

25. In the case of Oriental Insurance Company Ltd. Vs. Leelawati Devi and Others, the insurer had been able to prove that the deceased was a gratuitous passenger on the vehicle, which was not having a valid permit to ply on the road; but in the case in hand the insurer has not been able to prove any violation of the terms of the insurance policy by the owner of the vehicle at the time of accident, as such, this decision is not helpful to the insurer.

26. The insurer has also referred a decision in the case of National Insurance Co. Ltd. Vs. Parvathneni and Another, . In that case, there was no valid insurance coverage on the date of accident. The cheque towards premium for renewal of the policy was issued but the same was dishonoured. Hence, it was held that the insurance company had no liability to pay any compensation. This decision is also not helpful to the insurance company.

27. The effect of breach of condition of the insurance policy has been considered by the Hon'ble Supreme Court in a recent decision in the case of S. Iyyapan Vs. United India Insurance Company Ltd. and Another, wherein it has been held that the insurer cannot disown its liability on the ground of violation of the terms of the policy. The third party has statutory right to recover the amount of compensation so awarded from the insurer. It is for the insurer to proceed against the insured for recovery of the amount in the event there has been violation of any condition of the insurance policy.

28. In this view of the matter, the insurer-appellant of M.A. No. 289 of 2004 is directed to make payment of the amount of compensation decided in this order.

29. In this case, the Tribunal has not given the definite finding regarding the breach of the terms of the insurance policy by the owner of the vehicle, as such; it will be open to the insurer to raise its grievance before the Tribunal. In case any grievance is raised before the Tribunal by the insurer regarding violation of the terms of the policy by the insured, the same should be considered on the merit of this case without being prejudiced by this order.

30. M.A. No. 289 of 2004 is disposed of in terms of the above observation/direction.

31. M.A. No. 241/2004 is allowed to the extent indicated above. The insurer is directed to pay a sum of Rs. 2,21,600/- with interest @ 6% per annum from the date of filing of the claim application to the date of its realization. There is no order as to costs.