(2008) 05 DEL CK 0064

In the Delhi High Court

Case No : FAO No. 177 of 2000

The New India Assurance Co. Ltd. — APPELLANT

Vs

Smt. Nirmala alias Guddi and Others — RESPONDENT

Date of Decision : 30-05-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 26, Order 9 Rule 13, 13
Limitation Act, 1963 — Section 5
Motor Vehicles Act, 1988 — Section 147(1), 147(3), 149, 149(2), 163A

Citation : (2008) 05 DEL CK 0064

Hon'ble Judges : Vidya Bhushan Gupta, J

Bench : Single Bench

Advocate : R.P. Tripathi, for the Appellant; Suryakant Singla and Shanto Mukherjee for R7, for the Respondent

Final Decision : Dismissed

Judgement

V.B. Gupta, J.—This appeal u/s 173 of Motor Vehicles Act, 1988 (for short as ''Act'') has been filed by the Insurance Company against the impugned award dated 18th September, 1999 and order dated 17th February, 2000 passed by Sh. Rakesh Kapoor, Judge, MACT, Delhi.

2. The relevant facts for the disposal of the present appeal are that on 2nd September, 1993 at about 2.00 a.m., the deceased Azad Singh along with his nephew Prem Singh was going to get the their vehicle repaired at Tikri Border, Near New Amrit Petrol Pump, where truck No. RJ-13-G-0380 was parked in a stationary condition. When the deceased and his nephew were passing behind the stationary truck, its driver all of a sudden reversed the same, with the result that the truck struck against the deceased and ran over his body. The deceased was immediately removed to DDU Hospital but there he succumbed to the injuries sustained by him in the accident.

3. The driver as well as the owner of the offending truck did not appear before the Tribunal and they were proceeded ex-parte.

4. The appellant/Insurance Company in its written statement has admitted that the offending truck was insured with it but has denied allegations with regard to the manner in which the accident took place. It has also been denied that the driver of the vehicle had a valid and effective driving license to ply the insured vehicle at the time of alleged accident.

5. It is also stated that they were not liable to make payment of compensation and the amount claimed as compensation was highly exorbitant.

6. Vide impugned order dated 18th September, 1999, the learned Tribunal passed an award in the sum of Rs. 1,84,800/- along with 12% interest from the date of filing of the petition till realization.

7. After passing of the award, Insurance Company moved an application under Order 9 Rule 13 CPC before the Tribunal for setting aside of the impugned award.

8. Vide order dated 17th February, 2000, of the Tribunal, the said application was dismissed.

9. It has been contended by learned counsel for the appellant that the license of the driver of the offending truck was not a valid and effective license at the time of the alleged accident. As per report from the office of District Transport Officer, Ganga Nagar, the license of the truck driver was valid up to 16th June, 2001 only and as such on the date of accident, the driver was not having valid driving license and as such Insurance Company is not liable to make any payment. Further application under Order 9 Rule 13 CPC, filed by the appellant was dismissed wrongly by the learned Tribunal, though appellant has shown sufficient cause for setting aside the ex-parte order.

10. On the other hand, it has been argued by learned counsel for the respondents that no official from District Transport Office, Ganga Nagar, has appeared to prove the record and there is no infirmity in the impugned order passed by the Tribunal.

11. It was established before the tribunal by the testimony of PW1, Krishan Singh and PW-2, Prem Singh, considered along with the other documents i.e. the charge sheet and FIR registered in this case, that deceased Azad Singh Jain died in roadside accident due to rash and negligent driving of the vehicle No. RJ-13-G-0380. Moreover, the Driver had not given his own version about the manner in which the accident took place.

12. As regards the contention raised by Ld. Counsel for the Appellant that the Driver had no valid license and Therefore insurance company cannot be directed to pay interim compensation, Ld. Counsel for the Appellant has cited New India Assurance Co., Shimla Vs. Kamla and Others etc. etc., , in support of its contentions.

13. In the case of New India Assurance Co. Shimla (supra), the question was whether by virtue of Section 149(2)(a)(ii) of the Act, an Insurance Company

could avoid liability if it is proved that the driving license was fake. The Court considered, in detail, Section 149 of the Act and observed that:

The insurer has to pay to 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.

14. In Sohan Lal Passi Vs. P. Sesh Reddy and others, , the Apex Court has observed as under:

...On behalf of the insurance company, a stand was taken that when Section 96(2)(b)(ii) has provided that the insurer shall be entitled to defend the action on the ground that there has been breach of a specified condition to the policy i.e. the vehicle should not be driven by a person who is not duly licensed, then the insurance company cannot be held to be liable to indemnify the owner of the vehicle. In other words, once there has been a contravention of the condition prescribed in Sub-section (2)(b)(ii) of Section 96, the person insured shall not be entitled to the benefit of Sub-section (1) of Section 96. According to us, Section 96(2)(b)(ii) should not be interpreted in a technical manner. Sub-section (2) of Section 96 only enables the insurance company to defend itself in respect of the liability to pay compensation on any of the grounds mentioned in Sub-section (2) including that there has been a contravention of the condition excluding the vehicle being driven by any person who is not duly licensed. This bar on the face of it operates on the person insured. If the person who has got the vehicle insured has allowed the vehicle to be driven by a person who is not duly licensed then only that clause shall be attracted. In a case where the person who has got insured the vehicle with the insurance company, has appointed a duly licensed driver and if the accident takes place when the vehicle is being driven by a person not duly licensed on the basis of the authority of the driver duly authorised to drive the vehicle whether the insurance company in that event shall be absolved from its liability? The expression ''breach'' occurring in Section 96(2)(b) means infringement or violation of a promise or obligation. As such the insurance company will have to establish that the insured was guilty of an infringement or violation of a promise. The insurer has also to satisfy the Tribunal or the Court that such violation or infringement on the part of the insured was wilful. If the insured has taken all precautions by appointing a duly licensed driver to drive the vehicle in question and it has not been established that it was the insured who allowed the vehicle to be driven by a person not duly licensed, then the insurance company cannot repudiate its statutory liability under Sub-section (1) of Section 96. In the present case far from establishing that it was the appellant who had allowed Rajinder Pal Singh to drive the vehicle when the accident took place, there is not even any allegation that it was the appellant who was guilty of violation the condition that the vehicle shall not be driven by a person not duly licensed. From the facts of the case, it appears that the appellant had done everything within his power inasmuch as he has engaged a licensed driver Gurbachan Singh and had placed the vehicle in his charge. While interpreting the contract of insurance, the tribunals and courts have to be conscious of the fact that right to claim compensation by heirs and legal representative of the victims of the accident is not defeated on technical grounds. Unless it is established on the material on record that it was the insured who had wilfully violated the condition of the policy by allowing a person not daily licensed to drive the vehicle when the accident took place, the insurer shall be deemed to be a judgment debtor in respect of the liability in view of Sub-section (1) of Section 96 of the Act. It need not be pointed out that the whole concept of getting the vehicle insured by an insurance company is to provide an easy mode of getting compensation by the claimants, otherwise in normal course they had to pursue their claim against the owner from one forum to the other and ultimately to execute the order of the Accident Claims Tribunal for realisation of such amount by sale of properties of the owner of the vehicle. The procedure and result of the execution of the decree is well known.

15. In United India Insurance Company Ltd. Vs. Lehru and Others, , the Apex Court has observed as under;

A plain reading of Section 149 would show that an insurance company would continue to be liable to third persons. Section 149 read as follows.

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

(1) If, after a certificate of insurance has been issued under Sub-section (3) of Section 147 in favor of the person by whom a policy has been effected, judgment or award in respect of any such liability as is required to be covered by a policy under Clause (b) of Sub-section (1) of Section 147 (being a liability covered by the terms of the policy) or under the provisions of Section 163A is obtained against any person insured by the policy, then, notwithstanding that the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy, the insurer shall, subject to the provisions of this section, pay to the person entitled to the benefit of the decree any sum not exceeding the sum assured payable thereunder, as if he were the judgment debtor, in respect of the liability, together with any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.

(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 of 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) that there has been a breach of a specified condition of the policy, being one of the following conditions, namely:

(i) a condition excluding the use of the vehicle-

(a) for hire or reward, where the vehicle is on the date of the contract of insurance a vehicle not covered by a permit to ply for hire or reward, or

(b) for organise racing and speed testing, or

(c) for a purpose not allowed by the permit under which the vehicle is used, where the vehicle is a transport vehicle, or

(d) without side-car being attached where the vehicle is a motor cycle; or

(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 license during the period of disqualification; or

(iii) a condition excluding liability for injury caused or contributed to by conditions of war, civil war, riot or civil commotion; or

(b) that the policy is void on the ground that it was obtained by the non-disclosure of a material fact or by a representation of fact which was false in some material particular.

(3) Where any such judgment as is referred to in Sub-section (1) is obtained from a Court in a reciprocating country and in the case of a foreign judgment is, by virtue of the provisions of Section 13 of the Code of Civil Procedure, 1908 (5 of 1908)conclusive as to any matter adjudicated upon by it, the insurer (being an insurer registered under the Insurance Act, 1938 (4 of 1938) and whether or not he is registered under the corresponding law of the reciprocating country) shall be liable to the person entitled to the benefit of the decree in the manner and to the extent specified in Sub-section (1), as if the judgments were given by a Court in India:

Provided that no sum shall be payable by the insurer in respect of any such judgment unless, before the commencement of the proceedings, in which the judgment is given, the insurer had notice through the Court concerned of the bringing of the proceedings and the insurer to whom notice is given is entitled under the corresponding law of the reciprocating country, to be made a party to the proceedings and to defend the action on grounds similar to those specified in Sub-section (2)

(4) Where a certificate of insurance has been issued under Sub-section (3) of Section 147 to the person by whom a policy has been effected, so much of the policy as purports to restrict the insurance of the persons insured thereby by reference to any condition other than those in Clause (b) of Sub-section (2) shall, as respects such liabilities as are required to be covered by a policy under

Clause (b) of Sub-section (1) of Section 147, be of no effect:

Provided that any sum paid by the insurer in or towards the discharge of any liability of any person which is covered by the policy by virtue only of this sub-section shall be recoverable by the insurer from that person.

(5) If the amount which an insurer becomes liable under this section to pay in respect of a liability incurred by a person insured by a policy exceeds the amount for which the insurer would apart from the provisions of this section be liable under the policy in respect of that liability, the insurer shall be entitled to recover the excess from that person.

(6) In this section the expression; "material fact" and "material particular" means, respectively a fact or particular of such a nature as to influence the judgment of a prudent insurer in determining whether he will take the risk and, if so, at what premium and on what conditions, and the expression "liability covered by the terms of the policy" means a liability which is covered by the policy or which would be so covered but for the fact that the insurer is entitled to avoid or cancel or has avoided or cancelled the policy.

(7) No insurer to whom the notice referred to in Sub-section (2) or Sub-section (3) has been given shall be entitled to avoid his liability to any person entitled to the benefit of any such judgment or award as is referred to in Sub-section (1) or in such judgment as is referred to in Sub-section (3) otherwise than in the manner provided for in Sub-section (2) or in the corresponding law of the reciprocating country, as the case may be.

Thus under Sub-section (1) the Insurance Company must pay to the person entitled to the benefit of the decree, notwithstanding that it has become "entitled to avoid or cancel or may have avoided or cancelled the policy". The words "Subject to the provisions of this Section" mean that the Insurance Company can get out of liability only on grounds set out in Section 149. Sub-section (7), which has been relied on, does not state anything more or give any higher right to the Insurance Company. On the contrary the wording of Sub-section (7) viz. "No insurer to whom the notice referred to in Sub-section (2) or Sub-section (3) has been given shall be entitled to avoid his liability" indicate that the Legislature wanted to clearly indicate that Insurance Companies must pay unless they are absolved of liability on a ground specified in Sub-section (2). This is further clear from Sub-section (4) which mandates that conditions, in the insurance policy, which purport to restrict insurance would be of no effect if they are not of the nature specified in Sub-section (2). The proviso to Sub-section (4) is very illustrative. It shows that the Insurance Company has to pay to third parties but it may recover from the person who was primarily liable to pay. The liability of the Insurance Company to pay is further emphasised by Sub-section (5). This also shows that the Insurance Company must first pay, then it can recover. If Section 149 is read as a whole it is clear that Sub-section (7) is not giving any additional right to the Insurance Company. On the contrary it is emphasising that the Insurance Company cannot avoid liability except on the limited grounds set out in Sub-section (2).

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''s and Sohan Lal Passi''s cases, the breach must be on 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 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 Insurance Company would be available to pay. The business of the Company is to 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 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.

16. The Apex Court while discussing the question as regards the liability of the owner vis-?-vis the driver being not possessed of a valid license has observed in National Insurance Co. Ltd. Vs. Swaran Singh and Others, as under;

In each case, on evidence led before the claim Tribunal, a decision has to be taken whether the fact of the driver possessing license 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.

17. In the present case, no evidence was led by the appellant before the Tribunal in support of its defense that the driver of the offending vehicle was not having any valid driving licence. Further, no official from District Transport Office, Ganga Nagar, who has issued the license to the truck driver has been examined by the appellant. Thus, the appellant has failed to prove that the driver of offending vehicle was not having a valid driving licence.

18. It may be pertinent to point out that appellant has taken a preliminary objection in its written statement that the driver of the vehicle had not a valid and effective driving license to ply the insured vehicle at the time of the alleged accident and thus the appellant denied its liability to pay compensation under the policy of insurance and as per Section 149(2) of the Act.

19. On the preliminary objection taken by the respondent the Trial Court framed the following issue on this point.

Issue No. 4) Whether the Insurance Company is not liable to pay compensation as per objections raised by it in its written statement?OPR3

20. The findings on this issue given by the Tribunal, reads as under:

This issue has not been pressed by the respondents. Even otherwise, they have failed to show any ground on which the present claim of the petitioners can be defeated. The issue is decided against the respondents.

21. So, the issue relating to the fact as to whether the truck driver had a valid driving license or not, was not pressed at all by the appellant before the Tribunal.

22. Accordingly, no infirmity can be found with the finding of the Tribunal on this point.

23. With regard to the order dated 17.02.2000, the Appellant filed an application under Order 9 Rule 13 CPC for setting aside the award dated 18.9.1999. Along with this an application u/s 5 of the Limitation Act and an application, under Order 21 Rule 26 CPC have also been filed before the Tribunal.

24. It had been contented by the Appellant before the Tribunal, that the Appellant had appeared on 19.12.97 on which date the case was adjourned to 27.2.98. On 27.2.98, the file was not available and no further date was given to the Appellant. He had been regularly checking up with the court staff and the file was stated to be not traceable. It was in absence that an award dated 18.09.99 was passed.

25. The Tribunal while disposing of application under Order 9 Rule 13 CPC, on 17.2.2000 has held that;

I have gone through the record of this case. On 19.12.97 this case was adjourned to 27.02.98 for PE. On 27.2.98 the file was very much available and the case was adjourned to 27.4.98 as on that day also no evidence of the petitioner was available. The case was subsequently adjourned to 27.4.98, 3.8.98, 9.11.98, 5.3.99, 23.3.99, 9.4.99, 14.5.99, 16.8.99, 1.9.99 and 18.9.99. The averment that the file was not available on 27.2.98 is, Therefore, not true. The case was duly taken up on that day and was adjourned to 27.4.98. As already stated, the case was adjourned to a number of dates after 27.4.98. There is no Explanation on record as to why no application was filed by the Ld. Cl. for R3 to the effect that he had not communicated with the adjourned dates of the case. The application is without any basis and is hereby dismissed.

26. This plea taken by the appellant in his application under Order 9 Rule 13 CPC that on 27.2.98, file was not available, is against the record. On 27.2.98, the file was very much available with the Court and the case was adjourned for number of dates, but appellant did not appear before the Trial Court.

27. Under these circumstances, the learned Tribunal rightly dismissed application under Order 9 Rule 13 CPC and no infirmity can be found with the impugned order dated 17.2.2000 of the Tribunal.

28. Thus, the Insurance Company has failed to show any ground on which the present claim of the respondents No. 1 to 6 herein can be defeated.

29. The present appeal is Therefore devoid of any merits and the same is hereby dismissed.

30. No orders as to costs.