
(2016) 01 SHI CK 0050
In the High Court Of Himachal Pradesh
Case No : FAO No. 359 of 2009

The New India Assurance Company Limited	APPELLANT
Vs	
Smt. Nirmala Devi & others	RESPONDENT

Date of Decision : 08-01-2016

Acts Referred:

Motor Vehicles Act, 1988 — Section 147

Citation : (2016) AAC 630 : (2016) 2 HimLR 658 : (2016) ILRHP 369

Hon'ble Judges : Mansoor Ahmad Mir, CJ.

Bench : Single Bench

Advocate : Mr. V.S. Chauhan, Advocate, Mr. Sanjeev Bhushan, Senior Advocate with Ms. Abhilasha Kaundal, Advocate, Mr. Bhupender Thakur, Advocate, for the Respondent

Final Decision : Disposed Off

Judgement

Mansoor Ahmad Mir, CJ. (Oral)- Subject matter of this appeal is the award dated 18th March, 2009, made by the Motor Accident Claims Tribunal-II, Solan, Himachal Pradesh (hereinafter referred to as "the Tribunal") in Petition No. 22-S/2 of 2008, titled Nirmala Devi and others v. Sh. Om Parkash and others, whereby compensation to the tune of RS. 3,74,000/- with interest @ 12% per annum from the date of filing of the claim petition till its realisation, was awarded in favour of the claimants-respondents No. 1 to 3 herein and the insurer came to be saddled with liability (for short, "the impugned award").

2. The claimants, insured-owner and driver have not questioned the impugned award, on any count. Thus, it has attained finality, so far it relates to them.

3. The insurer has questioned the impugned award on the following two grounds:

"i) The driver was having fake licence at the time of accident;

ii) The Tribunal has fallen in an error in awarding RS. 50,000/- twice, under the head "consortium".

4. Learned Counsel for the appellant-insurer also argued that the interim compensation has not been deducted.

5. I have gone through the impugned award. It appears that the Tribunal has fallen in an error in awarding compensation to the tune of RS. 50,000/- twice, under the head "consortium", in view of paras 11 and 14 of the impugned award.

6. It was for the insurer to plead and prove that the owner of the offending vehicle has committed wilful breach of the terms and conditions of the insurance policy and mere plea here and there cannot be a ground for seeking exoneration, as held by the Apex Court in National Insurance Co. Ltd. v. Swaran Singh and others, reported in AIR 2004 Supreme Court 1531. It is apt to reproduce relevant portion of para 105 of the judgment herein below:

"105.

(i)

(ii)

(iii) The breach of policy condition e.g. disqualification of driver or invalid driving licence of the driver, as contained in subsection (2) (a) (ii) of Section 149, have 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 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 duly licensed driver or one who was not disqualified to drive at the relevant time.

(iv) The insurance companies are, 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 wherefore would be on them.

(v).....

(vi) Even where the insurer is able 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 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 insured under Section 149 (2) of available the Act."

7. It is also profitable to reproduce para 10 of the latest judgment of the Apex Court in the case of Pepsu Road Transport Corporation v. National Insurance

Company, reported in (2013) 10 Supreme Court Cases 217, herein below:

"10. 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 licensed. 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 the 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 the genuineness of the licence from the licensing authority. That is what is explained in Swaran Singh case. If despite such information with the owner that the licence possessed by his driver is fake, no action is taken by the insured for appropriate verification, then the insured will be at fault and, in such circumstances, the Insurance Company is not liable for the compensation."

8. This Court in FAO AO No. 322 of 2011, titled as IFFCO-TOKIO Gen. Insurance Company Limited v. Smt. Joginder Kaur and others, decided on 29.08.2014 and FAO No. 523 of 2007, titled as Oriental Insurance Company Ltd. v. Smt. Rikta alias Kritka and others, decided on 19.12.2014, has laid down the same principle.

9. The Tribunal has rightly made discussion in para- 12 of the impugned award and held that the owner has not committed any wilful breach. The learned Counsel for the appellant was not in a position to indicate how the owner has committed wilful breach.

10. Having said so, it is held that the claimants are held entitled to the compensation to the tune of RS. 2,74,000/- including interim compensation with interest at the rate of 7.5% per annum from the date of filing of the claim petition.

11. Accordingly, the impugned award is modified, as indicated above. The appeal is accordingly disposed of

12. The excess amount be refunded to the insurer through payees' cheque account. The Registry is directed to release the compensation amount in favour of the claimants, strictly in terms of the impugned award.

13. Send down the records after placing a copy of the judgment on the Tribunal's file.