

(1999) 06 MAD CK 0035
In the Madras High Court
Case No : C.M.A. No. 448 of 1993

The Oriental Insurance Co. Ltd.

APPELLANT

Vs

Petchi Muthu Asari and Others

RESPONDENT

Date of Decision : 16-06-1999

Acts Referred:

Motor Vehicles Act, 1939 — Section 2(9A), 8(2), 8A, 96

Citation : (2000) 1 ACC 156 : (2000) ACJ 1378 : AIR 1999 Mad 413 : (1999) 3 LW 167 : (1999) 3 MLJ 154

Hon'ble Judges : M. Karpagavinayagam, J

Bench : Single Bench

Advocate : K. Ranganathan, for the Appellant; P. Rathinadurai, for Nos. 1 and 2 and R. Kamala, for No. 3, for the Respondent

Final Decision : Dismissed

Judgement

M. Karpagavinayagam, J.—The Oriental Insurance Company is the appellant herein. The appeal has been filed as against the Award of Rs.

75,000/-directing the Insurance Company as well as the owner of the vehicle, the third respondent herein, to pay the said amount to the claimants,

the respondents 1 and 2 herein, challenging its liability to pay the compensation.

2. The facts briefly are :-- The deceased Kannan, a Goldsmith, on 20-1-1988 at 3.15 p.m., was riding a Moped from South to North in

Thiruchendur to Athur Road, keeping left side of the road. At that time, the lorry bearing Registration No. TNT 4359 driven rashly and negligently

by the driver dashed against the deceased. The deceased was run over by the lorry and the Moped was severely damaged. The deceased died at

the spot. The claimants being the parents filed M.C.O.P. No. 97 of 1988 before the Motor Accidents Claims Tribunal (Sub-Judge), Tuticorin

claiming a compensation of Rs. 1,00,000/- from the owner of the vehicle and the Oriental Insurance Company.

3. The owner of the lorry Sudalaimani Nadar, the third respondent herein, contested the claim by examining the driver as R.W. 1 stating that the

driver was not negligent. The Insurance Company, the appellant herein, repudiated the claim stating that the deceased alone was negligent and that

in any event, the driver of the lorry was not duly licenced to drive the lorry and that therefore, the Insurance Company is not liable to pay any

compensation.

4. The Tribunal after enquiry concluded that the driver of the lorry was negligent and both the owner of the vehicle and the Insurance Company are

jointly or severally liable to pay the compensation of Rs. 75,000/- to the claimants. This impugned order is challenged by the appellant Insurance

Company, disputing its liability on the ground that there is a breach of condition of policy of insurance, since the driver was not having licence to

drive the lorry, namely, heavy goods vehicle, which is insured with the Company.

5. Mr. Ranganathan, the counsel for the appellant would mainly make the following submissions :--

The Tribunal has committed a grave illegality in fastening the liability on the Insurance Company, viz., the appellant, overlooking the provisions of

Section 96(2) of the Motor Vehicles Act by holding that the driver's authorisation to drive the heavy passenger vehicle would suffice to drive the

heavy goods vehicle and that therefore, the Insurance Company is liable to pay the compensation. The vehicle involved in the accident was a heavy

goods vehicle (lorry). To drive such a classification of vehicle, it requires a special endorsement. In the instant case, as admitted by the driver, who

is R.W. 1 and as seen from Ex.B1, the licence, the driver was having only a licence to drive the heavy passenger vehicle. Therefore, the finding by

the Tribunal that the said licence to drive the heavy passenger vehicle is sufficient to drive the heavy goods vehicle is, opposed to the very concept

of the statutory classification of the vehicles into different categories and the issue of licence separately therefor. Since the materials are available

from the evidence of R.W. 1, the driver and Ex.B1, the licence, it is made clear that the driver was not duly licensed to drive the lorry on the date

of the accident. Therefore, the Insurance Company is not liable to pay any

compensation.

6. In support of his submissions, he would cite the following decisions :--

(1) National Insurance Company Limited v. Rangasamy, ILR 1997 Mad 731;

(2) United India Insurance Co. Ltd. Vs. Gian Chand and others, ;

(3) United India Insurance Company Ltd. Vs. Palaniammal and others, ;

(4) Oriental Insurance Co. Ltd. v. Angammal, 1997 ACJ 594

7. On the other hand, Mr. Rathinadurai, the learned Counsel appearing for the respondents I and 2, namely, the claimants, would urge the

following contentions :--

In the present case, the driver of the lorry has a valid licence with an endorsement to drive the heavy passenger vehicle. It was a permanent driving

licence. The driver has not been disqualified from holding or obtaining such a licence. The objection to the claim of the claimants that the licence of

the driver does not have an endorsement enabling him to drive the goods vehicle is purely a technical one. When licence has an endorsement

enabling the driver to drive a stage carrier, he must be found fit by the licensing authority. To disallow the claim of the claimants against the

Insurance Company on the ground that the driver was not provided with an endorsement to drive the goods vehicle is not in consonance with the

purpose with which Section 8(1) of the Motor Vehicles Act has been incorporated under the Act. The right to claim compensation by the legal

representatives of the victims of the accident should not be allowed to be defeated on a mere technical ground. The contractual liability in between

the insured and insurer would not in any way affect the statutory liability fastened on insurer with reference to the payment of compensation to the

claimants. The Insurance Company cannot escape from the liability merely on the classification of vehicles as the failure to get endorsement with

reference to the driving of the heavy goods vehicle would not be construed to be a fundamental breach of the conditions of the policy so as to

enable the Insurance Company to take the plea as contained in Section 96(2) of the Act. At any rate, the Insurance Company has not discharged

its burden by proving that it would come under any one of the exclusive clauses mentioned in the policy.

8. Mrs. Kamala, the learned Counsel appearing for the third respondent herein,

the owner of the vehicle, while adopting the arguments of the counsel for the claimants, would contend that the Insurance Company cannot wriggle out of its obligation by merely raising a technical objection, as its liability under the contract of insurance remains intact and unhampered and it is bound to satisfy the Award under the policy of the insurance.

9. To substantiate the above contentions, both the counsel appearing for the claimants and the owner of the vehicle would cite the following

decisions :--

- (1) Dhanaraj and Another Vs. Rubia and Another, ;
- (2) National Insurance Co. Ltd. Madras Vs. A. Babu and others, ;
- (3) Srinivasa Roadways, Madurai Vs. Saroja and Others, ;
- (4) Skandia Insurance Co. Ltd. v. Kokilaben Chandravadan, AIR 1987 SC 1184;
- (5) British India General Insurance Co. Ltd. Vs. Captain Itbar Singh and Others, ;
- (6) Madurai Veeran v. P. Subburaj, (1997) 1 Mad LW 271;
- (7) National Insurance Co. Vs. Prem Narain Sahu, ;
- (8) National Insurance Company Vs. T. Elumalai and anothers, ;
- (9) Duraiswami Naidu Vs. Kanthammal and others, ;

10. In the light of the above submissions, the following questions would emerge :--

1) Can the Insurance Company be fastened with liability, when the driver of the heavy goods vehicle (lorry) involved in the accident had possessed a licence to drive the heavy passenger vehicle, in the absence of special endorsement to drive the heavy goods vehicle?

2) Whether the defence plea taken by the Insurance Company has been provided as one of the pleas in the insurance policy and whether the said defence plea has been established by the Insurance Company by discharging its burden to prove the same?

11. Before analysing these questions, it is useful to extract some of the provisions of the Motor Vehicles Act, 1939 (hereinafter referred to as "the Act") and review of its provisions.

12. Section 2 of the Act defines the different kinds of vehicles like articulated vehicle, goods vehicle, heavy goods vehicle, heavy passenger motor vehicle, medium passenger motor vehicle, motor car, motor cycle, motor

vehicles, omni bus, etc.

13. Section 2(5-A) defines the driving licence. The "driving licence" means the document issued by the competent authority under Chapter II of the

Act, authorising the person specified therein to drive a motor vehicle or a motor vehicle of any specific class or description.

14. Section 2(8) defines "goods vehicle". "Goods vehicle" means any motor vehicle constructed or adapted for use for the carriage of goods, or

any motor vehicle not so constructed or adapted when used for the carriage of goods solely or in addition to passengers.

15. Section 2(9) defines "heavy goods vehicle". "Heavy goods vehicle" means any goods vehicle the registered laden weight of which, or a tractor

the unladen weight of which, exceeds 11,000 Kilograms.

16. Section 2(9-A) defines "heavy passenger motor vehicle". "Heavy passenger motor vehicle" means any public service vehicle or omnibus the

registered laden weight of either of which, or a motor car the unladen weight of which, exceeds 11,000 Kilograms.

17. Section 2(25) defines "public service vehicle". "Public service vehicle" means any motor vehicle used or adapted to be used for the carriage of

passengers for hire or reward, and includes a motor car, contract carriage, and stage carriage.

18. Section 2(33) defines "transport vehicle". "Transport vehicle" means a public service vehicle or a goods vehicle.

19. Section 3 which deals with necessity for driving licence reads as follows:

Sections. Necessity for driving licence : (1) No person shall drive a motor vehicle in any public place unless he holds an effective driving licence

issued to himself authorizing him to drive the vehicle, and no person shall so drive a motor vehicle as a paid employee or shall so drive a transport

vehicle unless his driving licence specifically entitles him so to do.....

20. Section 7 of the Act outlines the procedure for grant of driving licence.

21. Section 8 deals with Form and contents of driving licence. Sub-section (2) of Section 8 reads thus :

A driving licence shall specify whether the holder is entitled to drive as a paid employee and whether he is entitled to drive a transport vehicle and

shall further be expressed as entitling the holder to drive a motor vehicle of one or more of the following classes, namely,--

(a) to (e) x x x x x

(ei) heavy goods vehicle.

(eii) heavy passenger motor vehicle.

(f) to (g) x x x x x

Section 8-A(1) makes provision for addition of any other class of motor vehicles to the licence, according to the procedure prescribed thereunder,

22. From the reading of the above provisions, it is clear that the purpose of defining the different types of motor vehicles is to classify them into

particular categories, mainly related to that user. Section 3 of the Act, as mentioned earlier, prohibits a person from driving a motor vehicle, unless

he holds an effective driving licence authorising him to drive the vehicle. Section 5 of the Act puts an embargo on the owner of the vehicle from

permitting any person, who does not satisfy the provisions of Section 3, to drive the vehicle. u/s 8 of the Act relating to the form and contents of

the driving licence, the particulars of different kinds of vehicles in respect of which a driving licence may be issued, are given. Therefore, there is

some connection between the classification of the vehicles into different categories and also the issue of driving licence to persons to drive the

vehicles belong to different categories. Hence, the licence for driving a particular category of vehicle would not be sufficient to drive the motor

vehicle under different category.

23. Since vehicles are classified by statutory provisions into different categories, authorisation to drive one category of vehicle cannot enable the

driver to drive another category of vehicle.

24. In the light of the above provisions, it can be concluded that on the date of the accident, the driver of the lorry, heavy goods vehicle as

classified u/s 2(9) of the Act, cannot be said to be duly licensed, even though he was having a driving licence for driving the bus, viz., heavy

passenger motor vehicle as classified in Section 2(9-A) of the Act.

25. With these statutory provisions, we shall now deal with the facts of the present case.

26. The driver of the lorry was examined as R.W.1 by the owner of the vehicle who is the third respondent herein, in order to show that he was

not negligent and that in any event, he was having a driving licence Ex.R1 and

the vehicle involved in the accident was insured with the Insurance Company, the appellant herein.

27. In the chief examination, he would state that he was having the driving licence. In the cross-examination, he would deny the suggestion that the Insurance Company was not liable to indemnify. However, he would admit in the cross-examination that he was having licence only for driving the bus and not the lorry.

28. It is seen from Ex.B1, the driving licence D.L. No. 849 of 1977, that the holder of the licence had been licensed to drive throughout the State the vehicles of the following description ""shown as item (c)"". The further writing found is to the effect that the licence is confined to item (c) only.

There is also a further endorsement to the effect that he was authorised to drive as a paid employee with effect from 1-11-1977. The validity of the

licence is stated to be from 13-9-1977 to 12-9-1980. Thereafter, it was renewed on 8-10-1980 up to 12-9-1983. By The endorsement dated

12-10-1981, the holder of the licence was authorised to drive heavy passenger motor vehicle also with effect from 12-10-1981. By the

endorsement dated 21-9-1987, the holder of the licence was authorised to drive transport vehicle.

29. The accident took place on 20-1-1988. Prior to that, the driver was having driving licence to drive transport vehicle and to drive heavy

passenger motor vehicle also. The question that arises in this context is, whether on the date of the accident, the driver was duly licensed to drive

the vehicle insured with the Company?

30. The words contained in licence that he is authorised to drive transport vehicle and to drive heavy passenger motor vehicle also would give rise

to some ambiguity with reference to the nature of the driving licence. It is true that in the cross-examination, the driver would say that he was not

having the licence to drive the heavy goods vehicle, viz., lorry, But, that alone is not sufficient to show that the driver on the date of the accident

was not duly licensed.

31. In this context, the learned Counsel for the claimants, the respondents 1 and 2 would submit that even assuming that the classification of the

different kinds of the vehicles is relevant for the purpose of answering the question, whether he was authorised to drive the heavy goods vehicle on

the date of the accident, in the light of the ambiguity that could be seen from Ex.B1, it is for the Insurance Company who seeks immunity from

liability to establish that the driver was not duly licensed. He would also cite in this connection the decision in Dhanaraj and Another Vs. Rubia and

Another, , which followed the decision in Houghton v.Trafalgar Insurance Co. Ltd., (1954) I QB 247, in which it was observed that if there is any

ambiguity in the policy document, the ambiguity will be resolved in favour of the insured.

32. However, on principles there is no difficulty in accepting the contention urged by the counsel for the appellant that if the driver without any

authorisation to drive the heavy goods vehicle, drove the vehicle and met with an accident even though he was having licence for driving heavy

passenger vehicle, then the Insurance Company would certainly claim that it is not liable for paying compensation. This is laid down by this Court in

the following decisions : --

(1) ILR (1997) Mad 731 (supra);

(2) United India Insurance Company Ltd. Vs. Palaniammal and others, ;

(3) United India Insurance Co. Ltd. Vs. K. Subramaniam and Others, .

33. But, it is noticed in all these decisions that the claim for immunity by the Insurance Company can be made only when it takes the defence plea

as contained in Section 96(2) of the Act. Therefore, the question to be decided in this case primarily depends upon the interpretation of Section

96(2) of the Act. The said section provides that an insurer shall be entitled to defend the action on any of the following grounds, namely

96(2) (a) that the policy was cancelled by mutual consent or by virtue of any provision contained therein before the accident giving rise to the

liability, and that either the certificate of insurance was surrendered to the insurer or that the person to whom the certificate was issued has made an

affidavit stating that the certificate has been lost or destroyed, or that either before or not later than fourteen days after the happening of the

accident the insurer has commenced proceedings for cancellation of the certificate after compliance with the provisions of Section 105; or

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

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

(a) to (d)

(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 disqualification;...

34. The above section lays down in clear terms that the insurer, who has been made a party and who seeks to defend the action, can do so only

on the grounds specified in Section 96(2)(a)(b) or (c) of the Act. Whatever the defence the Insurance chooses to take, should be strictly traceable

to any one of these clauses.

35. Sub-section (2) clearly provides that an insurer is not entitled to take any other defence which is not specified in it. In other words, the only

manner of avoiding liability provided for in sub-section (2) is through the defences therein mentioned.

36. In this context, it is noticed from the reading of the said sub-section that none of these defences will be available to the Insurance Company

unless it incorporates these conditions in the policy. The expression contained in clause (b) of Section 96(2) is ""that there has been breach of a

specified condition of the policy, being one of the following conditions"".

37. The reading of the section makes it clear that the Insurance Company is at liberty to enumerate the above conditions as contained in Section

96(2) and to incorporate in the policy. Clause (b) deals with the defence on the ground of breach of a specified condition of the policy. Here again,

it is not the breach of each and every condition of the policy that would provide the Insurance Company a defence to disclaim its liability.

38. The reading of Clause (b) makes it manifestly clear that the condition of the policy, which, according to the Insurance Company, has been

violated, should be one that is mentioned in the Clause (b) itself. Unless the insurer establishes that the breach of the condition of the policy comes

within any one of the sub-clauses mentioned in Clause (b), the insurer cannot succeed, since the breach of the said condition of the policy not

mentioned in Clause (b) would not be a defence to the insurer.

39. Similarly, there are certain risks which, under the statute, the Insurance Company is bound to cover. There are certain other risks, which by

negotiating with the owner of the vehicle, the Insurance Company may choose to

cover at its option, though under the statute the Company is not bound to cover the same.

40. Section 96 enables the Insurance Company to defend an action against it on the ground that there has been a breach of a specified condition of the policy. It also enables the Company to incorporate in the policy any of the conditions mentioned in Sub-clause (ii) of Clause (b) of Section 96(2), namely, ""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 disqualification"".

41. The above clause contains three sub-clauses, namely, (1) excluding driving by anamed person or persons; or (2) excluding driving by any person who is not duly licensed; or (3) excluding driving by any person who has been disqualified for holding or obtaining a driving licence during the period of disqualification. The first clause permits an Insurance Company to rid itself of the liability by providing that if an accident occurs while a named person drives the vehicle, the Company shall not be liable to indemnify the owner. The second clause enables the Insurance Company to disclaim liability in cases where at the time of the accident, the driver is a person who does not hold a licence duly granted to him. The third clause enables the Insurance Company to disclaim liability in cases where during the accident the vehicle was driven by a person who might not hold a valid licence at the time of the accident, but who had held a licence previously, but who had not been disqualified for holding or obtaining it.

42. Thus, these three sub-clauses in Section 96(2)(b)(ii) indicates the amplitude of the permissible exclusion. As the sub-clauses are different and disjunctive, an option is given to the Insurance Company to exclude at. its discretion driving either by a named person or by a person who is not duly licensed or by a person who has been disqualified for holding or obtaining a driving licence or to exclude driving by all these three classes of persons. In other words, it is open to the Insurance Company to refuse to cover a risk brought about by a person like R.W.1, the driver in this case, who, at the time of the accident had held a licence to drive heavy passenger vehicle, but had no licence for driving the heavy goods vehicle.

43. The Insurance Company is given the option to impose conditions which it is

permitted by the statute to impose, and to exclude liability when the vehicle is driven by a person who is not duly licensed at the time of the accident. If the Company does not take advantage of the permissible conditions and enters into a contract with the owner of the vehicle without those conditions whereby it undertakes to cover risks, which it need not cover u/s 96 of the Act, then it cannot escape liability. In other words, it is the terms of the policy that ought to guide us and those terms would answer the question whether the Company would be liable in a case where a driver was not duly licensed and has not been disqualified at the time of the accident for holding or obtaining such a licence.

44. Therefore, we have to necessarily look into the policy in order to find out whether the said policy incorporates any or all of the conditions which the statute permits an Insurance Company to incorporate. If it incorporates all the conditions mentioned in the section, including the one which excludes driving by a person who is not duly licensed at the time of the accident, then the Insurer will be exonerated of liability. If, on the other hand, the policy incorporates only some of the conditions and omits the others mentioned in the statute, the Insurer cannot resist liability on the ground that though the policy has omitted the conditions, the said conditions are there in the statute.

45. As indicated earlier, the Insurance Company is not only to plead but also to prove that there is a breach of the conditions of the policy which would attract one of the defences mentioned in Section 96(2) of the Act.

46. In the counter filed before the Tribunal by the Insurance Company, it is specifically mentioned in para 5 that since the driver was not authorised to drive the heavy goods vehicle and was not having a valid driving licence at the time of the accident, the Insurance Company is not liable to pay any compensation and that the owner alone is liable to pay the compensation to the claimants. It is also seen from the evidence of R.W.1, as stated earlier, that on the date of the accident he was having only licence for driving the heavy passenger vehicle and not the heavy goods vehicle, namely, lorry. But, strangely there is no reference about the conditions of the policy either in the counter or in the deposition given by R.W.I.

47. Admittedly, the policy has not been produced before the Court. The perusal of the policy alone would clarify whether the policy in this case

insisted on the driver having a licence to drive a heavy goods vehicle. To invoke Section 96(2), the Insurance Company has to necessarily prove

that there was any violation of the conditions of the policy. In the absence of the said proof, the Insurance Company cannot escape liability.

48. It is settled law that the onus of proof in regard to breach of conditions in the policy is on the insurer and not on the claimant or owner of the

vehicle. The mere assertion in the written statement that the vehicle was driven by a person who was not duly licensed is not sufficient to discharge

the burden of the Insurance Company. The driver has to necessarily take steps to establish the same by producing and summoning the relevant

records including the policy before the Court to substantiate his defence plea.

49. It is held in the following decisions that it is not the burden of proof on the owner of the vehicle to prove that the driver had a valid licence, but

the Insurance Company ought to discharge its onus of proof by adducing necessary evidence to prove that the driver had not held the valid licence

on the date of the accident and the mere pleading to that effect in the counter-affidavit will not amount to proof:

1) Duraiswami Naidu Vs. Kanthammal and others, ;

2) National Insurance Co. Ltd. Madras Vs. A. Babu and others, .

These decisions rendered by the Division Bench of this Court on the basis of the principles laid down by the Apex Court.

50. The Supreme Court would specifically hold that the burden to prove that there was breach of the conditions of the policy and the contract of

Insurance was squarely placed on the shoulders of the Insurance Company and that the owner of the vehicle was under no obligation to furnish

evidence so as to enable the Insurance Company to wriggle out of its liability under the contract of insurance.

51. In the instant case, the Insurance Company has not taken any steps to produce the policy and other records in order to substantiate its

contention that the driver of the vehicle was not holding the valid licence on the date of the accident and that there was a breach of the conditions

of the policy. When once the Insurance Company failed to prove that aspect, its liability under the contract of Insurance remains intact. Therefore,

it is bound to satisfy the Award under the policy of insurance.

52. Though the reasoning given by the Tribunal stating that the licence for

driving heavy passenger vehicle is sufficient to drive the heavy goods vehicle, in my view, is not proper, the conclusion with reference to the liability of the Insurance Company arrived at by the Tribunal is perfectly correct on the reason that the Insurance Company did not establish its defence plea stating that the driver was not duly licensed on the date of the accident in violation of breach of the conditions mentioned in the policy by producing the relevant records. Therefore, my answer for the questions referred to above is this :

The Insurance Company would certainly disclaim liability, if the driver of the vehicle was not duly licensed to drive the said vehicle insured with the Company. But, in order to prove its immunity from liability, the Insurance Company has to establish before the Court by producing the policy and other records that one of the conditions mentioned in the policy that the vehicle should not be driven by a person who is not duly licensed to drive the said vehicle on the date of the accident, was violated. In the absence of the said proof, the Insurance Company is certainly liable to pay the compensation.

53. In the result, the appeal is dismissed. No costs.

54. It is noticed that the claimants filed Cross-Objection No. 97 of 1996 before this Court. But, as conceded by the counsel for the claimants, this Cross-Objection is not maintainable, in view of the decision reported in United India Insurance Co. Ltd. Vs. Rajammal and Others, . Therefore, the Cross-Objection also is dismissed.