
(2008) 09 BOM CK 0154
In the Bombay High Court
Case No : First Appeal No. 571 of 1996

United India Insurance Co. Ltd.

APPELLANT

Vs

Bindiya Udaykumar Adwani and Others

RESPONDENT

Date of Decision : 19-09-2008

Acts Referred:

Motor Vehicles Act, 1988 — Section 149(2), 3, 4, 5
Penal Code, 1860 (IPC) — Section 279, 304A, 338, 427

Citation : (2009) 2 BomCR 380

Hon'ble Judges : Naik Vasanti A., J

Bench : Single Bench

Advocate : H.V. Thakur, for the Appellant; V.P. Panpalia, for the Respondent

Judgement

Naik Vasanti A., J.—By this first appeal, the appellant challenges the judgment and Award passed by the Motor Accident Claims Tribunal, Akola, on 22/4/1996, in Motor Accident Claim Petition No. 105/ 1994, so far as it holds the appellant-United India Insurance Company jointly and severally liable to pay the amount of Rs. 77,465/- to the respondent No. 1-claimant. According to the appellant-Insurance Company, it was not liable to pay compensation to the claimant in view of the provisions of Section 149(2) of the Motor Vehicles Act, 1988.

2. Few facts giving rise to the first appeal are stated thus-

On 30/12/1993, respondent/claimant Bindiya was standing near the house of one Rajandas in Sindhi Camp, along with her son. At that time, a car bearing No. MH-30/8573 came from her left side in high speed and gave a dash to her while taking a turn at the square. As a result of the accident, Bindiya received fracture to her left femur bone. The car also dashed against one Savitrabai who was standing beside Bindiya and Savitrabai died on the spot.

3. Claimant Bindiya filed a claim petition before the Tribunal at Akola, which was registered as M.A.C.P. No. 105/1994. It was stated in the claim petition that Bindiya suffered injury in the accident though she was not at fault. According to

the claimant, respondent No. 2- Dharmendra, the son of the owner of the vehicle, was driving the car rashly and negligently in high speed while taking a turn at the square. Balram, father of Dharmendra, and respondent No. 4 to this appeal, was the owner of the car. Mahadeo, the regular driver of the vehicle, was sitting beside Dharmendra on the front seat. The claimant sought compensation to the tune of Rs. 2,28,000/-.

4. Respondent No. 2-Dharmendra filed his written statement and denied that he was driving the car at the relevant time. He did not dispute that Mahadeo was the regular driver of the car. He stated in the written statement that he was unnecessarily made a party to the proceeding. He sought for the dismissal of the claim petition.

5. The regular driver of the vehicle also filed his written statement and stated that he was driving the car at the relevant time and the car was not driven by Dharmendra at the time of accident. He further denied that the accident was caused due to the rash and negligent driving by Dharmendra. Mahadeo also sought for the dismissal of the claim petition.

6. Balram, the owner of the vehicle and father of Dharmendra, did not file his written statement. The Insurance Company also denied the claim of the claimant. It was denied that Bindiya had sustained permanent disability. It was the case of the Insurance Company that the car was being driven by Dharmendra a minor who did not possess a valid Driving Licence. It was stated in the written statement that the owner of the car committed a breach of the Policy by permitting Dharmendra, a minor, to drive the vehicle.

7. On the aforesaid pleadings of the parties, the issues were framed and the Tribunal came to a conclusion that the claimants succeeded in proving that the accident was caused due to rash and negligent driving of the Fiat car by Dharmendra. The Tribunal held that both Dharmendra and Mahadeo were negligent as Mahadeo, the regular driver, had permitted Dharmendra to drive the vehicle. The Tribunal held that the claimant succeeded in proving that Dharmendra was driving the car at the time of the accident. The Tribunal also held that the Insurance Company failed to prove the breach of policy condition. Since the claimant was successful in proving the permanent disability, the Tribunal held Dharmendra, Mahadeo, Balram, and the United India Insurance Company, jointly and severally liable to pay the amount of Rs. 77,465/- towards compensation along with interest @ 12% per annum from 18/6/1994 till, its realization. The judgment passed by the Tribunal on 22/ 4/1996 is challenged by the appellant-Insurance Company in the instant appeal as, according to the Insurance Company, the Tribunal wrongly fastened the liability on the Insurance Company.

8. Shri Thakur, the learned Counsel for the appellant, submitted that the Tribunal was not justified in fastening the liability on the appellant. It is submitted on behalf of the appellant that the Tribunal could not have held that it was a proved

fact that the regular driver of the vehicle allowed minor Dharmendra to drive the car and this fact was not within the knowledge of the owner, Balram. The Counsel for the appellant then submitted that the Tribunal was also not justified in applying the ratio laid down by the Hon''ble Supreme Court in the case of Skandia Insurance Co. Ltd. Vs. Kokilaben Chandravadan and Others, , to the facts of the case. The Counsel for the appellant submitted that the Tribunal came to the conclusion that Mahadeo had permitted Dharmendra to drive the car only on the basis of the evidence of claimantBindiya who had stated in her evidence that the regular driver of the car was sitting beside Dharmendra when Dharmendra was driving. The Counsel for the appellant took this Court through the provisions of Section 149(2) of the Motor Vehicles Act, 1988 and specially Sub-clause (ii) of Clause (a) of Sub-Section (2) of Section 149, to point out that the appellant was not liable as, Dharmendra was driving the car though he was not duly licenced and was also not qualified for holding or obtaining the Driving Licence in view of Section 4 of the Motor Vehicles Act, 1988. According to the Counsel for the appellant, since the car was rashly and negligently driven by a minor who was not qualified to drive the vehicle, there was obviously a breach of the material condition in the policy and the appellant was not liable in view of the provisions of Section 149(2) of the Motor Vehicles Act, 1988. It is submitted on behalf of the appellant that the owner of the vehicle had not entered the witness box and, therefore, it was necessary to draw an adverse inference against him. The Counsel for the appellant relied on the decision of the Hon''ble Supreme Court, United India Insurance Co. Ltd. Vs. Gian Chand and others, , to substantiate this submission. The Counsel for the appellant also relied on the decision of this Court, in Pandurang Narayandas Sarda Vs. Subhash Gopal Changale and Others, , to canvass that there is a presumption that the driver of a vehicle was driving the vehicle with the knowledge and consent of the owner. The Counsel for the appellant then submitted that though this presumption is rebuttable, in the instant case, there was no evidence whatsoever to rebut the same.

9. Shri Panpalia, the learned Counsel for the respondent No. 4 supported the judgment passed by the Motor Accidents Claim Tribunal on 22/4/1996, and submitted that the Tribunal was justified in holding that Dharmendra was driving the vehicle on the authorization of the regular driver of the car. The Counsel for the respondent No. 4 then submitted that the Tribunal had rightly held that Mahadeo was negligent in authorizing Dharmendra to drive the car. It was submitted on behalf of the respondent No. 4 that it was necessary for the Insurance Company to prove that the car was entrusted by the owner to his son for driving, at the relevant time or atleast that Dharmendra was driving the car with the consent and knowledge of his father, Balram. According to the Counsel for the respondent No. 4, the Tribunal rightly held that the Insurance Company had failed to prove that Dharmendra drove the car with the knowledge of Balram and Balram willfully allowed him to drive the car. The Counsel for the respondent No. 4 relied on the decision Lal Chand Vs. Oriental Insurance Co. Ltd., , to

canvass that it was necessary for the Insurance Company to prove that the insured, namely, the owner of the vehicle, 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. Then, by relying on the decision United India Insurance Co. Ltd. Vs. Vimal Narayanrao Nandanwar and Others, , it was canvassed on behalf of the respondent No. 4 that if there was a breach of condition of policy, the Insurance Company had a right to proceed against the insured. The Insurance Company can not avoid its liability as far as a third party is concerned.

10. On hearing the learned Counsel for the parties and after perusal of the judgment and the record and proceedings, it appears that the following points arise for determination.

(1) Whether the appellant-Company had failed to prove the breach of policy condition?

(2) Whether the Insurance Company was not liable to pay compensation to the claimant in view of the provision of Section 149(2) of the Motor Vehicles Act, 1988?

(3) What order?

11. To render the findings on the aforesaid points, it is necessary to consider few facts. Though, initially, it was submitted on behalf of the respondent No. 4 that the Tribunal wrongly came to a conclusion that Dharmendra was driving the car at the relevant time, the submission was not pressed in view of the judgment passed by the Judicial Magistrate, First Class, Akola in Criminal Case No. 104/1994, dt. 15-11-1997, filed against Dharmendra for the offences punishable under Sections 279, 304-A, 338 and 427 of the Penal Code. The Judicial Magistrate, First Class, Akola, had convicted Dharmendra for the offences and Dharmendra was also asked to pay nominal compensation to the legal heirs of Savitrabai who died in the accident, and Bindiya, the claimant in this case. The criminal appeal filed by Dharmendra against the judgment passed by the Judicial Magistrate, First Class, Akola, on 15th November, 1997, was also dismissed by the Sessions Judge, Akola, by the judgment dated 13/5/1999, upholding the conviction of Dharmendra under Sections 279, 304-A, 338 and 427 of the Penal Code. The certified copies of the judgments dated 15th November, 1997 and 13th May, 1999 are placed in the record and are marked as Exh. A and Exh.B. Thus, it is amply clear in view of the aforesaid two judgments in the criminal cases and findings rendered by the Tribunal in the present matter, that Dharmendra was driving the vehicle at the relevant time. A categorical finding of fact has been recorded by the Tribunal that Dharmendra was a minor on the date of the accident and was taking education in Carmel School.

12. It is necessary to note that under the provisions of Section 3 of the Motor Vehicles Act, 1988, a person is prohibited from driving a motor vehicle in a public place unless he holds an effective driving licence. In view of the provisions of

Section 4 of the Motor Vehicles Act, 1988, no person under the age of 18 years, is permitted to drive the motor vehicle in a public place. In view of the finding that Dharmendra was driving the car rashly and negligently on the date of the incident, while he was minor, it is clear that there was a breach of the condition of the policy which excludes a person who has no licence or who has been disqualified for holding or obtaining a driving licence, from driving. This is not a case of a person driving a vehicle without a licence, but is a case of a person driving the vehicle though he was not qualified for holding or obtaining a driving licence in view of the provisions of Section 4 of the Motor Vehicles Act, 1988. The provisions of Section 5 of the Motor Vehicles Act, 1988, further stipulate that an owner of the vehicle is responsible for contravention of the provisions of Section 3 as no owner or incharge of the motor vehicle shall cause or permit any person who does not satisfy the provisions of Section 3 or Section 4 of the Motor Vehicles Act to drive the vehicle.

13. Though it is pleaded by the claimant that the regular driver of the vehicle was negligent in permitting Dharmendra to drive the vehicle, it is necessary to consider whether the vehicle was driven by Dharmendra at the relevant time, without the knowledge and consent of Balram. It is conspicuous to note that Balram had not filed a written statement and had also failed to tender evidence. The regular driver of the vehicle and Dharmendra had, however, stated, in their written statements, that Dharmendra was not driving the car at the relevant time and Mahadeo was driving the same. The Tribunal had rightly disbelieved the evidence of the driver of the vehicle and had rightly relied on the evidence of claimant Bindiya, to hold that Dharmendra was driving the vehicle at the relevant time. The evidence of Mahadeo, the regular driver of the vehicle, clearly shows that he was trying to save his master, Balram. Though he had stated in his evidence that he was prosecuted for rash and negligent driving of the car in the said incident by the police, the judgment dated 15/11/1997 in (Regular Criminal Case No. 104/1994) (supra) clearly shows that only Dharmendra was tried for the offences punishable u/s 279, 304-A, 338 and 427 of the Penal Code. This shows that Mahadeo was not desirous of speaking the truth. He had stated in his evidence that he went to the Police Station to lodge a report, but his report was not recorded by the police as nobody was there in the Police Station. He then admitted in his cross-examination that he did not lodge a complaint to the higher authorities when his report was not recorded by the police. He denied the suggestion that the steering of the car was in Dharmendra's hands and Dharmendra was driving the car under his instructions. The evidence on record shows that Dharmendra was driving the car at the relevant time and Mahadeo was seated beside him on the front seat of the vehicle. It is not the case of either Mahadeo or Dharmendra that Dharmendra was driving the car as they had flatly denied the aforesaid fact. In view of the denial, there was no question of either Mahadeo or Dharmendra pleading before the Tribunal that Mahadeo had wrongly permitted Dharmendra to drive the car at the relevant time or that the car was driven by Dharmendra without the knowledge and consent of Balram, father of

Dharmendra. It is necessary to apply the principle of *falsus in uno falsus in omnibus* while appreciating the evidence of Mahadeo as Mahadeo had deposed falsely on a material fact that he was driving the vehicle when it is proved beyond doubt that Dharmendra was driving the same. As rightly submitted on behalf of the appellant, there is a presumption in law that the driver of the vehicle was driving the same with the knowledge and consent of the owner. In the instant case, neither did the owner file a written statement, nor did he enter into the witness box to state that he had no knowledge that Dharmendra was driving the car at the relevant time or that he had not consented to the said action of Dharmendra. The Insurance Company had clearly pleaded in the written statement that Dharmendra, a school-going boy, was driving the vehicle and as he was not possessing any valid driving licence at the relevant time, there was a clear cut breach of the insurance policy. The Insurance Company had further stated that in view of breach of insurance policy, the claim against the Insurance Company was not maintainable. In such circumstances, the burden heavily lay on Balram to prove that he had not permitted Dharmendra to drive the vehicle and he also had no knowledge of the same. It was necessary for Balram to enter the witness box and state about the absence of knowledge or consent. No evidence about the absence of consent or knowledge was brought on record, though there is a Resumption in law, of knowledge and consent. In this background, the judgments reported in *United India Insurance Co. Ltd. Vs. Gian Chand and others*, and *Pandurang Narayandas Sarda Vs. Subhash Gopal Changale and Others*, , would surely assist the case of the appellant to a certain extent.

14. The judgment reported in *Lal Chand Vs. Oriental Insurance Co. Ltd.*, would, however, not be of much assistance to the case of the respondent No. 4 as the owner in the reported decision had not only seen or examined the driving licence produced by the driver, but had also taken a driving test of the driver and found that the driver was competent to drive the vehicle. In the facts of that case, the Hon"ble Supreme Court held that the owner of the vehicle having satisfied himself that the driver had a licence and was driving competently, engaged him and in such circumstances, there was no breach of the provisions of Section 149(2)(a)(ii) of the Motor Vehicles Act and the Insurance Company could not be absolved of its liability. In the reported case, it was the case of the Insurance Company that the Driver was not holding a valid driving licence and in view of the evidence of the owner as aforesaid, the Supreme Court held that the Insurance Company would not be absolved of its liability. In this case, in the absence of any evidence from the side of the owner of the vehicle and in the absence of any written statement, it has to be held that the owner of the vehicle had failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of the vehicle by a duly licenced driver. The judgment reported in *United India Insurance Co. Ltd. Vs. Vimal Narayanrao Nandanwar and Others*, also cannot be made applicable to the facts of the case as the Insurance Company has in the present case paid the entire compensation to the claimant in

terms of the Award of the Tribunal. Since this is a case of breach of condition of policy, the Insurance Company is entitled to recover the amount paid to the claimant.

15. For the reasons aforesaid, the appeal is partly allowed. The judgment passed by the Motor Accident Claims Tribunal Akola on 22/4/1996 is hereby modified. It is hereby held that the respondent Nos. 2 to 4 are jointly and severally liable to pay the amount of Rs. 77,465/- to the respondent No. 1 along with interest & 12% per annum from 18/6/ 1994 till the date of deposit of the same. It is brought to the notice of this Court that the appellant-Insurance Company had deposited an amount of Rs. 58,870/- in the Motor Accident Claims Tribunal, and deposited an amount of Rs. 38,735/- in this Court. It appears that the respondent No. 1 has not withdrawn the amount of Rs. 38,735/- deposited by the appellant in this Court. The appellant is, therefore, permitted to withdraw the amount of Rs. 38,735/-. In the facts and circumstances of the case, the respondent Nos. 2 to 4 are directed to refund the amount of Rs. 58,870/- deposited by the appellant in the Tribunal towards compensation payable to the respondent No. 1. In the peculiar facts and circumstances of the case, interest is not payable to the appellant on this amount. The respondent Nos. 2 to 4 are directed to make the payment of Rs. 58,870/- to the appellant within a period of three months from today. Order accordingly. No order as to costs.