(2008) 09 DEL CK 0046

In the Delhi High Court

Case No : MAC App. No. 311 and C.M. No''s. 7134-36 of 2008 & MAC App. No. 311 of 2008 and CM No''s. 7134-36 of 2008

United India Insurance Co. Ltd. APPELLANT

Vs

Durga Dass @ Durga Prasad, Jagdish Chand and Suresh Chand Aggarwal RESPONDENT

Date of Decision : 12-09-2008

Acts Referred:
Motor Vehicles Act, 1988 — Section 14, 149, 149(1), 149(2), 170

Citation : (2008) 09 DEL CK 0046

Hon'ble Judges : Vidya Bhushan Gupta, J

Bench : Single Bench

Advocate : Sameer Nandwani, for the Appellant;

Final Decision : Dismissed

Judgement

V.B. Gupta, J.

+CM No. 7136/2008*

1. Allowed, subject to all just exception.

+CM No. 7135/2008*

There is a delay of 10 days in filing of the appeal.

For the reasons mentioned in the application, the application is allowed and the delay is condoned.

The application stands disposed of accordingly.

+MAC App. No. 311/2008 & CM No. 7134/2008*

The present appeal has been filed by the Insurance Company u/s 173 of the Motor Vehicles Act, 1988 (for short as ''Act'') against the order dated 28th January, 2008 passed by Dr. T.R. Naval, preceding Officer, MACT, Delhi (for short as ''Tribunal'').

2. Brief facts of this case are that, on 21st January, 2004, at about 9.30 p.m., respondent No. 1/Durga Dass, the injured in this case, was crossing road at 13 Block, Trilokpuri Bus stop through Zebra crossing, when a bus bearing No. DL-IPB-3884, being driven rashly and negligently by respondent No. 2/Jagdish Chand, hit the injured. As a result, respondent No. 1 fell down on the road and sustained injuries. Later on, he was removed to Lal Bahadur Shastri Hospital.

3. Respondent No. 1 has claimed compensation of Rs. 3 lacs from the driver, owner and insurer of the offending vehicle.

4. Respondents No. 2 and 3 herein, contested the case on the ground inter-alia, that no such accident was caused by the offending vehicle whereas, the appellant admitted this fact that offending vehicle was insured with it.

5. Vide impugned order, the Tribunal awarded compensation amounting to Rs. 1,90,141/- together with interest @ 7% from the date of filing of the petition till the date of realization.

6. Being aggrieved with the judgment of the Tribunal, the Insurance Company has filed the present appeal.

7. It is contended by learned Counsel for the appellant that the driver of the offending vehicle was not having a valid driving licence. The driver claims to have got the driving licence renewed for a period of five years whereas, the licence for the heavy vehicle is renewed for a period of three years only. The investigator of the appellant/Company has inspected the record of the transport authorities but did not find the licence claimed to have been issued to the driver.

8. The other contention is that permanent injury of 65% was not of the whole body but of right limb only and thus the whole body disability could not have been more than 10%.

9. Admittedly, in the present case no permission u/s 170 of the Act has been obtained by the appellant from the Tribunal.

10. Section 170 of the Act reads as under:

170. Impleading insurer in certain cases.-Where in the course of any inquiry, the Claims Tribunal is satisfied that -

(a) there is collusion between the person making the claim and the person against whom the claim is made, or

(b) the person against whom the claim is made has filed to contest the claim, it may, for reasons to be recorded in writing, direct that the insurer who may be liable in respect of such claim, shall be impleaded as a party to the proceeding and the insurer so impleaded shall thereupon have, without prejudice to the provisions contained in Sub-section (2) of Section 149, the right to contest the claim on all or any of the grounds that are available to the person against whom the claim has been made.

11. In Shankarayya and Another Vs. United India Insurance Co. Ltd. and Another, the Apex Court while dealing with the question as to whether Respondent No. 1-Insurance Company could have filed an appeal in the High Court against the award of the Motor Accidents Claims Tribunal and got the quantum of compensation reduced when the insured had not filed such appeal and when Respondent No. 1-Insurance Company had not moved the Tribunal u/s 170 of the Act for getting the right to contest the proceedings on merit, held as under;

It clearly shows that the Insurance Company when impleaded as a party by the Court can be permitted to contest the proceedings on merits only if the conditions precedent mentioned in the section are found to be satisfied and for that purpose the Insurance Company has to obtain order in writing from the Tribunal and which should be a reasoned order by the Tribunal. Unless that procedure is followed, the Insurance Company cannot have a wider defence on merits than what is available to it by way of statutory defence. It is true that the claimants themselves had joined respondent No. 1- Insurance Company in the Claim Petition but that was done with a view to thrust the statutory liability on the Insurance Company on account of the contract of the insurance. That was not an order of the Court itself permitting the Insurance Company which was impleaded to avail of a larger defence on merits on being satisfied on the aforesaid two conditions mentioned in Section 170. Consequently, it must be held that on the facts of the present case, respondent No. 1- Insurance Company was not entitled to file an appeal on merits of the claim which was awarded by the Tribunal.

12. In National Insurance Co. Ltd. and Another Vs. Smt. Balbir Kaur and Others, the Punjab and Haryana High Court held as under;

If the insurance company does not plead before the Tribunal that there was any collusion between the claimants and the person against whom the claim was made and does not ask the Tribunal to pass an order u/s 170 of the Act allowing it to contest the claim on merits it will have no right to contest the same on the grounds other than those mentioned in Sub-section (2) of Section 149 of the Act. In the case before us, the insurance company did not plead collusion between the claimants and the Insured and there is no order passed by the Tribunal allowing the insurance company to contest the claim on merits. As a matter of fact, the insurance company did not make any prayer to the Tribunal to allow it to contest the claim on all or any of the grounds available to the insured. Not having done so before the Tribunal, we are of the view that the insurer cannot be allowed to challenge the award on merits for the first time in appeal before this Court. The application filed by the appellant u/s 170 of the Act seeking permission to contest the claim on merits itself is, thus, misconceived and not maintainable as such a plea could only be made before the Tribunal and not before this Court as is clear from the plain language of the section.

13. Thus, it is well-settled that when permission of the Tribunal to contest the claim on merits had not been obtained as per requirement, the insurer cannot be permitted to challenge the award on merits.

14. Further, Chapter XI of the Act, providing compulsory insurance of vehicles against third party risks is a social welfare legislation to extend relief by compensation to victims of accidents caused by use of motor vehicles. The provisions of compulsory insurance coverage of all vehicles are with this paramount object and the provisions of the Act have to be so interpreted as to effectuate the said object.

15. Section 149 of the Act provides as follows;

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

(1) x x x (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 or 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) x x x (i) x x x (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 disqualifications;

16. 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 licence 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. The Apex Court in Narcinva V. Kamat and Another Vs. Alfredo Antonio Doe Martins and Others, observed;

When the Insurance Company complains of a breach of the term of contract, which would permit it to disown its liability under the contract of insurance, the burden is squarely on the Insurance Company to prove that the breach has been committed by the other party to the contract. The test in such a situation would be ''who would fail, if no such evidence is led''. With this principle of law in view, the evidence has to be judged. Merely non-production of licence or non-examination of the driver of the vehicle is not enough nor any adverse inference can be drawn against the person holding that because of non-examination of the driver or non-production of the licence, the burden is discharged by a mere question in cross examination nor the owner is under any obligation to furnish the evidence so as to enable the Insurance Company not to wriggle out its liability under the contract of insurance.

18. In a plethora of cases, the Apex Court and various High Courts have held that if there is a condition in the insurance policy that only a licensed driver is to drive the vehicle, the insurance company would not be liable in case there is a breach.

19. There could be no doubt that in order to escape liability, not only it should be proved that the driver of the vehicle was not having a licence at the time of the accident, but also the insurance company should prove that the driver was disqualified from holding or obtaining a licence or never had any licence at all. Merely proving that on the date of the accident, the driver did not have a licence, is not enough to hold that the insurance company is not liable for claim. The onus of proving that the driver of the vehicle never had a licence or was disqualified from holding a licence is on the insurance company.

20. In this regard, the Tribunal held as under;

The counsel for insurance company referred to the cross examination of RW1/ driver of offending vehicle and Section 14 of the Act and argued that driving licence of respondent No. 1 should be treated as a fake driving licence as RW1 deposed that it was valid upto 2008 after its renewal in 2003. He placed reliance on cross examination of RW 1 wherein he deposed that he got renewed his driving licence from Anand Vihar authority. He argued that in the year 1992 Anand Vihar Authority was not in existence. On perusal of file I find that insurance company got driving licence of Jahdish verified from Investigator Sh. Bhupinder Shyam from Anand Vihar Authority and he proved his report as Ex.R3W1/1. Sh. Bhupinder Shyam or any person from authority was not examined to prove that driving licence of the respondent No. 1 was fake. In fact Ex.R3W1/3 also contained that the driving licence might have been issued from licencing authority at Loni Road. The record of licencing authority Loni Road could not be examined.

21. It is clear from the above discussion that when the Insurance Company takes the plea that it is not liable to pay compensation or to indemnify the insured as the driver was not holding a valid licence for driving the vehicle on the date of the accident and the vehicle was being driven in breach of the terms of the policy, the Insurance Company has to discharge the burden by placing legal and cogent evidence before the Tribunal see Narcinva V. Alfredo (supra) : and the Division Bench cases of this Court in Shahzadibai Vs. Babukhan and Others,

22. As per trial court record on 28th April, 2006, Sh. S.K. Mishra, Motor Licensing

Officer, Anand Vihar Authority has appeared before it. Sh. Mishra submitted that Anand Vihar Authority came into existence in the year 1993 whereas as per licence number, it has been issued in the year 1992. He further submitted that this licence must have been issued from Loni Authority and report regarding this licence should be called from Motor Licensing Officer, Loni Road. In view of this, Sh. Mishra was discharged.

23. Counsel for the appellant sought an adjournment to summon Motor Licensing Officer from Loni Authority.

24. On 24th July, 2006, Sh. Mukesh Dayal from the office of Motor Licensing Officer, Loni Authority appeared and he submitted that wrong particulars have been supplied to the Authority. On this, the appellant counsel closed the evidence of appellant/Insurance Company and thereafter the matter was adjourned for final arguments.

25. There is nothing on record to show that thereafter, any effort made by the appellant/Insurance Company to furnish correct particulars to the Loni Authority or it summoned any record from that Authority.

26. Moreover, from the trial court record, it is apparent that one letter dated 14th February, 2006 has been placed on record signed by Motor Licensing Officer, Loni Road, Delhi stating that;

There is no record available of DL No. C-92051777 so far as this zone is concerned.

27. In the present case, apart from taking the plea in the written statement that driver of the offending vehicle was not holding a valid and effective driving licence, the appellant did nothing to substantiate that the driver at the pertinent time, was not having a valid driving licence. The Insurance Company has not examined any witness to prove the same. Thus, the contention regarding the fake driving licence made by the appellant counsel is rejected.

28. Since no permission u/s 170 of the Act has been obtained by the appellant, this Court cannot consider the plea with regard to disability being not more than 10% as argued by learned Counsel for appellant since it goes to the merits of the case.

29. Even otherwise, document Ex.PW1/1 shows that respondent No. 1 herein, was admitted in the hospital on 21.01.04 and discharged on 06.02.04. He was diagnosed compound grade third bone fracture in tibia and fibula. Moreover, respondent No. 1 has also filed disability certificate which shows that he became disabled by 65 %. The board of doctors of LSB Hospital, Khichripur opined his physical impairment in respect of both bones of right leg.

30. Thus, the tribunal has rightly assessed the physical disability of the respondent No. 1.

31. In view of the above discussion, I do not find any infirmity or illegality in the

impugned judgment passed by the Tribunal. The compensation awarded by the Tribunal is just, fair and equitable.

32. Accordingly, the present appeal filed by the Appellant is hereby dismissed with the costs of Rs. 5,000/-.

33. Appellant is directed to deposit the costs of Rs. 5,000/- by way of a cross-cheque in the name of Registrar General of this Court within four weeks from today.

34. List on 21st October, 2008 for compliance.

35. Trial Court record be sent back.