

(2007) 12 GAU CK 0008
In the Gauhati High Court

United India Insurance Co. Ltd.

APPELLANT

Vs

Suresh Ram and Another

RESPONDENT

Date of Decision : 14-12-2007

Acts Referred:

Motor Vehicles Act, 1988 — Section 149, 173, 181

Citation : (2009) ACJ 1472

Hon'ble Judges : T. Vaiphei, J

Bench : Single Bench

Final Decision : Allowed

Judgement

T. Vaiphei, J.—This appeal u/s 173 of the Motor Vehicles Act, 1988 is directed against the judgment and award dated 20.6.2007 passed by the Motor Accidents Claims Tribunal, Shillong awarding a compensation of Rs. 5,62,400 together with interest at the rate of 7.5 per cent per annum in favour of claimant-respondent for the death of her husband in a vehicular accident. The award further directed that the compensation with the interest be paid within 45 days of the receipt of the judgment and award.

2. The material facts leading to the filing of the appeal may be noticed at the very outset. The vehicular accident was alleged to have occurred when on 22.1.2006 at about 12.30 p.m., one Dwarika Ram, husband of the claimant, was hit by one Maruti van bearing registration No. ML 05-C 9652 due to rash and negligent driving of the driver. Dwarika Ram instantly died on the spot. He was 42 years old at the time of the accident and is survived by his wife (the claimant) and his two children. The deceased was claimed to be self-employed at the time of his death and was earning Rs. 6,000 per month. The claim petition filed by the claimant-respondent demanded a compensation of Rs. 6,36,000 for the death of her husband. The Motor Accidents Claims Tribunal entertained the petition and issued notice to the owner and driver of the offending vehicle as well as to the insurer, which is the appellant herein. The claim petition was resisted by the insurer and the insured by filing separate written statements. On the basis of

pleadings of the parties, the Tribunal framed the following issues:

- (1) Whether the instant claim case as filed by the attorney Mr. Suresh Ram on behalf of the legal heirs of the deceased is maintainable?
- (2) Whether the accident was caused due to rash and negligent driving of the driver of Maruti van No. ML 05-C 9652?
- (3) Whether the OP/United India Insurance Co. Ltd. is liable to pay compensation to the claimant and to indemnify the OP/owner of Maruti van No. ML 05-C 9652?
- (4) To what amount is the claimant entitled to as compensation?

3. To substantiate her case, claimant represented by her attorney examined as many as four witnesses, while the owner-respondent examined three witnesses to contest the claim petition. She, however, did not examine herself in the witness-box. None was examined on behalf of the insurer, though oral arguments were advanced on its behalf which was supported by written submissions. At the conclusion of the hearing, the Tribunal passed the impugned judgment and award, the correctness whereof is under challenge in this appeal. Attacking the impugned judgment, Mrs. R.D. Mazumdar, the learned Counsel for the insurer, submits that the learned Member of the Tribunal has completely overlooked the well established principles of *res ipsa loquitur* (the facts speak for themselves) in appreciating the evidence established on record; it is not at all necessary for the insurer to adduce evidence if it can prove its case from the evidence of the witnesses examined on behalf of the claimant-respondent and other materials on the record. So understood, contends the learned Counsel, there was no evidence on behalf of the owner of the vehicle to prove that she had handed over the offending vehicle to a driver with a valid driving licence at the time of accident and that, on the contrary, there is ample evidence to show that the owner of the offending vehicle had handed over the vehicle in question to a driver, namely, L. Kharbishnop, OPW 3, with the knowledge that he did not possess a valid driving licence and that the introduction of the story of the other driver, namely, Thorat Singh Kharsati, OPW 2, was an afterthought to escape her liability to satisfy the award and, conversely, to wrongly saddle such liability upon the appellant insurance company. Finally, it is contended by learned Counsel that when OPW 1, son of the owner of the offending vehicle, himself exhibited the policy of insurance showing the clause which was violated by the owner, no further proof is required for the appellant to show that the owner consciously committed breach of the policy condition. To buttress her contention, learned Counsel for the appellant, takes me to a decision of the Apex Court in *Kashiram Yadav v. Oriental Fire & Genl. Ins. Co. Ltd.* 1989 ACJ 1078 (SC).

4. On the other hand, Mr. V.K. Jindal, the learned senior counsel for the owner-respondent, supports the impugned award and submits that the burden of proving that the owner of the vehicle knowingly handed over the vehicle to a driver having no valid driving licence is, indeed, heavy; the evidence adduced on behalf of the owner, namely, OPWs 1, 2, 3 and 4 clearly established that the

owner had handed over the offending vehicle to an authorised driver, OPW 2 and not to L. Kharbishnop, OPW 3, who caused the accident and that the owner cannot, therefore, be held liable for the acts of a third party. In other words, the contention of the learned senior counsel is that it is only when the insured himself knowingly hands over the vehicle to a person who does not hold a valid driving licence can it be said that he is guilty of breach of policy condition: it must be established by the insurance company that the breach was on the part of the insured and that it was the insured who was guilty of violating the contract of insurance, otherwise the insurer cannot escape from its obligation to indemnify the insured. It is further submitted by the learned senior counsel that the insurance company has also failed to produce the policy or led any evidence to show that there was breach of policy terms and conditions. The learned senior counsel for the owner-respondent heavily relies upon the decisions such as *Narcinva V. Kamat v. Alfredo Antonio Deo Martins* 1985 ACJ 397 (SC); *Skandia Insurance Co. Ltd. v. Kokilaben Chandravadan* 1987 ACJ 411 (SC); *National Insurance Co. Ltd. v. Jugal Kishore* 1988 ACJ 270 (SC); *Pandurang Jivaji Apte Vs. Ramchandra Gangadhar Ashtekar (Dead) by Lrs. and Others*, ; *Sohan Lal Passi Vs. P. Sesh Reddy and others*, ; *National Insurance Co. Ltd. Vs. Swaran Singh and Others*, and *National Insurance Co. Ltd. v. Ishar Das Madan Lal* 2007 ACJ 1623 (SC), in support of his various contentions. He, therefore, strongly urges this Court to hold the appellant insurance company liable to satisfy the award and exonerate the owner-respondent from any liability to that end.

5. In my opinion, the law regarding the liability of the insurer to indemnify the insured is no longer *res Integra*; the difficulty lies in applying the settled law to the facts of a particular case. As early as 1989, the Supreme Court in *Kashiram Yadav v. Oriental Fire & Genl. Ins. Co. Ltd.* 1989 ACJ 1078 (SC), in paras 5, 6 and 7 held thus:

(5) Counsel for the appellants, however, submitted that insurer alone would be liable to pay the award amount even though the tractor was not driven by a licensed driver. In support of the contention, he placed reliance on the decision of this Court in *Skandia Insurance Co. Ltd. v. Kokilaben Chandravadan* 1987 ACJ 411 (SC). We do not think that that decision has any relevance to the present case. There the facts found were quite different. The vehicle concerned in that case was undisputedly entrusted to the driver who had a valid licence. In transit the driver stopped the vehicle and went to fetch some snacks from the opposite shop leaving the engine on. The ignition key was at the ignition lock and not in the cabin of the truck. The driver had asked the cleaner to take care of the truck. In fact the driver had left the truck in care of the cleaner. The cleaner meddled with the vehicle and caused the accident. The question arose whether the insured (owner) had committed a breach of the condition incorporated in the certificate of insurance since the cleaner operated the vehicle on the fatal occasion without driving licence. This Court expressed the view that it is only when the insured himself entrusted the vehicle to a person who does not hold a driving licence, he could be said to have committed breach of the condition of the

policy. It must be established by the insurance company that the breach is on the part of the insured. Unless the insured is at fault and is guilty of a breach of condition, the insurer cannot escape from the obligation to indemnify the insured. It was also observed that when the insured has done everything within his power inasmuch as he has engaged the licensed driver and has placed the vehicle in his charge with the express or implied mandate to drive himself, it cannot be said that the insured is guilty of any breach.

(6) We affirm and reiterate the statement of law laid down in the above case. We may also state that without the knowledge of the insured, if by driver's acts or omission others meddle with the vehicle and cause an accident, the insurer would be liable to indemnify the insured. The insurer in such a case cannot take the defence of a breach of the condition in the certificate of insurance.

(7) But in the present case, the onus of the insurer has been discharged from the evidence of the insured himself. The insured took a positive defence stating that he was not the owner of the vehicle since he had already sold the same to a third party. This has not been proved. Secondly, he took a defence stating that vehicle at the relevant time was driven by a licensed driver, Gaya Prasad, PW 2. This was proved to be false. There is no other material even to indicate that the vehicle was entrusted to the licensed driver on the date of the fatal accident. With these distinguishing features in the present case, we do not think that ratio of the decision in *Skandia Insurance Co. Ltd. v. Kokilaben Chandravadan* 1987 ACJ 411 (SC), could be called to aid the appellants.

6. In *National Insurance Co. Ltd. Vs. Swaran Singh and Others*, , a three-Judge Bench of the Apex Court approved the aforesaid observations and after reviewing the various authorities, has summarized the legal positions, the relevant portions whereof are as follows:

(102) (iii) The breach of policy conditions, e.g., disqualification of driver or invalid driving licence of the driver, as contained in Sub-section (2) (a) (ii) of Section 149, has to be proved to have been committed by 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 the "breach" on the part of the owner of the vehicle, the burden of proof wherefor would be on them.

(v) The court cannot lay down any criteria as to how the said burden would be discharged, inasmuch as the same would depend upon the facts and

circumstances of each case.

(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 of the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. 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 insurer u/s 149(2) of the Act.

On the question of burden of proof, it may also be relevant to reproduce para 63 of the same judgment, which is as follows:

(63) Apart from the above, we do not intend to lay down anything further, i.e., degree of proof which would satisfy the aforementioned requirement inasmuch as the same would indisputably depend upon the facts and circumstances of each case. It will also depend upon the terms of contract of insurance. Each case may pose different problem which must be resolved having regard to a large number of factors governing the case including conduct of parties as regards duty to inform, correct disclosure, suppression, fraud on the insurer, etc. It will also depend upon the fact as to who is the owner of the vehicle and the circumstances in which the vehicle was being driven by a person having no valid and effective licence. No hard and fast rule can, therefore, be laid down. If in a given case there exists sufficient material to draw an adverse inference against either the insurer or the insured, the Tribunal may do so. The parties alleging breach must be held to have succeeded in establishing the breach of conditions of contract of insurance on the part of the insured by discharging its burden of proof. The Tribunal, there cannot be any doubt, must arrive at a finding on the basis of the materials available on records.

7. In the instant case, the first point for determination is as to whether there is sufficient evidence to show that the owner-respondent handed over the charge of the offending vehicle to the custody of a driver who did not hold a valid driving licence at the time of the accident? The case of the owner is that she handed over the offending vehicle to her regular driver, namely, Thorat Singh Kharsati, OPW 2, to buy some vegetables at Laitumkhrah Bazaar and was told by the latter that on the way, he gave a lift to L. Kharbishnop and on reaching the bazaar, he left the key of the vehicle and went for shopping. She further claimed that this driver told her that when he came back, he found that the vehicle met with an accident in which one person was hit resulting in his death. It is interesting to note that the owner of the vehicle did not examine herself in the witness-box. However, three witnesses were examined on her behalf to substantiate her case. OPW 1 is her son, who deposed that it was he who sent Thorat Singh Kharsati, OPW 2, to the market to purchase vegetables by handing over the vehicle (Maruti van). This witness admitted in cross-examination that in the written

statement filed by his mother, it was nowhere stated therein that he was the one who had handed over the vehicle to OPW 2 to purchase vegetables from Laitumkhrah Bazaar. The suggestion made by insurance company to him in the cross-examination that it was L. Kharbishnop, OPW 3, who drove the vehicle from their residence to bazaar on 22.1.2006, is denied by him. He admitted that neither his statement nor the statement of Thorat Singh Kharsati was recorded by the police. Thorat Singh Kharsati, OPW 2, in his evidence deposed that on 22.1.2006, there was a Church function in the house of the owner-respondent and that on that day, at about 12 noon, the owner of the vehicle (Bahdeng) sent him along with Maruti van to buy some vegetables from Laitumkhrah Bazaar and on the way, he met OPW 3, gave him a lift and brought the vehicle to Laitumkhrah Bazaar and after parking the vehicle, left the same with OPW 3. He further deposed that after he returned from the market, he found that the vehicle met with an accident, hit one person, who subsequently died. He, among others, deposed that it was his mistake to have left the key of the vehicle in the hands of another person. In his cross-examination, he did not know the full name of his employer and that though he did not work on Sunday, he was at Bahdeng's house on that particular day. He further deposed that when he returned to the vehicle after making the purchase, the injured victim, the vehicle and the police were there, that they thereafter took the injured to hospital and that he told the police that he was the driver of the vehicle. Though he initially claimed that the police also recorded his statement, he later on retracted his claim. He also testified that he did not inform the police that he was the driver of the vehicle.

8. OPW 3 deposed that on 22.1.2006 at about 12 noon, while he was standing at Jingkieng Point, he saw Maruti van of his uncle proceeding towards Nongthymmai side, driven by OPW 2 and he took a lift, whereafter they came to Laitumkhrah Bazaar. He further deposed that the driver parked the vehicle and left the key in his hands and went for marketing and that after the driver left, some people asked him to back the vehicle, which he obliged as the key was with him and in the process hit one person from behind, who got injured and was taken to Nazareth Hospital where he died. The witness further testified that later the police came and took him to police station where he told the police that OPW 2 was the driver of the vehicle. He also deposed that he pleaded guilty to the charge u/s 181 of Motor Vehicles Act before the Magistrate and was convicted and sentenced to pay a fine of Rs. 500, which he paid. In cross, he revealed that when he took the injured to hospital, neither the police nor OPW 2 had arrived. It will also be instructive to go through the evidence of the IO of the case, who was examined as CW 4. He deposed that he had arrested the driver who was driving the offending vehicle, L. Kharbishnop and released him on bail later on. In his cross-examination, he disclosed that by the time he reached the PO, the deceased was not there as he was already removed to the hospital. He also admitted that the driver arrested by him was a minor and that he did not record the statement of the owner of Maruti van, but on enquiry from her, he came to

know that the said accused driver had taken the vehicle without her knowledge. He also admitted that he did not enquire from the owner of the vehicle if there was another regular driver, Thorat Singh Kharsati. In his cross-examination by the insurance company, he deposed that he had recorded the statement of OPW 3, who stated that he was driving Maruti van when his aunty, who was the owner of the van, sent him to Laitumkhrah Bazaar to make some purchases and that when he made enquiry from the owner of Maruti van, she did not tell him who was the authorised driver of the vehicle. He further revealed in the cross-examination that he did not remember having met OPW 2 and did not also examine him.

9. From the evidence aforesaid, the admitted position of the parties is that it was OPW 3, who caused the vehicular accident resulting in the death of the deceased, nay he was the one who was the person driving the offending vehicle at the time of the accident and further that he did not hold a valid driving licence at the time of the accident. There is thus a rebuttable presumption that he was the one entrusted by the owner to drive the offending vehicle at the time of the accident. However, it is the case of the owner that he was never authorised by her to drive the vehicle and it was OPW 2, to whom she had handed over the vehicle and that if her regular driver, OPW 2, had handed over her vehicle without her knowledge to a third person and if a third person while driving the vehicle unauthorisedly had caused the accident, she cannot be held liable for the compensation. The question is whether the burden of proving such assertion of fact lies on the owner of the vehicle or on the insurer? At this stage, the law may be restated that proof of fact depends upon the degree of probability of it having existed. The standard required for reaching the supposition is that of a prudent man acting in any important matter concerning him. In reaching the conclusion, the court can use the process of inference to be drawn from facts produced or proved. To prove that the vehicle was handed over by her to an unauthorised driver, i.e., OPW 2 and not to an unauthorised person like the OPW 3, as already noted, these two gentlemen along with her son, OPW 1, were examined on her behalf. However, the following material omissions and discrepancies can be noticed from their evidence:

(a) The IO of the case, namely, CW 4, had never recorded the statement of the owner of the vehicle, nor did he ever enquire from her as to whether she had a regular driver by the name of Thorat Singh Kharsati. He also disclosed in his cross-examination that he had recorded the statement of OPW 3 stating that he was driving the van when the owner of the vehicle sent him to Laitumkhrah Bazaar to make some purchases and that when he made enquiry from the owner of Maruti van, she did not tell him who was the authorised driver of Maruti van.

(b) The statement of OPW 2 that when he returned to the vehicle after making the purchases, the injured victim, the vehicle and the police were there, has been contradicted by OPW 3 and CW 4 in their evidence: OPW 3 deposed in cross that when he took the injured to the hospital, neither the police nor OPW 2 had

arrived, while CW 4 testified in cross that when he reached the place of occurrence, the accident had already occurred and that the deceased was also not at the place of occurrence as he was already removed to hospital.

(c) Though the incident took place on 22.1.2006, the F.I.R., which was lodged on 27.1.2006, on the basis of enquiry made by the IO, CW 4, did not mention anything about the vehicle driven by OPW 2 hitting the injured from behind when he attempted to back the vehicle. On the contrary, F.I.R. specifically mentioned that one Maruti van being driven by L. Kharbishnop, while proceeding from Laitumkhrah towards bazaar side dashed against one pedestrian near the Roshan Bakery shop, which is different from the version of the insured and her witnesses that the vehicle dashed against the deceased when OPW 3 made reverse driving.

(d) The owner of the vehicle did not come forward to depose in before the Tribunal. No reason is forthcoming for not examining herself. In her written statement, she stated that the OP vehicle was handed over by her to OPW 2, but OPW 1 in his deposition deposed that it was he who entrusted the vehicle to OPW 2. Though OPW 2 stated that he did not work on Sunday, he did not explain as to how he happened to be at the house of the owner of the vehicle on that fateful Sunday.

10. In the light of the material omissions and discrepancies appearing from the evidence adduced on behalf of the claimant and the owner of the vehicle, it is difficult to believe that the owner-respondent actually handed over the vehicle in question to her regular driver possessing a valid driving licence, namely, OPW 2. On the contrary, the evidence available on record rather probabilises the case of the insurer that the vehicle was driven by OPW 3 with the authorisation of the insured and that the story set up by the insured that the vehicle was driven by OPW 2, who held a valid driving licence, is an afterthought to escape her from liability to satisfy the award and that OPW 2 was made to masquerade as the driver of the offending vehicle to hoodwink the Tribunal, in her anxiety to saddle the insurer with unnecessary and avoidable burden, into believing that there was no breach of policy condition. Though no evidence was led by the insurer, in my opinion, the burden on the insurer stands discharged from the evidence of the insured herself inasmuch as the insured took a positive defence stating that she entrusted the vehicle to OPW 2 whose subsequent act of handing over the same to OPW 3 was without her knowledge and that the vehicle at the relevant time was driven by a third person unauthorisedly, but there is no credible evidence to substantiate her defence. Judging from the yardstick of probability, it is not possible, on the materials on record, to believe that the insurer ever handed over the offending vehicle to OPW 2. On the contrary, the case of the insurer that vehicle was entrusted by the insured to OPW 3 to purchase some vegetables from Laitumkhrah Bazaar with the knowledge that the latter did not have a valid driving licence and was also a minor, stands proved. The question of fundamental breach will also not arise due to the admission of OPW 3 himself in his deposition that he did not know driving, but had little idea of driving. Having little idea of

driving, he ought not to have driven the vehicle by undertaking the complicated act of reverse driving, that too, in a parking place. On the proven facts of the case, which is nothing but *res ipsa loquitur*, the contention of the learned senior counsel for the insured that the insurer was required to lead independent evidence and failing which, it could not be held to prove its case, cannot be accepted. To concede to such submission will amount to ignoring the glaring evidence on record and of stretching the concept of burden of proof a bit too far.

11. Much emphasis is, however, laid by the learned senior counsel for the insured, on Exhs. 4 and 4/1, which are the order dated 29.5.2006 of the learned Magistrate convicting OPW 3 u/s 181 of the Act on his plea of guilt to the charge and the application filed by him to that effect respectively, to show that OPW 3 did not hold a valid driving licence at the time of the accident and that he was not authorised by the insured to drive the offending vehicle at the time of the accident. This contention of learned senior counsel is attractive at the first blush but cannot stand closer scrutiny for more than one reason. In the first place, the plea taken by the OPW 3 in Exh. 4/1 is not consistent with the F.I.R. and is also contradictory to the evidence of CW 4 in his cross-examination on behalf of the insurer that OPW 3 had stated in the statement recorded by him that he was driving Maruti van when his aunty, who was the owner of the said van, sent him to Laitumkhrah Bazaar to make some purchase. Secondly, the application in Exh. 4/1 was filed by OPW 3 only on 29.5.2006, while the accident had already taken place on 22.1.2006. Moreover, this evidence is too small a peg to dilute the material omissions and the discrepancies found in the evidence adverted to earlier, which seriously cast doubt on the story set up by the insured.

12. On the contention of the learned senior counsel for the insured that when the insurer did not even file a copy of the insurance policy, it should not be allowed to take shelter behind the abstract doctrine of burden of proof, I do not find any merit in this contention either. Whether there was a policy of insurance covering other liability in addition to the statutory liability is certainly a matter within the knowledge of the insured. If the insured desired the Tribunal to hold that his vehicle was insured for additional liability, she ought to have produced the same by filing a copy of such policy of insurance. After all, if no evidence is at all led by the insurer, which categorically denies the existence of such policy of insurance and if the insured fails to lead evidence to prove the existence thereof, it is she who would fail. Furthermore, it is never the pleaded case of the insured either in her written statement or in her evidence that she took a policy of insurance to indemnify her from any liability in excess of statutory liability. If such plea were taken by her, the Tribunal could have required the insurer to produce such a document. I have read and re-read the decision in Jugal Kishore's case 1988 ACJ 270 (SC), cited by the learned senior counsel, but I am not able to persuade myself to hold that this decision is applicable to all and sundry cases. It must be noted that at the time when that decision was rendered by the Supreme Court, there was no requirement for the insurer to initially indemnify the insured and thereafter recover the amount from the insured even though it was held not

liable to satisfy the award. However, in view of the subsequent decisions of the Supreme Court ultimately approved in National Insurance Co. Ltd. Vs. Swaran Singh and Others, , directing the insurer to make such initial payment, the proposition of law that in all cases where the insurance company wishes to take a defence in a claim petition that its liability is not excess of the statutory liability, it should file a copy of the insurance policy along with its defence, appear to have lost its sting. After all, in my considered view, such a course of action was seemingly insisted upon to ensure that a claimant is not deprived of his due compensation in the event of protracted forensic battle between the insurer and the insured on such issue.

13. The upshot of the foregoing discussion is that the appeal is allowed. The impugned judgment and award is accordingly set aside. However, in accordance with the settled law, the appellant shall initially satisfy the award and, thereafter, if so advised, recover the same from the insured. It may be noted that this Court by the order dated 20.11.2007 has directed the appellant insurer to deposit 50 per cent of the awarded amount excluding the statutory deposit for payment to the claimant within 3 weeks. If this amount has already been deposited, the remaining amount shall now be deposited by the appellant within 45 days of the receipt of this judgment. If no such deposit has been made, the same shall be deposited by appellant together with the remaining amount due within the same period. On the peculiar facts of this case, I pass no order as to costs.