
(2019) 04 J&K CK 0107

In the Jammu And Kashmir High Court

Case No : MA No. 379 Of 2017, IA No. 01 Of 2017

United India Insurance Co.Ltd

APPELLANT

Vs

Saleema Bibi And Others

RESPONDENT

Date of Decision : 15-04-2019

Acts Referred:

Motor Vehicles Act, 1988 — Section 149(2), 149(2)(a)(ii), 163A, 165, 166, 168, 168(3), 174

Citation : (2019) 04 J&K CK 0107

Hon'ble Judges : Sanjeev Kumar, J

Bench : Single Bench

Advocate : Rupinder Singh, Prince Khanna

Judgement

1. This appeal by the United India Insurance Company Ltd. is directed against the award dated 19.08.2017 passed in File No.

674 titled "Saleema Bibi v. Vijay Kumar and others" whereby respondent No.1-claimant has been held entitled to the compensation of Rs.3,00,000/- to be paid by the appellant-insurance company along with interest @ 7.5 % per annum from the date of institution of the petition till realization of the whole amount. The appellant-insurance company has also been given liberty to recover the entire amount paid to the respondent No.1 from the owner of the offending vehicle, i.e. respondent No.3.

2. The appellant has not assailed the impugned award on the quantum of the compensation awarded to the respondent No.1 but is aggrieved of the award in so far as it holds the appellant insurance company liable to indemnify the owner and pay compensation amount to the claimant. This is challenged by the appellant on the ground that the driver of the offending vehicle who because of rash and negligent act injured respondent no.1-claimant, was not holding a valid and effective driving licence at the time of alleged accident.

3. On the basis of the pleadings of the parties, learned Tribunal framed four

issues which are reproduced as under:-

i. Whether an accident took place on 29.09.2011 at about 13:15 hrs, at near Kabir Basti, Jammu, due to rash and negligent driving of the vehicle, bearing No.JK02AN-2727, by its driver as a result of which the petitioner-Saleema Bibi received grievous injuries and has been disabled?

..OPP

ii. If issue No.1 is proved in affirmative, whether petitioner is entitled to compensation, if so to what amount and from whom?

..OPP

iii. Whether the offending vehicle was being driven in violation of terms and conditions of policy of insurance at the time of the accident and, therefore, the respondent insurance company is not liable to pay the compensation?.....

OPR-3.

iv.

Relief.....

O.P.

Parties.

4. Learned counsel appearing for the parties before me have only debated the findings of the Tribunal on issue No.3. On behalf of the appellant-insurance company, Mr. Rupinder Singh, learned Advocate urges that since Tribunal, on the basis of the evidence before it, had found that the driving licence possessed by the driver of the offending vehicle fake, as such, no liability could have been fastened on the appellant-insurance company. He has made feeble attempt to find fault with the manner in which compensation under different heads has been awarded by the Tribunal but could not substantiate it during the course of his arguments. Reliance was placed by Mr. Rupinder Singh on the judgment of Supreme Court in the case of United India Insurance Co.Ltd. through its Divisional Manager v. Sujata Arora and others, 2013(3)ACC 198 to contend that in a case where it is found that the offending vehicle was being driven by the driver who was either holding no licence or a fake licence then it would amount to violation of the terms and conditions of the policy and in that circumstances, no liability can be fastened on the insurance company.

5. Per contra, learned counsel for the respondent No.1 relies upon the judgment of Supreme Court rendered in the case of Shamanna and another v. Divisional Manager, the Oriental Insurance Co.Ltd. and others, AIR 2018 SC 3726 and recent judgment in the case of Singh Ram v. Nirmala and others 2018(3) SCC 800.

6. Having heard learned counsel for the parties and perused the record, the only question that begs determination in this case is; whether in a Motor Accident Claim's case where offending vehicle was being driven by the driver, who was either holding no licence or a fake licence, it would amount to violation of the terms and conditions of the policy absolving insurance company of its liability to

indemnify the insured by making payment of compensation to the injured or dependents of deceased as the case may be?. The judgment in the case of Sujata Arora (supra), which is rendered by the Bench of two Hon?ble Judges of the Supreme Courts lends support to the arguments raised by the appellant insurance company. What was held by the Supreme Court in the aforesaid judgment is succinctly contained in paragraph No.8 which, for expediency, is reproduced as under:-

"8. We are also fortified in our view in the light of the two judgments of this Court reported in 2007(4) Scale 36; 2007 (2) T.A.C, 398"National Insurance Co.Ltd. v. Laxmi Narain Dhut" and 2011(5) Scale 494: 2001 (3) T.A.C. 12"Jawahar Singh v. Bala Jain and others", wherein it has been held that in case it is found that the offending vehicle was driven by driver who was either holding no licence or a fake licence, then it amounts to violation of terms and conditions of policy and in that circumstances, no liability can be fastened on the Insurance Company."

7. But the view of the Supreme Court taken in the aforesaid case is not followed by the Supreme Court itself in the latter case. In the case of Singh Ram v. Nirmala and others (supra), three Judges Bench deliberated on the issue and concluded that in case it is proved that the driver of the offending vehicle was possessing a fake licence, the Insurance company is not absolved of its liability towards third party but would be entitled to recover the same from the owner who is found to have breached the terms and conditions of the policy by engaging the service of the driver who was not holding a valid driving licence. The observation by the Supreme Court came to be made in the light of law laid down by the Supreme Court in case of National Insurance Co.Ltd. v. Swarn Singh, (2004) 3 SCC 297.

The conclusions recorded by the Supreme Court in the case of Swarn Singh (supra) are contained in paragraph No. 110, which for facility of reference, is reproduced hereunder:-

"110. The summary of our findings to the various issues as raised in these petitions are as follows:

(i) Chapter XI of the Motor Vehicles Act, 1988 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.

(ii) Insurer is entitled to raise a defence in a claim petition filed under Section 163 A or Section 166 of the Motor Vehicles Act, 1988 inter alia in terms of Section 149(2)(a)(ii) of the said Act.

(iii) The breach of policy condition e.g., disqualification of driver or invalid driving

licence of the driver, as contained in sub-section (2)(a)(ii) of section 149, have to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time.

(iv) The insurance companies are, however, with a view to avoid their liability must not only establish the available defence(s) raised in the said proceedings but must also establish 'breach' on the part of the owner of the vehicle; the burden of proof wherefor would be on them.

(v) The court cannot lay down any criteria as to how said burden would be discharged, inasmuch as the same would depend upon the facts and circumstance 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 on the condition of driving licence is/ are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insured under section 149(2) of the Act.

(vii) The question as to whether the owner has taken reasonable care to find out as to whether the driving licence produced by the driver, (a fake one or otherwise), does not fulfil the requirements of law or not will have to be determined in each case.

(viii) If a vehicle at the time of accident was driven by a person having a learner's licence, the insurance companies would be liable to satisfy the decree.

(ix) The claims tribunal constituted under Section 165 read with Section 168 is empowered to adjudicate all claims in respect of the accidents involving death or of bodily injury or damage to property of third party arising in use of motor vehicle. The said power of the tribunal is not restricted to decide the claims inter se between claimant or claimants on one side and insured, insurer and driver on the other. In the course of adjudicating the claim for compensation and to decide the availability of defence or defences to the insurer, the Tribunal has necessarily the power and jurisdiction to decide disputes inter se between insurer and the insured. The decision rendered on the claims and disputes inter se between the insurer and insured in the course of adjudication of claim for compensation by the claimants and the award made thereon is enforceable and executable in the

same manner as provided in Section 174 of the Act for enforcement and execution of the award in favour of the claimants.

(x) Where on adjudication of the claim under the Act the tribunal arrives at a conclusion that the insurer has satisfactorily proved its defence in accordance with the provisions of section 149(2) read with sub-section (7), as interpreted by this Court above, the Tribunal can direct that the insurer is liable to be reimbursed by the insured for the compensation and other amounts which it has been compelled to pay to the third party under the award of the tribunal. Such determination of claim by the Tribunal will be enforceable and the money found due to the insurer from the insured will be recoverable on a certificate issued by the tribunal to the Collector in the same manner under Section 174 of the Act as arrears of land revenue. The certificate will be issued for the recovery as arrears of land revenue only if, as required by sub-section (3) of Section 168 of the Act the insured fails to deposit the amount awarded in favour of the insurer within thirty days from the date of announcement of the award by the tribunal.

(xi) The provisions contained in sub-section (4) with proviso thereunder and sub-section (5) which are intended to cover specified contingencies mentioned therein to enable the insurer to recover amount paid under the contract of insurance on behalf of the insured can be taken recourse of by the Tribunal and be extended to claims and defences of insurer against insured by relegating them to the remedy before regular court in cases where on given facts and circumstances adjudication of their claims inter se might delay the adjudication of the claims of the victims."

8. In the backdrop of the aforesaid legal position adumbrated in the judgment of Swarn Singh's case (supra), it can be authoritatively held that 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. And if the insurance company intends to avoid its liability towards insured, it 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. The onus to prove the breach on the part of the owner of the vehicle is on the insurer which it must discharge if it intends to avoid its liability. Not every breach of policy by the insured would give right to the insurer to avoid its liability towards the insured but only breach of such condition as is so fundamental as is found to have contributed to the cause of accident. As held by the Supreme Court in case of Swarn Singh (supra), the question as to whether the owner has taken reasonable care to find out as to whether the driving licence produced by the driver was fake one or otherwise, will have to be determined in each case.

9. In the backdrop of the aforesaid legal position when matter in hand is examined, this court finds no such plea either taken by the appellant-insurance company in its objections filed before the Tribunal nor there is any evidence

brought on record to substantiate it. The finding of the Tribunal with regard to the driver of the offending vehicle not possessing valid and effective driving licence are also tentative in nature. The findings on issue No.3 given by the Tribunal deserves to be reproduced which are as under:-

"As already noticed whilst returning the finding on issue No.2, here before, that although the insurance company has disputed its liability to pay the compensation on the ground that the vehicle in question was being driven in violation of the conditions of the insurance policy, at the time of mishap, yet no such violation has been brought to the notice of this Tribunal during enquiry proceedings. That being so, the fact that the respondent-insurance company has failed to discharge the onus of proof placed on it with respect to the issue under consideration, can hardly be over emphasized. Therefore, the issue no.3 is decided against the respondent-insurance company.

10. While the Tribunal was not very specific as to whether respondent No.3, appellant herein had sufficiently discharged its burden to prove the issue, which was ultimately held not proved by the appellant insurance company, yet, while returning findings on issue No.4, Tribunal held the company liable to pay compensation to the respondent No.1 and then recover it from the owner of the offending vehicle. There is contradiction of sorts in the findings, returned by the Tribunal with regard to the issue No.3 and issue No.4.

11. Be that as it may, even if we accept the plea of the appellant insurance company that the driver of the offending vehicle, at the time of accident, was holding a fake licence, the appellant insurance company cannot be absolved of its duties to indemnify the owner. This is so, because the appellant insurance company has not brought on record any evidence worth the name to show that the insured had not taken reasonable care to find out as to whether the driving licence possessed by the driver was fake one. In these circumstances, it cannot be held that there was deliberate breach of the terms and conditions of the policy by the insured and that the breach is so fundamental as would have contributed to the cause of accident.

12. In view of the judgment rendered by the larger Bench of the Supreme Court wherein view taken by the Supreme Court in *Swaran Singh*' case (supra) has been affirmed, law laid down in case of *Sujata Arora* (supra) cannot be held applicable to the facts and circumstances involved in this case.

13. For the foregoing reasons, I find no merit in the appeal of the appellant insurance company; the same is, accordingly, dismissed. Registry to release the awarded amount in favour of the respondent No.1-claimant after her proper verification. The shortfall, if any, shall be deposited by the appellant-insurance company within four weeks whereas excess amount, if any, which remains with the Registry after disbursement of the awarded compensation shall be refunded to the appellant insurance company through account payees cheque.