(2010) 02 AHC CK 0143

Allahabad High Court

Case No: None

National Insurance Co. Ltd	APPELLANT
Vs	
Smt. Kanti Devi and Others	RESPONDENT

Date of Decision: Feb. 26, 2010

Acts Referred:

- Motor Vehicles Act, 1988 - Section 147, 149, 163A, 165, 166

Hon'ble Judges: Sanjay Misra, J; S.P. Mehrotra, J

Bench: Division Bench

Final Decision: Dismissed

Judgement

1. This First Appeal From Order has been filed u/s 173 of the Motor Vehicles Act against the judgment and award dated 17.8.2009 passed by the Motor Accidents Claims Tribunal/Additional District Judge, Court No. 3, Aligarh M.A.C.T. No. 192 of 1999.

2. Sri A.C. Nigam appearing on behalf of the appellant Insurance Company has assailed the award by submitting that the claimants could not prove rash and negligent driving of the vehicle in question since the PW-1 Dharmendra Kumar was not an eye witness and no reliance could be placed on the first information report. He has further submitted that there was no cogent evidence on record with regard to the income of the deceased and in the absence of the driving licence the Insurance Company could not be held liable to pay the compensation.

3. We have considered the submission advanced on behalf of the appellant and perused the impugned judgment and award. The Tribunal had framed the issues and issue No. 1 was with respect to rash and negligent driving of Vehicle No. DL-1 GA-2332 on 1.4.1999 at about 5.50 p.m. near the clinic of Dr. Gyan Kumar situate in Gandhi Park. While considering the evidence it recorded that the deceased Kailash Chandra Bansal who was advocate by profession was going on his Motorcycle No. U.P. 13-A 4205 and met with the accident with the offending vehicle and because of

the injury suffered by him he died. Sri Dharmendra Kumar the son of the deceased, deposed as PW-1 and stated that the driver of the offending vehicle was caught on the spot. His cross examination was confined to the income of the deceased and his son. The Tribunal considered the first information report which was lodged on 1.4.1999 at 18.10. hours allegedly by one Raghuveer Prasad son of Omkar Prasad who stated that he was standing in front of the clinic of Dr. Gyan Kumar when he saw the deceased K.C. Bansal coming on his Kawasaki Motorcycle from the side of the bus station when the offending vehicle which was coming from the opposite direction and was driven rashly and negligently hit the Motorcycle whereupon the deceased fell down and died due to the injuries. He reported that the incident was seen by him and along with Vinod Kumar Jain and other persons they caught the driver on the spot. On the aforesaid complaint of Raghuveer Prasad written by Vinod Kumar Jain an FIR was lodged at the police station against the driver Amreek Singh of the vehicle No. DL-1 GA 2332 at police station Gandhi Park. Upon investigation chargesheet was filed. The Tribunal also took into account the site plan, the post mortem report and the technical report of the offending vehicle and came to a conclusion that the truck in question was being driven rashly and negligently and it was not proved that the deceased in any manner contributed by being negligent. He was driving on the correct side whereas the offending vehicle was in the middle of the road when it hit the Motorcycle. The Tribunal therefore found that the driver of the offending vehicle was driving rashly and negligently and answered the issue as such.

4. The Tribunal has framed issue No. 2 regarding possession of valid driving licence with the driver. While considering the aforesaid issue it considered the statement of the driver and owner and disbelieved their evidence because the claimants had produced photocopy of licence wherein it showed that the driving licence had been renewed up to 4.5.2001 by the District Transport Officer, Amritsar but since the other details regarding name and photograph of the licence holder were not clear hence it was of the view that it cannot be accepted that the truck was being driven by a person holding a valid driving licence.

5. On issue No. 3 the Tribunal held that the vehicle in question was insured with the appellant Insurance Co. and while considering issue No. 5 it found that the deceased was an advocate by profession who held a valid driving licence No. 27203/Aligarh/94. It found the income of the deceased on the basis of Income Tax Return which would be around Rs. 5750 per month. Since the deceased was aged about 56 years a multiplier of 8 was applied for calculating the compensation to which the claimants were entitled.

6. The Tribunal awarded a total sum of Rs. 3,69,440 to the claimants and directed the Insurance Co. appellant to pay the amount to the claimants with interest of 6% per annum and made it open for the appellant Insurance Co. to recover the same from the vehicle owner in view of the finding that the driver of the offending vehicle

was not holding a valid driving licence. Permission u/s 170 of the Motor Vehicles Act had already been allowed by the Tribunal by the order dated 28.4.2009.

7. It will be seen from the impugned award that the factum of accident and rash and negligent driving by the driver of the offending vehicle has been proved by the eye witnesses, who was the first informant during the investigation conducted by the police. The Tribunal has placed reliance upon the evidence given by the eye witness which was the basis of the oral statement given by PW-1. There is nothing on record to demolish the finding of the Tribunal given by the eye witness and therefore when the finding has been recorded on cogent evidence it cannot be said that there is any error or illegality when the Tribunal held that the accident had occurred due to the rash and negligent driving of the truck and that there is no contributory negligence of the deceased.

8. The finding of the Tribunal is that the driver of the offending vehicle did not have a valid driving licence and since the National Insurance Co. Ltd. had insured the vehicle it had made it open for the appellant to recover the compensation from the owner of the vehicle. There is no illegality in the direction.

9. Sub-section (5) of Section 147 of the Motor Vehicles Act, 1988 lays down as under:

147. Requirements of policies and limits of liability - (1) to (4)....

(5) Notwithstanding anything contained in any law for the time being in force, an insurer issuing a policy of insurance under this section shall be liable to indemnify the person or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of that person or those classes of persons.

10. The above provision, thus, provides that an insurer issuing a policy of insurance u/s 147 of the Motor Vehicles Act, 1988 shall be liable to indemnify the person or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of that person or those classes of persons.

11. Section 149 of the Motor Vehicles Act, 1988, in so far as is relevant, provides as follows:

149. Duty of insurers to satisfy judgments and awards against persons insured in respect of third party risks.-(1) If, after a certificate of insurance has been issued under Sub-section (3) of Section 147 in favour of the person by whom a policy has been effected, judgment or award in respect of any such liability as is required to be covered by a policy under Clause (b) of Sub-section (1) of Section 147 (being a liability covered by the terms of the policy) [or under the provisions of Section 163-A] is obtained against any person insured by the policy, then, notwithstanding that the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy, the insurer shall, subject to the provisions of this section, pay to the person entitled to the benefit of the decree any sum not exceeding the sum assured

payable thereunder, as if he were the judgment-debtor, in respect of the liability, together with any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.

(2) to (7)....

12. The above-quoted provision shows that in case any judgment or award in respect of the liability as is required to be covered by a policy under Clause (b) of Sub-section (1) of Section 147 (being a liability covered by the terms of the policy) or under the provisions of Section 163-A is obtained against any person insured by the policy, then the insurer shall pay to the person entitled to the benefit of the decree any sum not exceeding the sum assured payable thereunder, as if he were the judgment- debtor, in respect of the liability, together with the amount of costs and interest. This will be so even though the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy.

13. In view of the aforesaid provisions, we are of the view that the direction given by the Tribunal directing the Insurance Company/ Appellant to make deposit of the amount of compensation and recover the same from the insured person i.e. the owner of the vehicle in question - respondent No. 5 herein, does not suffer from any infirmity.

14. The above conclusion is supported by the decisions of the Apex Court:

In Oriental Insurance Co. Ltd. v. Inderjit Kaur and Ors. AIR 1998 SC 588, their Lordships of the Supreme Court opined as under (paragraph 7 of the said AIR):

7. We have, therefore, this position. Despite the bar created by S. 64-VB of the Insurance Act, the appellant, an authorised insurer, issued a policy of insurance to cover the bus without receiving the premium therefor. By reason of the provisions of Ss. 147(5) and 149(1) of the Motor Vehicles Act, the appellant became liable to indemnify third parties in respect of the liability which that policy covered and to satisfy awards of compensation in respect thereof notwithstanding its entitlement (upon which we do not express any opinion) to avoid or cancel the policy for the reason that the cheque issued in payment of the premium thereon had not been honoured.

15. This decision thus supports the conclusion mentioned above on the basis of Sections 147(5) and 149(1) of the Motor Vehicles Act, 1988.

16. In National Insurance Co. Ltd. Vs. Swaran Singh and Others, their Lordships of the Supreme Court held as follows (paragraph 105 of the said AIR):

105. The summary of our findings to the various issues as raised in these petitions is 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) An insurer is entitled to raise a defence in a claim petition filed u/s 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 the 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 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 the 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 a duly licensed driver or one who was not disqualified to drive at the relevant time.

(iv) Insurance Companies, 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 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 the 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 insurer u/s 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 u/s 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 the 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 Sections 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 u/s 174 of the Act as arrears as 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 the 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 to by the Tribunal and be extended to claims and defences of the insurer against the 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.

17. Proposition Nos. (vi) and (x), reproduced above support the conclusion that the direction given by the Tribunal in the award impugned in the present case is in accordance with law.

18. In National Insurance Co. Ltd. v. Laxmi Narain Dhut 2007 (2) T.A.C. 398 (S.C.), their Lordships of the Supreme Court considered the decision in National Insurance Co. Ltd. v. Swaran Singh (supra) and held as under (paragraph 35 of the said TAC):

35. As noted above, the conceptual difference between third party right and own damage cases has to be kept in view. Initially, the burden is on the insurer to prove that the license was a fake one. Once it is established the natural consequences have to flow.

In view of the above analysis the following situations emerge:

(1) The decision in Swaran Singh''s case (supra) has no application to cases other than third party risks.

(2) Where originally the license was fake one, renewal cannot cure the inherent fatality.

(3) In case of third party risks the insurer has to indemnify the amount and if so advised to recover the same from the insured.

(4) The concept of purposive interpretation has no application to cases relatable to Section 149 of the Act.

The High Courts/Commissions shall now consider the matter afresh in the light of the position in law as delineated above.

The appeals are allowed as aforesaid with no order as to costs.

19. In view of the above decision, it is evident that in case of third party risks, the decision in National Insurance Co. Ltd. v. Swaran Singh and Ors. (supra) would apply, and the insurer has to indemnify the amount to the third party and thereafter may recover the same form the insured.

20. In Prem Kumari and Ors. v. Prahlad Dev and Ors. 2008 (1) T.A.C. 803 (S.C.), their Lordships of the Supreme Court have reiterated the view expressed in National Insurance Company Limited v. Laxmi Narain Dhut case (supra) explaining the decision in National Insurance Company Limited v. Swarn Singh and Ors. (supra), and held as under (paragraphs 8 and 9 of the said TAC):

8. The effect and implication of the principles laid down in Swarn Singh''s case (supra) has been considered and explained by one of us (Dr. Justice Arijit Pasayat) in National Insurance Co. Ltd. Vs. Laxmi Narain Dhut, The following conclusion in para 38 are relevant:

38. In view of the above analysis the following situations emerge:

(1) The decision in Swaran Singh''s case (supra) has no application to cases other than third party risks.

(2) Where originally the license was a fake one, renewal cannot cure the inherent fatality.

(3) In case of third-party risks the insurer has to indemnify the amount, and if so advised, to recover the same from the insured.

(4) The concept of purposive interpretation has no application to cases relatable to Section 149 of the Act.

9. In the subsequent decision The Oriental Insurance Company Limited Vs. Meena Variyal and Others, which is also a two Judge Bench while considering the ratio laid down in Swaran Singh''s case (supra) concluded that in a case where a person is not a third party within the meaning of the Act, the Insurance Company cannot be made automatically liable merely by resorting to Swaran Sing''s case (supra). While arriving at such a conclusion the Court extracted the analysis as mentioned in para 38 of Laxmi Narain Dhut (supra) and agreed with the same. In view of consistency, we reiterate the very same principle enunciated in Laxmi Narain Dhut (supra) with regard to interpretation and applicability of Swaran Singh''s case (supra).

21. In view of the above, it is evident that the Tribunal did not commit any illegality in directing the Insurance Company/Appellant to make deposit of the amount of compensation and recover the same from the insured person i.e. the owner of the vehicle in question- respondent No. 5 herein.

22. The findings on the income of the deceased and his age is also based upon the evidence in the form of driving licence where the date of birth of the deceased was given as 17.11.1943 and the assessment of the doctor who conducted the post mortem. Since it was found that the deceased was aged about 56 years the multiplier of 8 has been applied. The income of the deceased was determined from the Income Tax Return of the year 1998-99 and there is nothing on record to indicate that such finding is erroneous or that it is not based on any evidence on record.

23. For the aforesaid reason no error can be found in the impugned judgment and award. The appeal has no merit it is accordingly dismissed.

24. After making the deposit of the amount as directed by the impugned award, it will be open to the Insurance Company/Appellant to recover the same from the insured person i.e. the owner of the vehicle in question-respondent No. 5 herein by moving appropriate application before the Tribunal in this regard.

25. It is made clear that in case the claimant-respondents or the owner of the vehicle in question/respondent No. 5 herein files an appeal against the impugned award, it will be open to the Insurance Company/Appellant to contest the same on the grounds legally open to it.

26. The statutory deposit of Rs. 25,000 made by the appellant before this Court should be remitted forthwith to the Tribunal for being paid to the claimant respondents upon being given due adjustment in the awarded amount.

27. The appeal is accordingly dismissed subject to the aforesaid observations.

28. No order is passed as to costs.