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(2012) 09 DEL CK 0126

Delhi High Court

Case No: MAC App. 469 of 2011

United India Insurance Co. Ltd.	APPELLANT
Vs	
Kamar Jahan and Others	RESPONDENT

Date of Decision: Sept. 7, 2012

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 12 Rule 8
- Motor Vehicles Act, 1988 - Section 133, 149(2)(a)(ii)

Citation: (2012) 09 DEL CK 0126

Hon'ble Judges: G.P. Mittal, J

Bench: Single Bench

Advocate: Vineet Malhotra, with Mr. R.M. Tatia, for the Appellant; Anshuman Bal, for R-1 to R-6, for the Respondent

Judgement

G.P. Mittal, J.
These two Appeals (MAC APP 469/2011 and MAC APP 470/2011) arise out of a common judgment dated 07.01.2011 passed by the Motor Accident Claims Tribunal (the Claims Tribunal) whereby a compensation of Rs. 4,84,700/- was awarded in favour of the Respondents No. 1 to 4 and Respondents No. 1 to 6 in each of the Appeals. The only ground of challenge raised at the time of hearing of the Appeal is that the Appellant Insurance Company successfully proved the breach of the terms of policy as envisaged u/s 149(2)(a) (ii) of the Motor Vehicles Act, 1988 (the Act), yet instead of exonerating the Appellant Insurance Company, it was made liable to pay compensation. Even the recovery rights were not granted.

2. The Learned Counsel for the Appellant urges that the legal heirs of the deceased Ikramuddin (in MAC APP 470/2011) initially misled the Claims Tribunal and did not even disclose as to who was driving the two wheeler involved in the accident which caused the

death of the two wheeler''s driver and the pillion rider. It was only later on that at the Appellant''s behest the Claim Petition was amended and it was disclosed that that the deceased Ikramuddin (in MAC APP 470/2011) was the driver of the two wheeler.

3. Learned Counsel for the Appellants contends that a notice under Order XII Rule 8 CPC (Ex.R2W1/D) was duly served upon Irfan Ali Respondent No. 7 (in MAC APP 469/2011) and Respondent No. 5 (in MAC APP 470/2011). He preferred not to contest the proceedings before the Claims Tribunal and was ordered to be proceeded ex-parte. He failed to respond to the notice Ex. R2W1/D.

4. It is urged that Ikramuddin''s widow in her cross-examination as PW-1 could not give the particulars of the driving license. She could not even tell as to from which State the driving license was issued. Thus, there was sufficient evidence produced by the Appellant to prove that there was willful breach of the terms of the policy on the part of the insured (Irfan Ali).

5. I have before me Affidavit Ex. R2W1/1 of R2W1 Anil Kumar Bhatia, Senior Assistant of the Appellant Insurance Company. He deposed that notice under Order XII Rule 8 CPC in terms of Section 133 of the Act was served upon the owner of the offending vehicle. The notice was proved as Ex. R2W1/D and its postal receipt as Ex. R2W1/E. Anil Kumar Bhatia''s testimony was not challenged by the owner as he was ex-parte. The driver of the two wheeler Ikramuddin died in this very accident. His widow appeared as PW-1. In cross-examination she deposed that her husband possessed a valid driving license, the same was missing after the accident. She was unable to give particulars of the driving license. She could not even tell as to from which Licensing Authority or from which State the driving license was issued. The stoic silence on the part of owner and a vague statement by Smt. Sajida PW-1 would amply show that the deceased Ikramuddin did not possess any valid driving license. Had he possessed a driving license, it would have been produced in the Court by owner of the vehicle or at least its particulars would have been given.

6. Thus, the Insurance Company did whatever was in its power to prove the breach of terms of policy and discharged the initial onus placed on it. Now, it was for the Respondent Irfan Ali to have come out with the circumstances under which he handed over the two wheeler to Ikramuddin. That having not been done, the Appellant Insurance Company would be deemed to have successfully proved the breach of the terms of the policy.

7. I am supported in this view by a judgment of the learned Single Judge of this Court in New India Assurance Co. Ltd. v. Sanjay Kumar and Ors., ILR 2007(II) Del 733, wherein it was held that although the onus is on the Insurer to prove that there was breach of condition of the policy, but once the record of the Licensing Authority is summoned to prove that the driver did not possess a valid driving license, the onus would shift on the Insured (the owner of the vehicle) who must then step into the witness box and prove the

circumstances under which he acted and handed over the vehicle to the driver. Paras 22 to Para 24 of the report are extracted hereunder:-

22. Thus, where the insurance company alleges that the term of the policy of not entrusting the vehicle to a person other than one possessing a valid driving license has been violated, initial onus is on the insurance company to prove that the license concerned was a fake license or was not a valid driving license. This onus is capable of being easily discharged by summoning the record of the Licensing Authority and in relation thereto proving whether at all the license was issued by the authority concerned with reference to the license produced by the driver. Once this is established, the onus shifts on to the assured i.e. the owner of the vehicle who must then step into the witness box and prove the circumstances under which he acted; circumstances being of proof that he acted bona fide and exercised due diligence and care. It would be enough for the owner to establish that he saw the driving license of the driver when vehicle was entrusted to him and that the same appeared to be a genuine license. It would be enough for the owner, to discharge the onus which has shifted on to his shoulders, to establish that he tested the driving skill of the driver and satisfied himself that the driver was fit to drive the vehicle. Law does not require the owner to personally go and verify the genuineness of the license produced by the driver.

23. Where the assured chooses to run away from the battle i.e. fails to defend the allegation of having breached the terms of the insurance policy by opting not to defend the proceedings, a presumption could be drawn that he has done so because of the fact that he has no case to defend. It is trite that a party in possession of best evidence, if he withholds the same, an adverse inference can be drawn against him that had the evidence been produced, the same would have been against said person. As knowledge is personal to the person possessed of the knowledge, his absence at the trial would entitle the insurance company to a presumption against the owner.

24. That apart, what more can the insurance company do other than to serve a notice under Order 12 Rule 8 of the CPC calling upon the owner as well as the driver to produce a valid driving license. If during trial such a notice is served and proved to be served, non response by the owner and the driver would fortify the case of the insurance company.

8. The owner of the vehicle has not come forward with any explanation that he had seen the driver''s driving license before and had seen his driving skills. The owner may not always have control over the driver of the vehicle and may not be always in a position to produce the driving license of the driver. He could have lost or misplaced copy of the driving license available with him. But, he must come forward to give an explanation once he is asked by the insurer to produce the driving license of the driver. This having not been done in the instant case, an inference of a conscious and willful breach of the terms of the policy can be drawn against the First Respondent.

9. It is well settled that once the insurer establishes a willful breach of the terms of the policy on the part of insured, it shall have the right to recover the compensation paid to the victim/his legal representatives under statutory liability. (See: Sohan Lal Passi Vs. P. Sesh Reddy and others, ; Skandia Insurance Co. Ltd. Vs. Kokilaben Chandravadan and Others, ; and New India Assurance Co., Shimla Vs. Kamla and Others etc. etc.,).

10. In view of the foregoing discussion, the Appeals are allowed and the Appellant Insurance Company is granted recovery rights to recover the compensation from the owner of the offending vehicle, that is Irfan Ali, Respondent No. 7 in MAC APP.469/2011 and Respondent No. 5 in MAC APP.470/2011.

11. The statutory deposits of Rs. 25,000/- shall be refunded to the Appellant Insurance Company. Pending Applications stand disposed of.