(2011) 06 GAU CK 0038

Gauhati High Court (Agartala Bench)

Case No: MAC Appeal No. 18 of 2010

The Oriental Insurance Company Ltd.		APPELLANT
	Vs	
Smt. Saraswati Malakar and Others		RESPONDENT

Date of Decision: June 2, 2011

Acts Referred:

- Motor Vehicles Act, 1988 - Section 149(2), 163A, 165, 166, 168

Hon'ble Judges: A.C. Upadhyay, J

Bench: Single Bench

Advocate: P. Gautam and K. De, for the Appellant; S. Lodh and A. Roy Choudhury, for the Respondent

Final Decision: Dismissed

Judgement

A.C. Upadhyay, J.
This appeal, preferred by the Appellant-Insurance Company, is directed against the impugned judgment and award dated 23.10.2009, passed by the learned Motor Accident Claims Tribunal, West Tripura, Agartala, Court No. 3, in Case No. TS(MAC) 498 of 2007.

2. I have heard Mr. P. Gautam, learned Counsel for the Appellant-Insurance Company, and Mr. S. Lodh, learned Counsel appearing for the Respondent Nos. 1 to 6.

3. The facts, leading to the filing of this appeal, may be stated, in brief, as follows:

On 10.06.2007 at about 0420 hrs. in the morning, while Nani Malakar(since deceased) was on his way to the newspaper office to collect daily newspapers, as newspaper vendor, he was knocked down at ONGC 1st Gate on Agartala-Bishalgarh road by the offending vehicle bearing registration No. TR-01-B-3215. As a result of

the accident, Nani Malakar fell down and was taken to the G.B.P. Hospital, Agartala, where he was declared dead.

4. A claim petition was filed by the claimants Respondents wherein it was claimed that deceased Nani Malakar was earning Rs. 9,500/- per month from a private service and also he used to earn Rs. 6,000/- per month, working as a newspaper vendor. It was also claimed that all the claimants Respondents were dependent on his earning.

5. The Appellant-Insurance Company as well as the Opposite Party-owner of the vehicle contested the claim by filing written statements.

6. The owner of the vehicle stated that the vehicle was insured with the Appellant-Insurance Company and was driven by one Sri Bijoy Debnath, who was holding a valid driving licence.

7. The Appellant-Insurance Company entered appearance by filing written statement, denying all the claims made in the claim petition by the claimants-Respondents. Subsequently, the Appellant-Insurance Company filed additional written statement, contenting inter alia, that the investigator of the Company, Sri Dibakar Gupta, on inquiry, found that the driving licence number of the driver of the offending vehicle referred to by the Opposite Party No. 1 i.e. the owner of the vehicle, in the written statement was a fake driving licence.

8. In the light of the pleadings, the learned Tribunal framed the following issues, for just settlement of the claim petition:

1. Did Nani Malakar die in a vehicular accident occurred on 10.6.2007 due to rash and negligent driving of vehicle bearing No. TR-01-B-3215 by its driver?

2. Are claimants entitled to receive compensation and if so what would be the quantum of compensation and who shall be liable to pay the same?

9. To establish the claim, claimant-Respondent No. 1 filed her affidavit-in-chief and also affidavit-in-chief of one Sri Dharma Das. However, Sri Dharma Das was not produced for cross-examination, and, as such, his affidavit-in-chief was not taken into consideration by the learned Tribunal. The OP No. 1 i.e. the owner of the offending vehicle also submitted his affidavit-in-chief but he did not appear for cross-examination by the claimants-Respondents as well as the Appellant-OP No. 2, as such, his affidavit-in-chief was also not taken up for consideration by the learned Tribunal. However, the Appellant-OP No. 2 adduced the testimony of Sri Dulal Das, Administrative Officer, who filed his affidavit-in-chief to exibit the copy of the Insurance policy of the offending vehicle and the letter dated 30.07.2008 of the licencing authority addressed to the Senior Divisional Manager, Oriental Insurance Company Limited, Agartala Division.

10. On careful considering of the evidence on record, the learned Tribunal decided the issues in favour of the claimants Respondents and allowed the claim petition by awarding a sum of Rs. 4,36,000/- as compensation for the death of deceased Nani Malakar. The learned Tribunal directed payment of compensation in equal shares to the claimants-Respondents. The Appellant-OP No. 2, being the insurer of the offending vehicle on the date of accident, was made liable to make the payment of the awarded sum of Rs. 4,36,000/- with interest @6% per annum from the date of filing of the claim petition till realization, in terms of the Insurance policy with the owner of the offending vehicle. An additional sum of Rs. 50,000/- was also awarded for loss of consortium to the claimant-Respondent No. 1, i.e. wife of deceased Nani Malakar.

11. Mr. P. Gautam, learned Counsel appearing for the Appellant has limited his argument on the specific question of fact as well as law regarding holding of a fake driving licence by the driver of the offending vehicle. Learned Counsel for the Appellant has vehemently submitted that since the driving licence of the driver of the offending vehicle was a fake driving licence, the liability for payment of compensation on the death of deceased victim will have to be satisfied by the owner of the vehicle and not by the Appellant-Insurance Company.

12. Per contra, learned Counsel for the Respondents submitted that it could not be established that the driver of the offending vehicle had a fake driving licence at the time of the accident. Learned Counsel, alternately contended that even if the driver had a fake driving licence, it could not be established that such fact of having a fake licence was within the knowledge of the owner, therefore, the owner, in no circumstances can be made liable for breach of Insurance policy.

13. Learned Counsel for the Appellant, however, pointed out that the licencing authority of the Motor Vehicles Department, Government of Tripura vide letter dated 30.07.2008 informed the Insurance Company that the driver of the offending vehicle had no valid driving licence, and, as such, the Insurance Company could not be made liable for payment of compensation, since the Insurance Company did not permit the owner of a vehicle to utilize the services of a driver with a fake driving licence. Learned Counsel has further submitted that the owner of the vehicle, by engaging the driver of the offending vehicle, has breached the conditions of the insurance policy as well as the provisions of the Motor Vehicles Act, 1988.

14. Learned Counsel for the Appellant has submitted that in view of the decisions of the Apex Court reported in AIR 2008 SCW 888 Oriental Insurance Co. Limited v. Prithvi Raj, the owner of the offending vehicle is not a third party and thus cannot be benefited in the name of beneficial legislation and the learned Tribunal ought to have directed payment of the award to the owner-Respondent and not the Appellant-Insurance Company since the driver had a fake driving licence. The relevant extract of the decision reads as follows:

24. In the background of the statutory provisions, one thing is crystal clear i.e. the statute is beneficial one qua the third party. But that benefit cannot be extended to the owner of the offending vehicle. The logic of fake license has to be considered differently in respect of third party and in respect of own damage claims.

39. 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.

15. In support of his contention, learned Counsel for the Appellant-Insurance Company has relied on the decision of the Apex Court reported in National Insurance Co. Ltd. Vs. Kaushalaya Devi and Others, wherein the Hon''ble Supreme Court observed as follows:

9. The High Court, however, held that the driving licence of the driver Shyam Lal was not valid, stating:

Since I am of the opinion that the endorsement permitting Shyam Lal to drive a heavy goods vehicle was ante dated and was not existing on the date of accident it is clear that the owner could not have handed over the vehicle to a person who held a valid driving licence. On 16.03.2000 Shyam Lal only held a licence to drive a light transport vehicle and the owner could not have checked or verified the licence for driving a heavy goods vehicle. In fact in his case the owner has not even stepped into the witness-box to say anything in this regard. Therefore, I hold that the insurance company was wrongly held liable to pay compensation.

As regards to the question as to whether the deceased was an unauthorised passenger, it accepted the plea of the insurance company.

12. In view of the findings arrived at by the High Court, it must be held that the owner alone was liable to pay compensation to Respondent No. 1 herein for causing death of her son by rash and negligent driving on the part of the driver of the truck. The High Court s judgment must be sustained on this ground.

16. Mr. S. Lodh, learned Counsel for the Respondents in reply to the above contentions made on behalf of learned Counsel for the Appellant-Insurance Company, has submitted that since the owner of the offending vehicle had no knowledge that the driver of the offending vehicle involved in the accident had fake licence, the owner of the vehicle cannot be saddle with the liability of making payment of compensation. Learned Counsel for the Respondents pointed out that for breach of insurance policy cannot be alleged without proof of knowledge of such breach of policy condition by the owner. In support of his contention, learned Counsel for the claimants-Respondents has relied on the decision of the Hon''ble Supreme Court reported in (a) AIR 2003 SCW 1695 United India Insurance Co. Ltd. v. Lehru and Ors. and (b) AIR 2004 SCW 663 National Insurance Co. Ltd. v. Swaran

Singh and Ors.

17. In United India Insurance Co. Ltd. v. Lehru and Ors. (supra), Hon''ble Supreme Court categorically held that the insurer is to establish willful breach of terms by the insured. The relevant discussions on the issue can be gainfully depicted herein below as follows:

18. Now let us consider Section 149(2). Reliance has been placed on Section 149(2)(a)(ii). As seen in order to avoid liability under this provision it must be shown that there is a breach . As held in Skandia s and Sohan Lal Passi s cases(supra) the breach must be on part of the insured. We are in full agreement with that. To hold otherwise would lead to absurd results, just to take an example, suppose a vehicle is stolen. Whilst it is being driven by the thief there is an accident. The thief is caught and it is ascertained that he had no licence. Can the Insurance Company disown liability? The answer has to be an emphatic "No". To hold otherwise would be to negate the very purpose of compulsory insurance. The injured or relatives of person killed in the accident may find that the decree obtained by them is only a paper decree as the owner is a man of straw. The owner himself would be an innocent sufferer. It is for this reason that the Legislature, in its wisdom, has made insurance, at least third party insurance, compulsory. The aim and purpose being that an Insurance Company would be available to pay. The business of the Company is to insurance. In all businesses there is an element of risk. All persons carrying on business must take risks associated with that business. Thus it is equitable that the business which is run for making profits also bears the risk associated with it. At the same time innocent parties must not be made to suffer or loss. These provisions meet these requirements. We are thus in agreement with what is laid down in aforementioned case viz. that in order to avoid liability it is not sufficient to show that the person driving at the time of accident was not duly licensed. The Insurance Company must establish that the breach was on the part of the insured.

20. When an owner is hiring a driver he will therefore have to check whether the driver has a driving licence. If the driver produces a driving licence which on the face of it looks genuine, the owner is not expected to find out whether the licence has in fact been issued by a competent authority or not. The owner would then take the test of the driver. If he finds that the driver is competent to drive the vehicle, he will hire the driver. We find it rather strange that Insurance Companies expect owners to make enquiries with RTO s, which are spread all over the country, whether the driving licence shown to them is valid or not. Thus where the owner has satisfied himself that the driver has a licence and is driving competently there would be no breach of Section 149(2)(a)(ii). The Insurance Company would not then be absolved of liability. If it ultimately turns out that the licence was fake the Insurance Company would continue to remain liable unless they prove that the owner/insured was aware or had noticed that the licence was fake and still permitted that person to drive. More importantly even in such a case the Insurance Company would remain

liable to the innocent third party, but it may be able to recover from the insured. This is the law which has been laid down in Skandia s, Sohan Lal Passi s and Kamla s case. We are in full agreement with the views expressed therein and see no reason to take a different view.

18. Hon''ble Supreme Court in the case of National Insurance Co. Ltd. v. Swaran Singh and Ors.(supra) categorically stated that 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. The insurance companies are, however, with a view to avoid their liability must not only establish the available defences(s) raised in the said proceedings but must also establish breach on the part of the owner of the vehicle; the burden of proof wherefore would be on them. The relevant observation on the issue made by the Hon''ble Supreme Court is given herein below:

87. It may be true as has been contended on behalf of the Petitioner that a fake or forged licence is as good as no licence but the question herein, as noticed hereinbefore, is whether the insurer must prove that the owner was guilty of the willful breach of the conditions of the insurance policy or the contract of insurance. In Lehru s case(supra) the matter has been considered at some details. We are in general agreement with the approach of the Bench but we intend to point out that the observations made therein must be understood to have been made in the light of the requirements of law in terms whereof the insurer is to establish willful breach on the part of the insured and not for the purpose of its disentitlement from raising any defence or the owners be absolved from any liability whatsoever. We would be dealing in some details with this aspect of the matter a little later.

105. 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 u/s 163A 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 wherefore 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 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 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 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 on or otherwise), does not fulfill 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 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 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.

19. Since the Appellant-Insurance Company neither could establish, nor prima facie prove that the owner of the vehicle had knowledge of the driver having a fake driving licence, the owner of the vehicle cannot be saddled with the burden of reimbursing the award, for breaching the insurance policy. The breach of conditions of the insurance policy as alleged by the Appellant Insurance Company has to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, of a valid driving licence and/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. The Insurance Company would not be absolved of liability. If it ultimately turns out that the licence was fake the Insurance Company would continue to remain liable unless they prove that the owner/insured was aware or had noticed that the licence was fake and still permitted that person to drive. More importantly even in such a case the Insurance Company would remain

liable to the innocent third party, but it may be able to recover the amount from the insured. 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. As a matter of fact, an owner of a vehicle is not expected to find out whether the driving licence produced by the driver was in fact issued by a competent authority or not. In usual course, the owner of the vehicle, after examining the driving licence of the driver, allows the driver to drive a vehicle. There is no reason for the owner to make enquiries from the transport authorities regarding the genuineness of the driving licence of the driver.

20. In the instant case, except producing a document issued by the licencing authority that the driving licence of the driver being fake for not tallying with the last serial number of the licences issued by the authority, there is no iota of evidence that the owner had knowledge that his driver was holding a fake driving licence. The decision relied on by the Appellants counsel in Naitonal Insurance Company v. Kaushlaya Dev (supra) would not apply in the present case. Since there is no evidence that on the face of the driving licence of the driver of the offending vehicle it was discernable that the driving licence was a fake one.

21. Thus, in view of the above discussions, this Court is of the opinion that the owner of the vehicle cannot be saddled with the liability for breach of conditions in the insurance policy for without prima facie proof that the owner had knowledge of the fake licence and went ahead to utilize the services of such driver holding a fake licence.

22. In view of the above, without lingering the discussions any further, this Court is of the considered view that the appeal preferred by the Appellant-Insurance Company is devoid of merit and, accordingly, it stands dismissed. However, in the facts and circumstances, I pass no order as to costs.

23. Send back the Lower Court Records together with a copy of the judgment immediately.