

* **HIGH COURT OF DELHI : NEW DELHI**

MAC APPEAL No.211 of 2006

% Judgment reserved on: 27th February, 2008

Judgment delivered on: 5th May, 2008

National Insurance Co. Ltd.

R O-II, 2E/9, Jhandewalan Extension,
New Delhi

.....Appellant

Through: Ms. Neerja Sachdeva, Adv.

Versus

1. Nirabjit Kaur,
W/o. Late Sh. Devendar Singh,

2. Sh. Gurpreet Singh
S/o Late Sh. Devendar Singh,

3. Ravinder Singh
S/o. Late Sh. Devendar Singh
All R/o, E-4, Ist Floor, Man Sarover Garden,
New Delhi

4. Sh. Sayed Khan S/o Sh. Hamit Khan
R/o VIII-Mallo Patti, Khan Chowk,
Distt-Arhararia, Bihar

5. Mohd. Naim, S/o Mohd. Kasim
R/o-910/JJ 272, Cement Godown,
Netaji Nagar, New Delhi

.....Respondents

Through: None.

Coram:

HON'BLE MR. JUSTICE V.B. GUPTA

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| 1. Whether the Reporters of local papers may be allowed to see the judgment? | Yes |
| 2. To be referred to Reporter or not? | Yes |
| 3. Whether the judgment should be reported in the Digest? | Yes |

V.B.Gupta, J.

This is an appeal under section 173 of the Motor Vehicles Act, 1988 (for short as the "Act") filed by National Insurance Ltd. against the order dated 13.09.05, passed by Ms. Ravinder Kaur, Judge, Motor Accident Claims Tribunal (for short as "Tribunal"), Delhi.

2. Facts in brief necessary for disposal of the present appeal are that on 25.12.03 at about 8.30p.m., the deceased, Sh. Devender Singh along with his wife was returning back to his home from the Gurudwara situated at Rajouri Garden. When they were crossing the Ring Road near the aforesaid Gurudwara, all of a sudden the offending vehicle tempo No. DL-IL-B-5759, driven rashly

and negligently by its driver, came and hit the deceased. As a result, the deceased fell down on the pavement and sustained grievous injuries all over his body. After hitting, the driver of the said offending vehicle sped away towards Raja Garden along with the offending vehicle and Devender Singh was rushed to Kukreja Hospital in a precarious condition by a car bearing no. DL 6CD 4415. Thereafter, the driver of the offending vehicle stopped near police booth at Raja Garden Chowk and one Mr. Dharmendar, who was sitting just beside the driver, informed the police about the said accident and DD no. 52B was registered against the Driver.

3. Sh. Devender Singh remained admitted in Kukreja Hospital for one day and expired on 26.12.03 due to the injuries sustained by him in the said accident.

4. Petition seeking compensation was filed by the widow and children of the deceased against the driver, owner, and insurer of the offending vehicle.

5. The Tribunal based on the materials placed and the evidence on record found that death was caused due to rash and negligent driving of the driver and therefore, vide impugned judgment, awarded compensation of Rs.4,18,000/- along with interest @ 6% per annum from the date of filing of the petition i.e. 20.05.04 till its realization.

6. It has been contended by learned Counsel for the Appellant that the Tribunal erred in holding that the Insurance Company has failed to prove on record that the driving licence possessed by the driver was invalid or ineffective and that too as per the knowledge of the owner. It is contended that it was a clear case of willful and intentional breach of the terms and conditions of the Insurance Policy on the part of the insured, since the driver of the offending vehicle did not hold any licence and neither the owner could place on record the licence of his driver, in spite of the fact that he had been served with the legal notice under Order 12 Rule 8 of the Code of Civil Procedure nor give any reasons why he could not produce

the copy of the driving licence of the driver and thus the Appellant is not liable to pay the compensation amount in view of section 149(2)(a)(ii) of the Act. The owner of the offending vehicle also had been served with the notice under section 133 of the Act, on 27.12.03 i.e. one day after the alleged accident, which was duly received by him with the remark that "his vehicle was loaded and has gone out of station and as soon as the vehicle returns he would produce the driver of the said vehicle."

7. Further, widow of the deceased who got herself examined as PW3 had not disclosed the number and the colour of the offending vehicle and could not state whether the offending vehicle was open body or close body. As per the evidence on record, PW4 was the only eye witness, who could speak about the manner of accident and he clearly stated that the accident had taken place due to the fault of the deceased himself.

8. Thus, in view of section 149(2) of the Act, directions to the Appellant to pay the claim amount to the claimants

without recovery rights of the compensation amount even when the Appellant had successfully proved the limited defence available to it by the statute that there was a willful and intentional breach of the terms of Insurance Policy, is arbitrary, untenable and is bad in law and as such, is liable to be set aside.

9. Ld. Counsel placed reliance on ***National Insurance Co. Ltd. v. Swaran Singh and others***, 2004 ACJ 1 in support of its contentions.

10. Thus, the principal question that arises for determination in this appeal is as to “whether the Insurance Company can avoid its liability on the ground that the driver of the vehicle did not possess valid driving licence at the time of accident?”

11. Chapter XI of the Act, 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

(ii) a condition excluding driving by a named person or persons or by any person who is not duly licensed, or by any person who has been disqualified for holding or obtaining a driving licence during the period of disqualifications;

13. In a plethora of cases, the Apex Court and various High Courts have held that if there is a condition in the insurance policy that only a licensed driver is to drive the vehicle, the insurance company would not be liable in case there is a breach.

14. There could be no doubt that in order to escape liability, not only it should be proved that the driver of the vehicle was not having a licence at the time of the accident, but also the insurance company should prove that the driver was disqualified from holding or obtaining a licence or never had any licence at all. Merely proving that on the date of the accident, the driver did not have a licence, is not enough to hold that the insurance company is not liable for claim. The onus of proving that the driver of the vehicle never had a licence or was disqualified from holding a licence is on the insurance company.

15. Though Nirabjit Kaur, widow of deceased had not disclosed the number of the offending vehicle in her statement but the same has been proved during the testimony of ASI Jora Singh, the Investigating Officer of the criminal case and from the statement of PW4, Mr. Dharmendar who was travelling in the offending vehicle. As per the statement of Nirabjit Kaur along with the post mortem report which has been proved on record as Ex PW 5/1, the accident took place due to the fault of the driver of tempo and the same has not been rebutted or disputed in any manner by the driver of the offending vehicle as he failed to contest the claim despite the notice and had not even filed written statement in defence.

16. The Appellant in its written statement admitted that the offending vehicle was insured with it. However, it is claimed that its driver was not possessing valid and effective driving licence at the time of accident.

17. In support of their plea, the appellant examined Dinesh Kumar Sikka, Senior Asst. of the Company who

proved the copy of the notice under Order 12 Rule 8 CPC along with its postal receipt, sent to Owner to produce the original Insurance policy and driving licence.

18. It is very important to note that the driver has not been examined by the Appellant. The owner of the vehicle as R3W2 deposed in his statement that he had employed Sayed Khan after verifying that he could drive efficiently and was possessing driving licence issued from State of Bihar for driving HMV. Further, he stated that the licence which he had seen at that time was valid, even at the time of accident, though, he did not possess any copy of the same.

19. Thus, from the above facts it is clear that the owner of the offending vehicle has taken all precautions while appointing Respondent no.4, (Sayed Khan) to drive the vehicle in question, so the insurance company cannot escape its statutory liability. It is only when the insured himself has placed the vehicle in charge of a person who does not hold a driving licence, then it can be said that he

is guilty of the breach of the promise, that the vehicle will be driven by a licenced driver. Unless the insured is at fault and guilty of breach, the insurer cannot escape from the obligation to indemnify the insured and successfully contend that he is exonerated having regard to the fact that the promisor committed a breach of his promise. The burden is, therefore, upon the insurer to establish that the owner of the vehicle is guilty of willful breach of the condition embodied in the policy.

20. It was for the appellant to prove that the insured consciously employed the driver without having licence. Apart from taking a plea in the written statement, the appellant did nothing to substantiate that the driver at the pertinent time was not having a valid driving licence. The Insurance Company has not proved any witness to prove the same.

21. The Apex Court in ***Narcinva V. Kamat and Anr. v. Alfredo Antonia Doe Martins and Ors.*** [1985 ACJ 397], observed;

“When the Insurance Company complains of a breach of the term of contract, which would permit it to disown its liability under the contract of insurance, the burden is squarely on the Insurance Company to prove that the breach has been committed by the other party to the contract. The rest in such a situation would be 'who would fail, if no such evidence is led'. With this principle of law in view, the evidence has to be judged. Merely non-production of licence or non-examination of the driver of the vehicle is not enough nor any adverse inference can be drawn against the person holding that because of non-examination of the driver or non-production of the licence, the burden is discharged by a mere question in cross examination nor the owner is under any obligation to furnish the evidence so as to enable the Insurance Company not to riggle out its liability under the contract of insurance.”

22. A driving licence is expected to be with the Driver and not with the owner of the vehicle. Thus, mere non-production of licence is not enough to discharge the burden of the Insurance Company. Merely giving notice to the owner of the vehicle to produce licence is not sufficient nor any admission, if any, of the owner that the driver was not holding a valid driving licence at the relevant time, and

therefore cannot absolve the Insurance Company from liability.

23. When the Insurance Company takes the plea that it is not liable to pay compensation or to indemnify the insured as the driver was not holding a valid licence for driving the vehicle on the date of the accident and the vehicle was being driven in breach of the terms of the policy, the Insurance Company has to discharge the burden by placing legal and cogent evidence before the Tribunal (see ***Narcinva V. Alfredo* 1985 ACJ 397** (supra) : and the Division Bench cases of this Court in ***Shajadibai v. Babookhan and Ors.* Vol. 1 1988 ACC 24**).

24. There is not dispute about the principles of law as enunciating in **National Insurance Co. Ltd. Vs. Swaran Singh (Supra)**. However, that decision of the Apex Court is not applicable to the facts of the present case as the case in hand the owner of offending vehicle has appeared in the

witness box and stated that his driver was having a valid driving licence at the time of accident.

25. In absence of any iota of evidence from the side of appellant. I do not find any error in the impugned judgment whereby the Tribunal directed the Insurance Company to pay the compensation amount to the claimant without any recovery rights.

26. The instant appeal is, accordingly, dismissed.

**V. B. GUPTA
(JUDGE)**

**5th May, 2008
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