

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 22nd March, 2012

Pronounced on: 11th May, 2012

+ **MAC.APP. 188/2011**

ORIENTAL INSURANCE CO LTD Appellant
Through: Ms. Neerja Sachdeva, Advocate

versus

MONTU & ORS Respondents
Through: None.

CORAM:
HON'BLE MR. JUSTICE G.P.MITTAL

J U D G M E N T

G. P. MITTAL, J.

1. The Appellant Oriental Insurance Company Limited impugned a judgment dated 06.12.2010 on the ground that the compensation of ₹2,04,500/- awarded in favour of the first Respondent Montu was excessive and that the Appellant Insurance Company was not exonerated in spite of the fact that it was proved that the driver Alimuddin Sheikh (Respondent No.2) did not possess a valid driving licence and the owner Hari Kishan Sharma (respondent No.3) did not have a permit to drive the vehicle.
2. On 15.02.2003 at about 2:15 P.M. the first Respondent was proceeding on his bicycle towards Gian Mandir Road, Jaitpur

when he was hit by a truck No.HR-38-C-7817 driven by the second Respondent in a rash and negligent manner.

3. The finding on negligence is not challenged by the Appellant Insurance Company.
4. The first Respondent was removed to All India Institute of Medical Sciences (AIIMS). He suffered very serious injuries in his abdomen, left shoulder, right eye and forehead. He underwent three surgeries in AIIMS. He had to be put on ventilator from 19.02.2003 to 26.02.2003. He remained admitted in AIIMS from 16.02.2003 to 04.03.2003. The Appellant although recovered from the injuries, but suffered partial loss of vision in respect of his right eye. He was issued a Disability Certificate by Hindu Rao Hospital showing that he had suffered 30% partial visual disability.
5. The compensation awarded is tabulated hereunder:-

Sl. No.	Compensation under various heads	Awarded by the Claims Tribunal
1.	Loss of Income	₹7,500/-
2.	Pain & Suffering	₹ 50,000/-
3.	Special Diet	₹ 25,000/-
4.	Conveyance	₹ 10,000/-
5.	Loss of Appearance	₹ 25,000/-

6.	Attendant's Care	₹ 6,000/-
7.	Disability (loss of future income)	₹ 81,000/-
	Total	₹ 2,04,500/-

6. Following contentions are raised on behalf of the Appellant Insurance Company:-

(i) The Disability Certificate showing 30% visual disability was not proved in accordance with law. The Claims Tribunal erred in granting compensation of ₹81,000/- towards the loss of earning capacity.

(ii) It was established that the driver did not possess a valid driving licence and the owner did not have a valid permit in respect of the offending vehicle on the date of the accident. The Appellant Insurance Company was thus entitled to be exonerated.

7. It is borne out from the record that the first Respondent suffered very serious injuries. He had to undergo three surgeries and was battling for life. He remained on ventilator for seven days. Although, it was claimed that the first Respondent used to sell vegetables and earned ₹3,000/- per month, yet as he was a minor, his income was treated as notional i.e. ₹15,000/- per annum for award of the loss of earning capacity.

8. The discharge summary issued by AIIMS and the Disability Certificate mark 'X' issued by Hindu Rao Hospital reveal that the first Respondent suffered disability to the extent of 30% in his right eye. It is true that the first Respondent ought to have examined the doctor to prove the disability certificate (*Raj Kumar v. Ajay Kumar & Anr.*, 2011 (1) SCC 343), yet considering the serious nature of injuries including the fact that the certificate was issued from a Govt. hospital coupled with the fact that just a sum of ₹81,000/- was awarded towards loss of future income, I would not like to remand the case back for proof of the disability certificate in accordance with law and would not interfere with the impugned judgment on the award of ₹81,000/- under this head.
9. Regarding breach of the policy condition, I would first deal with the issue of fake licence which has been agitated by the Appellant. It is true that the second Respondent was challaned for driving the vehicle without a licence. Challan of a driver for an offence under Section 3/181 of the Motor Vehicles Act is not sufficient to show that the driver did not possess a valid driving licence. (*Oriental Insurance Company Limited v. Rakesh Kumar & Ors.*, MAC APP.329/2010 decided on 03.02.2012).
10. It may be noticed that this accident took place in the year 2003. The Claim Petition was also filed in the year 2003 itself. Notices under Order XII Rule 8 CPC, Ex.R3W1/3 and R3W1/4 were issued to the driver and owner respectively to produce the

driving licence and the permit only on 26.03.2010 i.e. after seven years of filing of the Petition and five years of filing of the written statement by the Appellant. The driver immediately produced the driving licence which was verified by the Appellant Insurance Company.

11. On the issue of driving licence, the Claims Tribunal held as under:-

“21. Now coming to the defence of fake licence, it be observed that no effort for proving the above fact has been made by the Insurance Company. In the statement, Shri V.D.Talwar admitted that notice under Order 12 Rule 8 CPC has remained unserved upon the driver/owner. He claimed that the original report given by the licensing authority along with the investigator’s report was being filed and exhibited as Ex.R3W1/9. No reason is shown for not summoning the investigator who solicited the inquiry from the Transport Authority despite the fact that the investigator is on panel of the Insurance Company and hence, under their control. There is a mode of proving the report of the Transport Authority. Merely by filing the report on record, it would not get established automatically. The insurance company has made no effort to serve the official of the Transport Authority, Siliguri, West Bengal. It is a settled law that unless the primary mode of evidence has been exhausted, the secondary mode cannot be permitted to be used. Even otherwise, no permission is obtained to lead the evidence of secondary mode. In such circumstances, in view of the judgment of National Insurance Company Limited verses Swaran Singh, 2004 ACJ 1 SC and Ram Babu Tiwari versus United India Insurance Co. Ltd., 2008 ACJ 2654, I am of the view that the insurance

company is not entitled to any recovery right for which it may approach the civil court.”

12. No report from the Licencing Authority was obtained by the Appellant Insurance Company nor any witness was summoned and thus filing of the report of the Investigator by R3W1 V.D. Talwar, Administrative Officer of the Appellant was not sufficient to discharge the burden on the Appellant to prove that there was a conscious breach of the terms of the policy. The Claims Tribunal's finding on this aspect cannot be faulted.
13. As far as non production of the permit to ply the vehicle is concerned, the case of possession of a driving licence is different as a person can obtain a driving licence from any place throughout the country. Permit is to be issued by the concerned transport authority where the vehicle is registered. The Appellant was in possession of the registration No. HR-38-C-7817 of the vehicle. The Appellant was expected to note the particulars of registration and registering authority at the time of the Insurance. The same would otherwise be available from the registration number of the vehicle involved in the accident. The Appellant Insurance Company could have summoned the record from the concerned transport authority as to the validity of the permit, if any, issued by it. That having not been done, by the Appellant Insurance Company, it did not discharge the onus of proving the breach of policy condition.

14. The Appellant was rightly fastened with the liability and not granted the recovery rights.
15. The impugned order does not call for any interference.
16. The Appeal is accordingly dismissed.
17. CM APPL.20917/2011 for additional evidence also stands disposed of.

(G.P. MITTAL)
JUDGE

MAY 11, 2012
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