

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

Reserved on: 1st November, 2012
Pronounced on: 27th November, 2012

+ **MAC.APP. 399/2005**

NEW INDIA ASSURANCE COMPANY LTD..... Appellant
Through: Mr. Joy Basu, Adv.

versus

RASHI LAL & ORS. Respondents
Through: Mr. Nitinja Chaudhary, Adv. R-3.

CORAM:

HON'BLE MR. JUSTICE G.P.MITTAL

J U D G M E N T

G. P. MITTAL, J.

1. The Appeal is directed against a judgment dated 29.01.2005 passed by the Motor Accident Claims Tribunal (the Claims Tribunal) whereby while awarding a compensation of ₹9,95,000/- in favour of the First Respondent, the Appellant's (New India Assurance Company Limited) plea of breach of the terms and conditions of the policy was rejected on the ground that the Appellant failed to prove that there was willful breach on the part of the Insured.
2. The finding on negligence is not challenged by the Appellant Insurance Company. The other Respondents, that is the driver and financier (defecto owner) of the vehicle have also not challenged the quantum or the finding on negligence. Thus, the same has attained finality.
3. The short ground raised by Mr. Joy Basu, learned counsel for the Appellant Insurance Company is that once it was proved that the vehicle

was being driven by Gopal (a minor not possessing a driving licence), it was for the Respondent No.3 to have come forward with an explanation as to how Gopal came in possession of the vehicle and as to what were the precautions which were taken by him so that the vehicle does not come in the hands of an unauthorized person. It is contended that the Respondent No.3 had been shifting his stand from the time of filing of the written statement and the initial onus being discharged by the Insurance Company, it was for the Respondent No.3 to have proved that he had taken all steps not to commit the breach of the terms and conditions of the policy.

4. On the other hand, Mr. Nitinjya Chaudhary, learned counsel for Respondent No.3 (Pooja Finlease Ltd.) herein supports the judgment on the ground that since the Appellant failed to prove willful breach of terms and conditions of the policy, the Claims Tribunal rightly saddled the Appellant with the liability to pay the compensation.
5. Facts of the case are not very much in dispute. Two wheeler No.DL-6S-P-5810 was owned by Respondent No.2 Ashok Kumar Arora. The two wheeler was financed by Respondent No.3 herein. Respondent No.2 defaulted in payment of installments and the possession of the vehicle was surrendered by Respondent No.2 to Respondent No.3. Respondent No.3 (herein) admitted that he had taken the custody of the two wheeler. The vehicle, however, continued to be in the name of Respondent No.2 till the time this was to be transferred by Respondent No.3 in favour of any person who came forward to purchase the same.
6. I have before me the Trial Court record. In para 23 (x) of the Claim Petition, the First Respondent made averments about the rash and

negligent driving of the two wheeler by the Fourth Respondent, his relationship with Respondents No.2 and 3 and the insurance of the vehicle. Para 23 (x) is extracted hereunder:-

“(x) The accident in question has been caused by rash and negligent driving by the driver of the vehicle, namely Mr. Gopal S/o Sh. Shiv Narayan who is therefore liable for compensation payable to the Petitioner. Respondent No.1 and/or Respondent No.2 who own the vehicle and with whom the said driver was working as domestic servant. The same respondent(s) are therefore responsible in vicarious liability against the act of rash and negligent driving of its/their servants. The Respondent No.3 is the insurer of the vehicle who has issued an insurance policy against liability to the public of the offending vehicle, which liability includes in respect of rash and negligent driving. All the respondents are therefore jointly and severally liable for compensation to the petitioner.”

7. Respondent No.2, the registered owner of the vehicle preferred not to contest the Claim Petition probably on the assumption that he had already surrendered the two wheeler in favour of Respondent No.3, who filed the written statement admitting that he was in possession of the vehicle. He did not traverse the averments with regard to driving of the two wheeler by Gopal and the fact that he was a domestic servant with Respondents No.2 and 3. He simply took up the plea that the averments made in Para 23 of the Claim Petition were concocted, coloured and fabricated. Thus, there was implied admission on the part of Respondent No.3 regarding his relationship with Gopal (Respondent No.4) who was found driving the two wheeler at the time of the accident in a rash and negligent manner.
8. The third Respondent wanted to amend the written statement and moved an application under Order VI Rule 17 CPC. In reply to Para 23 of the Claim Petition, he *inter alia* wanted to say that the Respondent No.1 had

not averred the circumstances under which Respondent No.4 (Gopal) came in possession of the two wheeler. He wanted to say that Gopal, son of Shiv Narayan, was in no way connected with Respondents No. 2 and 3 or with Nur Karan Mehto, Director of Respondent No.3. The Third Respondent also wanted to deny if Gopal was a domestic servant with Respondents No.2 and 3. By an order dated 19.01.2005 the application under Order VI Rule 17 CPC was rejected on the ground that Respondent No.3 could not be permitted to set up an entirely new case at such a belated stage. Obviously, there was an implied admission on the part of Respondent No.3 about his relationship with Gopal, who was driving the two wheeler at the time of the accident.

9. Respondent No.3 examined Nur Karan Mehto, its Director as R2W1. He testified that he had financed the purchase of Scooty No.DL-6SP-5810 in favour of Ashok Kumar Arora (Respondent No.2) by Agreement dated 11.06.2002. It was financed for 12 installments for a sum of ₹2318/- each. The Second Respondent paid just four installments. He stated that since Respondent No.2 was unable to pay the remaining installments, the vehicle was to remain in his name till he sold the same. He testified that on 26.05.2003 the two wheeler was standing on the road outside his house. He last saw it at 8:00 P.M. when he was going to attend the wedding of his friend's son. He returned at 12:30 midnight and went inside his house. On 27.05.2003 he left for a morning walk at 7:00 AM and returned at 8:00 A.M. and then found the two wheeler missing. When he went to lodge a complaint to the police at Police Station New Rajender Nagar he was informed that someone had caused the accident with the Scooty. The police did not record his report.

10. He stated that he did not give possession of the two wheeler to Gopal for driving. He had no concern with Gopal. The facts regarding parking of the scooter outside the house, his leaving home at 8:00 P.M., returning at midnight, leaving for a morning walk on the next day, visiting the Police Station for lodging a report and claiming no relationship with Gopal were very important facts which ought to have been stated by Respondent No.3 in the written statement. The same having not been stated therein, have to be rejected as an afterthought. The Claims Tribunal rightly disbelieved the same. It is important to note that in the written statement or even in his examination-in-chief (which was recorded on 19.01.2005, that is, after two years of the accident) Nur Karan Mehto, the Director of Respondent No.3 (who appeared on behalf of Respondent No.3) was completely silent as to how Gopal got possession of the two wheeler. It was only in cross-examination on behalf of the Appellant Insurance Company that R2W1 stated that the Scooty could be opened only with its keys and the keys used to remain with Shri Pankaj Kumar Jindal, its employee. Even, at this stage, R2W1 did not state as to how Gopal came in possession of the two wheeler.
11. There is no dispute about the proposition of law which is well settled that it is for the Insurer to prove that there was breach on the part of the insured. (*Sohan Lal Passi v. P. Sesh Reddy*, (1996) 5 SCC 21; *National Insurance Company Limited v. Swaran Singh & Ors.*, (2004) 3 SCC 297 and *United India Insurance Company Ltd. v. Lehu & Ors.*, (2003) 3 SCC 338)
12. It is well settled that onus keeps on shifting depending upon the facts and circumstances of the case. Since it was established that Gopal was driving the vehicle at the time of the accident and that he did not possess

a valid and effective driving licence; it was for the third Respondent to prove that there was no negligence on his part and he took all steps not to commit breach of the terms and conditions of the policy. 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) Delhi 733. In Para 22 of the report it was held as under:-

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 licence has been violated, initial onus is on the insurance company to prove that the licence concerned was a fake licence or was not a valid driving licence. This onus is capable of being easily discharged by summoning the record of the Licencing Authority and in relation thereto proving whether at all the licence was issued by the authority concerned with reference to the licence 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.....”

13. Thus, in my view, the Appellant successfully proved the breach of the terms and conditions of the policy and was, therefore, entitled to avoid the insurance policy but for the statutory liability.
14. Even if the Insurance Company successfully proved the breach of the terms of the policy, its liability to satisfy the award as per the third party liability is statutory.
15. The issue of satisfying the third party liability even in case of breach of the terms of insurance policy is settled by three Judge Bench report in *Sohan Lal Passi v. P. Sesh Reddy*, (1996) 5 SCC 21. As per Section 149(2) of the Motor Vehicles Act (the Act), an insurer is entitled to defend the action on the grounds as mentioned under Section

149(2)(a)(i)(ii) of the Act. Thus, the onus is on the insurer to prove that there is breach of the condition of the policy. It is well settled that the breach must be conscious and willful. Even if a conscious breach on the part of the insured is established, still the insurer has a statutory liability to pay the compensation to the third party and will simply have the right to recover the same from the insured/tortfeasor either in the same proceedings or by independent proceedings as the case may be, as ordered by the Claims Tribunal or the Court. The question of statutory liability to pay the compensation was discussed in detail by a two Judge Bench of the Supreme Court in *Skandia Insurance Company Limited v. Kokilaben Chandravadan*, (1987) 2 SCC 654 where it was held that exclusion clause in the contract of Insurance must be read down being in conflict with the main statutory provision enacted for protection of victim of accidents. It was laid down that the victim would be entitled to recover the compensation from the insurer irrespective of the breach of the condition of policy. The three Judge Bench of the Supreme Court in *Sohan Lal Passi* analyzed the corresponding provisions under the Motor Vehicles Act, 1939 and the Motor Vehicles Act, 1988 and approved the decision in *Skandia*. In *New India Assurance Co., Shimla v. Kamla and Ors.*, (2001) 4 SCC 342, the Supreme Court referred to the decision of the two Judge Bench in *Skandia*, the three Judge Bench decision in *Sohan Lal Passi* and held that the insurer who has been made liable to pay the compensation to third parties on account of issuance of certificate of insurance, shall be entitled to recover the same if there was any breach of the policy condition on account of the vehicle being driven without a valid driving licence. The relevant portion of the report is extracted hereunder:

“21. A reading of the proviso to sub-section (4) as well as the language employed in sub-section (5) would indicate that they are intended to safeguard the interest of an insurer who otherwise has no liability to pay any amount to the insured but for the provisions contained in Chapter XI of the Act. This means, the insurer has to pay to the third parties only on account of the fact that a policy of insurance has been issued in respect of the vehicle, but the insurer is entitled to recover any such sum from the insured if the insurer were not otherwise liable to pay such sum to the insured by virtue of the conditions of the contract of insurance indicated by the policy.

22.To repeat, the effect of the above provisions is this: when a valid insurance policy has been issued in respect of a vehicle as evidenced by a certificate of insurance the burden is on the insurer to pay to the third parties, whether or not there has been any breach or violation of the policy conditions. But the amount so paid by the insurer to third parties can be allowed to be recovered from the insured if as per the policy conditions the insurer had no liability to pay such sum to the insured.

23.It is advantageous to refer to a two-Judge Bench of this Court in *Skandia Insurance Company Limited v. Kokilaben Chandravadan*, (1987) 2 SCC 654. Though the said decision related to the corresponding provisions of the predecessor Act (Motor Vehicles Act, 1939) the observations made in the judgment are quite germane now as the corresponding provisions are materially the same as in the Act. Learned Judge pointed out that the insistence of the legislature that a motor vehicle can be used in a public place only if that vehicle is covered by a policy of insurance is not for the purpose of promoting the business of the insurance company but to protect the members of the community who become suffers on account of accidents arising from the use of motor vehicles. It is pointed out in the decision that such protection would have remained only a paper protection if the compensation awarded by the courts were not recoverable by the victims (or dependants of the victims) of the accident. This is the *raison d’etre* for the legislature making it prohibitory for motor vehicles being used in public places without covering third-party risks by a policy of insurance.

24. The principle laid down in the said decision has been followed by a three-Judge Bench of this Court with approval in Sohan Lal Passi v. P. Sesh Reddy, (1996) 5 SCC 21.

25. The position can be summed up thus:

The insurer and the insured are bound by the conditions enumerated in the policy and the insurer is not liable to the insured if there is violation of any policy condition. But the insurer who is made statutorily liable to pay compensation to third parties on account of the certificate of insurance issued shall be entitled to recover from the insured the amount paid to the third parties, if there was any breach of policy conditions on account of the vehicle being driven without a valid driving licence.....”

16. Again in *United India Insurance Company Ltd. v. Lehu & Ors.*, (2003) 3 SCC 338, in para 18 of the report the Supreme Court referred to the decision in *Skandia, Sohan Lal Passi* and *Kamla* and held that even where it is proved that there was a conscious or willful breach as provided under Section 149(2)(a) (ii) of the Motor Vehicle Act, the Insurance Company would still remain liable to the innocent third party but may recover the compensation paid from the insured. The relevant portion of the report is extracted hereunder:

“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 and Sohan Lal Passi cases the breach must be on the 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.....”

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20.....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*, *Sohan Lal Passi* and *Kamla* cases. We are in full agreement with the views expressed therein and see no reason to take a different view.”

17. The three Judge Bench of the Supreme Court in *National Insurance Company Limited v. Swaran Singh & Ors.*, (2004) 3 SCC 297 again emphasized that the liability of the insurer to satisfy the decree passed in favour of the third party was statutory. It approved the decision in *Sohan Lal Passi*, *Kamla* and *Lehru*. Paras 73 and 105 of the report are extracted hereunder:

“73. The liability of the insurer is a statutory one. The liability of the insurer to satisfy the decree passed in favour of a third party is also statutory.

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105. Apart from the reasons stated hereinbefore, the doctrine of *stare decisis* persuades us not to deviate from the said principle.”

18. This Court in *Oriental Insurance Company Limited v. Rakesh Kumar and Others*, 2012 ACJ 1268 and other Appeals decided by a common judgment dated 29.02.2012, noticed some divergence of opinion in *National Insurance Company Limited v. Kusum Rai & Ors.*, (2006) 4 SCC 250, *National Insurance Company Limited v. Vidhyadhar*

Mahariwala & Ors., (2008) 12 SCC 701; Ishwar Chandra & Ors. v. The Oriental Insurance Company Limited & Ors., (2007) 10 SCC 650 and Premkumari & Ors. v. Prahalad Dev & Ors., (2008) 3 SCC 193 and held that in view of the three Judge Bench decision in Sohan Lal Passi(supra) and Swaran Singh, the liability of the Insurance Company vis-à-vis the third party is statutory. If the Insurance Company successfully proves the conscious breach of the terms of the policy, then it would be entitled to recovery rights against the owner or driver, as the case may be.

19. In the instant case, the driver of the offending vehicle (Respondent No.4 herein) was a minor at the time of the accident. The right to recover the compensation to the Appellant Insurance Company thus cannot be granted against Respondent No.4 even if he attained the age of majority during the pendency of the Claim Petition. In *Jawahar Singh v. Bala Jain, (2011) 6 SCC 425* it was held that where it was not possible for an awardee to recover the compensation from the driver of the vehicle, the liability to make the payment of compensation would fall on the owner of the vehicle. Para 11 of the report is extracted hereunder:-

“11. It has been well settled that if it is not possible for an awardee to recover the compensation awarded against the driver of the vehicle, the liability to make payment of the compensation awarded fell on the owner of the vehicle. It was submitted that in this case since the person riding the motorcycle at the time of accident was a minor, the responsibility for paying the compensation awarded fell on the owner of the motorcycle. In fact, in Ishwar Chandra v. Oriental Insurance Co. Ltd. [(2007) 10 SCC 650 : (2008) 1 SCC (Cri) 591 : (2007) 3 AD 753 (SC)] , it was held by this Court that in case the driver of the vehicle did not have a licence at all, the liability to make payment of compensation fell on the owner since it was his obligation to take adequate care to see that the driver had an appropriate licence to drive the vehicle.”

20. It appears that the application being CM APPL.7029/2005 was preferred by the Appellant seeking stay of the execution of the award. From the record it appears that stay of execution of the award was not granted. Even if, the compensation has not been paid by the Appellant, it would be liable to pay the same in terms of the order passed by the Claims Tribunal and would be entitled to recover the same from Respondent No.3, the rightful owner and the possessor of the vehicle.
21. The Appeal is allowed in above terms.
22. Statutory deposit of ₹25,000/- shall be refunded to the Appellant Insurance Company.
23. Pending Applications stands disposed of.

(G.P. MITTAL)
JUDGE

NOVEMBER 27, 2012

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