

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

Decided on: 22nd March, 2012

+ **MAC. A PP. 700/2010**

ORIENTAL INSURANCE CO. LTD Appellant
Through: Mr. Santosh Paul, Advocate
versus

NARESH KUMAR & ORS. Respondents
Through: Mr.S.N. Parashar, Adv. for R-1.
Mr. Surjeet Singh, Adv. for R-2

+ **MAC.APP. 701/2010**

ORIENTAL INSURANCE CO LTD Appellant
Through: Mr. Santosh Paul, Advocate
versus

GEETA & ORS. Respondents
Through: Mr.S.N. Parashar, Adv. for R-1.
Mr. Surjeet Singh, Adv. for R-2

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

J U D G M E N T

G. P. MITTAL, J. (ORAL)

1. These two Appeals preferred by the Oriental Insurance Company Limited arise out of a common judgment dated 14.07.2010 passed by the Motor Accident Claims Tribunal (the Claims Tribunal).

2. MAC APP.700/2010 relates to the grant of compensation of ₹70,000/- to the first Respondent for having suffered injuries in an accident which occurred on 3.02.2005.
3. In MAC APP.701/2010 a compensation of ₹24,63,024/- was awarded to Respondents No.1 to 5 who were the legal representatives of deceased Satbir who was working as a Head Constable in Delhi Police at the relevant time.
4. During the course of arguments, a very short submission has been made on behalf of the Appellant.
5. It is urged that second Respondent Sanjeev @ Bobby (the driver) in MAC APP.700/2010 and sixth Respondent in MAC APP.701/2010 did not possess a valid driving licence at the time of the accident. At the time of registration of the case under Section 279/338/304-A IPC, the driver was also challaned for driving the vehicle without a licence.
6. During the course of inquiry, the driver came out with a plea that he did not possess a driving licence as he was working only as a helper on RTV bearing number DL-IV-1152. It is urged that the Insurance Company discharged its onus of proving conscious breach on the part of the owner (Krishan Kumar). In spite of this, the liability was fastened on the Appellant to pay the compensation awarded and even the recovery rights were declined.

7. Learned counsel for the Appellant contends that in view of the clear admission of the driver that he did not possess any driving licence, nothing more was required to be proved by the Appellant to establish a willful breach of the terms of the Insurance policy by the Insured. The Appellant was, therefore, entitled to at least grant of recovery rights.
8. On the other hand, it is urged by the learned counsel for Krishan Kumar (the Insured) that the driver did possess a valid driving licence from the year 2004 to 2007. It was amply proved during inquiry before the Claims Tribunal that the driver told a lie with oblique motive that he was not driving the vehicle at the time of the accident although, this was amply proved from the testimony of PW-3 Naresh (an eye witness) and R2W2 Krishan Kumar, the Insured.
9. The Claims Tribunal dealt with this question at great length in Paras 42 to 65 of the impugned judgment, which are extracted hereunder:-

“42. In the preset case the plea of R1 is that he was not driving the offending vehicle at the time of accident. He was in his village. When examined under Section 15 Evidence Act, he stated that he does not have any driving license. He had never issued any driving license. He had never applied for it.

43. The plea of R2 is that it was R1 who was driving the offending vehicle at the time of accident. He was having a valid driving license.

44. R3 wants to take the benefit of the dispute between R1 and R2. Since R1 has specifically denied his having any driving license on the date of accident or his having ever applied for issuance of the license, R3 on the basis of his (R1's) statement wants to wriggle out of its liability to pay the compensation.

45. First of all, I will try to deal with the question as to who was driving the vehicle at the time of accident.

46. Constable Naresh PW3 in the cross examination of R2 has admitted the suggestion that R1, who was present on that day in the court, was the driver of the offending vehicle. He (PW3) had volunteered, he (R1) was driving the vehicle at the time of accident. This witness was cross examined by Ld. Counsel for R1. It was not suggested to him that R1 was not driving the offending vehicle at the time of accident or that he was in his village. The witness denied the suggestion that he had not seen the driver at the place of accident. The witness deposed that after the accident, the driver had tried to flee away from the spot and in that process he had seen him while he (R1) was getting down from the offending vehicle and his face was towards them (witness). It is well settled that if a particular fact asserted by a witness is not tested in the cross examination, that particular fact will have to be taken to have been accepted by the opposite side.

47. A notice under Section 133 MV Act dated 24.02.2005 was issued to R2. The certified copy of the notice is on record. R2 had given it in writing that at the time of accident R1 was driving the offending vehicle. This fact has been stated on oath by R2 when he appeared as R2W2.

48. R1 has not appeared to refute the claim of PW3 and R2W2. An adverse inference shall have to be drawn against him. The facts were within his personal knowledge, therefore, it was for him to state those facts on oath to believe the claim of W3 and R2 W2. R2 would

not have given in writing on 24.02.2005 itself that it was R1 who was driving the offending vehicle at the time of accident. By naming a person not having a valid DL at the time of accident would have been suicidal involving his RTV had taken place, there was every likelihood of filing of the claim petitions by the injured/LRs of the deceased. He would not have himself invited the trouble/liability. The defence of R1 has come, in writing, for the first time, in shape of the written statement dated 16.04.2007. The plea of R2 is therefore, consistent. Therefore, I hold that the offending bus was being driven by R1 at the time of accident.

49. It brings me to the crucial question as to who, in the circumstances of the case, is liable to pay the compensation.

50. R2 has appeared as R2W2 and in his examination in chief he has stated that when R1 had come to him for employment, he had verified his credentials. He has personally seen him driving another vehicle bearing No.DLIVA1187 prior to joining his service. At that time he (witness) had also seen the DL of R1 which was produced by him. He had also seen the name of the accused (R1) as well as the validity of DL. He had also seen the DL and satisfied himself that R1 was authorized to drive the commercial vehicle. After appointing R1, he had personally seen the manner in which R1 used to drive his (witness's) vehicle. He was told by R1 that he was not having any criminal case. However, he (R1) had told him that he was having traffic challan against him. The witness further deposed that he was having a valid permit for plying this vehicle.

51. The witness (R2W2) was not cross examined on behalf of petitioner(s). Statement of this witness was recorded on 17.09.2009. R1 was present on that day. However, he did not put any question to the witness. On that very day R1 was examined under Section 165 Evidence Act. In the cross examination of R3, the witness

deposed that he had verified the DL of R1, which, at that time was valid from the year 2004 till 2007. The witness denied the suggestion that R1 was not having any driving license or that he (witness) had not verified the DL or R1. The witness further deposed that he was not challenged or charge-sheeted for offence under Section 5/80 MV. Act.

52. R2, in order to prove the fact that R1 was having a license, has examined constable Jai Ram IR2W3) and Sh. Rakesh Hooda (R2W4).

53. Ct. Jai Ram, R2W3 had produced the record of challans of the vehicles. As per the record, vehicle No. DL4A1187 was challaned on 15.10.2004. The challan was issued to the driver Sanjeev Kumar s/o Jai Prakash. At the time of issuance of this challan, the DL of Sanjeev Kumar was impounded. Copy of the challan is mark A. Copy of the relevant entry of the register is Ex.R2W3/A.

54. This witness (R2W3) was not cross examined at all on behalf of R1, though an opportunity to cross examine had been afforded to his counsel. In the cross examination of R3, the witness deposed that he was not in a position to say as to whether the DL, which was impounded in this case was fake. The witness admitted that in the register neither the name of the authority which had issued the DL nor the date on which it was issued, was mentioned. The witness was not cross examined on behalf of the petitioner (s).

55. Sh. Rakesh Hooda, R2W4, who was owner of DLIVA1187, which was challenged on 15.10.2004, deposed that he knows R1 as he had earlier worked with him as driver and had driven his vehicle. At the time when R1 came to him for employment, he had seen his driving license. He had not retained the copy of DL. R1 had worked with him for about one year. During his tenure, R1 had driven his (witness's) vehicle diligently and had not caused any accident except a traffic challan

issued on 15.10.2004. He then identified R1 who was present in the court on that day.

56. This witness (R2W4) was also not cross examined on behalf of R1 though an opportunity to cross examine the witness had been afforded to the counsel for R1. In the cross examination conducted on behalf of R3 the witness denied the suggestion that R1 had never worked with him (witness) or that he was shown to him outside the court or that he (R1) had not shown any license or that he (witness) had deposed at the instance of R2.

57. The entry Ex.R2W3/A is dated 15.10.2004. On that day R2W4 could not have even imagined that an accident of the offending vehicle would take place on 23.02.2005. In the challan copy of which is mark A, which has been proved by R2W3, name of R1 finds mentioned. The number of the challan book 575237 finds mentioned in Ex.R2W3/A. This number could not have been mentioned in the absence of the actual challan. The challenging authority would not have known on 15.10.2004 that this driver (R1) would be required to answer as to whether he (R1) was having a DL or not. R2W3 has categorically stated that at the time of issuance of the challan, DL of Sanjeev Kumar was impounded. Thus, there is an overwhelming evidence that Sanjeev Kumar s/o Jai Prakash had been challaned on 15.10.2004 and his DL had been seized by the police.

58. The question arises as to whether the person arrayed as R1 is the same who had been challaned on 15.10.2004 and in respect of whom the evidence has been produced by R2.

59. As mentioned earlier, R1 has not appeared. He could have appeared and stated it on oath that he never been challaned. He could have stated on oath that he had never worked with R2W4. It is his plea that he had worked as helper on the vehicle of R2 and due to non-payment of his salary for two months, he (R1) had left the

job, before the alleged accident. Thus it is not the plea of R1 that he does not know R2 at all. Therefore, in view of the nature of evidence, I hold that R1 is the same person who was challaned on 15.10.2004.

60. It is the plea of R1 that he had never applied for DL. He did not have any DL. As against this plea, we have the evidence of R2W2, R2W3 and R2W4. Once a finding on the basis of the evidence to the effect that R1 is the same person who had been challaned on 15.10.2004, is arrived at, it can be said that the plea put forth by R1 is unbelievable. He had not been paid the salary by R2. It could have been the reason for him to come out with such a plea to create problem for R2.

61. R2 has substantiated his defence by appearing as a witness and examining R2W3 and R2W4. R1 cannot be permitted to defeat the plea of R2. In such like cases, as the present one, where satisfactory evidence has been produced by the owner, his (owner's) interest will have to be safe guarded otherwise a disgruntled driver, for obvious reasons, would, in order to achieve his illegal design, deny his having DL on the date of accident. In the present case R1 is facing trial in the criminal case. He has been challaned under Sections 279/338/304IPC read with Section 3/181 MV Act. The trial has not been concluded as yet. He wants to put forth a formidable defence. During investigation he had been arrested. He had refused to join the TIP. This is evident from the report under Section 173 Cr.P.C. certified that copy of which is Ex.R3W1/F. R2 has not been challenged under Section 5/180 of MV Act.

62. I am conscious of that fact that in some cases owners of the vehicles, in order to avoid liability, produce a person having a valid DL and assert that at the time of accident the vehicle was being driven by him though in fact that vehicle had been driven by a person not having a valid DL. It would never be vice verse. But then in those cases the tribunal will be required to appreciate the

facts in the light of the evidence produced in those cases. As mentioned earlier, whatever may be the reason for R2 to say that R1 was the driver of the offending vehicle at the time of accident, he would not have, at least invited the trouble to pay the compensation.

63. Since, we do not have the DL of R1, therefore, the question of its being fake or otherwise does not arise.

*64. In the circumstances of the case, in view of the nature of evidence and the observations made by the Hon'ble Supreme Court in **Lal Chand Vs. OIC (2006) SCCR 967,** I am inclined to accept the plea of R2 that R1 was the driver of the offending vehicle at the time of accident and he was having a valid DL. The claim of R2 finds necessary corroboration from the statements of R2W3 and R2W4.*

65. In view of the above discussion it is held that R1 was driving the offending vehicle at the time of accident. He is the principal tort feaser. Admittedly the offending vehicle was owned by R2 and insured with R3, therefore, they are held vicariously liable. All the respondents are held jointly and severally liable to pay the awarded amount. In view of nature of evidence and findings, R3 cannot escape the liability. The awarded amount be paid by R3”.

10. On the basis of the evidence adduced by the Respondent Naresh Kumar and the owner Krishan Kumar, it was clearly established that Sanjeev was driving RTV No.DL-IV-1152 at the time of the accident. As noticed by the Claims Tribunal, testimony of PW-3 Naresh Kumar that Sanjeev was driving the vehicle at the time of the accident was not challenged in his (PW-3's) cross-examination. Similarly, testimony of the owner, Krishan Kumar, who entered the witness box as R2W2, that Sanjeev

was driving the vehicle at the time of the accident was not challenged. The Insured also examined Constable Jai Ram (R2W3). He deposed that a challan was issued against Sanjeev Kumar for violating the guidelines laid down by the Supreme Court. The relevant entry of the challan was proved as Ex.R2W3/A. His testimony was also not challenged by the driver.

11. In these circumstances, it was established on record that Sanjeev Kumar was driving the offending vehicle at the time of the accident. Thus, the driver's plea that he was simply working as a helper on the RTV bearing No. DL-IV-1152; that there was some dispute with regard to the payment of wages between him and the owner and that he was falsely involved in the accident case was rightly rejected by the Claims Tribunal.
12. It was also proved by R2W4 Rakesh Huda's testimony that the driver Sanjeev Kumar had worked with him as a driver on his RTV No.DL-1VA-1187 and that he was also challaned by the traffic police on 15.10.2004 vide challan mark A which also shows that the driver had put up a totally false case that he was working merely as a helper on the RTV involved in the accident. It is amply proved that he was working as a driver on the RTV not only on the date of the accident but even prior thereto.
13. It is well settled that the onus is on the Insurance Company to

prove that there was willful breach of the terms of the policy as envisaged under Section 149 (2) of the Motor Vehicles Act (the Act).

14. In *United India Insurance Co. Ltd. v. Lehu and Ors.*, (2003) 3 SCC 338 while relying on *Skandia Insurance Co. Ltd. v. Kokilaben Chandravadan and Ors.*, (1987) 2 SCC 654 and *Sohan Lal Passi v. P. Sesh Reddy & Ors*, (1996) 5 SCC 21 the Supreme Court held as under: -

“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. The injured or relatives of the 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 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 the aforementioned cases 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.***”

15. I have already held above that Sanjeev Kumar was driving not only the RTV involved in the accident but the RTV No.DL-IVA-1187 owned by R2W4 almost four months prior to the accident.
16. R2W4 with whom Sanjeev Kumar worked as a driver, deposed that when he (Sanjeev Kumar) came to him for employment he had seen his driving licence. He stated that Sanjeev Kumar drove the vehicle diligently during the course of his employment with him. The owner of the vehicle (Krishan Kumar) R2W2 deposed that at the time Sanjeev Kumar came to him for employment, he verified his credential personally, saw him driving another vehicle and also found out that he had a valid driving licence to drive a commercial vehicle. He personally saw Krishan Kumar driving his vehicle.
17. The Claims Tribunal rightly came to the conclusion that in order to settle his personal score, Sanjeev Kumar (the driver) took the plea that he was working merely as a helper and did not possess any driving licence. There was no reason for the owner of the RTV to have falsely named a person not having a driving

licence as the driver of the vehicle at the time of the accident, knowing fully well the consequences that he himself would be liable to pay the compensation to the legal representatives.

18. In the circumstances of the case, it cannot be said that the Insurance Company discharged the onus placed on it. Rather, there is ample evidence to show that the owner took all precautions to see that the vehicle is driven by a duly licensed person. Non-production of the driving licence for the reasons stated hereinabove would not mean that the owner committed breach of the terms of the policy.
19. The Appeals are devoid of any merit; the same are accordingly dismissed.
20. No costs.

(G.P. MITTAL)
JUDGE

MARCH 22, 2012
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