

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

+ MAC.A. 141/2011

% Judgment reserved on: 6th February, 2013
Judgment delivered on: 13th February, 2013

ORIENTAL INSURANCE CO LTD. Appellant
Through: Mr. Pradeep Gaur, Advocate.

Versus

BALBIRI & ORS. Respondents
Through: Mr. R.K. Bacchan, Advocate for
Respondent No. 1.

CORAM:
HON'BLE MR. JUSTICE SURESH KAIT

SURESH KAIT, J.

1. Instant appeal is directed against the impugned award dated 23.11.2010 passed by the Id. Tribunal, whereby while awarding the compensation in favour of the respondents / claimants, appellant was granted recovery rights of the said amount from the respondent nos. 1 & 3, owner and driver of the offending vehicle.

2. Counsel appearing on behalf of the appellant has argued only on the ground that the Id. Tribunal failed to consider the fact that in the present case, there was no driving licence and in such type of cases, the Insurance Company is not liable at all to indemnify the insured.

3. Ld. Counsel has submitted that the Id. Tribunal wrongly reached

to the conclusion that the Insurance Company has failed to prove the breach of terms and conditions of the Insurance policy in accordance with the law. Therefore the impugned award is liable to be set aside and the appellant is entitled to be absolved from any responsibility.

4. He further submitted that a chargesheet was filed against respondent no. 3 in which the driver was challaned under Section 279/337 of the IPC and also under Section 3/181 of the Motor Vehicles Act. Notice under Order XII Rule 8 CPC was also sent to the owner and driver of the offending vehicle but they preferred not to appear before the Id. Tribunal.

5. To strengthen his arguments, Id. Counsel has relied upon a case decided by this Court on 17.04.2007 in bunch of matters titled lead case ***FAO 476/2003 New India Insurance Co. Ltd. & Ors. v. Sanjay Kumar & Ors. etc.*** wherein it is held as under:-

“29. Evidence on record, being the chargesheet submitted by the police, proved as Ex. R1 by the insurance company establishes that the driver of the vehicle failed to produce any driving licence before the police authorities in spite of being called upon to do so.

30. Notwithstanding that, learned Judge MACT has held that the insurance company has failed to establish that there was a breach of the conditions of the policy of insurance.

31. It would be relevant to note that neither the owner nor the driver produced any licence before the Motor Accident Claim Tribunal.

32. I therefore do not agree with the view taken by the learned Judge that the insurance company failed to prove that there was a breach of a condition of the policy of insurance which required the owner not to entrust the vehicle to a person not possessing a valid driving licence.

33. The learned Judge failed to appreciate that as per the provisions of Section 158 of the Motor Vehicles Act, 1988 every driver of a motor vehicle is legally obliged to keep with him the driving licence while driving a vehicle and produce the same required by a authority empowered to seek production of the licence. What else could the insurance company prove other than the fact that the driver failed to produce any driving licence when called upon to do so after the accident? A presumption has to be drawn that the driver possessed no licence.

34. The appeal has to succeed. As per para 84 of the decision in Swaran Singh's case (Supra), insurance company would be entitled to avoid any liability. However, I note that vide order dated 1.8.2003, the insurance company was declined any interim relief, in that, application filed by the insurance company seeking stay of execution of the award against it was declined.

35. Since the insurance company has satisfied the award vis-a-vis the claimant, I dispose of the appeal granting recovery rights to the insurance company. The insurance company would be entitled to recover the amount paid to the claimant from the owner of the vehicle insured. The insurance company would be entitled to interest @ 8% p.a. on the sum paid to the claimant with effect from the day it satisfied the award till date of recovery from the owner”

6. On perusal of the impugned award it is revealed that Id. Tribunal has recorded the statement of the appellant that as the driver of the offending vehicle was not holding any driving licence, they should be

absolved from making any compensation to the respondents / claimants. To prove their plea, the appellant Insurance Company has relied upon a testimony of Sh. Vikram Singh, examined as R3W1. He has proved the certified copy of chargesheet filed against R3 as Ex.R3W1/1. It was stated that besides being challenged under Section 279/337 IPC, respondent no. 3 has also been challaned under Section 3/181 of the M.V. Act. A notice under Order XII Rule 8 CPC was sent to owner as well as the driver of the offending vehicle to produce original insurance policy, DL, permit of the offending vehicle. But these documents have not been produced. Accordingly, it is a case of clear breach of terms and conditions of the insurance policy.

7. Ld. Tribunal has recorded the contention of the respondents / claimants that Insurance Company is duly liable to pay compensation award and it is not a case of fake driving licence nor it has been established that the driver was driving the offending vehicle without the driving licence.

8. After hearing ld. Counsel for the parties, ld. Tribunal has opined that in case of breach of any term of the policy by the insured, the Insurance Company is not liable to pay any compensation amount. The onus is on the Insurance Company to prove that the driver was not holding a driving licence or a valid driving licence at the time of accident.

9. In the present case, the driver and owner of the offending vehicle have been proceeded *ex-parte*. The Insurance Company has

sent a casual notice to them on 28.09.2010, whereas the earlier reports were received that driver of the offending vehicle was not residing at the given address and the address of the owner was incomplete. Therefore, both the driver and owner were ordered to be served through publication. Moreover from the chargesheet filed by the police of PS-Nand Nagri, it is apparent that FIR was registered under Section 279/337 IPC. Respondent no. 3 was produced before the police by the claimant. In the chargesheet it has not been mentioned that IO had made any attempt to produce the DL of respondent no.3. It has not been shown that IO had ascertained that the driver of the offending vehicle was not having the driving licence.

10. I have perused the chargesheet, wherein Section 3/181 M.V. Act has been added. It proves that either the driver of the offending vehicle was not having the driving license or the same was not handed over to the police. Both these situations do not affect the issue involved in the present case.

11. Before the Id. tribunal, the appellant relied upon a case of ***Oriental Insurance Company Ltd. v. Pyare Lal 2010 ACJ 1647.***

12. In the present case, it has not been proved by the Insurance Company that respondent no. 3 was not having any valid driving licence on the date of accident. Thus, the Id. Tribunal has opined that it does not absolve the Insurance Company from making the payment of the compensation amount. Accordingly, Insurance Company was directed to make the payment of the compensation amount.

13. Law is well settled in the case of ***National Insurance Co. Ltd. vs. Swaran Singh and Ors. (2004) 3 SCC 297***, wherein the Apex Court has held as under:-

“76. In Kamla's case (supra), a Division Bench of this Court summed up the legal position:

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. Learned counsel for the insured contended that it is, enough if he establishes that he made all due enquiries and believed bona fide that the driver employed by him had a valid driving licence, in which case there was no breach of the policy condition. As we have not decided on that contention it is open to the insured to raise it before the Claims Tribunal. In the present case, if the Insurance Company succeeds in establishing that there was breach of the policy condition, the Claims Tribunal shall direct the insured to pay that amount to the insurer. In default the insurer shall be allowed to recover that amount (which the insurer is directed to pay to the claimant third parties) from the insured person.”

77. The submissions made on behalf of the petitioner may now be noticed. According to the learned counsel, Sub-section (4) of Section 149 deals with the situation where the insurer in the policy purports to restrict the insurance of the persons insured thereby by reference to any condition other than those in Clause (b) of Sub-section (2) of Section 149

and in that view of the matter no liability is covered for driving of a vehicle without licence or fake licence. The submission ignores the plain and unequivocal expression used in Sub-section (2) of Section 149 as well as the proviso appended thereto. With a view to construe a statute the scheme of the Act has to be taken into consideration. For the said purpose the entire Act has to be read as a whole and then chapter by chapter, section by section and word by word. [See Reserve Bank of India etc. v. Peerless General Finance and Investment Co. Ltd. and Ors. [1987]2SCR1 .

78. Proviso appended to Sub-section (4) of Section 149 is referable only to Sub-section (2) of Section 149 of the Act. It is an independent provision and must be read in the context of Section 96(4) of the Motor Vehicles Act, 1939. Furthermore, it is one thing to say that the insurer will be entitled to avoid its liability owing to breach of terms of a contract of insurance but it is another thing to say that the vehicle is not insured at all. If the submission of the learned counsel for the petitioner is accepted, the same would render the proviso to Sub-section (4) as well as Sub-section (5) of Section 149 of the Act otiose, nor any effective meaning can be attributed to the liability clause of the insurance company contained in Sub-section (1). The decision in Kamla's case (supra) has to be read in the aforementioned context.

79. Sub-section (5) of Section 149 which imposes a liability on the insurer must also be given its full effect. The insurance company may not be liable to satisfy the decree and, therefore, its liability may be zero but it does mean that it did not have initial liability at all. Thus, if the insurance company is made liable to pay any amount it can recover the entire amount paid to the third party on behalf of the assured. If this interpretation is not given to the beneficent provisions of the Act having regard to its purport and object, we fail to see a situation where beneficent provisions can be given effect to Sub-section (7) of Section 149 of the Act, to which pointed attention of the Court has been drawn by the

learned counsel for the petitioner, which is in negative language may now be noticed. The said provision must be read with Sub-section (1) thereof. The right to avoid liability in terms of Sub-section (2) of Section 149 is restricted as has been discussed hereinbefore. It is one thing to say that the insurance companies are entitled to raise a defence but it is another thing to say that despite the fact that its defence has been accepted having regard to the facts and circumstances of the case, the Tribunal has power to direct them to satisfy the decree at the first instance and then direct recovery of the same from the owner. These two matters stand apart and require contextual reading.”

14. This Court in the case of ***Oriental Insurance Co. Ltd. Vs. Rakesh Kumar and others, 2012 ACJ 1268*** has held as under:-

“44. In view of the foregoing discussion, it is held as under:-

(i) In order to avoid an obligation to indemnify the Insured, the Insurer is under obligation to establish that there was conscious and willful breach of the terms of the policy.

(ii) Even when there is a willful breach of the terms of the policy under Section 149 (2) (a) of the Act, the Insurance Company is under obligation to indemnify the liability towards the third parties and recover the same from the owner.

(iii) Once the Insured proves that the driver did not hold any driving licence to drive the Class of vehicle involved in the accident or that the driving licence was fake; requires the owner and driver to produce the driving licence and if they failed to produce the same, the onus of proving breach of policy would be deemed to be discharged. Onus would then shift on the owner to establish that he was not guilty of breach of the terms of policy. In the absence of any evidence being produced by the Insured, in such cases, it will be presumed that he was guilty of a willful breach. The Insured

in such cases, would be entitled to recover the compensation paid to third party in discharge of its statutory liability.

(iv) Where policy is avoided on proof or facts which renders the Insurance policy void under Section [149\(2\)\(b\)](#) of the Act, the Insurance Company would not be under obligation to pay even to third parties, as in such cases the contract of insurance is nonest.”

15. Settled law is that if there is violation of any of the terms and conditions of insurance policy, in that case, Insurance Company is liable to pay compensation as statutory liability. In such eventuality, the Insurance Company is entitled to recover the amount from the owner / driver.

16. Admittedly, in the present case, recovery rights have been given in favour of the appellant. Accordingly, in the present case, the Insurance Company is liable to pay the compensation amount as initial liability as well as statutory liability as envisages in the Motor Vehicles Act, 1988.

17. In view of the above discussion and legal position, I find no discrepancy in the impugned award dated 23.11.2010, therefore, this Court is not inclined to interfere therewith.

18. Consequently, the instant appeal is dismissed with no order as to costs.

19. Pursuant to order dated 08.03.2011, the appellant/Insurance Company was directed to deposit the entire awarded amount along with upto date interest with the Registrar General of this Court.

Therefore, I direct the Registrar General to disburse the awarded amount in favour of the claimants/respondents as per the terms and conditions fixed by the learned Tribunal in the impugned award dated 23.11.2010.

20. Statutory amount shall also be released in favour of the appellant/Insurance Company.

SURESH KAIT, J

FEBRUARY 13, 2013

Jg/sb