

GAHC010003412017



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : MACApp./61/2018

SMTI AROTI DUTTA and 2 ORS
RESIDENT OF JAYMATI NAGAR, PANDU P.S JALUKBARI

2: SHRABANI DUTTA
RESIDENT OF JAYMATI NAGAR
PANDU P.S JALUKBARI

3: RANJANA DUTTA
RESIDENT OF JAYMATI NAGAR
PANDU P.S JALUKBAR

VERSUS

THE UNITED INDIA INSURANCE COMPANY LIMITED.
REPRESENTED BY ITS REGIONAL MANAGER, BHANGAGARH, GUWAHATI
15, INSURER OF THE VEHICLE NO .AS 0 1 /BF 4246,BEARING POLICY NO .
1310043114P 105151308,VALID UP TO 10 10 2015

2:BARADA TALUKDAR
R/O HOUSE NO .12
A.K. AZAD ROAD
REHABARI
P.S PALTAN BAZAR
OWNER OF THE OFFENDING VEHICLE

3:AJOY KUMAR TALUKDAR
R/O UPARHALI PALASHBARI P.S PALASHBARI PRESENTLY RESIDING AT
R/O HOUSE NO .12 A.K. AZAD ROAD REHABARI
P.S PALTAN BAZAR DISTT KAMRUP

Advocate for the Petitioner : MR. A T SIKDER

Advocate for the Respondent : MR. S DUTTA

BEFORE
HON'BLE MR JUSTICE ARUN DEV CHOUDHURY

For the Appellant : Mr. J. Ahmed, Advocate.

For the Respondents : Ms. M. Choudhury, Advocate,

Date of Hearing : 23.02.2023

Date of Judgment : 26.04.2023

JUDGMENT & ORDER (CAV)

- 1.** Heard Mr. J. Ahmed, learned counsel for the appellant. Also heard Ms. M. Choudhury, learned counsel for the respondent/ Insurance Company.
- 2.** The present appeal under Section 173 of the Motor Vehicles Act, 1988 is preferred against the Judgment and Award dated 26.09.2017, passed by the learned Court of Additional District Judge No. 2, Kamrup (Metro) at Guwahati in MAC Case No. 497/2015 wherein the owner and the driver of the offending vehicle have been directed to pay compensation of Rs.9,60,000/- along with interest @ 9% per annum from the date of filing of the claim petition till realization.
- 3.** The claimant is aggrieved by the aforesaid judgment only on the ground that the learned Court below ought to have directed the insurance company to pay the amount so awarded and to recover the same from the owner and the driver of the offending vehicle inasmuch as there were no dispute that the vehicle was having valid insurance policy covering third party risk on the date of accident.
- 4.** The insurance company has not assailed such judgment for obvious reasons.

Thus, there is no dispute as regards the entitlement of compensation as claimed by the claimant and determined by the learned Court below. Therefore, the only determination that is to be made in the present case is whether the learned Court below has committed any error by not following the principles of pay and recovery in the given facts of the present case.

5. Though the other facts and evidences except the validity of the driving license of the driver of the offending vehicle is not necessary, however, the brief facts as projected by the claimants are described herein below:-

- I. The claim petition was filed by the wife and daughters of the deceased. The claimant's case is that on the fateful day i.e. on 26.12.2014, when the deceased was returning home from Jalukbari, the driver of the offending vehicle bearing registration number AS-01-BF-4246 driving in a rash and negligent manner knocked down the deceased at Adabari, Katiya Dalang near Jalukbari resulting in grievous injuries to the person of the deceased. Though, the injured was immediately taken to Mahendra Mohan Choudhury Hospital, Panbazar, Guwahati however, he succumbed to his injury after a few hours.
- II. The Insurance Company took a specific plea that insurance company cannot be held liable as the driver of the offending vehicle was not having any valid driving license to drive the vehicle. The driving license which was exhibited to prove that driver was holding a driving license, was negated by the learned Court below in view of the evidence laid by the insurance company through DW-1.
- III. The DW-1 was a person from the licensing authority and the said DW-1 proved that the driving license seized by the Police and projected to be the license of the driver of the offending vehicle, was issued in the name of one Phukan Chandra Barman and not in the name of the driver of the

offending vehicle and the said license was seized by the police and exhibited by the claimant was also having a validity from 12.05.2014 to 11.05.2009. Therefore, it was also a contention that the said driving license even was not valid on the date of accident. The evidence of DW-1 remained unshaken.

IV. In view of the aforesaid evidence and material available on record, the learned Court below came to a conclusion that the driver of the offending vehicle was not authorized under law to drive any motor vehicle on the date of accident and therefore, the owner of the offending vehicle had clearly breached the condition of the policy of insurance as well as provision of Section 149 (2) of the Motor Vehicles Act, 1988. Accordingly, the learned Court below held that though the offending vehicle was duly insured with the insurance company, for breach of condition of the insurance and the provision of Section 149(2) M.V. Act, 1988, the driver and owner are jointly and severally liable to pay the compensation to the claimants.

6. The learned counsel for the appellant submits that the learned Court below had failed to adhere to the settled principles of law as laid down by the Hon'ble Apex Court regarding the principle of pay and recovery to the third parties inasmuch as the right of a third party is statutorily protected in terms of Section 149 (1) of the M.V. Act, 1988. The terms of contract by the owner of the offending vehicle in the present case cannot be said to be fundamental breach inasmuch as it is well settled that even in a case of fake driving license, the third party victim of motor vehicular accident are entitled for compensation to be paid by the insurance company which can be recovered from the owner and driver of the offending vehicle.

The learned counsel for the appellant in support of his contention, relies on the decisions of the Hon'ble Apex Court in the case of ***National Insurance Company***

Limited –Vs- Swaran Singh and Ors reported in **2004 3 SCC 297**, **Singh Ram – Vs- Nirmala and Ors** reported in **2018 3 SCC 800** and **Shamanna and Ors –Vs- the Divisional Manager, Oriental Insurance Company Ltd.** reported in **2018 9 SCC 650**.

7. Per contra Ms. M. Choudhury, learned counsel for the insurance company submits that it has rightly been decided by the learned Court below inasmuch as the appellants cannot be said to be aggrieved person as they are having no grievance against the compensation awarded. Under the provision of Section 173 of the M.V. Act, 1988 only an aggrieved person can file an appeal. Accordingly, Ms. Choudhury, learned counsel submits that appeal should be dismissed.

Ms. Choudhury, learned counsel further contends that it is not an universal rule that in every cases when there is breach of condition of insurance policy, the insurance should be directed to pay and recover the same from the insured inasmuch as in the present case, the insurance has established their case that on the date accident, the driver of the offending vehicle was not having any valid license.

8. This Court has given anxious consideration to the arguments advanced by the learned counsel for the parties and also perused the materials available on record.

9. Section 149 (1) of the M.V. Act, 1988, statutorily protects the right of a third party. Such right is a valuable right and such right cannot be defeated on the basis of the conduct of the owner or the driver of an offending vehicle. The principle of pay and recovery is a beneficial provision meant for third party victims of motor vehicular accident. Under Section 149 (2)(ii) of the M.V. Act, 1988, even if the insurance company establishes that there is violation of the terms of the policy condition, then also the insurance company needs to satisfy the claim of the third party first and then recover the same from the owner/driver of the offending vehicle.

10. The Hon'ble Apex Court in **PEPSU Road Transport Corporation –Vs-**

National Insurance Company reported in **(2013) 10 SCC 217**, after considering different decisions on the Hon'ble Apex Court laid the following principles:-

- I. It is open to the insurer under Section 149 (2) (a) (ii) to take a defence that the driver of the vehicle involved in the accident was not duly licensed.
- II. If such defence is taken, the onus is upon the insurance to prove the same.
- III. The owner of a vehicle when hires a driver, he has to check the validity of the driving license and to satisfy himself as to the competence of the driver. The owner cannot be expected to go beyond that, to the extent of verifying the genuineness of the driving license with the licensing authority before hiring the services of the driver. In an event, if, despite having information regarding a fake license, yet the owner does not take appropriate action for verification of the matter, then, insurer will not be at fault and in such circumstances, insurance company is not liable for the payment of compensation.

11. In the case of **Swaran Singh (supra)** the Hon'ble Apex Court held that mere absence, fake or invalid driving license or disqualification of the driver for driving at the relevant time are not in themselves defences available to the insurer against either the insured or the 3rd parties. It was also held in **Swaran Singh (supra)** that to avoid its liability towards the insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of policy regarding use of vehicle by duly licensed driver or one who was not disqualified to drive at that relevant point of time.

12. In the case of **Shamanna (supra)**, the Hon'ble Apex Court after dealing with different earlier pronouncement of the Hon'ble Apex Court including **Swaran**

Singh (supra) held that in case of third party risk the insurer had to indemnify the compensation amount payable to the third party and the insurance company may recover the same from the insured. Relying on **Swaran Singh** (Supra), the Hon'ble Apex Court held that in cases of breach of policy condition due to disqualification of the driver or invalid driving license of the driver, the insurer has to indemnify the compensation amount to the third party and the insurance company may recover the same from the insured.

13. Again in the case of **Pappu and ors –Vs- Binod Kumar Lamba and ors** reported in **2018 3 SCC 308**, similar views were taken by the Hon'ble Apex Court. The Hon'ble Apex Court in a situation when the insurance company established that the driver was an unauthorized driver with invalid license, directed the payment to be made by the insurance company and to recover the same. While passing such judgment, the Hon'ble Apex Court relied on the fact that insurance certificate indicates that the offending vehicle was comprehensively insured by the insurance company. It was also held that ends of justice would be met if the dicta of **Swaran Singh** (supra) is applied and insurance is directed to pay the claimant at the first instance with liberty to recover the same from the owner of the vehicle in accordance with law.

14. In the case in hand as discussed hereinabove, it is established beyond comprehension that the offending vehicle was having a valid insurance on the date of accident. It was also established by the insurance company in its defense that the vehicle was driven by the driver without any valid driving license. Therefore, in the aforesaid factual background and applying the principle of law, as discussed hereinabove, including the provision of Section 149 (1) and 149(2) of the Motor Vehicles Act, 1988, this Court is of the unhesitant view that the learned Court below has ignored settled proposition of law in not directing the insurance company to satisfy the award at the first instance and giving a liberty to the insurance company to recover the same from the owner/driver of the offending vehicle.

15. Coming to the argument of Ms. Choudhury, learned counsel for the Insurance Company that the appellant cannot be treated as an aggrieved party as they have no grievance with the compensation amount awarded inasmuch as an appeal under Section 173 M.V. Act, 1988 can be preferred by an aggrieved person, this Court is of the view that when a settled proposition of law of pay and recovery as discussed hereinabove is ignored, the party shall definitely be treated as aggrieved party so far it relates to the direction of pay and recovery. Therefore, such contention of Ms. Choudhury, learned counsel for the Insurance Company is rejected.

16. In view of the forgoing reasons and discussions, the impugned judgment so far the same relates to award of compensation is affirmed and the direction of the impugned judgment directing the owner and driver to pay the compensation is set aside and the appeal is allowed by directing the respondent insurance company to pay the compensation awarded by the learned tribunal below to the claimant along with accrued interest and the insurance company shall recover the same from the owner of the vehicle.

17. With the aforesaid, this appeal stands disposed of. Parties to bear their own cost.

18. LCR be sent back forthwith to the learned tribunal below.

JUDGE

Comparing Assistant