

GAHC010022722023



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

Case No. : MACApp./36/2023

THE ORIENTAL INSURANCE CO. LTD.,
A CENTRAL GOVT. UNDERTAKING HAVING ITS REGIONAL OFFICE AT
GUWAHATI, G.S. ROAD, ULUBARI, GUWAHATI 781007 REPRESENTED BY
THE MANAGER, GAUHATI REGIONAL OFFICE, ULUBARI, GUWAHATI
781005

VERSUS

MD. SAHIDUL ISLAM @ ABDUL HUSSAIN and 2 ORS,
S/O MD. AYUB ALI, VILL. CHENGAPARA PHUSINATIKA, URIAGRANT, DIST.
NAGAON, ASSAM.

2:MD. ALAUDDIN CHOUDHURY

S/O MD. NAZIR ALI CHOUDHURY
VILL. URIAGRANT TUBUKI
P.S. NAGAON SADAR
DIST.NAGAON
ASSAM OWNER

3:MD. ASRAF ALI

S/O MD. G. ALI
VILL. GAMARI ATI
JUMURMUR
P.O. JUMURMUR
P.S. SADAR
DIST. NAGAON
ASSAM DRIVE

Advocate for the Petitioner : MS. R D MOZUMDAR

Advocate for the Respondent : MR D R SAIKIA

**BEFORE
HONOURABLE MR. JUSTICE ARUN DEV CHOUDHURY**

: Date of Hearing and
date of Order : 03.02.2023

JUDGMENT AND ORDER(ORAL)

Heard Ms. R. D. Mazumdar, learned counsel for the appellant. Also heard Mr. D.R.Saikia, learned counsel for the respondent claimant.

2. The present appeal is preferred by the appellant Insurance Company being highly aggrieved by the judgment and award dated 31.5.2014 passed by the learned Member, Motor Accident Claims Tribunal, Nagaon in MAC Case No. 163/2010.

3. The claim case was filed by claimant for injuries sustained by him in a motor vehicular accident on 6.4.2010. It is the case of the claimant that while the claimant was digging earth, the offending vehicle bearing registration number *ASU 6912* (Truck) suddenly moved backward and hit the claimant. As a result of the accident claimant sustained grievous multiple fracture injuries on his right leg. Immediately, he was taken to B.P.C. Civil Hospital, Nagaon. However he was referred to Guwahati Medical College & Hospital (GMCH) for better treatment. Subsequently his right leg was imputed and he became permanently disabled and being deprived of pursuit of life.

4. The learned Tribunal issued notice to the appellant Insurance Company

and owner and Driver of the vehicle. The owner of the vehicle admitted the accident and also contended that the vehicle was insured with the appellant Insurance Company and if any liability arises, the Insurance Company is bound to indemnify the owner.

5. The Insurance Company contested the case by filing the written statement denying the accident and the injury to the claimant etc. A specific stand was taken that the driver of the vehicle had no authorised valid license at the relevant time of accident and therefore the Company is not liable to indemnify the owner. The driver of the vehicle did not appear and accordingly the case proceeded against him.

6. The learned Tribunal after considering the material available on record awarded a payment of Rs. 5,85,570/- to the claimant which is to be paid to the claimant within three months from the date of the judgment i.e. 31.5.2014 and if such payment is not made within the stipulated period, the compensation amount shall bear interest @ 9% per annum from the date of filing of the claim petition and a cost of Rs.1000/- is also awarded.

7. As the learned Tribunal held that the driver was not having a valid driving license, the appellant Insurance Company was directed to make the payment and further directing the Insurance Company recover the amount from the owner of the vehicle.

8. Against the aforesaid judgment the Insurance Company preferred appeal however there was delay in 68 days in preferring the appeal and as such delay was condoned by this court under its order dated 1.2.2023.

9. The appellant is aggrieved by the aforesaid judgment only for the reason that the learned Court/Tribunal ought not to have directed the Insurance

Company to pay the amount so awarded and to recover the same from the owner of the offending vehicle. The single specific ground to the aforesaid effect has been urged by Ms. Mazumdar, learned counsel for the appellant and argues that though the learned Tribunal has passed the impugned judgment relying on the judgment of Hon'ble Apex Court in the case of ***National Insurance Company Vs Chella Bharathamma*** reported in **(2004) 8 SCC 517**, however, the direction of Hon'ble Apex Court in the said case that before release of the amount to the claimants, the owner of the offending vehicle shall furnish the security for the entire amount which the insurer will pay to the claimant, has been ignored. Thus, the learned Tribunal has failed to protect the interest of the insurance.

10. The accident dates back to 6.4.2010, the award dates back to 31.5.2014 and the delay was condoned only on 1.2.2023. Accordingly matter was listed for admission. The learned counsels for the parties in common voice urged that as the issue relates to a question of law and facts are not disputed, the matter can be taken up for disposal at the admission stage itself. Accordingly the matter is taken up for disposal at the admission stage itself.

11. This Court has given anxious consideration to the arguments advanced by the learned counsel for the parties. Perused the materials available on record.

12. 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.

13. 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.

14. 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.

15. 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.
16. 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.
17. 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 defence that the vehicle was driven by the driver without any authority under law and 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)(i) and 149(2) of the Motor Vehicle 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.

18. None of the judgment of the Hon'ble Apex Court discussed hereinabove, which are subsequent to the judgment passed by the Hon'ble Apex Court in the case of **Chella Bharathamma (supra)** held that furnishing of security by owner is a condition precedent for applying the principle of pay and recovery. In the considered opinion of this court though furnishing of security may be desirable but the same cannot be insisted upon as a strict condition in all cases. Further this court is of the considered opinion that the direction for furnishing security was issued in **Chella Bharathamma (supra)** in the given fact of the said case. Otherwise also, if such security is strictly insisted the object of the principle of pay and recovery as upheld in the judgment of the Hon'ble Apex Court, as discussed herein above, shall become meaningless.

19. In view of aforesaid, this court finds no merit in the present appeal. Accordingly the same stands dismissed. The Insurance Company is to pay the amount alongwith 9% interest, if the Insurance

Company had not paid the amount within 30 days from the date of award i.e. 31.5.2014. It is also made clear that Insurance can recover the aforesaid amount in terms of the aforesaid settled proposition of law.

20. With the aforesaid, this appeal stands disposed of. Parties to bear their own cost.
21. Statutory deposit if any be released in favour of the Insurance Company after proper verification.
22. LCR be sent back forthwith to the learned tribunal below.

JUDGE

Comparing Assistant