

\$-20

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

Decided on: 27th May, 2015

+ **MAC.APP. 591/2014**

ICICI LOMBARD GENERAL INSURANCE CO. LTD. Appellant

Through: Ms. Arpan Wadhawan, Adv.

versus

SH. ADITYA KALRA & ANR.

..... Respondents

Through: Mr. Rajesh Mahendru, Adv. with

Mr. Sagar Anand, Adv. for R-1 along
with Respondent no.1 in person.

CORAM:

HON'BLE MR. JUSTICE G.P.MITTAL

J U D G M E N T

G. P. MITTAL, J. (ORAL)

1. This appeal is directed against the judgment dated 19.05.2014 passed by the Motor Accident Claims Tribunal (the Claims Tribunal) whereby compensation of ₹2,02,620/- was granted in favour of Respondent no.1 for having suffered injuries in a motor vehicular accident which occurred on 07.01.2012.
2. The quantum of compensation is not challenged by the Appellant Insurance Company. The only plea raised by the Appellant is that since Respondent Arun Gaur, who was the driver and the owner of the vehicle did not possess a valid and effective driving licence, the

Appellant has no liability at all to pay the compensation. In the alternative, it is urged that even if the Insurance Company is made liable to pay the compensation, it is at least entitled to recover the compensation paid from the insured.

3. It was accepted by the Claims Tribunal that a notice under Order XII Rule 8 of the Code of Civil Procedure, 1908 (CPC) was duly served upon Respondent Arun Gaur. In spite of this, relying on *National Insurance Company Limited v. Swaran Singh & Ors.*, (2004) 3 SCC 297 and the judgment of this Court in *Shiv Devi v. Manoj Kumar*, MAC APP.139/2010, decided on 05.10.2010, the Claims Tribunal held that it could not be said that the driver did not possess a valid driving licence. In my view, this finding of the Claims Tribunal cannot be sustained. The initial onus, of course, is on the Insurance Company to prove that there is conscious and wilful breach of the terms and conditions of the Insurance Policy. Admittedly, Respondent Amit Gaur was challaned under Section 3/181 of the Motor Vehicles Act, 1988 (the Act). However, that by itself may not be sufficient to prove that the driver did not possess a valid driving licence. But, once a notice under Order XII Rule 8 CPC was served upon the driver-owner, it was incumbent upon him to come forward with the driving licence if he possesses any.

4. The owner-driver having chosen not to contest the proceedings an adverse inference has to be drawn against him that he did not possess valid and effective driving licence. In this connection, a reference may be made to the judgment of this Court in *New India Assurance Company Ltd. v. Sanjay Kumar & Ors.*, ILR (2007) 11 Delhi 733, wherein it was held as under:

“23. Where the assured chooses to run away from the battle i.e. fails to defend the allegation of having breach the terms of the insurance policy by opting not to defend the proceedings, a presumption could be drawn that he has done so because of the fact that he has no case to defend. It is trite that a party in possession of best evidence, if he withholds the same, an adverse inference can be drawn against him that had the evidence been produced, the same would have been against said person. As knowledge is personal to the person possessed of the knowledge, his absence at the trial would entitle the insurance company to a presumption against the owner.

24. That apart, what more can the insurance company do other than to serve a notice under Order 12 Rule 8 of the Code of Civil Procedure calling upon the owner as well as the driver to produce a valid driving licence. If during trial such a notice is served and proved to be served, non response by the owner and the driver would fortify the case of the insurance company.”

5. Thus, it is established that Respondent Arun Gaur did not possess a valid and effective driving licence at the time of the accident.
6. 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 wherein it was held that an exclusion clause in the contract of Insurance must be read down being in conflict with the main statutory provision enacted for protection of the victims of motor accidents. It was laid down that the victim would be entitled to recover compensation from the insurer irrespective of the breach of any condition of Insurance Policy. Thereafter, the three Judge Bench of the Supreme Court in *Sohan Lal Passi v. P. Sesh Reddy*, (1996) 5 SCC 21 analysed the corresponding provisions under the Motor Vehicles Act, 1939 and the Motor Vehicles Act, 1988 and approved the decision in *Skandia (supra)*. 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(supra)* as well as the three Judge Bench decision in *Sohan Lal Passi(supra)* and held that the insurer who has been made liable to pay the compensation to third parties on account of certificate of insurance issued shall be entitled to recover the same if there was any breach of 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'être 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.....”

7. 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 decisions in *Skandia(supra)*, *Sohan Lal Passi (supra)* and *Kamla(supra)* 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 Vehicles Act, 1988, the Insurance Company would still remain liable to the innocent third party but it 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.....”

xxxx xxxx xxxx xxxx xxxx
 xxxx xxxx xxxx xxxx xxxx

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.”

8. The three Judge Bench of the Supreme Court in *National Insurance Company Limited v. Swaran Singh & Ors.*, (2004) 3 SCC 297 again emphasised that the liability of the insurer to satisfy the decree passed in favour of the third party was statutory. It approved the decisions in *Sohan Lal Passi (supra)*, *Kamla (supra)* and *Lehru (supra)*. 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.

xxxx xxxx xxxx xxxx xxxx

xxxx xxxx

xxxx

xxxx

xxxx

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

9. This Court in *MAC APP. No.329/2010, Oriental Insurance Company Limited v. Rakesh Kumar and Others* and other Appeals decided by a common judgment dated 29.02.2012, noticed some divergence of opinion in *Malla Prakasarao v. Malla Janaki & Ors.*(2004) 3 SCC 343; *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 on the one hand and *Sohan Lal Passi v. P. Sesh Reddy*, (1996) 5 SCC 21; *New India Assurance Co., Shimla v. Kamla and Ors.*, (2001) 4 SCC 342; *United India Insurance Company Ltd. v. Lehru & Ors.*, (2003) 3 SCC 338; *National Insurance Company Limited v. Swaran Singh & Ors.*, (2004) 3 SCC 297; *Oriental Insurance Co. Ltd. v. Zaharulnisha and Ors.*, (2008) 12 SCC 385; *National Insurance Company Limited v. Geeta Bhat & Ors.*, (2008) 12 SCC 426 and *National Insurance Company Limited v. Laxmi Narain Dhut*, (2007) 3 SCC 700 on the other hand and held that in view of the

three Judge Bench decisions in *Sohan Lal Passi(supra)* and *Swaran Singh(supra)*, 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, it would be entitled to recovery rights against the owner or the driver, as the case may be.

10. Thus, the Insurance Company cannot escape its liability to satisfy the award with regard to third party but it will have right to recover the compensation from the insured.
11. The appeal is allowed to the extent that the Appellant Insurance Company will first pay the compensation to Respondent Aditya Kalra and will then have a right to recover the amount so paid from Respondent no.2 Arun Gaur, owner and driver of the offending vehicle.
12. The execution of the award was stayed by the learned Predecessor Judge by an order dated 15.07.2014. It is directed that the entire awarded amount along with upto date interest shall be deposited by the Appellant Insurance Company with UCO Bank, Delhi High Court Branch, New Delhi within six weeks from today, failing which Respondent no.1 shall be entitled to claim interest @ 12% per annum from the date of this order.

13. A compliance report shall be filed by the Appellant within eight weeks. On filing of compliance report, statutory amount, if any, shall be refunded to the Appellant Insurance Company.
14. The compensation awarded shall be disbursed/held in fixed deposit in favour of the Claimant Respondent no.1 in terms of the order passed by the Claims Tribunal.
15. The appeal is allowed in above terms.

(G.P. MITTAL)
JUDGE

MAY 27, 2015

vk