

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

% *Judgment Reserved on: September 08, 2015*
Judgment Delivered on: September 18, 2015

+ **MAC.APP No.721/2010**

SAKET EDUCATIONAL SOCIETY & ORS. Appellants

Through: Mr.Pradyumna Singh, Advocate

versus

ICICI LOMBARD GENERAL INSURANCE

COMPANY LTD MOTOR & ORS Respondents

Through: Mr.Pankaj Gupta, Advocate for
Ms.Suman Bagga, Advocate for
R-1/insurance company.

CORAM:

HON'BLE MS. JUSTICE PRATIBHA RANI

PRATIBHA RANI, J.

MAC.APP.No. 721/2010

1. The appellant No.1 is the registered owner of offending vehicle i.e. Bus bearing registration No.UP-14AA-9269, who had the valid permit to ply the Bus in the area of Ghaziabad-Gautam Budh Nagar. The appellant No.2 was driving the offending vehicle on the date of accident.

2. The fatal accident in which Kasif Malik lost his life after being hit by Bus bearing registration No.UP-14AA-9269 owned by appellant No.1,

had taken place in Delhi. The learned Tribunal considered the same to be violation of condition of permit hence granted recovery rights to the respondent No.1/insurance company.

3. The appellants have preferred this appeal impugning the award dated 05.06.2010 passed in Claim Petition bearing MACT No.05/2009 limited to the extent that there was no violation of permit hence recovery rights could not have been granted to the insurance company.

4. Mr.Pradyuman Singh, learned counsel for the appellants has made the following submissions:-

(i) The accident has taken place on 02.09.2008 near Bus Stand C-Block, Yamuna Vihar, Delhi and at that time the offending bus was empty and it had come to Delhi to get the CNG filled.

(ii) Since the offending bus is a school bus, to ferry the children the CNG was required but as it was not available at CNG Pump, Ghaziabad/Noida, the driver had to come to CNG Pump at Delhi for limited purpose i.e. to get the CNG filled.

(iii) Entry of vehicle in Delhi for the purpose of repair or for getting the fuel when it was not carrying any school children/passenger does not amount to fundamental breach of terms and conditions of insurance policy so as to entitle the insurance company to have recovery rights.

(iv) The appellant No.1 was holding a temporary permit, copy of which is Ex.R3W2/2, in respect of the offending vehicle for the date 02.09.2008 to 03.09.2008 for Ghaziabad to Delhi and back.

5. On behalf of respondent No.1/insurance company, it has been submitted that undisputedly the accident has taken place on 02.09.2008 at 6.15 am. The statement of R3W3 Sh.Surinder Kumar, Steno, RTO Ghaziabad proves that the temporary permit was obtained only in the afternoon of 02.09.2008 i.e. it was applied at 12.00 noon on 02.09.2008 and granted at 3.30 pm and it cannot be said to be operative at the time when the accident has taken place i.e. on 02.09.2008 at 6.15 am. Learned counsel for the insurance company has further submitted that since the offending vehicle was not having valid permit to ply in Delhi on 02.09.2008 at the time when the fatal accident had taken place, hence the learned Tribunal has rightly granted recovery rights to the insurance company.

6. I have considered the rival contentions. The limited issue arising for consideration before this Court is whether the entry of offending bus bearing registration No.UP-14AA-9269 in Delhi for purpose of getting fuel i.e. CNG amounts to fundamental breach of condition of permit to the extent that the insurance company becomes entitled to have recovery rights against the owner of the offending bus.

7. In the case of National Insurance Co. Ltd. vs. Swaran Singh (2004) 3 SCC 297, the Supreme Court discussed the issue at length and held that mere proof of breach by the insurer is not sufficient to avoid the liability towards insured. The relevant discussion appears in para 106 of the report which is extracted hereunder:-

'106. The summary of our findings to the various issues as raised in these petitions are as follows:

(i) Chapter XI of the Motor Vehicles Act, 1988 providing compulsory insurance of vehicles against third party risks is a social welfare legislation to extend relief by compensation to victims of accidents caused by use of motor vehicles. The provisions of compulsory insurance coverage of all vehicles are with this paramount object and the provisions of the Act have to be so interpreted as to effectuate the said object.

(ii) Insurer is entitled to raise a defence in a claim petition filed under Section 163A or Section 166 of the Motor Vehicles Act, 1988 inter alia in terms of Section 149(2)(a)(ii) of the said Act.

(iii) The breach of policy condition, e.g. disqualification of driver or invalid driving licence of the driver, as contained in Sub-section (2)(a)(ii) of Section 149, have to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence 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 third parties. To avoid its liability towards 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 the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time, (iv) The insurance companies are, however, with a view to avoid their liability must not only establish the available defence(s) raised in the said proceedings but must also establish 'breach' on the part of the owner of the vehicle; the burden of proof where for would be on them.

(v) The court cannot lay down any criteria as to how said burden would be discharged, inasmuch as the same would depend upon the facts and circumstance of each case.

(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards insured unless the said breach or breaches on the condition of driving licence is/ are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insured under Section 149(2) of the Act.

(vii) The question as to whether the owner has taken reasonable care to find out as to whether the driving licence produced by the driver, (a fake one or otherwise), does not fulfil the requirements of law or not will have to be determined in each case.

(viii) If a vehicle at the time of accident was driven by a person having a learner's licence, the insurance companies would be liable to satisfy the decree.

(ix) The claims tribunal constituted under Section 165 read with Section 168 is empowered to adjudicate all claims in respect of the accidents involving death or of bodily injury or damage to property of third party arising in use of motor vehicle. The said power of the tribunal is not restricted to decide the claims inter se between claimant or claimants on one side and insured, insurer and driver on the other. In the course of adjudicating the claim for compensation and to decide the availability of defence or defences to the insurer, the Tribunal has necessarily the power and jurisdiction to decide disputes inter se between insurer and the insured. The decision rendered on the claims and disputes inter se between the insurer and insured in the course of adjudication of claim for compensation by the claimants and Se award made thereon is enforceable and executable in the same manner as provided in Section 174 of the Act for enforcement and execution of the award in favour of the claimants.

(x) Where on adjudication of the claim under the Act the tribunal arrives at a conclusion that the insurer has satisfactorily proved its defence in accordance with the provisions of Section 149(2) read with Sub-section (7), as interpreted by this Court above, the Tribunal can direct that the insurer is liable to be reimbursed by the insured for the compensation and other amounts which it has been compelled to pay to the third party under the award of the tribunal. Such determination of claim by the Tribunal will be enforceable and the money found due to the insurer from the insured will be recoverable on a certificate issued by the tribunal to the Collector in the same manner under Section 174 of the Act as arrears of land revenue. The certificate will be issued for the recovery as arrears of land revenue only if, as required by Sub-section (3) of Section 168 of the Act the insured fails to deposit the amount awarded in favour of the insurer within thirty days from the date of announcement of the award by the tribunal.

(xi) The provisions contained in Sub-section (4) with proviso thereunder and Sub-section (5) which are intended to cover specified contingencies mentioned therein to enable the insurer to recover amount paid under the contract of insurance on behalf of the insured can be taken recourse of by the Tribunal and be extended to claims and defences of insurer against insured by, relegating them to the remedy before, regular court in cases where on given facts and circumstances adjudication of their claims inter se might delay the adjudication of the claims of the victims.'

8. It is admitted case of the appellants that the offending bus entered Delhi on the fateful day for purpose of getting the CNG filled as it was not available in U.P. in the area for which the appellant No.1 was holding permit to ply the said vehicle. It is also not disputed that when the offending bus entered Delhi it was not being plied to ferry school children/passengers. The purpose of entering in Delhi was to get the

CNG filled from the neighbouring area to enable the bus to run as school bus which was not possible without fuel. In view of the decision of Supreme Court in Swaran Singh's case (Supra), mere entry of the offending vehicle i.e bus bearing registration No.UP-14AA-9269 in Delhi for the limited purpose of taking fuel does not amount to fundamental breach of terms and conditions of permit and insurance policy.

9. In MAC.APP. No.708/2012 titled as City Water Supplier vs. The New India Assurance Co. Ltd. decided on 12.02.2014, the Co-ordinate Bench of this Court while dealing with a similar issue has held that entry of the vehicle in Delhi without permit does not amount to fundamental breach. The relevant paragraphs No.12 and 13 of the report read as under:

'12. In view of the above dictum in Swarn Singh (Supra), the alleged deviations in the permit are not sufficient to exonerate from the liability. The stipulations in the insurance policy are interpreted on the basis of two concepts: rule of main purpose and fundamental breach. Therefore, there is no wilful breach in terms of the insurance policy.

13. A similar issue came before this Court in the case of New India Assurance Co. Ltd. Vs. Ram Partap & Ors. MAC. APP. 960/2011. The facts of the case in hand are similar to this case, therefore, keeping in view the decision of this Court in the above case; and also the view taken by the Apex Court in Swarn Singh (Supra), non-permit to ply the vehicle in Delhi cannot be the basis for grant of recovery rights because the said failure is not fundamental in nature, whereas it is otherwise, as discussed above.'

10. In view of above discussion, the appeal is allowed and the direction given by the Tribunal in the impugned award dated 05.06.2010 granting recovery rights to the insurance company/respondent No.1 herein is set aside.

CM No.19320/2010 (Stay)

Dismissed as infructuous.

**(PRATIBHA RANI)
JUDGE**

SEPTEMBER 18, 2015
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