HON'BLE SRI JUSTICE M.S.K.JAISWAL

M.A.C.M.A.No.1425 of 2010

JUDGMENT:

This appeal is filed by the insurance company – 2nd respondent in O.P.No.81 of 2006, against the award dated 21.07.2008 passed by the Special Judge for trial of offences under SCs & STs (POA) Act-cum-VI Additional Metropolitan Sessions Judge-cum-Additional Chairman, Motor Accident Claims Tribunal-cum-XX Additional Chief Judge, Secunderabad.

2. The respondents/claimants filed the claim petition claiming a compensation of Rs.5,00,000/- on account of death of one S.Penta Reddy, who died in a motor accident that occurred on 05.11.2005. The claimants are the wife and children of the deceased.

3. The brief facts of the case are that on 05.11.2005 at about 7 p.m. while the deceased S.Penta Reddy and another person Krishna were going towards Chevella side on Bajaj Chetak, bearing registration No.AP23C-7119 and when they reached Pamel Gate on Chevalla Shabad Road, one Either Canter, bearing registration No.AP28U-3195 came in opposite direction in high speed and in rash and negligent manner and dashed the scooter of the deceased, due to which, the deceased and another person fell down and sustained grievous injuries and the deceased Penta Reddy succumbed to injuries while shifting to the hospital. The deceased was aged about 45 years, he was hale and healthy by the time of accident, he was doing agriculture and selling milk and earning Rs.4,000/- per month.

4. The appellant/Insurance Company filed the counter denying the averments of the claim petition and its liability.

5. On behalf of the claimants, P.Ws.1 & 2 were examined and got marked Exs.A.1 to A.8. On behalf of the Insurance Company, RW.1 was examined and Ex.B1 was marked.

6. The Tribunal, on consideration of the oral and documentary evidence, has awarded compensation of Rs.4,43,700/- as against the claim of Rs.5,00,000/-. Questioning the said award, the appellant-Insurance Company filed this appeal.

7. The learned counsel for the appellant insurance company submitted that the Tribunal erred in fastening the liability on the insurance company, even though the driver of the insured vehicle, who caused the accident, was not possessing any valid licence. He has further submitted that the Tribunal also erred in determining the compensation at Rs.4,43,700/-, which is excessive.

8. On the other hand, the learned counsel for the respondents/claimants submitted that the claimants being third parties to the accident cannot be said to be responsible or required to prove about the driver of the offending vehicle possessing valid driving licence. It is further submitted that it is for the insurance company to prove that the insured has committed breach of the terms of the policy so as to exonerate its liability, but that responsibility cannot be fastened on the third party claimants. The learned counsel has relied upon certain authorities in support of his contention, which will be referred to hereinafter.

9. Heard both sides and perused the material on record.

10. The point that arises for consideration in this appeal is whether the appellant-insurance company is liable to pay the compensation to the claimants, as directed by the Tribunal.

11. It is not in dispute that on 05.11.2005 at about 7 a.m the deceased S.Penta Reddy and another person, by name, Krishna while going towards Chevella side on Bajaj Chetak motorcycle and when reached Pamel Gate on Chevalla Shabad Road, one Etcher Canter, bearing registration No.AP28U3195 came in high speed, in rash and negligent manner and

dashed the scooter, which resulted in the deceased sustained grievous injuries and succumbed to injuries on the way to hospital. It is also not disputed that the 5th respondent herein was the owner of the offending vehicle and the appellant insured the same, vide Ex.B1 policy, which was in force as on the date of the accident.

12. The main contention of the appellant-insurance company is that on the date when the accident took place, the driver of the offending vehicle was not possessing any driving licence and therefore, since there is breach committed by the insured, the insurance company cannot be made liable to indemnify the insured.

13. In order to prove their case, the claimants examined PWs 1 and 2. PW 1 is the wife of the deceased and her evidence is not of much significance in so far as the present controversy is concerned. In the cross examination, what is all that is put to her is that she has not filed the driving licence of the driver of the crime vehicle. Similarly, from the eyewitness who was examined as PW 2, in his cross examination, nothing was elicited regarding the licence of the driver of the crime vehicle.

14. On behalf of the insurance company, its officer was examined as RW 1. If the insurance company wants to establish its defence which absolves its liability to indemnify the insured, it is incumbent on the part of the insurance company to plead the said aspect and to prove the same so as to hold that the insurance company is not liable to pay any compensation to the third parties. As already noticed, respondent No.5 herein, who is the owner of the offending vehicle, remained *ex parte*. The insurance company has not taken any steps to secure the details as to whether the driver of the crime vehicle had driving licence or not. In the counter that is filed by the insurance company, in paragraph No.5, it is pleaded that the onus is on the claimants to prove that the driver of the offending vehicle was having valid

driving licence to drive such vehicle and was in possession of the same at the time of the alleged accident and vehicle roadworthy to ply.

15. From the above averment in the counter what is noticed is that the insurance company has not taken a specific plea that the driver of the vehicle was not possessing any valid driving licence at the relevant time.

16. When it came to the evidence, RW 1 deposed that as per the FIR, the charge sheet and the report of the M.V.Inspector, which are marked as Exs.A1, A2 and A5, the driver of the offending vehicle was not having driving licence. What is noticed from the evidence on record is that except for placing reliance upon FIR, charge sheet and M.V.Inspector's report, nothing is produced by the insurance company to show that they have discharged the burden of proving that the person who was driving the offending vehicle at the relevant time was not possessing valid driving licence.

17. In Ex.A2, the charge sheet, it is mentioned that the accused driver had no driving licence and was liable for prosecution there for. However, it is not mentioned as to what investigation was carried out before charging the accused driver for having violated the provisions of the Motor Vehicles Act for having driven the vehicle without driving licence.

18. Heavy reliance is placed on Ex.A5, which is the report of the M.V.Inspector, who inspected the crime vehicle on 11.11.2005. In Ex.A5, it is mentioned in Col.No.17 that the driving licence is not produced and the investigating officer was requested to launch prosecution against the driver and owner for contravention of Section 3 of the Motor Vehicles Act.

19. Except for the above endorsement of the M.V.Inspector, there is nothing on record to show that the driver of the offending vehicle had no valid driving licence on the date when the accident took place.

20. The Tribunal has referred to all these aspects and held that the insurance company cannot avoid its liability to pay the compensation on the ground that the driver had no valid driving licence.

21. The learned counsel for the insurance company relied upon the decision of the Hon'ble Supreme Court in *Sardari v. Sushil Kumar*[1] in support of his contention. In the said case, the driver of the offending vehicle was examined and in his evidence he categorically stated that he did not know how to drive a tractor and he never even try to obtain a learning driving licence for the tractor. The driver further admitted that he had not been possessing any valid driving licence to drive a tractor and the driver accepted that he never applied for any licence. In view of the above admissions from the mouth of the driver of the offending vehicle, the Hon'ble Supreme Court in paragraph No.11, observed that the concurrent finding of the fact that the driver never hold a licence and that the owner of the vehicle has a statutory obligation to see that the driver of the vehicle whom he authorized to drive the same holds a valid licence.

22. The said authority, however, cannot be in any way helpful to the appellant in the instant case, for the reason that there is no evidence on record, as was the case before the Apex Court to the effect that the driver had no driving licence.

23. On the other hand, the learned counsel for the respondents/claimants relied upon some authorities in support of his contention that in the absence of there being any conclusive evidence that the driver had no driving licence, the insurance company cannot deny its liability to satisfy the claim of the claimants and if they can establish that the insured has deliberately violated the terms of the policy and was guilty of

[1] (2008) 17 SCC 208

gross negligence, the insurance company can recover the amount from the insured after satisfying the claim of the third parties.

24. In *Rukmani v. New India Assurance Co.*[2] the insurance company has produced the evidence of the Inspector of Police, who deposed that his enquiries revealed that the driver did not produce the licence to drive the offending vehicle. The investigating officer further asserted that in spite of his demand, the licence was not produced, since he was not having it. In spite of such evidence before the court, the Hon'ble Supreme Court held that such evidence is not sufficient to discharge the burden which cast on the insurance company, that it did not summon the driver of the vehicle, that no record from RTA has also been produced and therefore, the insurance company has not discharged the burden cast upon it under Section 96(2)(b)(ii) of the Motor Vehicles Act, 1939.

25. *United India Insurance Co.Ltd. v. LEHRU*[3] was a case where the driver of the offending vehicle having a licence which was fake. The Hon'ble Supreme Court in paragraph No.20 held as under:

> "20. When an owner is hiring a driver he will therefore have to check whether the driver was a driving licence. If the driver produces a driving licence which on the face of it looks genuine, the owner is not expected to find out whether the licence has in fact been issued by a competent authority or not. The owner should then take the test of the driver. If he find that the driver is competent to drive the vehicle, he will hire the driver. We find it rather strange that Insurance Companies expect owners to make enquiries with RTO's, which are spread all over the country, whether the driving licence shown to them is valid or not. Thus where the owner has satisfied himself that the driver has a licence and is driving competently there would be no breach of Section 149(2)(a)(ii). The Insurance Company would not then be above of liability. If it ultimately turns out that the licence was fake the Insurance Company would continue

[2] (1998) 9 SCC 160
[3] (2003) 3 SCC 338

to remain liable unless they prove that the owner/insured was aware or had notice 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 Skiandia's Sohan Lal Passi's and Kamla's case We are in full agreement with the views expressed therein and see no reason to take a different view."

26. A Three-Judges' Bench in *National Insurance Co.Ltd. v. Swaran Singh*[4] after discussing the entire case law and subject, in paragraph No.11 held as under:

"110. 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

[4] (2004) 3 SCC 297

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) …..

(ix) ……

(x) ……

(xi) …..

27. In view of the above authoritative pronouncement of judgments and applying the same to the case on hand, what is noticed is that the insurance company has neither specifically pleaded that the driver had no valid driving licence nor did it take any effective steps to prove that the driver

had no licence at all so as to deny its liability to indemnify the insured. Except examining RW 1 and relying upon Ex.A2-charge sheet and Ex.A5-M.V.Inspector's report, no steps whatsoever are taken by the insurance company to substantiate its feeble defence that the driver had no driving licence. The insurance company should have taken steps to examine the investigating officer who laid the charge sheet-Ex.A2 and the Motor Vehicle Inspector, who has prepared Ex.A5, summon the driver who has been charge sheeted or issue any notice to the insured-5th respondent.

28. As already stated, except for relying on Ex.A5, the report of the M.V.Inspector, that the driver did not produce the licence, no other evidence has been produced conclusively to hold that the insurance company has proved the breach on the part of the insured so as to absolve its liability. Except for producing RW 1 who gave evidence only with reference to the endorsement made in Ex.A5, neither any oral nor documentary evidence has been produced in support of its contention that the insured has committed breach of the terms of the policy by allowing the vehicle to be driven by a person who did not possess any driving licence. The Tribunal has properly appreciated the evidence on record on that aspect and held that the insurance company cannot deny its liability and therefore, fastened the liability on the insured and the insurance company jointly and severally.

29. The next aspect of the matter is about awarding of compensation. The claimants claimed compensation of Rs.5,00,000/- for the death of one S.Penta Reddy, who was the person, aged about 45 years, who was doing business of selling milk and also doing agriculture. The wife/PW 1 claims that the deceased was doing business in selling milk by going around on his scooter for the last 20 years. A copy of the pattedar passbook of the deceased was also produced to show that the deceased was the owner of an

extent of Ac.4.20 cents of land. PW 1 claims that the deceased was earning Rs.4,000/- per month.

30. The monthly income of the deceased taken by the Tribunal @Rs.4,000/- per month is just and reasonable, since the deceased was aged 45 years and was maintaining a family consisting of wife, aged 36 years and three teen-aged children. The Tribunal has deducted 1/4th out of it towards his personal expenses and applied proper multiplier and has determined the compensation towards loss of dependency at Rs.4,15,700/-. The Tribunal has awarded a sum of Rs.15,000/- towards loss of consortium and Rs.10,000/- towards loss of love and affection, Rs.2,000/- towards funeral expenses and Rs.1,000/- towards transportation. Upon considering the evidence on record, the said amount of compensation awarded by the Tribunal cannot at all be said to be in any way excessive, erroneous and unjust.

31. In view of the foregoing discussion, I see no merit in the appeal and the same is accordingly dismissed.

M.S.K.JAISWAL, J

Date: August, 2017
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