

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

+ **RSA No. 237/2017 & CM Nos. 35369/2017 - 35371/2017**

% **25th September, 2017**

HDFC ERGO GENERAL INSURANCE CO. LTD. Appellant

Through: Mr. Suman Bagga, Advocate

versus

RAHUL CARGO PVT. LTD. Respondent

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

CM No.35371/2017(Exemption)

Exemption allowed subject to just exceptions.

CM stands disposed of.

CM No. 35370/2017(delay in filing the appeal)

For the reasons stated in the application, delay in filing the appeal is condoned.

CM stands disposed of.

RSA No. 237/2017 & CM No. 35369/2017 (stay)

1. This Regular Second Appeal under Section 100 of the Code of Civil Procedure, 1908 (CPC) is filed by the defendant/insurance company impugning the concurrent judgments of

the courts below; of the trial court dated 31.3.2016 and the first appellate court dated 22.4.2017; by which the courts below have decreed the suit of the respondent/plaintiff for recovery of monies of Rs. 2,64,055/- along with interest at 9% p.a. being the value of repairs of the insured vehicle.

2. The facts of the case are that respondent/plaintiff filed the subject suit pleading that its vehicle bearing a registration no. DL-01-LM-3372 was insured with the appellant/defendant/insurance company as per the policy Ex. PW1/2. The insured vehicle met with an accident at Okhla Industrial Area and with respect to which a complaint was lodged with the Police Station as also with the Insurance Company. The Surveyor of the appellant/insurance company which had insured the vehicle gave his survey report and thereafter the vehicle was repaired. Respondent/plaintiff after paying the charges for the repairs done by the repair company filed its claim with the appellant/insurance company which rejected the same vide its letter dated 29.10.2011 on the ground that the driver was not holding a valid driving licence. The subject suit thereafter came to be filed after serving a legal notice dated 5.8.2012.

3. Appellant/insurance company in its written statement denied its liability by pleading that the respondent/plaintiff was not entitled to the amount under the insurance policy inasmuch as the driver did not hold an effective and valid driving licence at the time of the accident. It was pleaded that the licence of the driver was fake. It was pleaded that the Licencing Authority at Mathura had issued its report stating that the driving licence of the driver Sh. Parvesh Kumar was not issued in the name of Sh. Parvesh Kumar.

4. After pleadings were completed trial court framed the issues, the parties led evidence, and which aspects are stated in paras 5 to 7 of the judgment of the trial court and which paras read as under:-

“5. On the basis of pleadings following issues were settled vide order dated 01.04.2014 :

- (1) Whether defendant has no liability on account of violation of terms and insurance policy as driver was not having valid driving license? OPD
- (2) Whether petitioner/plaintiff has lodged an inflated claim, if so to what effect? OPD
- (3) Whether plaintiff is entitled for recovery of sum of Rs. 2,64,055/-, as prayed for? OPP
- (4) Whether plaintiff is entitled for pendentelite and future interest, if so to what effect? OPP
- (5) Relief.

6. Plaintiff in order to prove its case has examined Sh. Deepak Kumar, Asst. Manager, Purchase and Admin., as PW1. He has tendered his evidence by way of affidavit Ex. PW1/A and has relied upon following documents:

- (1) Copy of Board Resolution as Ex. PW1/1 (OSR)
- (2) Original Policy bearing policy no. 2315200047103500000 as Ex. PW1/2.

- (3) Copy of the job work and invoices as Ex. PW1/3.
- (4) Letter dated 29.10.2011 as Ex. PW1/4 (OSR)
- (5) Copy of letter dated 15.11.2011 as Ex. PW1/5 (OSR)
- (6) Postal receipt as Ex. PW1/6.
- (7) Original Legal notice as Ex. PW1/7
- (8) Postal proof as Ex. PW1/8.
- (9) AD Card as Ex. PW1/9.

7. Defendant company in order to prove its case has examined, Sh. Pankaj Kumar, Manager legal as DW1 and Sh. Mukesh Kumar Aggarwal, Surveyor, as DW2. Both these witnesses have tendered their evidence by way of affidavit Ex. DW1/A and Ex. DW2/1, respectively. DW1 has proved the report of surveyor as Ex. DW1/1. He has relied upon the copy of the driving license, verification report as Mark A.”

5. The relevant issue is that whether the appellant/insurance company was or was not liable on account of driving licence being fake. This issue has been decided in favour of the respondent/plaintiff by the trial court relying upon the judgment of the Supreme Court in the case of *United India Insurance Co. Ltd. vs. Lehu and Others*, (2003) 3 SCC 338 by holding that an owner of the vehicle is not expected to check the record of the licencing officer to check whether the driving licence is genuine. Paras 13 and 14 of the judgment of the trial court read as under:-

“13. In the case of United Insurance Company Ltd. V. Lehur and ors. MANU/SC/0219/2003 : 2003 M/s Rahul Cargo Pvt. Ltd. Vs. H.D.F.C Ergo General Insurance Co. Ltd. (3) SC 338, it was held by the Supreme Court that owner of a vehicle while hiring a driver is not expected to check the records of the licencing officer to satisfy himself that the driving license is genuine. If the driver produces a driving license which on the fact of it looks genuine, the owner cannot said to be negligent. The relevant para of the report is extracted as under:-

“When an owner is hiring a driver he will therefore have to check whether the driver was a driving license. If the driver produces a driving license which on face of it looks genuine, the owner is not expected to find out whether the license 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 license shown to them is valid or not. Thus, where the owner has satisfied himself that the driver has a license 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 license was fake the owner/insured was aware or had notice that the license 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 Cases. We are in full agreement with the views expressed therein and see no reason to take a different view.”

14. It is no more res-integra that the person who alleges breach must prove the same. The insurance company is thus required to prove the said breach by evidence. In the absence of any evidence being led by the insurance company/defendant to prove that the driving license was found to be fake, the initial burden put on the defendant is not discharged. The issue is accordingly decided against the defendant and in favor of plaintiff.”

6. Learned counsel for the appellant/insurance company once again argued that appellant/insurance company had filed the report from the Licencing Authority, and which was a public document, and which showed that the driving licence was fake, however, this argument has rightly been rejected by the courts below *inter-alia* on the ground that an owner of a vehicle is not expected to conduct an enquiry and all that the vehicle owner is to see at the time of the employment was that the driver has showed him a valid driving

licence at the time of employment. It makes no difference that the driving licence however is found to be fake because an owner of the vehicle is not expected to conduct an enquiry to find out the genuineness of the driving licence. The respondent/plaintiff had deposed that the driver had a valid driving licence and which in law is sufficient.

7. In my opinion, therefore the courts below have committed no illegality in decreeing the suit by holding that the issue of fake licence as raised by the appellant/insurance company cannot prevent liability being fastened upon the appellant/insurance company.

8. Learned counsel for the appellant/insurance company then argued that the courts below have wrongly ignored the report of the Surveyor, Ex.DW1/1, and as per which the loss was correctly assessed at Rs.1,67,561/-, and therefore, the respondent/plaintiff cannot get the cost of repair of the vehicle in terms of the bills/Ex. PW1/3 of the repair company being Shree Motors Private Limited.

9. In my opinion, the argument urged on behalf of the appellant/insurance company is misconceived because a civil case is decided on balance of probabilities. The bills of the repair being

Ex.PW1/3 are genuine and there is no case set up by the appellant/insurance company that bills of the Shree Motors Private Limited are not genuine bills. It is also noted that the survey report which is relied upon by the appellant/insurance company is not accompanied by any bills of repair, and therefore, there is no reason why the trial court could not have instead relied upon the genuine bills of repair which were proved and exhibited as Ex.PW1/3 and decreeing the suit for the amount of cost of repairs as shown in Ex.PW1/3.

10. Learned counsel for the appellant/insurance company finally sought to argue that the policy in question was not a repair value policy but only for a depreciated amount but counsel for the appellant/insurance company concedes that this factual issue was not raised in appellant's written statement, no such issue got framed and hence not decided by the courts below. Therefore, a factual issue cannot be permitted to be raised for the first time in the second appeal to the prejudice of the respondent/plaintiff, and who would have appropriately if the factual issue was raised in the trial court, defended the same by raising pleading and leading evidence accordingly. Accordingly, this argument urged on behalf of the appellant/insurance

company of the respondent/plaintiff being only entitled to a depreciated value and not an actual repair value is rejected.

11. No substantial question arises. Dismissed.

SEPTEMBER 25, 2017
Godara

VALMIKI J. MEHTA, J

