

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR**MAC No 450 of 2014**

Raj Agrawal S/o Late Niranjana Lal Agrawal Aged About 33 Years,
Occupation Business, R/o T.P. Nagar, Korba, Plot No 140, Police
Chowki-CSEB, PS City Kotwali, Korba, Tahsil & District Korba (CG)
Civil and Revenue District Korba (CG)

.....Appellant

Versus

1. Smt. Firtin Bai W/o Late Shiv Prasad Sahu Aged About 25 Years
2. Khik Bai W/o Late Shri Mukut Ram Sahu Aged About 65 Years
3. Master Arun Kumar Sahu S/o Late Shri Shiv Prasad Aged About 6 Years
4. Master Arjun Kumar Sahu S/o Late Shri Shiv Prasad Aged About 10 Years
5. Miss Anju Sahu D/o Late Shri Shiv Prasad Sahu Aged About 8 Years
6. Respondent No.3 to 5 are represented through their natural guardian Mother Smt. Firtin Bai, W/o Late Shri Shiv Prasad Sahu
All are resident of village Develapatha, Police Chowki- Uрга
Tahsil Kartala, District Korba (CG)
7. Ajay Kumar Mahto S/o Golak Bihari Mahto R/o Village Champa, Post- Binda, Police Station Pandapara, District Kikondhara (Orissa)
8. I.C.I.C.I. (wrongly mentioned as ICICI) Lombard General Insurance Company Ltd., ICICI Bank Towers, Bandra Kurla Complex, Mumbai- 400051, India. Through Branch Manager ICICI Lombard General Insurance Company Ltd., B.R. Plaza, Second Floor, Link Road, Bilaspur, Tahsil & District Bilaspur (C.G).

---- Respondents

For Appellant : Shri Malay Shrivastava, Advocate

For Respondent No.7 : Shri Amrito Das, Advocate

Order on Board by Hon'ble Shri Justice Parth Prateem Sahu**3/05/2019**

1. Appellant-owner of offending vehicle has challenged impugned award dated 15.1.2013 passed by learned Motor Accident Claims Tribunal, Korba (for short 'the Claims Tribunal') in Claim Case No.107/2008 by which learned Claims Tribunal partly

allowed claim application, awarded a sum of Rs.7,20,000/- as compensation to claimants/respondents No 1 to 6 herein and fastened liability on appellant respondent No.7 herein i.e. owner & driver of offending vehicle.

2. Brief facts relevant for disposal of this appeal are that on 18.6.2008 Shiv Prasad Sahu was returning from his work place Bharat Engineering Lanco Amarkantak Power Plant, Patadi Korba to his village Devlapaati. When said Shiv Prasad Sahu was crossing road at village Parawani, at that relevant time truck bearing registration number CG04-JA-9425, driven by respondent No. 7 herein, dashed him due to which he sustained severe injuries over his head, chest and other parts of body. He was taken to BDM Hospital, Champa and looking to his injuries, he was referred to the hospital at Bilaspur but on the way to hospital, he succumbed to injuries.
3. Respondents No.1 to 6 being widow, children and mother of deceased have filed claim application before competent Claims Tribunal claiming Rs.32,69,000/- as compensation mentioning therein that deceased at the time of accident was working on the post of 'Fitter in Bharat Engineering Lanco Amarkantak Power Plant, Patadi, Korba.
4. As respondent No.7-driver of offending vehicle did not appear despite service of notice, therefore, he was proceeded ex-parte.
5. Non-applicant No.2/appellant herein submitted reply to claim application and denied all adverse pleadings made against him in application. He also denied the fact of accident with vehicle

owned by him. He further stated that on the date of accident, the offending vehicle was insured with respondent No.8 Insurance Company and therefore liability, if any, for payment of compensation would be on insurance company.

6. Non-applicant No.3/respondent No.8 herein i.e. Insurance Company, filed its reply denying all adverse pleadings. It was pleaded that there was violation of conditions of insurance policy as on the date of accident the driver of offending vehicle was not having valid and effective driving license. Driving license seized and produced in criminal case was not issued by the competent authority i.e. Regional Transport Officer, Keonjhar (Odisha). As the conditions of insurance policy have been breached, therefore, the insurance company is not liable to indemnify the insured.
7. Learned Claims Tribunal on the basis of pleadings and evidence brought on record by respective parties has held that there is violation of condition of insurance policy as on the date of accident driver of offending vehicle (respondent No.7 herein) was not possessing valid and effective driving license because the driving license produced before Claims Tribunal was found to be fake. The Claims Tribunal further assessing income of deceased as Rs.5,000/- per month, awarded a total sum of Rs.7.20,000/- as compensation.
8. Learned counsel for appellant - owner submitted that driving license of driver engaged by him to drive offending vehicle was seized by the police at the time of accident vide seizure memo

Ex.P-7 and this license was produced and exhibited before the Claims Tribunal as Ex.D-2. This shows that driver engaged by him was having license shown to be issued by competent authority. He further argued that insurance company failed to prove willful breach of condition of insurance policy and therefore insurance company cannot escape from its liability under the insurance policy.

9. Learned counsel appearing for respondent No.8-Insurance Company has though not disputed issuance of insurance policy but argued that license seized and made part of records of Claims Tribunal was sent for verification to the Licensing Authority and on verification it was found that License No.239/1995-96 dated 17.4.1995 was not issued in the name of respondent No.7-Ajay Kumar Mahato. He further argued that Clerk of Regional Transport Office, Keonjhar was examined on commission. In his evidence he has specifically stated that no license has been issued in the name of respondent No.7 herein. He further argued that driving license with number 239/95 (Ex.D-1) was issued in the name of one Niranjana Baaj Singh on 13.3.1995, whereas license with number 239/96 (Ex.D-2) was issued in the name of one Sunder Titu Singh on 17.6.1996. He further argued that owner of offending vehicle failed to prove that before authorizing respondent No.7 to drive offending vehicle, he satisfied himself that respondent No.7 had a valid driving license to drive offending vehicle. He further argued that as on the date of accident the driver of offending vehicle was not

possessing valid and effective driving license to drive, therefore, the Claims Tribunal has rightly exonerated insurance company from its liability to indemnify the insured.

10. I have heard learned counsel for the parties and perused the records.

11. Only question involved in this appeal is whether the Claims Tribunal was justified in exonerating insurance company from its liability to indemnify insured after finding license seized from possession of driver of offending vehicle to be fake?

12. Indisputably, accident took place on 18.6.2008 and at the time of accident, respondent No.7 was driving offending vehicle. Immediately after accident the offence was registered against respondent No.7 and in the course of investigation i.e. on 19.6.2008, the police seized offending vehicle and various other documents i.e. registration certificate copy of insurance policy, fitness certificate, permit and copy of driving license No.239/1995-96, which was issued in the name of respondent No.7 herein and valid upto 19.4.2010. From the seized documents it is evident that after the accident, the driver fled from the spot leaving offending vehicle.

13. Thus, from the above facts it can very well be presumed that vehicle was handed over to respondent No.7 herein, who was possessing a license to drive heavy transport vehicle, which is evident from the endorsement made in the said license.

14. Perusal of evidence of Sunit Kumar Tripathi (NAW-3), Senior Clerk in Regional Transport Office, Keonjhar, Odisha would

show that driving license available on record and seized by the police from the spot was not issued in the name of Ajay Kumar Mahato (respondent No 7 herein). According to this witness No.239/95 has been issued in the name of one Niranjana Baaj Singh and License No.239/96 in the name of one Sundar Titu Singh. In the light of evidence of this witness, it is amply clear that license possessed by respondent No 7 herein was a fake driving license.

15. Issue with respect to liability of Insurance company where driving license is found to be fake has been dealt with and considered by Hon'ble Supreme Court in the matter of **National Insurance Company v. Swarn Singh** reported in **(2004) 3 SCC 297** and it has been held thus;-

92. It may be true as has been contended on behalf of the petitioner that a fake or forged licence is as good as no licence but the question herein, as noticed herein-before, is whether the insurer must prove that the owner was guilty of the willful breach of the conditions of the insurance policy or the contract of insurance. In *Lehru's case* (supra), the matter has been considered at some details. We are in general agreement with the approach of the Bench but we intend to point out that the observations made therein must be understood to have been made in the light of the requirements of law in terms whereof the insurer is to establish wilful breach on the part of the insured and not for the purpose of its dis-entitlement from raising any defence or the owners be absolved from any liability whatsoever. We would be dealing in some details with this aspect of the matter a little later.

99. So far as the purported conflict in the judgments of *Kamla* (supra) and *Lehru* (supra) is concerned, we may wish to point out that the

defence to the effect that the licence held by the person driving the vehicle was a fake one, would be available to the insurance companies, but whether despite the same, the plea of default on the part of the owner has been established or not would be a question which will have to be determined in each case.

100. The court, however, in *Lehru* (supra) must not read that an owner of a vehicle can under no circumstances has any duty to make any enquiry in this respect. The same, however, would again be a question which would arise for consideration in each individual case.

101. The submission of Mr. Salve that in *Lehru's* case (supra), this Court has, for all intent and purport, taken away the right of insurer to raise a defence that the licence is fake does not appear to be correct. Such defence can certainly be raised but it will be for the insurer to prove that the insured did not take adequate care and caution to verify the genuineness or otherwise of the licence held by the driver.

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 163-A 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 eg. disqualification of driver or invalid driving license 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 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 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 wherefor 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 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 license 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 license produced by the driver, (a fake one or otherwise), does not fulfill the requirements of law or not will have to be determined in each case.

(viii) xxxxxxxxxxxxxxxx

(ix) xxxxxXxxxxxxxxxx

(x) xxxxxXxxxxxxxxxx

(xi) xxxxxXxxxxxxxxxx”

16. In the above judgment Hon'ble Supreme Court has very specifically held that mere absence, fake or invalid driving license or disqualification of driver for driving at the relevant time, are not in themselves defences available to the insurer against either insured or third parties and it is for the insurer to prove that insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling conditions of policy. It has further been held that to avoid liability the insurer must not only establish available defence (s) but must also establish willful breach on the part of owner of vehicle.

17. Hon'ble Supreme Court in the matter of Pepsu RTC v. National Insurance Company Ltd. reported in (2013) 10 SCC 217 has also dealt with issue with respect to defence of insurer of holding fake driving license at the time of accident and held thus:-

“10. In a claim for compensation, it is certainly 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. Once such a defence is taken, the onus is on the insurer. But even after it is proved that the licence possessed by the driver was a fake one, whether there is liability on the insurer is the moot question. As far as the owner of the vehicle is concerned, when he hires a driver, he has to check whether the driver has a valid driving licence. Thereafter he has to satisfy himself as to the competence of the driver. If satisfied in that regard also, it can be said that the owner had taken reasonable care in employing a person who is qualified and competent to drive the vehicle. The owner cannot be expected to go beyond that, to the extent of verifying the genuineness of the driving licence with the licensing authority before hiring the services of the driver. However, the situation would be different if at the time of insurance of the vehicle or thereafter the insurance company requires the owner of the vehicle

to have the licence duly verified from the licensing authority or if the attention of the owner of the vehicle is otherwise invited to the allegation that the licence issued to the driver employed by him is a fake one and yet the owner does not take appropriate action for verification of the matter regarding the genuineness of the licence from the licensing authority. That is what is explained in Swaran Singh's case (supra). If despite such information with the owner that the licence possessed by his driver is fake, no action is taken by the insured for appropriate verification, then the insured will be at fault and, in such circumstances, the insurance company is not liable for the compensation."

18. Recently, in Ram Chandra Singh v. Rajaram & others reported in (2018) 8 SCC 799 the Supreme Court while taking into consideration its earlier decision in Swarn Singh's case (supra), and also Pepsu RTC's case (supra) has observed thus:-

"11.Suffice it to observe that it is well established that if the owner was aware of the fact that the license was fake and still permitted the driver to drive the vehicle, then the insurer would stand absolved. However, the mere fact that the driving license is fake, per se, would not absolve the insurer. Indubitably, the High Court noted that the counsel for the appellant did not dispute that the driving licence was found to be fake, but that concession by itself was not sufficient to absolve the insurer."

19. In the case at hand, appellant-owner submitted reply to claim application in which there is no pleading that before engaging respondent No.6 as driver of offending vehicle, he had perused license and satisfied himself that that driver engaged by him is possessing valid and effective driving license. Appellant-owner even after filing of reply to claim application did not enter into witness box so that insurance company could have an opportunity to prove negligence on the part of owner of offending vehicle, as held by Hon'ble Supreme Court in above cited judgments.

20. In view of the facts and circumstances emerging in the instant

case, argument advanced by learned counsel for the appellant that mere proof that license possessed by driver of offending vehicle is fake alone is not sufficient to absolve insurer from its liability, is not sustainable. Appellant-owner not only failed to plead in his pleadings that he has perused driving license and satisfied himself that driver engaged by him is having valid and effective driving license, but also failed to enter into witness box to enable insurance company to cross-examine him and discharge burden of proof as placed upon him that after believing the license to be genuine, he engaged the person as driver. It is only thereafter the burden will shift on insurance company under the law when owner of vehicle contested the case. In these circumstances, this Court is of the opinion that appellant owner cannot be granted benefit of observations in the matter of Swarn Singh's case (supra) & Pepsu RTC's case (supra).

21. In view of facts and circumstance of case and law laid down by Hon'ble Supreme Court in above referred judgments, I do not find any good ground calling interference in the impugned award. The appeal being devoid of any merit is liable to be dismissed and is hereby dismissed.

Sd/-

(Parth Prateem Sahu)
Judge

roshan/-