

In the High Court of Punjab and Haryana at Chandigarh

Date of Decision: 10th January, 2020

FAO No. 3756 of 2015 (O&M)

M/s Cholamandalam Ms General Insurance Company Limited

versus **---Appellant**

Rattan Kumar and others

---Respondents

FAO No. 4283 of 2015 (O&M)

Rattan Kumar

versus **---Appellant**

Ashib and others

---Respondents

FAO No. 4357 of 2015 (O&M)

Joginder Yadav

versus **---Appellant**

Rattan Kumar and others

---Respondents

Coram: Hon'ble Mrs. Justice Rekha Mittal

**Present: Mr. Rajneesh Malhotra, Advocate
for the insurance-company**

**Mr. Ashish Yadav, Advocate,
for the owner**

**Mr. R.K.Dhiman, Advocate
for the claimant**

Rekha Mittal, J.

This order will dispose of FAO Nos. 3756, 4283 and 4357 of 2015 as these have emerged out of the same award dated 27.1.2015 passed by the Motor Accidents Claims Tribunal, Gurgaon whereby compensation has been assessed to the tune of Rs. 44,37,976/- in respect of injury sustained by Rattan Kumar in a motor vehicular accident that took place on 21.8.2013.

FAO No. 3756 of 2015 has been filed by M/s Cholamandalam Ms General Insurance Company Limited (hereinafter referred to as “the insurance company”), FAO No. 4283 of 2015 by claimant whereas FAO No. 4357 of 2015 has been filed by Joginder Yadav-owner of offending vehicle

For facility of reference, Rattan Kumar shall be referred to as the claimant and Joginder Yadav as the appellant.

Counsel for the insurance company has assailed the award primarily on two counts. It is argued that compensation assessed by the Tribunal is on extremely higher side and merits modification on the basis of materials on record. To bring home his contention, he has submitted that claimant did not examine a witness to prove his employment as Constable in CRPF and salary received. It is further argued that Tribunal has assessed future loss of income by taking into consideration entire disability to the extent of 80% on annual income to the tune of Rs. 3,25,765/- and monthly income of Rs. 27,147/- even in absence of clear evidence that claimant is no longer working in CRPF or he had sought voluntary retirement on account of disability suffered.

Another submission made by counsel is that as licence possessed by Ashib, driver of offending vehicle namely Hywa Dumper

bearing No. HR-74-3152 was found to be fake, renewal thereof would not cure inherent fatality and as such the insurance company is wrongly saddled with liability to pay compensation though given right of recovery against the insured.

Counsel representing the appellant, on the contrary, has assailed findings of the Tribunal on the question of driving licence on the basis whereof the insurance company has been given right of recovery. It is argued that appellant examined Devender Singh, Clerk RTA office, Gurgaon to prove that licence possessed by Ashib was renewed by the licensing authority, Gurgaon. It is further argued that the witness had admitted that office used to send the earlier licence for verification before renewal, therefore, the insured cannot be held guilty of violating the terms and conditions of policy. It is argued with vehemence that there is no requirement in law that registered owner of the vehicle must be examined to negate plea of the insurance company with regard to breach of terms and conditions of policy. In support of his contention, he has relied upon judgment of Hon'ble the Supreme Court **National Insurance Company Limited vs. Laxmi Narain Dhut 2007 (2) RCR (Civil) 345**. Reference has also been made to judgment of this court **Sandeep Kumar and another vs. Atam Parkash and others** along with connected case 2018 (3) RCR (Civil) 762, judgment of the Allahabad High Court **U.P.State Road Transport Corporation through G.M. vs. Oriental Insurance Company Limited and others 2019 (4) TAC 346** and that of the Himachal Pradesh High Court **Oriental Insurance Company Limited vs. Vinod Kumr Sayog 2015(7) RCR (Civil) 923**.

Counsel would further argue that in view of the principles laid

down in the land mark judgment of Hon'ble the Supreme Court **National Insurance Company Limited vs. Swaran Singh 2004(2) RCR (Civil) 114** 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 the insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling condition of the policy regarding use of vehicle by a duly licensed driver or one who was not disqualified to drive at the relevant time. It is argued that no such evidence has been led by the insurance company that either the insured was guilty of negligence or he failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicle by duly licensed driver, therefore, findings of the Tribunal upholding plea of the insurance company with regard to breach of terms and conditions of policy by insured cannot be allowed to sustain and consequently right of recovery given in favour of the insurer may be set aside.

Counsel representing the claimant has submitted that compensation assessed by the Tribunal needs enhancement. Future loss of income may be assessed by considering disability to the extent of 100%.

Counsel representing the insurance company while refuting

contention of counsel for the appellant assailing right of recovery given in favour of the insurance company has submitted that as licence originally issued by the licensing authority at Agra was found to be fake and the insured did not discharge his primary obligation to prove that he had seen the licence possessed by driver or tested driving skill of Ashib, the insurance company is entitle to be exonerated of liability to pay compensation but in any case recovery right given in its favour cannot be faulted with.

I have heard counsel for the parties, perused the paper book and records.

Before dealing with the issue of quantum of compensation, it is appropriate to deal with the question of driving licence possessed by Ashib-respondent No. 1 therein. The insurance company examined an official from the office of RTO, Agra to prove that driving licence No. 6798/Ag/06 was not issued to Ashib son of Hassam but the same was issued in the name of Gauri Shankar son of Sh. Ram, valid with effect from 16.6.2006 to 15.6.2026. The other witness Devender Singh, Clerk RTA Office, Gurgaon was examined with regard to renewal of aforesaid driving licence by the authority at Gurgaon w.e.f. 16.11.2010 to 15.11.2013 and 24.10.2013 till 23.10.2016.

There is no quarrel with the settled position in law that renewal of fake licence would not cure inherent defect nor the insured or driver can be heard to say that since fake licence has been validily

renewed, driver was duly licensed to drive the vehicle.

The question for consideration is, whether plea of insurance company that the insured has committed breach of terms and conditions of policy for want of driver not being duly licensed can be accepted merely because licence possessed by driver was found to be fake or he was not holding any licence.

Hon'ble the Supreme Court in **National Insurance Company Limited vs. Swaran Singh's case (supra)** had culled out certain principles while recording summary of findings in para 110 of the judgment. A relevant extract from sub para (iii), (v) and (vii), relevant in the present context, reads thus:-

- “(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,
- (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.

(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 fulfill the requirements of law or not will have to be determined in each case.”

Perusal of sub para (v) and (vii) makes it evident that the court has refused to lay down any criteria as to how the burden to establish breach on the part of owner of the vehicle would be discharged and that would depend upon the facts and circumstances of each case. Similarly, the question as to whether the owner has taken reasonable care to find out as to whether driving licence produced by driver does not fulfill the requirements of law or not will have to be determined in each case.

In the case at hand, owner of the offending vehicle did not appear in the witness box to prove as to what reasonable case was taken by him in the matter fulfilling condition of the policy regarding use of vehicle by a duly licensed driver. There is nothing on record suggestive of the fact that owner had even seen driving license possessed by Ashib before giving him employment or he had tested his driving skill for the purpose of satisfying himself that he had given his vehicle for driving to a person who possessed a valid licence and is skillful in driving. The insurance company possibly cannot adduce any evidence to prove what care was taken by the owner and what not at the time of giving employment to him (driver) though knowing fully well

the terms and conditions of contract of insurance that vehicle must be driven by a person who is duly licensed or not disqualified to drive such a vehicle.

The matter is no longer res integra when examined in the light of latest judgment of Hon'ble the Supreme Court **Pappu and others vs. Vinod Kumar Lamba and another 2018(1) PLR 425.** A relevant extract from para 11 of the judgment, reads as follows:-

“The question is: whether the fact that the offending vehicle bearing No.DIL-5955 was duly insured by respondent No.2 Insurance Company would per se make the Insurance Company liable? This Court in the case of National Insurance Co. Ltd. (supra), has noticed the defences available to the Insurance Company under [Section 149\(2\)\(a\)\(ii\)](#) of the Motor Vehicles Act, 1988. The Insurance Company is entitled to take a defence that the offending vehicle was driven by an unauthorized person or the person driving the vehicle did not have a valid driving licence. The onus would shift on the Insurance Company only after the owner of the offending vehicle pleads and proves the basic facts within his knowledge that the driver of the offending vehicle was authorized by him to drive the vehicle and was having a valid driving licence at the relevant time. In the present case, the respondent No.1 owner of the offending vehicle merely raised a vague plea in the Written Statement that the offending vehicle DIL-5955 was being driven by a person having valid driving licence. He did not disclose the name of the driver and his other details. Besides, the respondent No.1 did not enter the witness box or examine any witness in support of this plea. The respondent No.2 Insurance Company in the Written Statement has plainly refuted that plea and also asserted that the offending vehicle

was not driven by an authorized person and having valid driving licence. The respondent No.1 owner of the offending vehicle did not produce any evidence except a driving licence of one Joginder Singh, without any specific stand taken in the pleadings or in the evidence that the same Joginder Singh was, in fact, authorized to drive the vehicle in question at the relevant time. Only then would onus shift, requiring the respondent No.2 Insurance Company to rebut such evidence and to produce other evidence to substantiate its defence. Merely producing a valid insurance certificate in respect of the offending Truck was not enough for the respondent No.1 to make the Insurance Company liable to discharge his liability arising from rash and negligent driving by the driver of his vehicle. The Insurance Company can be fastened with the liability on the basis of a valid insurance policy only after the basic facts are pleaded and established by the owner of the offending vehicle - that the vehicle was not only duly insured but also that it was driven by an authorized person having a valid driving licence. Without disclosing the name of the driver in the Written Statement or producing any evidence to substantiate the fact that the copy of the driving licence produced in support was of a person who, in fact, was authorized to drive the offending vehicle at the relevant time, the owner of the vehicle cannot be said to have extricated himself from his liability. The Insurance Company would become liable only after such foundational facts are pleaded and proved by the owner of the offending vehicle.”

A plain but careful reading of the aforesaid extract makes it evident that the insurance company is entitled to take a defence that offending vehicle was driven by an unauthorized person or the person who did not have valid licence. The onus would shift upon the

insurance company only after owner of the offending vehicle pleads and proves the basic facts within his knowledge that driver of offending vehicle was authorised by him to drive the vehicle and was having a valid driving licence at the relevant time. As has rightly been argued by counsel for the insurance company, the owner did not enter the witness box or examined any witness in support of his plea that driver was having valid driving licence at the relevant time. Contention raised by counsel for the appellant that insured examined RW2 to prove that licence was duly renewed by the authority at Gurgaon is patently false as Devender Singh RW2 was examined by the insurance company and not by owner because the said witness was cross examined by counsel representing the driver and owner (respondents No. 1 and 2 therein). The statement of Devender only proves that licence which was found to be fake in view of testimony of Hari Om Maurya RW1 was renewed by the office of RTA Gurgaon twice for the period aforesaid. However, the owner never appeared in the witness box to say that he had seen the licence, accepted the same to be correct and thereafter employed Ashib to drive the offending vehicle. As the insured failed to discharge the primary obligation that he had taken reasonable care to fulfill the condition of insurance policy qua driving licence, constituting a defence in favour of the insurer under Section 149(2) of the Motor Vehicles Act, 1988 (in short “the Act”), I find it difficult to accept that findings of the Tribunal on the

question of driving licence and giving right of recovery in favour of the insurance company are erroneous or warrant interference. In view of enunciation laid down in **Pappu and others' case (supra)**, the appellant cannot drive any advantage to his contention from the referred authorities.

The Tribunal has given right of recovery against driver and owner of offending vehicle without appreciating that there is no privity of contract between the insurer and driver of offending vehicle. As there was no contract between the driver and insurer, question of driver having committed any breach of terms and conditions of policy can not arise in any circumstance whatever. That being so, right of recovery given against driver of offending vehicle can not sustain and accordingly set aside.

This brings the court to quantum of compensation assessed by the Tribunal. The Tribunal awarded Rs. 44,37,976/-, detailed hereunder:-

Medical treatment	Rs. 7,29,419/-
Loss of future earnings on account of permanent disability	Rs. 36,48,557/-
Physical and mental pains	Rs. 20,000/-
Loss of amenities and loss of expectation of life	Rs. 20,000/-
Special diet and transportation	Rs. 20,000/-

The plea of claimant is that he was working as constable in CRPF before the accident and on account of disability to the extent of 80%, can not perform his duties as a constable. The claimant appeared in the witness box and tendered into evidence affidavit Ex. PW5/A by way of examination in chief. He had stated that he was getting Rs. 26,000/- per month as salary from his employer. However, he did not produce any

document with regard to his employment or salary. Counsel for the claimant made a statement tendering documents mark 1 to 29 on 13.10.2014 and another statement dated 19.1.2015 tendering salary slip Ex. P17 and documents mark P-30 to P41. The document Ex. P17 was objected to on the ground of mode of proof. There is no clear evidence on record if Rattan Kumar continued to be an employee in CRPF or what is status of his employment. The Tribunal did not bother to examine this vital aspect of the matter while awarding more than Rs. 36 lakhs qua future loss of income by applying multiplier method. That being so, findings of the Tribunal assessing future loss of earnings on account of disability to the extent of 80% cannot be allowed to sustain.

As per the settled position in law, Tribunal has an obligation to assess just and reasonable compensation to make good the loss in terms of money, suffered by the victim or victim family. Equally true is that compensation cannot be a bonanza, source of profit or largesse. In the instant case, the Tribunal has failed to discharge its obligation to summon a witness from CRPF alongwith relevant records in order to record a positive finding with regard to status of employment of injured who had suffered 80% physical disability, stated to be functional in nature. It is also surprising that if the injured was an employee of CRPF, why didn't he submit his medical bills to his employer for reimbursement. In the given circumstances, interest of justice commands that findings of the Tribunal with regard to assessment of compensation are set aside and matter is remitted to the Tribunal for making assessment afresh on the basis of materials already on record and additional evidence to be collected with

regard to status of employment of the injured and emoluments drawn by him before the accident. The Tribunal would also call upon employer of the victim to produce evidence if he was given reimbursement of medical expenses, if so to what effect.

In view of what has been discussed hereinbefore, the appeals are disposed of in the aforesaid terms. The parties are direct to appear before the Tribunal on 28.1.2020 for deciding the question of assessment of compensation afresh. Parties shall be at liberty to adduce further evidence for deciding the question of quantum of compensation. The Tribunal shall dispose of the issue of assessment of compensation within a period of four months of parties putting in appearance. In the meanwhile, the insurance company shall not recover compensation already paid to the claimant.

(Rekha Mittal)
Judge

10th January, 2020

PARAMJIT

Whether speaking/reasoned : Yes

Whether reportable : Yes