

\$~

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

Date of Decision: 11.05.2023

+ MAC.APP. 914/2019, CM APPL. 51954/2019 (stay), CM APPL. 51955/2019 (delay if any) & CM APPL. 51957/2019 (delay in RF)
GEETA DEVI & ANR Appellants

Through: Mr. Tushar Bathija, Mr. Abhimanyu Tewari, Ms. Eliza, Advs.

versus

KAVITA & ORS (IFFCO TOKIO GENERAL INSURANCE COMPANY LTD) Respondents

Through: Mr. Sameer Nandwani, Ms. Pooja Tandon, Advs. for R-3

CORAM:
HON'BLE MS. JUSTICE REKHA PALLI

REKHA PALLI (ORAL)

MAC.APP. 914/2019

1. The present appeal under Section 173 of the Motor Vehicles Act, 1988 preferred by the owner of the offending vehicle seeks to assail the award dated 06.07.2018 passed by the learned Motor Accidents Claims Tribunal in MACT No. 4415/2016 insofar as it grants recovery rights in favour of the insurer/respondent no.3.

2. Vide the impugned award, the learned Tribunal held that since the driving licence held by the driver of the insured vehicle, i.e., respondent no.2 was fake, there was a breach of the terms and conditions of the insurance policy and therefore the insurer was entitled to a right of recovery against

the appellant.

3. The primary submission of Mr. Tushar Bathija, learned counsel for the appellant is that not only was the driving license of the respondent no.2 which, was later found to be fake, duly verified by her late husband at the time of engaging him but he had even taken a driving test of respondent no.2 and had found him fit for driving. The late husband of the appellant, having taken all possible steps to check that the driver was holding a valid license and was fit to drive the vehicle; even if the said license later turned out to be fake, it could not be held that the appellant had breached the terms and conditions of the insurance policy.

4. He submits that since the appellant's husband had expired by the time evidence was led before the learned Tribunal, the appellant had stepped into the witness box and specifically deposed during her cross-examination that her late husband had duly verified the licence of the driver at the time of his employment and also taken his driving test before employing him. He contends that in the light of these specific averments by the appellant, the learned Tribunal has erred in holding that there was a breach of the terms and conditions of the insurance policy thereby granting recovery rights in favour of the insurer. In support of his plea, he seeks to place reliance on the decisions of the Apex Court *United India Insurance Co. v. Lehu*, (2003) 3 SCC 338 and *Nirmala Kothari v. United India Insurance Co. Ltd.*, (2020) 4 SCC 49. He, therefore, prays that the impugned award in so far as it grants recovery rights to the respondent no.3 be set aside.

5. *Per Contra*, Mr. Sameer Nandwani, learned counsel for the insurer seeks to defend the impugned award by contending that once there was no direct evidence before the learned Tribunal to show that the late husband of

the appellant had taken all possible steps to verify the driving license of the driver at the time of engaging him, the learned Tribunal cannot be faulted in holding that there was a breach of the terms and conditions of the insurance policy. He submits that the appellant merely stated that she had been informed by her husband about having taken a driving test of respondent no.2 and having checked his driving license. This he contends was not sufficient to show that the appellant's late husband had taken appropriate steps to check the licence of respondent no.1 at the time of taking him in employment.

6. Furthermore, respondent no.2, the driver of the offending vehicle had himself admitted during his cross examination that despite not being a resident of Mathura, he had obtained his driving licence from the license authority at Mathura. Even during his cross examination the respondent no.2 was not able to produce his driving license verification fee obtained from the licensing authorities. He therefore contends that once it was evident that the driving license of respondent no.2 was fake, the learned Tribunal was justified in granting recovery rights in favour of respondent no.3. He therefore prays that the appeal be dismissed.

7. Having considered the submissions of the learned counsel for the parties and perused the record, I find that while the factual matrix of the manner in which the accident took place is not in dispute, the only question which arises for consideration of this Court is as to whether the learned Tribunal was justified in holding that there was a breach of the terms and conditions of the insurance policy by the appellant's late husband. The answer to this would depend on as to whether the appellant's late husband can be said to have taken all possible steps as is expected to be taken from

an owner at the time of engaging a driver. While the appellant contends that all necessary steps were taken, the respondent seeks to contend otherwise.

8. In order to appreciate the rival submissions of the parties, it would be apposite to first refer to the findings of the learned Tribunal on this aspect. The relevant extracts of the decision read as under:

“36. In order to appreciate the aforesaid contention raised on behalf of insurance company, it would be relevant to discuss the testimonies of relevant witnesses examined in this regard. Smt. Geeta Devi(widow of Sh. Netra Pal Singh/Registered owner of offending vehicle) has examined herself as R2W1. Although, she has deposed in her evidence by way of affidavit (Ex. R2W1/A) that at the time of employing Ujay Pal (R1) as driver on vehicle no. HR69-D-0246,- her husband i.e. deceased registered owner had taken his driving skill test and was satisfied about his driving skills and also that her deceased husband had kept copy of DL of R1 in respect of HMV but during her cross-examination on behalf of insurance company, she could not disclose as to when R1 was employed by her deceased husband and as to when copy of DL of R1 was taken by her deceased husband. She admitted that no such driving test was taken before her but claimed that her husband has told her about the same. She herself did not get DL of R1 verified. She denied the suggestion that no driving skill test of R1 was taken at the time of employing him as driver for the said vehicle or that R1 was not holding valid DL as on the date of accident or that copy of DL(Ex. R2W1/1) was forged and fabricated one.

37. R1 has examined himself as R1W2 and has deposed during his cross-examination that he never resided in the area of Mathura but volunteered that he had occasionally visited the said place 3-4 times in a year. He had got DL prepared from Licencing Authority, Mathura by personally visiting the said place and reiterated that copy of DL (Ex. R2W1/1) is genuine one. Although, he claimed to have paid driving licence verification fee but could not produce receipt thereof when asked to do so. He further deposed that his

original DL was seized by IO in the criminal case. He denied the suggestion that he was not holding valid and effective DL as on the date of accident.

38. In view of the aforesaid factual matrix, my Ld. Predecessor summoned the concerned official i.e. Record Clerk from the office of ARTO, Mathura, U.P. He produced relevant record in respect of Driving Licence No. 1347/MTR/2000 and testified that as per their record, said licence was issued In the name of Irshad Qureshi S/o Islam Qureshl. He exhibited copy of computerized extracts of said DL as Ex. CW1/A. He further deposed that DL verification report. (Ex. RW2/1) dated 30.08.13(which is relied by R1 & R2) was never issued by their office and same is fake report. He also deposed that said DL was never issued in the name of Sh. Ujay Pal S/o Sh. Anokhe Lal and also that copy of DL(Ex. CW1/B) was fake. He further deposed that DL verification report (Ex. CW1/C) produced by insurance company, genuine report. During his cross-examination on behalf of respondent nos.1 and 2, he deposed that DL in the name of Irshad Qureshi was issued on 24.02.2000 having validity upto 23.02.2020 and record was computerized in the year 2013 onwards. He reiterated that report Ex. RW2/1 was fake and denied the suggestion that Ex. CW1/A was false report.

39. It is quite evident from the aforesaid discussion that DL produced by R1 was found to be fake. It is pertinent to note that R1 & legal heirs of R2 did not raise any plea in their WS that registered owner had taken driving skill test of R1 at the time of employing him or that he had retained copy of DL of R1 in respect of HMTV at that time. The said plea is sought to be raised for the first time during the course of RE in aid of the submission that since registered owner/insured had taken due care and precaution while employing R1 as driver for the offending vehicle, insurance company is liable to pay the compensation amount. It is well settled law that there can not be any evidence beyond pleadings and thus, the, the said respondents cannot be allowed to rely upon the said plea. Even otherwise, the said plea remained unsubstantiated

during the course of inquiry in as much as insured did not enter into witness box and his widow(R2W1) admitted during her cross examination that no such driving skill test of R1 was taken in her presence. In other words, relevant portion of her testimony is based upon hearsay evidence and thus, same is not admissible under the law.

40. Hence, I find substance in the submission made on behalf of insurance company that had there been any valid DL in favour of respondent no.1 to drive the type of vehicle like the present one, copy thereof would have been provided by him to the police or would have been placed on record.

41. In view of the aforesaid discussion, I find substance in the plea raised on behalf of insurance company that for want of valid and effective DL in favour of respondent no. 1 being proved on record, it would be termed as breach in the terms and conditions of insurance policy on the part of insured i.e. respondent no. 2. Thus, insurance company is entitled to recovery rights against the respondent no. 1 & legal heirs of respondent no. 2. Issue no. 2 is decided accordingly.”

9. From a bare perusal of the aforesaid cross-examination of the appellant as has been noted in the impugned award itself, it is evident that the appellant had clearly stated that her late husband, who had engaged the driver, had not only kept the copy of the driving license furnished by the respondent no.2 but had also taken his driving test before employing him. Merely because the appellant could not disclose the details as to when the respondent no.2/the driver was employed by her late husband or as to when was the copy of the driving license of the driver taken by her deceased husband, the learned Tribunal could not have presumed that there was any failure on the part of the appellant's late husband to verify the credentials of the driver at the time of his employment. Once the appellant had categorically stated in her cross examination that her husband apprised her

of the fact of the verification of the driving licence and the driving test being conducted by him, the learned Tribunal ought to have accepted her plea instead of drawing an adverse inference against her.

10. Even otherwise, the Tribunal appears to have misdirected itself by ignoring the fact that as held by the Apex Court in *Nirmala Kothari (supra)*, it is for the insurer to prove that the owner of the vehicle did not take adequate care and caution to verify the genuineness of the driver. The relevant extracts of the said decision reads as under:

8. Breach of conditions under Section 149(2)(a) of the Motor Vehicles Act, 1988 absolves the insurer of its liability to the insured. Section 149(2)(a)(ii) deals with the conditions regarding driving licence. In case the vehicle at the time of accident is driven by a person who is not duly licenced or by a person who has been disqualified from holding or obtaining a driving licence during the period of disqualification, the insurer is not liable for compensation. In the instant case it is a matter of fact that no record of the licence bearing No. P03041288753070 was found with the licensing authority.

9. Having set forth the facts of the present case, the question of law that arises for consideration is what is the extent of care/diligence expected of the employer/insured while employing a driver? To answer this question, we shall advert to the legal position regarding the liability of the insurance company when the driver of the offending vehicle possessed an invalid/fake driving licence. In United India Insurance Co. Ltd. v. Lehu [United India Insurance Co. Ltd. v. Lehu, (2003) 3 SCC 338 : 2003 SCC (Cri) 614] a two-Judge Bench of this Court has taken the view that the insurance company cannot be permitted to avoid its liability on the ground that the person driving the vehicle at the time of the accident was not duly licensed. It was further held that the wilful breach of the conditions of the policy should be established. The law with this respect has been discussed in detail in PEPSU RTC v National Insurance Co. [PEPSU RTC v. Nation

al Insurance Co., (2013) 10 SCC 217 : (2013) 4 SCC (Civ) 713 : (2013) 4 SCC (Cri) 768 : (2014) 1 SCC (L&S) 750] . We may extract the relevant paragraph from the judgment : (PEPSU case [PEPSU RTC v. National Insurance Co., (2013) 10 SCC 217 : (2013) 4 SCC (Civ) 713 : (2013) 4 SCC (Cri) 768 : (2014) 1 SCC (L&S) 750] , SCC p. 223, para 10)

“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 case [National Insurance Co. Ltd. v. Swaran Singh, (2004) 3 SCC 297 : 2004 SCC (Cri) 733] . 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.”

12. While hiring a driver the employer is expected to verify if the driver has a driving licence. If the driver produces a licence which on the face of it looks genuine, the employer is not expected to further investigate into the authenticity of the licence unless there is cause to believe otherwise. If the employer finds the driver to be competent to drive the vehicle and has satisfied himself that the driver has a driving licence there would be no breach of Section 149(2)(a)(ii) and the insurance company would be liable under the policy. It would be unreasonable to place such a high onus on the insured to make enquiries with RTOs all over the country to ascertain the veracity of the driving licence. However, if the insurance company is able to prove that the owner/insured was aware or had notice that the licence was fake or invalid and still permitted the person to drive, the insurance company would no longer continue to be liable.

11. In the present case, it is an admitted position that the respondent no.3 did not take any steps to prove that the appellant's late husband did not take adequate steps to verify the genuineness of the driving license of the respondent no.2. On the other hand, in her detailed cross examination by respondent no.3, the appellant stuck to her stand that the driving license of respondent no.2 was duly checked by her husband who had also kept a copy thereof. I am, therefore, of the view that once the respondent no.3 did not take any such plea, the learned Tribunal could not have held that there was any breach of the terms and conditions of the insurance policy.

12. I also find that the learned Tribunal appears to have been swayed by the fact that the respondent no.2 had admitted in this cross examination that though he was not a resident of Mathura, he had obtained a driving license from the licensing authority at Mathura. In my considered opinion, nothing

much would turn on this statement of the driver that his license was fake as it is not even the appellant's case that the driving license of respondent no.2 was in fact genuine. It is however her case that this fact about the driving license being fake was known only to respondent no.2 and not to her late husband, who never had any reason to doubt that the driving licence of the respondent no.2 was fake especially when he was found to be able to drive the vehicle properly

13. For the aforesaid reasons, the impugned award insofar as it grants recovery rights to the respondent no.3 against the appellant is unsustainable and is, accordingly, set aside.

14. At this stage, learned counsel for the appellant submits that the statutory amount of Rs. 25,000/- deposited by the appellant be refunded. He, however submits that this amount along with accrued interest, instead of being refunded to the appellant, be refunded to any deserving widow who lost her husband during the pandemic of Covid-19. The Registry is, accordingly, directed to remit the statutory amount of Rs.25,000/- alongwith accrued interest thereon to the Kotak Mahindra Bank account of Smt. Preeti Singh Solanki, Account No. 5745470231, IFSC Code- KKBK0004618, CRN- 457721571.

REKHA PALLI, J

MAY 11, 2023

al