A.F.R.

Reserved

Case :- FIRST APPEAL FROM ORDER No. - 3492 of 2009
Appellant :- National Insurance Company Ltd.
Respondent :- Kewal Krishna Arora And Others
Counsel for Appellant :- Anand Kumar Sinha
Counsel for Respondent :- Anurag Sharma,Anurag Singh,Anurag Sinha,Km. Pratima Srivastava,S. Shekhar,Sharve Singh

Hon'ble Subhash Chandra Sharma,J.

1. Heard Sri Anand Kumar Sinha, learned counsel for the appellant- National Insurance Company, Sri S. Shekhar, learned counsel for respondent nos.1 & 2 and Ms. Nirja Singh, learned counsel for the respondent no.3.

2. This appeal under Section 173 of Motor Vehicle Act has been filed by the National Insurance Company/opposite party no.2/appellant challenging the judgment and order dated 28.09.2009 passed by Additional District Judge/Special Judge (SC/ST)/M.A.C.T., Ghaziabad by which a sum of Rs.12,70,406/- alongwith 6 % interest has been awarded as compensation on account of death of deceased against the appellant.

3. Facts in brief are that an application u/s 166 & 140 M. V. Act was filed by the claimant/respondent no.1 & 2 seeking compensation to the tune of Rs.42,66,000/- alongwith 18% interest alleging that on 09.03.2005 deceased Vikas Arora S/o claimant was returning to his home from his office by motorcycle and when he reached near Mohan Nagar police outpost, Ghaziabad at 7:00 P.M. a truck bearing no. AS 01 F 4749 driven by its driver rashly and negligently dashed him from behind causing injuries to him as a result he died on the same day in the hospital. F.I.R. in this regard was lodged by the brother of deceased on the same day at

police station concerned against unknown driver of the said truck bearing no. AS 01 F 4749 as Case Crime No.189 of 2005, under Section 279, 304A I.P.C.

4. Deceased was aged about 26 years and was earning Rs.9500/- from Kamdhenu Inspat Ltd. and Rs.3000/- from accountancy in Agarwarl Timber and Bans Company. Truck owner as well as insurance company contested the proceedings by filing written statement and denying the allegations made by the claimant/respondent nos.1 & 2.

5. Learned tribunal on the basis of pleadings and after appreciating the evidence brought on record by the parties, both oral and documentary determined that incident took place due to rash and negligent driving of the driver of offending vehicle. It recorded finding on the basis of oral testimony of eye-witness PW-2 Kamal Arora who proved the manner and mode of accident. It was stated by him that he was waiting for his brother at the police outpost Mohan Nagar and accident took place in his presence on 09.03.2005 at about 7:00 P.M. A truck bearing no.AS 01 F 4749 was coming from the opposite direction and driver of the truck was driving it rashly and negligently which dashed the motorcycle of deceased from behind in which deceased got injuries and was taken to the hospital where he died. He informed to the police station and lodged F.I.R. PW-1 Kewal Krishna Arora is father of deceased who had not seen the incident. The testimony of PW-2 was found to be unshakable in cross-examination. F.I.R. was lodged by PW-2 who had seen the incident and this was also taken into account by the learned tribunal.

6. On the question of quantum, learned tribunal found that deceased who was working as accountant in Kamdhenu Ispat Ltd. from where he was earning Rs.9500/- per month as salary and was also working in Agarwal Timber and Bans Company from where he

earned Rs.26,500/- per year. In this regard statements of PW-3 Sushil Bhardawaj, Assistant Regional Manager, Sales & PW-4 Puneet Agarwal care taker of his father's business were recorded and relied on. Deceased filed I.T.R. in assessment year 2004-05 in which he showed his income as Rs.1,05,700/- on the basis of which his income was assumed to be Rs.1,05,700/- out of which 1/3 of the annual income was deducted as personal expenses of deceased and after applying multiplier of 18 on the age of the deceased determined the compensation to the tune of Rs.12,68,406/- and further awarded a sum of Rs.2000/- for funeral expenses. In this way, a total sum of Rs.12,70,406 was determined as compensation payable to the claimant/respondent nos.1 & 2.

7. Learned tribunal found that at the time of accident driver of the truck causing accident, had no valid driving license, even though liability was fastened against the insurance company the appellant.

8. Learned counsel for the appellant submits that the learned tribunal has wrongly assessed the income of deceased on the basis of income as shown in the I.T.R. filed by the deceased in Income Tax Department and assessed the compensation on higher side.

9. Learned counsel for respondent nos.1 & 2 urged that the argument made by learned counsel for the appellant is not tenable regarding income of deceased and amount of compensation as determined by the learned tribunal but said nothing about the liability for payment of compensation.

10. In this regard it is to note that learned tribunal has not added any amount under the head of future prospects and conventional head as provided in the case of ***Sarla Verma and Pranay Sethi,*** so it cannot be said that the amount of award is on higher side. Since

learned counsel for claimant/respondent nos.1 & 2 has made no any objection relating to the awarded amount, therefore, this Court is not inclined to disturb the assessment of amount of compensation as determined by the learned triubnal.

11. It is further submitted that driver of the offending vehicle had no valid license at the time of accident, therefore, liability for payment of compensation cannot be fastened with the insurance company and compensation was payable by the owner of the offending vehicle. In this regard, learned tribunal has recorded its finding while deciding issue no.3 & 4. that owner of the vehicle has committed breach of conditions of insurance policy, therefore, insurance company is not liable for making payment of compensation but fastened the liability on the insurance company which is illegal. Learned tribunal has also mentioned in the judgment that if owner of the vehicle makes breach of conditions of insurance policy, insurance company is entitled to recover the amount of compensation from owner of the vehicle even though in the operative portion liability has been fastened on the insurance company without giving it right to recovery.

12. Learned counsel for the respondent no.3 (owner of the vehicle) has contended that in this case driver of the vehicle held driving license at the time of accident which was issued from Transport Authority, Muzaffarpur but during investigation by the insurance company it was found to be fake which was not in his knowledge. The driving license was valid at the time of accident and he employed the driver with due care and caution as having valid driving license, therefore, he cannot be held liable for making payment of compensation.

13. The main question involved in this appeal is whether the M.A.C.T. was not right in holding that insurer was liable even though the driver had a fake license.

14. To understand the correct legal position regarding liability of the insurance company where the driver of the offending vehicle possessed a fake driving license, I have to go through the provisions u/s 149(2)(a) & 149(2)(a)(ii) Motor Vehicle Act, 1988 and various pronouncements made by Hon'ble the Apex Court in this regard.

15. Section 149(2)(a) and Section 149(2)(a)(ii) are as under:-

> "(2) No sum shall be payable by an insurer under Section (1) in respect of any judgment or award unless, before the commencement of the proceedings in which the judgment or award is given the insurer had notice through the Court, or in respect of such judgment or award so long as execution is stayed thereon pending an appeal; and an insurer to whom notice of the bringing of any such proceedings is so given shall be entitled to be made a party thereto and to defend the action on any of the following grounds, namely:-
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> **(a)** that there has been a breach of a specific condition of the policy, being one of the following conditions, namely:-
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> **(i)** a condition excluding the use of the vehicle-
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> **(a)** for hire or reward, where the vehicle is on the date of the contract of insurance a vehicle not covered by a permit to ply for hire or reward, or
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> **(b)** for organised racing and speed testing, or
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> **(c)** for a purpose not allowed by the permit under which the vehicle is used, where the vehicle is a transport vehicle, or
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> **(d)** without side-car being attached where the vehicle is a motor cycle; or
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> **(ii)** a condition excluding driving by a named person or persons or by any person who is not duly licenced, or by any person who has been disqualified for holding or obtaining a driving licence during the period of disqualification;"

16. 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 licensed 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 the compensation. In the instant case, we are called upon to deal with a situation where the driver allegedly possessing only a fake driving licence.

17. In ***United India Insurance Company Limited vs. Lehru and others (2003) 3 SCC 338***, a two-Judge Bench of Hon'ble The Apex Court has taken the view that the insurance company cannot be permitted to avoid its liability only on the ground that the person driving the vehicle at the time of accident was not duly licensed. It was further held that the willful breach of the conditions of the policy should be established. Still further it was held that it was not expected of the employer to verify the genuineness of a driving licence from the issuing authority at the time of employment. The employer needs to only test the capacity of the driver and if after such test, he has been appointed, there cannot be any liability on the employer. The situation would be different when the employer was told that the driving licence of its employee is fake or false and yet the employer not taking appropriate action to get the same duly verified from the issuing authority. We may extract the relevant paragraphs from the judgment:

> *"18. Now let us consider Section149(2). Reliance has been placed on Section149(2)(a)(ii). As seen in order to avoid liability under this provision it must be shown that there is a "breach". As held in Skandia and Sohan Lal Passi cases the breach must be on part of the insured. We are in full agreement with that. To hold otherwise would lead to absurd results. Just to take an example, suppose a vehicle is stolen. Whilst it is being driven by the thief there is an accident. The thief is caught and it is ascertained that he had no licence. Can the Insurance Company disown liability? The answer has to be an emphatic "No". To hold otherwise would be to negate the very purpose of compulsory insurance. The injured or relatives of the person killed in the accident may find that the decree obtained by them is only a paper decree as the owner is a man of straw. The owner himself would be an innocent sufferer. It is for this reason that the Legislature, in its wisdom, has made insurance, at least third party insurance, compulsory. The aim and purpose being that an insurance company would be available to pay. The business of the company is insurance. In all businesses there is an element of risk. All persons carrying on business must take risks*

associated with that business. Thus it is equitable that the business which is run for making profits also bears the risk associated with it. At the same time innocent parties must not be made to suffer or loss. These provisions meet these requirements. We are thus in agreement with what is laid down in aforementioned cases viz that in order to avoid liability it is not sufficient to show that the person driving at the time of accident was not duly licensed. The insurance company must establish that the breach was on the part of the insured."

"20. When an owner is hiring a driver he will therefore have to check whether the driver has 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 would then take the test of the driver. If he finds 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 RTOs, 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 Section149(2)(a)(ii). The Insurance Company would not then be absolved of liability. If it ultimately turns out that the licence was fake, the insurance company would continue to remain liable unless they prove that the owner/insured was aware or had noticed 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 Skandia, Sohan Lal Passi and Kamla cases. We are in full agreement with the views expressed therein and see no reason to take a different view."

18. The matter was subsequently considered by a three-Judge Bench of Hon'ble the Apex Court in ***National Insurance Company Limited vs. Swaran Singh and others (2004) 3 SCC 297***. The said Bench was of the view that in case the insured did not take reasonable and adequate care and caution to verify the genuineness or otherwise of the licence, the liability would still be open-ended and will have to be determined on the basis of facts of each case. The relevant discussions are available at paragraphs 92, 99, 100 and 101, which are extracted below:

"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 hereinbefore, is whether the insurer must prove that the owner was guilty of the wilful breach of the conditions of the insurance policy or the contract of insurance. In Lehru case, the matter has been considered in some detail. 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 the law in terms whereof the insurer is to establish wilful breach on the part of the insured and not for the purpose of its disentitlement from raising any defence or for the owners to be absolved from any liability whatsoever."

"99. So far as the purported conflict in the judgments of Kamla and Lehru 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. This Court, however, in Lehru must not be read to mean that an owner of a vehicle can under no circumstances have 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 case, 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."

19. Swaran Singh's case (supra) was subsequently considered by Hon'ble the Apex Court in ***National Insurance Company Limited vs. Laxmi Narain Dhut 2007 (3) SCC 700***. It was explained that:

"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 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…"

20. In the case of ***Pepsu Road Transport Corporation vs. National Insurance Company (2013) 10 SCC 217*** Honb'le the Apex Court after considering the law as laid down in aforementioned cases, has held in para 8 which is as under:-

8.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.

21. In the case of ***Ram Chandra Singh vs. Rajaram & others, A.I.R. 2018 SC 3789,*** Hon'ble the Apex Court by considering the judicial precedents in the case of ***Pepsu Road Transport Corporation (supra) & Premkumari vs. Prahlad Deo (2008) 3 SCC 193*** ruled in para 11 which is given as under:-

11. Suffice it to observe that it is well established that if the owner was aware of the fact that the licence was fake and still permitted the driver to drive the vehicle, then the insurer would stand absolved. However, the mere fact that the driving licence 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.

22. Again in a recent case of ***Nirmala Kothari vs. United India Insurance Company Ltd. 2020 (4) SCC 49*** Hon'ble the Apex Court considered the aforementioned position of law and explained about the extent of care/diligence expected of the employer/insured while employing a driver. The relevant para no.9, 10 & 11 are as under:-

9. While the insurer can certainly take the defense that the license of the driver of the car at the time of incident was invalid/fake however the onus of the proving that the insured did not take adequate care and caution to verify the genuineness of the license or was guilty of willful breach of the conditions of the insurance policy or the contract of insurance lies on the insurer.

10.The view taken by the National Commission that the law as settled in the Pepsu case (Supra) is not applicable in the present matter as it related to third-party claim is erroneous. It has been categorically held in the case of ***National Insurance Co. Ltd vs. Swaran Singh & Ors.***

> *"110. (iii).... 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 the condition of the policy regarding use of vehicles by a duly licenced driver or one who was not disqualified to drive at the relevant time."*

11. While hiring a driver the employer is expected to verify if the driver has a driving license. 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)(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.

23. In the present case opposite party no.1/respondent no.3 owner of the offending vehicle had stated in his written statement that on the date of accident Ram Naresh was driver on his vehicle. He had valid dirving licence. It was issued from the office of District Transport Officer, Muzaffarpur. On investigation by the Insurance company/appellant, this driving licence was found to be fake as per report of Investigator Mr. Arvind Kumar Misra but he had not entered into the witness box to prove the contents of his report

which was based on the observation of dealing assistant. Even the dealing assistant of the office of District Transport Officer, Muzaffarpur has also not been examined to prove that the seal and signature of District Transport Officer in the xerox copy of driving licence were not found to be correct.

24. Further it was also not proved by the appellant that the owner/respondent no.3 had not taken adequate care and caution to verify the genuineness of the driving licence of the driver at the time of his employment and that the owner was aware or had notice that the licence was fake or invalid and still permitted him to drive the offending vehicle. In such circumstances, it cannot be said that the insured/owner is at fault in having employed a person whose licence has been found to be fake by the insurance company before the learned tribunal. Therefore, there exists no any cause to disturb the findings recorded by learned tribunal in this regard.

25. In view of the above, this appeal is ***dismissed.*** The appellant/Insurance Company is liable to indemnify the respondents. Claimants be given the same without keeping in the fixed deposit as more than 16 years have elapsed.

26. There is no order as to costs.

Order Date :- ***2nd February, 2022***
Ashok Gupta

(Subhash Chandra Sharma,J.)