

**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD****FIRST APPEAL No. 1312 of 2003****For Approval and Signature:****HONOURABLE MR.JUSTICE A.L.DAVE****HONOURABLE MR.JUSTICE SHARAD D.DAVE**

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1 Whether Reporters of Local Papers may be allowed to  
see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the  
judgment ?

4 Whether this case involves a substantial question of law  
as to the interpretation of the constitution of India,  
1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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**UNITED INDIA INSURANCE CO. LTD.****Versus****KUSUMBEN BAKULBHAI CHAMPAKLAL MEHTA & Others**

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**Appearance :**

MR PV NANAVATI with MR VIBHUTI NANAVATI for the Appellant.

MR AV PRAJAPATI for Respondents No.1 &amp; 2.

None for Respondent No. 3.

NOTICE SERVED for Respondent No. 4.

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**CORAM : HONOURABLE MR.JUSTICE A. L. DAVE****and****HONOURABLE MR. JUSTICE S. D. DAVE**

**Date : 31/01/2008**

**ORAL JUDGMENT:- (Per: A. L. DAVE, J.)**

1. The appellant herein challenges the judgment and award rendered by Motor Accident Claims Tribunal (Aux.), Ahmedabad, on 27<sup>th</sup> March, 2003 in Motor Accident Claim Petition No. 1006 of 1999.

1.1 The said Claim Petition was by heirs and legal representatives of one Bakul Champaklal Mehta, aged about 57 years, who died in a vehicular accident that occurred on 12<sup>th</sup> October, 1999, at about 5.00 A.M. The case of the claimants was that the deceased was working as Assistant Manager with Punjab National Bank. While he was walking on the road, he was hit by scooter No.GUI 782, which was driven by one Ashok Roopchand Keshwani, original respondent No.1, who came to be deleted during the hearing of the Claim Petition before the Tribunal, by virtue of an order below Exhibit 13 passed by the Tribunal. The claimants had claimed a compensation of Rs.25 lakh. The claimants are the widow and widowed mother of the deceased.

2. The stand by the Insurance Company-original opponent No.3 and present appellant was that the driver of the scooter did not hold a valid and effective driving licence at the time of the accident and, therefore, in absence of a valid and effective driving

licence, the policy condition is breached, which would exonerate the Insurance Company from its liability to pay compensation as an indemnifier. A plea was also taken to the effect that the scooter involved in the accident was not insured with the Insurance Company. However, that plea was given up when a copy of the certificate of insurance was brought on record, but the plea regarding want of valid and effective driving licence was very much pressed into service.

3. To bring home its case, the Insurance Company summoned Police Officer, Kalumiya Umarmiya Malek, who was the Investigating Officer in the criminal proceedings. His deposition is recorded at Exhibit 69. He has deposed that he had investigated the accident and it was revealed during the course of investigation that the vehicle was driven by Ashok Roopchand Keshwani. He has also deposed that he had recorded statement of the said Ashok Roopchand Keshwani, where he stated that he had not possessed any licence. Signature of the said Ashok Roopchand Keshwani was taken on the statement. The witness produced the said statement at Exhibit 70 and identified the signature and proved the contents thereof. Certificate of insurance was also produced on record of the case at Exhibit 76.

4. The Tribunal considered the evidence on record and came to a conclusion that the accident occurred because of negligence on the part of the driver of the scooter, Ashok Roopchand Keshwani. The Tribunal also examined the question of quantum of compensation and awarded a compensation of

Rs.8,56,000/- with proportionate costs and interest at the rate of 9 per cent from the date of Claim Petition till realization. The Tribunal gave a finding that the driver of the scooter was primarily responsible to pay the compensation and the owner of the vehicle and the insurer of the vehicle (present appellant) was responsible to pay the compensation vicariously and as indemnifier, respectively.

4.1 The Insurance Company has preferred this appeal only on the ground that the Insurance Company could not have been saddled with liability to pay compensation in view of the fact that was brought on record that the driver of the scooter, at the time of the accident, did not possess a valid and effective driving licence, which was in breach of the policy condition and, therefore, the Insurance Company ought to have been exonerated.

4.2 Learned Advocate, Mr. Nanavati, has drawn our attention firstly to Exhibit 27, which is an application under Section 170 of the Motor Vehicles Act, which was granted by the Tribunal. He has also drawn our attention to the deposition of Kalumiya Umarmiya Malek (Exhibit 69) and statement of Ashok Roopchand Keshwani, driver of the scooter, at Exhibit 70. He has also drawn our attention to the written statement of the Insurance Company at Exhibit 18 and submitted that there is a specific plea taken by the Insurance Company for want of valid and effective driving licence, which has been proved by the Insurance Company by examining independent police witness and, therefore, the Insurance Company has discharged its burden of proving want of valid and effective

driving licence and consequent breach of policy condition. The Tribunal has overlooked this aspect and has, on the contrary, observed that the liability of the Insurance Company compensation to a third party is statutory and, therefore, even if there is breach of policy condition, the Insurance Company has to pay compensation to the third party claimant and recover the same from the insured. In doing so, the Tribunal has relied on the decision in the case of *New India Assurance Company Limited v. Kamla*, 2002(1) GLR 916. It was, therefore, urged that this appeal may be allowed.

5. Learned Advocate, Mr. Prajapati, appearing for the original claimants, has opposed this appeal. According to him, the policy is not produced on record. By examining the Investigating Officer, it cannot be said that the Insurance Company has discharged its burden of showing want of valid and effective driving licence by the driver of the scooter. He has also submitted that even if there is a breach of policy condition, the Insurance Company is under statutory liability to pay compensation and, therefore, the Insurance Company should be made liable to pay compensation to a third party and recover the same from the insured, if there is any breach of policy condition. He has drawn our attention to certain decisions, where the Supreme Court refused to interfere with the judgments either of the Tribunal or the High Court holding the Insurance Company responsible to pay compensation in events of breach of policy condition and keeping it open to the Insurance Company to recover the same from the insured. He, therefore, submitted that the appeal may be dismissed.

6. We have considered rival side contentions and have perused the record and proceedings.

7. Since the appeal is founded only on the ground of breach of policy condition regarding want of valid and effective driving licence by the driver of the scooter insured by the appellant, we do not propose to deal with other aspects on merits.

7.1 The Insurance Company has produced xerox true copy of the certificate of insurance where it is indicated thus:

*“Persons or classes of persons entitled to drive -*

*Any of the following :*

*Any person including insured PROVIDED that a person driving holds an effective driving licence at the time of the accident and not disqualified from holding or obtaining such a licence provided also that the person holding an effective learner's licence may also drive the vehicle when not used for transport of goods/ passengers at the time of accident and that such a person satisfy the requirements of Rule 3 of the Central Motor Vehicles Rules, 1989.”*

It is, thus, clear that, as per the condition of policy, the Insurance Company accepted its liability to pay compensation only if the accident occurred when the scooter was driven by a person holding an effective and valid driving licence and not disqualified from

holding or obtaining such a licence.

7.2 The case of the appellant has been that the driver of the scooter did not possess a valid and effective driving licence. This aspect is proved through deposition of Kalumiya Umarmiya Malek (Exhibit 69). He was the Investigating Officer in respect of the accident case and he was to collect information on the question whether the person driving the vehicle did possess a valid driving licence or not. He stated that Ashok Roopchand Keshwani was the accused, who was driving the scooter at the relevant time and he had recorded his statement. The witness states that, during investigation, it was revealed that Ashok Roopchand Keshwani did not possess a driving licence. He had recorded statement of the said Ashok Roopchand Keshwani, which he signed in presence of the witness. He has produced the said statement at Exhibit 70.

7.3 The witness has been cross-examined at length. He denies the suggestion that Ashok Roopchand Keshwani did possess and produce a licence, but the same was lost by the witness during the course of investigation. The evidence further indicates that, in the charge sheet, the offences under Sections 3 and 112 of the Motor Vehicles Act were not included. But that seems to be an oversight on his part because it has emerged during his deposition, upon putting questions by the Court, that the said witness addressed letters for examination of the vehicle on 18.10.1999, where a reference was made to Sections 3 and 112 of the Motor Vehicles Act (Exhibits 71 and 72). He, however, admits that he missed to incorporate reference of these provisions of the Motor

Vehicles Act in his report. It was, therefore, argued that the prosecution was for driving a motor vehicle without a valid and an effective driving licence and, therefore, the plea of the Insurance Company is only an afterthought, which is not properly proved by the Insurance Company.

7.4 The first question that requires to be addressed by this Court is whether adducing of evidence of Kalumiya Umarmiya Malek and the statement of the driver of the vehicle, as recorded by him, can be said to be a due discharge of onus of the Insurance Company to prove want of valid and effective driving licence.

7.5 The driver of the scooter was indicated to be Ashok Roopchand Keshwani in the Claim Petition, but his name came to be deleted as per order below Exhibit 13, preferred by the claimants, wherein the applicants-claimants have stated that as it was not possible to serve the summons on opponent No.1, his name may be deleted to avoid delay in disposal of the case. The fact, however, remains that, even as per the claimants, Ashok Roopchand Keshwani was the driver of the scooter.

7.6 Against that, the case of the Insurance Company from the very beginning has been that the driver of the scooter did not possess a valid and an effective driving licence, as can be seen from the averments made in the written statement Exhibit 18. The Insurance Company, therefore, summoned the Investigating Officer in respect of the offence registered with Maninagar Police Station vide C.R. No.339 of 1999, i.e. the present incident and that



Investigating officer is Kalumiya Umarmiya Malek, who is examined at Exhibit 69. He stated that, during the course of investigation, it was revealed that Ashok Roopchand Keshwani was driving the vehicle in question and that he did not possess a driving licence. In support of his oral version, the witness has produced a statement of Ashok Roopchand Keshwani at Exhibit 70, which was recorded by him during the course of investigation, which confirms the version of the witness regarding Ashok Roopchand Keshwani being driver of the vehicle at the time of the accident and he having not obtained a driving licence.

7.6.1 An objection was raised by learned Advocate, Mr. Prajapati, that the statement of the driver was before police during the course of investigation and, therefore, inadmissible in evidence. He was, however, unable to show any provision of law to that effect. He relied on Section 25 of the Evidence Act, but he had not answered when it was pointed out to him that Section 25 relates to confession. In our view, the contention of Mr. Prajapati that the statement of Ashok Roopchand Keshwani before police is only his police statement cannot be accepted. It is only a previous statement, which is relevant to be questioned before the Court. Apart from that, the Investigating Officer has stated that, during the course of investigation, it was revealed that Ashok Roopchand Keshwani did not have a driving licence.

7.6.2 A further objection that was raised by learned Advocate, Mr. Prajapati, was that the Insurance Company has not made any attempt to summon Ashok Roopchand Keshwani and examine him

as a witness to show that he did not possess a driving licence. We are afraid, we cannot accept this contention either, firstly, for the reason that the claimants themselves were unable to serve the summons on Ashok Roopchand Keshwani and, secondly, for the reason that a party cannot force another party to enter the witness box to the detriment of his interest and, therefore, the contention cannot be accepted.

7.7 In view of the above discussion, we are of the view that there could not have been a better piece of evidence than what is produced before the Court to show that the driver of the vehicle involved in the accident was Ashok Roopchand Keshwani and that he had not obtained any driving licence. Differently put, he did not have any driving licence at the time of the accident, while he was driving the vehicle involved in the accident. The Insurance Company, i.e. the appellant, can, therefore, be said to have duly discharged its onus of proving want of valid and effective driving licence.

8. Now, if this fact is proved that the driver of the vehicle involved in the accident did not have a valid and an effective driving licence at the time of the accident, the second question that arises for our consideration is whether the Insurance Company can still be held liable to pay the compensation? It is true that the original policy is not before the Court but xerox copy of the certificate of insurance of the vehicle involved in the accident and valid on the relevant date is produced at Exhibit 76 and there is a specific covenant to the effect that only that person would be

entitled to drive the vehicle insured who holds an effective driving licence at the time of the accident. The liability of the Insurance Company is accepted subject to this condition. Obviously, therefore, if this condition is violated or committed breach of, the Insurance Company can disown or claim exoneration from its liability to pay compensation as indemnifier.

9. Learned Advocate, Mr. Prajapati, then submitted that the appellant-Insurance Company had preferred Civil Application for stay of operation and execution of the award and that relief is granted by this Court, but the awarded amount, which was deposited with the Tribunal was ordered to be disbursed to the claimants as per the award of the Tribunal. Differently put, the award has already been implemented. An attempt was vehemently made by learned Advocate, Mr. Prajapati, to convince us that the liability of the Insurance Company to pay compensation to a third party is statutory and it cannot escape from the liability on such technical grounds. The Insurance Company has to pay the compensation that may be awarded by the Tribunal and then the Insurance Company may recover the same from the insured. In support of this submission, he has relied on following decisions:-

- (1) Oriental Insurance Company Limited v. Syed Ibrahim & Others, AIR 2008 SC 103.
- (2) National Insurance Company Limited v. Kusum Rai & Others, (2006) 4 SCC 250.

- (3) National Insurance Company Limited v. Swaran Singh & Others, (2004) 3 SCC 297.
- (4) National Insurance Company Limited v. Laxmi Narain Dhut, 2007(2) Supreme 721.
- (5) New India Assurance Company Limited v. Kamla, 2002(1) GLR 916.

In the case of New India Assurance Company Limited v. Kamla (supra), Their Lordships have observed thus:

*“22. To repeat, the effect of the above provisions is thus : When a valid insurance policy has been issued in respect of a vehicle as evidenced by a certificate of insurance the burden is on the insurer to pay to third parties, whether or not there has been any breach or violation of the policy conditions. But the amount so paid by the insurer to their parties can be allowed to be recovered from the insured if as per the policy conditions the insurer had no liability to pay such sum to the insured.”*

The above observation was made by Their Lordships after taking into considered provisions contained in Section 149 of the Motor Vehicles Act.

9.1           Learned Advocate, Mr. Nanavati, tried to distinguish the said case of Kamla by pointing out that, in the said case, the driver of the vehicle had obtained a driving licence from Himachal

Pradesh. It was issued in favour of Liaqat Ali, whose photo was affixed thereon. The licence was renewed by the Licensing Authority, Rohru of Himachal Pradesh on 17.4.1993 for a period of three years and, according to the Insurance Company, the said document was fabricated one as no such licence was granted by Licensing Authority Paonta. Differently put, that was a case where the driving licence was fake whereas, in the instant case, there is total absence of driving licence, as is proved by the Insurance Company and, therefore, Mr. Nanavati submitted that the said judgment cannot be applied to the present case.

10. We are not in a position to accept the stand of Mr. Nanavati for the reason that the Insurance Company claims exoneration from liability on the ground of breach of policy condition, i.e. want of valid and effective driving licence, which could be on account of number of reasons/situations like non-renewal, licence for different category, fake licence, etc. It would not make any difference whether that want of valid and effective licence is on account of total absence of licence or the licence being fake or the licence being not renewed or the licence being not valid for the category of the vehicle involved in the accident. It still remains a case of want of valid licence. In the case of Kamla (supra), as indicated above, Their Lordships have, in terms, laid down a principle considering the provisions of Section 149 that, if a valid policy is issued in respect of a vehicle, the burden is on the insurer to pay to the third party whether or not there has been any breach or violation of policy condition. A policy cannot change the provision of statute. So far as liability of the insurer towards third

party is concerned, it is not subject to fulfilment of policy condition. The other judgments cited above deal with other questions but do not take a different view on this aspect. The Tribunal, therefore, was justified in directing the Insurance Company also to pay the awarded amount. It is upto the appellant to proceed against the insured for recovery of the amount that it has been required to pay despite breach/violation of policy condition.

11. In light of the foregoing discussion, we do not find any merit in the appeal. The appeal must fail and stands dismissed without any order as to costs.

[ A. L. DAVE, J. ]

[ S. D. DAVE, J. ]

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