

*** HIGH COURT OF DELHI : NEW DELHI**

MAC App. No.217 of 2008

% Judgment reserved on: 26th May, 2008

Judgment delivered on: 30th May, 2008

Oriental Insurance Co. Ltd.
25/27, Asaf Ali Road
New Delhi

....Appellant

Through: Mr. Tarkeshwar Nath, Adv.

Versus

1. Arun Saha
S/o. Sh. Mishri Saha

2. Meena Devi
W/o. Arun Saha

3. Asha Kumari
D/o. Arun Saha

All are residents of Jhuggi Sarai Kale Khan,
Ganda Nala, New Delhi-13.

4. Sh. Hari Ram Singh
S/o. Sh. Chamki Lal Singh
R/o. Village Bhatta Chak,
P.O. Shakund,
P.S. and District-Bhagalpur (Bihar)

5. Yashpal
S/o. Sh. Ram Kishan,

R/o. 8/13, Jangpura, Bhogal,
New Delhi-14Respondents.

Through:

Coram:

HON'BLE MR. JUSTICE V.B. GUPTA

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| 1. Whether the Reporters of local papers may be allowed to see the judgment? | Yes |
| 2. To be referred to Reporter or not? | Yes |
| 3. Whether the judgment should be reported in the Digest? | Yes |

V.B.Gupta, J.

Oriental Insurance Co. Ltd. has filed the present appeal under Section 173 of the Motor Vehicles Act, 1988 (for short as 'Act') challenging the judgment, dated 11th January, 2008 passed by Sh. J.P.S. Malik, Judge MACT.

2. The facts of this case are that on 14th June, 2000, the deceased Rajesh Saha died due to injuries received by him in an accident near Ganda Nala, Sarai Kalen Khan, Delhi. This accident was caused due to rash and negligent driving of vehicle No. DIG 4727 which was

being driven by respondent No.4. The vehicle in question is owned by respondent No.5 and insured with the appellant. The deceased was doing the work of Kabari and the offending vehicle was dumping the garbage and was being driven in a rash and negligent manner by its driver.

3. Vide impugned judgment, the Tribunal awarded a compensation of Rs. Rs.2,80,005/- along with simple interest @ 9% p.a. from the date of filing of the petition.

4. It has been contended by learned counsel for the appellant that the owner as well as driver did not produce the driving licence in spite of notice under Order 12 Rule 8 CPC given to them and as such adverse inference has to be drawn against them. It is further contended that the insured has committed the breach of the terms and conditions of the Insurance Policy. Therefore, the insurer is entitled to the recovery of awarded amount from the owner of the

offending vehicle and the present case is of a no driving licence and as such the award passed by the Tribunal is liable to be set aside.

5. Ld. Counsel for the appellant has also relied upon the decision of Allahabad High court in ***Oriental Insurance co. Ltd. v. Indrasani Devi & ors., 2007 ACJ 1192***, in support of its contentions.

6. Chapter XI of the Act, 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.

7. Section 149 of the Act provides as follows;

“149. Duty of insurers to satisfy judgments and awards against persons insured in respect of third party risks.-

(1) x x x

(2) No sum shall be payable by an insurer under sub-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 as the case may be, the Claims Tribunal of the bringing of the proceedings, 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:

(a) x x x x

(i) x x x x

(ii) a condition excluding driving by a named person or persons or by any person who is not duly licensed, or by any person who has been disqualified for holding or obtaining a driving licence during the period of disqualifications;

(iii) x x x x

8. In a plethora of cases, the Apex Court and various High Courts have held that, if there is a condition in the insurance policy that only a licensed driver is to drive the vehicle, the insurance company would not be liable in case there is a breach.

9. There could be no doubt that in order to escape liability, not only it should be proved that the driver of the vehicle was not having a licence at the time of the accident, but also the insurance company should prove that the driver was disqualified from holding or obtaining a licence or never had any licence at all. Merely proving that on the date of the accident, the driver did not have a licence, is not enough to hold that the insurance company is not liable for claim. The onus of proving that the driver of the vehicle never had a licence or was disqualified from holding a licence is on the insurance company.

10. It was well established before the Tribunal by the testimony of PW2, Prakash that the accident took place due to the fault of the driver of the truck and the same has not been rebutted or disputed in any manner by the Appellant.

11. Although Respondent No.4, the driver of the offending vehicle could not be served despite repeated efforts but Respondent No.5, the owner has examined himself in evidence and testified that when he kept the driver in his employment, he had seen his driving licence

and he had ensured that he knew how to drive the vehicle properly.

12. Thus, from the above facts, it is clear that Respondent no.5, the owner of the offending vehicle has taken all precautions while appointing Respondent no.4, to drive the vehicle in question. So, the insurance company cannot escape its statutory liability.

13. It is only when the insured himself placed the vehicle in charge of a person who does not hold a driving licence that it can be said that he is guilty of the breach of the promise that the vehicle will be driven by a licenced driver. Unless the insured is at fault and guilty of breach, the insurer cannot escape from the obligation to indemnify the insured and successfully contend that he is exonerated having regard to the fact that the promisor committed a breach of his promise. The burden is, therefore, upon the insurer to establish that the owner of the vehicle is guilty of willful breach of the condition embodied in the policy.

14. It was for the appellant to prove that the insured consciously employed the driver without having licence but

apart from taking a plea in the written statement the appellant did nothing to substantiate that the driver at the pertinent time was not having a valid driving licence.

15. The Apex Court in ***Narcinva V. Kamat and Anr. v. Alfredo Antonia Doe Martins and Ors.*** [1985 ACJ 397], observed;

“When the Insurance Company complains of a breach of the term of contract, which would permit it to disown its liability under the contract of insurance, the burden is squarely on the Insurance Company to prove that the breach has been committed by the other party to the contract. The rest in such a situation would be 'who would fail, if no such evidence is led'. With this principle of law in view, the evidence has to be judged. Merely non-production of licence or non-examination of the driver of the vehicle is not enough nor any adverse inference can be drawn against the person holding that because of non-examination of the driver or non-production of the licence, the burden is discharged by a mere question in cross examination nor the owner is under any obligation to furnish the evidence so as to enable the Insurance Company not to riggle out its liability under the contract of insurance.”

16. A driving licence is expected to be with the Driver and not with the owner of the vehicle. Thus, mere non-production of licence is not enough to discharge the

burden of the Insurance Company. Merely giving notice to the owner of the vehicle to produce licence is not sufficient nor any admission, if any, of the owner that the driver was not holding a valid driving licence at the relevant time, and therefore cannot absolve the Insurance Company from liability.

17. When the Insurance Company takes the plea that it is not liable to pay compensation or to indemnify the insured as the driver was not holding a valid licence for driving the vehicle on the date of the accident and the vehicle was being driven in breach of the terms of the policy, the Insurance Company has to discharge the burden by placing legal and cogent evidence before the Tribunal (see ***Narcinva V. Alfredo* 1985 ACJ 397** (supra) : and the Division Bench cases of this Court in ***Shajadibai v. Babookhan and Ors.* Vol. (1) 1988 ACC 24**).

18. Further, the facts in the present case are different from the ***Oriental Insurance co. Ltd. v. Indrasani Devi and Others (supra)*** case because in that case neither the truck owner nor the truck driver appeared before the court nor did they produce even a photocopy of the licence. In

these circumstances, it cannot be said that burden was upon the insurance company to prove that the truck driver did not have a driving licence. Therefore, the Court held that the insurance company may pay the amount of compensation to the claimants and thereafter the insurance company may recover that amount from the truck owner.

19. However, in the case in hand, the owner of the offending vehicle has testified that he has seen the driving licence of the driver but unfortunately he did not retain the copy of the driving licence of the driver who being a resident of Bihar could not be served with the summons.

20. Thus, the insurance company being the insurer cannot avoid its liability to indemnify the owner, for no fault of the owner when he had seen the driving licence of the driver as deposed by him on oath.

21. In absence of any iota of evidence from the side of appellant, I do not find any error in the impugned judgment whereby the Tribunal directed the Insurance Company to

pay the compensation amount to the claimants without any recovery rights.

22. The instant appeal is, therefore not maintainable and accordingly, dismissed.

23. No orders as to costs.

**V. B. GUPTA
(JUDGE)**

**30th May, 2008
rs**