HIGH COURT OF JAMMU AND KASHMIR AT JAMMU

CIMA No. 319/2012

Date of decision: 29.07.2013

National Insurance Co. ltd. vs. Renu Sharma and ors.

Coram:

HON'BLE MR. JUSTICE JANAK RAJ KOTWAL-JUDGE

Appearing counsel:

For appellant (s): Mr. D.S.Chouhan, Advocate
For respondent(s): Mr. Amrit Sareen, Advocate

(i) Whether to be reported in Press, Journal/Media: Yes/No
(ii) Whether to be reported in Journal/Digest: Yes/No

1. This is an appeal in a Motor Accident Claims case.

2. Learned Motor Accident Claims Tribunal, Jammu vide order dated 12.05.2012 passed in file No. 218/C has awarded compensation of Rs. 11,45,000/ to the legal representatives (herein respondents 1 to 3) of deceased Kulbushan Sharma, who on 05.02.2009 was knocked down to death by the offending vehicle (Matador) bearing registration No. JK02T 2272. The accident was found to have occurred due to rash and negligent driving by the driver of the offending vehicle. The offending vehicle at the relevant time was insured for third party risk with the appellant so liability of satisfying the award is to be discharged by the appellant.

3. Heard. Considered. I have perused the record.

4. Appellant-insurer has challenged the award mainly on two grounds:

   (i) firstly, it having been proved that offending vehicle at the time of accident was being driven by one Madassar Qayoom, who did not possess a driving license, appellant is not liable to indemnify the insured and therefore, to satisfy the award and

   (ii) Secondly, the compensation awarded by the Tribunal is not just and proper being on higher side.

5. The plea taken by the appellant-insurer before the learned Tribunal was that driver of the offending vehicle was not holding a valid and effective driving license at the time of accident. This plea was formulated for adjudication in issue No. 3, which reads:

   Whether driver of offending vehicle at the time of accident was not holding a valid and effective driving licence and plied the vehicle in violation of the insurance policy ?

6. Learned Tribunal found that respondent No. 3 Subash Chander, who was the original driver of the offending vehicle, had at the time of accident allowed the conductor of the vehicle, Mudassar Qayoom, to take charge of the vehicle, knowing well that he was not holding a valid driving licence.

7. Perusal of the impugned order would show that respondent, Bansa Ram, was the owner of the offending vehicle. He had engaged respondent No.3, Subash Chander, as his driver. Finding in this regard recorded by the learned Tribunal is not disputed. It is no body's case that the driver engaged by the owner/ insured was not holding a valid driving licence. It is therefore, indisputable that no breach of insurance policy had been committed by the owner/insured by engaging respondent, Subash Chander, as driver of the offending vehicle but the latter had handed over the vehicle to a person, who did not possess any driving license.

8. Simple question, thus, raised for consideration is whether there is a breach of insurance policy as contemplated under Section 149 (2) (a) (ii) of the Motor Vehicles Act, 1988 and therefore, the appellant/insurer is not liable to ideniminfy the insured?

9. The condition contemplated under Section 149 (2) (a) (ii) is a condition inter alia excluding driving by any person who is not duly licenced.

10. Learned Tribunal, while relying upon Skandia Insurance Co. ltd. v Kokilaben Chandravandan and others, 1987 ACJ 411, has taken the view that there was no breach on the part of owner/insured so insurer cannot hide under the umbrella of exclusion clause.

11. Mr. D. S. Chouhan, learned counsel for the appellant would say that learned Tribunal has fallen into error while applying ratio of Skindia's case and foisting liability on the insurer after it has been proved that vehicle at the time of accident was driven by a person who was not holding a driving licence.

12. Mr. Sareen, learned counsel for the respondents/ claimant on the other hand supports the view taken by the learned Tribunal saying that breach of insurance policy by the insured/ owner of the vehicle is the sine qua non to escape the liability under the above exclusion clause under the Act.

13. The question raised by the appellant is no more res integra and better should not have been raised in

this case. Factual scenario involved in Skindia's case (supra) was almost similar to one arising in this case. Supreme Court in Skindia's case, while interpreting the parallel provision under section 96(2) (b) (ii) of the old Motor Vehicle Act, 1939, has very clearly laid down that insurer can escape liability only when insured himself places the vehicle in charge of a person who does not hold driving license. Insurer has to prove that breach of policy by engaging driver not holding a valid license was committed by the insured himself. The Supreme Court has observed:

> "14…. It is, therefore, abundantly clear that insurer will have to establish that the insured is guilty of an infringement or violation of promise that a person who is duly licensed will have to be in charge of the vehicle. The very concept of the infringement or violation of the promise that the expression 'breach' carries within itself induces an inference that the violation or infringement on the part of the promisor must be a willful infringement or violation. If the insured is not at all at fault and has not done anything he should have not done or is amiss in any respect, how can it be conscientiously posited that he has committed a breach. It is only when the insured himself places 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 licensed driver It must be established by the insurance company that the breach was on the part of the insured and that it was the insured who was guilty of violating the promise or infringement of the contract. Unless the insured is at fault and is guilty of a 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 (the insured) has committed a breach of his promise. Not when some mishap occurs by some mischance. When the insured has done everything within his power inasmuch as he has engaged a licensed driver and has placed the vehicle in charge of a licensed driver, with the express or implied mandate to drive it himself, it cannot be said that the insured is guilty of any breach."

14. View taken by the Supreme Court in Skandia's case (supra) has been approved by a three-Judge Bench of the same Court when the correctness thereof was referred to a larger Bench in Sohan Lal Passi's case 1996 ACJ 1044 SC, wherein the Court in para 12 of the judgment has observed:

> "….According to us, section 96 (2) (b) (ii) should not be interpreted in a technical manner. Sub Section (2) of section 96 only enables the insurance company to defend itself in respect of the liability to pay compensation on any of the grounds mentioned in sub section (2) including that there has been a contravention of the condition including the vehicle being driven by any person who is not duly licensed. This bar on the face of it operates on the person insured. If the person who has got the vehicle insured has allowed the vehicle to be driven by a person who is not duly licensed then only that clause shall be attracted. In a case where the person who has got insured the vehicle with the insurance company, has appointed a duly licensed driver and if the accident takes place when the vehicle is being driven by a person not duly licensed on the basis of the authority of the driver duly authorized to drive the vehicle whether the insurance company in that event shall be absolved from its liability?" The expression 'breach' occurring in Section 96(2(b) means infringement or violation of a promise or obligation. As such the insurance company will

> have to establish that the insured was guilty of an infringement or violation of a promise. The insurer has also to satisfy the Tribunal or the Court that such violation or infringement on the part of the insured was willful. If the insured has taken all precautions by appointing a duly licensed driver to drive the vehicle in question and it has not been established that it was the insured who allowed the vehicle to be driven by a person not duly licensed, then insurance company cannot repudiate its statutory liability under Sub Section (1) of Section 96…."

15. View taken by the Supreme Court in Skandia and Sohan Lal Passi has been referred to with approval by a three-Judge Bench of the Supreme Court in Swarn Singh's case, 2004 ACJ 1 SC, observing in para 62 as under:

> "62. The proposition of law is no longer res integra that the person who alleges breach must prove the same. The insurance company is, thus, required to establish the said breach by cogent evidence. In the event the insurance company fails to prove that there has been breach of conditions of policy on the part of the insured, the insurance company cannot be absolved of its liabilities [See Sohan Lal Passi, 1996 ACJ 1044 (SC)]"

16. Again, while recording summery of findings to the various issue raised in Sohan Lal's case Supreme Court in, in para 102 of the judgment has stated in clause (iv) which reads:

> " The insurance companies are, however with a view to avoid their liability must not only establish the available defence(s) raised in the said proceedings but must also establish 'breach' on the part of the

> owner of the vehicle, the burden of proof whereof would be on them.

17. The correct legal position is clear too. There will be no breach of condition excluding ‘driving by any person who is not duly licenced’ if the insured has appointed a duly licenced driver for driving the vehicle. Insurer cannot escape liability if the vehicle at the time of accident is driven by a person not duly licenced, if that person has been allowed to drive by the driver appointed by insured and not the insured himself. In order to avail benefit of this exclusion clause, the insurer has to prove not only that the person driving the vehicle at the time of accident was not duly licenced but also that he was willfully appointed by the insured.

18. In light of what is stated above, contention of the appellant’s counsel that learned Tribunal has not correctly applied the ratio of Skandia’s case is not impressing. Learned Tribunal has rather correctly applied the law and refused exemption from liability to the insured with cogent reasons.

19. As regards, the challenge to the fairness of the compensation, it suffice to say that on perusal of the impugned order in light of the settled principles governing assessment of fair compensation in death cases, nothing unfair is evident. In his brief

submissions on this count, learned counsel for the appellant was not found in position to point out any defect or error in the assessment of compensation made by the learned Tribunal.

20. For the above mentioned, I do not find any merit in this appeal and accordingly it is dismissed.

(Janak Raj Kotwal)
Judge

Jammu
29.07.2013
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