



**HIGH COURT OF JUDICATURE FOR RAJASTHAN AT
JODHPUR**

S.B. Civil Misc. Appeal No. 46/2002

The Oriental Insurance Company Limited, Divisional Office,
Residency Road, near Goyal Hospital, Jodhpur.

----Appellant

Versus

1. Smt. Samya widow of Shri Suraj Karan @ Surajmal B/c Mali.
2. Sinty S/o Shri Suraj Karan @ Surajmal B/c Mali.
3. Anju D/o Shri Suraj Karan @ Surajmal B/c Mali.
4. Nanu Ram S/o Shri Suraj Karan @ Surajmal B/c Mali.
Respondent No. 2 to 4 are minor through mother Smt. Samya widow of Shri Suraj Karan @ Surajmal.
5. Shri Kalyan S/o Shri Bakhtawer B/c Mali.
6. Smt Sohani Devi W/o Shri Kalayan B/c Mali.
Respondent No. 1 to 7 are resident of Village Khotiya Tehsil Shapur District Bjhilwara.
7. Shri Sanjay Yadav S/o Shri Rajender Singh B/c Yadav R/o Yadva Transport Nagar, Bhilwara (Owner).
8. Shri Bajrang Lal S/o Shri Jagdish Prashad B/c Sharma R/o Village and Tehsil Vijay Nagar, District Ajmer (Driver).

----Respondents

For Appellant(s) : Mr. Jagdish Vyas
For Respondent(s) : Mr. Subham Modi and
Mr. Udit Modi for R.1 to 6
None present for R.7 to 8.

HON'BLE MR. JUSTICE RAJENDRA PRAKASH SONI
Order

Reportable
01/05/2023

1. This appeal arises out of judgment dated 16.07.2001 passed by the Motor Accident Claims Tribunal, Gulabpura, Camp at Shahpura, District Bhilwara (for short "the tribunal") in Civil Misc. Case No. 123/2000 (C.M.38) by which the tribunal has held only the insurance company liable to make the payment of the compensation amount to the claimants. Being aggrieved by the



judgment of the tribunal, the appellant insurance company has preferred the instant appeal.

2. In the present appeal, the question arises is whether on the basis of the facts of the case, can it be said that the driver of the offending vehicle was having valid driving licence?

3. The facts of the case are that on 19.09.1996 at about 2.15 p.m. when Suraj Karan @ Suraj Mal Mali was on his way to duty to the mill of his employer and reached near the Vivekanand School, he was hit by a speeding bus as a result of which he got injured. He was immediately taken to the hospital but he died within a short time. The legal heirs of the deceased filed an application for compensation under Section 140 and 166 of the Motor Vehicle Act, 1988 (for short "the act"). The appellant insurance company filed the written statement with a specific plea that the driver was holding the licence for driving the H.G.V. (Heavy Goods Vehicle) only where as he was driving a bus which was a Heavy Passenger Vehicle.

4. The owner has pleaded existence of insurance policy of the vehicle involved and fixing of liability upon the insurance company. Whereas the insurance company has denied manner of the accident, negligent driving by the bus driver and also taken a plea about non-existence of valid driving licence of the bus driver.

5. On the basis of pleadings, learned tribunal framed as many as 5 issues but only the determination qua the issue No.3 has been agitated by the appellant which is in respect of holding of valid driving licence by the driver of offending vehicle. Learned tribunal has considered the driving licence of bus driver and went



on to hold that it is not prove that driver of the offending vehicle was not in possession of a valid and effective driving licence. Holding so, the insurance company was held liable to pay the award while absolving the owner.

6. Though appearance was put in, on behalf of owner of the bus but his counsel has not remained present for arguing the matter. Hence I am supposed to decide the appeal on following grounds:-

“Whether the driver of the offending bus was possessing a valid driving licence at the time of accident?”

7. Shri Jagdish Vyas, learned counsel appearing for the appellant insurance company has argued that learned tribunal has erred while holding the insurer to make the payment of the award without considering Section 3 of the Act as such the owner of the vehicle had breached the policy condition; that the learned tribunal without considering the Rule 2.2 of Rajasthan Motor Vehicle Rules, 1990 as well as Section 3 of the Act, has passed the impugned award against the insurance company hence, the insurance company cannot be held liable for the payment of the award. Learned tribunal has erred in not considering the fact that driver of the offending bus was having a licence for Heavy Goods Vehicle, but he was driving a passenger bus, for which the driver was required to have either a H.P.V. (Heavy Passenger Vehicle) category driving licence or an endorsement of H.P.V. authorization on his existing licence of H.G.V. category. The learned tribunal should have passed the award against the owner of the offending bus because he has given the vehicle to such a driver who was not authorized to drive the bus. On these grounds prayer has been



made to re-consider the award. As against this, learned counsel appearing for respondent No.1 to 6 has supported the judgment.

8. I have heard the learned counsel for the parties and gone through the impugned award and perused the material place on record.

9. In the present case, the driver of the offending vehicle was issued driving licence prior to the amendment made in the act by Act 54 of 1994.

10. Section 10 of the Act deals with the form and contents of the licence to drive. Section 10 as it stood before the amendment made in the year 1994 by virtue of amendment Act 54 of 1994 is extracted hereunder:-

10. Form and contents of licences to drive –

(1) Every learner's licence and driving licence, except a driving licence issued Under Section 18, shall be in such form and shall contain such information as may be prescribed by the Central Government.

(2) A learner's licence or, as the case may be, driving licence shall also be expressed as entitling the holder to drive a motor vehicle of one or more of the following classes, namely:-

- (a) motorcycle without gear;
- (b) motorcycle with gear;
- (c) invalid carriage;
- (d) light motor vehicle;
- (e) medium goods vehicle;
- (f) medium passenger motor vehicle;
- (g) heavy goods vehicle;
- (h) heavy passenger motor vehicle;
- (i) roadroller;
- (j) motor vehicle of a specified description.

11. It is apparent from the pre-amended provision which existed before the amendment made in the year 1994 that class or



description of the vehicle for which licence used to be issued were categorized inter alia as light motor vehicle, medium goods vehicle, medium passenger motor vehicle, heavy goods vehicle, heavy passenger motor vehicle and motor vehicle of a specified description. Transport vehicle was not a separate class, and it could be under section 10(1) (d) to (h).

12. The pre-amended provision of Section 10 contained the vehicles of ten kinds in Section 10(2) (a) to (j). In order to simplify the procedure for obtaining the licence, categories like medium goods vehicle, medium passenger motor vehicle, heavy goods vehicle, and heavy passenger motor vehicle were deleted and one category was inserted for these four kinds of vehicles in the form of "transport vehicle" in section 10(2)(e) so that drivers are not required to obtain the licence again and again for aforesaid four kinds of vehicles. The provision of section 10 after amendment made by act 54 of 1994 is extracted hereunder:

10. Form and contents of licences to drive - (1) Every learner's licence and driving licence, except a driving licence issued Under Section 18, shall be in such form and shall contain such information as may be prescribed by the Central Government.

(2) A learner's licence or, as the case may be, driving licence shall also be expressed as entitling the holder to drive a motor vehicle of one or more of the following classes, namely:-

- (a) motorcycle without gear;
- (b) motorcycle with gear;
- (c) invalid carriage;
- (d) light motor vehicle;
- (e) transport vehicle;



- (f) - (h)
(i) road-roller;
(j) motor vehicle of a specified description.

13. I have read the evidence and pleadings. Based upon the statement of NAW1 Omprakash Mutha, Divisional Manager of appellant insurance company, the insurer has been able to prove that at the time of accident, the driver of the offending vehicle was having a driving licence authorizing him to drive a vehicle of H.G.V. category only whereas, as per the registration certificate (Ex.-4) of the involved vehicle, he was driving a heavy passenger vehicle, for which it was mandatory for him to have H.P.V. category of D.L. or authorization of H.P.V. on his existing driving licence as required by the pre-amended Section 10 of the Act. This proves that insured was guilty of negligent and had failed to exercise reasonable care in the matter of fulfilling the condition of policy regarding use of vehicle by a duly licenced driver.

14. At the time of accident the driver was not qualified or authorized to drive the offending heavy passenger vehicle thus, I am inclined to hold that the insurance company has been successful in establishing the breach of insurance policy on the part of the owner. Respondent bus owner or driver had failed to rebut the evidence led by the insurer.

15. In the present case, there is no dispute to the fact that the deceased Suraj Karan @ Suraj Mal Mali was a third party.

16. In the case of third party risks, as per the decision in "**National Insurance Company Ltd. Vs. Swaran Singh & Ors. (2004) 03 SCC 297**", the insurer had to indemnify the compensation amount payable to the third party and the insurance



company may recover the same from the insured. Doctrine of "Pay and Recover" was considered by the Hon'ble Apex Court in the above case wherein the Supreme Court examined the liability of the insurance company in case of breach of policy condition due to disqualifications of the driver or invalid driving licence. Elaborately considering the contractual liability of insurer as well as statutory liability viz-a-viz the claims of the third party, Hon'ble Supreme Court issued detailed guidelines as to how and in what circumstances, the "Pay and Recover" can be ordered.

17. Hon'ble the Supreme Court summarised its conclusions as under:-

110. The summary of our findings to the various issues as raised in these petitions is as follows:

(i) Chapter XI of the Motor Vehicles Act, 1988 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.

(ii) An insurer is entitled to raise a defence in a claim petition filed under Section 163-A or Section 166 of the Motor Vehicles Act, 1988, inter alia, in terms of Section 149(2)(a)(ii) of the said Act.

(iii) The breach of policy condition e.g. disqualification of the driver or invalid driving licence of the driver, as contained in sub-section (2)(a)(ii) of Section 149, has to be proved to have been committed by the insured for avoiding liability by the insurer. 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.

(iv) Insurance companies, 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 wherefore would be on them, (v) The court cannot lay down any criteria as to how the said burden would be discharged, inasmuch as the same would depend upon the facts and circumstances of each case.

(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards the insured unless the said breach or breaches on the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insurer under Section 149(2) of the Act.

(vii) The question, as to whether the owner has taken reasonable care to find out as to whether the driving licence produced by the driver (a fake one or otherwise), does not fulfill the requirements of law or



not will have to be determined in each case. (viii) If a vehicle at the time of accident was driven by a person having a learner's licence, the insurance companies would be liable to satisfy the decree.

(ix) The Claims Tribunal constituted under Section 165 read with Section 168 is empowered to adjudicate all claims in respect of the accidents involving death or of bodily injury or damage to property of third party arising in use of motor vehicle. The said power of the Tribunal is not restricted to decide the claims inter se between claimant or claimants on one side and insured, insurer and driver on the other. In the course of adjudicating the claim for compensation and to decide the availability of defence or defences to the insurer, the Tribunal has necessarily the power and jurisdiction to decide disputes inter se between the insurer and the insured. The decision rendered on the claims and disputes inter se between the insurer and insured in the course of adjudication of claim for compensation by the claimants and the award made thereon is enforceable and executable in the same manner as provided in Section 174 of the Act for enforcement and execution of the award in favour of the claimants.

(x) Where on adjudication of the claim under the Act the Tribunal arrives at a conclusion that the insurer has satisfactorily proved its defence in accordance with the provisions of Section 149(2) read with sub-section (7), as interpreted by this Court above, the Tribunal can direct that the insurer is liable to be reimbursed by the insured for the compensation and other amounts which it has been compelled to pay to the third party under the award of the Tribunal. Such determination of claim by the Tribunal will be enforceable and the money found due to the insurer from the insured will be recoverable on a certificate issued by the Tribunal to the Collector in





the same manner under Section 174 of the Act as arrears of land revenue. The certificate will be issued for the recovery as arrears of land revenue only if, as required by sub-section (3) of Section 168 of the Act the insured fails to deposit the amount awarded in favour of the insurer within thirty days from the date of announcement of the award by the Tribunal.

(xi) The provisions contained in sub-section (4) with the proviso there under and sub-section (5) which are intended to cover specified contingencies mentioned therein to enable the insurer to recover the amount paid under the contract of insurance on behalf of the insured can be taken recourse to by the Tribunal and be extended to claims and defences of the insurer against the insured by relegating them to the remedy before regular court in cases where on given facts and circumstances adjudication of their claims inter se might delay the adjudication of the claims of the victims,"

18. As per the decision in Swaran Singh case, onus is always upon the insurance company to prove that the driver had no valid driving licence and that there was breach of policy conditions. Where the driver did not possess the valid driving licence and there is breach of policy conditions, "pay and recover" can be ordered in case of third party risks.

19. Resultantly, in view of the above, there being violation of specified condition, the insurer is held liable to pay the compensation.

20. So far as judgment of the learned tribunal is concerned, I am of the view that, the tribunal ought not to have absolved the owner of the tribunal because he was guilty of breach of the terms and conditions of the policy. Since, the involved vehicle was



insured therefore, both the vehicle owner and the insurance company were liable for joint and several liability to pay the compensation.

21. So far as the recovery of the amount from the owner of the vehicle, the insurance company shall recover as held in the decision in "***Oriental Insurance Co. Ltd. v. Nanjappan and others (2004) 13 SCC 224***" where this Court held that

"....that for the purpose of recovering the same from the insured, the insurer shall not be required to file a suit. It may initiate a proceeding before the concerned Executing Court as if the dispute between the insurer and the owner was the subject matter of determination before the Tribunal and the issue is decided against the owner and in favour of the insurer."

22. In the result, direction of the impugned judgment directing only the insurance company to pay the compensation is liable to be modified.

23. Accordingly, the appeal is partly allowed and the award dated 16.07.2001 is modified to the extent that appellant insurance company shall pay the compensation to the claimants and shall recover the same from the owner of the vehicle. No costs.

24. The appeal stands allowed to the above extent.

(RAJENDRA PRAKASH SONI),J

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