

HIGH COURT OF JAMMU AND KASHMIR
AT JAMMU

Reserved on : 26.08.2020
Pronounced on :01.09.2020

MA No.191/2017
IA No.1/2017

National Insurance Company Limited ...Appellant(s)

Through:- Mr. Sanjay Kumar Dhar, Advocate

V/s

Ashwani Kumari and others ...Respondent(s)

Through:- None

Coram: HON'BLE MR. JUSTICE SANJEEV KUMAR, JUDGE

JUDGMENT

1. The National Insurance Company Limited [**'the appellant'**] is in appeal against the judgment and award dated 28th April, 2017 passed by the Motor Accident Claims Tribunal, Jammu [**'the Tribunal'**] in Claim No.404/C, whereby the claim petition filed by respondent No.1 [**'the claimant'**] has been allowed and the appellant has been directed to pay a sum of R.88,045- along with *pendente lite* and future interest @ 7.5% per annum to the claimant for the injuries suffered by him in a motor vehicular accident caused due to rash and negligent driving of the offending vehicle by its driver, the respondent No.4.

2. The award impugned has been assailed primarily on the ground that the driver of the offending vehicle was not holding a valid and effective driving license at the time of accident, therefore, the insurer is absolved of its liability to indemnify the insured.

3. Before appreciating the ground of challenge raised by the insurer, it would be appropriate to notice few facts, which are relevant for the disposal of this appeal. On, 12.02.2013 at about 6.30 p.m., near Nai Balla Camp, a motor vehicle (Nano Car) bearing Regd. No.JK02BA-1085, being driven by its driver-respondent No.3 herein in a rash and negligent manner, hit the scooter bearing No.JK02AA-5286 and caused the accident. As a result of the accident, respondent No.1-claimant, who was travelling on the scooter being a pillion rider, was seriously injured and rendered permanently disabled to the extent of 5%. A claim petition came to be filed by respondent No.1 before the Tribunal claiming compensation for the injuries sustained and disability suffered in the accident. On being put to notice, the insurer, owner as well as driver appeared and filed their objections. Thereafter, owner and driver chose not to appear and were, accordingly, set ex-parte. On the basis of the pleadings of the parties, the Tribunal framed the following issues for determination:-

- “1. Whether an accident took place on 12.02.2012 near Naiwala Camp Akhnoor by rash and negligent driving of the vehicle bearing registration No.JK02BA-1085 by its driver as a result of which petitioner received grievous injuries and has been disabled ? OPP
2. If issue No.1 is proved in affirmative, whether petitioner is entitled to compensation ? If so, to what amount and from whom? OPP
3. Whether the offending vehicle was being driven at the time of accident in violation of terms and conditions of policy of insurance and respondent insurance company is not liable ? OPR-1
4. Relief? O.P.Parties”

In order to discharge the onus of proof, the claimant besides entering himself in the witness box, also examined one Kishore Kumar as his witness to substantiate his claim. The insurer has also examined owner and driver of the offending as its witnesses to discharge the burden of proof of issue No.3. Appreciating the evidence on record and the position of law, the Tribunal held issue Nos. 1 and 2 proved in favour of the claimant. However, issue No.3 was held not proved by the appellant and the Tribunal directed it to pay a sum of Rs.88,045/- as compensation along with interest to the claimant in indemnification of the insured.

4. Mr. Sanjay Dhar, learned counsel for the insurer, submits that the insurer discharged its onus of proof of issue No.3 by leading cogent evidence and once it was proved that the license held by respondent No.3, at the time of accident, was fake, the appellant-insurer was absolved of its liability to indemnify the insured. It is further submitted that the Tribunal, after recording a finding that the license of the driver of the offending vehicle was fake, was not right in directing the insurer to pay compensation to the claimant in indemnification of the insured, i.e. owner of the offending vehicle.

5. Having heard learned counsel for the appellant and perused the record, I am of the view that the ground of challenge raised by the insurer to assail the award has no substance. It is true and as is otherwise discernible from the impugned award, the insurer had succeeded in proving before the Tribunal that the driving licence possessed by the driver of the offending vehicle was fake, but it has nowhere come in the evidence or

testimony of any of the witnesses of the insurer that owner of the offending vehicle had engaged the services of the driver even after being aware that the licence possessed by him was fake and invalid.

6. The position of law on the point is no longer *res integra*. In the case of **National Insurance Company Ltd vs Swaran Singh and others, (2004) 3 SCC 297**, the three-Judge Bench of the Hon'ble Supreme Court elaborately discussed the issue and concluded thus:-

- “(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) 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 driver or invalid driving licence of the driver, as contained in sub-section (2)(a)(ii) of section 149, have 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 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.

- (iv) 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 wherefor would be on them.
- (v) The court cannot lay down any criteria as to how said burden would be discharged, inasmuch as the same would depend upon the facts and circumstance 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 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 insured 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 fulfil 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 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 proviso thereunder and sub-section (5) which are intended to cover specified contingencies mentioned therein to enable the insurer to recover amount paid under the contract of insurance on behalf of the insured can be taken recourse of by the Tribunal and be extended to claims and defences of insurer against 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.”

7. From a perusal of the judgment cited above, it abundantly clear that mere absence, fake or invalid driving license or disqualification of the driver to drive at the relevant time, are not in themselves defences

available to the insurer either against 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.

8. Admittedly, in the instant case, the insurer has succeeded in proving that the driving license held by the driver of the offending vehicle, at the time of accident, was fake. However, the evidence oral as well as documentary produced by the insurer before the Tribunal, nowhere suggests that the insured was guilty of negligence and had failed to exercise reasonable care before engaging respondent No.3 as driver to drive the offending vehicle to find out as to whether the driving license did not fulfill the requisites of law. That aside, it is also not the case of the insurer that the breach on the condition of license is so fundamental as is found to have contributed to the cause of accident.

9. For the foregoing reasons, the appeal of the insurer is found to be devoid of any merit, hence the same is dismissed along with connected application. The award of the Tribunal is upheld. The amount, if deposited, shall be released in favour of the claimant in terms of the award of the Tribunal after proper identification and verification.

(Sanjeev Kumar)
Judge

JAMMU.
01.09.2020
Vinod.

Whether the order is speaking : Yes
Whether the order is reportable: Yes