HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

…

CMAM no.137/2015
c/w RPC no.01/2016

Pronounced on: 10 .03.2022

Mohammad Abbas Wani

…….Petitioner(s)

Through: Mr Anees ul Islam, Advocate

Versus

Sharifa and others

……Respondent(s)

Through: Ms Rifat Khalida, Advocate
Mr Tawheed Ahmad, Advocate
Mr G.N.Sofi, Advocate

***CORAM*:**
HON'BLE MR JUSTICE VINOD CHATTERJI KOUL, JUDGE

JUDGEMENT

1. Challenge in this Appeal is thrown to Award dated 11th July 2015, passed by Motor Accident Claims Tribunal, Anantnag, in a claim petition, bearing Claim No.78/2008 titled *Sharifa and others v. Shabir Ahmad Bhat and others*, on the grounds made mention of therein.
2. A claim petition, as is apparent from perusal of the file, was filed by claimants – respondents 1 to 4 herein before the Tribunal on 18th December 2008. In claim petition, claimants/respondents 1 to 4 stated that on 30th September 2008, the deceased, Bashir Ahmad Wagay, was busy in distributing the milk and other associated items including packed milk to shopkeepers of alongside road. It was also stated in the claim petition that deceased boarded at Anantnag in offending vehicle

(TATA 407), bearing registration no.JK03-888, and kept the luggage at roof top of offending vehicle, and on reaching at Hiller Arhama, deceased asked driver to stop the vehicle as he had to pull down luggage/milk items. The driver, after stopping the vehicle, told deceased to pull down the luggage but without waiting the deceased, the driver started driving which resulted fall of deceased from roof top of the vehicle. It was also pleaded in claim petition that deceased sustained injuries on the body, particularly the head. The deceased was taken to hospital at Kokernag, wherefrom he was referred to SKIMS, Srinagar, where he succumbed to injuries on 2nd October 2008. According to claimants, the accident occurred because of rash and negligent act of driver of offending vehicle. The claimants, on the basis of claim put up before the Tribunal, sought compensation in the amount of Rs.39.90 Lakhs.

3. Opposite side, before the Tribunal, filed their objections resisting the claim petition.

4. The Tribunal, taking into account the pleadings of the parties, framed following issues for determination of claim petition:

    i. Whether the deceased namely Bahir Ahmad Wagay s/o Gh. Qadir Wagay R/o Sagam Kokernag died on 30.09.2008 at Hillar Arhama in a road accident due to rash and negligent driving of respondent no.1 who was driving vehicle bearing registration no.JK03-888 (Tata Mini Bus) rashly and negligently? OPP
    ii. If issue no.1 is proved in affirmative, whether the petitioners are entitled to compensation, if so, from whom and to what extent? OPP
    iii. Whether the respondent no.1 was not holding valid and effective driving licence on 01.10.2008, if so what is its effect upon the claim petition? OPR 3
    iv. Relief.

5. Claimants/respondents produced witnesses, namely, Mohammad Wagay, Gh. Qadir Wagay, and Manzoor Ahmad Wagay besides, claimant/respondent no.1. The owner/driver of offending vehicle also

produced and examined witness, namely, Parvaiz Ahmad Malik. Respondent-Insurance Company produced witnesses, Mohd Abas Wani, Shabir Ahmad Bhat, and Irshad Ahmad Rather, Licencing Clerk RTO Srinagar.

6. The Tribunal, while considering Issue no.1, has discussed the statement of witnesses and only thereafter, found that deceased, Bashir Ahmad Wagay, died as a result of fatal injuries received in a vehicular accident involving offending vehicle due to negligence of its driver and accordingly, decided Issue no.1 in favour of claimants.

7. Issue no.2, viz. whether claimants are entitled to compensation, if so, from whom and to what extent, was to be proved by claimants/ respondents. The Tribunal decided Issue no.2 in favour of claimants. The Tribunal, in the first instance, proceeded to calculate compensation to be paid to claimants. The Tribunal relied upon the law laid down by the Supreme Court in *Sarla Verma v. Delhi Transport Corporation, 2009 (3) Supreme 487*. The Tribunal found deceased was 30 years of age and fixed his minimum income as Rs.6000/- per month and thereafter, applied multiplier and multiplicand. The Tribunal assessed, calculated and found claimants entitled to total compensation of Rs.16,07,000/- with 9% per annum. The Tribunal decided Issue no.2 in favour of claimants.

8. Insofar as Issue no.3, viz. whether driver of offending vehicle was holding valid and effective driving licence at the time of accident, is concerned, the onus to prove it was on respondent-Insurance Company. As can be seen from perusal of the file, as also impugned Award, the Insurer examined Mohd Abas Wani, Shabir Ahmad Bhat

and Irshad Ahmad Rather, Licence Clerk RTO Srinagar. Mohd Abas Wani (appellant herein) stated before the Tribunal that he purchased offending vehicle from Altaf Hussain and that at the time of appointing Shabir Ahmad Bhat as driver of offending vehicle, he went through his Driving Licence as was required of an owner of a vehicle. The driver of offending vehicle, Shabir Ahmad Bhat, stated that he was driver of offending vehicle. The Licence Clerk stated before the Tribunal that the driving licence of driver was not genuine, so official witness supported the contention of respondent-Insurance Company before the Tribunal that driver of offending vehicle was not having valid and effective driving licence at the time of accident. The Tribunal, accordingly, directed payment of compensation by respondent-Insurance Company with right of recovery from owner of offending vehicle.

9. The instant appeal has been preferred by owner of offending vehicle, namely, Mohd Abas Wani. According to counsel for appellant, the burden of proof on Insurance Company was not restricted to establishing mere breach of insurance policy terms and conditions by owner/appellant but to establish a wilful breach of such conditions. It is stated by him that Insurance Company has not proved the factum of wilful breach and negligence on the part of owner/appellant qua genuineness of driving licence held by respondent no.6/driver of offending vehicle. It is urged that appellant was never given an opportunity to cross-examine the witnesses produced by claimants/ respondents.

10. From the above backdrop, what emerges for consideration and adjudication in this appeal is what is the responsibility and duty of an owner of a vehicle while engaging and/or appointing a driver therefor.

11. Counsel for respondent-Insurance Company has stoutly stated that driver of offending vehicle was not holding valid and effective driving licence at the time of accident, so respondent-Insurance Company has every right to recover the compensation from owner of offending vehicle. In support of her submissions, she has placed reliance on ***U.P. State Road Transport Corporation v. Mamta and others, 2016 ACJ 699; Pappu and others v. Vinod Kumar Lamba and another, 2018 ACJ 690 Royal Sundaram Alliwance Ins. Co. Ltd v. Chin Reddy Rama Devi and others, 2021 ACJ 1614; New India Assurance Co. Ltd. v. Usha Baloria and others, 2021 ACJ 845;*** and ***National Insurance Co. Ltd. v. Bashir Ahmad Malla & ors, 2010 (II) SLJ 944***.

12. While on the side of appellant, it is submission of his counsel that responsibility as being owner of offending vehicle has been fulfilled by appellant, more particularly when Shabir Ahmad Bhat was appointed as driver of offending vehicle, the owner went through the driving licence bearing no.1873/MVDK and in such circumstances owner/ appellant had done everything in his power to keep honour of and fulfil the promise and, therefore, he is not guilty of any breach as having been alleged by Insurance Company against him. Counsel for appellant as regards breach of a specified condition of insurance policy, has rightly referred to and placed reliance on a judgement passed by the Supreme Court in the case of ***Skandia Insurance Co.***

Ltd v. Kokilaben Chandravadan and others, (1987) 2 SCC 654. The Supreme Court in the above case has defined the meaning of word "breach" and said that "breach" means "infringement or violation of a promise or obligation" and this gives an inference that violation or infringement on the part of promisor must be wilful infringement or violation. The "breach" must be established to have been committed by owner/insured wilfully and deliberately. The Supreme Court has also said that when insured has done everything within his power inasmuch as he has engaged a licenced driver and has placed the vehicle in charge of licenced driver, with the express or implied mandate to drive himself, it cannot be said that the insured is guilty of any breach. The Supreme Court has in clear cut terms stressed that unless insured is at fault and is guilty of a breach, insurer cannot escape from obligation to indemnify insured and successfully contend that it is exonerated having regard to the fact that promisor/insured committed a breach of his promise. It would be apt to reproduce paragraph 14 of above judgement hereunder:

> "14. Section 96(2)(b)(ii) extends immunity to the Insurance Company if a breach is committed of the condition excluding driving by a named person or persons or by any person who is not fully licensed, or by any person who has been disqualified for holding or obtaining a driving licence during the period of disqualification. The expression 'breach' is of great significance. The dictionary meaning of 'breach' is 'infringement or violation of a promise or obligation'. It is therefore abundantly clear that the insurer will have to establish that the insured is guilty of an infringement or violation of a promise that a person who is duly licensed will have to be in charge of the vehicle. The very concept of 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 wilful infringement or violation. If the insured is not at all at fault and has not done anything he should not have done or is not 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) committed a breach of his promise. Not when some mishap occurs by some mis- chance. 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 himself it cannot be said that the insured is guilty of any breach. And it is only in case of a breach or a violation of the promise on the part of the insured that the insurer can hide under the umbrella of the exclusion clause. In a way the question is as to whether the promise made by the insured is an absolute promise or whether he is exculpated on the basis of some legal doctrine. The discussion made in paragraph 239 of Breach of Contract by Carter (1984 Edition) under the head Proof of Breach, 1. See Collins English Dictionary.

gives an inkling of this dimension of the matter1 In the present case even if the promise were to be treated as an absolute promise the grounds for exculpation can be found from Section 84 of the Act which reads under:-

> "84. Stationary vehicles--No person driving or in charge of a motor vehicle shall cause or allow the vehicle to remain stationary in any public place, unless there is in the driver's seat a person duly licensed to drive the vehicle or unless the mechanism has been stopped and a brake or brakes applied or such other measures taken as to ensure that the vehicle cannot accidentally be put in motion in the absence of the driver."

In view of this provision apart from the implied mandate to the licensed driver not to place an unlicensed person in charge of the vehicle. There is also a statutory obligation on the said person not to leave the vehicle unattended and not to place it in charge of an unlicensed driver. What is prohibited by law must be treated as a mandate to the employee and should be considered sufficient in the eye of law for excusing non-compliance with the conditions. It cannot therefore in any case be considered as a breach on the part of the insured. To construe the provision differently would be to re-write the provision by engrafting a rider to the effect that in the event of the motor vehicle happening to be driven by an unlicensed person regardless of the circum- stances in which such a contingency occurs, the insured will not be liable under the contract of insurance. It needs to be emphasised that it is not the contract of insurance which is being interpreted. It is the statutory provision defining the conditions of exemption which is being interpreted. These must therefore be interpreted in the spirit in which the same have been enacted accompanied by an anxiety to ensure that the protection is not nullified by the backward looking interpretation which serves to defeat the provision rather than to fulfil its life-aim. To do otherwise would amount to nullifying the benevolent provision by reading it with a non-benevolent eye and with a mind not tuned to the purpose and

1. "Exculpation of a promisor. Given a presumption of absoluteness of obligation, a promisor who is alleged to have failed to perform must either prove performance or establish some positive excuse for any failure on his part. In other words he must find exculpation from what is presumed to be a breach of contract, either in the contract itself or in some external rule of law. These are five grounds for exculpation: construction of the contract; the doctrine of frustration; the existence of an implied term; the presence of an exclusion clause; and the application of a statutory rule or provision. These will be considered later."

philosophy of the legislation without being informed of the true goals sought to be achieved. What the legislature has given, the Court cannot deprive of by way of an exercise in interpretation when the view which renders the provision potent is equally plausible as the one which renders the provision impotent. In fact it appears that the former view is more plausible apart from the fact that it is more desirable. When the option is between opting for a view which will relieve the distress and misery of the victims of accidents or their dependents on the one hand and the equally plausible view which will reduce the profitability of the insurer in regard to the occupational hazard undertaken by him by way of business activity, there is hardly any choice. The Court cannot but opt for the former view. Even if one were to make a strictly doctrinaire approach, the very same conclusion would emerge in obeisance to, the doctrine of 'reading down' the exclusion clause in the light of the 'main purpose' of the provision so that the 'exclusion clause' does not cross swords with the 'main purpose' high- lighted earlier. The effort must be to harmonize the two instead of allowing the exclusion clause to snipe success- fully at the main purpose. This theory which needs no support is supported by Carter's "Breach of Contract" vide paragraph 251. To quote:-

> "Notwithstanding the general ability of contracting parties to agree to exclusion clause which operate to define obligations there exists a rule, usually referred to as the "main purpose rule", which may limit the application of wide exclusion clauses defining a promisor's contractual obligations. For example, in *Glynn v. Margetson & Co., [1893] A.C. 351 at 357* Lord Halsbury L.C. stated:
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> > "It seems to me that in construing this document, which is a contract of carriage between the parties, one must be in the first instance look at the whole instrument and not at one part of it only. Looking at the whole instrument, and seeing what one must regard ..... as its main purpose, one must reject words, indeed whole provisions, if they are inconsistent with what one assumes to be the main purpose of the contract."
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> Although this rule played a role in the development of the doctrine of fundamental breach, the continued validity of the rule was acknowledged when the doctrine was rejected by the House. of Lords in *Suissee Atlantique Societe d' 766 Armement Maritime S.A.v.N.V. Rotterdamsche Kolen Centrale, [1967] 1 A.C. 361 at 393,412- 413,427-428, 430. Accordingly, wide exclusion clauses will be read down to the extent to which they are inconsistent with the main purpose, or object of the contract*." (emphasis added)."

13. An imperative aspect of the matter that has been emphasised and stressed by the Supreme Court in ***Skandia Insurance Co. Ltd v. Kokilaben Chandravadan*** (supra) is that obligation to insure a vehicle is not aiming at promoting business of insurers engaged in the business of automobile insurance but to protect the members of community travelling in vehicles or using the roads from the risk attendant upon the user of motor vehicles on the roads, and that

legislature has made it obligatory that no motor vehicle shall be used unless insurance is in force and to use the vehicle without requisite insurance is a penal offence. It has also been said that legislature has insisted and made it incumbent on the user of motor vehicle to be armed with an insurance policy so as to ensure that the injured victims of automobile accidents or dependents of victims of fatal accidents are really compensated in terms of money and not in terms of the promise.

14. Another vehement submission of counsel for appellant is that even if in the present case, contention of respondent-Insurance Company qua validity and effectiveness of driving licence of driver of offending vehicle is taken into account, yet respondent-Insurance Company has not established or proved that owner/appellant was aware of the fact that driver of offending vehicle was not holding driving licence, and still permitted him to drive the vehicle. He avers that respondent-Insurance Company has not been able to prove that there was a breach on the part of owner/appellant in checking the driving licence of driver of offending vehicle. He, in this regard, has invited attention of this Court to a judgement passed by the Supreme Court in ***United India Insurance Co. Ltd v. Lehru and others, (2003) 3 SCC 338***, in which the Supreme Court has observed that where owner has satisfied himself that driver has a licence and is driving competently there would be no breach of Section 149(2)(a)(ii). He will, therefore, have to check whether driver has a driving licence and if driver produces a driving licence, which on the face of it looks genuine, owner is not expected to find out whether licence has in fact been issued by a

competent authority or not. The owner would then take test of the driver, and if he finds that driver is competent to drive the vehicle, he will hire the driver. Paragraphs 18 to 20 of the judgement would be advantageous, having regard to the present case, to be reproduced hereinafter:

> "Now let us consider Section 149(2). Reliance has been placed on Section 149(2)(a)(ii). As seen in order to avoid liability under this provision it must be shown that there is a "'breach". As held in Skandia's and Sohan Lal Passi's cases (supra) the breach must be on part of the insured. We are in full agreement with that. To hold otherwise would lead to absurd results. Just to take an example, suppose a vehicle is stolen. Whilst it is being driven by the thief there is an accident. The thief is caught and it is ascertained that he had not license. Can the Insurance Company disown liability? The answer has to be an emphatic "No". To hold otherwise would be to negate the very purpose of compulsory insurance. The injured or relatives of person killed in the accident may find that the decree obtained by them is only a paper decree as the owner is a man of straw. The owner himself would be an innocent sufferer. It is for this reason that the Legislature, in its wisdom has made insurance, at least third party insurance, compulsory. The aim and purpose being that an Insurance Company would be available to pay. The business of the Company is to insurance. In all businesses there is an element of risk. AH persons carrying on business must take risks associated with that business. Thus it is equitable that the business which is run for making profits also bears the risk associated with it. At the same time innocent parties must not be made to suffer or loss. These provisions meet these requirements. We are thus in agreement with what is laid down in aforementioned cases viz. that in order to avoid liability it is not sufficient to show that the person driving at the time of accident was not duly licensed. The Insurance Company must establish that the breach was on the part of the insured.
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> Section 3 of the Motor Vehicles Act, 1988 prohibits driving of a motor vehicle in any public unless the driver has an effective driving licence. Further Section 180 of the Motor Vehicles Act makes an owner or person in charge of a motor vehicle punishable with imprisonment or fine if he causes or permits a person without a licence to drive the vehicle. It is clear that the punishment under Section 180 can only be imposed if the owner or person in charge of vehicle "causes or permits" driving by a person not duly licensed. Thus there can be no punishment if a person without a licence drives without permission of the owner. Section 149(2)(ii) merely recognises this condition. It therefore only absolves the Insurance Company where there is a breach by the insured.
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> When an owner is hiring a driver he will therefore have to check whether the driver has a driving licence. If the driver produces a driving licence which on the face of it looks genuine, the owner is not expected to find out whether the licence has in fact been issued by a competent authority or not. The owner would then take the test of the

> driver. If he finds that the driver is competent to drive the vehicle, he will hire the driver. We find it rather strange that Insurance Companies expect owners to make enquiries with RTO's, which are spread all over the country, whether the driving licence shown to them is valid or not. Thus where the owner has satisfied himself that the driver has a licence and is driving competently there would be no breach of Section 149(2)(a)(ii). The Insurance Company would not then be absolved of liability. If it ultimately turns out that the licence was fake the Insurance Company would continue to remain liable unless they prove that the owner/insured was aware or had noticed that the licence was fake and still permitted that person to drive. More importantly even in such a case the Insurance Company would remain liable to the innocent third party, but it may be able to recover from the insured. This is the law which has been laid down in Skandia 's Sohan Lal Passi 's and Kamla 's case. We are in full agreement with the views expressed therein and see no reason to take a different view."

15. As can be gathered from the above settled legal position, it is undoubtedly open to insurance company to take a defence in a claim petition that driver of offending vehicle was not duly licenced, but it is required to prove such a plea. Nevertheless, even after proving that licence was a fake one, it is to be looked into that the owner of vehicle while hiring a driver checked the licence and satisfied himself as to competence of driver. When a driver is hired, the owner of vehicle has to check whether driver has a driving licence. If driver produces a driving licence, which on the face of it looks genuine, the owner is not expected to find out whether licence has in fact been issued by competent authority or not. As has been held by the Supreme Court in the case of ***Lehru*** (supra) that it would be strange that insurance companies would expect owners to make enquiries with RTOs, which are spread all over the country, whether driving licence shown to them is valid or not. Thus, where owner has satisfied himself that driver has a licence and is driving competently, there would be no breach of Section 149 (2)(a) (ii) and the insurance company would not then be absolved of its liability.

In the above backdrop, when the present case is looked into, owner of offending vehicle had gone through driving licence and, as such, satisfied himself. Verily, it is not the case of insurance company that despite knowing that driver was holding fake licence, the owner permitted him to drive the vehicle. In such circumstances, holding the owner liable to pay compensation or giving recovery right to insurance company to pay compensation is against the settled legal position and to this extent impugned Award is liable to be set-aside. In that view of matter, indulgence of this Court has rightly been invoked by appellant.

16. For the reasons discussed above, the instant Appeal is *allowed* and Award dated 11th July 2015, passed by Motor Accident Claims Tribunal, Anantnag, in a claim petition, bearing Claim No.78/2008 titled *Sharifa and others v. Shabir Ahmad Bhat and others*, to the extent it gives right of recovery to respondent-United India Insurance Company Limited, is *set-aside*.

17. In consequence of above, the review petition, being RPC no.01/2016, is also *disposed of* on the aforesaid lines.

18. Copy be sent down along with the record, if summoned/received.

(Vinod Chatterji Koul)
Judge

Srinagar
10.03.2022
Ajaz Ahmad, PS

Whether the order is reportable: Yes/No.