

The Manager vs Bulkis @ Shaila

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Court : Kerala

Decided On : Dec-09-2022

Judge : Honourable Mr.Justice C. Jayachandran

Appeal No. : MACA/4/2015

Appellant : The Manager

Respondent : Bulkis @ Shaila

Advocate for Pet/Ap. : Sri. Mathew John

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR.JUSTICE C.JAYACHANDRAN FRIDAY, THE 9TH DAY OF DECEMBER 2022 / 18TH AGRAHAYANA, MACA NO. 4 OF 2015 IN O.P.(MV)NO.12/2013 OF MOTOR ACCIDENTS CLAIMS TRIBUNAL, THODUPUZHA APPELLANT: THE MANAGER, NIRMALA PUBLIC SCHOOL, KARIMANNOOR POST, THODUPUZHA. BY ADVS. SRI.MATHEW JOHN (K) SRI.DOMSON J.VATTAKUZHAY RESPONDENTS: 1 BULKIS @ SHAILA, W/O.HUSSAIN, EDANACKAL HOUSE, KARIMANNOOR POST, THODUPUZHA-685 584. 2 GEORGE @ JOY, S/O.VARKEY, MANICKAL HOUSE, KARIMANNOOR POST, KILIYARA-685 581. 3 THE ORIENTAL INSURANCE CO. LTD., BRANCH OFFICE, ALWAYE-683 101. BY ADV SRI.A.R.GEORGE, SC THIS MOTOR

ACCIDENT CLAIMS APPEAL HAVING COME UP FOR ADMISSION ON 18.11.2022, THE COURT ON 09.12.2022 DELIVERED THE FOLLOWING: ..2..

C.JAYACHANDRAN, J.

----- Dated this
the 9th day of December, 2022

JUDGMENT

In a case where the driver of the offending vehicle was not duly licensed - in the sense that his driving license was not renewed within the statutory period of 30 days - whether the Tribunal's direction enabling the insurance company to recover the compensation amount from the owner is sustainable in law is the legal question posed in this appeal.

2. The appellant is the second

respondent/owner of a school bus, which collided with the motor bike in which the injured was a pillion, sustaining serious injuries. It is not in dispute that, Ext.B1 license of the first respondent was valid for the period from ..3..

19.03.2007 up to 18.03.2010, and that the same was renewed only w.e.f. 27.08.2010, whereas the accident took place on 19.08.2010. It could thus be seen that, the first respondent/driver was not duly licensed as on the date of accident, even if, the statutory period of 30 days is reckoned for the purpose of renewal of license.

3. Heard Sri. Mathew John, learned counsel for

the appellant and Sri. A.R.George,
records.

4. Relying on the judgment of the Hon'ble Supreme Court in National Insurance Company Ltd. v. Swaran Singh & Others, [2004 (3) SCC 297], learned counsel for

the appellant argued that, in order to claim exoneration, the insurer should not only establish that, the driver was not duly licensed but should also prove that, ..4..

the same amounted to a fundamental breach to have contributed to the cause of the accident. In the instant case, there is no plea, much less any proof, that there is breach of a condition and that the same is fundamental in nature. The principle in Swaran Singh (supra) has been adopted by a Full Bench of this Court in National Insurance Co. v. Jisha [2015 (1) KLT 1 (FB)], which was followed by a subsequent Full Bench in Shaji v. Pradeesh [2018 (2) KLT 136 (FB)]. Another limb of contention raised by the learned counsel is with respect to the reasonable care taken by the appellant/owner in examining and satisfying the validity of Ext.B1 driving license of the first respondent/driver,

as also, his driving skill before appointing him. Relying upon United India Insurance Co. Ltd. v. Lehu [2003 (2) KLT 97 (SC)], it was argued that once the registered owner has ..5.. satisfied the twin conditions referred above, he cannot be mulcted with the liability of reimbursing the compensation paid by the insurance company under a valid policy.

5. Opposing these submissions seriously, learned counsel for the third respondent/insurance company pointed out that, in a series of decisions of Hon'ble Supreme Court following Swaran Singh (supra), the principle which was being applied invariably, in cases where the driver is not duly licensed, is to direct payment of compensation by the insurance company at the first instance, followed by a clause enabling recovery from the owner. Insofar as the argument based on Lehu

(supra), it was submitted that the same was rendered in a case of fake license, where the owner has little means to ascertain its genuineness, in which case, the twin conditions ..6.. referred above would amount to reasonable care being taken by the owner, thus satisfying the requirements of law. The dictum in Lehu (supra) rendered in the above said setting has no application, whatsoever, in the given facts, is the submission of the learned counsel.

6. Having heard the learned counsel appearing

on both sides, this Court is impelled to uphold the submissions of the learned counsel for the third respondent/insurance company, so as to confirm the questioned direction for recovery in the impugned award. At the first instance, this Court notices that Swaran Singh (supra) examined in detail the liability of the insurer

from the stand point of an innocent against third party risks. In paragraph no.110 ..7.. of the judgment, the Hon'ble Supreme Court has summarized its findings, of which findings nos. iii, iv and vi are relevant in the present context, which are extracted here below:

iii) The breach of policy condition e.g. disqualification of the driver or invalid driving license 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 license 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 licensed driver or one who was not disqualified to drive at the relevant time. ..8..

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 wherefor would be on them. v) x x x x 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 license by the driver or his disqualification 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 license 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. ..9..

7. Therefore, in addition to proof being adduced that the driver was not duly licensed, the insurer should also establish that the insured was guilty of negligence and failed to

exercise reasonable care. It should also be established that there was a breach on the part of the owner, which is so fundamental to have contributed to the cause of the accident.

8. Coming to the facts, it is the specific

contention of the appellant/owner that he took reasonable care while appointing the first respondent/driver by perusing Ext.B1 license, which was valid and in force then. They also

assessed the driving skills of

negligence and there is no failure to exercise reasonable care. This Court finds it difficult to endorse the appellant's contention in this ..10.. regard. The manager of the appellant school filed a proof affidavit stating the above facts. However, she had not mounted the box, so as to afford an opportunity of cross examination to the claimant/respondent. Be that as it may.

Going by the proof affidavit, the first respondent/driver was employed from 16.03.2009, in the appellant school, as a driver. Ext.B1 license is valid for the period from 19.03.2007

to 18.03.2010. If Ext.B1 was perused by the manager of the appellant school in exercise of reasonable care, the fact that the license would expire on 18.03.2010 should have come to her notice. Therefore, it is no answer to the duty to take reasonable care that the license was examined at the time of initial appointment. Nor could it be said that, since the license was found valid at the time of initial appointment, the owner has no further duty to examine the

..11.. validity of the driving license, when the holder of the license is continued to be employed as a driver.

9. The next point is whether the failure to renew the license amounts to a fundamental breach or not. Going by Section 5 of the Motor Vehicles Act, responsibility is cast on the owner not to permit any person who does not satisfy the requirements of Sections 3 & 4, that is to say, of holding an effective driving license and of not being under the age of 18

years. Under Section 149(2) of the Motor Vehicles Act, driving a vehicle by a person, who was not issued with a duly granted license, is a recognized ground to disown the liability under the policy. In the instant case, the fact that the first respondent/driver had no valid driving license at the time of accident has been suppressed by the appellant/owner in the joint ..12.. written statement filed by the owner and the driver, by specifically contending that the driver was possessed of a valid driving license at the time of accident. In the proof affidavit filed, it is stated that, the accident occurred due to the negligence of the husband of the

injured, who drove the motor cycle, which collided with the school bus. However, Ext.A4 charge sheet against the first respondent/driver would prima facie constitute sufficient proof of negligence on the part of the driver of the school bus, as held in *New India Assurance Co. Ltd. v. Pazhaniammal* [2011 (3) KLT 648]. Thus, if it is established that the accident occurred due to the rash and negligent driving of the

first respondent/driver, and that he was not duly licensed at the time of accident, the only possible conclusion is that, the breach of the condition is so fundamental, to have contributed ..13.. to the cause of accident. This Court therefore, cannot find fault with the direction of the Tribunal to the insurance company to pay the compensation amount at the first instance and to recover the same from the owner and driver of the offending vehicle.

10. This Court is fortified in taking the above view by a series of decisions commencing from *Swaran Singh* (supra) itself, of which, paragraph no.104 is extracted here below:

104. It is, therefore, evident from the discussions made herein before that the liability of the insurance company to satisfy the decree at the first instance and to recover the awarded amount from the owner or driver thereof has been holding the field for a long time.

11. The position was reiterated in 1) Ishwar

Chandra & Others v. Oriental Insurance Co. Ltd. & Others, 2007 (10) SCC 650; 2) National Insurance Co. Ltd. v. Vidhyadhar Mahariwala & ..14.. Oths., (2008) 12 SCC 701; 3) a five judges bench decision of this Court in Oriental Insurance Co.Ltd. v. Poullose, 2015 (1) KLT 682 (LB); 4) Kempaiah & Others v. S.S. Murthy & Another, AIR

2017 SC 1822; 5) Shamanna & Another v. Divisional Manager, Oriental Insurance Co. Ltd. & Others, AIR 2018 SC 3726; 6) Pappu & Others v. Vinod Kumar Lamba & Another, (2018) 3 SCC 208; and 7) Parminder Singh v. New India Assurance Co.Ltd. & Others, (2019) 7 SCC 217. In none of these decisions, it was held that absence of a valid driving license in force at the time of

accident is not a fundamental breach and therefore, the direction to recover the amount from the owner is bad in law.

12. Before leaving the judgment, this Court will also deal with the contention based on Lehu (supra), which has been reiterated in a recent judgment of the Hon'ble Supreme Court in ..15.. Rishi Pal Singh v. New India Assurance Co. Ltd., [2022 ACJ 1868 (SC)]. In Lehu (supra) it was

held that, if the owner had satisfied himself

that the driver has a license and he is driving competently, there would be no breach of Section 149(2)(a)(ii). This Court may straight away observe that, both Lehu and Rishi Pal Singh were rendered on a totally different factual premise, where the license in question was a fake one. It was held in Paragraph No.10 of Rishi Pal Singh (supra) that, the owner is not expected to run to the licensing authority to verify the genuineness of the driving license before appointing a driver. As it is trite, the dictum laid down in a judgment, which is propounded as a

precedent, has to be ascertained in the light of the attendant facts; and even a small change of facts may uproot the precedential value of the dictum. As already ..16.. enunciated, the instant case is one where the owner fails to note the expiry of the driving license, even when she chose to continue to employ the first respondent/driver, which factual matrix will not be governed by Leheru and Rishi Pal Singh (supra). The appeal fails and the same is therefore dismissed. Sd/- C.JAYACHANDRAN JUDGE ak

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