

Pappu Singh and anr. Vs. Ravindra Nath Dubey and anr.

Pappu Singh and anr. Vs. Ravindra Nath Dubey and anr.

SooperKanoon Citation : sooperkanoon.com/493549

Court : Allahabad

Decided On : Aug-17-2004

Reported in : 2005(2)AWC1889

Judge : Prakash Krishna, J.

Acts : [Motor Vehicles Act, 1988](#) - Sections 149(1) and 149(2); [Motor Vehicles Act, 1939](#) - Sections 96(1)(2)

Appeal No. : F.A.F.O. No. 912 of 1991

Appellant : Pappu Singh and anr.

Respondent : Ravindra Nath Dubey and anr.

Advocate for Def. : P.K. Tripathi, ;Saral Srivastava, ;A.K. Banerji and ;S.K. Srivastava, Advs.

Advocate for Pet/Ap. : R.B. Sahai, Adv.

Disposition : Appeal allowed

Judgement :

Prakash Krishna, J.

1. This appeal is against the judgment and order of Motor Accident Claims Tribunal, Fatehpur, dated 16th August, 1991, passed in M.A.C.P. No. 19 of 1989.

2. Respondent No. 1 filed a claim petition against the present appellants and Insurance Company, namely, Oriental Insurance Company Limited claiming a sum of Rs. two lacs as compensation in an accident caused by tractor No. UPW 4804 on 28th August, 1988 at about 8 p.m. near Mission Hospital, Fatehpur. The Tribunal by its impugned order has awarded a sum of Rs. 45,000 as compensation along with the interest at the rate of 12% per annum from the date of the petition till the date of payment. The said award has been passed against the present appellants only. It was dismissed against the Insurance Company, opposite party No. 3 in the claim petition. The present appeal is at the instance of the owner of the vehicle and it is alleged driver, driving the vehicle on the fateful day when the accident took place.

3. The challenge in the appeal is a limited one. The case of the appellant is that the vehicle being insured with the Insurance Company, the respondent No. 2 in the appeal, the Claims Tribunal committed illegality in not passing the award against the Insurance Company. The Tribunal exonerated the Insurance Company on the short ground that on 28th August, 1988 at the time of the accident the vehicle was being driven by Pappu Singh, appellant No. 1, who happens to be the son of appellant No. 2 had no driving licence to drive the tractor. Therefore, in the present appeal the controversy involved is as to whether Pappu Singh was driving the vehicle on the date of the accident and whether the finding of the Tribunal exonerating the Insurance Company, is legally justified.

4. Heard learned counsel for the appellant and Sri Saral Srivastava, learned counsel for the Insurance Company. None appeared for the claimant/respondent No. 1 to oppose the appeal.

5. The Tribunal decided issue Nos. 1, 4 and 5 together and have come to the conclusion that Pappu Singh was driving the vehicle on the date of the accident. Therefore, in paragraph 17 of the judgment it is concluded that only opposite party Nos. 1 and 2 are liable to pay the compensation amount and in terms of the policy the Insurance Company, respondent No. 2 is not liable for the same.

6. It is to be noted that the Insurance Company has not laid any evidence in support of its plea that the tractor in question was not being driven by a duly

licensed driver at the time of the accident. The claimant who received the injuries in the accident on 28.8.1988 came out with a case that the tractor was being driven by Pappu Singh who was caught on the spot by one Kailash Dwivedi, examined as P.W. 2. In contra ; the case of the owner of the tractor was that he had employed Mahipal Singh as a driver of the tractor and he had a valid driving licence and was driving the tractor at the time of the occurrence of accident.

7. The Tribunal has taken into consideration the statement of claimant and of Mahipal Singh (P.W. 2) to arrive at the aforesaid finding. From the judgment it appears that the Tribunal was very much influenced by the fact that the driver of the tractor was arrested by Sri Kailash Dwivedi immediately after the accident on 28.8.1988. It has come on record that the accident took place on 28th August, 1988 and the first information report was lodged on 29th August, 1988. Kailash Dwivedi has further stated that the tractor was driven to the police station and handed over to the police immediately after the accident. He also stated that he apprehended Pappu Singh and was handed to the police on 28th August, 1988. In the above background the evidence of the parties are required to be scrutinized. It is admitted case that the F.I.R. was lodged on 29th August, 1988. The case of the appellant is that when Pappu Singh went to the police station on 29th August, 1988, he was arrested there by the police. Admittedly, there is nothing on record to show that Pappu Singh was apprehended on 28th August, 1988 and was handed over to the police on the same day except the statement of Kailash Dwivedi (P.W. 2). The attention of the Tribunal was invited to the fact that the F.I.R. itself was lodged on 29.8.1988 and there is nothing on record to show that Pappu Singh was apprehended on 28th August, 1988 and was handed over to the police on that date. The Tribunal met these points with following observations :

'But every body knows the working of the police. Till 29.8.1988 there was no F.I.R. Even if Pappu Singh and tractor were present without an F.I.R. the police will naturally detain the tractor and will ask the driver to go away. The tractor is already in the hand of the police. The owner and driver will naturally appear to take their four lacs tractor and if necessary they will be arrested and such happened in this case. The tractor was detained there. The F.I.R. was lodged the next day. The other day when the driver appeared at the police station to take the tractor or

otherwise he was arrested.'

8. Thus, it is clear that Pappu Singh was arrested only on 29th August, 1988 when he went to the police station for release of the tractor involved in the accident. The Tribunal in my view has not correctly appreciated the evidence on record. This part of* the order is based on surmises, and it has wrongly preferred to place reliance upon the statement of P.W. 2 on this point. It has also come on record that the claimant became unconscious immediately after the accident. He has not deposed that the tractor was being driven at the time of the accident by Pappu Singh. Kailash Dwivedi was produced as a witness to establish that the tractor in question was involved in the accident. In the circumstances of the case and in the light of the evidence of the respective parties, it is not safe to rely upon the statement of P.W. 2 to hold that the tractor was being driven by Pappu Singh. Further Mahipal Singh the driver of the tractor was examined on behalf of the appellants and he accepted that he was driving the tractor on the date of the accident and ran away immediately after the accident. Undisputedly Mahipal Singh is duly licensed driver of the tractor and was employed by the owner of the tractor as a driver. On this point there is no issue in between the parties. The Tribunal was very much influenced by the fact that Pappu Singh was arrested and challaned by the police and the claimant has got no interest that it was being driven by Pappu Singh or if it was being driven by Mahipal Singh. These two circumstances are wholly irrelevant to come to the conclusion that the tractor was being driven by Pappu Singh at the time of the accident. Therefore, I am of the view that the finding of the Tribunal that the tractor was being driven by Pappu Singh and not by Mahipal Singh cannot be sustained. I am of the view that the tractor was being driven by Mahipal Singh who was having a valid driving licence to drive the tractor.

9. In this connection it is also relevant to examine the plea raised by the Insurance Company disputing its liability to pay the amount of compensation to the victim. This matter is not res-integra. Very recently the Supreme Court has examined this matter in depth in the case of National Insurance Company Limited v. Swaran Singh and Ors., 2004 (2) AWC 1589 (SC) : 2004 (1) SCCD 520 : JT 2004 (1) SC 109. On this judgment the learned counsel for both the parties have placed reliance. Sub-section (1) of Section 149 of the Motor Vehicles Act casts a liability

upon the insurer to pay to the person entitled to the benefit of the decree as if he were the judgment debtor. Although the said liability is subject to the provisions of section, it prefaces with a non-obstante clause that the insurer may be entitled to avoid or cancel or may have avoided and cancelled the policy. Interpreting Section 149(2)(a) and (b) it has been held in the aforesaid case that the Insurance Company with a view to avoid its liability is not only required to show that the conditions laid down in the aforesaid section are satisfied but is further required to establish that there has been breach on the part of the insured. The relevant portion of paragraph 46 of the aforesaid judgment is quoted below :

'Furthermore, the insurance company with a view to avoid its liabilities is not only required to show that the conditions laid down under Section 149(2)(a) or (b) are satisfied but is further required to establish that there has been a breach on the part of the insured.'

10. In the aforesaid case, the Supreme Court has placed reliance upon its earlier judgment given in the case of Skandia Insurance Company Limited v. Kokilaben Chandrabandan and Ors., AIR 1978 SC 1184. In this case the Supreme Court laid emphasis on the expression 'breach' used in Section 96(1)(2)(b)(ii) of the [Motor Vehicles Act, 1939](#). It has been held that the insurer will have to establish that the insured is guilty of an infringement or violation of the promise that a person who is duly licensed will have to be in charge of the vehicle. The relevant paragraph is quoted below :

'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 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 himself it cannot be said that the insurer 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 insured 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, gives an inkling of this dimension of the matter. 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 thus :

'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 a non-licensed 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 rewrite 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 circumstances in which such a contingency occurs, the insured will not be liable under the contract of insurance. It needs to be emphasized that it is not the contract.'

11. The Supreme Court after discussing the various cases on the point has recorded its conclusion in para 64 of the judgment which reads as follows :

'A bare perusal of the provisions of Section 149 of the Act leads to only one conclusion that usual rule is that once the assured proved that the accident is covered by the compulsory insurance clause, it is for the insurer to prove that it comes within an exception.

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 liability.'

12. The ratio of the judgment of the Supreme Court is to be applied in the facts of the present case. Admittedly, the owner of the tractor had employed a duly licensed driver, ' namely, Mahipal Singh. The Insurance Company has not led any evidence to show that the insured person, namely, the owner of the tractor handed over the tractor to Pappu Singh to drive the tractor on 28.8.1988. Therefore, it cannot be said that the insured person committed breach of the terms of the policy. The Insurance Company should have established by leading evidence that there was breach of condition of contract of the Insurance Company. The Insurance Company has failed to discharge the burden in the present case. Assuming that the tractor was being driven by Pappu Singh on 28.8.1988, it is not sufficient to hold that the insured person has committed breach of the terms of the Insurance Company in the absence of wilful violation of the terms of the policy by the insured person.

13. I am of the opinion that the law as laid down by Supreme Court in the case of Swarn Singh and others (supra), is fully applicable to the facts of the present case. In the absence of any finding by the Tribunal that the owner of the tractor committed wilful breach of the terms of the Insurance Company, the Insurance Company is liable to indemnify the owner of the tractor and to pay the compensation to the victim.

14. There is no dispute that Mahipal Singh was having a valid driving licence on 28th August, 1988 and the tractor was duly insured with Oriental Insurance Company Ltd.

15. In the result, the appeal is allowed. The judgment and order of the Tribunal is modified to the extent that the claim petition is allowed against the Insurance Company also with costs and, therefore, the claimant/applicant is entitled to recover the amount of compensation from the Insurance Company also. The Insurance Company will indemnify the owner of the tractor. No order as to costs.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com