PETITIONER:
NARCINVA V. KAMAT AND ANR. ETC.

Vs.

RESPONDENT:
ALFRED ANTONIO DOE MARTINS AND ORS.

DATE OF JUDGMENT25/04/1985

BENCH:
DESAI, D.A.
BENCH:
DESAI, D.A.
MISRA RANGNATH

CITATION:
1985 AIR 1281 1985 SCR (3) 951
1985 SCC (2) 574 1985 SCALE (1)947
CITATOR INFO :
F 1987 SC 70 (4)

ACT:
Motor Vehicles Act:
Accident claim-Motor vehicle owned by partnership firm-Driven by one of the partners-Accident occurs Whether breach of contract of insurance policy-Insurance company whether absolved from liability-Burden of proof whether lies on insurance company.

HEADNOTE:
In a road accident that took place two ladies were injured. One succumbed to her injuries. The offending vehicle was a pick-up van belonging to a firm and was being driven by one of the partners. Two claim petitions were filed one by the heirs of the deceased and the other by the injured. The Motor Accident Claims Tribunal held that the van was being driven at the relevant time rashly and negligently. The Tribunal awarded Rs. 75,000 as compensation to the heirs of the deceased and Rs. 3,000 to injured.

Before the Tribunal, the Insurance company contended that according to the terms of the contract of insurance as evidenced by the policy of insurance, the vehicle can be driven either by a driver in the employment of the insured or with the permission of the insured by one who holds a valid driving licence. The Tribunal found that at the time of the accident, the vehicle was being driven by appellant No. 2, the partner of the firm, which was the owner of the vehicle and as the driver did not produce his driving licence, held that the driver did not have a valid driving licence and, in the absence of a valid driving licence, there was a breach of the contract of insurance and the insurance company was absolved from the liability under the policy of insurance.

A Division Bench of the High Court confirmed the findings of the Tribunal and dismissed the appeals by the firm and its partners.

On the question whether the insurance company under the contract of insurance is liable to satisfy the award, partly allowing the appeals,

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HELD: 1. The insurance company has failed to prove that

there was a breach of the term of the contract of insurance as evidenced by the policy of insurance on the ground that the driver who was driving the vehicle at the relevant time did not have a valid driving licence. Once the insurance company failed to prove that aspect, its liability under the contract of insurance remains
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intact and unhampered and it was bound to satisfy the award under the comprehensive policy of insurance. [959B-D]

2. The award of the Tribunal as well as the judgment of the High Court are modified. The Insurance Company is to satisfy the award with interest at 12 per cent from the date of the accident till payment. [959D-E]

3. Where the pick-up van belonging to the firm is being driven by a partner, it can be said that it is done with the permission of the owner of the firm or with its implied authority. [956E]

While dealing with the question whether the partner had a valid driving licence at the relevant time, both the Tribunal and the High Court fell into an error which resulted in giving a clean chit to the insurance company, Admittedly this pick up van could be used as a private carrier and the insurance company had issued a comprehensive insurance policy in respect of this van and at the relevant time it was in force. [946E-G]

5. If a breach of a term of contract permits a party to the contract to not to perform the contract. the burden is squarely on that party which complains of breach to prove that the breach has been committed by the other party to the contract. The test in such a situation would be who would fail if no evidence is led. [957B-C]

In the instant case, not an iota of evidence has been led by the insurance company to show that the second appellant did not have a valid driving licence to drive the vehicle. The High Court took no notice of the fact that the van be. longed to the firm and every partner for that reason would be the owner of the property of the firm. It limited its enquiry to ascertain whether the driver was in the employ of the insurer. It completely overlooked the fact that the driver appellant No. 2 was driving with the permission of the insured, the firm in this case. [957C-H; 951A-B]

6. On a proper analysis and interpretation of the term of contract of insurance, the insurance company cannot escape the liability if (a) the insured himself was driving the vehicle or (b) the driver was in the employment of the insurer and was driving on the order of the insurer or not being in such employment was driving under order of the insurer or (c) with his permission.

[958B-C]

7. The burden to prove that there was breach of the contract of insurance was squarely placed on the shoulders of the insurance company. It could not be said to have been discharged by it by a more question in cross-examination. The second appellant was under no obligation to furnish evidence so as to enable the insurance company to riggle out its liability under the contract of insurance. Further the R.T.A. which issued the driving licence keeps a record of the licences issued and renewed by it. The insurance company could have got the evidence produced to substantiate his allegation. Applying the test who would fail if no evidence is led, the obvious answer is the insurance company.

[958G-H; 959A]

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JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 153839 Of 1985.

From the Judgment and Order dated 25.4.1984 of the Bombay High Court in First Civil Appeal Nos. 37/8 and 38/8 of 1980.

S.K. Mehta for the Appellants.

Jitendra Sharma for the Respondents.

The Judgment of the Court was delivered by

DESAI, J.A monopoly successfully avoided its legally incurred liability on the wholly untenable ground. That is the scenario in these appeals. Oriental Fire and General Insurance Company Ltd., a nationalised company having the monopoly of general insurance is the Fifth Respondent in the first appeal and the second respondent in the second appeal. It would be referred to and 'insurance company' hereinafter.

An accident occurred on Praca de Jorge Barrete Road, Margao on May 17, 1976 around 10.30 A.M. in which one Sita Gomes and her sister-in-law Ida Menezes were injured. Ida succumbed to her injuries and Sita Gomes recovered. The offending vehicle was a pick-up van belonging to M/s. Narcinva V. Kamat, a firm carrying on business at Margao, Goa. The vehicle was insured with the insurance company. Two petitions claiming compensation came to be filed; one by the heirs of Ida and the other by Sita. The Motor Accident Claims Tribunal (Tribunal for short) held that the driver of the van was responsible for the accident as the van was being driven at the relevant time, rashly and negligently. The Tribunal awarded Rs. 75,000 as compensation to the heirs of Ida and Rs. 3,000 to Sita.

In the proceedings before the Tribunal, the Insurance Company, appeared and contended that according to the terms of the contract of insurance as evidenced by the policy of insurance, the vehicle can be driven either by a driver in the employment of the insured or with the permission of the insured by one who holds a valid driving licence. In respect of this contention the Tribunal framed issue Nos. 7 and 8 in both the petitions in the following terms;

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> "7. Whether the respondent No. 6 (insurance company) proves that there is no liability on them as the respondent No. 2 Narcinva Kamat who was driving the vehicle involved in the accident was not holding any effective driving licence ?
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> 8. Whether the respondent No. 6 proves that under the provisions of Sec. 95 of the Motor Vehicles Act and the policy in force their liability in any event is limited to the extent of Rs. 50,000 in all both in respect of this Claim Petition as well as other Claim Petition filed in the same Tribunal on account of the same accident being Claim Petition Nos. 22-23/76 filed in the Tribunal on account of the same accident."

The Tribunal answered both the issues in favour of the insurance company observing that at the time of the accident the vehicle was being driven by appellant No. 2, the partner of the firm, which was the owner of the vehicle and as the driver did not produce his driving licence, it must be held that the driver did not have a valid driving licence. The Tribunal therefore, concluded that in the absence of a valid driving licence, there was a breach of the contract of insurance and the insurance company was absolved from the liability under the policy of insurance.

The firm and its partner preferred two appeals before

the Panaji Bench (Goa) of the High Court of Bombay.A Division Bench of the High Court agreed with the findings of the Tribunal and dismissed the appeals. Hence these appeals by special leave.

The scope of the appeals is very limited. The appeals are by the firm, owner of the vehicle which was involved in the accident and one of its partner who it was alleged was shown to be driving the vehicle at the time of the accident and while granting leave it was limited to the question: whether both the Tribunal and the High Court were justified in holding that the insurance company was not liable to satisfy the award under the contracts of insurance.

The undisputed facts are that the pick-up van-motor vehicle bearing No. GDT-9510 belongs to the first appellant-firm, and

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the second appellant is the partner of the firm. This vehicle was involved in an accident that occurred on May 17, 1976 at around 10.30 a.m. There is a concurrent finding that the vehicle was driven rashly and negligently by the partner who was then driving the vehicle and that in this accident, Sita and Ida suffered injuries. Ida's injuries proved fatal. The amount of the compensation awarded in both the petitions is no more open to dispute. The question is whether the insurance company under the contract of insurance is liable to satisfy the award ?

Before the Tribunal and the High Court, it was contended on behalf of the appellants that at the relevant time, it was not appellant No. 2 but one Pandu Lotlikar, who was respondent No. 4 before the Tribunal was driving the vehicle. It has been concurrently found that it was appellant No. 2 who was driving the vehicle. The concurrent finding must be accepted as correct.

Appellant No. 2 is none other than the partner of the first appellant-firm which is the owner of the vehicle. The High Court has extracted a term in the schedule of the policy of insurance pertaining to the pick-up van which may be reproduced from the judgment of the High Court.

"Driver: Any of the following;

(a) (deleted in type)

(b) any other person provided he is in the Insured's employ and is driving on his order or with his permission.

Provided that the person driving holds a licence to drive the Motor Vehicle or has held and is not disqualified for holding or obtaining such a licence."

We have reproduced this term from the judgment of the High Court because the learned counsel for the insurance company did not have a copy of the policy of the insurance nor the one was shown from the record. Of course, the Tribunal records that the vehicle was insured as a private carrier and this was culled out from the claim form submitted on October 14,1976. It is produced at Ext. 37. One Jaimo Albert was examined on

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behalf of the insurance company. He was shown Ext. 29 which was identified as a copy of the policy of insurance issued by the insurance company in favour of the first appellant. He admitted that it was a comprehensive policy meaning thereby that the insurance company would be liable to satisfy the claim of damage arising out of the use of the vehicle. He does not speak of any other term of the contract of insurance.

Now would the insurance company be discharged from the

liability under the contract of insurance if as contended by it, at the relevant time, appellant No. 2 was driving the vehicle. Appellant No. 2 is the partners of the firm. All the partners of the firm if they have a valid driving licence would be entitled to drive the vehicle. Each partner of the firm is an agent of the firm as well as the other partner as provided by Sec. 18 of the Partnership Act. Every partner is entitled to attend diligently to his duties in the conduct of the business as provided in Sec. 12 of the Partnership Act. Sec. 26 provides that where by the wrongful act or omission of a partner acting in the ordinary course of the business of a firm, or with the authority of his partners, loss or injury is caused to any third party, or any penalty is incurred, the, firm is liable therefor to the same extent as the partner.

A conspectus of these provisions shall show that where the pick-up van belonging to the firm is being driven by a partner, it can be said that it is done with the permission of the owner namely, the firm or with its implied authority.

The next question is whether the partner had a valid driving licence at the relevant time. Unfortunately, while dealing with this aspect of the case, both the Tribunal and the High Court fell into an error which resulted in giving a clean chit to the insurance company. It is admitted that this pick-up van could be used as a private carrier. It is also admitted that the insurance company had issued a comprehensive insurance policy in respect of this van and at the relevant time it was in force. '

It is contended on behalf of the insurance company that the second appellant did not have a valid driving licence. It is the insurance company which complains that there has been a breach of one of the important terms of the contract of insurance as evidenced by the policy of insurance (the whole of which was
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not shown to us) and that the second appellant who was shown to be driving the vehicle at the relevant time, did not have a valid driving licence to drive the pick-up van. The insurance company complains of breach of a term of contract which would permit it to disown its liability under the contract of insurance. If a breach of a term of contract permits a party to the contract to not to perform the contract, the burden is squarely on that party which complains of breach to prove that the breach has been committed by the other party to the contract. The test in such a situation would be who would fail if no evidence is led. The language and the format in which issues Nos. 7 and 8 have been cast by the Tribunal clearly casts the burden of proof on the insurance company. Not an iota of evidence has been led by the insurance company to show that the second appellant did not have a valid driving licence to drive the vehicle. Mr. J. Sharma, learned counsel who appeared for the appellant urged that a question was asked in the cross-examination of the second appellant whether he would produce his driving licence, and that as he failed to produce the same an adverse inference must be drawn against him that he did not have a valid driving licence. The High Court has recorded a finding in this behalf which may first be extracted in its own words:

> "Mr. Cardoso's contention proceeds on a misreading of clause (b) indented above, which brings to the forefront that the person driving the vehicle must be 'in the insurer's employ' and further, being in such employment was driving the vehicle on the order of the insurer or with his permission. In this case, the very

first premise is missing for the simple reason it is not even the second P appellant's case that he was every in the employment of the first appellant firm but was at all material times a partner thereof. Even if the first appellant held a valid driving licence, clause (b) would not absolve him from liability for payment, if the van had been driven by him at the relevant time."

The High Court took no notice of the fact that the van belonged to the firm and every partner for that reason would be the owner of the property of the firm because the firm is not a legal entity in the sense in which the company under the Com-
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panies Act has a juristic personality. Firm is a compendious name for the partners. And the High Court limited its enquiry to ascertain whether the first part of the condition is satisfied viz. whether the driver was in the employ of the insurer. It completely overlooked the second clause that the driver appellant No. 2 was driving with the permission of the insured, the firm in this case. Two clauses are disjointed by a disjunctives 'or'. On a proper analysis and interpretation of the term of contract of insurance, the insurance company cannot escape the liability if (a) the insured himself was driving the vehicle or (b) the driver is in the employment of the insurer and is driving on the order of the insurer or (c) he is driving with his permission. The words with his permission does not qualify the expression 'is in the insurer's employ'. The clause can be properly read thus: 'any other person with insurer's permission.' This ought to be so because a friend can always be permitted if he has a valid driving licence to drive a friend's car. If in every such situation where the person driving the vehicle is not shown to be the insurer himself or someone in his employment, the contract of insurance would afford no protection and the insurance company having collected the premium would wriggle out of a loophole. Therefore the proper construction of this condition must be to read it as stated hereinbefore.

Approaching the matter from this angle, if appellant No. 2 was driving the vehicle belonging to the firm, it can be said to be by the insurer itself or with its permission.

The last question is whether he had a valid driving licence. The High Court has not recorded a clear cut finding on this point. The finding of the Tribunal is more evasive then the one by the High Court. Mr. Sharma did not dispute that the second appellant had driving licence. His grievance is that he having failed to produce the same when called upon to do so in the cross examination, an adverse inference be drawn against him that he did not have a valid licence to drive a pick-up van. The submission fails to carry conviction with us. The burden to prove that there was breach of the contract of insurance was squarely placed on the shoulders of the insurance company. It could not be said to have been discharged by it by a mere question in cross-examination. The second appellant was under no obligation to furnish evidence so as to enable the insurance company to wriggle out its
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liability under the contract of insurance. Further the R.T. which issues the driving licence keeps a record of the licences issued and renewed by it. The insurance company could have got the evidence produced to substantiate his allegation. Applying the test who would fail if no evidence is led, the obvious answer the insurance company.

To some up of insurance company failed to prove that there was a breach of the term of the contract of insurance as evidenced by the policy of insurance on the ground that the driver who was driving the vehicle at the relevant time did not have a valid driving licence. Once the insurance company failed to prove that aspect, its liability under the contract of insurance remains intact and unhampered and it was bound to satisfy the award under the comprehensive policy of insurance.

Accordingly, both these appeals must succeed and are partly allowed. The award of the Tribunal as well as the judgment of the High Court are modified directing the Oriental Fire and General Insurance Co. Ltd. to satisfy the award with interest at 12 percent from the date of the accident till payment, and full costs in favour of the original claimants. The full payment to satisfy the award shall be made within a period of two moths from today.

A.P.J. Appeals allowed.

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