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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 20th September, 2012

+ **MAC. APP. No.286/2009**

KSK ACADEMY

..... Appellant

Through: Ms. Shilpa Chauhan with Mr. Jitender
Chaudhary, Advocates.

Versus

THE ORIENTAL INSURANCE CO. LTD. & ORS Respondents

Through: Mr. Pankaj Seth, Advocate for the
Respondent No.1 Insurance Company.

CORAM:

HON'BLE MR. JUSTICE G.P.MITTAL

J U D G M E N T

G. P. MITTAL, J. (ORAL)

1. The KSK Academy owner of vehicle No.DL-1PB-7165 involved in the accident impugns a judgment dated 30.07.2008 passed by the Motor Accident Claims Tribunal(the Claims Tribunal) whereby while awarding a compensation of ₹1,80,000/- in favour of the Claimants, the Claims Tribunal held that the Appellant committed breach of the terms of policy. Thus, while making the Insurance Company liable to pay the compensation in the first instance the Claims Tribunal granted recovery rights to it against the Appellant.
2. There is twin challenge to the finding. It is urged that onus to prove the terms of policy was on the Respondent Insurance Company. The Appellant while engaging the Respondent No.2 as the driver of the

vehicle, presumed the driving licence produced by the Appellant as genuine, conducted a driving test and was satisfied about the driving skills. The driver was found to be sufficiently experienced, and in the circumstances, the Appellant did not commit any willful breach of the terms of the policy. Thus, recovery rights against the Appellant could not have been granted. In the alternative, it is urged that the recovery rights were granted only against the Appellant but since the Respondent No.2 was the principal tortfeasor, he would equally be liable to reimburse the compensation to the Respondent Insurance Company.

3. The learned counsel for the Appellant heavily relies on para 20 of the report in *United India Insurance Company Ltd. v. Lehu & Ors.*, (2003) 3 SCC 338, which is extracted hereunder:

“20. 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, Sohan Lal Passi and Kamla cases. We are in full agreement with the views expressed therein and see no reason to take a different view.”

4. The Claims Tribunal while dealing with the apportionment of liability held as under:

“12. Learned counsel for respondent No.1 has examined Sh. Shyam Narain from Licensing Authority Moradabad and Sh. G.K. Aggarwal as RIW1 and RIW2 respectively. RIW1 produced the register of licenses issued from 19.5.2001 to 22.5.2001 and testified that licence No.7490/T/MBD/2001 dated 20.5.2001 in the name of Shatrughan Maurya s/o Som Nath Maurya, r/o Village Singpur Sali Sambal, Moradabad

had not been issued by the Licensing Authority Moradabad. He further testified that the Licensing Authority had issued licences No.1114/TPT/2001 to 1128/TPT/2001 from 19.5.2001 to 22.5.2001. Copy of licences issued are Exhibit R1W1 (collectively). (original seen and returned). He deposed that license no.7490/T/MBD/2001 was fake. The report on the said licence is Exhibit R1W1/3. R1W2 produced the certified copies and policy of offending vehicle which Exhibit R1W2/1. He testified that the license, the certificate copy of which is Exhibit PW R1W1/2 was got verified from Licensing Authority, Moradabad. The receipt of payment of ₹100/- with the authority letter is Exhibit R1W2/1. The report of Licensing Authority dated 29.6.2007 is Exhibit R1W2/3. He further testified that a notice was issued by their counsel to the owner and driver u/o 12 Rule 8 CPC, copy of which is Exhibit R1W2/4. The postal receipts are Exhibit R1W2/5 and 6 and UPC receipt is Exhibit R1W2/7. He also testified that the license was fake and thus the owner had violated the terms and conditions of the insurance policy. The testimony of R1W1 and R1W2 remained unrebutted. From the testimony of both the respondents witnesses and the record produced by them, it has been sufficiently established that the license of respondent No.3, certified copy of which is Exhibit R1W2/2 was fake and not issued by Moradabad Licensing Authority. Thus there is violation of driving clause of the policy, certified copy of which Exhibit R1W2/1. Further, as respondent No.1 and 2 did not appear in the court despite of notice u/o 12 Rule 8 CPC sent by registered post as well as UPC, an advance inference is drawn against them. Though respondent No.1 has sufficiently proved the violation of terms and conditions of the insurance policy, being the insurer, it is not exonerated from its liability to pay the compensation. Respondent No.1 is therefore directed to deposit the award liable to pay interest at a rate of 12% per annum for the period of delay. In view of violation of terms and conditions, respondent No.1 is at liberty to recover the compensation amount from respondent No.2 by initiating the execution proceedings.”

5. Thus, it is evident that the Respondent Insurance Company did whatever was in its power by serving a notice under Order XII Rule 8 CPC to the

Appellant to come forward with the driving licence of the driver. It summoned the record from the Transport Authority and proved that the licence which was placed on record by the Claimants was fake. In the circumstances, the initial onus placed on the Insurance Company was discharged. The appellant preferred not to contest the proceedings and was ordered to be proceeded *ex parte*. The fact that the Appellant saw the driving licence at the time of engaging the driver, conducted his driving test and was satisfied about his driving skills were in the Appellant's special knowledge and these were required to be proved by the Appellant. I am supported by the judgment of the Learned Single Judge of this Court in *New India Assurance Company Ltd. v. Sanjay Kumar & Ors.*, ILR (2007) 11 Delhi 733, wherein it is held as under:

“23. Where the assured chooses to run away from the battle i.e. fails to defend the allegation of having breach the terms of the insurance policy by opting not to defend the proceedings, a presumption could be drawn that he has done so because of the fact that he has no case to defend. It is trite that a party in possession of best evidence, if he withholds the same, an adverse inference can be drawn against him that had the evidence been produced, the same would have been against said person. As knowledge is personal to the person possessed of the knowledge, his absence at the trial would entitle the insurance company to a presumption against the owner.

24. That apart, what more can the insurance company do other than to serve a notice under Order 12 Rule 8 of the Code of Civil Procedure calling upon the owner as well as the driver to produce a valid driving licence. If during trial such a notice is served and proved to be served, non response by the owner and the driver would fortify the case of the insurance company.”

6. In the circumstances, the Respondent Insurance Company proved conscious and willful breach of the terms of the policy and was entitled to recovery rights.
7. It is true that the Respondent No.2 Shatrughan being driver of the offending vehicle was a principal tortfeasor. Thus, apart from the Appellant, the Respondent No.2 was also liable to reimburse the compensation paid by the Respondent No.1 Insurance Company. It is, therefore, directed that the Respondent No.1 Oriental Insurance Company Ltd. shall be entitled to recover the compensation from the Appellant as also from the Respondent No.2, the driver of the offending vehicle.
8. Statutory amount of ₹25,000/- shall be paid to the Respondent No.1 Oriental Insurance Company Ltd.
9. A recovery certificate of ₹2,16,229/- was issued against the Appellant in execution of the judgment. The execution of the award against the Appellant was stayed subject to the deposit of a sum of ₹1,80,000/-. In the circumstances, balance amount shall be released in favour of the Respondent No.1 Oriental Insurance Company Ltd. and it shall be entitled to recover the balance compensation in accordance with law.
10. The Appeal is allowed in above terms.
11. Pending Applications stand disposed of.

(G.P. MITTAL)
JUDGE

SEPTEMBER 20, 2012
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