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

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Judgment delivered on: 10th October, 2013

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MAC.APP. 258/2012

NEW INDIA ASSURANCE CO LTD.

..... Appellant

Represented by: Mr.L.K.Tyagi, Advocate.

Versus

DILAWAR @ MUKHTAR & ORS.

..... Respondents

Represented by: None.

CORAM:

HON'BLE MR. JUSTICE SURESH KAIT

SURESH KAIT, J. (Oral)

MAC.APP. 258/2012

1. Despite service, none is appearing on behalf of the respondent Nos.2 to 4, therefore, this Court is compelled to proceed with the matter.
2. The present appeal has been filed by the appellant/Insurance Company assailing the award dated 04.01.2012, whereby the learned Tribunal has awarded a compensation of Rs.1,70,046/- along with interest at the rate of 7.5% *per annum*.
3. The sole ground argued by the learned counsel for the appellant/Insurance Company is that the respondent No.2/driver of the

offending vehicle was not holding valid driving licence and the appellant/Insurance Company had issued a notice under Order XII Rule 8 of the Code of Civil Procedure, 1908 to him to produce the same, however, he failed to do so. Moreover, the police had filed a charge sheet in a criminal case, wherein the respondent No.2/driver was charged under Sections 3/181 of the Motor Vehicles Act, 1988 (for short 'MV Act'). Fact remains that the respondent No.2/driver neither produced the driving licence before the police nor before the learned Tribunal. Thus, it is proved that he was not holding driving licence on the date of accident.

4. Learned counsel submits that the learned Tribunal has wrongly relied upon a case bearing MAC App. No. 139/07 titled as ***Deepak Kumar vs. National Insurance Co. Ltd.*** decided by this Court on 07.02.2008, wherein it was held as under:-

“ It is the settled legal position that it is for the insurer to produce evidence on record and to satisfy the Tribunal that there is a willful breach of the terms and conditions of the policy by the insured. The Apex Court has already taken a view that there mere absence, fake or invalid driving licence or disqualification of the driver for driving the vehicle at the relevant time are not in themselves defences available to the insurer against either the insured or the third parties and to avoid its liability towards the insured, the insurer has to prove on record that there was negligence on the part of the insured in fulfilling the terms there was negligence on the parties of the insured in fulfilling the terms and conditions of the policy and the insured has failed to exercise reasonable care in the matter of fulfilling such conditions. Merely because the driver was challaned under Sections 3/181 of the M.V. Act in itself would not be suffice to prove that the driver of the offending vehicle

was not having a valid driving license. May be on the relevant date of the accident the driver might not have been found in possession of the licence which could have invited his prosecution lead to an inference that the driver was not having a valid driving licence at all.”

He submits that in the aforesaid case the Insurance Company had not issued any notice under Order XII Rule 8 CPC, however, in the present case, the notice was issued to the driver by the appellant, which fact is proved by R3W1/Sh.N.K.Saxena, Assistant of the Insurance Company.

5. It is proved that R3W1 sent the notice under Order XII Rule 8 CPC to the respondent No.2/driver, however, he did not produce the driving licence. The police had filed a challan under Sections 3/181 of MV Act in a criminal case which proves that the respondent No.2/driver did not have any driving licence on the date of the accident, i.e., 27.07.2007. The learned Tribunal has wrongly relied upon the case of **Deepak Kumar** (*supra*) for the reason, in the case in hand, the appellant/Insurance Company made efforts by sending notice under Order XII Rule 8 CPC to the respondent No.2/driver of the offending vehicle for producing his driving licence so that they can lead evidence regarding thereto. However, he failed to produce driving licence.

6. Vide the instant appeal, the appellant seeks exoneration from any liability. A similar issue came before this Court in a case titled as **Santosh Chabra & Ors. vs. Abhishek Gureja & Ors.** in MAC Appeal No.805/2010 decided on 04.10.2013, wherein held as under:-

“21. Law is settled on the issue of no licence, fake licence or

invalid driving licence in the case of New India Insurance Company Ltd. v. Darshana Devi 2008 ACJ 1388. The offending vehicle at the time of accident was being driven by son of the owner of the vehicle, who was not holding any licence to drive the same. Ld. Tribunal, while awarding the compensation held that the amount shall be payable by the insurer initially, however, the insurer will be at liberty to recover the same from the owner of the offending vehicle. The award passed by Ld. Tribunal was challenged by the Insurance Company, same was affirmed by the High Court and also upheld by the Supreme Court.

22. In *New India Assurance Co. Ltd. v. Kamla and Ors. etc.* 2001 ACJ 843, wherein it is held as under:

“The position can be summed up thus: The insurer and insured are bound by the conditions enumerated in the policy and the insurer is not liable to the insured if there is violation of any policy condition. But the insurer who is made statutorily liable to pay compensation to third parties on account of the certificate of insurance issued shall be entitled to recover from the insured the amount paid to the third parties, if there was any breach of policy conditions on account of the vehicle being driven without a valid driving licence..”

23. In *National Insurance Co. Ltd. v. Swarn Singh*, 2004 ACJ 1 while deciding the issue of driving licence, the Apex Court has held as under:

“(iii) The breach of policy condition e.g., disqualification of driver or invalid driving licence of the driver, as contained in sub-section (2)(a)(ii) of section 149, have to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence 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 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 duly licensed driver or one who was not disqualified to drive at the relevant time. (iv) The insurance companies are, 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.

In V. Mepheron vs. Shiv Charan Singh [1998 ACJ 601 (Del.)], the the owner of the vehicle was held not to be guilty of violating the condition of policy by willfully permitting his son to drive the car who had no driving licence at the time of accident. In that case, it was held that the owner and insurer both were jointly and severally liable.”

24. In *Oriental Insurance Co. Ltd. v. Rakesh Kumar & Ors.*, 2012, ACJ, 1268, the Coordinate Bench of this court in Para 44 has held as under:

“44. (ii) Even when there is a willful breach of the terms of the policy under Section [149 \(2\) \(a\)](#) of the Act, the Insurance Company is under obligation to indemnify the liability towards the third parties and recover the same from the owner.

(iii) Once the Insured proves that the driver did not hold any driving licence to drive the Class of vehicle involved in the accident or that the driving licence was fake; requires the owner and driver to produce the driving licence and if they failed to produce the same, the onus of proving breach of policy would be deemed to be discharged. Onus would then shift on the owner to

establish that he was not guilty of breach of the terms of policy. In the absence of any evidence being produced by the Insured, in such cases, it will be presumed that he was guilty of a willful breach. The Insured in such cases, would be entitled to recover the compensation paid to third party in discharge of its statutory liability.

(iv) Where policy is avoided on proof or facts which renders the Insurance policy void under Section 149 (2) (b) of the Act, the Insurance Company would not be under obligation to pay even to third parties, as in such cases the contract of insurance is non est.”

25. No doubt, the respondent no. 3 / insurance company successfully proved that there was breach of terms and conditions of the policy, mere breach of the conditions of the policy would not entitle the insurance company to avoid its liability against the insured.

26. In the present case, the offending vehicle is admittedly an insured vehicle, limited to the terms of the policy of insurance, the insurance company is duty bound to take over the contractual liability of the assured and pay the sum awarded to the claimants by the Ld. Tribunal.

27. The provisions of sub-section 4 and 5 of the Section 149 of Motor Vehicles Act, 1988 may be considered as to the liability of the insurer to satisfy the decree at the first instance.”

7. In the instant case, admittedly, the offending vehicle was insured at the time of the accident, therefore, the Insurance Company is contractually liable to pay the compensation to the claimants at the first instance and recover the same from the owner of the offending vehicle.

8. Therefore, keeping in view the settled law and the facts and circumstances of the case, it is established that the driver of the offending

vehicle was not having licence strictly in terms of Section 10 (2) (a) and (b) of MV Act. Therefore, the appellant is entitled for recovery and accordingly recovery rights are given in favour of the appellant and against the respondent Nos. 2 to 4.

9. Vide impugned award dated 04.01.2012, the learned Tribunal has held liable the respondent Nos. 2 to 4, i.e., driver, registered owner and the insured owner of the offending vehicle.

10. In view of the above discussion, I am of the considered opinion that the appellant/Insurance Company has made out a good case for grant of recovery rights in its favour.

11. Accordingly, I grant recovery rights in favour of the appellant/Insurance Company and against the respondent Nos.2 to 4.

12. With disposal of instant appeal, Vide order dated 13.03.2012, this Court stayed the execution of the impugned award subject to appellant's/Insurance Company's depositing award amount with proportionate interest with the Registrar General of this Court and thereafter, vide order dated 11.02.2013, 50% of the awarded amount was released in favour of the respondent No.1/injured.

13. Consequently, the Registrar General of this Court is directed to release the balance compensation amount with upto date interest accrued thereon in favour of the respondent No.1/Injured on taking necessary steps by him.

14. Statutory deposit of Rs.25,000/- shall be released in favour of the appellant/Insurance Company.

15. In view of the above, the instant appeal is allowed.

CM No.4504/2012 (for stay)

With the disposal of the appeal itself, this application has become *infructuous*. The same is accordingly dismissed.

SURESH KAIT, J.

OCTOBER 10, 2013

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