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

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Judgment delivered on: 11th July, 2013

+ **MAC.APP. No. 754/2010 & CM No. 20240/2010 (for stay)**

ORIENTAL INSURANCE COMPANY LTD. Appellant
Through: Ms. Neerja Sachdeva, Advocate.

Versus

ISTKAR & ORS. Respondents
Through: Ms. Sunanda Roy and Ms. Manjeet
Chawla, Advocates for Respondent
No.1.
Mr. Ashwani Tyagi, Advocate for
Respondent No.3.

CORAM:
HON'BLE MR. JUSTICE SURESH KAIT

SURESH KAIT, J. (Oral)

MAC.APP. No. 754/2010

1. Vide the instant appeal, the appellant/Insurance Company has challenged the award dated 17.07.2010, whereby the learned Tribunal has granted the compensation in favour of the respondents/claimants as under:-

a)	<i>Pain & suffering</i>	:	<i>Rs.10,000/-</i>
b)	<i>Loss of amenities & disfigurement</i>	:	<i>Rs.25,000/-</i>
c)	<i>Actual medical expenses</i>	:	<i>Rs. 768/-</i>
d)	<i>Reasonable medical expenses in absence of bills</i>	:	<i>Rs. 5,000/-</i>
e)	<i>Loss in earning due to injury</i>	:	<i>Rs. 3200/-</i>

	(one month)		
f)	Loss in earning capacity due to disability	:	Rs.34,560/-
g)	Special diet + conveyance	:	Rs 5,000/-
Total =			Rs.83,528/-

The said total sum is rounded off to Rs.84,000/- which shall be the just compensation.”

2. Learned counsel appearing on behalf of the appellant/Insurance Company has argued only on the ground that the driver of the offending vehicle was having fake driving licence and it is a case of breach of the terms of the policy, therefore, the appellant/Insurance Company is not liable to pay any compensation. She further submitted that when there is a breach of terms of policy, then they have to be exonerated fully and if not, the appellant company should have been granted recovery rights against the owner of the offending vehicle.

3. Learned counsel has submitted that the appellant/Insurance Company has filed an application under Order XVI Rule 7A read with Section 151 CPC for calling witness from the concerned District Transport Office of Motihari, Muzaffarpur, Bihar along with complete record of driving licence No.716/98 in the name of Lal Saheb.

4. Thus, they tried their level best to call the witness, however, none appeared from the said authority, therefore, they could not prove the fact that the driver was having fake driving licence. In the eventuality, they had placed the report on record from the said authority, the learned Tribunal should have relied upon the report, wherein it is clearly mentioned that the

driving licence in question was fake and not issued in the name of Lal Saheb, i.e., alleged driver of the offending vehicle.

5. On the other hand, learned counsel appearing on behalf of the respondents/claimants submitted that the learned Tribunal had given numerous opportunities to the appellant/Insurance Company despite that they did not examine any witness from the concerned authority to prove the fact that the driving licence of the driver was fake. Finally, on 26.05.2010, as learned counsel for the appellant had stated before the learned Tribunal that she would not lead any evidence, therefore, the evidence of the appellant/Insurance Company was closed by the learned Tribunal.

6. On considering the documents and the evidence adduced by the appellant/Insurance Company, it is recorded by the learned Tribunal that the appellant being the Insurer admitted the policy but insisted for recovery rights on the ground that the driving licence of the respondent No. 2 was fake.

7. However, the appellant/Insurance Company did not lead any evidence on this point which could prove that the driving licence of the driver was fake. Moreover, they failed to summon any witness from the concerned authority to prove this fact.

8. Learned Tribunal further recorded that there being no evidence of violation of the policy condition and there being no evidence to support the permitted defence under Section 149(2) of the M.V. Act, thus, the terms of the policy deemed to be accepted.

9. Learned counsel for the respondents/claimants has relied upon a case of *National Insurance Co. Ltd. Vs. Swaran Singh & Ors., 2004 ACJ I (SC)* and submitted that onus is upon the Insurer to prove the violation of the

insurance policy, therefore, the appellant being the Insurer of the offending vehicle is rightly held liable to pay compensation.

10. The Apex Court in ***Swaran Singh*** (*supra*) has held as under:-

“60. In *MacGillivray on Insurance Law* it is stated:

"25-82 Burden of Proof: Difficulties may arise in connection with the burden of proving that the facts of any particular case fall within this exception. The usual rule is that once the assured has proved that the case comes within the general risk, it is for the insurers to prove that it comes within an exception. It has therefore been suggested in some American decisions that, where the insurers prove only that the assured exposed himself to danger and there is no evidence to show why he did so, they cannot succeed, because they have not proved that this behavior was voluntary or that the danger was unnecessary. Since an extremely heavy burden is imposed on the insurers if they have to prove the state of mind of the assured, it has been suggested in Canadian decisions that the court should presume that the assured acted voluntarily and that, where he does an apparently dangerous and foolish act, such danger was unnecessary, until the contrary is shown. In practical terms, therefore, the onus does in fact lie on the claimant to explain the conduct of the assured where there is not apparent reason for exposing himself to an obvious danger."

61. In *Rukmani and Ors. v. New India Assurance Co. Ltd. and Ors.*: (1998)9SCC160, this Court while upholding the defences available to the insurer to the effect that vehicle in question was not being driven by a person holding a licence, held that the burden of the insurer would not be discharged when the evidence which was brought on record was that the Inspector of Police in his examination in chief merely stated, "My enquiry revealed that the respondent No. 1 did not produce the licence to drive the

abovesaid scooter. The respondent No. 1 even after my demand did not submit the licence since he was not having it.

62. *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, (See Sohan Lal Passi (supra))*

63. *Apart from The above, we do not intend to lay down anything further i.e. degree of proof which would satisfy the above mentioned requirement inasmuch as the same would indisputably depend upon the facts and circumstances of each case. It will also depend upon the terms of contract of insurance. Each case may pose different problem which must be resolved having to a large number of factors governing the case including conduct of parties as regard duty to inform, correct disclosure, suppression, fraud on the insurer etc. It will also depend upon the fact as to who is the owner of the vehicle and the circumstances in which the vehicle was being driven by a person having no valid and effective licence. No hard and fast rule can therefore be laid down. If in a given case there exists sufficient material to draw an adverse inference against either the insurer or the insured, the Tribunal may do so. The parties alleging breach must be held to have succeeded in establishing the breach of conditions of contract of insurance on the part of the insurer by discharging its burden of proof. The Tribunal, there cannot be any doubt, must arrive at a finding on the basis of the materials available on records.”*

11. Admittedly, the appellant/Insurance Company did not examine any of the witness, thus the issue of the fake driving licence has not been established. Therefore, the appellant is neither entitled to be exonerated from any liability nor entitled for any recovery rights. Hence, the learned

Tribunal has rightly fastened the liability on the appellant/Insurance Company.

12. Moreover, no application has been moved before this Court for leading additional evidence to prove the fact that the driving licence issued to respondent No. 2 was fake. Therefore, in view of the above, I do not find any discrepancy in the award passed by the learned Tribunal.

13. Pursuant to order dated 16.11.2010, the entire awarded amount along with upto date interest has been deposited with the Registrar General of this Court. Vide order dated 23.04.2012, 50% of the awarded amount was directed to be released in favour of the respondent No.1/claimant.

14. Accordingly, the Registrar General of this Court is directed to release the balance amount with upto date interest accrued thereon in favour of the respondent No.1/claimant in terms of the award dated 17.07.2010 passed by the learned Tribunal.

15. Needless to state that if the aforesaid 50% of the awarded amount directed to be released by this Court vide order dated 23.04.2012 has not been released, the said amount shall be released with interest accrued thereon and rest of the amount shall be released in terms of order dated 17.07.2010, as aforesaid.

16. The appeal is dismissed with no order as to costs.

17. The Registry of this Court is directed to refund the statutory amount in favour of the appellant/Insurance Company.

CM No. 20240/2010 (for stay)

With the dismissal of the appeal itself, the instant application has become *infructuous*. The same is disposed of accordingly.

SURESH KAIT, J.

JULY 11, 2013

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