IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Date of decision:12.08.2015.

(1) FAO No.1408 of 1993

Rani Devi and another ... Appellants.

Versus

Baljit Singh and others ... Respondents.

(2) FAO No.1409 of 1993

Kumba Ram ... Appellant.

Versus

Baljit Singh and others ...Respondents.

Present: Mr. Kamal Sharma, Advocate, *Amicus Curiae*,
for the appellant(s) in both the appeals.

Mr. Pardeep Goyal, Advocate for respondent No.3 -
M/s United India Insurance Company Limited.

Mr. R.C. Kapoor, Advocate for respondent No.6 -
New India Assurance Company Limited.

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S.S. Saron, J.

Mr. Kamal Sharma, Advocate for the appellants submits that earlier he was appearing for the appellants in both the appeals. However, he received a message from his clients that they have already engaged another counsel. Today, no other counsel is present on behalf of the appellants.

In the circumstances, Mr. Kamal Sharma, Advocate is appointed as *amicus curiae* for the appellants.

Heard learned counsel for the parties.

This order will dispose of FAO No.1408 of 1993 and FAO No.1409 of 1993, as these arise out of the same judgment and award dated 24.07.1993 passed by the learned Motor Accident Claims Tribunal ('Tribunal' - for short), Kurukshetra.

The paper-books in the cases were burnt in a fire that occurred in the High Court premises. It has been reconstructed by the office by photocopying the paper book from the salvaged records of the partially burnt case. The evidence and other record is not available. The facts are taken from the judgment and award passed by the learned Tribunal at Kurukshetra.

Rani Devi and Jangiri Ram alias Jagir Mal (appellants in FAO No.1408 of 1993) are the widow and father respectively of Sh. Girdhari Lal, who is the deceased in the present case and died in a motor vehicle accident that occurred between a jeep and a truck. Compensation of Rs.1,44,000/- has been awarded to Rani Devi and out of this amount, Rs.10,000/- has been awarded to Jangiri Ram alias Jagir Mal. In this manner, Rs.1,34,000/- has been awarded to Rani Devi and Rs.10,000/- to Jangiri Ram alias Jagir Mal. They are aggrieved against the inadequate compensation awarded by the learned Tribunal for the demise of Girdhari Lal and have filed the appeal claiming more compensation.

Kumba Ram (appellant in FAO No.1409 of 1993) was a servant of Girdhari Lal (deceased). He was hurt in the same accident that had occurred. Aggrieved against the less compensation granted to him for the injuries that he suffered, he has also filed an appeal.

Three claim petitions were filed before the learned Tribunal at Kurukshetra. Rani Devi and Jangiri Ram alias Jagir Mal filed MACT No.79 of 1991; Kumba Ram filed MACT No.80 of 1991 and Kulwant Singh son of Shri Kundan Singh filed MACT No.128 of 1992. Kulwant Singh is not an appellant in these appeals.

An accident occurred between a Jeep with registration No.PJB-8782 and truck No.DIL-3411. The jeep was being driven by Kulwant Singh (petitioner in MACT No.128 of 1992 and respondent No.4 in both the appeals filed by Rani Devi and another as also Kumba Ram). The truck was being driven by Baljit Singh (respondent No.1 in both the appeals). The accident occurred at about 12:30 a.m. during the intervening night of 28/29.12.1990. In the said accident, Girdhari Lal, the husband of Rani Devi and son of Jangiri Ram alias Jagir Mal (appellants) suffered fatal injuries; besides, Kulwant Singh and Kumba Ram suffered multiple injuries.

Baljit Singh, driver (respondent No.1) and MSD Carriers, owner (respondent No.2) of the offending truck bearing registration No.DIL-3411 have remained un-served in the appeals. Their presence, however, would not be necessary as the offending truck No.DIL-3411 was insured with M/s United India Insurance Company Limited, Ludhiana ('Insurance Company' - for short) (respondent No.3).

According to the learned counsel appearing for the Insurance Company (respondent No.3); the driver of the offending truck No.DIL-3411 Baljit Singh (respondent No.1), did not have a valid driving license. Therefore, the Insurance Company (respondent No.3) would be absolved of its liability to pay any compensation.

The accident in the present case, as already noticed, occurred during the intervening night of 28/29.12.1990 at about 12:30 a.m. Jeep with registration No.PJB-8782 was being driven by Kulwant Singh (respondent No.4 in both the appeals). It was coming from Yamuna Nagar and was on its way to Sardulgarh in District Bhatinda in Punjab. Girdhari Lal (deceased in the case), husband of Rani Devi (appellant No.1 in FAO No.1408 of 1993) and Kumba Ram (appellant in FAO No.1409 of 1993) who was a servant with him, were in the said Jeep. As the Jeep reached the Pipli crossing, the offending truck No.DIL-3411 driven by Baljit Singh (respondent No.1) came from Ambala side. It was moving on the National Highway and was being driven in a rash and negligent manner. The offending truck No. DIL-3411 came on the wrong side of the road and struck against the Jeep which was being driven at a slow speed by Kulwant Singh (respondent No.4). As a result of the accident, Girdhari Lal received fatal injuries, while Kulwant Singh and Kumba Ram (appellant in FAO No.1409 of 1993) received multiple injuries. It was alleged by the claimants that the accident had been caused due to the rash and negligent driving of Baljit Singh (respondent No.1) driver of the offending truck.

Baljit Singh (respondent No.1) and MSD Carriers, driver and owner of the offending truck No.DIL–3411, however, stated that the accident in fact occurred because Kulwant Singh (respondent No.4), driver of Jeep No.PJB-8782, was driving his jeep in a rash and negligent manner.

The FIR in the case was registered on the statement of Kumba Ram (appellant in FAO No.1409 of 1993). The learned Tribunal at Kurukshetra considered the issue whether the accident took place because of the rash and negligent driving by Baljit Singh, driver of the offending truck No.DIL 3411, or by Kulwant Singh, driver of the Jeep No.PJB-8782. It was held that Baljit Singh (respondent No.1), driver of the offending truck, was guilty of rash and negligent driving and the issue was decided accordingly in favour of the claimants. There is no appeal by Baljit Singh (respondent No.1) or MSD Carriers (respondent No.2) to the said finding as regard the rash and negligent driving of Baljeet Singh (respondent No.1), driver of the offending truck.

The issue that is involved in the appeals is regarding the payment of more compensation to Rani Devi and Jangiri Ram alias Jagir Mal, who are the widow and the father respectively of the deceased Girdhari Lal; besides, the amount of compensation payable to Kumba Ram (appellant in FAO No.1409 of 1993) who was servant and was injured in the accident.

The learned Tribunal assessed the loss of dependency to the estate of Girdhari Lal (deceased) at Rs.9,000/- per annum. Income tax returns of Girdhari Lal for the period 01.04.1988 to 31.03.1989; 01.04.1989 to 31.03.1990 and 01.04.1990 to 28.12.1990 Ex.P1, Ex.P2 and Ex.P3 respectively were noticed. The learned counsel for the Insurance Company (respondent No.3) had submitted that these returns were filed subsequent to the death of Girdhari Lal (deceased) so as to inflate his income.

The learned Tribunal at Kurukshetra noticed that Girdhari Lal (deceased) during the period 01.04.1988 to 31.03.1989 was shown to have earned net profit of Rs.18,000/- and the withdrawals were Rs.4168.88 p. His total capital was shown to be Rs.62,097.69 paise. He paid income tax of Rs.550/-. In the next year i.e. 01.04.1989 to 31.03.1990, his profits were shown to be Rs.15,124.15 paise and the withdrawals were Rs.6,320/-. In respect of the last nine months of his life from 01.04.1990 to 28.12.1990, his profits were shown to be Rs.9,807/- and withdrawals were Rs.4,885/-.

From the said documents, it was observed that Girdhari Lal (deceased) had a shop, which had an earning of Rs.12,000/- to Rs.15,000/- per annum. In the last nine months, his earnings were Rs.9,807/- and the earning per annum would work out to Rs.13,000/-. However, his withdrawals were hardly Rs.6,000/- per annum. Taking various factors into consideration, it was held by the learned Tribunal at Kurukshetra that the loss of dependency to the estate of Girdhari Lal (deceased) would be Rs.9,000/- per annum. Girdhari Lal as per postmortem report was aged 24-25 years at the time of his demise. The learned Tribunal accepted the said age and applied a multiplier of 16.

It was contended on behalf of Jangiri Ram alias Jangir Mal that he was very old. Rani Devi during her deposition before the learned Tribunal at Kurukshetra stated that her husband Girdhari Lal used to give her Rs.2,000-Rs.3,000/- per month for house hold expenses; besides, her father in law i.e. Jangiri Ram alias Jangir Mal used to get Rs.200-Rs.300/- per month from the deceased. The learned Tribunal held that the age of Jangiri Ram alias Jangir Mal, father of the deceased, had not been given and except for the bare statement of Smt. Rani Devi there was no other evidence that he was old enough and not capable of earning for himself. It was further held that at least it could be said that his dependency upon the deceased could only be taken to be marginal. Besides, Ms. Jyoti Jindal, it was observed, was the posthumous child of Girdhari Lal (deceased) and if the latter had lived, he was bound to support her. Therefore, she and Rani Devi were held entitled to compensation as per law. An award for a sum of Rs.1,44,000/- was passed in favour of Rani Devi widow of the deceased Girdhari Lal and out of this amount, Rs.10,000/- was to be paid to Jangiri Ram alias Jagir Mal.

There is no challenge by Baljit Singh, MSD Carriers and the Insurance Company (respondents No.1 to 3) to the said findings and conclusions of the learned Tribunal at Kurukshetra. In the circumstances it is to be considered as to whether Rani Devi widow of Girdhari Lal and Jangiri Ram alias Jagir Mal are entitled to more compensation than that has been awarded.

In Smt. Sarla Verma v. Delhi Transport Corporation and another, 2009 (3) RCR (Civil) 77 (S.C.), it was *inter alia* held that for grant of compensation to the legal heirs of a deceased in a motor vehicle accident, where deceased was married and number of dependent members was 2 to 3, a deduction of 1/3rd from the income was to be made towards his personal and living expenses. Besides, the multiplier to be applied was with reference to the age of the deceased. For the age group of 15 to 25 years, it was said that a multiplier of 18 should be applied.

The amount assessed by the learned Tribunal towards the loss of dependency from the estate of Girdhari Lal (deceased) taking the annual income to be about Rs.13,000/- from which a deduction of 1/3rd is to be made for personal expenses, would indeed work out to Rs.9,000/- per annum. Taking the age of the deceased to be 24/25 years, a multiplier of 18 is to be applied to the amount of Rs.9,000/-, which would work out to Rs.1,62,000/-.

In Rajesh and ors v. Rajbir Singh, 2013 (3) Law Herald 2274 (SC), it was held by Hon’ble the Supreme Court that in case of self-employed or persons with fixed wages, in case, the deceased victim was below 40 years, there must be an addition of 50% to the actual income of the deceased while computing future prospects and annual income should be income after paying the tax, if any. Therefore, adding 50% of the income of Rs.1,62,000/- i.e. Rs.81,000/-, the amount would work out to Rs.1,62,000/- + Rs.81,000/- i.e. Rs.2,43,000/-.

Learned counsel appearing of the Insurance Company (respondent No.3) has, however, submitted that with regard to the enhancement of 50%, that Hon'ble the Supreme Court in National Insurance Co. Limited v. Pushpa and others SLP (C) CC……. No.8058/2014 has vide order dated 02.07.2014 referred the matter to a Larger Bench. It is, therefore, submitted that the income of the deceased that has been assessed be not enhanced.

Hon'ble the Supreme Court in National Insurance Co. Limited v. Pushpa and others (supra) has vide order dated 02.07.2014 referred the matter regarding addition of income towards the future prospect of a deceased to a larger Bench. In the said circumstances, it would be just and proper that the payment of enhanced amount of Rs.81,000/- being 50% addition to the actual income of the deceased towards future prospects be kept in abeyance till decision of the matter by Hon'ble the Supreme Court. In case the issue is decided in the favour of the claimants holding 50% of the enhanced income is liable to be given to the claimants towards future prospects of a deceased, as held in Rajesh's case (supra), the same shall be paid to the claimants along with interest @ 7.5% per annum. Therefore, by adding the amount of Rs.81,000/- to Rs.1,62,000/-, the compensation payable works out to Rs.2,43,000/- which shall be paid to the claimants with interest @

7.5%. However, the payment of Rs.81,000/- shall be kept in abeyance till the issue is decided by Hon'ble the Supreme Court.

In Rajesh and others v. Rajbir Singh (supra), it was also held that the concept of non-pecuniary damage for loss of consortium was one of the major head of award of compensation in other parts of the world more particularly in the United States of America, Australia, etc. English Courts had also recognized the rights of spouse to get compensation even during the period of temporary disablement. By loss of consortium, it was said that the Courts had made an attempt to compensate the loss of spouse's affection, comfort, solace, companionship, society, assistance, protection, care and sexual relations during the future years. Unlike the compensation awarded in other countries and other jurisdictions, since the legal heirs were otherwise adequately compensated for the pecuniary loss, it was held that it would not be proper to award a major amount under the said head. Hence it was considered just and reasonable that the Courts award at least Rs.1.00 lac for loss of consortium. As regards funeral expenses, it was held that it would be just fair and equitable, under the head of 'Funeral Expenses', in the absence of evidence to the contrary for higher expenses, to award at least an amount of Rs.25,000/-. Rani Devi shall, therefore, also be entitled to Rs.1.00 lac as loss of consortium and Rs.25,000/- for funeral expenses. This works out to Rs.3,68,000/- payable to Rani Devi and out of this Rs.81,000/- is to be kept in abeyance subject to decision of the matter referred to a larger Bench.

As regards payment of compensation to Jangiri Ram alias Jagir Mal, learned counsel appearing for the Insurance Company objected to payment of any compensation to him stating that he being father of the deceased was not a Class I legal heir. In this regard it may be noticed that Hon'ble the Supreme Court in Manjuri Bera v. Oriental Insurance Company Limited, 2009 ACJ 1279 referred to the provisions of Section 2 (11) of the Code of Civil Procedure ('CPC' - for short) which defines 'legal representative' to mean any person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character, the person on whom the estate devolves on the death of the party so suing or sued. Reference was also made in the said case to Custodian of Branches of BANCO National Ultramarino v. Nalini Bai Naique, 1989 Supp. (2) SCC 275 wherein it was said that the definition contained in Section 2 (11) CPC was inclusive in character and its scope was wide, it was not confined to legal heirs only. Instead it stipulated that a person who may or may not be a legal heir competent to inherit the property of the deceased can represent the estate of the deceased person. It included heirs as well as persons who represent the estate even without title either as executors or administrators in possession of the estate of the deceased. All such person would be covered by the expression 'legal representative'. Reference was also made to Gujarat SRTC v. Ramanbhai Prabhatbhai, (1987) 3 SCC 234 wherein it was observed that a legal representative was one who suffered on account of death of a person due to a motor vehicle accident and need not necessarily be a wife, husband, parent and child.

Therefore, some compensation out of the compensation awarded to Rani Devi, as has been done by the learned Tribunal at Kurukshetra, is liable to be given to Jangiri Ram alias Jagir Mal as well. The learned Tribunal at Kurukshetra, out of the compensation awarded to Rani Devi, had awarded a sum of Rs.10,000/- to Jangiri Ram alias Jagir Mal. The said amount of Rs.10,000/- in the facts and circumstances is liable to be enhanced to Rs.40,000/- and is to be paid out of the compensation payable to Rani Devi for which the Insurance Company, in any case, would have no serious objection. Accordingly, from the amount of compensation that has been awarded to Rani Devi (respondent No.1), a sum of Rs.1,44,000/- awarded by the learned Tribunal, if paid to her, is to be deducted and in case it is not paid, the amount as now awarded is to be paid. Besides, Jangiri Ram alias Jagir Mal shall be paid Rs.40,000/- and in case Rs.10,000/- has been paid to him, the same shall be deducted.

The case of Kumba Ram (appellant in FAO No.1409 of 1993) may be noticed. The learned Tribunal at Kurukshetra referred to the injuries suffered by him. He was medico legally examined by Dr. B. Bhardwaj of L.N.J.P. Hospital, Kurukshetra on 29.12.1990. Four injuries were found on his person. The doctor who medico legally examined him was, however, not examined as a witness in Court to give evidence. Besides, no bill regarding medicines or any other document was produced. Kumba Ram appeared as PW2. He submitted that he suffered a fracture of hip bone, knee bone and left ankle. He also stated that he got himself treated from Dr. Bhola, a private orthopedic surgeon at Kurukshetra. He (Kumba Ram) deposed that a POP (Plaster of Paris) plaster was applied to his fracture and he remained under plaster for three months. He also stated that he had taken special diet costing about Rs.50/- per day. He claimed that he had suffered shortening of his leg and he had pain at the site of his injuries. Rani Devi (PW1) in his case deposed that he was a servant at her husband's shop and getting Rs.1200/- per month. She also stated that he was illiterate. This was also admitted by Kumba Ram himself. Rani Devi further stated that Kumba Ram used to help her husband in the sale of utensils and later even he came to help her in running the shop. She qualified her statement by stating that he was no longer a servant with her and she only paid him Rs.200/- per month when he came to her shop on the third or fourth day. According to her, he could move with the help of support because of the fracture of his leg. Kumba Ram in his cross examination stated that he did not sign any document at the shop of Girdhari Lal for receiving his salary.

The learned Tribunal in the absence of medical bills and also in the absence of the evidence of Dr. Bhola, the local orthopedic surgeon or any reliable evidence was of the view that it was difficult to accept the testimony of Kumba Ram as a gospel truth. If he had fracture of his hip bone, fracture of his leg in the middle and left ankle, he would not have been able to move as had been stated by Smt. Rani Devi (PW1). However, it was also observed that to reject his case in its entirety would not be fair to him. Injury No.3 on his person, it was observed, would require special attention. Injury No.3 was regarding complain of pain in the epigestic region with presence of tenderness for which surgeon's opinion was advised. The learned Tribunal held that presence of fracture in that area could not be ruled out and he (Kumba Ram) must have been getting treatment for the same. It was presumed that Kumba Ram suffered one fracture but the other fracture was not there and it was presumed that the other injuries were simple in nature.

Smt. Rani Devi in Kumba Ram's case stated that he was getting Rs.1200/- per month from her husband Girdhari Lal. However, no record in this regard was produced. The income tax returns (Ex.P1, Ex.P2 and Ex.P3) that were produced did not, however, show payment of any salary to Kumba Ram. Kumba Ram had stated that his father was a casual labourer. The learned Tribunal at Kurukshetra presumed that Kumba Ram had accompanied Girdhari Lal (deceased) on his tour to Yamuna Nagar on a jeep, which he had hired. He had travelled either as a casual labourer or a sort of an attendant. It was held to be difficult to believe that a person earning about Rs.12,000/- or Rs.13,000/- per annum would be paying a salary of Rs.14,400/-per annum to a third person. The learned Tribunal accordingly observed that Kumba Ram could be treated as a casual labourer and that he was not earning more than Rs.700/- per month. Keeping in view, the nature of injuries suffered by Kumba Ram, his financial position and other expenses, he was held entitled to Rs.15,000/- as compensation. This it was said would be just and equitable in the case. He was held entitled to the said compensation.

In the facts and circumstances, keeping in view the fact that there is no evidence on record to establish the case for grant of more compensation, no case is made out for enhancement of compensation granted to him. However, in case the amount has not been paid to him, the same shall be paid to him with interest @ 7.5% per annum.

The contention of the learned counsel for the Insurance Company regarding Baljeet Singh (respondent No.1), the driver of the offending truck, said to be not holding a valid driving license, may be adverted to. The learned Tribunal considered this aspect. Baljit Singh (respondent No.1), the driver of the offending vehicle did not appear as a witness. The Insurance Company summoned the licensing clerk from the RTA (Regional Transport Authority), Gwalior. However, he failed to appear. Shri Trivedi Lal, a Senior Assistant from the said office was examined. He produced documents Ex.R3 to Ex.R6. These showed that the Insurance Company sought verification of the driving license of Baljit Singh (respondent No.1) from the RTA Gwalior from where the license was allegedly issued. According to the documents, the driving license No.B-7277 dated 16.08.1981 was not in the name of Baljit Singh but was in the name of Balbir Singh son of Varinder Singh. Shri M.M. Bakshi, a partner of M.S.D. Carriers (respondent No.2) appeared as RW2. He deposed that the driver was in their service for the last about four years and they had taken care about his antecedents and about his driving license also. A photocopy of the driving license Ex.R1 was renewed by the same authority. The learned counsel for the claimants as also for the driver and owner before the learned Tribunal submitted that the fact that the driving license of Baljit Singh (respondent No.1) was stated to be fake in fact was not proved through legally permissible evidence. They contended that either RTA Gwalior or an official from the said office was liable to be produced to prove the fact that the driving license was fake. It was submitted that Shri Trivedi Lal, RW1 did not in any manner whatsoever know that the license was not genuine.

The learned Tribunal held that it was unable to accept the plea that the documents had not been proved in a proper manner. In the first instance, the driver and the owner were given opportunity to produce evidence in rebuttal to the evidence produced by the respondent-Insurance Company. Secondly, the Court had issued process for the official of RTA Gwalior. Thirdly, the Tribunal was at liberty have its own process insofar as the recording of the evidence was concerned. It was observed that if the respondent-driver could be allowed to produce a Photostat copy of the driving license and the said copy could be exhibited then there was no reason for applying different standards in the case of the Insurance Company. Thus the objection as regards the mode of proof of the report of the RTA Gwalior was held to be not sustainable.

It was further noticed that initially a sum of Rs.6550/- was paid to MSD Carriers (respondent No.2) on account of the damages suffered to the body of the truck. The said amount was, however, recovered from M/s Mehra Siri Ram Distributor. Shri M. M. Bakshi appearing for MSD Carriers (respondent No.2), the owner of the truck stated that the amount had not been recovered from his company. The learned Tribunal held that there was nothing to disbelieve the record as the abbreviation of Mehra Siri Ram Distributor would be 'MSD'. This point also raised on behalf of the private respondent was held to be of no significance.

The further submission of MSD Carriers (respondent No.2) was that it had taken care to hand over the truck for driving to Baljeet Singh (respondent No.1) with due care and caution so it could not be held liable for paying the compensation. A decision of this Court in Zora Singh v. Dalip Kaur and others, (1990-1) PLR 558 (P & H) was cited. In the said case, it was held that where the owner of the truck had taken all possible steps to hand over the vehicle to a person having a valid driving license, he could not be held to be guilty of breach of promise made by him under the policy of insurance. The onus of proof of breach of promise, it was held, was on the insurance company, which had failed to discharge the same and it was held liable to pay the compensation. Reliance was placed on Skandia Insurance Company Ltd. v. Kokilaben Chandravadan and others, (1987-1) PLR 665 : AIR 1987 SC 1184 wherein it was held by Hon'ble the Supreme Court that Section 96 (2) (b) (ii) of the Motor Vehicles Act, 1939 extends immunity to the Insurance Company if a breach is committed of the condition excluding driving by a named person or persons or by any person who is not fully licensed, or by any person who has been disqualified for holding or obtaining a driving license during the period of disqualification. The expression 'breach', it was said is of great significance. The dictionary meaning of 'breach' is 'infringement or violation of a promise or obligation'. It was further said that it is, therefore, abundantly clear that the insurer will have to establish that the insured is guilty of an infringement or violation of a promise that a person who is not (sic.) duly licensed will have to be in charge of the vehicle. It was further said that 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 license, 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. From this, it is evident that it is for the insurer to establish that there has been a breach on the part of the insured. The onus of proof that there has been breach of the promise on the part of the insured, therefore, lies on the insurer.

In this regard, other case law was also cited by the private respondents; the learned Tribunal, however, held the same to be of no help as the terms contained in the policy of insurance, it was said, would govern the liability of the Insurance Company (respondent No.3). Besides, it was a fact that the claimants do suffer in cases where recovery was to be made from the private persons but so long as the clause was there, it could not be given a go-bye. It was further observed that the Tribunal could not adopt a different standard while admitting the evidence of one party and disallowing the evidence of the other.

A reference was made by the learned Tribunal to Shri Kashiram Yadav and another v. Oriental Fire and General Insurance Company and others, AIR 1989 SC 2002 wherein it was held that when the insured does everything within his power inasmuch as he engages a licensed driver and places the vehicle in his charge with the express or implied mandate to drive himself, the insured cannot be held to be guilty of any breach of condition of policy and the insurer cannot escape from its obligation to indemnify the insured. Without the knowledge of the insured, if by driver's acts or omission other meddle with the vehicle and cause an accident, the insurer would be liable to indemnify the insured. The insurer in such a case could not take the defence of a breach of the condition in the certificate of insurance. But when the insured himself entrusted the vehicle to a person who does not hold a driving license, he could be said to have committed breach of the condition of the policy. It was said that it must be established by the Insurance Company that the breach was on the part of the insured. In the said case, the burden on the insurer had been discharged from the evidence of the insured himself inasmuch as the insured took a positive defence stating that he was not the owner of the vehicle since he had already sold the same to a third party and that the vehicle at the relevant time was driven by a licensed driver, but both the statements could not be proved by the insured. Besides, there was no other material even to indicate that the vehicle was entrusted to a licensed driver on the date of the fatal accident. Therefore, it was held that the insurer was not liable and the insured owner was liable to pay the entire compensation. It is to be noticed that in Kashiram Yadav's case (supra) also it was held that it is for the Insurance Company to establish that the breach was on the part of the insured. In other words, the onus of proof of breach of the Insurance contract is on the insurer.

The learned Tribunal also referred to a decision of this Court in Bhagwani Devi v. Krishan Kumar Saini and others, 1986 ACJ (P&H) 331 : AIR 1985 P&H 347 wherein it was said that if witnesses were kept away from the witness box without sound reasons, it is to be construed as a telling circumstance against the respondents. The learned Tribunal in the present case held that the non-production of Baljeet Singh (respondent No.1) is a material circumstance in the determination of negligence. In the matter of validity of the license, it was observed by the learned Tribunal that the same standard was to be applied. Accordingly, it was held that Baljeet Singh (respondent No.1), the driver, was not possessed of a valid driving license at the relevant time and the claim would have to be satisfied jointly and severally by the private respondents i.e. the owner MSD Carriers (respondent No.2) and the driver Baljeet Singh (respondent No.1) of the truck No.DIL-3411 and not by Insurance Company.

It may be noticed that in Bhagwani Devi's case (supra), the accident had occurred when the deceased coming on his scooter had turned to go on to the link road and a car came from the opposite direction and hit into the scooter. The scooter driver sustained multiple injuries as a result of which he died. The Tribunal in the said case found that it was a case of contributory negligence with both the car driver and the deceased being equally to blame. The claimants had alleged that the accident was caused entirely due to the rash and negligent driving of the car driver. It was said that the scooter had almost entered the link road when the car struck it. The respondents in the said case had taken a plea that the accident occurred due to the negligence of the deceased himself as he suddenly turned towards the right side without giving any signal. It was said that it was the scooter that had struck against the car which was proceeding on its correct side. However, no evidence was led by any of the respondents in support of their case. The car driver even did not appear in the witness box to explain how the accident had occurred. It was in the said context and circumstances that this Court held that the manner in which the accident had occurred could best be explained by the drivers of the vehicles concerned and if they chose to keep away from the witness box and that too without really sound reasons, it must indeed be construed as a telling circumstance against them. The ratio of the said judgment would not apply to the facts of the present case as it is for the insurer to establish that the insured had breached the terms of the insurance contract and the mere fact that Baljeet Singh (respondent No.1), who was the driver of the offending truck did not appear would not discharge the onus on the part of the insurer to establish that the insured had breached the terms of the contract.

The position has now somewhat been settled by Hon'ble the Supreme Court in National Insurance Company Limited v. Swaran Singh, (2004) 3 SCC 297. It has *inter alia* been held that a fake or forged driving license is as good as no license but the requirement to establish the defence is that the insurer must prove that the owner was guilty of the willful breach of the conditions of the insurance policy or the contract of the insurance. It was said that the breach of policy condition e.g. disqualification of the driver or invalid driving license of the driver, as contained in sub-section (2) (a) (ii) of Section 149 of the Motor Vehicles Act, 1988 has to be proved to have been committed by the insured for avoiding the liability of the insurer. Mere absence, fake or an invalid driving license 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 the 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 a duly licensed driver or one who was not disqualified to drive at the relevant time. It was further said that the question as to whether the owner had taken reasonable care to find out as to whether the driving license produced by the driver (a fake one or otherwise), does not fulfill the requirements of law or not would have to be determined in each case. It was concluded that the liability of the Insurance Company was to satisfy the decree at the first instance and to recover the awarded amount from the owner or driver thereof had held the field for a long time.

In the facts and circumstances of the present case, the Insurance Company (respondent No.3) cannot be said to have discharged its burden for establishing that the insured i.e. MSD Carriers (respondent No.2) did not exercise due diligence while permitting Baljeet Singh (respondent No.1) to drive the offending truck No.DIL-3411 or that the driving license held by Baljeet Singh (respondent No.1) was fake or invalid. Shri Trivedi Lal (RW1) was examined by the Insurance Company (respondent No.3). He (RW1) produced documents Ex.R3 to Ex.R6 which showed that the Insurance Company had sought verification of the driving license of Baljeet Singh from RTA Gwalior from where it was alleged to have been issued. The driving license of which verification was sought was not in the name of Baljeet Singh (respondent No.1) but was in the name of Balbir Singh son of Varinder Singh. It was contended on behalf of the claimants as also Baljeet Singh (respondent No.1), besides, the MSD Carriers (respondent No.2) that the fact as to whether the license was a fake one was not proved through legally permissible evidence. According to them, either the RTA Gwalior or an official of the said office was liable to be produced to prove that the driving license of Baljeet Singh (respondent No.1) was fake. Shri Trivedi Lal, it was submitted, did not in any manner whatsoever know that the license was not genuine. The learned Tribunal, however, was unable to accept the plea that the document i.e. the driving license had not been proved in a proper manner. It was said that in the first instance the respondents - driver and owner i.e. Baljeet Singh and MSD Carriers were given opportunity to produce evidence in rebuttal of the evidence produced by the Insurance Company. Secondly, the Court had issued processes for the official of the RTA Gwalior. Thirdly, the Tribunal was at liberty to have its own process as far as the recording of evidence was concerned. If the respondent-driver could be allowed to produce a photo-stat copy of the driving license and the said copy could be exhibited, there was no reason for applying a different standard in the case of the Insurance Company. Thus the objections as regards the mode of proof of the report of RTA Gwalior, was held to be not sustainable.

It is to be noticed that the findings of the learned Tribunal at Kurukshetra do not conclusively establish or prove that the driving license with which Baljeet Singh (respondent No.1) was driving the offending truck, was fake. Trivedi Lal (RW1), who was examined, is mentioned as a Senior Assistant from the Office of RTA Gwalior. He is shown to have produced documents Ex.R3 to Ex.R6, which show that the Insurance Company had sought verification of the driving license of Baljeet Singh from RTA Gwalior from where it was alleged to have been issued was not in the name of Baljeet Singh (respondent No.1); however, he is not shown to have established as to what connection did he have with the report of the RTA Gwalior and as such the same could be exhibited on record. The learned Tribunal at Kurukshetra has proceeded on the premise that since a photocopy of the driving license was exhibited; therefore, the report of RTA Gwalior was also liable to be exhibited. In fact, it is well settled that mere marking of a document as an exhibit does not dispense with its proof. Besides, the learned Tribunal has also taken into account the fact that Baljeet Singh (respondent No.1) did not appear in the witness box for which an adverse inference is liable to be drawn. This, as already noticed, would not be the correct position insofar as the liability of the insurer is to be absolved is concerned. It is in fact for the insurer to establish that there had been a breach of the insurance conditions by the insured, which it has not done so.

In any case, it is to be noticed that Hon'ble the Supreme Court in National Insurance Company v. Swaran Singh (supra) has held that in case the driving license is to be taken as fake, the liability of the Insurance Company would be to satisfy the decree at the first instance and thereafter recover the awarded amount from the owner or driver thereof. This it was said had been holding the field for a long time. Therefore, it would be just and expedient, in the facts and circumstances of the case that the Insurance Company (respondent No.3) pays to the claimants/appellants the amount as awarded in the first instance and then recover the amount due, if it is entitled to, from the insured, i.e. MSD Carriers (respondent No.2). This would be in case the Insurance Company (respondent No.3) establishes before the learned Tribunal at Kurukshetra that there was a breach of the condition of insurance on the part of the insured and that the driving license of Baljeet Singh (respondent No.1), who was driving the offending truck at the time of accident, was found to be fake.

Accordingly, the appeals are disposed of with the directions that an amount of Rs.2,43,000/- shall be paid to the claimant Rani Devi and out of this amount Rs.40,000/- shall be paid to Jangiri Ram alias Jagir Mal, father of the deceased. The amount shall be paid along with the interest @ 7.5% per annum. Besides, out of the payment of Rs.2,43,000/-, a sum of Rs.81,000/- shall be kept in abeyance till the issue whether addition of income towards future prospects of a deceased who was not a salaried person but was engaged in business, is decided by Hon'ble the Supreme Court. An amount of Rs.1,44,000/- awarded by the learned Tribunal if already paid shall be deducted from this amount. Rani Devi shall also be entitled to Rs.1.00 lac towards loss of consortium, Rs.25,000/- for love and affection and Rs.25,000/- for funeral expenses. Kumba Ram (appellant) shall not be entitled to any further amount; however, if the amount already awarded has not been paid, the same shall be paid with interest @ 7.5% per annum.

(S.S. Saron)
Judge

12.08.2015
Amit/A.Kaundal