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

Date of decision: 12th January, 2015

+ **MAC.APP. 163/2011**

ICICI LOMBARD GENERAL INSURANCE CO LTD..... Appellant

Through: Mr. Pankaj Gupta, Adv. for
Ms. Suman Bagga, Adv.

versus

AVDESH KUMAR & ORS

..... Respondents

Through: Nemo.

CORAM:

HON'BLE MR. JUSTICE G.P.MITTAL

G. P. MITTAL, J. (ORAL)

1. This appeal is directed against the judgment dated 20.11.2011 passed by the Motor Accident Claims Tribunal (the Claims Tribunal) whereby compensation of Rs.25,571/- was awarded in favour of Respondent No.1.
2. The only ground of challenge raised is that the Appellant successfully proved the breach of the terms and conditions of the policy and therefore, recovery rights ought to have been granted. In this connection, it will be appropriate to refer to paras 16 and 17 of the impugned judgment where the Claims Tribunal held as under:-

“16. The driver of the offending vehicle has produced the driving licence to the police after the accident. The insurance company after collecting this driving licence submitted the same for verification. The driving licence is Ex.R3W1/2. As per the report of the Licensing Authority this driving licence has not been issued by their office in the name of the driver Depak Kumar son of Sh. Arun Kumar.

17. Admittedly, in the present case the driver of the offending vehicle was in possession of a driving licence. In order to avoid the responsibility the insurance company has not only to show that the driving licence produced by the driver of the offending vehicle is fake but also to the effect that this fact was in the knowledge of the insured and despite of which he permitted the driver to drive a vehicle. The contract of the insurance is a contract between the insured and insurance company. Simply for the reason that DL produced by the driver of the offending vehicle has been found fake does not mean that owner/insured of the said vehicle was also aware of this fact. The positive evidence on this point is the responsibility of the insurance company to place on record. The insurance company in the instant case has only come up with half covered evidence on the point of proving that DL is fake but that would not complete their task to avoid responsibility unless and until they further go on to prove that owner despite being alive to the fact that the driver holding a fake licence permitted him to drive the said vehicle. Serving of the notice under Order 12 Rule 8 CPC to the owner by the insurance company is not considered to be sufficient. In order to discharge the burden by the insurance company the insurance company was still able to summon the owner as a witness in such a fact situation. Since no such step has been taken by the insurance company in the present case the responsibility as such to be considered would continue with insurance

company alone. The plea of grant of recovery right is also rejected for the same reason.”

3. Admittedly, not only the Appellant Insurance Company proved that the licence produced by the driver was found to be fake but a notice under Order XII Rule 8 CPC was also issued to the owner to produce the licence on the basis of which the driver was employed.
4. Failure to produce the driving licence in spite of the service of the notice under Order XII Rule 8 CPC would be sufficient to draw an inference that the driver did not possess a valid driving licence and nothing further could have been done as the Appellant Insurance Company would not have known the Licensing Authority or the place from where the driving licence should have been obtained. If the owner relied upon some other licence of the driver or had taken his test, it was for the owner to have come forward and prove the same.
5. The case is squarely covered by the judgment of this Court in *New India Assurance Company Ltd. & Ors. v. Sanjay Kumar & Ors.*, ILR 2007(II) Delhi 733 where this Court held as under:-

“22. Thus, where the insurance company alleges that the term of the policy of not entrusting the vehicle to a person other than one possessing a valid driving licence has been violated, initial onus is on the insurance company to prove that the licence concerned was a fake licence or was not a valid driving licence. This onus is capable of being easily

discharged by summoning the record of the Licensing Authority and in relation thereto proving whether at all the licence was issued by the authority concerned with reference to the licence produced by the driver. Once this is established, the onus shifts on to the assured i.e. the owner of the vehicle who must then step into the witness box and prove the circumstances under which he acted; circumstances being of proof that he acted bona fide and exercised due diligence and care. It would be enough for the owner to establish that he saw the driving licence of the driver when vehicle was entrusted to him and that the same appeared to be a genuine licence. It would be enough for the owner, to discharge the onus which has shifted on to his shoulders, to establish that he tested the driving skill of the driver and satisfied himself that the driver was fit to drive the vehicle. Law does not require the owner to personally go and verify the genuineness of the licence produced by the driver.

23. Where the assured chooses to run away from the battle i.e. fails to defend the allegation of having breached 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 view of this, in my view, the Appellant insurance company has successfully proved breach of the terms and conditions of the policy.
7. In view of my judgment in *Oriental Insurance Company Limited v. Shanti & Ors.*, MAC APP.343/2009, decided on 02.07.2012, the Appellant Insurance Company is entitled to recover compensation paid to the Claimant in execution of this very judgment without having recourse to independent proceedings for recovery.
8. The statutory amount of Rs.25,000/-, if any, shall be refunded to the Appellant Insurance Company.
9. The Appeal is allowed in above terms.
10. Pending applications, if any, also stand disposed of.

(G.P. MITTAL)
JUDGE

JANUARY 12, 2015
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