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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of decision: 13th January, 2015

+ **MAC.APP. 79/2006**

THE NEW INDIA ASSURANCE CO.LTD Appellant

Through: Mr. Pankaj Seth, Adv.

versus

NARESH & ORS.

..... Respondents

Through: Nemo.

CORAM:

HON'BLE MR. JUSTICE G.P.MITTAL

G. P. MITTAL, J. (ORAL)

1. I have perused the order dated 07.11.2014 passed by the Registrar (Original). Respondent no.5 has failed to put in appearance despite service through publication in the newspaper '*Statesman*'. Respondent no.5 is thus, proceeded *ex-parte*.
2. By virtue of this appeal, the Appellant New India Assurance Company Limited seeks recovery of the compensation(from the owner of the vehicle) paid to the legal heirs of the deceased Sri Krishan, who died in a motor vehicular accident which occurred on 02.03.1995 at 1:50 a.m. while deceased Sri Krishan was driving a taxi bearing no.DLT-6547 which was hit by a truck bearing registration no. DEL 5539, which was being driven by Puran Singh in a rash and negligent

manner.

3. The Claims Tribunal on appreciation of evidence held that the accident was caused on account of rash and negligent driving of the driver of the insured truck bearing registration no.DEL 5539 and awarded a compensation of Rs.6,32,000/- and made the Appellant Insurance Company liable to pay the compensation as the vehicle was insured with the Appellant.
4. The only ground urged by the learned counsel for the Appellant is that the driving licence held by the driver Puran Singh was proved to be fake. The Appellant, therefore, proved breach of the terms and conditions of the policy and even if it was liable to initially pay the compensation, it was entitled to recover the compensation paid from the insured. It is urged that the Claims Tribunal erred in declining recovery rights to the Appellant.
5. I have perused the impugned judgment and have gone through the trial court record. There is no dispute about the fact that it was proved that the driving licence which was seized by the investigating officer in the criminal case was found to be fake on verification by the Appellant. The Appellant examined Bhavani Dutt Joshi (RW2) from the office of the RTO, Dehradun who testified that the driving licence was fake. In

spite of this, the Claims Tribunal declined to grant recovery rights on the premise that the owner was never put to notice to produce the driving licence, which might have been seen by him while employing driver Puran Singh. It is urged by the learned counsel for the Appellant that no purpose could have been served by issuing notice to the owner to produce the driving licence as he preferred not to contest the proceedings at all. I am unable to agree with the learned counsel for the Appellant. Paras 13 to 15 of the impugned judgment are extracted hereunder:-

“13. The insurance company has not examined the owner of the vehicle. Notice was given to him Under Order 12 Rule 8 only for the production of original insurance policy and not for the production of the driver or his driving licence. Even no AD has been placed on the record to show that owner was served. It was for the insurance company to examine the owner to prove that there was willful default on the part of the insured.

14. Insurance company has failed to prove that there was willful breach on the part of insured. Here it is relevant to refer to case of United India Insurance Company vs. Lehu & Ors. II (2003) SLT 516 SC where it was held that:

“When an owner is hiring a driver he will therefore have to check whether the driver has a driving license. If the driver produces a driving license which on the face of it looks genuine, the owner is not expected to find out whether the license has in fact been issued by a competent authority or not. The owner would then take the test of the driver.

If he finds that the driver is competent to drive the vehicle, he will hire the driver. We find it rather strange that Insurance companies expect owners to make inquiries with RTO's, which are spread all over the country, whether the driving license shown to them is valid or not. Thus where the owner has satisfied himself that the driver has a license and is driving competently there would be no breach of Section 149(2)(a)(ii). The Insurance company would not then be absolved of liability. If it ultimately turns out that the license was fake the Insurance company would continue to remain liable unless they prove that the owner/insured was aware or had noticed that the license 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”

15. Similar view was taken in case of New India Insurance Company Ltd. Vs. Savitri Parag & Ors. 2002 ACJ 1781. Even the same view was taken by the Hon'ble Supreme Court in case of National Insurance Company Ltd. Vs. Swarn Singh and ors. 2004 IAD (SC) 491.”

6. It is well settled that initial onus is on the Insurance Company to prove that there was willful and conscious breach of the terms and conditions of the policy. The Insurance Company required the owner to produce the original Insurance Policy, since the owner failed to do so, therefore, the Insurance Company was entitled to lead secondary evidence to prove the Insurance Policy.

7. It is quite strange that no notice was issued to the insured to produce the driving licence. In view of this, it cannot be said that the Insurance Company has been able to discharge the initial onus to prove that there was willful and conscious breach of the terms and conditions of the policy. The Claims Tribunal rightly declined recovery rights to the Appellant.
8. The appeal is devoid of any merit; the same is accordingly dismissed.
9. The statutory amount of Rs.25,000/- shall be refunded to the Appellant Insurance Company.
10. Pending application also stands disposed of

(G.P. MITTAL)
JUDGE

JANUARY 13, 2015

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