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

Date of decision: 20th January, 2015

+ **MAC. APP.660/2012**

NATIONAL INSURANCE CO. LTD. Appellant

Through: Mr. A.K. Soni, Advocate

versus

KRIPA SHANKAR SHARMA & ORS. Respondents

Through: None

CORAM:

HON'BLE MR. JUSTICE G.P.MITTAL

G. P. MITTAL, J. (ORAL)

1. The Appellant impugns judgment dated 07.03.2012 passed by the Motor Accidents Claims Tribunal (the Claims Tribunal) and seeks recovery rights from the insured on the ground that there was conscious and willful breach of the terms and conditions of the insurance policy by the insured as proved by the Appellant Insurance Company and therefore, the Appellant was entitled to recover the compensation paid to Respondent no.1.

2. The Claims Tribunal dealt with the question of liability in paras 64 to 71 of the impugned judgment, which are extracted hereunder:

“64. The case of insurance company is that it had served a notice under Order 12 Rule 8 of CPC upon owner and driver of the vehicle to produce driving license, valid and effective on the date of accident, original policy, route permit which are Ex. R3W1/3 and 4 respectively.

65. Insurance company has deposed that the notices were sent by registered post and postal slips are Ex. R3W1/5 to 7.

66. Insurance company has also relied upon the report of its Surveyor which is Ex. R3W1/2 as per which fee of the driving license was not entered in the records and the Licensing Authority, Mathura gave his remarks in Form 54 that DL No. 11665/MTR/06 is not issued by the said authority in favour of the driver of the offending vehicle.

67. Merely, by sending a notice to produce driving license the insurance company is not absolved of its responsibility to prove breach of terms and conditions of policy.

68. When copy of driving license of the driver of offending vehicle was available on record it was for insurance company to summon appropriate witness from relevant Licensing Authority to show that the driving license was fake. Reliance can be placed on Bajaj Allianz General Insurance Co. Ltd. v. Bhikhari Yadav, MAC APP. No. 727/11, dated 03.01.12 as well as the New India Assurance Co. Ltd. v. Geeta & Ors. MAC APP. No. 553/07, dated 23.12.11 in this regard.

69. In the case of Bhikhari Yadav, Hon'ble High Court of Delhi has held that:

“It is settled that in order to avoid the liability the onus is on the insurance company to prove that there is breach of the policy conditions by the insured. The breach committed by the insured must be willful, e.g. where the insured entrusts a vehicle to a duly licensed driver and it is unlawfully driven by any other person not holding a valid and effective driving license, it cannot be said that the owner is guilty of willful breach. Similarly, where a vehicle is stolen by a thief holding no license and meets with an accident, it cannot be said that the insured is guilty of a willful breach. Rather, the insured himself is a victim.”

70. Further, dealing with permit, the Hon'ble High Court of Delhi has held that:

“Turning to the second limb of argument i.e. issuance of permit to ply vehicle no. DL1G2715 on the date of the accident, the appellant insurance company did not summon any record from the relevant office of the Delhi Transport Authority that on the date of the accident, the vehicle did not have any permit to ply on the road. Here again, the insurance company failed to discharge the onus that there was breach of the condition of policy in this regard.”

71. Therefore, it cannot be said that the insurance company has proved breach of terms of policy by the insurer.”

3. It may be seen that the Appellant Insurance Company issued a notice requiring the owner, Respondent no.3 herein, to produce the driving licence of the driver and the permit of the vehicle. The Insurance Company further examined its surveyor as R3W1 who proved the report R3W1/2 from the licensing authority, Mathura in Form no.55

which established that the driving licence was not issued by licensing authority, Mathura.

4. It is true that no effort was made to find out from the concerned Transport Authority that the owner did not possess any permit. But, in my view, the Appellant Insurance Company did whatever was in its power to prove that there was breach of the terms and conditions of policy as the driver was found to be driving the vehicle on the basis of fake licence. The onus therefore, shifted on the owner, Respondent no.3 to prove that it had taken all precautions to avoid breach of the terms and conditions of the insurance policy. In the circumstances, the Appellant ought to have been granted recovery rights against the owner of the offending vehicle, Respondent no.3 herein.
5. I am supported in this view by the judgment of this Court in *New India Assurance Company Ltd. v. Sanjay Kumar & Ors.*, ILR (2007) 11 Delhi 733, wherein it was held as under:

“23. Where the assured chooses to run away from the battle i.e. fails to defend the allegation of having breach 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. The Appellant is hence, granted recovery rights. It is made clear that the Appellant should be entitled to compensation paid along with interest in execution of this very judgment without having recourse to independent proceedings for recovery.
7. The appeal is allowed in above terms.
8. Pending applications stand disposed of.
9. Statutory amount of Rs. 25,000/-, if any, shall also be refunded to the Appellant Insurance Company.

(G.P.MITTAL)
JUDGE

JANUARY 20, 2015

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