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

Date of decision: 08th January, 2015

\+ **MAC. APP. No.934/2013**

ORIENTAL INSURANCE CO. LTD.

..... Appellant

Through: Mr. L.K. Tyagi, Advocate

Versus

KUNAL SADH & ORS. .....Respondents

Through: Mr. Brijesh Oberoi, Advocate with Ms. Lakshana Oberoi, Advocate & Ms. Priyanka Kamal, Advocate for Respondents no.1 to 5.

CORAM:
HON'BLE MR. JUSTICE G.P.MITTAL

JUDGMENT

G. P. MITTAL, J. (ORAL)

1. The Appellant has impugned the judgment dated 21.08.2013 passed by the Motor Accident Claims Tribunal(the Claims Tribunal) whereby compensation of Rs.32,62,536/- along with interest @ 7.5% per annum was awarded in favour of Respondents no.1 to 5/claimants for death of Subodh Kumar Sadh, who died in a motor vehicular accident which

occurred on 19.06.2009 at 5:30 a.m. on Shikohpur Mor, Gurgaon on Delhi Jaipur Highway.

2. Although in the appeal, the quantum of compensation awarded has been disputed, but at the time of hearing, the learned counsel for the Appellant only presses for grant of recovery rights against the owner and driver *i.e.* Respondents no.6 and 7. Respondent no.7 preferred not to contest the proceedings despite service and appeared on 20.01.2014 and Respondent no.6 preferred not to contest the proceedings despite service through publication in *Dainik Hindustan* Mathura Edition.

3. The learned counsel for the Appellant urges that the Appellant did prove willful breach of terms and conditions of the policy on the part of the owner by examining the Clerk, ARTO Office, Mathura, UP. and proving that the licence issued in favour of the driver, Respondent no.6 was fake, yet recovery rights were not granted to it solely on the ground that no notice was issued by the Appellant Insurance Company to the driver telling him that the licence held by him was found to be fake. It is urged by the learned counsel for the Appellant that it was not expected or required from the Appellant (Insurance Company) to have intimated the driver that the licence held by him was fake. It is further urged that the Appellant was only obliged to prove that the licence held by the driver was fake and then it was for the owner to have established that he had

taken appropriate steps to hand over the vehicle only to a person who possessed a valid licence. In support of his contention, the learned counsel for the Appellant relies on an order of this Court in *Subhash Jindal v. Asha Kumar & Ors.*, FAO No.589/2002 decided on 21.10.2005. Paras 3 to 9 of the order are extracted hereunder:

> *"3. Insurance Company successfully established at the trial that the license held by the driver engaged by the appellant to drive the vehicle was a forged and fabricated license and was not issued by the Licensing Authority from where it was purported to have been issued.*
>
> *4. In view of the said evidence, learned Tribunal directed that on the Insurance Company paying the claimants they would have their right to recover the awarded sum from the appellant.*
>
> *5. Counsel for the appellant contends that onus was on the Insurance Company to establish that there was a violation of contract of insurance.*
>
> *6. It is not in dispute between the parties that it was a term of the Contract of Insurance that the vehicle insured would not be driven by a person not having a valid driving license. Under the circumstance, the Insurance Company could do no better than to prove that the driver was not holding a valid driving license.*
>
> *7. Appellant could have shifted the onus by entering the witness box and justifying that he had seen the driving license and it appeared as a genuine one and he was satisfied with the driving skills of the driver engaged.*
>
> *8. Observations of the three Bench decision of the Supreme Court reported as JT 2004 (1) SC 109, National Insurance Co.Ltd. Vs. Swaran Singh and Ors. relied upon by learned counsel for the appellant have to be understood in the factual context of each and every case. The observations of the Hon'ble Supreme Court that the onus is on the Insurance Company to*

establish willful breach of conditions of the insurance policy means that the initial onus is on the insurance company.

9. In the discharge of initial onus, insurance company can do no better than to prove that the driving license of the driver of the vehicle was a forged document. It is then for the insured to come in the witness box and depose that he had taken all reasonable care. If the insured discharges the said onus, it would shift back to the insurance company and in the context of the testimony and evidence of the insured on case to case basis it would have to be determined as to in what manner the onus has shifted back."

4. Thus, it is evident that the Appellant did whatever was in its power to prove that the licence held by the driver was fake. The Insurance Company has discharged the onus which was placed upon it but the owner failed to prove that it had taken adequate care to ensure that there was no breach of the terms and conditions of the policy. In view of this, the Appellant has sufficiently established breach of terms and conditions of policy and is entitled to grant of recovery rights. The Claims Tribunal erred in not granting recovery rights to the Appellant.

5. The impugned judgment is therefore, set aside to the extent that the Appellant Insurance Company shall be entitled to recover the amount of compensation paid to Respondents no.1 to 5 in execution of this very judgment without the necessity of taking recourse to independent proceedings for recovery of the amount from Respondents no.6 and 7.

6. The Appeal is allowed in above terms.

7. Pending applications, if any, also stand disposed of.

8. The statutory amount of Rs.25,000/- shall also be refunded to the Appellant Insurance Company.

(G.P. MITTAL)
JUDGE

JANUARY 08, 2015
pst