$~R-3A

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

Date of Decision: 10th February, 2016

\+ **MAC.APP. 583/2006**

THE NEW INDIA INSURANCE CO. LTD. ..... Appellant
Through: Mr. D K Sharma, Adv.

versus

JITENDER KUMAR AND ORS. ..... Respondents
Through: None

CORAM:
HON'BLE MR. JUSTICE R.K.GAUBA

JUDGMENT

R.K.GAUBA, J (ORAL):

1. The short question raised by the insurance company in the appeal at hand is that the Motor Accident Claims Tribunal (the Tribunal) while deciding the claim petition of the second and third respondents herein, registered as suit No.4/2001, by judgment dated 20.03.2006 erred by not granting recovery rights to it against the first respondent Jitender Kumar, owner of motor vehicle bearing registration No.DL-1C-3612 (the offending vehicle), even though evidence had been adduced to show that the driving license of Deepak Bahadur, who was driving the vehicle at the relevant point of time and on account of whose death the compensation was claimed, was a fake document.

2. The contention of the insurance company in above regard was considered by the Tribunal against the third issue framed during inquiry, in the following manner :

"It is argued on behalf of petitioner no.2 that deceased Deepak Bahadur himself was driving the vehicle. He was not having a valid driving licence. Owner of the vehicle Jitender Kumar has filed a claim petition before respondent no.2 claiming damages caused to his vehicle in this accident. That claim petition of Jitender Kumar was not accepted by the company because D/L of the driver Deepak Bahadur was found to be fake. It is argued that in these circumstances respondent no.2 insurance company is not liable to pay compensation.

RW1 Mahender Kumar produced investigation report of investigating authority made while deciding claim filed by the owner of vehicle which is Ex.RW1/1 and RW1/2. He has also produced DD entry lodged with the PS of Samalka with regard to this accident which is Ex.RW1/3. He has produced carbon copy of insurance policy, claim form filed by Respondent no.1 and letters written to owner which are Ex.RW1/4 to 7. RW1 (again Sumeri Lal, Clerk, DTO office, Karnal) stated that licence number 4535 dated 5.1.99 was not issued to Deepak Bahadur. RW2 Subhash Chand stated that he was appointed as Investigator by New India Insurance Company. He has produced his report which is Ex.RW2/1.

A full bench of our Hon'ble Supreme Court in National Insurance Com. Ltd. Vs Sawaran Singh has held that insurance company is required to establish the breach of term and condition of insurance policy by cogent evidence. If the insurance company fails to prove that there has been breach of conditions of policy on the part of insured, insurance company cannot be absolved of its liability.

It has been further held in this case by our Hon'ble Supreme Court that mere absence, fake and invalid DL 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 insured the insurance has to prove that insured was <u>guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of</u>

<u>the policy regarding use of vehicles by duly licenced driver or one who was not disqualified to drive at the relevant time</u>. Insurance companies are however with a view to avoid their liability must not only establish the available defences but must also establish breach on the part of owner of vehicle and burden of proof is on them to prove it. Even where the insurance is able to prove breach on the part of insured concerning the policy condition regarding holding of a valid licence by the driver of his disqualification to drive during the relevant period the <u>insurer would not allowed to avoid its liability towards insured unless the said breach of condition of driving licence is so fundamental as are found to have contributed to the cause of accident</u>.

Hon'ble Supreme Court in United India Insurance Company Ltd. V. Lehru & Ors. has held as follows :-

'If it ultimately turns out that licence was fake the Insurance company would continue to remain liable unless it proves that owner/insured was aware or had noticed that licence was fake and still permitted that person to drive.'

In our case insurance company has produced evidence that driving licence of driver was fake however insurance company has not produced any evidence to prove that insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling condition of policy regarding use of vehicle by duly licenced driver. Insurance company has not produced any evidence to prove that owner had not taken reasonable care to find out that driving licence of driver was fake. Insurance company has also failed to prove that alleged breach of condition of valid D.L was a fundamental breach which have contributed to the cause of accident.

From the above quoted DD entry it is clear that this accident had taken place because of sudden breakage of staring bolts. This accident had not taken place because of rash and negligent driving of driver (deceased Deepak Bahadur), thus, it is well proved on the file even from the documents relied upon by respondent no.2 that this accident is not the result of non possessing of D/L by *deceased Deepak Bahadur. This issue is decided in favour of petitioners against R.2."*

3. This Court finds no error in the view taken by the Tribunal inasmuch as it was found on facts clearly that the accident had occurred due to mechanical failure rather than contribution to negligence by the driver of the offending vehicle due to he not holding a valid or effective driving license. The law laid down by Supreme Court in the case of *National Insurance Company V. Swaran Singh* (2004) 3 SCC 297 has been rightly referred to by the Tribunal in taking the above view and rejecting the recovery rights to the insurance company.

4. The appeal is thus dismissed.

5. The statutory deposit, if made, shall be refunded.

R.K. GAUBA
(JUDGE)

FEBRUARY 10, 2016
VLD