

\$~34 & 35

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Date of Decision: 01st March, 2016

+ **MAC.APP. 701/2012**

SHEELA RANI Appellant

Through: Mr. R.K. Kohli, Adv.

versus

NATIONAL INSURANCE CO. LTD.& ORS. Respondents

Through: None.

AND

+ **MAC.APP. 388/2014**

NATIONAL INSURANCE CO. LTD. Appellant

Through: None.

versus

BEERA DEVI @ MEERA DEVI& ORS. Respondents

Through: Mr. R.K. Kohli, Adv. for R-3.

CORAM:

HON'BLE MR. JUSTICE R.K.GAUBA

JUDGMENT

R.K.GAUBA, J (ORAL):

1. The background facts and the issues raised in these two similarly placed appeals under Sections 173 of Motor Vehicles Act, 1988 (MV Act) were noted at some length in the common order that was passed on 25.02.2016 as under:-

“It is stated that on 16.03.2009 an accident occurred involving motor vehicle described as water tanker bearing registration

no.DL-1GB-8196 (the offending vehicle) driven by second respondent (Lal Singh) in the area of DC Office Mehrauli Badarpur Border resulting in injuries being suffered by Shiv Kumar. The offending vehicle is concededly owned by Sheela Rani (appellant in MAC no.701/2012). Admittedly, the offending vehicle was insured against third party risk with National Insurance Company Ltd. (first respondent in MAC appeal no.701/2012) for the period covering the date of accident (16.03.2009).

On the claim petition (registered as suit no.616/2010) brought by Shiv Kumar (on 20.07.2009), notices were issued by the motor accident claims tribunal (the tribunal). Both, Lal Singh & Sheela Rani though served and having appeared, failed to put in a contest, not even filing a written statement and instead chose to suffer the proceedings exparte w.e.f. 20.09.2010. The record would show that the insurance company issued a notice under Order 12 Rule-8 of the Code of Civil Procedure, 1908 (CPC) to Sheela Rani and Lal Singh on 26.07.2011 and on that basis sought to be exonerated on the ground that the driving license shown by the driver Lal Singh had been found, upon verification, to be a fake document. The insurance company led evidence to this effect by examining Shiv Raj Kanwal (R3W1). Sheela Rani joined the inquiry again on the same date (04.08.2011) and examined herself as (R2W1), while conceding that she had not verified the driving license from the concerned authority, deposing that she had taken the driving test of Lal Singh through her husband before engaging him as a driver. The tribunal, by judgment dated 12.10.2011 in claim petition (no.616/2010) of Shiv Kumar rejected the defence of Sheela Rani and found breach of terms and conditions of the policy and while calling upon the insurance company to pay the compensation, allowed it to recover the same from Sheela Rani.

It is the abovenoted direction of the tribunal which is challenged by Sheela Rani in MAC appeal no.701/2012. The appellant (Sheela Rani) places reliance on the judgment in National Insurance Company V. Swaran Singh (2004) 3 SCC 297 and contends that there was no fundamental breach and that since she

had shown due diligence, rule of main purpose would apply and, therefore, insurer cannot be given right to recover.

The other appeal (MAC appeal no.388/2014) has come up for hearing alongside the above appeal of Sheela Rani and presents a similar state of affairs concerning the same set of party respondents and respecting the same offending vehicle, though with a different result on the plea of the insurance company regarding breach of terms and conditions of the insurance policy. The said other appeal (MAC Appeal no.388/2014) was taken up for hearing with the first above said appeal (MAC Appeal no.701/2012) at the instance of the learned counsel for Sheela Rani (the insured/owner of the offending vehicle) as he sought to point out that, in stark contrast, the insurer has been denied recovery rights by the tribunal accepting the same defence plea taken there.

The file of the said appeal shows that on 02.10.2010, at about 08:00 AM, the motor vehicle described as water tanker bearing registration no.DL-1GB-8196 (the offending vehicle), the same one as involved in the first above mentioned case, again driven by Lal Singh, the same very driver, who was impleaded as principal tort-feasor in the above mentioned first case was involved in another motor vehicular accident in front of house of Chhote Lal, Gali No.2, Babu Colony, Mandi Pahari, New Delhi, resulting in injuries being suffered by Beera Devi @ Meera Devi (first respondent in MAC appeal no.388/2014). The said Beera Devi @ Meera Devi filed claim petition for compensation (registered as petition no.301/2011) impleading Lal Singh (the driver), Sheela Rani (the owner) and National Insurance Company Ltd. (insurer) as party respondents. The said claim case was decided by the tribunal by judgment dated 20.09.2013. The record of the said judgment shows that Lal Singh (the driver) did not contest and chose to suffer the proceedings exparte. Sheela Rani (the owner) and National Insurance Company Ltd. (the insurer) contested by filing their respective written statements. The insurer took the defence that there was breach of terms and conditions of the policy as the driving license shown by Lal Singh, had been found, upon verification, to be a fake document. The insurance company relied

upon notice under Order 12 Rule-8 of CPC given to the said owner (the insured) and submitted that there had been no response thereto. Sheela Rani (the owner), on the other hand, claimed that Lal Singh had been employed as driver about six years ago and, at that time, she had seen the driving license which was found to be in order and taken his test before engaging him in the capacity of driver. The tribunal, however, was not impressed with the plea for exoneration of the insurance company and referring to the precedent of Swaran Singh (supra) and another reported as United India Insurance Co. Ltd. vs. Lehu & Ors. (2003) ACC 611 (SC), held by judgment dated 20.09.2013 that the insurance company could not be absolved or granted any recovery rights.

The insurance company by MAC appeal no.388/2014 has come up to question the propriety and correctness of the view thus taken contending, inter-alia, that the facts and circumstances show that there was no diligence on the part of the insured (Sheela Rani) and that allowing the driver (Lal Singh) to be at the wheel of the vehicle on the strength of fake licence is a fundamental breach of terms and conditions of insurance.

Interestingly, the judgments in both the cases, involving the same set of party respondents and concerning the same offending vehicle, though respecting accidents caused on different dates (16.03.2009 & 02.10.2010) have been passed by the same presiding officer of the same tribunal.

In the above facts and circumstances, the factual contentions raised, and issues of law in both these appeals, have bearing on each other. Thus, both must be heard and decided together.

Heard in part.

The appeals shall be taken up for final hearing and disposal on 01st March, 2016."

2. The chronology of events needs to be recapitulated. The motor vehicular accident which is the subject matter of MAC Appeal No. 701/2012

occurred on 16.3.2009. The injured (Shiv Kumar) brought his claim petition before the tribunal on 20.7.2009 impleading Lal Singh (driver) and Sheela Rani (the registered owner) of the vehicle as party respondents in addition to National Insurance Company Ltd. (the insurer) with which the vehicle was insured against third party risk for the period in question. For convenience of reference, they shall hereinafter be referred to as the driver, the owner and the insurer respectively of the offending vehicle.

3. In the claim case of Shiv Kumar (hereinafter referred to as “the first claim case”), the insurer filed its written statements on 12.1.2010. The driver and owner also appeared on 26.7.2010 and were granted liberty to file written statements within 5 days. No written statements were concededly filed and rather the said party respondents suffered the said proceedings *ex-parte* from 20.09.2010 onwards.

4. On 02.10.2010, the motor vehicular accident which is the subject matter of MAC Appeal No. 388/2014 occurred in which Beera Devi @ Meera Devi suffered injuries.

5. In the context of the proceedings arising out of the first claim case, the insurer had issued and served a notice under Order 12 Rule 8 of Code of Civil Procedure, 1908 (CPC) issued on 26.7.2011 on the owner of the offending vehicle. The first claim case came up for hearing before the tribunal on 4.8.2011. Noticeably, both the insurer and the owner of the offending vehicle appeared before the tribunal on the said date. While the insurer led evidence to prove the facts relating to its investigation having revealed the driving license to be fake and the issuance of notice under Order 12 Rule 8 CPC in its wake, the owner examined herself on her

affidavit (as R2W1) to claim that the driver had been engaged about 4 years ago, after his driving license had been seen and his capability to drive had been tested by her through her husband. It is explained on her behalf at the hearing on these appeals that she became aware of 4.8.2011 as the date of hearing before the tribunal on account of it having been, *inter alia*, intimated through the notice under Order 12 Rule 8 CPC that had been issued on 26.07.2011.

6. On 12.10.2011, the tribunal decided the first claim case granting compensation in favour of Shiv Kumar upholding the contention of the insurance company and, thus, granting it recovery rights against the owner.

7. On 16.12.2011, Beera Devi @ Meera Devi filed the claim case which is subject matter of MAC Appeal No. 388/2014 (hereinafter referred to as “the second claim case”). The driver, owner and insurer of the offending vehicle, who continued to be the same, were duly noticed. No written statement was filed by the driver. The owner, however, filed her written statement on 30.1.2012 denying negligence or liability to pay. The insurer also contested by relying upon its reply to the detailed accident report (DAR).

8. The insurer issued another notice under Order 12 Rule 8 CPC to the owner on 20.11.2012 referring to the investigation carried out at its end revealing that the driving license relied on by the driver had been found to be a fake document. As noted by the tribunal in the order sheet dated 31.1.2012 that the driver and owner opted to suffer the proceedings *ex-parte*. The tribunal framed issues and put the second claim case to inquiry.

9. In the course of the above-said inquiry besides evidence led by the claimant (Beera Devi @ Meera Devi), the insurer and owner also led evidence. On behalf of the insurer, Thakur Dass (R3W1) appeared to prove the policy conditions as also the result of the investigation concerning the driving license and the notice under Order 12 Rule 8 CPC. The owner, on the other hand, examined herself on the basis of her own affidavit and appeared (as R2W1) mainly to restate the above mentioned position that the driver had been engaged about 6 years prior to the accident after his driving license had been found to be in order and he had been put to test as to his driving capability by her through her husband.

10. The tribunal, by judgment dated 20.9.2013, decided the second claim case awarding compensation but rejecting the contention of the insurance company regarding breach of terms and conditions of the insurance policy and, thus, declining the recovery rights.

11. The reasons set out by the tribunal to take two divergent views in these similarly placed fact-situations need to be noted at this stage.

12. In the first claim case, while rejecting the contention of the owner and granting recovery rights to the insurer, the tribunal stated as under:-

“21. In the instant case the respondent No.3 has examined the Assistant Manager who tendered the affidavit Ex.R3W1/A, the copy of the driving license of respondent No.1 Ex.R3W1/1 and the verification report Ex.R3W1/2 as well as the notice and its service including the policy Ex.R3W1/4. Perusal of which shows that the aforesaid license was issued to Gurudev Singh and not to respondent No.1. On going through the record, the report of the investigator Ex.R3W1/2 and insurance policy Ex.R3W2/1 and the testimony of R3W1, I find that the

respondent No.1 was driving the vehicle using the fake license as from the record collected from the Licensing Authority, no such licence was issued by the authority in the name of respondent no.1. Nothing has come in the cross-examination of R3W1 to disbelieve him. Although the respondent No.2 has appeared in the witness box and tendered her affidavit ExR2W1/A stating that she had seen the driving license of respondent No.1 at the time of him employment but it is to be noted that in this case, the respondent No.2 did not file her Written Statement and was proceeded against ex-parte on 20.09.2010. No application was moved by respondent No.2 for setting aside the ex-parte order. During the proceedings no such defence was taken by respondent No.2 that she had seen the driving license of respondent No.1 or had checked his driving skill. The said defence is taken for the first time by respondent No.2 when she entered into the witness box on 04.08.2011. In the absence of such defence which was required to be taken at the initial stage, the evidence led by respondent No.2 on this aspect cannot be looked into to exonerate her from her liability. As per the terms of the policy, any person including insured must hold an effective driving licence at time of the accident and is not disqualified from holding or obtaining such a license. This very act on the part of respondent No.2 amounts to breach of insurance policy. Consequently, the insurance company i.e. Respondent No.3 has been able to establish that the vehicle was not plying on the road in consonance with the terms of the policy. Thus, the liability to compensate the petitioner would remain with that of respondent No. and respondent No.2 i.e. driver/owner of the offending vehicle”.

13. In the second claim case, the tribunal upheld the owner’s contention and rejected the plea of the insurer for recovery rights on the following reasoning:-

“23. R3W1 proved the policy Ex.R3W1/1 as per which the driver of the vehicle must have valid and effective licence to

drive the vehicle. R3W1 has stated that the company had got verified the driving licence of the respondent no.1 from the Licensing Authority, Agra and as per the report of the Investigator EX.R3W1/2, the licence was fake. He stated that the notice U/o 12 R 8 CPC EX.R3W1/3 was given to the owner to produce the licence but it was not produced. Perusal of the charge sheet reveals that the Investigating Officer has also verified the driving licence of the respondent no.1 and as per the report collected by him from the Licensing Authority, Agra, the licence was issued to Bhudev Singh not to Lai Singh, respondent no.1 herein. It is therefore, proved that the vehicle was being driven by the respondent no.1 using the fake licence. However, from the testimony of R2W1 I find that before employing the respondent no.1 as driver on the vehicle in question she had seen his driving licence and taken his driving test which appeared to be genuine and he was found to have driving the vehicle quite rightly.

24. It was held in the case of United India Insurance Co. Ltd. Vs. Lehu & Ors. 1 (2003) ACC 611 (SC) that the owner, at the time of hiring a driver has 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. He 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. In the case of Lai Chand Vs. Oriental Insurance Co. Ltd. (2006) ACJ 2161 SC, the owner had not only seen and examined the driving license produced by the driver but also took test of the driving of the driver and found that the driver was competent to drive the vehicle and thereafter appointed him as driver of the vehicle in question. It was held that the owner had satisfied himself that the driver had a license and was driving competently so there would be no breach of Section 149 (2) (a) (11) and the insurance company would not then be absolved of its liability. In that case, National Insurance Co. Ltd. Vs. Swaran Singh 2004 (3)

SCC 297 was also referred and sub Para (iii) of Para 102 discussed.

"(iii) The breach of policy conditions e.g. disqualification of driver or invalid driving license of the driver, as contained in sub-section (2) (a) (ii) of section 149, have to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving license or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insured against either the insured or the third parties. To avoid its liability towards insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in

the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time."

25. It was held that as observed in the above para the insurer has to prove that the insured, namely the owner of the vehicle was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicle by a duly licensed vehicle or one who was not disqualified to drive at the relevant point of time. Hon'ble Supreme Court allowed the appeal filed by the owner of the vehicle and absolved him from any liability.

26. The facts of the present case are similar to the case supra. In the present case also the respondent no.2 had checked the license and driving skills before appointing him as a driver on the vehicle in question. After satisfying herself that the respondent no.1 had a license and was driving competently she engaged him on the offending vehicle. She did not observe any time prior to the aforesaid incident that he drove the offending vehicle negligently or did not exercise reasonable care. I am of the view that the respondent no. 2 fulfilled the conditions of the policy regarding use of the vehicle by a duly licensed driver or one who was not disqualified to drive at the relevant point of time. I am of the view that the respondent No.3 cannot be

absolved of its liability to compensate the petitioner and no liability can be fastened on the respondent no.2, the insured since at the time of accident, the policy was valid.

14. In *United India Insurance Company Ltd. V. Lehu & Ors.* (2003) 3 SCC 338, the Supreme Court observed as under:-

*"20. When an owner is hiring a driver he will therefore have to check whether the driver has a driving licence. If the driver produces a driving licence which on the face of it looks genuine, the owner is not expected to find out whether the licence 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 enquiries with RTOs, which are spread all over the country, whether the driving licence shown to them is valid or not. Thus where the owner has satisfied himself that the driver has a licence 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 licence was fake, the insurance company would continue to remain liable unless they prove that the owner/insured was aware or had noticed that the licence 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. This is the law which has been laid down in *Skandia*[(1987) 2 SCC 654] , *Sohan Lal Passi* [(1996) 5 SCC 21 : 1996 SCC (Cri) 871] and *Kamla* [(2001) 4 SCC 342 : 2001 SCC (Cri) 701] cases. We are in full agreement with the views expressed therein and see no reason to take a different view".*
(emphasis supplied)

15. In *National Insurance Company V. Swaran Singh* (2004) 3 SCC 297, a judgment rendered by a bench of three Hon'ble Judges, the question of

effect of breach of terms and conditions of the insurance policy, particularly in the context of driving license, was examined at length. The summary of findings recorded in the said judgment, as appearing in para 110 of the report needs to be taken note of, for guidance, in *extenso*. It reads as under:

"110. The summary of our findings to the various issues as raised in these petitions is as follows:

(i) Chapter XI of the Motor Vehicles Act, 1988 providing compulsory insurance of vehicles against third-party risks is a social welfare legislation to extend relief by compensation to victims of accidents caused by use of motor vehicles. The provisions of compulsory insurance coverage of all vehicles are with this paramount object and the provisions of the Act have to be so interpreted as to effectuate the said object.

(ii) An insurer is entitled to raise a defence in a claim petition filed under Section 163-A or Section 166 of the Motor Vehicles Act, 1988, inter alia, in terms of Section 149(2)(a)(ii) of the said Act.

(iii) The breach of policy condition e.g. disqualification of the driver or invalid driving licence of the driver, as contained in sub-section (2)(a)(ii) of Section 149, has to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence 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 the insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by a duly licensed driver or one who was not disqualified to drive at the relevant time.

(iv) Insurance companies, however, with a view to avoid their liability must not only establish the available defence(s) raised in the said proceedings but must also establish "breach" on the part of the owner of the vehicle; the burden of proof wherefore would be on them.

(v) *The court cannot lay down any criteria as to how the said burden would be discharged, inasmuch as the same would depend upon the facts and circumstances of each case.*

(vi) *Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards the insured unless the said breach or breaches on the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply “the rule of main purpose” and the concept of “fundamental breach” to allow defences available to the insurer under Section 149(2) of the Act.*

(vii) *The question, as to whether the owner has taken reasonable care to find out as to whether the driving licence produced by the driver (a fake one or otherwise), does not fulfil the requirements of law or not will have to be determined in each case.*

(viii) *If a vehicle at the time of accident was driven by a person having a learner's licence, the insurance companies would be liable to satisfy the decree.*

(ix) *The Claims Tribunal constituted under Section 165 read with Section 168 is empowered to adjudicate all claims in respect of the accidents involving death or of bodily injury or damage to property of third party arising in use of motor vehicle. The said power of the Tribunal is not restricted to decide the claims inter se between claimant or claimants on one side and insured, insurer and driver on the other. In the course of adjudicating the claim for compensation and to decide the availability of defence or defences to the insurer, the Tribunal has necessarily the power and jurisdiction to decide disputes inter se between the insurer and the insured. The decision rendered on the claims and disputes inter se between the insurer and insured in the course of adjudication of claim for compensation by the claimants and the award made thereon is enforceable and executable in the same manner as provided in*

Section 174 of the Act for enforcement and execution of the award in favour of the claimants.

(x) Where on adjudication of the claim under the Act the Tribunal arrives at a conclusion that the insurer has satisfactorily proved its defence in accordance with the provisions of Section 149(2) read with sub-section (7), as interpreted by this Court above, the Tribunal can direct that the insurer is liable to be reimbursed by the insured for the compensation and other amounts which it has been compelled to pay to the third party under the award of the Tribunal. Such determination of claim by the Tribunal will be enforceable and the money found due to the insurer from the insured will be recoverable on a certificate issued by the Tribunal to the Collector in the same manner under Section 174 of the Act as arrears of land revenue. The certificate will be issued for the recovery as arrears of land revenue only if, as required by sub-section (3) of Section 168 of the Act the insured fails to deposit the amount awarded in favour of the insurer within thirty days from the date of announcement of the award by the Tribunal.

(xi) The provisions contained in sub-section (4) with the proviso thereunder and sub-section (5) which are intended to cover specified contingencies mentioned therein to enable the insurer to recover the amount paid under the contract of insurance on behalf of the insured can be taken recourse to by the Tribunal and be extended to claims and defences of the insurer against the insured by relegating them to the remedy before regular court in cases where on given facts and circumstances adjudication of their claims inter se might delay the adjudication of the claims of the victims.”

(emphasis supplied)

16. As observed in the case of *Swaran Singh* (supra) mere absence of a driving license or the fact that there was a fake or invalid driving license, by itself, cannot suffice to hold that there has been a fundamental breach of the terms and conditions of the insurance policy. The tribunal and the courts while dealing with such issues have to apply the “rule of main purpose” to

ascertain as to whether the defence available to the insurer under Section 149 (2) of MV Act has been proved or not. There cannot be a strait-jacketed formula to arrive at appropriate conclusions in this regard as the questions of fact and law will have to be determined in the light of peculiar facts and circumstances of each case.

17. It is the contention of the owner in her appeal against the judgment in the first claim case that the tribunal failed to take note that under the Delhi Motor Accident Claims Tribunal Rule 2008, particularly rule 14, when served with the notice of the claim petition her obligation was to respond to the contentions of the claimant. It is her submission that the insurer had been impleaded as a party respondent basically to invoke the indemnity clause and there was no litigation, so to say to be answered by the owner/insured towards the contentions of the insurer. It is argued that the insurer in either of these two cases did not share the defences pleaded by it in its written statements as no copy of the said pleadings were ever made available. The owner further argues that the tribunal fell into error by rejecting her evidence (as R2W1) with the observation that the contentions raised there were not founded on any pleadings and as no defence of the kind stated that had been earlier taken. Her counsel submitted that the affidavit (Ex.R2W1/A) of the owner had been allowed to be taken on record and she was allowed to be examined in her own defence on 4.8.2011 without any demur. It is his plea that the evidence having been taken on board, the tribunal could not have rejected it by the reasoning quoted above.

18. The counsel for the owner, while defending the view taken by the tribunal in the judgment in the second claim case, submitted that similar

view should have been taken in the first claim case as well, inasmuch as, by her evidence she has demonstrated that she had exercised due diligence at the time of engaging the driver. It is her argument that soon as the second accident had occurred, the facts of negligent driving having come to her knowledge, the services of the driver were immediately terminated.

19. The owner's plea is that there has been no fundamental breach of the terms and conditions of the policy and, thus, the recovery rights granted against her in the first claim case and the plea for similar recovery rights against her in the second claim case are wholly unjustified.

20. *Per contra*, the counsel for the insurer argued that given the conduct of the owner in first suffering the proceedings in both cases *ex-parte* and then appearing only upon the notices under Order 12 Rule 8 CPC to claim that there had been due diligence on her part exposes the plea to be an afterthought and that the tribunal took a correct view of the matter in the first claim case but failed to exercise its jurisdiction properly in the second claim case. It is argued that the insurer deserves reimbursement through recovery rights against the owner in both the cases.

21. Having given considered thoughts to the contentions raised, this Court finds the plea of the insurer to be well-founded. While there can be no two views about the fact that the owner as a party respondent, called through notice by the tribunal in an accident claim case, is required first to respond to the contentions raised in the claim petition by filing a written statement. As noticed above, opportunity was made available in both claim cases but the owner chose to suffer the proceedings *ex-parte*. The written statement

was filed in the second claim but thereafter the owner was disinterested or apathetic towards inquiry proceedings.

22. It has to be borne in mind that ordinarily in accident claim cases based on fault-liability, the primary cause of action of the person having suffered bodily injury (or other damage) is against the principal tortfeasor i.e the driver of the motor vehicle which was involved in the accident. The responsibility of the owner of such offending vehicle arises on account of vicarious liability. If the facts pleaded by claimant in such a case are brought home and finding of fault on the part of the driver is reached, the driver and owner are made liable, jointly and severally, to pay compensation which is assessed by the tribunal on settled principles. The insurance company need not be impleaded as a party respondent. It can be so impleaded, however, if the need were to arise in terms of Section 170 of MV Act. Be that as it may, a claimant may implead the insurer as a party respondent at the very initiation of the proceedings. The presence of the insurer is primarily to take care of the interest of the insured (the owner of the offending vehicle) on account of the insurance policy upon which the latter relies. Thus, the owner/insured depends on the assistance of the insurer in terms of the indemnity clause under the insurance policy. In such fact-situation, it is natural that the insured/owner shall appropriately take care that the insurer admits the liability to indemnify under the insurance policy and at the same time is not pleading any breach of terms and conditions of the policy. After all, the liability of the insurer under the insurance policy is not absolute but conditional upon terms and conditions included in the contract to which both the insurer and the insured are a party.

23. In above view of the matter, it is not correct to argue that the insured is not obliged to respond to the pleadings of the insurer. Given the fact that the insurer's liability is not absolute and since it may take defences available under Section 147 MV Act or be permitted under Section 170 even to plead collusion and seek to be absolved and, in view of law explained in *Swaran Singh* (supra) may press for recovery rights, it is the duty of the insured (owner) to participate in the inquiry and assist the tribunal by appropriate pleadings answering not only the claim but also the stand of the insurer.

24. The owner/insured in both the above-mentioned cases seems to have assumed that the insurer was there to take care of her liability arising out of the motor vehicular accidents caused by the motor vehicle she owned. Thus, she came back to participate in the proceedings in each of these cases only upon notices under Order 12 Rule 8 CPC (pointing out that the driver she had engaged on the offending vehicle on the dates of accident i.e. 16.3.2009 and 2.10.2010 in the two cases had been found to be fake) having been served upon her by the insurer. It is only at that stage that she came up with the theory that she had engaged the driver after exercise of due diligence, having seen the driving license presented by the driver with her own eyes and having satisfied herself as to his driving capability by taking a test through her husband. She would not spell out the date of such test or as to how and where it was conducted, more particularly as to whether this was done in her presence. It is pertinent to note that she did not examine her husband who had statedly taken the driving test of the driver while being so engaged.

25. The chronology of events and the facts of these cases clearly show that the claim of due diligence of the insured/owner cannot be accepted. The driver engaged by her was committing serious accidents causing *mayhem* to the ordinary citizens almost with impunity. She had learnt soon after the first accident (on 16.3.2009) that the driver had caused a serious accident and had been accused of rash/negligent driving. She made no verification of facts concerning his ability or qualification to drive at that stage or even after the second accident (on 02.10.2010). She came up with the story of verification of license and driving test only when the insurer served her with the notice under Order 12 Rule 8 CPC in July, 2011. As the said pleas had come at much belated stage, they are palpably an afterthought.

26. In the above facts and circumstances, the view taken by the tribunal in the second claim case cannot be upheld. The insurance company has made out a good case of breach of terms and conditions of the insurance policy in both the cases. Thus, the view taken in this regard in the first claim case is accepted and upheld.

27. The appeal of Sheela Rani (MAC Appeal No. 701/2012) having been found devoid of substance is dismissed. The appellant in the said matter had been called upon by order 10.07.2012 to deposit 50% of the awarded amount with the Registrar General, subject to which the enforcement of the recovery rights granted against her was stayed. The counsel on her behalf submits that due compliance was made with the said directions. The said amount shall now be released to the insurance company as reimbursement for the amount paid to the claimant. Appellant Sheela Rani is directed to

pay the balance amount to the insurer by depositing it with up-to-date interest with the tribunal within 30 days of this order, failing which the insurer shall be at liberty to enforce its recovery rights by appropriate proceedings before the tribunal.

28. The appeal of the insurer (MAC Appeal No. 388/2014) is allowed. The finding recorded by the tribunal declining recovery rights is set aside. It is directed that the owner Sheela Rani (third respondent in the said appeal) is liable to reimburse the payment made by the insurer to the claimant of the said case with interest by depositing the said amount with the tribunal within 30 days of this order whereupon the same shall be released to the insurance company to satisfy its recovery rights, failing which the insurer shall have the liberty to take out appropriate proceedings before the tribunal to enforce the said right. In the said appeal, by order dated 29.4.2014, the insurer had been called upon to deposit the awarded amount. It had been noted that the insurance company had deposited the awarded amount with the tribunal and out of the said deposit 80% was released to the claimant. There is no reason as to why the balance should be withheld any further. It is, therefore, directed that the balance amount lying in deposit with the tribunal shall also be released to the claimant of the said case in terms of the judgment of the tribunal.

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

30. The appeals are disposed of in above terms.

**R.K. GAUBA
(JUDGE)**

MARCH 01, 2016/nk