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

\+ MAC.APP. 369/2014

ICICI LOMBARD GENERAL INSURANE CO LTD..... Appellant

Through: Ms. Suman Bagga, Adv.

versus

SMT MANJEET KAUR & ORS. ..... Respondent

Through: None.

CORAM:
HON'BLE MR. JUSTICE NAJMI WAZIRI

<u>O R D E R</u>

% 27.04.2017

On 08.03.2016, 28.09.2016 and 19.12.2016 none appeared for the respondent. An appearance was marked on 03.02.2017. However, none appears today despite the matter having been called out twice in forenoon and even now at 14:27 hours.

This appeal impugns the Award dated 18.02.2014, whereby compensation amounting to Rs. 6,42,007/- along with interest @ 9% per annum was granted to the claimants – the kin of the deceased who lost his life in a motor vehicle accident on 08.10.2010. The offending vehicle was insured by the appellant. It is the appellant's case that since no valid driving licence of the driver was produced, therefore, it would be presumed that he did not possess one.

The Court notes that there is nothing on record to show that the appellant led any evidence or set out a case as now contended. In their reply to the claim petition, the appellant simply stated that the offending vehicle was duly insured by them as on the date of the accident. The appellants however pleaded that their liability is subject to the terms and conditions of the insurance policy. It was stated that the driver/respondent no. 4 was driving the offending vehicle without holding a proper and valid driving licence and therefore has been rightly charge sheeted under Section 279/304A IPC and Section 3/181 of M.V. Act. The appellant relied upon the challan issued on the date of accident under Section 3 and 181 of the M.V. Act to support this contention. However, no further evidence was led in this regard. After considering the essential aspects of the case the Tribunal concluded as under:

> "..... 3. The claim of the petitioners has been contested by all the respondents. Respondent no. 1 in his written statement has taken the preliminary objections inter-alia that no cause of action has accrued in favour of the petitioners and respondent no. 1 has been falsely booked by the IO in the criminal case since he was not driving his vehicle rashly and negligently but the accident had occurred due to the mistake of the deceased who while crossing the road, without following the rules and regulation, suddenly came under the impact of another pulser motorcycle and in the process of controlling his balance touched the offending vehicle and received minor injuries. The driver of the pulser had ran away from the place of occurrence after hitting and thus this case is one of the hit and run case. On merit also, the contents of the petition have been denied and. It is denied that the deceased had suffered fatal injuries in the accident. It is denied that the petitioner had incurred expenses on his treatment, transportation and last rites of the deceased or that due to premature death of the deceased the petitioners have suffered any loss. Respondent no. 2 has also contested the case on the same ground.

4. Respondent no. 3 / insurance company, in its written statement has not disputed that the offending vehicle was insured with it on the date of accident. It is however pleaded that the liability of the insurance company is subject to terms and condition to the policy. It is stated that the driver of the offending vehicle was driving the vehicle at the time of accident without holding a proper and valid driving licence and therefore has been charge sheeted under Section 279/304A IPG and Section 3/181 of MV.

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9. PW2 Sh. Ram Chander deposed that he is eye witness of the accident. He deposed that on 8.10.10 while he along with his jija was going to A Block Mangolpuri Delhi to purchase the goods for household requirement from his residence on foot with due care and caution and on the correct side of the road, at about 10 am when he reached at park near A block market on Kalamandir road, Delhi all of a sudden, a Hero Honda passion pro motorcycle bearing registration no. DL4SBP-4087 being driven by its driver in a rash, negligent and reckless manner came from behind in a breakneck speed and hit his deceased jija namely Sh. Raj Kishan with great force and due to the impact he suffered grievous injuries all over his body and ultimately died on account of the injuries sustained in the said accident on 9.10.10. The deceased was removed to Sri Balaji Action Hospital, Delhi in a precarious condition where his MLC was prepared and even after the best efforts to save his life, he succumbed to his injuries on 9.10.10 in the said hospital and the postmortem was conducted by the doctors of Sanjay Gandhi Hospital. He further deposed that the deceased received the fatal injury due to the rash and negligent driving on the part of the driver of the offending vehicle and had the driver of the offending vehicle been vigilant and cautious enough and driven his vehicle with due care and caution with proper look out and at a normal

speed the accident could have been avoided.

10.There is no cross examination of the witness on the point that the offending vehicle was being driver by respondent no. 1 in a rash negligent and reckless manner without proper look out and at a fast speed and hit the deceased from behind with a great force. Though it is suggested to the witness that he could not see the accident, the suggestion has been categorically denied. Respondent no. 1 has been prosecuted for having caused the said accident by the police and report under Section 173 CrPC has also been filed. Respondent no. 1 has not explained as to why he has been prosecuted for the said accident nor he has stepped into the witness box to explain the manner in which the accident took place. The postmortem report filed along with DAR shows that the deceased was brought to the hospital with the history of road traffic accident and the cause of death has been opined as cerebral damage consequent upon blunt force / surface impact to the head. It has also been opined that all the in Bimla Devi and Others v. Himachal Koad Corporation & others (2009) 13 SC 530 Hon'ble Supreme Court Held:

> "It was necessary to be borne in mind that strict proof of accident caused \by particular bus in a particular manner may not be possible to be done by the claimant. The claimants were merely to establish their case on the touchstone of preponderance of probability The standard of proof beyond reasonable doubt could not have been applied"

11. In view of the aforesaid discussion, testimony of eye witness and certified copies of the criminal case, preponderance of probability that the deceased died due to rash and negligent driving of the offending vehicle by respondent no. 1. Issue no. 1 is accordingly decide in favour of petitioner and against the respondents.

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> 21. Respondent no. 3 has not adduced any evidence to establish the statutory defence taken by them. Hence, being the insurance company, Respondent no. 3 is directed to deposit the award amount along with upto date interest @9% per annum w.e.f. filing the date of petition till the notice regarding the deposit of award amount is sent to the petitioners. Respondent no. 3 /insurance company is further directed to prepare the separate cheques of the compensation amount as per above order.....”

The third party liability was fixed on the insurer simply because it led no evidence regarding its statutory defence i.e. breach of policy condition. The appellant – insurer has paid the awarded amount. Counsel for the appellant contends that if the driver possessed a valid driving licence, it ought to have been produced either by him or by the owner of the offending vehicle. Default of bringing the same on record only substantiates the appellant’s contention that the driver never possessed a driving licence hence there was a breach of policy condition. The proceedings under Sections 3 and 181 of the M.V. Act are with respect to prosecution for driving the vehicle without a valid driving licence. Those proceedings are an indicator of wrongdoing by the driver. This pointer, of driving without a licence was never sought to be disproved. No evidence was presented about possession of a valid driving licence. In the circumstances, right of recovery against the driver and owner of the vehicle ought to have been granted to the insurer.

What emerges from the aforesaid discussion is that despite having been granted multiple opportunities, the driver of the vehicle did not produce a valid driving licence. The subsequent purchaser too did not produce any such document to show that the vehicle was being driven by a duly licensed person. There is no opposition to the appellant's contentions. Therefore, the insurer/appellant ought to be granted right to recover from the respondents. The appeal is allowed.

The appellant is granted right to recover the compensation amount against respondent Nos. 4 & 5.

Statutory deposit be released to the appellant.

NAJMI WAZIRI, J

APRIL 27, 2017/acm