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* **IN THE HIGH COURT OF DELHI AT NEW DELHI*****Date of decision: 26.09.2023***

+ MAC.APP. 704/2018
THE NATIONAL INSURANCE CO LTD Appellant
Through: Mr.Shyam Singh Yadav, Adv.

versus

DINESH KUMAR & ORS Respondents
Through: None

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (ORAL)**CM APPL. 30327/2018**

1. For the reasons stated in the application, the delay of 20 days in filing the appeal stands condoned.
2. The application is disposed of.

MAC.APP. 704/2018 & CM APPL. 30328/2018

3. This appeal has been filed challenging the Award dated 05.04.2018 (hereinafter referred to as the 'Impugned Award') passed by the learned Motor Accidents Claims Tribunal-01, North, Rohini, Delhi (hereinafter referred to as 'Tribunal') in Suit no.4457/2016, titled ***Dinesh Kumar & Anr. v. Avdesh Kumar & Ors.***
4. It was the case of the claimants, that is, the respondent nos.1 and 2 herein, before the learned Tribunal that on 17.11.2014 at about 3 p.m., the





deceased, that is, Baby Achal, was playing in front of Jhuggi, Sector-8, Noida, Uttar Pradesh, when a Tata Sumo bearing registration no. UP16BT 3455, being driven by the respondent no.3 herein at a high speed and in a rash and negligent manner, hit the deceased. Due to the impact of the accident, the deceased suffered fatal injuries.

5. The limited challenge of the appellant to the Impugned Award is on the denial of the learned Tribunal to grant a right to the appellant to recover the compensation paid to the respondent nos.1 and 2 herein, who were the claimants before the learned Tribunal, from the respondent no.4 herein, that is owner of the offending vehicle.

Submissions by the learned counsel for the appellant:

6. The learned counsel for the appellant submits that the appellant had issued a notice under Order XII Rule 8 of the Code of Civil Procedure, 1908 (in short, 'CPC') to the respondent no.4 herein, seeking the production of the driving licence of the driver of the Offending Vehicle, that is, the respondent no. 3 herein. In spite of service of the said notice, the respondent no.4 neither provided the driving licence nor appeared before the learned Tribunal. The appellant proved the notice through the testimony of its witness, namely Mr.B.S. Yadav (R3W1), working as Assistant with the appellant company. However, his testimony was discarded by the learned Tribunal observing that from the tracking report, it could not be shown as to on whom the said notice was served. He submits that the appellant also took steps to summon the officer/report from the Motor Licencing Officer, Mainpuri, UP, (hereinafter referred to as 'MLO'), who, in spite of service of notice twice, did not appear before the learned Tribunal. The appellant also served the notice on the MLO *dasti*, however, in spite of the same, the





witness did not turn up before the learned Tribunal, forcing the appellant to close its evidence. He submits that the report of the office of the MLO, however, stated that the licence produced by the respondent no.3 herein was fake and not issued by the said office. He submits that therefore, the appellant should have been granted a right to recover the compensation paid to the respondent nos.1 and 2 from the respondent no.4.

Analysis:

7. I have considered the submissions made by the learned counsel for the appellant, however, in the peculiar facts of the present case, I am unable to agree with the same.

8. The onus of proving that the driving licence of the driver/respondent no.3 was fake and not genuine was on the appellant. As noted by the learned Tribunal, the appellant took steps to summon the witness from the MLO, however, as the witness was not appearing, closed its evidence on its own. The appellant therefore, did not insist upon the learned Tribunal to enforce the presence of the MLO before it. Having not done so, the appellant shall bear the consequences of the same.

9. The evidence of R3W1-Mr.B.S.Yadav cannot come to the aid of the appellant. The said witness has placed on record the notice dated 12.05.2016 issued under Order XII Rule 8 of the CPC to the respondent no.4 (Ex.R3W1/3). The said notice called upon the respondent no.4 to produce the original driving licence of the respondent no.3. It did not put the respondent no.4 to notice that the driving licence produced by the respondent no.3 was fake and not genuine. Similarly, no notice of the purported report of MLO was ever served on the respondent no.4.

10. In *National Insurance Co. Ltd. v. Swaran Singh*, (2004) 3 SCC 297,





the Supreme Court in the cases of the driver of the Offending Vehicle having a fake driving licence, has observed as under:

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

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(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 wherefor 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.
xxxx”*

11. In the present case, the appellant has clearly been unable to meet the above standard laid down by the Supreme Court.
12. Accordingly, I find no merit in the present appeal. The same, is dismissed, along with the pending application.
13. The statutory amount deposited by the appellant be returned to the appellant along with interest accrued thereon.

NAVIN CHAWLA, J

SEPTEMBER 26, 2023/Arya/rp

