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

Pronounced on: 29th February, 2012

\+ **MAC.APP. 329/2010**

Reserved on: 3rd February, 2012

ORIENTAL INSURANCE CO. LTD. …….Appellant
Through: Mr. L.K.Tyagi, Advocate.

versus

RAKESH KUMAR & ORS. …….Respondents
Through: Mr. Udai Raj Singh, Advocate for Respondent No.1.

\+ **MAC.APP. 13/2008**

Reserved on: 24th January, 2012

JAGPAL SINGH SOLANKI &ANR. ..... Appellants
Through: Mr. Manoranjan, Advocate
Mr. Jitender Singh, Advocate

versus

THE ORIENTAL INSURANCE CO. LTD. & ANR.
..... Respondents
Through: Mr. A.K.Soni Adv. for R-1.

\+ **MAC.APP. 404/2007**

Reserved on: 23rd January, 2012

NATOINAL INSURANCE CO.LTD. ..... Appellant
Through: Mr. Pradeep Gaur, Adv.

versus

RAM PAL SINGH & ORS. ..... Respondents
Through: Mr. Ashok Popli, Adv. for R-1.

+ **MAC.APP. 514/2009**

Reserved on: 24th January, 2012

ORIENTAL INSURANCE CO. LTD ..... Appellant
Through: Mr. A.K. Soni, Advocate.

versus

CHOTKAN & ORS. ..... Respondents
Through: Nemo.

+ MAC.APP. 189/2009

Reserved on: 9th February, 2012

MUNISH KUMAR AZAD ..... Appellant
Through: Mr.Sujit K.Jaiswal, Advocate

versus

IFFCO TOKIO GENERAL INSURANCE CO. LTD.
……..Respondent
Through: Mr. Pankaj Seth, Advocate

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

J U D G M E N T

G. P. MITTAL, J.

1. In these Appeals a common question of law falls for consideration i.e. whether in case of a willful or intentional breach of the terms of the policy by the Insured in terms of Section 149 (2) (a) (ii) of the Motor Vehicles Act (the Act), would the Insurer still be liable to satisfy the award of

compensation in favour of third parties and avail the right to recover the same from the Insured or whether Insurer would not be so liable, leaving the third party to enforce the award against the Insured/owner and driver of the offending vehicle?

2. It is urged by the learned counsel for the Insurers (the Insurance Companies) that once a willful breach is established, the Insurer can avoid the liability to pay even to third parties. In support of their argument, reliance is placed on *Malla Prakasarao v. Malla Janaki & Ors.(2004) 3 SCC 343*, *National Insurance Company Limited v. Kusum Rai & Ors., (2006) 4 SCC 250; National Insurance Company Limited v. Vidhyadhar Mahariwala & Ors., (2008) 12 SCC 701; Ishwar Chandra & Ors. v. The Oriental Insurance Company Limited & Ors., (2007) 10 SCC 650;* and *Premkumari & Ors. v. Prahalad Dev & Ors., (2008) 3 SCC 193.*

3. On the other hand, learned counsel for the Claimants and owners urge that irrespective of the breach of the terms of policy, the Insurance Company cannot avoid its liability as far as the third party liability is concerned and where the breach is not willful, the Insured is not liable at all and the Insurer is under obligation to satisfy the judgments and awards. Reliance is placed on *Sohan Lal Passi v. P. Sesh Reddy, (1996) 5 SCC 21, New India Assurance Co., Shimla v. Kamla and Ors., (2001) 4 SCC 342, United India Insurance Company Ltd. v. Lehru & Ors., (2003) 3 SCC 338, National Insurance Company Limited*

v. Swaran Singh & Ors., (2004) 3 SCC 297, Oriental Insurance Co. Ltd. v. Zaharulnisha and Ors., (2008) 12 SCC 385, National Insurance Company Limited v. Geeta Bhat & Ors., 2008 (12) SCC 426, and *National Insurance Company Limited v. Laxmi Narain Dhut, (2007) 3 SCC 700.*

4. Before I advert to the facts of each case, I shall try to analysize the law on the subject as there appears to be a conflict in some of the decisions of the Supreme Court. Section 146 of the Act prohibits any person from using or allowing another person from using any motor vehicle in a public place unless there is in force, in relation to the use of the vehicle by that person or that other person, a policy of insurance complying with the requirements of Chapter XI.

5. In the case of *United India Insurance Company Ltd. v. Lehru & Ors., (2003) 3 SCC 338,* the Supreme Court went into the object and philosophy of obtaining an insurance policy by every person, using a motor vehicle in public place in respect to the third party risk. The Supreme Court observed that the provision of Section 96 (2) (b) (ii) of the Act of 1938 is in *parimateria* to Section 149 (2) (a) (ii) of the Act and referred to *Skandia Insurance Company Limited v. Kokilaben Chandravadan ,(1987) 2 SCC 654* and quoted with approval the following observations:-

> *"12. The defence built on the exclusion clause cannot succeed for three reasons, viz.,:*

(1) On a true interpretation of the relevant clause which interpretation is at peace with the conscience of Section 96, the condition excluding driving by a person not duly licensed is not absolute and the promisor is absolved once it is shown that he has done everything in his power to keep, honour and fulfil the promise and he himself is not guilty of a deliberate breach.

(2) Even if it is treated as an absolute promise, there is substantial compliance therewith upon an express or implied mandate being given to the licensed driver not to allow the vehicle to be left unattended so that it happens to be driven by an unlicensed driver.

(3) The exclusion clause has to be 'read down' in order that it is not at war with the 'main purpose' of the provisions enacted for the protection of victims of accidents so that the promisor is exculpated when he does everything in his power to keep the promise.

13. In order to divine the intention of the legislature in the course of interpretation of the relevant provisions there can scarcely be a better test than that of probing into the motive and philosophy of the relevant provisions keeping in mind the goals to be achieved by enacting the same. Ordinarily it is not the concern of the legislature whether the owner of the vehicle insures his vehicle or not. If the vehicle is not insured any legal liability arising on account of third-party risk will have to be borne by the owner of the vehicle. Why then has the legislature insisted on a person using a motor vehicle in a public place to insure against third-party risk by enacting Section 94? Surely the obligation has not been imposed in order to promote the business of the insurers engaged in the business of automobile insurance. The provision has been inserted in order to protect the members of the community travelling in vehicles or using the roads from the risk attendant upon the user of motor vehicles on the roads. The law may provide for compensation to victims of the accidents who sustain injuries in the course of an automobile accident or

compensation to the dependants of the victims in the case of a fatal accident. However, such protection would remain a protection on paper unless there is a guarantee that the compensation awarded by the courts would be recoverable from the persons held liable for the consequences of the accident. A court can only pass an award or a decree. It cannot ensure that such an award or decree results in the amount awarded being actually recovered, from the person held liable who may not have the resources. The exercise undertaken by the law courts would then be an exercise in futility. And the outcome of the legal proceedings which by the very nature of things involve the time cost and money cost invested from the scarce resources of the community would make a mockery of the injured victims, or the dependants of the deceased victim of the accident, who themselves are obliged to incur not inconsiderable expenditure of time, money and energy in litigation. To overcome this ugly situation the legislature has made it obligatory that no motor vehicle shall be used unless a third-party insurance is in force. To use the vehicle without the requisite third-party insurance being in force is a penal offence. The legislature was also faced with another problem. The insurance policy might provide for liability walled in by conditions which may be specified in the contract of policy. In order to make the protection real, the legislature has also provided that the judgment obtained shall not be defeated by the incorporation of exclusion clauses other than those authorised by Section 96 and by providing that except and save to the extent permitted by Section 96 it will be the obligation of the insurance company to satisfy the judgment obtained against the persons insured against third-party risk (vide Section 96). In other words, the legislature has insisted and made it incumbent on the user of a motor vehicle to be armed with an insurance policy covering third-party risks which is in conformity with the provisions enacted by the legislature. It is so provided in order to ensure that the injured victims of automobile

accidents or the dependants of the victims of fatal accidents are really compensated in terms of the money and not in terms of promise. Such a benign provision enacted by the legislature having regard to the fact that in the modern age the use of motor vehicles notwithstanding the attendant hazards, has become an inescapable fact of life, has to be interpreted in a meaningful manner which serves rather than defeats the purpose of the legislation. The provision has therefore to be interpreted in the twilight of the aforesaid perspective."

6. It is urged by the learned counsel for the Insurance Companies that as per Section 149 (2) (a) (ii), if the Insurance Company establishes that there is willful or intentional breach of terms of the policy, the Insurance Company is completely absolved and it will be the liability of the owner and driver to satisfy the claim against the third party also.

7. First of all, I would first refer to a three Judges Bench decision of the Supreme Court in *Malla Prakasarao (supra)* where it was held that, where there is breach of terms of contract, the Insurance Company has no liability to indemnify the Insured. The Supreme Court observed as under:-

"It is not disputed that the driving licence of the driver of the vehicle had expired on 2-11-1982 and the driver did not apply for renewal within 30 days of the expiry of the said licence, as required under Section 11 of the Motor Vehicles Act, 1939. It is also not disputed that the driver of the vehicle did not have driving licence when the accident took place. According to the terms of contract, the Insurance Company has no liability to pay any compensation where an accident takes places by a vehicle, driven by a driver without a driving licence. In

that view of the matter, we do not find any merit in the appeal."

8. Thus, in this case, it was held that the Insurance Company has no liability to pay where an accident took place with a vehicle driven by a person without a driving licence.

9. In the case of *Kusum Rai & Ors.(supra),* the offending vehicle was a taxi. Driver of the vehicle did not possess a licence to drive a commercial vehicle. Evidently, there was breach of condition of policy. The Supreme Court held that the Insurer was not liable to pay the compensation to the third party. However, in exercise of its jurisdiction under Article of 136 of the Constitution of India, the Insurer was asked to pay and recover, as the Claimants were very poor. I would extract Paras 11, 16 and 17 of the report hereunder:-

"11. It has not been disputed before us that the vehicle was being used as a taxi. It was, therefore, a commercial vehicle. The driver of the said vehicle, thus, was required to hold an appropriate licence therefor. Ram Lal who allegedly was driving the said vehicle at the relevant time, as noticed hereinbefore, was holder of a licence to drive a light motor vehicle only. He did not possess any licence to drive a commercial vehicle. Evidently, therefore, there was a breach of condition of the contract of insurance. The appellant, therefore, could raise the said defence.

x x x x x x x x x

16. In a case of this nature, therefore, the owner of a vehicle cannot contend that he has no liability to verify

the fact as to whether the driver of the vehicle possessed a valid licence or not.

17. However, in this case the owner has not appeared. The victim was aged only 12 years. The claimants are from a poor background. They must have suffered great mental agony. Therefore, we are of the opinion that it may not be appropriate to push them into another round of litigation particularly when it may be difficult for them to secure the presence of the owner of the vehicle."

10. In *Ishwar Chandra & Ors. (supra)* the driving licence of the driver expired on 27.08.1994. The same was renewed after the accident which took place on 24.08.1995. The Supreme Court referred to the provision of Section 15 and held that the renewal would not relate back to the date of the expiry. The Claims Tribunal awarded the compensation to the Claimants i.e. Respondent No.2 and 3 before the Supreme Court. The Respondent No.1 preferred an Appeal to the High Court. While dismissing the Appeal, the High Court granted liberty to the Oriental Insurance Company Limited to initiate appropriate proceedings against the owner and driver of the vehicle for realization of the amount which was to be paid by the Insurance Company in terms of the award, to the third party-cum-Claimants, subject to establishing its case before the Tribunal. The Appeal preferred by the owner was dismissed. Thus, although this authority is relied by the Insurer, infact the liability of the Insurance Company to first satisfy the award did not fall for consideration before the Supreme Court.

11. Again in *Vidhyadhar Mahariwala & Ors. (supra)*, the driving licence of the driver had expired; it was valid for the period between 29.12.2000 to 14.12.2003 and was renewed from 16.05.2005 to 15.05.2008. The accident took place on 11.06.2004. As per provision of Section 15 of the Act, since the licence was not renewed within 30 days of the expiry, the licence was to be effective only from the date of the renewal. While referring to *Ishwar Chandra & Ors. (supra)*, the Supreme Court held that the Insurance Company would have no liability in the case of this nature and the Appeal filed by the Insurance Company was allowed. It was held that it was open to the Claimant to recover the amount from Respondent No.2 (i.e. the owner).

12. In *Premkumari and Ors. v. Prahlad Dev and Ors., (2008) 3 SCC 193,* the driver of the offending vehicle did not have a valid licence on the date of the accident. In fact, the driver of the vehicle was the owner's brother; willful breach of the terms of the policy was therefore established. The Claims Tribunal and the High Court exonerated the Insurance Company from its liability. The Supreme Court held that the Insurer was not liable to pay any amount. A sum of ₹ 50,000/- had already been paid by the Insurer. The Supreme Court directed that the Insurer could recover the same from the owner/driver and the Claimants could recover the remaining amount from the owner/driver.

13. Similarly, in *Sardari and Ors. v. Sushil Kumar and Ors., (2008) 17 SCC 208,* an Appeal was filed by the Claimants as the Insurer was exonerated both by the Tribunal and the High Court as the driver of the offending vehicle did not possess a valid driving licence which was admitted by the driver in his testimony before the Tribunal. The Tribunal rejected the Claim on the ground of not proving the negligence on the driver's part. The High Court granted a compensation of ₹ 63,000/- and asked the Claimants to recover the same from the driver and owner. The Supreme Court held that the Insurer cannot be made responsible to pay the award amount.

14. All the above mentioned decisions except *Malla Prakasarao (supra)* are decided by a Division Bench of two Learned Judges of the Supreme Court, whereas, *Malla Prakasarao v. Malla Janaki & Ors.(supra)* was decided by the three Hon'ble Judges.

15. Now, it would be appropriate to refer to the other set of judgments which have adopted the line of reasoning that, irrespective of the willful breach of the terms of policy under Section 149 (2) (a) (ii) it would be the obligation of the Insurer to satisfy the judgments and the award and then to recover the amount paid, from the Insured and the driver.

16. First of all, I would refer to a three Judges Bench decision in *Sohan Lal Passi v. P. Sesh Reddy, (1996) 5 SCC 21,* wherein the Supreme Court referred to the earlier judgment in *Skandia*

Insurance Company Limited v. Kokilaben Chandravadan,(1987) 2 SCC 654. In para 12 of the report it was opined:-

> *"12. Now it has to be examined as to whether the insurance company can be absolved of its liability to pay the compensation in a case where the owner of the vehicle had got the vehicle insured, but the accident took place when it was being driven by a person not holding the driving licence. In the present case the accident took place when the Motor Vehicles Act, 1939 was in force. Section 96 of that Act prescribed the duty of the insurers to satisfy the judgments against persons insured in respect of third party risks (the parallel provision being Section* 149 *in the Motor Vehicles Act, 1988). The relevant part of Section 96 provided:-*
>
> > ***96. Duty of insurers to satisfy judgments against persons insured in respect of third party risk.-***
> >
> > *(1) If, after a certificate of insurance has been issued under Sub-section (4) of Section 95 in favour of the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under Clause (b) of Sub-section (1) of Section 95 (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then, notwithstanding that the insurer may be entitled to. avoid or cancel or may have avoided or cancelled the policy, the insurer shall, subject to the provisions of this section, pay to the person entitled to the benefit of the decree any sum not exceeding the sum assured payable thereunder, as if he were the judgment-debtor, in respect of the liability.*

(2) No sum shall be payable by an insurer under Sub-section (1) in respect of any judgment unless before or after the commencement of the proceedings in which the judgment is given the insurer had notice through the court of the bringing of the proceedings, or in respect of any judgment so long as execution is stayed thereon pending an appeal; and an insurer to whom notice of the bringing of any such proceedings is so given shall be entitled to be made a party thereto and to defend the action on any of the following grounds, namely:

(a)……..

(b) that there has been a breach of a specified condition of the policy, being one of the following conditions, namely;

(i) ……..

(a) to (d) ……..

(ii) a condition excluding driving by a named person or persons or by any person who is not duly licensed, or by any person who has been disqualified for holding or obtaining a driving licence during the period of disqualification; or

x x x x x x

In view of Sub-section (1) of Section 96 if after the certificate of insurance has been issued in favour of the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy, the insurer shall subject to the provisions of the said section pay to the person entitled to the benefit of the decree any sum not exceeding the sum assured payable thereunder, as if he was the judgment-debtor, in respect of the liability. (emphasis supplied). Sub-section (2) of Section 96 enjoins that notice of the

proceedings in which the judgment is given, has to be given to the insurer and such insurer shall be entitled to defend the action on any of the grounds mentioned in Sub-section (2) of Section 96. We are concerned in the present case only with Section 96(2)(b)(ii), a condition excluding driving by any person who is not duly licensed. The question is as to whether the insurance company can repudiate its liability to pay the compensation in respect of the accident by a vehicle only by showing that at the relevant time it was being driven by a person having no licence. In the case of Skiandia Insurance Company Limited v. Kokilaben Chandravadan, (1987) 2 SCC 654, in respect of this very defence by the insurance company, it was said:

> *"The defence built on the exclusion clause cannot succeed for three reasons, viz:*
>
> *(1) On a true interpretation of the relevant clause which interpretation is at peace with the conscience of Section 96, the condition excluding driving by a person not duly licensed is not absolute and the promisor is absolved once it is shown that he has done everything in his power to keep, honour and fulfil the promise and he himself is not guilty of a deliberate breach.*
>
> *(2) Even if it treated as an absolute promise, there is substantial compliance therewith upon an express or implied mandate being given to the licensed driver not to allow the vehicle to be left unattended so that it happens to be driven by an unlicensed driver.*
>
> *(3) The exclusion clause has to be 'read down' in order that it is not at war with the 'main purpose' of the provisions enacted for the protection of victims of accidents so that the promisor is exculpated when he does everything in his power to keep the promise."*

To examine the correctness of the aforesaid view this appeal was referred to a three Judge Bench, because on behalf of the insurance company, a stand was taken that when Section 96(2)(b)(ii) has provided that the insurer shall be entitled to defend the action on the ground that there has been breach of a specified condition to the policy i.e. the vehicle should not be driven by a person who is not duly licensed, then the insurance company cannot be held to be liable to indemnify the owner of the vehicle. In other words, once there has been a contravention of the condition prescribed in Sub-section (2)(b)(ii) of Section 96, the person insured shall not be entitled to the benefit of Sub-section (1) of Section 96. According to us, Section 96(2)(b)(ii) should not be interpreted in a technical manner. Sub-section (2) of Section 96 only enables the insurance company to defend itself in respect of the liability to pay compensation on any of the grounds mentioned in Sub-section (2) including that there has been a contravention of the condition excluding the vehicle being driven by any person who is not duly licensed. This bar on the face of it operates on the person insured. If the person who has got the vehicle insured has allowed the vehicle to be driven by a person who is not duly licensed then only that clause shall be attracted. In a case where the person who has got insured the vehicle with the insurance company, has appointed a duly licensed driver and if the accident takes place when the vehicle is being driven by a person not duly licensed on the basis of the authority of the driver duly authorised to drive the vehicle whether the insurance company in that event shall be absolved from its liability? The expression "breach" occurring in Section 96(2)(b) means infringement or violation of a promise or obligation. As such the insurance company will have to establish that the insured was guilty of an infringement or violation of a promise. The insurer has also to satisfy the Tribunal or the Court that such

violation or infringement on the part of the insured was wilful. If the insured has taken all precautions by appointing a duly licensed driver to drive the vehicle in question and it has not been established that it was the insured who allowed the vehicle to be driven by a person not duly licensed, then the insurance company cannot repudiate its statutory liability under Sub-section (1) of Section 96. In the present case far from establishing that it was the appellant who had allowed Rajinder Pal Singh to drive the vehicle when the accident took place, there is not even any allegation that it was the appellant who was guilty of violating the condition that the vehicle shall not be driven by a person not duly licensed. From the facts of the case, it appears that the appellant had done everything within his power inasmuch as he has engaged a licensed driver Gurbachan Singh and had placed the vehicle in his charge. While interpreting the contract of insurance, the tribunals and courts have to be conscious of the fact that right to claim compensation by heirs and legal representatives of the victims of the accident is not defeated on technical grounds. Unless it is established on the materials on record that it was the insured who had wilfully violated the condition of the policy by allowing a person not duly licensed to drive the vehicle when the accident took place, the insurer shall be deemed to be a judgment-debtor in respect of the liability in view of Sub-section (1) of Section 96 of the Act. It need not be pointed out that the whole concept of getting the vehicle insured by an insurance company is to provide an easy mode of getting compensation by the claimants, otherwise in normal course they had to pursue their claim against the owner from one forum to the other and ultimately to execute the order of the Accident Claims Tribunal for realisation of such amount by sale of properties of the owner of the vehicle. The procedure and result of the execution of the decree is well known."

17. In *New India Assurance Co., Shimla v. Kamla and Ors., (2001) 4 SCC 342* it was held that even when willful breach is proved the Insurance Company has to first satisfy the award. In this case, the driver had a fake licence which was genuinely renewed by the Licensing Authority. It was held that such a renewal will not make a fake licence, valid. The Supreme Court held that if there is breach or violation of the policy condition, the Insurer would not be liable. It was observed that when a valid insurance policy has been issued, the Insurer is liable to pay to the third parties irrespective of the breach or violation of the terms of policy. In Para 25 of the report it was held as under:-

> *"25. The position can be summed up thus:*
>
> *The insurer and insured are bound by the conditions enumerated in the policy and the insurer is not liable to the insured if there is violation of any policy condition. But the insurer who is made statutorily liable to pay compensation to third parties on account of the certificate of insurance issued shall be entitled to recover from the insured the amount paid to the third parties, if there was any breach of policy conditions on account of the vehicle being driven without a valid driving licence……."*

18. In *United India Insurance Company Ltd. v. Lehru & Ors., (2003) 3 SCC 338,* it was held that where the owner hires a driver he is not expected to verify the genuineness of the licence shown to him by the driver from the RTOs, if on the face of it the licence looks genuine and the driver appears to be

competent after testing his driving skills, the owner would not be held to be guilty of willful breach of the terms of the policy, if ultimately the licence is found to be fake. It was held that where the breach of the policy condition is not willful, the Insurer is liable and where it is proved by the Insurer that there is willful breach of the terms of the policy, the Insurer would still be liable to pay to the third party and recover the amount paid. Para 20 of the report is extracted hereunder:-

> *"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 above 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 (Skiandia Insurance Company Limited v. Kokilaben Chandravadan, (1987) 2 SCC 654, Sohan*

Lal Passi v. P. Sesh Reddy, (1996) 5 SCC 21, and New India Assurance Company v. Kamla, (2001) 4 SCC 342) cases. We are in full agreement with the views expressed therein and see no reason to take a different view." (emphasis supplied).

19. It will not be out of place to mention that the judgment in *Kamla (supra)* and *Lehru (supra)* were noted by the Supreme Court in its three Judges Bench case in *Swaran Singh (supra).*

20. In Swaran Singh (supra) The Supreme Court distinguished the three Judges' decision in *Malla Prakasarao (Supra),* holding that the Supreme Court did not have an occasion to consider the general terms and conditions of the contract of Insurance vis-à-vis the liability of the insurer under the Act. Para 103 of the report is extracted hereunder:-

"103. In that case, the Court presumably as in the case of New India Assurance Company Limited v. Mandar Madhav Tambe (1996) 2 SCC 328, was concerned with the terms and conditions of the contract of insurance. Before the Court, no occasion arose to consider the general terms and conditions of the contract of insurance vis-a-viz liability of insurance under the Motor Vehicles Act."

21. Thus, in *Swaran Singh (supra)* the Supreme Court laid down that *Malla Prakasarao (supra)* was not an authority on the statutory liability of the Insurance Company.

22. In *Swaran Singh (supra)*, the Supreme Court held that the liability of the Insurer to satisfy the decree passed in favour of

the third party was statutory. Before proceeding further, I would like to extract Section 149 hereunder:-

> ***"149. Duty of insurers to satisfy judgments and awards against persons insured in respect of third party risks.***
>
> *(1) If, after a certificate of insurance has been issued under sub-section (3) of section 147 in favour of the person by whom a policy has been effected, judgment or award in respect of any such liability as is required to be covered by a policy under clause (b) of sub-section (1) of section 147 (being a liability covered by the terms of the policy) [or under the provisions of section 163A] is obtained against any person insured by the policy, then, notwithstanding that the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy, the insurer shall, subject to the provisions of this section, pay to the person entitled to the benefit of the decree any sum not exceeding the sum assured payable thereunder, as if he were the judgment debtor, in respect of the liability, together with any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.*
>
> *(2) No sum shall be payable by an insurer under sub-section (1) in respect of any judgment or award unless, before the commencement of the proceedings in which the judgment or award is given the insurer had notice through the Court or, as the case may be, the Claims Tribunal of the bringing of the proceedings, or in respect of such judgment or award so long as execution is stayed thereon pending an appeal; and an insurer to whom notice of the bringing of any such proceedings is so given shall be entitled to be made a party thereto and to defend the action on any of the following grounds, namely:-*

(a) that there has been a breach of a specified condition of the policy, being one of the following conditions, namely:-

(i) a condition excluding the use of the vehicle-

(a) for hire or reward, where the vehicle is on the date of the contract of insurance a vehicle not covered by a permit to ply for hire or reward, or

(b) for organised racing and speed testing, or

(c) for a purpose not allowed by the permit under which the vehicle is used, where the vehicle is a transport vehicle, or

(d) without side-car being attached where the vehicle is a motor cycle; or

(ii) a condition excluding driving by a named person or persons or by any person who is not duly licensed, or by any person who has been disqualified for holding or obtaining a driving licence during the period of disqualification; or

(iii) a condition excluding liability for injury caused or contributed to by conditions of war, civil war, riot or civil commotion; or

(b) that the policy is void on the ground that it was obtained by the non-disclosure of a material fact or by a representation of fact which was false in some material particular.

(3) Where any such judgment as is referred to in sub-section (1) is obtained from a Court in a reciprocating country and in the case of a foreign judgment is, by virtue of the provisions of section 13 of the Code of Civil Procedure, 1908 (5 of 1908) conclusive as to any matter adjudicated upon by it, the insurer (being an insurer registered under the Insurance Act, 1938 (4 of 1938) and whether or not he is registered under the

corresponding law of the reciprocating country) shall be liable to the person entitled to the benefit of the decree in the manner and to be the extent specified in sub-section (1), as if the judgment were given by a Court in India:

Provided that no sum shall be payable by the insurer in respect of any such judgment unless, before the commencement of the proceedings in which the judgment is given, the insurer had notice through the Court concerned of the bringing of the proceedings and the insurer to whom notice is so given is entitled under the corresponding law of the reciprocating country, to be made a party to the proceedings and to defend the action on grounds similar to those specified in sub-section (2).

(4) Where a certificate of insurance has been issued under sub-section (3) of section 147 to the person by whom a policy has been effected, so much of the policy as purports to restrict the insurance of the persons insured thereby by reference to any condition other than those in clause (b) of sub-section (2) shall, as respects such liabilities as are required to be covered by a policy under clause (b) of sub-section (1) of section 147, be of no effect:

Provided that any sum paid by the insurer in or towards the discharge of any liability of any person which is covered by the policy by virtue only of this sub-section shall be recoverable by the insurer from that person.

(5) If the amount which an insurer becomes liable under this section to pay in respect of a liability incurred by a person insured by a policy exceeds the amount for which the insurer would apart from the provisions of this section be liable under the policy in respect of that liability, the insurer shall be entitled to recover the excess from that person.

(6) In this section the expression "material fact" and "material particular" means, respectively a fact or particular of such a nature as to influence the judgment of a prudent insurer in determining whether he will take the risk and, if so, at what premium and on what conditions, and the expression "liability covered by the terms of the policy" means a liability which is covered by the policy or which would be so covered but for the fact that the insurer is entitled to avoid or cancel or has avoided or cancelled the policy.

(7) No insurer to whom the notice referred to in sub-section (2) or sub-section (3) has been given shall be entitled to avoid his liability to any person entitled to the benefit of any such judgment or award as is referred to in sub-section (1) or in such judgment as is referred to in sub-section (3) otherwise than in the manner provided for in sub-section (2) or in the corresponding law of the reciprocating country, as the case may be.

Explanation. - For the purposes of this section, "Claims Tribunal" means a Claims Tribunal constituted under section 165 and "award" means an award made by that Tribunal under section 168."

23. While dealing with the statutory liability, the Supreme Court referred to *Halsbury's Law of England, 4th Edition Reissue, Volume 25,* to opine that the liability of the Insurance Company to satisfy the decree at the first instance and to recover the amount from the owner or driver thereof, was holding the field for long time and their Lordships would not deviate from the said principle. Paras 73, 77, 83, 104-107 are extracted hereunder:-

"73. The liability of the insurer is a statutory one. The liability of the insurer to satisfy the decree passed in favour of a third party is also statutory.

x x x x x x x

77. In United Insurance Co. Ltd. v. Jaimy and Ors. 1998 ACJ 1318 (Ker.) it is stated:-

> *"Section 149(2) relates to the liability of the insurer and speaks of a situation in regard to which no sum shall be payable by an insurer in respect of any judgment or award. In the context it is proved that an insurer to whom notice of bringing of any such proceeding is given, could defend the action stated in the said statutory provision. The contention in the context would be found in section 149(2)(a) in the event of a breach of a specified condition of the policy enabling the insurer to avoid liability in regard thereto. In the process in regard to the right of the insurer to recover the amount from the insured, it would have to be seen by referring to section 149(4) as to under what circumstances this can be successfully recovered from the insured.*
>
> *Section 149(4) says that where a certificate of insurance is issued, so much of the said policy as purports to restrict the insurance of the persons insured thereby by referring to any of the conditions mentioned and it is precisely enacted in regard thereto that the liability covered by Section 2(b) as is required to be covered by the policy would not be available. The position is made further clear by the provisions enacting that any sum paid by the insurer in or towards the discharge of any liability of any person who is covered by the policy by virtue of this sub-*

section shall be recoverable by the insurer from that person.

In other words, section 149(4) considers the right of the insurance company in regard to re-imbursement of the amount paid by them only in the context of a situation other than the one contemplated under Section 149(2)(b). It would mean that except under the situation provided by Section 149(2)(b), the insurer would not be in a position to avoid the liability because he has got rights against the owner under the above provision.

The learned counsel strenuously submitted that this would not be the correct understanding and interpretation of the statutory provisions of section 149 of the 1988 Act. The learned counsel submitted that to read the statutory provision to understand that the insurance company could only claim from the owner in situations governed by section 149(2)(b) and to have no right under the said provision with regard to other situations under section 149(2)(a) would not be the proper reading of the statutory provision. The learned counsel submitted that in fact the provision would have to be meaningfully understood. It is not possible to consider the submission of the learned counsel in the light of the plain language of the statutory provision. It is necessary to emphasise that under the new Act the burden of the insurance company has been made heavier in the context of controlling the need of taking up contentions to legally avoid the liabilities of the insurance company."

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83. Sub-section (5) of Section 149 which imposes a liability on the insurer must also be given its full effect.

The insurance company may not be liable to satisfy the decree and, therefore, its liability may be zero but it does mean that it did not have initial liability at all Thus, if the insurance company is made liable to pay any amount, it can recover the entire amount paid to the third party on behalf of the assured. If this interpretation is not given to the beneficent provisions of the Act having regard to its purport and object, we fail to see a situation where beneficent provisions can be given effect to. Sub-section (7) of Section 149 of the Act, to which pointed attention of the Court has been drawn by the learned counsel for the petitioner, which is in negative language may now be noticed. The said provision must be read with Sub-section (1) thereof. The right to avoid liability in terms of Sub-section (2) of Section 149 is restricted as has been discussed hereinbefore. It is one thing to say that the insurance companies are entitled to raise a defence but it is another thing to say that despite the fact that its defence has been accepted having regard to the facts and circumstances of the case, the Tribunal has power to direct them to satisfy the decree at the first instance and then direct recovery of the same from the owner. These two matters stand apart and require contextual reading.

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104. It is, therefore, evident from the discussions made hereinbefore that the liability of the insurance company to satisfy the decree at the first instance and to recover the awarded amount from the owner or driver thereof has been holding the field for a long time.

105. Apart from the reasons stated hereinbefore, the doctrine of stare decisis persuades us not to deviate from the said principle.

106. It is well-settled rule of law and should not ordinarily be deviated from. (See The Bengal Immunity Company Limited v. The State of Bihar and Ors. AIR

1955 SC 661, Keshav Mills Co. Ltd. v. Commissioner of Income-Tax, Bombay North, AIR 1965 SC 1636 , Union of India and Anr. v. Raghubir Singh (Dead) By LRs. Etc. (1989) 2 SCC 754, Gannon Dunkerley and Co. & Ors. v. State of Rajasthan & Ors., (1993)1 SCC 364, Belgaum Gardeners Cooperative Production Supply and Sale Society Ltd. v. State of Karanataka, 1993 Supp (1) SCC 96 (1), Hanumantappa Krishnappa Mantur and Ors. v. State of Karnataka, 1992 Supp. (2) SCC 213.

x x x x x x x

107. We may, however, hasten to add that the Tribunal and the court must, however, exercise their jurisdiction to issue such a direction upon consideration of the facts and circumstances of each case and in the event such a direction has been issued, despite arriving at a finding of fact to the effect that the insurer has been able to establish that the insured has committed a breach of contract of insurance as envisaged under Sub-clause (ii) of Clause (a) of Sub-section (2) of Section 149 of the Act, the insurance company shall be entitled to realise the awarded amount from the owner or driver of the vehicle, as the case may be, in execution of the same award having regard to the provisions of Sections 165 and 168 of the Act. However, in the event, having regard to the limited scope of inquiry in the proceedings before the Tribunal it had not been able to do so, the insurance company may initiate a separate action therefor against the owner or the driver of the vehicle or both, as the case may be. Those exceptional cases may arise when the evidence becomes available to or comes to the notice of the insurer at a subsequent stage or for one reason or the other, the insurer was not given opportunity to defend at all. Such a course of action may also be resorted when a fraud or collusion between the victim and the owner of the vehicle is

detected or comes to the knowledge of the insurer at a later stage."

24. From the ratio of *Swaran Singh (supra)* it is amply clear that (i) the breach of policy condition as envisaged under Section 149 (2) (a) (ii) has to be proved by the Insurer. If the Insurer is able to establish the willful breach of the terms of the policy, the Insurer can successfully avoid its liability towards the insured but it would have to satisfy the award vis-à-vis the third parties. The Claims Tribunal would be competent to decide not only the claims of the Claimants but the inter-se dispute between the Insurer and the insured and pass an award in the same proceedings which would be enforceable under Section 174 as arrears of land revenue. It is obvious that when the breach by the insured is not willful, the Insurer has an obligation to indemnify the insured. It is only in those cases where the Insurer has successfully proved the willful breach of the policy that the inter-se dispute between the insured and the Insurer is required to be decided by the Claims Tribunal. It has further been held that where the dispute between the insured and the Insurer cannot be decided without undue delay, they can be relegated for a remedy before the regular Civil Court. The summary of findings given in Para 110 of the report is extracted hereunder:-

"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 driver or invalid driving licence 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 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 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,*

(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 where for 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 circumstance 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 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 insured under Section 149(2) *of the Act.*

x x x x x x x

(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 proviso thereunder and Sub-section (5) which are

intended to cover specified contingencies mentioned therein to enable the insurer to recover 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 insurer against 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).

25. It is urged by the learned counsel for the Insurance Companies that where a driver of the offending vehicle does not possess a driving licence at all, the Insurance Company would not have any liability to pay the compensation even to the third party. Reliance is placed on Para 84 and 89 of the report in *Swaran Singh (supra)* which is extracted hereunder:-

> *"84. We have analysed the relevant provisions of the said Act in terms whereof a motor vehicle must be driven by a person having a driving licence. The owner of a motor vehicle in terms of Section 5 of the Act has a responsibility to see that no vehicle is driven except by a person who does not satisfy the provisions of Section 3 or 4 of the Act. In a case, therefore, where the driver of the vehicle, admittedly, did not hold any licence and the same was allowed consciously to be driven by the owner of the vehicle by such person, the insurer is entitled to succeed in its defence and avoid liability. The matter, however, may be different where a disputed question of fact arises as to whether the driver had a valid licence or where the owner of the vehicle committed a breach of the terms of the contract of insurance as also the provisions of the Act by consciously allowing any person to drive a vehicle who did not have a valid driving licence. In a given case, the*

driver of the vehicle may not have any hand in it at all e.g. a case where an accident takes place owing to a mechanical fault or vis major. (See Jitendra Kumar v. Oriental Insurance Co. Ltd., (2003) 6 SCC 420).

x x x x x x x x x x

89. Section 3 of the Act casts an obligation on a driver to hold an effective driving licence for the type of vehicle which he intends to drive. Section 10 of the Act enables Central Government to prescribe forms of driving licences for various categories of vehicles mentioned in Sub-section (2) of said section. The various types of vehicles described for which a driver may obtain a licence for one or more of them are: (a) motorcycle without gear, (b) motorcycle with gear, (c) invalid carriage, (d) light motor vehicle, (e) transport vehicle, (f) road roller, and (g) motor vehicle of other specified description. The definition clause in Section 2 of the Act defines various categories of vehicles which are covered in broad types mentioned in Sub-section (2) of Section 10. They are 'goods carriage', 'heavy goods vehicle', 'heavy passenger motor vehicle', 'invalid carriage', 'light motor vehicle', 'maxi-cab', medium goods vehicle', "medium passenger motor vehicle', 'motor-cab', 'motorcycle', 'omnibus', "private service vehicle', 'semi-trailer', 'tourist vehicle', 'tractor', 'trailer', and "transport vehicle'. In claims for compensation for accidents, various kinds of breaches with regard to the conditions of driving licences arise for consideration before the Tribunal as a person possessing a driving licence for 'motorcycle without gear', [sic may be driving a vehicle] for which he has no licence. Cases may also arise where a holder of driving licence for 'light motor vehicle' is found to be driving a 'maxi-cab', 'motor-cab' or 'omnibus' for which he has no licence. In each case, on evidence led before the Tribunal, a decision has to be taken whether the fact of the driver possessing licence for one type of

vehicle but found driving another type of vehicle, was the main or contributory cause of accident. If on facts, it is found that accident was caused solely because of some other unforeseen or intervening causes like mechanical failures and similar other causes having no nexus with driver not possessing requisite type of licence, the insurer will not be allowed to avoid its liability merely for technical breach of conditions concerning driving licence".

26. I have considered the report in *Swaran Singh (supra)* and I am of the view that these observations were only in the context that in such cases there would be willful breach of the terms of the policy and thus, the Insurer could avoid the liability. These observations were not with regard to satisfying the judgment vis-à-vis the third party. Thus, where a driver does not possess a valid driving licence or the driving licence is not renewed within a period of thirty days as provided under Section 15 of the Act and it is established that the Insured consciously allowed the vehicle to be driven by a person not having a driving licence or having an expired driving licence or not having a licence for the class of vehicle involved in the accident, the Insurance Company would be successful in avoiding the liability but for its statutory liability to satisfy the award vis-à-vis the third party. In other words, even in such cases, the Insurance Company would be under obligation to satisfy the award and have the right to recover the compensation paid to the third party from the owner or the driver of the vehicle, as the case may be.

27. In *Oriental Insurance Company Limited v. Shri Nanjappan & Ors., (2004) 13 SCC 224,* where willful breach was established it was held that the Insurer would pay the quantum of compensation fixed by the Tribunal to the Respondents/ Claimants within three months and shall recover the same from the Insured in execution of that award without initiating any separate proceeding.

28. In *Oriental Insurance Co. Ltd. v. Zaharulnisha and Ors., (2008) 12 SCC 385,* the driver of the offending two wheeler was holding a licence for driving Heavy Motor Vehicles (HMV) only. On facts, it was found that the Insured was guilty of willful violation of the terms of the policy and was liable to be absolved of the liability, but it was added that the Insurer cannot escape the liability to satisfy a decree passed in favour of the third party, as the same was statutory. The Division Bench of the Supreme Court quoted with approval the summary in *Swaran Singh (supra).* In Para 16 of the report it was held as under:-

> *"16. The judgment proceeds to hold that under the MV Act, holding of a valid driving licence is one of the conditions of contract of insurance. Driving of a vehicle without a valid licence is an offence. However, the question herein is whether a third party involved in an accident is entitled to the amount of compensation granted by the Motor Accidents Claims Tribunal although the driver of the vehicle at the relevant time might not have a valid driving licence but would be entitled to recover the same from the owner or driver*

thereof. It is trite that where the insurers, relying upon the provisions of violation of law by the assured, take an exception to pay the assured or a third party, they must prove a willful violation of the law by the assured. In some cases, violation of criminal law, particularly violation of the provisions of the MV Act, may result in absolving the insurers but, the same may not necessarily hold good in the case of a third party. In any event, the exception applies only to acts done intentionally or "so recklessly as to denote that the assured did not care what the consequences of his act might be". ***The provisions of sub-sections (4) and (5) of Section* 149 *of the MV Act may be considered as to the liability of the insurer to satisfy the decree at the first instance. The liability of the insurer is a statutory one. The liability of the insurer to satisfy the decree passed in favour of a third party is also statutory."*** (emphasis supplied).

29. In *National Insurance Company Limited v. Geeta Bhat & Ors., 2008 (12) SCC 426,* the Supreme Court drew a distinction between own damage claim by the insured and a claim made by a third party on account of loss suffered in a motor accident. The Supreme Court relied on *Lehru & Ors. (supra)* and *Swaran Singh (supra)* and held that in a case where a third party has raised a claim, the Insurer would be liable to pay, with the liberty to recover the same from the owner and driver of the vehicle. The relevant parts of the report are extracted hereunder:-

"6. Liability of an insurer to reimburse the insured, as an owner of the vehicle not only depends upon the terms and conditions laid down in the contract of insurance but also the provisions of the Motor Vehicles

Act, 1988 (the Act). The owner of vehicle is statutorily obligated to obtain an insurance for the vehicle to cover the third party risk. A distinction has to be borne in mind in regard to a claim made by the insured in respect of damage of his vehicle or filed by the owner or any passenger of the vehicle as contradistinguished from a claim made by a third party.

7. An owner of the vehicle is bound to make reasonable enquiry as to whether the person who is authorized to drive the vehicle holds a licence or not. Such a licence not only must be an effective one but should also be a valid one. It should be issued for driving a category of vehicle as specified in the Motor Vehicles Act and/or Rules framed thereunder.

8. Indisputably, in a case where the terms of the contract of insurance are found to have been violated by the insured, the insurer may not be held to be liable for reimbursing the insured. So far as a driving licence of a professional driver is concerned, the owner of the vehicle, despite taking reasonable care, might have not been able to find out as to whether the licence was a fake one or not. He is not expected to verify the genuineness thereof from the Transport Offices.

9. The question in regard to the statutory obligation on the part of an owner of a vehicle to obtain an insurance policy to cover a third-party risk, vis-`a-vis possession of a fake licence by a driver who had been employed bona fide by the owner thereof had come up for consideration before this Court United India Insurance Co. Ld. v. Lehru and Ors. (supra).

x x x x x x x x

13. Thus, whereas in a case where a third party has raised a claim, Swaran Singh (supra) would apply, in a claim made by the owner of the vehicle or other passengers of a vehicle, it would not.

> *14. We would, therefore, assume that the licence possessed by the 6th respondent, Gopal Singh was a fake one. Only because the same was fake, the same, having regard to the settled legal position, as noticed hereinbefore, would not absolve the insurer to reimburse the owner of a vehicle in respect of the amount awarded in favour of a third party by the Tribunal in exercise of its jurisdiction under Section* 166 *of the Motor Vehicles Act, 1988.*
>
> *15. Nobody has appeared on behalf of the respondents despite service of notice.*
>
> *16. We, therefore, are of the opinion that interest of justice shall be subserved if the appellant is directed to pay the awarded amount in favour of Respondent 1 to 5 with liberty to recover the same from the owner and the driver of the vehicle, Respondent 6 and 7 in an appropriate proceeding in accordance with law."*

30. In *National Insurance Company Limited v. Laxmi Narain Dhut, (2007) 3 SCC 700*, again a distinction was drawn between own damage claim not involving any third party and the liability in respect of the third party risk. The Supreme Court referred with approval *Swaran Singh (supra)* and held that *Swaran Singh (supra)* was rendered in the background of Section 149. In case of own damage, the principle 'let the Insurer pay and recover from the Insured' did not apply. The Supreme Court held as under:-

> *"17. Section* 149 *is part of Chapter XI which is titled "Insurance of Motor Vehicles against Third-Party Risks". A significant factor which needs to be noticed is that there is no contractual relation between the insurance company and the third party. The liabilities*

and the obligations relatable to third parties are created only by fiction of Sections 147 *and* 149 *of the Act.*

18. It is also to be noted that the terms of the policy have to be construed as they are and there is no scope for adding or subtracting something. However liberally the policy may be construed, such liberalism cannot be extended to permit substitution of words which are not intended. (See United India Insurance Co. Ltd. V Harchand Rai Chandan Lal (2004) 8 SCC 644 and Polymat India (P) Ltd. v. National Insurance Company Ltd., (2005) 9 SCC 174.

x x x x x x x

23. As noted above, there is no contractual relation between the third party and the insurer. Because of the statutory intervention in terms of Section 149, the same becomes operative in essence and Section 149 provides complete insulation."

31. Thus, in *Zaharulnisha and Ors.(supra), Geeta Bhat & Ors. (supra)* and *Laxmi Narain Dhut (supra),* the Supreme Court relied upon *Swaran Singh (supra)* to hold that even in cases of willful breach the Insurer's liability vis-à-vis third party was statutory. It was held that the Insurance Company will satisfy the award in the first place and recover the amount paid from the owner and the driver of the vehicle.

32. The decision in *Malla Prakasarao (supra)* was clearly distinguished by the Supreme Court on the ground that the decision was rendered in *Malla Prakasarao (supra)* only with regard to the terms of the contract and not with regard to the statutory liability of the Insurer. Thus, even if, the Insurer is

able to prove the willful breach of the policy condition e.g. that the driver did not possess a valid driving licence on the date of the accident or that he did not possess a licence of the Class of vehicle (as in the case of *Zaharulnisha and Ors.,* where the driver had a licence of HMV but was driving a two wheeler) or did not have a driving licence, the Insurance Company though would be absolved of its liability to indemnify the insured, it would still be liable to satisfy the judgments and the awards against the third parties in respect of the injury or damage suffered by them. If the willful breach is established, the Insurer would be entitled to recover the amount paid in execution in the same proceedings.

33. This Court in *New India Assurance Co. Ltd. v. Sanjay Kumar and Ors., ILR 2007(II) Delhi 733*, referred to *National Insurance Company Limited v. Swaran Singh & Ors., (2004) 3 SCC 297; United India Insurance Company v. Lehru & Ors., (2003) 3 SCC 338, New India Assurance Co., Shimla v. Kamla and Ors., (2001) 4 SCC 342; Sohan Lal Passi v. P. Sesh Reddy, (1996) 5 SCC 21;* and *Skandia Insurance Company Limited v. Kokilaben Chandravadan ,(1987) 2 SCC 654* and anlysized the law with regard to the liability of the Insurer vis-à-vis the Insured and third parties and summarized the legal position as under:-

> *"(a) Where the offending vehicle is admittedly an insured vehicle, limited to the terms of the policy of insurance, the insurance company is obliged to take*

over the liability of the assured and pay the sum awarded by the Tribunal to the claimant.

(b) Where the insurance company alleges breach of the terms and conditions of the policy of insurance and Section 149 (2)(a) of the M.V. Act, 1988 is attracted, on proof of violation of a breach of a specified condition of a policy, the insurance company would still be liable to pay the sum awarded to the claimants but would be entitled to recovery rights against the assured, meaning thereby, on proof of having satisfied the award in favour of the claimant would be entitled to recover the said amount from the assured.

(c) Where the policy is avoided on proof of facts which attracts Section 149(2) (b) of the M.V. Act, 1988, the liability of the insurance company to pay under the policy of insurance stands avoided vis-a-vis even the third parties, meaning thereby the Tribunal would have no power to direct recovery against the insurance company.

(d) Mere breach of the conditions of the policy would not entitle the insurance company to either avoid liability to pay or have recovery rights against the assured unless the insurance company additionally proves that the assured, knowingly and consciously breached the terms of the policy or by proving facts evidencing conduct of acting so recklessly as to denote that the assured did not care what the consequences of his act might be."

34. I am in respectful agreement with the view taken by this Court in *Sanjay Kumar (supra)* and hold that the Insurance Company is liable to satisfy the third party even in case of a willful breach of the policy of Insurance and Section 149 (2)(a) of the Act. I

am bound by the vie taken by the three Judges Bench judgment in *Swaran Singh (Supra)* that the Insurance Company has the liability to satisfy the award vis-à-vis third party and to recover the compensation in case the breach of the Insurance policy is willful or intentional.

35. It is urged by the learned counsel for the Claimants / Owners that the licencing Authority is under obligation to renew a driving licence if an application is made within a period of five years from the date of expiry of the licence without requiring the driver to undergo and pass the test of competence to drive the vehicle and, therefore, it shall be presumed that although such driver did not possess a valid and effective driving licence, but since the driver was not disqualified from holding a driving licence, the owner would not be guilty of the breach of the terms of the policy as contained in Section 149(2) (a) (ii) of the Act. Reliance is placed on a Division Bench judgment of Madras High Court in *Oriental Insurance Co. Ltd. v. Indirani & Ors., 1995 ACJ 703;* a Full Bench decision of Kerala High Court in *Oriental Insurance Co. Ltd. v. Paulose, 2004 ACJ 457;* and a decision of this Court in *National Insurance Company Ltd. v. Nirabjit Kaur & Ors., 2010 ACJ 121.*

36. In *Indirani (supra)* and *Paulose (supra)*, it was held that in spite of the expiry of the validity period unless the driver had been disqualified from holding or obtaining a driving licence, there would not be breach of the terms of the policy. *Indirani (supra)*

and *Paulose (supra)*, however, are not good law in view of the judgment of the Supreme Court in *National Insurance Company Limited v. Jarnail Singh & Ors., (2007) 15 SCC 28, Ram Babu Tiwari v. United India Insurance Co. Ltd. & Ors., (2008) 8 SCC 165* and *New India Assurance Company Ltd. v. Suresh Chandra Aggarwal, (2009) 15 SCC 761.*

37. In *Jarnail Singh (supra)* the driver had a driving licence which expired on 18.05.1994. The accident took place on 20.10.1994. The licence was renewed with effect from 28.10.1996. While referring to Section 15 (1) of the Act, the Supreme Court held that the driver had no licence to drive the vehicle on the date of the accident i.e. 20.10.1994. Recovery rights were granted to the Insurance Company holding:-

> *"7. There is no dispute that the policy stipulated a condition that the vehicle would not be driven by a person without a valid driving licence. It means that the policy condition had been violated.*
>
> *8. This Court held in New India Assurance Co. v. Kamla (2001) 4 SCC 342 that the insurance company is nonetheless liable to pay the compensation to the third party on the strength of the valid insurance policy issued in respect of a vehicle, but the remedy of the insurer when there was breach or violation of the policy condition was to recover the amount from the insured…"*

38. In para 18 of the report in *Ram Babu Tiwari (supra)* it was held as under:-

> *"18. It is beyond any doubt or dispute that only in the event an application for renewal of licence is filed within a period 30 days from the date of expiry thereof, the same would be renewed automatically which means that even if an accident had taken place within the aforementioned period, the driver may be held to be possessing a valid licence. The proviso appended to Sub-section (1) of Section 15, however, clearly states that the driving licence shall be renewed with effect from the date of its renewal in the event the application for renewal of a licence is made more than 30 days after the date of its expiry. It is, therefore, evident that as, on renewal of the licence on such terms, the driver of the vehicle cannot be said to be holding a valid licence, the insurer would not be liable to indemnify the insured. The second proviso appended to Sub-section (4) of Section 15 is of no assistance to the appellant. It merely enables the licensing authority to take a further test of competent driving and passing thereof to its satisfaction within the meaning of Sub-section (3) of Section 9. It does not say that the renewal would be automatic. ..."*

39. Similarly, in *Suresh Chandra Aggarwal (supra)*, the driving licence of the driver had expired on 25.10.1991 i.e. four months prior to the date of accident which occurred on 29.02.1992. The driving licence was renewed w.e.f. 23.03.1992. Since the renewal of the licence was not within 30 days of the expiry, it was held that the driver did not possess any effective driving licence and there was breach of the terms of the policy.

40. As far as breach of the conditions of Insurance policy is concerned, it is well settled that mere breach or violation of the terms of the policy is not enough. The onus is on the Insurer to

establish the breach and it must satisfy the Court that there was conscious or willful breach on the part of the Insured.

41. In Para 51 of the report in *National Insurance Company Limited v. Swaran Singh & Ors., (2004) 3 SCC 297,* it was held as under:-

> *"51. It is trite that where the insurers, relying upon the provisions of violation of law by the assured, take an exception to pay the assured or a third party, they must prove a wilful violation of the law by the assured. In some cases violation of criminal law, particularly, violation of the provisions of the Motor Vehicles Act may result in absolving the insurers but, the same may not necessarily hold good in the case of a third party. In any event, the exception applies only to acts done intentionally or "so recklessly as to denote that the assured did not care what the consequences of his act might be".*

42. In *National Insurance Company Limited v. Laxmi Narain Dhut, (2007) 3 SCC 700,* the Supreme Court referred to *Swaran Singh & Ors. (supra)* and held as under:-

> *"The insurance company is required to prove the breach of the condition of the contract of insurance by cogent evidence. In the event the insurance company fails to prove that there has been breach of conditions of the policy on the part of the insured, the insurance company cannot be absolved of its liability. This court did not lay down a degree of proof, but held that the parties alleging the breach must be held to have succeeded in establishing the breach of the condition of the contract of insurance, on the part of the insurance company by discharging its burden of proof. The Tribunal, must*

arrive at a finding on the basis of the materials available on the records."

"It was further held, inter alia, that 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 has to be so interpreted as to effectuate the said object. The judgment added that 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 fultilling 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."

43. In the case of *New India Assurance Co. Ltd. v. Sanjay Kumar and Ors., ILR 2007(II) Delhi 733*, it was held that although the onus is on the Insurer to prove that there was breach of condition of policy, but once the record of the Licensing Authority is summoned to prove that the driver did not possess a valid driving licence, the onus would shift on the Insured (the owner of the vehicle) who must then step into the witness box and prove the circumstances under which he acted and handed

over the vehicle to the driver. Paras 22 to Para 24 of the report are extracted hereunder:-

> *"22. Thus, where the insurance company alleges that the term of the policy of not entrusting the vehicle to a person other than one possessing a valid driving licence has been violated, initial onus is on the insurance company to prove that the licence concerned was a fake licence or was not a valid driving licence. This onus is capable of being easily discharged by summoning the record of the Licencing Authority and in relation thereto proving whether at all the licence was issued by the authority concerned with reference to the licence produced by the driver. Once this is established, the onus shifts on to the assured i.e. the owner of the vehicle who must then step into the witness box and prove the circumstances under which he acted; circumstances being of proof that he acted bona fide and exercised due diligence and care. It would be enough for the owner to establish that he saw the driving licence of the driver when vehicle was entrusted to him and that the same appeared to be a genuine licence. It would be enough for the owner, to discharge the onus which has shifted on to his shoulders, to establish that he tested the driving skill of the driver and satisfied himself that the driver was fit to drive the vehicle. Law does not require the owner to personally go and verify the genuineness of the licence produced by the driver.*
>
> *23. Where the assured chooses to run away from the battle i.e. fails to defend the allegation of having breached the terms of the insurance policy by opting not to defend the proceedings, a presumption could be drawn that he has done so because of the fact that he has no case to defend. It is trite that a party in possession of best evidence,*

if he withholds the same, an adverse inference can be drawn against him that had the evidence been produced, the same would have been against said person. As knowledge is personal to the person possessed of the knowledge, his absence at the trial would entitle the insurance company to a presumption against the owner.

24. That apart, what more can the insurance company do other than to serve a notice under Order 12 Rule 8 of the Code of Civil Procedure calling upon the owner as well as the driver to produce a valid driving licence. If during trial such a notice is served and proved to be served, non response by the owner and the driver would fortify the case of the insurance company."

44. In view of the foregoing discussion, it is held as under:-

(i) In order to avoid an obligation to indemnify the Insured, the Insurer is under obligation to establish that there was conscious and willful breach of the terms of the policy.

(ii) Even when there is a willful breach of the terms of the policy under Section 149 (2) (a) of the Act, the Insurance Company is under obligation to indemnify the liability towards the third parties and recover the same from the owner.

(iii) Once the Insured proves that the driver did not hold any driving licence to drive the Class of vehicle involved in the accident or that the driving licence was fake; requires the owner and driver to produce the driving licence and if

they failed to produce the same, the onus of proving breach of policy would be deemed to be discharged. Onus would then shift on the owner to establish that he was not guilty of breach of the terms of policy. In the absence of any evidence being produced by the Insured, in such cases, it will be presumed that he was guilty of a willful breach. The Insured in such cases, would be entitled to recover the compensation paid to third party in discharge of its statutory liability.

(iv) Where policy is avoided on proof or facts which renders the Insurance policy void under Section 149 (2) (b) of the Act, the Insurance Company would not be under obligation to pay even to third parties, as in such cases the contract of insurance is *nonest*.

45. Now, I would turn to the facts of each case.

MAC APP.329/2010

46. In this case a compensation of ₹ 2,48,500/- along with interest @ 8% per annum was awarded by the Claims Tribunal by the impugned judgment dated 09.12.2009. There is no Appeal by the Claimants challenging the quantum of compensation.

47. The Oriental Insurance Company Limited challenges the award on the ground that the driving licence of the driver was valid upto 24.09.2004, the accident took place on 02.11.2004 and it

was renewed on 21.12.2004. It is thus urged that the owner was guilty of willful breach of the terms of policy and the Insurance Company was liable to be exonerated.

48. In support of its contention, the Insurance Company examined one Ramesh Dutt, its representative. Apart from proving the copy of the Insurance Policy Ex.R3W1/A, the witness tried to prove the Investigating Report given by one Om Prakash Kadiyan regarding driving licence of Pala Singh running into three pages Ex.R3W1/D1 to D3, the receipt of the Transport Department of NCT of Delhi Ex.R3W1/E and E1 to E2 and the report of the MLO office Ex.R3W1/F1 to F3. No witness from the Transport Department was summoned by the Appellant Insurance Company to prove that the driving licence alleged to be seized by the Investigating Officer was not valid. Of course, the driver and the owner of the offending vehicle preferred not to contest the proceedings before the Claims Tribunal, but at the same time, no effort was made to summon them to prove that there was a breach or in any case a willful breach of the terms of the policy as the owner allowed the driver Pala Singh to drive the vehicle knowing fully well that he was not in possession of a valid driving licence. No notice was issued to the owner to produce the driving licence of Pala Singh valid on the date of the accident.

49. Thus, there is no manner of doubt that the Insurance Company has failed to establish that there was willful breach of the terms

of the policy by the Insured. It therefore, cannot avoid liability to pay the compensation as awarded.

50. The Appeal is devoid of any merit; the same is accordingly dismissed. No cost.

51. Pending applications also stand disposed of.

MAC APP. 13/2008

52. This Appeal is by the owner of vehicle number DL-1PB-0267 which caused the accident. Although the Claims Tribunal held that the Insurance Company had failed to prove that the owner was aware that the driver was not holding a valid driving licence at the time of the accident, yet, the First Respondent was granted the right to recover the compensation from the Appellants herein (the owner and the driver).

53. The Appellants contested the Claim Petition filed by the second Respondent and denied that the accident was caused on account of rash or negligent driving by the second Appellant. The Second Respondent (the Petitioner before the Claims Tribunal) entered the witness box as PW-4. He deposed that on 20.09.2004 at about 5:30 P.M. while he was waiting for a bus at bus stand, Ajmeri Gate, a bus number DL-1PB-0267 (route number 753) came at the bus stand. The conductor of the bus shouted and called the passengers to board the bus from the front gate as they were already getting late. A few passengers

boarded the bus from the front gate. When he was in the process of boarding the bus, the driver started the bus with a jerk without any signal form the conductor as a result of this he fell down and his hand came under the left front wheel of the bus. No suggestion was given to the second Respondent to dispute the manner of the accident.

54. The driver of the bus entered the witness box as R3W1 and did not state a word disputing the manner of the accident. In the circumstances, the conclusion reached by the Claims Tribunal that the accident was caused by rash and negligent driving of the bus by the second Respondent cannot be faulted with.

55. While making the owner liable to reimburse the compensation to the Insurer, the Claims Tribunal in Para 21 and 22 of the impugned judgment held as under:-

> *"21. United India Insurance company Vs Lehru and others reported as 1(2003) ACC 611 (SC). In this case it has been held by Hon'ble Supreme Court that insurance company is liable to make the payment even if the license is fake unless it is proved that owner/insured was aware that license was fake and still permitted the driver to drive the vehicle. Further in National Insurance company vs Swaran Singh reported as 2004 ACJ 1 it has been held by Hon'ble Supreme Court that unless it is known by the owner of the vehicle that driver concerned is holding fake license the owner cannot be held liable.*
>
> *22. Applying these principles to the present case, in this case admittedly the respondent no.1 was holding the valid driving license. Driving license is not fake. However it was valid from 27.09.02 to 26.09.03 and*

thereafter from 17.09.05 to 16.09.08 and the accident had taken place on 20.09.04. The insurance company has no where proved on record that the owner of the vehicle in question was aware of the fact that respondent no. 1 was not holding valid driving license at the time of accident. Therefore respondent no.1 being driver, respondent no 2 being owner and respondent no 3 being insurer of the offending vehicle are jointly and severally liable to make the payment of compensation to petitioner. However since Respondent no.1 was not holding any license on the date of accident, insurance company is at liberty to recover the amount from respondent no.1 and 2……."

56. As I have already observed earlier in MAC APP.329/2010 that in order to avoid the liability the Insurance Company is to prove that there was willful breach of the terms of the policy. A driving licence number C09092000188556 valid for the period between 27.09.2003 to 26.09.2006 was seized by the IO on 21.09.2004. The driver of the bus entered the witness box as R3W1 and testified that the driving licence held by him at the time of the accident was valid for the period between 27.09.2003 to 26.09.2006. This part of the second Appellant's (the driver) testimony was not challenged in cross-examination. It is true that the Insurance Company examined R3W2 Sudesh Kumar LDC from RTO Officer and R3W3 J.P.S.Talwar, Administrative Officer, Oriental Insurance Company Limited to prove that the driving licence was valid from 27.09.2000 to 26.09.2003. It was renewed from 17.09.2005 to 16.09.2008. It is thus established on record that the driving licence held by the driver and seized by the IO, immediately after the accident and

which was valid for the period 27.09.2003 to 26.09.2006 was not genuine.

57. It is true that in this case the owner has not entered the witness box to take the defence that he had infact checked the licence shown by the driver and that he was satisfied about the genuineness of the licence. But, at the same time, as stated above, R3W1's (the driver's) testimony that his licence was valid from 27.09.2006 to 26.09.2006 was not challenged in the cross-examination. In the absence of any material on record and in view of driver's case, even during inquiry before the Claims Tribunal that his licence was valid on the date of the accident, it can be presumed that such a representation was made to the owner i.e. the first Appellant as well.

58. In the case of *United India Insurance Company Ltd. v. Lehru & Ors., (2003) 3 SCC 338,* it was held that the owner is not expected to visit the Transport Authority to verify the genuineness of the licence. In view of unrebutted testimony of R3W1 (the driver), it can be said that even the driver bonafidely believed that the licence issued to him was a genuine one. Thus, it cannot be said that the owner was guilty of willful breach of the terms of the policy. Rather, it transpired only later on that the licence held by him was not genuine.

59. Since there was no willful breach of the condition of policy, in view of the law laid down in *Lehru & Ors. (supra)* and *Swaran*

Singh (supra) the Insurance Company, therefore, cannot avoid liability. As I have already quoted earlier, the Claims Tribunal held that the first Appellant was not aware that the licence was fake. It also held that the Insurance Company had not proved on record that the owner was not aware that the driver did not hold a valid driving licence at the time of the accident.

60. In the circumstances, The Claims Tribunal's order granting recovery rights to the First Respondent Insurance Company against the owner cannot be sustained. The impugned order to that extent is set aside.

61. The Appeal is allowed in above terms.

MAC APP.404/2007

62. In this case, a compensation of ₹ 46,456/- was awarded in favour of the First Respondent for having suffered injuries in an accident which occurred on 30.08.2005. The Appellant National Insurance Company Limited does not dispute the finding on the negligence or on the quantum of compensation.

63. During inquiry before the Claims Tribunal, a written statement was filed by Respondents No.2 and 3 (driver and owner of the vehicle) wherein they disputed the negligence on the part of the driver. It is important to note that the First Respondent (the Claimant) before the Claims Tribunal filed a certified copy of the cover note along with other documents, enclosed with the

report under Section 173 Cr.P.C. filed against Rameshwar driver of the offending vehicle. A seizure memo of the driving licence number C08072002301424 valid for the period 01.09.2005 to 31.08.2008 along with the driving licence was also filed. A notice (Ex.R3W1/A) under Order 12 Rule 8 CPC was served upon the owner (the third Respondent) and the driver (the second Respondent) to produce the driving licence in the Court. The said notice was duly proved by the Insurance Company by examining R3W1 K.G.Malhotra, Assistant Manager of the Appellant. He deposed that the driving licence was issued to the driver on 10.11.1984 and the licence was valid upto 02.07.2005. Thereafter, it was renewed only on 01.09.2005 i.e. there was a gap of about 59 days in renewing the licence. Initially, adjournment was sought for cross-examination of this witness on behalf of the Second and the third Respondents. However, on the next date i.e. on 29.05.2007 nobody appeared on their behalf and thus, the cross-examination was recorded as 'NIL'. Similarly, R3W2 Ramesh Kumar, LDC from Transport Authority, Ashok Vihar, deposed that as per the report Ex.R3W2/A the driving licence was renewed from 03.07.2002 to 02.07.2005 and thereafter w.e.f. 01.09.2005 to 31.08.2008. Admittedly, the driver and owner have preferred not to cross-examine these two witnesses produced by the Insurance Company. (they failed to produce the driving licence also).

64. The driver and the owner (the second and the third Respondents) have failed to produce any other licence; in fact the driver could not possess a second licence as per the provision of Section 6 sub-Section (1) of the Act. Since the third Respondent has failed to prove the circumstances under which the vehicle was given to the driver by the second Respondent and in the absence of any evidence adduced by the third Respondent it shall be assumed that there was willful breach of the policy condition.

65. Similarly, as per the General Condition No.5 of the terms and conditions of the permit Ex.R3W3/A proved by the Clerk of the Transport Authority, it was the permit holder only, who was permitted to drive the auto rickshaw (TSR) as on the date of the accident. Since the vehicle was driven by a person other than the permit holder, there was violation of the policy as mentioned in the Insurance Policy Ex.R3W1/C under the head "limitation as to use."

66. The Appellant Insurance Company has been granted recovery rights by the impugned judgment. Since it was a case relating to the claim made by the third party, the Insurance Company was under obligation to pay and recover the amount of compensation. The Insurance Company was not entitled to be completely absolved.

67. The Appeal is without any merit, the same is accordingly dismissed.

68. Pending applications also stand disposed of.

MAC APP.514/2009

69. In this Appeal, the first Respondent Chotkan, who was a vegetable vendor, suffered serious injuries in an accident which occurred on 19.11.2003 with bus number DL-1PB-3982. He was awarded a compensation of ₹ 1,28,400/- by the impugned judgment.

70. The finding on negligence and quantum of compensation has not been challenged. No Appeal against the impugned judgment has been filed by the second and the third Respondent. The driving licence of the second Respondent was valid for the period between 26.04.2000 to 25.04.2003. It was renewed on 23.12.2004 and was valid till 22.12.2007. Thus, on the date of accident, the second Respondent did not possess a valid driving licence.

71. With regard to the payment of the compensation, the Claims Tribunal held that although the licence had expired, since the person holding expired licence would be considered to be a person "duly licensed" if the licence was renewed later on, the Insurance Company cannot be exonerated from the liability to

indemnify the owner. Paras 68 to 76 of the impugned judgment are extracted hereunder:-

> *"68. Sh.V.D.Talwar, Administrative Officer of the Insurance Company in this case appeared and proved the insurance policy qua offending vehicle involved in the accident as R3W2/11. He deposed that the name of the policy holder changed from Sneh Lata to Saroj and endorsed policy R3W2/12 was issued. He deposed that they had verified the driving licence of respondent no.1 and got report Ex.R3W2/14 and R3W2/15. He deposed that driving licence of respondent no.1 was not valid as on date of accident, therefore, insurance company is not liabile to indemnify the insured.*
>
> *69. R3W1, a clerk from the Tranport Authority appeared and stated that driving licence was issued to respondent no.1 from 29.09.2991 till 11.02.2000 and it was renewed from 26.04.2000 till 25.04.2003 and thereafter from 23.12.2004 till 22.12.2007. He proved the copy of licences as Ex.R3W1 to R3W1/3. As this deposition of the witness of the insurance company has not been challenged on behalf of the respondent no.1 and respondent no.2, therefore same remains admitted position on record.*
>
> *70. Hon'ble Supreme Court in case titled "National Insurance Company Limited v/s Swaran Singh" reported as AIR 2004 (Supreme Court) 1531, enumerated various incidents wherein as per the Statute, Insurance company has right to raise the defence in terms of section 149 of the Motor Vehicles Act. It has been held by Hon'ble Apex Court in the said case that in such an eventuality, the onus to prove the defence raised by the insurance company remains on it. It has also been held by Hon'ble Apex Court that merely because*

on the date of accident, driver of the offending vehicle did not have the licence or his licence was expired, that in itself is not sufficient for the insurance company to contract out of its contractual obligation.

71. In Swaran Singh's Case (Supra), Hon'ble Suprme Court has observed and enumerated various provisions of Motor Vehicles Act where in the driving licence has issued or is renewed. It has been observed by Hon'ble Apex Court that driving licence even after its expiry can be renewed within a period of 30 days and in such an eventuality it is renewed from the date of expiry. In other cases, it has been observed by Hon'ble Apex Court that it can still be renewed without undergoing any additional test, till the period of five years from the date of its expiry, where after the driver has to undergo a fresh driving test.

72. It is further observed by Hon'ble Apex Court that the present provision is a beneficial piece of legislation and has to be interpreted as such. It has been held that Insurance Company can be made to escape its liability only when it is held that non-possession of a valid driving licence by the driver of offending vehicle was the main or actual cause of the accident.

73. In the present case, it is apparent from the deposition of R3W1 that the driving licence of respondent no.1 was renewed by the transport authority subsequently. Merely because, there was an intregnum period for which respondent no.1 did not have the driving licence, I am of the opinion that it cannot be presumed that during this period, respondent no.1 has lost any of his expertise or knowledge of driving the motor vehicle for which he had a valid driving licence prior to the date of accident and even after the date of accident. In

such an eventuality, it cannot be held that non-possession of an effective licence as on date of accident was the sole cause of accident.

74. Legislation in its wisdom has used words "duly licenced" and to my mind renewal of driving licence that of respondent no.1 by the Regional Transport Authority, makes respondent no.1 a duly licenced person to drive the vehicle.

75. Insurance company has failed to place on record any evidence to effect that the owner of the offending vehicle i.e. insured, at any point of time had the knowledge that respondent no.1 was not a duly licenced person to drive the vehicle.

76. In view thereof, I am of the considered opinion that Insurance Company cannot be exonerated of its contractual liability to indemnity the insured."

72. The Insurance Company in its written statement took the general defence that if the driver of the insured vehicle did not possess a valid and effective driving licence on the date of the accident, the Insurance Company would not be liable to indemnify the insured. In the written statement filed by the second and the third Respondent i.e. the driver and owner of the offending vehicle, no plea was taken by owner that she ever tested the driving skills or saw the driver's driving licence. A notice (Ex.R3W2/1 to R3W2/3) under Order 12 Rule 8 CPC dated 28.02.2009 requiring the owner and driver to produce the driving licence was sent to them by registered post. The notice was duly served upon the owner as the same was not returned back as 'undelivered'. The driver preferred to be proceeded ex-

parte w.e.f. 19.12.2007. The owner was also proceeded ex-parte by order dated 28.08.2008.

73. Applying the ratio of *Sanjay Kumar (Supra)* I hold that the owner was guilty of willful breach of the conditions of policy. *Swaran Singh's case (Supra)* would also not help the owner and driver. After having proved that the driver did not possess an effective driving licence, the owner did not come forward to explain the circumstances under which he handed over the vehicle to him.

74. In view of the judgment of the Supreme Court in *Ram Babu Tiwari (Supra)* and *Suresh Chandra Aggarwal (Supra),* it cannot be said that the driver was duly licensed, if the licence was renewed after expiry of 30 days.

75. The Claims Tribunal erred in declining to grant recovery rights to the Appellant Insurance Company. Since the Appellant has proved willful violation of the terms of the policy, the Appellant would be entitled to recover the amount of compensation paid in execution of this very award without filing for separate proceedings.

76. The Appeal is allowed in above terms.

MAC APP.189/2009

CM APPL.4990/2009 (delay)

77. There is a delay of 30 days in filing the appeal. For the reasons stated in the application, the same is allowed. Delay of 30 days in filing the appeal is condoned. Application stands disposed of.

MAC APP.189/2009

78. The Appellant Munish Kumar Azad, who is the owner of the road roller Engine No. S.E.P.630736 purported to be involved in the accident impugns the judgment dated 14.11.2008 whereby a compensation of Rs.4,34,000/- was awarded in favour of the Claimants Kamal and Om Singh in a Petition under Section 163-A of the Motor Vehicles Act.

79. While deciding the Claim Petition the Claims Tribunal took the income of the deceased on the basis of Lata Wadhwa (Supra) to be Rs.3,000/- per month, deducted one-third towards the personal living expenses and applied the multiplier of '16' relevant to the age of the Claimants. The Claim of compensation is not disputed by the Claimants by filing any Appeal against the impugned judgment.

80. While awarding this compensation, the Claims Tribunal held that the driver did not possess a driving licence to drive a road roller and, therefore, although the Insurance Company was liable to satisfy the award in favour of a third party, it was entitled to recover the compensation awarded from the owner of the offending vehicle. It is this part of the judgment which is impugned in this Appeal.

81. The contention raised on behalf of the Appellant (the owner) are:-

(i) Road roller Engine No. S.E.P.630736, owned by the Appellant was not involved in the accident.

(ii) Driver Harbhajan Singh did possess a driving licence to drive Light Motor Vehicles (LMV) and the road roller is included in the definition of LMV as given under Section 2(21) of the Act as the unladen weight of the road roller was admittedly less than 7500 kg.

82. Admittedly, the Claim Petition was filed under Section 163-A of the Act. Respondents/Claimants to succeed in their Petition were not required to prove the negligence on the part of the driver. It was enough if involvement of the road roller was established.

83. A DD No.27-A was recorded in Police Station Naraina on 23.04.2006 at 10:35 P.M. that a road roller had struck against a lady at Barar Squire Red light and that the driver had been caught at the spot. On the basis of this DD entry, endorsement was made by SI Ratan Singh for registration of a case under Section 279/304-A IPC against Harbhajan Singh son of Swaran Singh the driver of the road roller. Site Plan, copy of which has been placed on record by the Claimants shows the places where the accident took place and where the road roller was found after the accident. The postmortem examination shows that the

deceased had a crush injury on her head. The driver of the road roller, Harbhajan Singh (R1W2), in his evidence affidavit Ex.R1W2/A, had denied the involvement of the Road roller in the accident; in the cross examination he admitted that he was not authorized by any authority to drive the road roller on the day of accident. The testimony of this witness does not inspire any confidence, as in his evidence affidavit he stated that it was very dark night on the day of the accident, but on the other hand he states that the deceased fell on the road while crossing the central verge; it is not plausible as to how the driver managed to see the deceased falling when it was completely dark. A perusal through the postmortem report suggests that, it was not possible for a person to merely fall from a central verge, to sustain such grievous injuries including crush injury as mentioned in the postmortem report. All this indicates the involvement of the offending vehicle in the accident.

84. The Appellant relies on the driving licence No. P09042006391761 issued by the Licensing Authority, South West Zone, Delhi for driving motor cycle and LMV (NT). The licence was valid from 27.04.2006 to 26.04.2011 which covers the period of accident.

85. The only question for determination is whether the holder of a licence of LMV (NT) is competent to drive a road roller.

86. Learned counsel for the Appellant has taken pains to convince me that the road roller is a Light Motor Vehicle and a person holding a licence to drive LMV is competent to drive a road roller. He referred to the provision of Section 2 (47) of the Act which defines the 'transport vehicle', Section 2(33) which defines 'private service vehicle' and Section 2(35) which defines 'public service vehicle'.

87. It is urged that Section 2 (47) of the Act does not cover a road roller. Consequently, the road roller comes under the definition of LMV as defined under Section 2(21) of the Act. Section 2(47), 2(33) and 2(35) of the Act are extracted hereunder:-

> ***"2. Definitions.***
> *In this Act, unless the context otherwise requires,-*
>
> *(47) "transport vehicle" means a public service vehicle, a goods carriage, an educational institution bus or a private service vehicle;*
>
> *(33) "private service vehicle" means a motor vehicle constructed or adapted to carry more than six persons excluding the driver and ordinarily used by or on behalf of the owner of such vehicle for the purpose of carrying persons for, or in connection with, his trade or business otherwise than for hire or reward but does not include a motor vehicle used for public purposes;*
>
> *(35) "public service vehicle" means any motor vehicle used or adapted to be used for the carriage of passengers*

for hire or reward, and includes a maxicab, a motorcab, contract carriage, and stage carriage."

88. A combined reading of Section 2(33), 2(35) and 2(47) of the Act would reveal that a road roller cannot be said to be a transport vehicle.

89. A perusal of the written statement filed by the Appellant (the First Respondent before the Claims Tribunal) reveals that the Appellant did not take the plea that the road roller weighed less than 7500 kg. No suggestion was given to any of the witnesses produced by the Appellant or for the Respondent that the weight of the road roller was less than 7500 kg. It was only during the pendency of the Appeal that an Affidavit was filed by the Appellant testifying that the weight of the road roller was less than 7500 kg and the receipt from Hariom Dharamkanta, Registered was also placed on record. The receipt, of course, reveals that the weight of the road roller Engine No. SEP 630736 is 6755 kg. Even if, this weight is accepted, I am of the view that although the road roller is less than 7500 kg and would come within the definition of 'LMV' but a separate endorsement is required to drive a road roller. For this purpose, I would refer to Section 10 of the Act which prescribes form and contents of licence to drive, which is extracted hereunder:-

"10. Form and contents of licences to drive.

(1) Every learner's licence and driving licence, except a driving licence issued under section 18, shall be in such

form and shall contain such information as may be prescribed by the Central Government.

(2) A learner's licence or, as the case may be, driving licence shall also be expressed as entitling the holder to drive a motor vehicle of one or more of the following classes, namely:-

(a) motor cycle without gear;
(b) motor cycle with gear;
(c) invalid carriage;
(d) light motor vehicle;
(e) transport vehicle;
(i) road-roller;
(j) motor vehicle of a specified description."

90. Rule 16 (1) of the Central Motor Vehicles Rules, 1989 provides Form 6 for issuance of a driving licence, which is extracted hereunder:-

FORM 6
[See rule 16(1)]
(To be printed in Book Form of the size six centimeters into eight centimeters)
Form of Driving Licence

Name of the Licence Holder ……...
Son/Wife/Daughter of ……..

Passport size photograph

Name to be written across the photograph (Part of the seal and signature of the Licensing Authority to be on the Photograph and part of the driving licence).

Specimen signature/Thumb impression
of the Holder of the Licence.

Signature and designation of the
Licensing Authority.

Driving Licence number ……
Date of issue ……
Name ……
Son/wife/daughter of ……
Temporary address/Official address (if any)
……
Permanent address ……
Date of Birth ……
Educational qualifications ……
Optional
Blood group ……
RH factor ……

The holder of this licence is licensed to drive throughout India vehicles of the following description:-

Motor cycle without gear
Motor cycle with gear
Invalid carriage
Light motor vehicle.
Transport vehicle.
Road roller
Motor vehicle of a specified description, namely
The licence to drive a motor vehicle other than transport vehicle is valid from……. to ……..

The licence to drive transport vehicle is valid
from……..to ……..

Name and designation of the authority who conducted the driving test.
…….

Signature ……..
Designation of the Licensing Authority

Name & designation of the authority who conducted the driving test.

Space for addition of other classes of vehicles

Number ……

Date……

Also authorised to drive the following class of or description of motor vehicles :

Name & designation of the Authority who conducted the driving test.

……

……"

91. A combined reading of Section 10 along with Form 6 reveals that the road roller is a separate category; a separate endorsement is required to drive the same. Had it been included in the licence of LMV, there was no necessity to mention it as a separate category by insertion of Clause (i) in Section 10 of the Act.

92. Moreover, the Respondent No.2 Insurance Company examined R2W1 Babu Lal, LDC in the office of Licensing Authority, South Zone. In cross-examination he testified that the holder of the licence i.e. Harbhajan Singh son of Swarn Singh was not authorized to drive a road roller. R2W1's testimony in cross-examination was not challenged by the Appellant. Further, it was also admired by the driver Harbhajan Singh in his cross-examination that he was not authorized by any authority on the day of accident to drive the road roller. Thus, it is established that Harbhajan Singh who was driving the road roller at the time of the accident was not holding a valid and effective driving licence to drive the same. Consequently, there was breach of the

terms of the policy Ex.R2W3/2 as envisaged under Section 149 (2) (a) (ii) of the Act.

93. It is not the Appellant's case that the road roller was not entrusted to Harbhajan Singh who was driving the road roller at the time of the accident. He has not brought out any other circumstance which could show that he had taken precaution to avoid the breach of the policy condition.

94. The Appellant was rightly held to have committed the willful breach of the condition of the policy. The Insurance Company was entitled to avoid indemnification of the insured but for its statutory liability. The Claims Tribunal, therefore, rightly granted the recovery rights in favour of the First Respondent.

95. The Appeal is without any merit, the same is accordingly dismissed.

96. Pending applications also stands disposed of.

(G.P. MITTAL)
JUDGE

FEBRUARY 29, 2012
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