IN THE HIGH COURT OF HIMACHAL PRADESH
SHIMLA

FAO (MVA) No. 533 of 2008.
Date of decision: 31st July 2015.

United India Insurance Company Ltd. …..Appellant.
Versus
Smt. Rachna Devi and others …Respondents

Coram:
The Hon'ble Mr. Justice Mansoor Ahmad Mir, Chief Justice.

Whether approved for reporting ?[1] *Yes.*

For the appellant: *Mr. Ashwani K. Sharma, Advocate.*
For the respondents: *Mr. R.R. Rahi, Advocate, for respondents No. 1 and 2.*
Nemo for other respondents.

Mansoor Ahmad Mir, Chief Justice *(Oral)*

Subject matter of this appeal is the judgment and award dated 24.07.2008, made by the Motor Accident Claims Tribunal (I), Kangra at Dharamshala, in MACP No. 50-N/II-2004 titled *Rachna Devi and another versus Manoj Kumar and others,* whereby compensation to the tune of Rs.4,03,200/- with 9% interest was awarded in favour of the claimants and insurer/appellant herein came to be saddled with the liability, hereinafter referred to as "the

[1] ***Whether the reporters of Local Papers may be allowed to see the judgment ?.***

impugned award", for short, on the grounds taken in the memo of appeal.

2. Owner, driver and claimants have not questioned the impugned award on any ground, thus, it has attained finality so far it relates to them.

3. The appellant has questioned the impugned award on three grounds:-

(i) *That the driver was not having a valid and effective driving license,*

(ii) That the accident was outcome of contributory negligence which was caused by driver and the deceased,

(iii) The amount awarded is excessive,

4. I have gone through the impugned award and have perused the entire record.

5. The Tribunal framed following issues in the claim petition:-

(i) Whether on 31.7.2003, respondent No.2 was driving Bus No. HP-19-5541 rashly and negligently, and had hit Sh. Kushal Kumar who sustained head injury and succumbed to injuries as alleged? OPP

(ii) If issue No. 1 is proved in the affirmative, tow hat amount of compensation, the petitioners are entitled to for and from whom ?OPP

(iii) *Whether the respondent No. 2 was not holding a valid and effective driving license as alleged? OPR*

(iv) *Whether the vehicle in question was not insured with the respondent No. 3 as alleged? OPR*

(v) *Whether the petition is bad for non-joinder of necessary parties as alleged? OPR*

(vi) *Whether the deceased had contributed to the accident and liable for contributory negligence? OPR*

(vii) *Relied.*

6. Parties have led the evidence before the Tribunal.

7. The Tribunal, after scanning the evidence, rightly held that the driver of the offending bus has caused the accident. The driver has not denied the averments contained in the claim petition wherein it has been specifically averred that the accident was outcome of the negligence of the driver of the bus. The insurer has not led any evidence to prove that the accident was outcome of contributory negligence. First Information Report (FIR) was lodged with the police against the driver which is *prima facie* proof of the fact that the driver was negligent. Thus, the findings returned by the Tribunal on issue No. 1 are upheld.

8. Before I deal with issue No. 2, I deem it proper to deal with issues No. 3 to 6. The onus to prove these issues was on the insurer, failed to discharge the same. The Tribunal has discussed in paras 11 and 12 of the impugned award that the driving license of the driver was renewed in Local Licensing Authority Jawali.

9. While going through the record, it appears that the driving license was renewed and the factum of renewal is not in dispute. Therefore, the Tribunal has rightly made discussions in paras 11 and 12 of the impugned award. The findings so recorded in these paras are supported by the judgment delivered by the apex Court in **Pepsu Road Transport Corporation versus National Insurance Company,** reported in **(2013) 10 Supreme Court Cases 217.** It is apt to reproduce para 10 of the said judgment herein:

> *"10. In a claim for compensation, it is certainly open to the insurer under Section 149(2)(a)(ii) to take a defence that the driver of the vehicle involved in the accident was not duly licensed. Once such a defence is taken, the onus is on the insurer. But even after it is proved that the licence possessed by the driver was a fake one, whether there is liability on the insurer is the moot question. As far as the owner of the vehicle is concerned, when he hires a driver, he has to check whether the driver has a valid driving licence.*

Thereafter he has to satisfy himself as to the competence of the driver. If satisfied in that regard also, it can be said that the owner had taken reasonable care in employing a person who is qualified and competent to drive the vehicle. The owner cannot be expected to go beyond that, to the extent of verifying the genuineness of the driving licence with the licensing authority before hiring the services of the driver. However, the situation would be different if at the time of insurance of the vehicle or thereafter the insurance company requires the owner of the vehicle to have the licence duly verified from the licensing authority or if the attention of the owner of the vehicle is otherwise invited to the allegation that the licence issued to the driver employed by him is a fake one and yet the owner does not take appropriate action for verification of the matter regarding the genuineness of the licence from the licensing authority. That is what is explained in Swaran Singh case. If despite such information with the owner that the licence possessed by his driver is fake, no action is taken by the insured for appropriate verification, then the insured will be at fault and, in such circumstances, the Insurance Company is not liable for the compensation."

10. The insurer has also not pleaded and proved that the owner has committed willful breach. It was for the insure to plead and prove that the owner has committed willful breach in order to seek exoneration. The apex Court in **National Insurance Co. Ltd. versus Swaran Singh and others,** reported in **AIR**

2004 Supreme Court 1531 has laid down the test how the owner can be said to have committed willful breach in terms of Sections 147 and 149 of the Motor Vehicles Act, for short "the Act" read with the insurance policy. But it is not the case here. It is apt to reproduce relevant portion of para 105 of the judgment herein:

> *"105. .....*
>
> *(i) .....*
>
> *(ii) .....*
>
> *(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) The insurance companies are, however, with a view to avoid their liability, must not only establish the available defence(s) raised in the said proceedings but must also establish 'breach' on the part of the owner of the vehicle; the burden of proof wherefore would be on them.*
>
> *(v).....*
>
> *(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."*

11. Accordingly, the findings returned on these issues are upheld.

12. Now coming to the question of compensation. The insurer had sought permission under Section 170 of the Act and is within its right to question the adequacy of compensation.

13. Admittedly, the Tribunal has assessed the income of the deceased as Rs.3200/- per month and deducted 1/3rd towards his personal expenses. The multiplier applicable was "16" but, the Tribunal has applied the multiplier of "14". The claimants have not questioned the impugned award. It appears that the amount of compensation is neither excessive nor inadequate. The compensation awarded is just and appropriate.

14. Viewed thus, all the three questions are answered accordingly. The impugned award is upheld and the appeal is dismissed.

15. Registry is directed to release the amount in favour of the claimants strictly, in terms of the conditions contained in the impugned award, through payee's cheque account.

16. Send down the record, forthwith, after placing a copy of this judgment.

July 31, 2015, **(Mansoor Ahmad Mir)**
(cm Thakur) **Chief Justice.**