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**(2013) 02 DEL CK 0054**

**In the Delhi High Court**

**Case No : Mac. App. 483/2011 and 1040/2012**

Dharmender Kumar Jain and Others

APPELLANT

Vs

New India Insurance Co. Ltd. <BR> New India Assurance  
Co. Ltd. Vs Dharmender Kumar Jain and Others

RESPONDENT

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**Date of Decision : 18-02-2013**

**Acts Referred:**

**Citation : (2013) 1 ACC 815 : (2013) 135 DRJ 135 : (2013) 3 RCR(Civil) 648**

**Hon'ble Judges : G.P. Mittal, J**

**Bench : Single Bench**

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## **Judgement**

G.P. Mittal, J.—These two Appeals arise out of a judgment dated 29.11.2010 passed by the Motor Accident Claims Tribunal (the Claims Tribunal) whereby a compensation of Rs. 7,32,000/- was awarded in favour of the parents of deceased Shikha Jain who died in a motor vehicle accident which occurred on 20.09.2004. MAC APP. 483/2011 is preferred by New India Assurance Company Limited, the insurer of the offending bus No. DL-1PB-5002, on the grounds that the compensation awarded is excessive and arbitrary and that the Insurer was entitled to avoid liability as the driver of the bus was found to be driving the same without a valid and effective driving licence.

2. MAC APP. 1040/2012 is preferred by the parents of the deceased Shikha Jain on the ground that the compensation awarded is very meagre and low.

3. For the sake of convenience, the Appellant in MAC APP. 438/2011 shall be referred to as the Insurance Company whereas the Appellants in MAC APP. 1040/2012 shall be referred to as the Claimants.

4. On 20.09.2004 deceased Shikha Jain was riding on the pillion of the motorcycle No. DL-8SU-9300 which was driven by PW Rajesh Sharma. When the motorcyclist reached Windsor Palace roundabout, near hotel Le Meridien, Ashoka Road, bus No. DI-1PB-5002 which was being driven by Respondent Raj Kumar in a rash and negligent manner while overtaking the same hit it from behind

resulting in injuries to Rajesh Sharma and Shikha Jain. In case of Shikha Jain, the injuries proved fatal and she was declared brought dead in RML hospital.

5. Since the findings on negligence are not challenged by the Insurance Company or the driver, or the owner of the offending bus, the same has attained finality.

6. The following contentions are raised on behalf of the Insurance Company:-

(i) The Claims Tribunal assessed the income of the deceased Shikha Jain to be Rs. 6,000/- per month. Since there was no evidence with regard to the deceased future prospects, an addition of 50% therein was illegal and arbitrary.

(ii) Raj Kumar (Respondent No. 2) was challaned by the police for an offence u/s 3 read with Section 181 of the Motor Vehicles Act, 1988 (the Act) for driving the bus without a driving licence. A notice under Order XII Rule 8 CPC was duly served upon the owner of the bus to produce Respondent No. 2's driving licence. The Claims Tribunal erred in fastening the liability on the Insurance Company solely on the premise that the Appellant could have summoned the record from the Transport Authority to prove that the driver did not possess any driving licence. In the absence of any particulars of the driving licence, it was not possible for the Insurance Company to summon the record from the Motor Licensing Officer. Thus, the findings on liability reached by the Claims Tribunal are unsustainable.

7. On the other hand, learned counsel for the Claimants urges that deceased Shikha Jain was a meritorious student. She was earning Rs. 6,000/- per month from tuitions. Apart from this, she was well versed in computers which is proved from the factum of the purchase of a Desktop by the invoice Ex. PW-1/9. Since she was about to pass her B.Sc. (Hons.) Mathematics, her potential income as a TGT ought to have been taken into consideration while computing the loss of dependency.

#### QUANTUM

8. I have before me the Trial Court record. Deceased Shikha Jain obtained First Division in Secondary School Examination and Senior School Certificate Examination. She obtained 88% marks in Math and that is why she preferred to pursue B.Sc. (Hons.) in Mathematics.

9. It is well settled that the potential income of a victim can be taken into consideration to award loss of dependency.

10. In the case of Haji Zainullah Khan (Dead) by Lrs. Vs. Nagar Mahapalika, Allahabad, , death of a young boy, aged 20 years took place in an accident which happened in the year 1972. The deceased was a student of B.Sc. 1st year (Biology), a compensation of Rs. 1,46,900/- was increased and rounded off to Rs. 1,50,000/-.

11. In Ganga Devi & Ors. v. New India Assurance Co. Ltd. & Ors., MAC APP.

359/2008, decided by this Court on 23.11.2009, which related to the death of a student (studying medicine) who was doing internship and was to be awarded the MBBS degree in a short time, the Tribunal awarded a compensation of Rs. 9,35,352/- on the basis of the minimum wages of a Graduate. This Court observed that although the deceased was getting a stipend of Rs. 5,000/- per month at the time of his death due to the accident, he would have ultimately joined as a doctor at a salary ranging between Rs. 16,000/- per month to Rs. 25,000/- per month. Thus, the average monthly income of the deceased was taken as Rs. 18,000/- and after adding 50% towards future prospects, the compensation was enhanced to Rs. 21,36,000/-.

12. In Ramesh Chand Joshi v. New India Assurance Company MAC APP. 212-213/2006 decided on 20.01.2010 this Court took the potential income of a BE (Bio-Technology) First year student of Delhi College of Engineer (DCE) Rs. 38,333/- per month.

13. A Division Bench of Andhra Pradesh High Court in B. Ramulamma and Others Vs. Venkatesh, Bus Union and Another, , held that it was very difficult to determine the income of a student who was allowed to complete his course. It was observed that it was appropriate and reasonable to take salary at the entry level fixed by the Govt. for such jobs.

14. Considering that the deceased Shikha Jain was a meritorious student; after completing her Graduation, she would have got some job as an Assistant Accountant or in any Govt. or any Public Sector Undertaking or in the private sector or as a TGT. On the basic pay of Rs. 5,500/- in the year 2004 the gross salary of the deceased would have been about Rs. 10,000/- per month.

15. The loss of dependency on the basis of the potential income of Rs. 10,000/- on applying the multiplier of "14" and deducting 50% towards personal and living expenses; even without future prospects, would come to Rs. 8,40,000/- (10,000/- x 12 x 1/2 x 14).

16. The Claimants would be further entitled to a sum of Rs. 10,000/- each towards funeral expenses and loss to estate and Rs. 25,000/- towards loss of love and affection. The overall compensation thus comes to Rs. 8,85,000/-.

## LIABILITY

17. While dealing with the issue of liability, the Claims Tribunal held as under:-

19. The Insurance Company/Respondent No. 3 contended that it was not liable to indemnify the claimants as there was breach of terms and conditions of the Insurance Policy. The onus to prove that the driver of the offending vehicle did not have a valid driving licence was on the Insurance Company as it is the Insurance Company, who is liable as per the policy had sought to avoid its liability on the grounds that terms and conditions of the insurance Policy had been violated. Respondent No. 3 examined R3W1, its Administrative Officer who stated that notice under order 12 rule 8 CPC was served upon the owner and

driver of the offending vehicle through their counsel by registered post which was proved Ex. R3W1/A and postal receipt of the same was Ex. R3W1/B. In his cross-examination, he stated that a separate notice was not sent to the driver of the offending vehicle. He also stated that they had sent the notice through registered AD, but the same was not received back.

20. In my view as the Insurance Company respondent no. 3 did not send a notice to the driver of the offending vehicle under order 12 rule 8 CPC, therefore, it failed to discharge the onus of proving that driver of the offending vehicle did not have a valid driving licence at the time of accident. Respondent No. 3 did not examine any witness from the State/Regional Transport Authority in this regard. Hence, respondent No. 3 failed to discharge its onus. I am of the view that respondent No. 1, 2 and 3 are jointly and severally liable to pay the compensation. Accordingly, respondent No. 3 is directed to deposit the award amount within a period of 30 days. In case of any delay, it shall be liable to pay interest at a rate of 12% per annum for the period of delay.

18. Admittedly, Respondent No. 2 Raj Kumar was prosecuted for driving the offending vehicle without a driving licence; that by itself was not sufficient to conclude that the bus No. DL-1PB-5002 was being driven without a driving licence by Respondent No. 2 at the time of the accident. At the same time, it is established that notice Ex. R3W1/A dated 16.02.2008 was sent to Respondent No. 3 through speed post. The postal receipt was duly proved as Ex. R3W1/B. In the absence of any rebuttal to the receipt of notice requiring Respondent No. 3 to produce the original insurance policy and the driving licence of the Respondent No. 2, a presumption of service can very well be drawn against Respondent No. 3.

19. Admittedly, notice has not been served upon the driver of the bus. The driver did not even come forward to contest the Claim Petition. Can the Insurance Company, in such circumstances, avoid the contract of insurance? It has to be borne in mind that inspite of receipt of the notice Ex. R3W1/A to produce the driving licence of the driver, Respondent No. 3 did not come forward with any explanation as to the circumstances under which he handed over the vehicle to Respondent No. 2.

20. In the circumstances non-service of the notice upon driver to produce his driving licence, particularly, when he was ex-parte, was not material because of the failure of Respondent No. 3 (the owner) to respond to the notice under Order XII Rule 8 CPC and in the absence of any explanation from him. As stated earlier, an inference can be drawn that he handed over the vehicle to a driver who did not possess any valid and effective driving licence. The Insurance Company has thus successfully proved the breach of the terms of policy.

21. The issue of satisfying the third party liability even in case of breach of the terms of insurance policy is settled by three Judge Bench report in Sohan Lal Passi Vs. P. Sesh Reddy and others, . As per Section 149(2) of the Motor Vehicles Act (the Act), an insurer is entitled to defend the action on the grounds as

mentioned u/s 149(2)(a)(i)(ii) of the Act. Thus, the onus is on the insurer to prove that there is breach of the condition of the policy. It is well settled that the breach must be conscious and willful. Even if a conscious breach on the part of the insured is established, still the insurer has a statutory liability to pay the compensation to the third party and will simply have the right to recover the same from the insured/tortfeasor either in the same proceedings or by independent proceedings as the case may be, as ordered by the Claims Tribunal or the Court. The question of statutory liability to pay the compensation was discussed in detail by a two Judge Bench of the Supreme Court in *Skandia Insurance Co. Ltd. Vs. Kokilaben Chandravadan and Others*, where it was held that exclusion clause in the contract of Insurance must be read down being in conflict with the main statutory provision enacted for protection of victim of accidents. It was laid down that the victim would be entitled to recover the compensation from the insurer irrespective of the breach of the condition of policy. The three Judge Bench of the Supreme Court in *Sohan Lal Passi (supra)* analyzed the corresponding provisions under the Motor Vehicles Act, 1939 and the Motor Vehicles Act, 1988 and approved the decision in *Skandia (supra)*. In *New India Assurance Co., Shimla Vs. Kamla and Others etc. etc.*, the Supreme Court referred to the decision of the two Judge Bench in *Skandia (supra)*, the three Judge Bench decision in *Sohan Lal Passi (supra)* and held that the insurer who has been made liable to pay the compensation to third parties on account of issuance of certificate of insurance, shall be entitled to recover the same if there was any breach of the policy condition on account of the vehicle being driven without a valid driving licence. The relevant portion of the report is extracted hereunder:

21. A reading of the proviso to sub-section (4) as well as the language employed in sub-section (5) would indicate that they are intended to safeguard the interest of an insurer who otherwise has no liability to pay any amount to the insured but for the provisions contained in Chapter XI of the Act. This means, the insurer has to pay to the third parties only on account of the fact that a policy of insurance has been issued in respect of the vehicle, but the insurer is entitled to recover any such sum from the insured if the insurer were not otherwise liable to pay such sum to the insured by virtue of the conditions of the contract of insurance indicated by the policy.

22. To repeat, the effect of the above provisions is this: when a valid insurance policy has been issued in respect of a vehicle as evidenced by a certificate of insurance the burden is on the insurer to pay to the third parties, whether or not there has been any breach or violation of the policy conditions. But the amount so paid by the insurer to third parties can be allowed to be recovered from the insured if as per the policy conditions the insurer had no liability to pay such sum to the insured.

23. It is advantageous to refer to a two-Judge Bench of this Court in *Skandia Insurance Co. Ltd. Vs. Kokilaben Chandravadan and Others*, . Though the said

decision related to the corresponding provisions of the predecessor Act (Motor Vehicles Act, 1939) the observations made in the judgment are quite germane now as the corresponding provisions are materially the same as in the Act. Learned Judge pointed out that the insistence of the legislature that a motor vehicle can be used in a public place only if that vehicle is covered by a policy of insurance is not for the purpose of promoting the business of the insurance company but to protect the members of the community who become suffers on account of accidents arising from the use of motor vehicles. It is pointed out in the decision that such protection would have remained only a paper protection if the compensation awarded by the courts were not recoverable by the victims (or dependants of the victims) of the accident. This is the *raison d'être* for the legislature making it prohibitory for motor vehicles being used in public places without covering third-party risks by a policy of insurance.

24. The principle laid down in the said decision has been followed by a three-Judge Bench of this Court with approval in *Sohan Lal Passi Vs. P. Sesh Reddy and others*, .

25. The position can be summed up thus:

The insurer and the 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.....

22. Again in *United India Insurance Company Ltd. Vs. Leheru and Others*, of the report the Supreme Court referred to the decision in *Skandia (supra)*, *Sohan Lal Passi (supra)* and *Kamla (supra)* and held that even where it is proved that there was a conscious or willful breach as provided u/s 149(2)(a)(ii) of the Motor Vehicle Act, the Insurance Company would still remain liable to the innocent third party but may recover the compensation paid from the insured. The relevant portion of the report is extracted hereunder:

18. Now let us consider Section 149(2). Reliance has been placed on Section 149(2)(a)(ii). As seen, in order to avoid liability under this provision it must be shown that there is a "breach". As held in *Skandia* and *Sohan Lal Passi* cases the breach must be on the part of the insured. We are in full agreement with that. To hold otherwise would lead to absurd results. Just to take an example, suppose a vehicle is stolen. Whilst it is being driven by the thief there is an accident. The thief is caught and it is ascertained that he had no licence. Can the insurance company disown liability? The answer has to be an emphatic "No". To hold otherwise would be to negate the very purpose of compulsory insurance???

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20. ....If it ultimately turns out that the licence was fake, the insurance company would continue to remain liable unless they prove that the owner/insured was aware or had noticed that the licence was fake and still permitted that person to drive. More importantly, even in such a case the insurance company would remain liable to the innocent third party, but it may be able to recover from the insured. This is the law which has been laid down in Skandia, Sohan Lal Passi and Kamla cases. We are in full agreement with the views expressed therein and see no reason to take a different view.

23. The three Judge Bench of the Supreme Court in National Insurance Co. Ltd. Vs. Swaran Singh and Others, again emphasized that the liability of the insurer to satisfy the decree passed in favour of the third party was statutory. It approved the decision in Sohan Lal Passi (supra), Kamla (supra) and Lehu (supra). Paras 73 and 105 of the report 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.

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

24. This Court in Oriental Insurance Co. Ltd. and Others Vs. Rakesh Kumar and Others, noticed some divergence of opinion in National Insurance Co. Ltd. Vs. Kusum Rai and Others, , National Insurance Co. Ltd. Vs. Vidhyadhar Mahariwala and Others, ; Ishwar Chandra and Others Vs. The Oriental Insurance Co. Ltd. and Others, and Premkumari and Others Vs. Prahlad Dev and Others, and held that in view of the three Judge Bench decision in Sohan Lal Passi(supra) and Swaran Singh(supra), the liability of the Insurance Company vis-?-vis the third party is statutory. If the Insurance Company successfully proves the conscious breach of the terms of the policy, then it would be entitled to recovery rights against the owner or driver, as the case may be.

25. By an order dated 26.05.2011 (passed in MAC APP. 483/2011) 75% of the awarded compensation was ordered to be released to the Claimants. Since the compensation has been enhanced, rest 25% of the amount of compensation lying deposited shall be released along with interest in favour of the Claimants in terms of the order passed by the Claims Tribunal.

26. The enhanced compensation of Rs. 1,53,000/- shall carry interest @ 7.5%% per annum from the date of filing of the Petition till its deposit with the Claims Tribunal.

27. The enhanced compensation shall be equally apportioned amongst the Claimants.

28. The Appellant Insurance Company is directed to deposit the enhanced compensation within six weeks and to recover the same from Respondent No. 3 (the owner) in the terms as indicated above.

29. The statutory deposit of Rs. 25,000/- be refunded to the Appellant Insurance Company. Pending Applications stands disposed of.