(2007) 04 DEL CK 0076

In the Delhi High Court

Case No : F.A.O. No. 476 of 2003 and Mac. App. No''s. 28, 46, 154, 236, 378, 476 and 562 of 2005

New India Assurance Co. Ltd. and Others — APPELLANT

Vs

Sanjay Kr. and Others etc. etc. — RESPONDENT

Date of Decision : 17-04-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 12 Rule 8, Order 9 Rule 13, 13
Evidence Act, 1872 — Section 101
Motor Vehicles Act, 1939 — Section 94, 95(1), 95(4), 96, 96(1)
Motor Vehicles Act, 1988 — Section 145, 147, 147(1), 147(2), 147(3)

Citation : (2007) 2 ILR Delhi 733

Hon'ble Judges : Pradeep Nandrajog, J

Bench : Single Bench

Advocate : S.L. Gupta, in Mac. app. Nos. 28, 46/2005, Kapil Chawla, in Mac. app. No. 562/2005, P.K. Seth, in Mac. app. No. 236/2005, Rajesh Gupta, Harpreet Singh, in Mac. app. No. 378/2005, A.K. Soni, in Mac. app. No.154/2005 and Pradeep Gaur, in F.A.O. No. 476/2003, for the Appellant; S.N. Parashar, S.P. Jain for Respondents 1, 2 in Mac. App. Nos. 28, 46/2005, Manoj Ranjan Sinha, for R-1 in Mac. App. No. 378/2005 and Parbhat Kumar, for R-3 in F.A.O. No. 476/2003, for the Respondent

Final Decision : Dismissed

Judgement

Pradeep Nandrajog, J.—Common questions of law arose for consideration in the captioned 7 appeals and hence the same are being

decided by a common order. The issue involved is, if it is established that the driver of the vehicle at the time of the accident was not holding a valid

driving licence would entitle the insurance company to avoid liability under the policy to pay any money to the third party or are the rights of the

insurance company to recover from the insured, after paying the sum awarded to the injured/claimants of the deceased. An ancillary question arises for consideration as to what should be the standard of proof for the insurance company to establish breach of the policy of insurance by the

assured.

2. In FAO. No. 476/03, MAC.APP. No. 562/05, MAC.APP. No. 28/05, MAC.APP. No. 46/05 and MAC.APP. No. 154/05 grievance of the

insurance company is that no recovery rights have been granted. Save and except FAO No. 476/2003, only contention urged is that the finding

that the insurance company is liable to satisfy the award in favour of the claimants is contrary to law. In FAO No. 476/2003 it is additionally urged

that the finding by the Tribunal that the insurance company has failed to establish that the driver of the vehicle at the time when the vehicle met with

the accident was not holding a valid driving licence is contrary to evidence on record.

3. In MAC.APP. No. 236/2005 grievance of the insurance company is akin to the grievance in the other appeals. However, the facts of the said

case are a little different as would be noted hereinafter.

4. Filtering the facts a little further, owners of the vehicles involved in the accident which are the subject matter of FAO No. 476/2003 and MAC.

APP. No. 562/2005 failed to contest the proceedings before the learned Judge, MACT and in spite of a notice under Order 12 Rule 8 CPC

issued by the insurance company during trial to the assured and the driver to produce the original driving licence held by the driver concerned,

failed to respond to the notice. In MAC.APP. No. 28/2005, MAC.APP. No. 46/2005, MAC.APP. No. 154/2005 and MAC.APP. No.

236/2005 the owners appeared and gave testimony.

5. Same vehicle was the subject matter of the accident in MAC.APP. No. 28/.2005 and MAC.APP. No. 46/2005. The owner of the vehicle Shri

Pawan Kumar Yadav examined himself as R2W1. His deposition reads as under:

R2W1

Shri Pawan Kumar Yadav, S/o Sh. Prabhu Singh Yadav, R/o.WZ-1393A, Nangal Raya, New Delhi.

on S.A.

I know Sanjay Kumar S/o Sh. Shiv Kumar. He was my driver. On 3.2.01. I have seen the DL of my driver before handed over my truck No. DL

1GB 0148. I examined the driving licence about the category which is issued Transport Authority, Rohtak. I have brought the photocopy of the

same which is Ex.R2W1/A. The original is sized by the police. Driving licence No. 030452/S initially issued from Transport Authority, Sonepat.

My driver taken the training fro heavy transport driving from Driver Training School, Haryana Roadways, Gurgaon. The training No. was 695. The

heavy licence number is 835/TPT/Veh/99 RTU dated 6.8.99. This driving licence number is issued for HGV + HPV passed by MVI Rohtak.

After expiring of DL. my driver renewed for the same licence from the Sonepat Authorities, Haryana. The complete record of DL of my driver is

available with Sonepat Authorities. At present DL Number is 735 DTO/02 dt. 20.11.02. The photocopy of renewed driving licence is mark A

which is shown the DL is category of HGV HPV. The driver left the job from my office.

xxxxx by Sh. Amar Singh, Clause for petitioner.

My driver himself got his DL made. At the time of accident he was holding DL Ex.R2W1/A as per my knowledge.

6. Owner of the vehicle which is subject matter of

MAC.APP. No. 154/2005 examined himself as R2W1. He deposed by way of an affidavit. Not a word has been spoken by him in his testimony

as to what prudent steps were taken by him to check the driving skills of the driver engaged by him, namely, Uday Veer Singh. Not a word has

been spoken that he saw the driving licence produced by the driver and on perusal thereof satisfied himself that the driver was authorised to drive

the truck.

7. The owner of the vehicle concerned which is subject matter of MAC.APP. No. 236/2005 stepped into the witness box as R3W1 and deposed

that at the time of the accident, i.e., 1.9.2000 he entrusted the car for servicing to Goldie Car Scan. When he went to pick up the car in the evening

from the service center he was informed that the same had met with an accident. The insurance company proved that the driving driving the vehicle

when it met with an accident did not possess a valid driving licence.

8. The owner of the vehicle which is subject matter of MAC.APP. No. 378/2005 chose not to defend the proceedings. Insurance company

served upon her a notice under Order 12 Rule 8 of the CPC calling upon her to produce the original driving licence. She failed to respond thereto.

The insurance company successfully established that the driving licence held by the driver to whom she had entrusted the vehicle was a fake driving

licence.

9. The issue has to be adjudicated with reference to the provisions of Section 149 of the Motor Vehicles Act, 1988. The same reads as under:

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 converted 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 canceled 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 and 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 organized 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 as 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 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 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 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 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 expressions

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 canceled 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.

10. The forerunner of Section 149 of the M.V. Act, 1988 was Section 96 of the M.V. Act, 1939.

11. In the report published as Sohan Lal Passi Vs. P. Sesh Reddy and others, the Supreme Court compared and contrasted the provisions of

Section 96 of the M.V. Act, 1939 and Section 149 of the M.V. Act, 1988. Earlier decision of the Supreme Court reported as Skandia Insurance

Co. Ltd. Vs. Kokilaben Chandravadan and Others, was also noticed in Sohan Lal Passi''s case. In para 12 of the decision it was opined as under:

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 risks.--(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

* * *

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 Skandia Insurance Co. Ltd.

v. Kokilaben Chandravadan, 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 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 ï¿½read downï¿½ in order that it is not at war with the ï¿½main purposeï¿½ 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

ï¿½breachï¿½ 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 willful. 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 willfully 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.

12. Decision in Skandia Insurance Co.''s case and Sohan Lal Passi''s case were revisited by the Supreme Court in the decision reported as New

India Assurance Co., Shimla Vs. Kamla and Others etc. etc., it was observed as under:

17. The details regarding the requirements of the policy including the limits of liability to be insured are enumerated in Section 147. Sub-section (3)

of it states that a policy shall be of no effect for the purposes of that Chapter unless and until a certificate of insurance is issued by the insurer in the

prescribed form in favour of the insured. It is in Section 149 that provisions, relating to the duty of the insurer for satisfying the judgments and

awards in respect of third-party claims, are incorporated. Sub-section (1) says that the insurer shall pay to the person entitled to the benefit of a

judgment or award as if the insurer were the judgment-debtor in respect of the liability, when any such judgment or award is obtained against the

insured in whose favour a certificate of insurance has been issued. Of course, the said liability of the insurer is subject to the maximum sum assured

payable under the policy.

18. Section 149(2) of the Act says that notice regarding the suit or other legal proceedings shall be given to the insurer if such insurer is to be

fastened with such liability. The purpose of giving such notice is to afford the insurer to be made a party in the proceedings for defending the action

on any one of the grounds mentioned in the Sub-section. Among the multiplicity of such grounds the one which is relevant in this case is extracted

below:

149. (2)(a) that there has been a breach of a specified condition of the policy, being one of the following conditions, namely

* * *

(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;

19. Sub-section (4) of Section 149 of the Act says that so much of the policy as purports to restrict the insurance of the person insured by

reference to any condition shall ""as respects such liabilities as are required to be covered by a policy ., be of no effect"". The proviso to the said

Sub-section is important for the purpose of considering the question involved in this case and hence that proviso is extracted below:

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.

20. Similarly, in this context Sub-section (5) is equally important and hence that is also extracted below:

149. (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.

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. v. Kokilaben Chandravadan. 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 Judges 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 sufferers 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

dï¿½ï¿½tre 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 v. P.

Sesh Reddy.

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. Learned Counsel for the insured contended that it is enough if he establishes that he made all

due enquiries and believed bona fide that the driver employed by him had a valid driving licence, in which case there was no breach of the policy

condition. As we have not decided on that contention it is open to the insured to raise it before the Claims Tribunal. In the present case, if the

Insurance Company succeeds in establishing that there was breach of the policy condition, the Claims Tribunal shall direct the insured to pay that

amount to the insurer. In default the insurer shall be allowed to recover that amount (which the insurer is directed to pay to the claimant third

parties) from the insured person.

13. The decision in Kamla''s case (Supra) clearly brings out the distinction and the consequences which flow due to breach of specified conditions

of the policy enumerated in Section 149(2)(b) of the M.V. Act, 1988 and the consequences which flow on account of policy being void on the

conditions contemplated by Section 149(2)(b) of the M.V. Act, 1988. The language of Sub-section 4 and the proviso to Sub-section 4 of Section

149 of the M.V. Act, 1988 was specifically noted in para 19 of the decision to the effect that the said provisions were intended to safeguard the

interest of an insurer, meaning thereby that on the insurer paying to the third party on account of a policy of insurance having been issued in respect

of the vehicle it would be entitled to recover such sum from the assured. In para 22 of the decision, the Supreme Court re-emphasized and

repeated that the effect of Sub-section 4 of Section 149 of the M.V. Act, 1988 and the proviso to Sub-section 4 of Section 149 was that for the

breaches envisaged by clause ''a'' of Sub-section 2, insurance company has 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 assured if as per

the policy conditions the insurer had no liability to pay such sum to the assured.

14. But, the insurance companies did not relent. They raised the issue once

again. In the report published as United India Insurance Company Ltd.

Vs. Lehru and Others, the issue was revisited. Decision in Skandia Insurance, Sohan Lal Passi and Kamla''s case were once again noted with

approval. In paras 11, 12, 15 and 18 of the decision in Lehru''s case it was observed as under:

11. In the case of Skandia Insurance Co. Ltd. v. Kokilaben Chandravadan the object and purpose of getting motor vehicles insured was

considered. The question was whether the Insurance Company could avoid liability because the accident was caused by the cleaner of the truck

who had no licence. The Insurance Company relied upon Section 96(2)(b)(ii) which read as under:

96. (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 proceeding 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)-(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

12. To be noted that Section 96(2)(b)(ii) is identical to Section 149(2)(a)(ii) on which reliance is placed in this case. The argument that the

Insurance Company could avoid liability was negatived for the following reasons:

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 ï¿½read downï¿½ in order that it is not at war with the ï¿½main purposeï¿½ 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 dependents 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 dependents 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 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.

14. Section 96(2)(b)(ii) extends immunity to the insurance company if a breach is committed of the condition excluding driving by a named person

or persons or by any person who is not fully licensed, or by any person who has been disqualified for holding or obtaining a driving licence during

the period of disqualification. The expression ï¿½breachï¿½ is of great significance. The dictionary meaning of ï¿½breachï¿½ is ï¿½infringement or

violation of a promise or obligationï¿½. It is therefore abundantly clear that the insurer will have to establish that the insured is guilty of an infringement or violation of a promise that a person who is duly licensed will have to be in charge of the vehicle. The very concept of infringement

or violation of the promise that the expression ï¿½breachï¿½ carries within itself induces an inference that the violation or infringement on the part

of the promisor must be a wilful infringement or violation. If the insured is not at all at fault and has not done anything he should not have done or is

not amiss in any respect how can it be conscientiously posited that he has committed a breach? It is only when the insured himself places the

vehicle in charge of a person who does not hold a driving licence, that it can be said that he is ï¿½guiltyï¿½ of the breach of the promise that the

vehicle will be driven by the licensed driver. It must be established by the insurance company that the breach was on the part of the insured and

that it was the insured who was guilty of violating the promise or infringement of the contract. Unless the insured is at fault and is guilty of a breach

the insurer cannot escape from the obligation to indemnify the insured and successfully contend that he is exonerated having regard to the fact that

the promisor (the insured) committed a breach of his promise. Not when some mishap occurs by some mischance. When the insured has done

everything within his power inasmuch as he has engaged a licensed driver and has placed the vehicle in charge of a licensed driver, with the express

or implied mandate to drive himself it cannot be said that the insured is guilty of any breach. And it is only in case of a breach or a violation of the

promise on the part of the insured that the insurer can hide under the umbrella of the exclusion clause.

To construe the provision differently would be to rewrite the provision by engrafting a rider to the effect that in the event of the motor vehicle

happening to be driven by an unlicensed person, regardless of the circumstances in which such a contingency occurs, the insured will not be liable

under the contract of insurance. It needs to be emphasised that it is not the contract of insurance which is being interpreted. It is the statutory

provision defining the conditions of exemption which is being interpreted. These must therefore be interpreted in the spirit in which the same have

been enacted accompanied by an anxiety to ensure that the protection is not nullified by the backward-looking interpretation which serves to

defeat the provision rather than to fulfil its life aim. To do otherwise would amount to nullifying the benevolent provision by reading it with a non-benevolent eye and with a mind not tuned to the purpose and philosophy of the legislation without being informed of the true goals sought to be

achieved. What the legislature has given, the court cannot deprive of by way of an exercise in interpretation when the view which renders the

provision potent is equally plausible as the one which renders the provision impotent. In fact it appears that the former view is more plausible apart

from the fact that it is more desirable. When the option is between opting for a view which will relieve the distress and misery of the victims of

accidents or their dependants on the one hand and the equally plausible view which will reduce the profitability of the insurer in regard to the

occupational hazard undertaken by him by way of business activity, there is hardly any choice. The court cannot but opt for the former view. Even

if one were to make a strictly doctrinaire approach, the very same conclusion would emerge in obeisance to the doctrine of ï¿½reading downï¿½

the exclusion clause in the light of the ï¿½main purposeï¿½ of the provision so that the ï¿½exclusion clauseï¿½ does not cross swords with the

ï¿½main purposeï¿½ highlighted earlier. The effort must be to harmonize the two instead of allowing the exclusion clause to snipe successfully at the

main purpose.

* * *

15. The question was again considered by a three-Judge Bench of this Court in the case of Sohan Lal Passi v. P. Sesh Reddy. In this case the bus

was being driven by the cleaner, an employee of the owner, at the time of accident. The cleaner did not have a valid licence. The Insurance

Company sought to avoid liability on the ground that there was breach of Section 96(2)(b)(ii) of the Motor Vehicles Act, 1939 inasmuch as the

vehicle was being driven by a person who was not duly licensed. The Insurance Company questioned the correctness of the view taken in Skandia

case. Hence this case was placed before a three-Judge Bench. The Bench held as follows:

12. ...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 ï¿½breachï¿½ 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 Accidents 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.

13. This Court in the case of Kashiram Yadav v. Oriental Fire and General Insurance Co. reiterated the views expressed in Skandia Insurance Co.

Ltd. v. Kokilaben Chandravadan. While referring to that case it was said:

...There the facts found were quite different. The vehicle concerned in that case was undisputedly entrusted to the driver who had a valid licence. In

transit the driver stopped the vehicle and went to fetch some snacks from the opposite shop leaving the engine on. The ignition key was at the

ignition lock and not in the cabin of the truck. The driver had asked the cleaner to take care of the truck. In fact the driver had left the truck in care

of the cleaner. The cleaner meddled with the vehicle and caused the accident. The question arose whether the insured (owner) had committed a

breach of the condition incorporated in the certificate of insurance since the cleaner operated the vehicle on the fatal occasion without driving

licence. This Court expressed the view that it is only when the insured himself entrusted the vehicle to a person who does not hold a driving licence,

he could be said to have committed breach of the condition of the policy. It must be established by the Insurance Company that the breach is on

the part of the insured. Unless the insured is at fault and is guilty of a breach of the condition, the insurer cannot escape from the obligation to

indemnify the insured. It was also observed that when the insured has done everything within his power inasmuch as he has engaged the licensed driver and has placed the vehicle in his charge with the express or implied mandate to drive himself, it cannot be said that the insured is guilty of any

breach.

We affirm and reiterate the statement of law laid down in the above case. We may also state that without the knowledge of the insured, if by

driverï¿½s acts or omission others meddle with the vehicle and cause an accident, the insurer would be liable to indemnify the insured. The insurer

in such a case cannot take the defence of a breach of the condition in the certificate of insurance.

We are in respectful agreement with the view expressed in the case of Skandia Insurance Co. Ltd. v. Kokilaben Chandravadan.

* * *

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. The injured or relatives

of the person killed in the accident may find that the decree obtained by them is only a paper decree as the owner is a man of straw. The owner

himself would be an innocent sufferer. It is for this reason that the legislature, in its wisdom, has made insurance, at least third-party insurance,

compulsory. The aim and purpose being that an insurance company would be available to pay. The business of the company is insurance. In all

businesses there is an element of risk. All persons carrying on business must take risks associated with that business. Thus it is equitable that the

business which is run for making profits also bears the risk associated with it. At the same time innocent parties must not be made to suffer or loss.

These provisions meet these requirements. We are thus in agreement with what is laid down in the aforementioned cases viz. that in order to avoid

liability it is not sufficient to show that the person driving at the time of accident was not duly licensed. The insurance company must establish that

the breach was on the part of the insured.

15. One would have expected that the issue attained finality. But yet once again, matter was raised by the insurance companies before a 3 Judge

Bench of the Supreme Court. The decision is reported as National Insurance Co. Ltd. Vs. Swaran Singh and Others, Decision in Skandia

Insurance, Sohan Lal Passi, Kamla, Lehru and a host of other decisions were noted. The Supreme Court noted the law on the subject and in

particular the language of Section 147 and 149 of the M.V. Act, 1988. In paras 36, 39, 40, 41, 48, 49, 50, 51, 69, 70, 73, 77, 84, 110(iv) and

(v) it was observed as under:

36. Sub-section (1) of Section 149 casts a liability upon the insurer to pay to the person entitled to the benefit of the decree ""as if he were the

judgment-debtor"". Although the said liability is subject to the provision of this section, it prefaces with a non obstante clause that the insurer may be

entitled to avoid or cancel or may have avoided or cancelled the policy. Furthermore, the statute raises a legal fiction to the effect that for the said

purpose the insurer would be deemed to be a judgment-debtor in respect of the liability of the insurer.

* * *

39. The question as to whether an insurer can avoid its liability in the event it raises a defence as envisaged in Sub-section (2) of Section 149 of the

Act corresponding to Sub-section (2) of Section 96 of the Motor Vehicles Act, 1939 had been the subject-matter of decisions in a large number

of cases.

40. It is beyond any doubt or dispute that u/s 149(2) of the Act, an insurer, to whom notice of the bringing of any proceeding for compensation has

been given, can defend the action on any of the grounds mentioned therein.

41. However, Clause (a) opens with the words ""that there has been a breach of a specified condition of the policy"", implying that the insurerï¿½s

defence of the action would depend upon the terms of the policy. The said sub-clause contains three conditions of disjunctive character, namely,

the insurer can get away from the liability when (a) a named person drives the vehicle; (b) it was being driven by a person who did not have a duly granted licence; and (c) driver is a person disqualified for holding or obtaining a driving licence.

* * *

48. Furthermore, the insurance company with a view to avoid its liabilities is not only required to show that the conditions laid down u/s 149(2)(a)

or (b) are satisfied but is further required to establish that there has been a breach on the part of the insured. By reason of the provisions contained

in the 1988 Act, a more extensive remedy has been conferred upon those who have obtained judgment against the user of a vehicle and after a

certificate of insurance is delivered in terms of Section 147(3). After a third party has obtained a judgment against any person insured by the policy

in respect of a liability required to be covered by Section 145, the same must be satisfied by the insurer, notwithstanding that the insurer may be

entitled to avoid or to cancel the policy or may in fact have done so. The same obligation applies in respect of a judgment against a person not

insured by the policy in respect of such a liability, but who would have been covered if the policy had covered the liability of all persons, except

that in respect of liability for death or bodily injury.

49. Such a breach on the part of the insured must be established by the insurer to show that not only the insured used or caused or permitted to be

used the vehicle in breach of the Act but also that the damage he suffered flowed from the breach.

50. Under the Motor Vehicles 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.

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"".

* * *

69. The proposition of law is no longer res integra that the person who alleges breach must prove the same. The insurance company is, thus,

required to establish the said breach by cogent evidence. In the event the insurance company fails to prove that there has been breach of conditions

of policy on the part of the insured, the insurance company cannot be absolved of its liability. (See Sohan Lal Passi.)

70. Apart from the above, we do not intend to lay down anything further i.e. degree of proof which would satisfy the aforementioned requirement

inasmuch as the same would indisputably depend upon the facts and circumstances of each case. It will also depend upon the terms of contract of

insurance. Each case may pose a different problem which must be resolved having regard to a large number of factors governing the case including

conduct of parties as regards duty to inform, correct disclosure, suppression, fraud on the insurer etc. It will also depend upon the fact as to who is

the owner of the vehicle and the circumstances in which the vehicle was being driven by a person having no valid and effective licence. No hard-

and-fast rule can, therefore, be laid down. If in a given case there exists sufficient material to draw an adverse inference against either the insurer or

the insured, the Tribunal may do so. The parties alleging breach must be held to have succeeded in establishing the breach of conditions of the

contract of insurance, on the part of the insurer by discharging its burden of proof. The Tribunal, there cannot be any doubt, must arrive at a finding

on the basis of the materials available on records.

* * *

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.

* * *

77. In United India Insurance Co. Ltd. v. Jaimy 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 provided 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 proviso 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 reimbursement of the amount paid by them only in the

context of a situation other than the one contemplated u/s 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

u/s 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.

* * *

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.

* * *

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

(i) * * *

(ii) * * *

(iii) * * *

(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 wherefore would be on them.

(v) The court cannot lay down any criteria as to how the said burden would be discharged, inasmuch as the same would depend upon the facts

and circumstances of each case.

....

16. The legal position could therefore be stated as follows:

(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.

17. It is more than elementary that decisions decide contentions on the basis of pleadings and evidence. Section 101 of the Evidence Act requires

a fact to be pleaded and proved in the context of a legal right. Where escapement from liability is pleaded, it has to be on the basis of averments in

pleading that there is a breach. The breach has to be pleaded in the context of violation of the terms of the insurance policy. The law grants

immunity to the insurer from liability to indemnify the assured if breach of the terms of policy is committed by the assured.

18. A breach is the infringement or violation of a promise or obligation on the part of the assured. Therefore, it follows from the rule of evidence

that if the insurer desires the court to give judgment as to his legal right to be exonerated from the liability to indemnify the insured, he must prove that those facts exist.

19. Further, evidence must be brought on record to establish the breach. Since obligation on the insurer is to prove that the assured, knowingly,

willingly or intentionally violated the conditions of the policy or that he acted so recklessly as to denote that he did not care what the consequences

of his act might be, the insurance company has not only to prove, where breach alleged is of entrusting the vehicle to a person not possessing a

valid driving licence, that the driver did not possess a valid driving licence but additionally has to prove that the owner was conscious of the said

fact when the vehicle was entrusted to the driver.

20. In the context of a fake driving licence, the factual arena becomes a little complex. With the advancement of science and technology and

computer aids it has become very easy to replicate licences. Indeed, it has become extremely difficult to distinguish the fake from the real. Cases

have been reported where a licence, origin whereof is fake, has been renewed by the Licencing Authority. Kamla''s case (Supra) was dealing with

a licence, origin whereof was dubious but was subsequently renewed by the Licencing Authority. If the Licencing Authority could not detect, when

presented for renewal, that the licence was fake licence, how can a lay person detect the same?

21. Knowledge is a state of mind. It is personal to the person possessed of the knowledge. Till he steps into the witness box, it would be

impossible for any person to establish what his knowledge was.

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 CPC 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.

25. In the backdrop of the legal position as extracted hereinabove, reference may conveniently now be made to facts of each appeal.

MAC.APP. No. 28/2005 and MAC. APP. No. 46/2005

26. MAC.APP. No. 28/2005 and MAC. APP. No. 46/2005 pertain to the same accident involving truck No. DL 1GB 0148 owned by Pawan

Kumar Yadav. The vehicle was entrusted by him to one Sanjay Kumar. Testimony of Pawan Kumar Yadav, as noted in para 5 above establishes

that he took more than reasonable care to satisfy himself that Sanjay Kumar was competent to drive a heavy duty vehicle.

27. Notwithstanding that the insurance company has proved that the licence produced by Sanjay Kumar was a fake driving licence, the insurance

company, which has been denied recovery rights cannot succeed in the appeal, inasmuch as it has failed to establish that Pawan Kumar Yadav knowingly or willingly breached the condition of the policy of insurance. On the contrary Pawan Kumar Yadav has positively established that he

acted with due diligence.

28. MAC.APP. No. 28/2005 and MAC.APP. No. 46/2005 are accordingly dismissed.

FAO No. 476/2003

29. Evidence on record, being the chargesheet submitted by the police, proved as Ex. R1 by the insurance company establishes that the driver of

the vehicle failed to produce any driving licence before the police authorities in spite of being called upon to do so.

30. Notwithstanding that, learned Judge MACT has held that the insurance company has failed to establish that there was a breach of the

conditions of the policy of insurance.

31. It would be relevant to note that neither the owner nor the driver produced any licence before the Motor Accident Claim Tribunal.

32. I therefore do not agree with the view taken by the learned Judge that the insurance company failed to prove that there was a breach of a

condition of the policy of insurance which required the owner not to entrust the vehicle to a person not possessing a valid driving licence.

33. The learned Judge failed to appreciate that as per the provisions of Section 158 of the Motor Vehicles Act, 1988 every driver of a motor

vehicle is legally obliged to keep with him the driving licence while driving a vehicle and produce the same required by a authority empowered to

seek production of the licence. What else could the insurance company prove other than the fact that the driver failed to produce any driving

licence when called upon to do so after the accident? A presumption has to be drawn that the driver possessed no licence.

34. The appeal has to succeed. As per para 84 of the decision in Swaran Singh''s case (Supra), insurance company would be entitled to avoid any

liability. However, I note that vide order dated 1.8.2003, the insurance company was declined any interim relief, in that, application filed by the

insurance company seeking stay of execution of the award against it was declined.

35. Since the insurance company has satisfied the award vis-a-vis the claimant, I dispose of the appeal granting recovery rights to the insurance

company. The insurance company would be entitled to recover the amount paid to the claimant from the owner of the vehicle insured. The

insurance company would be entitled to interest @ 8% p.a. on the sum paid to the claimant with effect from the day it satisfied the award till date

of recovery from the owner.

MAC. APP. No. 562/2005

36. Notwithstanding that the insurance company has proved through the testimony of R3W2, Khem Raj, Superintendent from the Regional

Transport Office, wherefrom the licence produced by the driver was purportedly issued that the licence was never issued by said office, i.e. that

the licence was a fake licence, recovery rights have been denied by the learned Judge MACT on the ground that the insurance company failed to

prove that it served a notice under Order 12 Rule 8 CPC upon the owner and the driver to produce the original genuine licence. The learned Judge

has opined that the insurance company has failed to prove willful breach.

37. The owner as also the driver had failed to contest the claim. Thus, facts in the personal knowledge of the owner as also the driver were

withheld by the two. By establishing that the licence was a fake licence, insurance company successfully discharged the initial burden on it. As the

owner nor the driver led any evidence, the onus did not shift back on the insurance company.

38. MAC.APP. No. 562/2005 stands disposed of granting recovery rights to the insurance company. The insurance company would be entitled to

interest @ 8% p.a. on the sum paid to the claimants pursuant to the award with effect from the day it satisfied the award till date of recovery from

the owner.

MAC. APP. No. 154/2005

39. As noted in para 6 above owner of the vehicle insured examined himself as R2W1. He deposed by way of an affidavit. Not a word has been

spoken by him in his testimony as to what prudent steps were taken by him to check the driving skills of the driver engaged by him. Not a word

has been spoken that he saw the driving licence produced by the driver before giving him employment under him. Not a word has been spoken

that on perusal of a driving licence he was satisfied that the driver was authorised to drive a truck.

40. Notwithstanding that, the appeal must fail for the reason the insurance company did not summon the record from the Licencing Authority,

Firozabad, the authority wherefrom the licence in question was purportedly issued. Attempt by the insurance company to prove that the licence

was a fake licence is through the testimony of R3W1, Shri Balram Mahajan, Addl. Divisional Manager of the appellant. He stated that they had

engaged the services of an advocate, Chander Raj Singh Chauhan who submitted a report marked ''A'' to the effect that the licence was not issued

by the authority at Firozabad. Report of the Licencing Authority enclosed with the report of Raj Singh Chauhan being Ex. R3W1/B cannot be

accepted as a proof that the driving licence was fake for the reason neither was Raj Singh Chauhan produced as a witness nor was the author of

Ex.R3w1/B produced as a witness. Further, no record was summoned from the authority at Firozabad.

41. I may only add that proof of violation of the policy of insurance has not to be lightly inferred. Clear and cogent evidence has to be led by the

insurance company. A report emanating from an authority can be proved either by the author of the report or a record keeper from the authority

who proves the signatures of the concerned officer on the report and deposes that the report has emanated from their office. It would be

additionally desirable to summon the original record pertaining to the licence in question and in relation thereto prove the person in whose name the

licence is issued.

42. MAC. APP. No. 154/2005 is accordingly dismissed.

MAC. APP. No. 236/2005

43. As noted in para 7 above, owner of the vehicle stepped into the witness box as R3W1 and deposed that on the date of the accident, i.e.

1.9.2000, in the morning he had entrusted the vehicle to Goldie Car Scan for service. He further stated that when he went to take delivery of the

car in the evening he learnt that he had met with an accident.

44. It would be interesting to note that the owner was not cross-examined in spite of opportunity given.

45. It is not a case where the owner, knowingly or willingly or recklessly handed over the vehicle to a person not possessing a valid driving licence.

He entrusted the vehicle to a service center. If the owner of the service centre allowed a person not possessing a driving licence to drive the same,

it would not be a breach of the conditions of the policy of insurance by the owner of the vehicle.

46. Observations of the Supreme Court in para 18 of the judgment in Lehru''s case (supra) are squarely attracted. As held therein, the owner

himself would be an innocent sufferer.

47. MAC. APP. No. 236/2005 is dismissed.

MAC.APP. No. 378/2005

48. Admittedly, the owner chose to remain ex-parte before the MACT. Evidence on record led by the insurance company has established that the

driving licence produced by the driver after the accident was a fake driving licence. R3W4, Suraj Mal, Licencing Clerk from the Licencing

Authority wherefrom the licence was purportedly issued proved that no such licence as produced by the driver was issued to him.

49. Since the owner chose to not step into the witness box, the Tribunal has held it to be a case of knowingly or intentionally violating the policy of

insurance which mandated that the vehicle insured would not be entrusted to a person not possessing a valid driving licence.

50. Thus, as regards the award dated 22.11.2002, no exception can be taken to the grant of recovery rights against the owner.

51. In the appeal order dated 30.3.2005 dismissing application under Order 9 Rule 13 CPC for setting aside of the award has also been

challenged.

52. As recorded in the said order dated 30.3.2005, appellant was duly served and had engaged a Counsel Ms. Kiran Kumari. Case of the

appellant was that her Counsel kept her in the dark. She stated that she learnt about the award on 16.8.2004.

53. Learned Judge has held against the appellant inter alia on the ground that during pendency of the proceeding, since appellant was not appearing

at the trial, a notice dated 1.8.2001 under Order 12 Rule 8 CPC was served upon her by the insurance company calling upon her to produce the

driving licence of the driver as also the original policy of insurance. No explanation was furnished by the appellant as to why she did not respond to

the said notice by producing the documents, production whereof was sought. Learned Judge has opined that the said notice was a caution to the appellant.

54. What has further weighed with the learned Judge is that the insurance company had challenged the award vide FAO No. 40/2003 and had

questioned the liability cast upon it to first pay the money to the claimants and thereafter recover the same from the appellant. Learned Judge has

noted that in the said appeal, appellant was duly served and appeared through her Counsel on 5.3.2003.

55. I agree with the view taken by the learned Judge that when served with the notice in FAO No. 40/2003, on perusing the grounds of appeal

urged by the insurance company, appellant in the instant appeal as owner of the vehicle would have known that under the impugned award

recovery rights have been granted against her.

56. Indeed, Learned Counsel for the appellant had no answer when questioned during arguments as to on what basis could the appellant urge that

she learnt about the award only when recovery proceedings were initiated against her by the insurance company.

57. I find no infirmity in the order dated 30.3.2005.

58. MAC. APP. No. 378/2005 is accordingly dismissed.

59. No costs in any appeal save and except MAC.APP. No. 378/2005 which is dismissed with costs in sum of Rs. 5000/- against the appellant

and in favour of respondent No. 1.

60. LCR be returned in all the cases wherever received.