

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

% *Date of Judgment: 11.08.2011*

+ **MAC APPEAL No.201/2010 & CM No. 5807/2010**

ORIENTAL INSURANCE CO. LTD.. Appellant
Through: Ms. Manjusha Wadhwa and
Ms. Anjana Goswami,
Advocate.

Versus

NISHA KOHLI & OTHERS Respondents
Through: Mr. Ashok Popli, Advocate for
respondent No. 1.

AND

MAC APPEAL No.202/2010 & CM No. 5835/2010

ORIENTAL INSURANCE CO. LTD.. Appellant
Through: Ms. Manjusha Wadhwa and
Ms. Anjana Goswami,
Advocate.

Versus

K.K. KOHLI & OTHERS Respondents
Through: Mr. Ashok Popli, Advocate for
respondent No. 1.

CORAM:
HON'BLE MS. JUSTICE INDERMEET KAUR

1. Whether the Reporters of local papers may be allowed to see the judgment?

2. To be referred to the Reporter or not? Yes

3. Whether the judgment should be reported in the Digest? Yes

INDERMEET KAUR, J. (Oral)

1 These are two appeals which have been filed by the Insurance Company impugning Award dated 29.01.2010 vide which compensation in the sum of Rs.77,759/- along with interest had been directed to be paid to the two petitioners K.K. Kohli and Nisha Kohli both of whom had suffered injuries in an accident which had occurred on 12.05.2005. K.K. Kohli and Nisha Kohli were the victims in this accident; K.K. Kohli was driving a two wheeler scooter on which his wife was the pillion rider; a Santro car collided with their scooter as a result of which the parties sustained grievous injuries.

2 The Tribunal had passed the Award against the insurance company. Recovery rights had not been granted against the owner/driver of the vehicle which is the grievance now in the present appeals. The contention raised by the appellant is that the driver of the vehicle had no valid driving license; in the absence of an effective driving license, the Insurance Company in fact could not be burdened with any liability; this is first submission; in the alternate even if liability is foisted upon the Insurance Company,

MAC APPEAL Nos.201-202/2010 Page 2 of 7

the Insurance Company should have been granted recovery rights against the owner/driver.

3 Record shows that the driver of the vehicle namely Alok Kumar had expired in the course of the proceedings and the learned Tribunal has recorded this fact on 10.05.2007; on 14.05.2008 since Alok Kumar (driver) had expired and there being no dispute to his identity, permission had been granted to the appellants not to substitute the legal representatives of respondent No. 1/driver. Contention of learned counsel for the appellant is that in these circumstances when the legal heirs of driver Alok Kumar were not known and Alok Kumar having died, notice under Order 12 Rule 8 of the Code could have only been issued to the owner and not to the driver and the judgments relied upon by the learned Tribunal reported in Oriental Insurance Company Ltd. Vs. Sonia II (2009) ACC 44 and (2008) 4 ACC 136 National Insurance Co. Ltd. Vs. Nirabjit Kaur & others are both distinct; it is pointed out that in both these cases, the owner of the offending vehicle had come into the witness box and stated that the driver did have a valid and effective driving license. Contention being that the impugned Award suffers from an infirmity and is liable to be modified and recovery rights be granted to the appellant.

4 The owner has been arrayed as respondent No. 3 namely Smt. Rameshwari Devi. In spite of service, she has chosen not to appear before this Court.

5 Submissions made by learned counsel for the appellant have little force. Record shows that the death of driver Alok Kumar had been recorded as a fact on 10.05.2007, two applications had thereafter been filed by the claimants; in the first application the name of the driver which had inadvertently been mentioned as Ashok Kumar has been sought to be corrected as Alok Kumar which had been allowed. The second application is relevant. Vide this application, the contention of the petitioners/claimants was that since the identity of the driver Alok Kumar was not disputed and he having died' claimants be allowed not to substitute the legal representatives of the driver; the order dated 14.05.2007 specifically records that the counsel for the Insurance Company did not wish to file any reply to the said application; he had no objection to the said application; he had therefore by his consent permitted the legal representatives of the deceased driver not to be brought on record. It does not now lie in the mouth of the Insurance Company to state that they had no details about the legal representatives of the driver and in these circumstances

notice under Order 12 Rule 8 of the Code could not have been
MAC APPEAL Nos.201-202/2010

issued to the driver.

6 Record further shows that the notice under Order 12 Rule 8 of the Code is dated 25.08.2009; it has admittedly been issued only to the owner; it could not have been issued to the driver or to his legal representatives as the names of the legal representative of the driver had not been brought on record in terms of order dated 14.05.2007. Insurance Company as noted supra had not opposed this prayer; if the defence of the Insurance Company was that the driver did not have a valid driving license, it was incumbent upon the Insurance Company to have ensured that the legal representatives of the driver are brought on record but it chose not to do so. R3W-1 has appeared as a witness on behalf of the Insurance Company; he had proved the notice under Order 12 Rule 8 of the Code which is dated 25.08.2009. This notice had admittedly been sent to the owner of the vehicle and not to the driver.

7 In the judgments of Nirabjit Kaur and Sonia referred to Supra, a Bench of this Court had observed that where the notice under Order 12 Rule 8 of the Code had been served by the Insurance Company only upon the owner and not upon the driver, the Insurance Company could not be absolved of its liability as

presumption is that the driver would be having the driving license
MAC APPEAL Nos.201-202/2010

in his possession and not the owner; the Insurance Company not having resorted to this procedure and the plea now set up that the notice under Order 12 Rule 8 of the Code could not have been issued for want of particulars of the legal representatives of the driver, is not a valid defence as in the proceedings before the Tribunal the Insurance Company had not disputed the prayer made by the petitioners wherein they had sought exclusion for bringing on record the legal representatives of the driver. At the cost of repetition, if the defence of the Insurance Company was that the driver did not have an effective driving license, it should not have allowed the application of the petitioners seeking exclusion of the legal heirs of the driver to be brought on record; the Insurance Company not having opposed this application, they cannot now set up a plea that it was because of the absence of the details of the legal representatives of the driver that notice under Order 12 Rule 8 of the Code could not be served upon them. Burden of proof in terms of Section 106 of the Evidence Act was upon the appellant; it has failed to discharge this burden.

8 In (2004) ACC 1 (SC) National Insurance Co. Ltd. Vs. Swaran Singh & others, the Apex Court has observed that a mere submission by the Insurance Company that the driving license of

the driver was fake and invalid is not by itself sufficient to absolve

the Insurance Company from its liability. In this case the Insurance Company itself was a party in permitting the Tribunal to exclude the names of the legal representatives of the driver on his death; it cannot now claim a benefit that service of notice under Order 12 Rule 8 of the Code could not be given to the driver as it did not have knowledge about the names of the legal representatives of the said person. In these circumstances, recovery rights cannot be granted in favour of the appellant. Appeals have no merit.

9 Dismissed.

AUGUST 11, 2011

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INDERMEET KAUR, J.