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

Date of Decision: 19th January, 2016

+ **MAC.APP. 105/2013 & CM No.1862/2013**

ICICI LOMBARD GIC LTD. Appellant

Through: Ms. Suman Bagga and Mr.
Pankaj Gupta, Advs.

Versus

SUBHASH & ORS. Respondents

Through: None

CORAM:

HON'BLE MR. JUSTICE R.K.GAUBA

JUDGMENT

R.K.GAUBA, J (ORAL):

1. The insurance company is in appeal seeking to assail the judgment dated 19.09.2012 of the Motor Accident Claims Tribunal (“the Tribunal”) in claim case No.133/2008 arising out of petition under Sections 166 and 140 of Motor Vehicles Act, 1988 (“MV Act”) preferred by the first respondent on account of injuries suffered by him in an accident that occurred at 2.30 PM on 24.04.2008 in front of police booth at Udyog Nagar, Nangloi, Delhi involving motor vehicle No.DL-4S-BK-2339 (“the offending vehicle”). By the impugned judgment, the Tribunal directed the appellant insurance company to pay Rs.35,940/- as compensation to the claimant rejecting its case for recovery rights on the ground that there was breach of terms of the insurance policy taken out by owner (the third respondent) for the reason that the driver (the second respondent) was not holding a valid driving licence.

2. It be noted at the outset that the driver did not contest the claim petition before the Tribunal while the owner of the vehicle only denied liability on the ground that there was no rash or negligent driving. The insurance company, on its part, had taken up the defence of it not being liable, *inter alia*, on the ground that the driver did not possess a valid driving licence. No evidence was led by the owner or the driver during the inquiry before the Tribunal. The claimant led evidence by examining himself (PW-1) to prove the facts pertaining to the accident to bring out the necessary information for computation of the compensation. The appellant insurance company examined Mr. Vivek Yadav (legal manager) (R3W1) on the basis of his affidavit (Ex.R3W1/A) to affirm the aforesaid defence and to press for recovery rights.

3. The learned Tribunal by the impugned judgment has denied the recovery rights, referring in this context to the judgment of the Supreme Court in *National Insurance Company V. Swaran Singh* (2004) 3 SCC 297 and judgment dated 05.10.2010 of this Court in *Shiv Devi & Ors. V. Manoj Kumar & Ors.* (MAC.APP.No.139/2010). The observations of the Tribunal denying the recovery rights appear mainly in paras 24 and 26 which read as under :

“24. In the present case the insurance company has only proved the notice u/o 12 R 8 CPC sent by its counsel to the owner of offending vehicle and have done nothing more. As already said there is no prosecution of the driver by the State agency for driving the offending vehicle without license.

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26. In view of the aforesaid discussion, it is clear that insurance company has utterly failed to prove the willful breach on part of the owner of the offending vehicle, the insurance company is not entitled for recovery rights for the breach of the terms and conditions of the policy. Simplicitor by producing its own officer to depose for the breach of the terms and conditions of the policy, the insurance company does not become entitled to the recovery Suit No. 133/08 Page No.6/8 rights without having further proof of the same. The prayer of the insurance company stands rejected accordingly.”

4. The contention of the insurance company in appeal is that the evidence adduced has not been properly appreciated and that the insurance company could not have done anything beyond calling upon the owner and driver of the vehicle through notice under Order 12 Rule 8 CPC to produce the driving licence, if there was one held by the driver. Reliance has been placed on the judgment of a learned Single Judge of this Court in *New India Assurance Company Ltd. V. Sanjay Kumar & Ors.* ILR 2007 (II) Delhi 733.

5. In spite of notice, the second and third respondent have failed to appear to put in any contest.

6. Having heard the learned counsel for the appellant and gone through the record of the Tribunal, I find the view taken by the Tribunal cannot be upheld. The judgment in the case of *Shiv Devi* (supra) cannot apply here as in the said case the distinguishing feature was that the driver of the offending vehicle involved there had produced a driving licence before the claims Tribunal and the impugned award made no reference to it. It was in these circumstances, that it was observed that mere issuance of notice under Order 12 Rule 8 CPC would be

inconsequential.

7. In *Swaran Singh* (supra), the Supreme Court ruled thus:

“The breach of policy condition e.g., disqualification of driver on invalid driving licence of the driver, as contained in Sub-section (2)(1)(ii) of Section 149, have to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving license or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly fulfilling the condition of the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time.”

8. In the case at hand the insurance company led evidence by examining R3W1. The evidence of the said witness affirms what was pleaded. The insurance company had issued notice under Order 12 Rule 8 CPC calling upon the owner to produce the driving licence. The owner failed to respond to the said notice. In these circumstances, adverse view to the effect that the owner and driver would not be in a position to produce any valid driving licence will have to be drawn.

9. It is in the above context that the observations of this Court in the case of *Sanjay Kumar* (supra) are relevant and need reiteration. The same read thus :

“23. Where the assured chooses to run away from the battle i.e. fails to defend the allegation of having breached the terms of the insurance policy by opting not to defend the proceedings, a presumption could be drawn that he has

done so because of the fact that he has no case to defend. It is trite that a party in possession of best evidence, if he withholds the same, an adverse inference can be drawn against him that had the evidence been produced, the same would have been against said person. As knowledge is personal to the person possessed of the knowledge, his absence at the trial would entitle the insurance company to a presumption against the owner.

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

10. In above facts and circumstances, the learned Tribunal should have concluded that the driver of the offending vehicle did not have a valid driving licence. The only corollary of this conclusion would be that the insurance company is entitled to recovery rights. [*Sohan Lal Passi V. P. Sesh Reddy* (1996) 5 SCC 21; *New India Assurance Co., Shimla V. Kamla and Ors.* (2001) 4 SCC 342 and *United India Insurance Company Ltd. V. Lehru & Ors.* (2003 3 SCC 338)]

11. Thus, the appeal is allowed.

12. The negative finding recorded by the Tribunal in the impugned judgment denying recovery rights to the insurance company is set aside. The appellant – insurance company had prayed for stay against the execution of the impugned award by CM No.1860/2013. The said application was dismissed by order dated 08.03.2013 with observation that if it succeeds in the appeal it would be able to recover the amount paid to the claimants. The learned counsel for the appellant submits that, in this view of the matter, the awarded amount was deposited with

the Tribunal and in due course would have been paid to the claimants.

13. Against the above backdrop, no further directions to the insurer are required. The insurance company shall be entitled to take out appropriate proceedings before the Tribunal to recover the amount paid to the claimants.

14. Statutory deposit, if made, shall be refunded to the insurance company.

**R.K. GAUBA
(JUDGE)**

**JANUARY 19, 2016
VLD**