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

Date of Decision: 17th May, 2016

+ **MAC.APP. 260/2013**

ORIENTAL INSURANCE COMPANY LTD. Appellant
Through Mr. Abhishek Kumar Gola, Adv.

versus

SUMAN VERMA & ORS. Respondent
Through Mr. Anshuman Upadhyay, Adv. for
R-3

+ **MAC.APP. 280/2013**

ORIENTAL INSURANCE COMPANY LTD. Appellant
Through Mr. Abhishek Kumar Gola, Adv.

versus

OM PRAKASH VERMA & ORS. Respondent
Through Mr. Anshuman Upadhyay, Adv. for
R-3

+ **MAC.APP. 281/2013**

ORIENTAL INSURANCE COMPANY LTD. Appellant
Through Mr. Abhishek Kumar Gola, Adv.

versus

KUMARI SHIVANI & ORS. Respondent
Through Mr. Anshuman Upadhyay, Adv. for
R-3

CORAM:
HON'BLE MR. JUSTICE R.K.GAUBA

JUDGMENT

R.K.GAUBA, J (ORAL):

1. On 18.09.2006, a motor vehicular accident occurred at about 5.20 AM involving two motor vehicles, one being a motorcycle bearing No.DL 4 SNB 3357 (motorcycle) and the other a Qualis car bearing registration No.DL 1VA 1461 being used as a taxi (the taxi). As a result of the collision Pramod died and two other persons suffered injuries (Shivani and Suman Verma). Three accident claim cases were filed, they being registered as case No.283/2008 on account of death and case numbers 292/2008 and 27/2008 on account of compensation for injuries. All the three accident claim cases invoked Sections 166 & 140 of Motor Vehicles Act, 1988 (MV Act) and were consolidated for inquiry. In each of the said cases Oriental Insurance Co. Ltd. (appellant in these appeals) was impleaded as a party respondent, it having admittedly issued an insurance policy against third party risk for the period in question in respect of the taxi. Additionally, Prem Singh and Ram Prasad were also impleaded as respondents, they being driver and owner of the taxi.

2. Before the tribunal, the driver and owner of the taxi submitted written statement and denied involvement or rash or negligent driving of the taxi being the cause for the collision. The insurer contested the claim cases pleading that there was breach of terms and conditions of the insurance policy as the taxi was not covered by a valid permit. The tribunal, after holding inquiry, by common judgment dated 12.12.2012,

upheld the case of the claimants about the accident having occurred due to negligent driving of the taxi which finding has attained finality as it was never challenged any further. By the same judgment, compensation was awarded in each of the three cases, in the case of death in the sum of Rs.5,30,955/- and in the injury cases in the sums of Rs.14,000/- and Rs.1,03,899/- respectively. The tribunal, however, was not impressed with the plea of the insurer about the breach of terms and conditions of the insurance policy and, thus, directed it to satisfy the awards in each case with interest.

3. Feeling aggrieved with the rejection of its plea for exoneration, the insurer has come up with these appeals challenging the view taken by the tribunal. The plea of the insurance company was considered and rejected by the tribunal by the impugned judgment :

“40. The insurance company have taken plea that the driver of the offending vehicle was driving the same without having any permit. The insurance company have also produced its own officer as R3W1 Sh.Hukumat Rai who solemnly affirmed that there was breach of terms and conditions of the policy It also took the plea that the driver and owner were issued with the notice u/o 12 R 8 PC vide Ex. R3W1/2. The postal receipts were proved as Ex. R3W1/3 and R3W1/4. The AD card or any service proof have not filed by the insurer.

41. Further in a latest judgment titled Shiv Devi Vs. Manoj Kumar MAC Appeal No.139/10 decided on 05/10/10, the Hon’ ble High Court has held that mere issuance of notice u/o 12 R 8 CPC by the insurance company to owner and driver of the offending vehicle does not go to prove much less conclusively that driver did not possess driving license.

42. Coming to present case, the police have not even challaned the driver for driving the same without permit. Simplicitor by producing its own officer to depose for proving notice u/s 12 R8 CPC to establish the breach of the terms and conditions of the policy, the insurance company does not become entitled to the recovery rights without having further proof of the same. Therefore, the insurance company is not entitled for recovery rights for the breach of the terms and conditions of the policy. The prayer of the insurance company stands rejected accordingly.”

4. Noticeably, in spite of opportunity before the tribunal, the driver or owner did not adduce any evidence. Further, when R3W1 was examined by the insurer, the driver and owner of the offending vehicle chose to remain absent from the proceedings. Thus, they did not offer any challenge to the testimony of R3W1. In these circumstances, the issuance of notice under Order 12 Rule 8 of Code of Civil Procedure, 1908 (CPC) by the insurance company to the driver and owner of the taxi had been duly proved. The said evidence also brings on record that no challenge was offered. Thus, in spite of the said notices neither the driver nor the owner of the offending vehicle produced any such document during the proceedings before the tribunal as could show facts to the contrary.

5. The submission of the counsel for the driver and owner in the appeals that the tribunal had adequately considered the issue and has reached a correct finding because the police did not prosecute the said parties for having been brought the vehicle on road without permit, is not acceptable. The insurance company had done what was within its power to do. It would not have any information about the permit unless the same were shared with it by the driver or owner. The driver and owner having

not responded to the notices under Order 12 Rule 8 CPC, the only inference is that they do not have any document in the nature of permit to show. The burden, thus, had shifted from the insurance company on to the owner and driver of the offending vehicle. No evidence having been led by them, a finding has to be returned that the taxi was brought on road without a valid permit.

6. In *National Insurance Co. Ltd. v. Challa Bharathamma* (2004) 8 SCC 517, the Supreme Court observed, thus :

“High Court was of the view that since there was no permit, the question of violation of any condition thereof does not arise. The view is clearly fallacious. A person without permit to ply a vehicle cannot be placed at a better pedestal vis-à-vis one who has a permit, but has violated any condition thereof. Plying of a vehicle without a permit is an infraction. Therefore, in terms of Section 149(2) defence is available to the insurer on that aspect. The acceptability of the stand is a matter of adjudication. The question of policy being operative had no relevance for the issue regarding liability of insurer. High Court was, therefore, not justified in holding the insurer liable.”

7. The omission or failure on the part of the police to initiate criminal action on account of absence of permit cannot lead to the inference that a permit existed. This fact had to be shown by positive evidence by the driver and owner of the offending vehicle who only would have access to the crucial document if it actually existed. No evidence having been led by them, it is held that the insurance company has proved breach of terms of the policy on account of there being no permit.

8. Thus, the appeals are allowed. The insurance company is granted recovery rights in each of these three cases against the owner and driver of the offending vehicle. For enforcing the same, the insurer shall have the liberty to take out appropriate proceedings before the tribunal.

9. The appeals are disposed of in above terms.

R.K. GAUBA
(JUDGE)

MAY 17, 2016
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