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

Date of Decision: 09th February, 2016

+ MAC.APP. 610/2011

NEW INDIA ASSURANCE CO LTD Appellant

Through: Mr. Kanwal Chaudhary, Adv.

versus

MOHD YAMIN & ORS Respondents

Through: Mr. Sanjeet Singh, Adv. for R-1
& 2.

Mr. Danesh Ralan, Mr. Arush
Bhandari & Ms. Akshita
Manocha, Advs. for R-4.

CORAM:

HON'BLE MR. JUSTICE R.K.GAUBA

JUDGMENT

R.K.GAUBA, J (ORAL):

1. On 19.11.2004, at about 03:00 PM, Shaukin, a child aged 9 years died in a motor vehicular accident involving truck bearing registration no.HR-38J-1078 (hereinafter referred to as “the offending vehicle”), statedly driven by the third respondent Harpal, it being a vehicle registered in the name of the fourth respondent herein (M/s N. K. Builders). The parents of the deceased child (first and second respondents herein) brought a claim petition under Sections 166 and 140 of the Motor Vehicles Act, 1988 (the MV Act) before the motor accident claim tribunal (tribunal), where it was registered as suit

no.39/2005. Harpal, the driver and M/s N. K. Builders, the registered owner of the offending vehicle did not appear before the tribunal and rather suffered the proceedings *ex parte*.

2. The claim petition had stated that the offending vehicle was insured against third party risk with the appellant/insurance company, it being shown in the array of the claim petition as third party respondent. The appellant appeared on notice and submitted written statement conceding the factum of insurance against third party risk covering the period in question but taking the position that it was not liable if there was any fundamental breach of terms of the policy.

3. The tribunal held inquiry into the claim petition and by judgment dated 21.03.2011 awarded compensation in the sum of ₹3,75,000/- with interest @ 7.5% from the date of filing of petition (05.02.2004) till realization, apportioning the compensation amongst the claimants. The tribunal held the driver and owner (third and fourth respondent herein) liable to pay the compensation and also held the insurance company (appellant) liable to indemnify.

4. The insurance company preferred the appeal at hand in 2001, questioning the computation of the award and also insisting on being exonerated on the plea that there had been breach of terms and conditions of the insurance policy.

5. At the hearing today, the learned counsel for the appellant submitted that the contentions with regard to the computation of compensation are not pressed and the insurance company only presses for recovery rights against the insured (fourth respondent herein), since

the offending vehicle was put on road without a valid permit and the driver (third respondent) was not holding a valid driving license.

6. During the course of arguments, the learned counsel for the fourth respondent relied upon the evidence of RW4 (Suman Suri), a partner of the fourth respondent stating that the driver (third respondent) was holding a valid driving license for heavy motor vehicle issued by the licensing authority, Firozabad, Uttar Pradesh, valid from 28.12.2002 to 27.12.2005. On the application of the fourth respondent, evidence was allowed to be led during the pendency of the appeal. The statement of Suman Suri (RW4) was recorded before the registrar on 11.08.2015.

7. The insurance company, on the other hand, points out that since the permission for raising defence about the breach of the policy had been taken under Section 170 of the MV Act before the tribunal and since inspite of notice under Order 12 Rule-8 of Code of Civil Procedure, 1908 (CPC), the owner or driver of the offending vehicle had failed to respond and come forward with the driving license and permit, adverse view should have been taken by the tribunal. It is further argued that since the fourth respondent has not come forward even now with a valid permit respecting the offending vehicle, breach of terms of insurance policy must be held to have been established.

8. By way of reply to the above noted arguments, it was argued on behalf of the fourth respondent that no notice under Order 12 Rule-8 CPC was ever served. It is pointed out that inspite of opportunity the insurance company did not lead evidence to prove the said notice during the inquiry before the tribunal.

9. Whilst it is true that the insurance company was duty bound to adduce the necessary evidence, including by proving the notice under Order 12 Rule-8 CPC in support of its contention about the breach of terms and conditions of the policy, it is equally true that the tribunal should have made some scrutiny of the said contention and recorded its observations in such regard either granting recovery rights or denying the same. The impugned judgment of the tribunal is conspicuously silent on this issue. This, however, cannot dilute the impression that the insurance company must blame itself for the position it has been put into by ineffective prosecution of its defences during the inquiry before the tribunal or, for that matter, all these years during the pendency of the appeal before this court. It has risen up to claim the right to lead evidence in support of its defences only after the fourth respondent came forward with the application offering to prove that the driver of the offending vehicle was holding a valid driving license.

10. The learned counsel for the fourth respondent submits that there was a valid permit available and in operation for the relevant period and, thus, there was no breach of terms and conditions of the policy.

11. In the given facts and circumstances, there is no reason why the compensation due in favour of claimants should remain under any further cloud. In terms of order dated 12.07.2011, the insurance company deposited the entire awarded amount with up-to-date interest in the court. By order dated 30.07.2012, the said deposited amount was released in favour of the claimants (first and second respondent herein). Thus, in so far as rights of the claimants are concerned, the same stands satisfied.

12. The issue as to whether there was any breach of terms and conditions of the policy and, consequently, as to whether the insurance company is entitled to recovery rights against fourth respondent requires to be properly inquired into by giving fresh opportunity not only to the insurance company but also to fourth respondent to prove their respective contentions about the driving license and permit. Though some evidence respecting the driving license was led, as noted above, before this Court through Suman Suri (RW4) examined at the instance of the fourth respondent but that cannot constitute a complete inquiry.

13. The inquiry into the above aspects is, thus, remitted to the tribunal which shall give opportunity first to the insurance company to prove its contentions and then to the fourth respondent (the owner of the offending vehicle) to prove its case about the driving license and permit.

14. The appellant/insurance company and the fourth respondent shall appear before the tribunal for further proceedings in above regard on 05th April, 2016. The tribunal shall hold the proceedings expeditiously and should it reach the finding that there has been breach of policy, it shall grant recovery rights to the insurance company against the fourth respondent. The evidence recorded before this court is part of the record of the appeal at hand. The tribunal may summon the same for its inquiry.

15. The insurance company, undoubtedly, did not prosecute its defences diligently. It failed to avail the opportunity to prove its contentions before the tribunal. It has dragged even the claimants in this appeal which has remained pending for almost five years. In these circumstances, the appeal is disposed of with cost of ₹50,000/- which

shall be paid to the claimants. The cost shall be deposited with the tribunal within 30 days of today, failing which the claimants shall be entitled to take out appropriate execution proceedings before the tribunal to recover the same.

16. The appeal is disposed of in above terms.

R.K. GAUBA
(JUDGE)

FEBRUARY 09, 2016/ssc