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

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Decided on: 23.09.2019

+ **MAC.APP. 639/2019**
GIRIRAJ

..... Appellant

Through: Mr. Bhupesh Narula and Ms.
Rinku Narula, Advocates.

versus

**VINIT KOHLI & ANR (UNITED INDIA INSURANCE
COMPANY LTD)**

..... Respondents

Through: Mr. Nikhil Jain, Advocate for
insurance company.

CORAM:
HON'BLE MR. JUSTICE NAJMI WAZIRI

NAJMI WAZIRI, J. (Oral)

1. This appeal impugns the award of compensation dated 15.12.2012 passed by the learned MACT in Suit No. 50/11, on the ground that the impugned order has erred in law in exonerating the insurance company from payment of the compensation while making the driver-cum-owner to pay the same.
2. It is the appellant's contention that even if it was a breach of policy condition, that the driver-cum-owner of the offending vehicle was not having a valid driving licence, nevertheless

under the principle of ‘Pay and Recover’ as enunciated by the Supreme Court in *Shamanna & Anr. vs. Divisional Manager, Oriental Insurance Co. Ltd. & Ors.*, (2018) 9 SCC 650, the awarded amount is to be paid by the insurer first and the same then can be recovered from the owner/driver. The said judgment, holds as under:

“6. As per the decision in Swaran Singh case [National Insurance Co. Ltd. v. Swaran Singh, (2004) 3 SCC 297 : 2004 SCC (Cri) 733] , onus is always upon the insurance company to prove that the driver had no valid driving licence and that there was breach of policy conditions. Where the driver did not possess the valid driving licence and there are breach of policy conditions, “pay and recover” can be ordered in case of third-party risks. The Tribunal is required to consider

“as to whether the owner has taken reasonable care to find out as to whether the driving licence produced by the driver ... does not fulfil the requirements of law or not will have to be determined in each case”.

7. The Supreme Court considered the decision of Swaran Singh case [National Insurance Co. Ltd. v. Swaran Singh, (2004) 3 SCC 297 : 2004 SCC (Cri) 733] in subsequent decision in National Insurance Co. Ltd. v. Laxmi Narain Dhut [National Insurance Co. Ltd. v. Laxmi Narain Dhut, (2007) 3 SCC 700 : (2007) 2 SCC (Cri) 142] , wherein this Court held that: (SCC p. 705, para 5)

“5. The decision in Swaran Singh case [National Insurance Co. Ltd. v. Swaran Singh, (2004) 3 SCC 297 : 2004 SCC (Cri) 733] has no application to cases other than third-party risks and in case of third-party

risks the insurer has to indemnify the amount and if so advised, to recover the same from the insured.”

8. The same principle was reiterated in Premkumari v. Prahlad

Dev [Premkumari v. Prahlad Dev, (2008) 3 SCC 193 : (2008) 1 SCC (Civ) 822 : (2008) 1 SCC (Cri) 694] .

9. For the sake of completion, we may refer to few judgments where the breach of policy conditions was compensation. In National Insurance Co. Ltd. v. Bommithi Subbhayamma [National Insurance Co. Ltd. v. Bommithi Subbhayamma, (2005) 12 SCC 243] , the Supreme Court reversed the judgment of Andhra Pradesh High Court in making the insurance company liable for payment of compensation in respect of gratuitous passengers carried in the goods vehicle.

10. In Oriental Insurance Co. Ltd. v. Brij Mohan [Oriental Insurance Co. Ltd. v. Brij Mohan, (2007) 7 SCC 56 : (2007) 3 SCC (Cri) 304] , the claimant was travelling in the trolley attached to tractor carrying earth to brick kiln. It was found that the tractor and the trolley were not used for “agricultural works”, the only purpose for which the tractor was insured, when the claimant sustained the injuries. The Supreme Court though held that the insurance company is not liable to pay compensation, however, invoked the power vested in the Supreme Court under Article 142 of the Constitution of India in directing the insurance company to satisfy the award by paying compensation to the insured/claimant and realise the same from the owner of the tractor.

11. In the present case, to deny the benefit of “pay and recover”, what seems to have substantially weighed with the High Court is the reference to larger Bench

made by the two-Judge Bench in National Insurance Co. Ltd. v. Parvathneni [National Insurance Co. Ltd. v. Parvathneni, (2009) 8 SCC 785 : (2009) 3 SCC (Civ) 568 : (2009) 3 SCC (Cri) 943] which doubted the correctness of the decisions which in exercise of jurisdiction under Article 142 of the Constitution of India directing insurance company to pay the compensation amount even though insurance company has no liability to pay. In Parvathneni case [National Insurance Co. Ltd. v. Parvathneni, (2009) 8 SCC 785 : (2009) 3 SCC (Civ) 568 : (2009) 3 SCC (Cri) 943] , the Supreme Court pointed out that Article 142 of the Constitution of India does not cover such type of cases and that: (SCC p. 786, para 5)

“5. If the insurance company has no liability to pay at all, then, it cannot be compelled by order of the court in exercise of its jurisdiction under Article 142 of the Constitution of India to pay the compensation amount and later on recover it from the owner of the vehicle.”

12. The above reference in Parvathneni case [National Insurance Co. Ltd. v. Parvathneni, (2009) 8 SCC 785 : (2009) 3 SCC (Civ) 568 : (2009) 3 SCC (Cri) 943] has been disposed of on 17-9-2013 [National Insurance Co. Ltd. v. Parvathneni, (2018) 9 SCC 657] by the three-Judge Bench keeping the questions of law open to be decided in an appropriate case.

13. Since the reference to the larger Bench in Parvathneni case [National Insurance Co. Ltd. v. Parvathneni, (2009) 8 SCC 785 : (2009) 3 SCC (Civ) 568 : (2009) 3 SCC (Cri) 943] has been disposed of by keeping the questions of law open to be decided in an appropriate case, presently the decision in Swaran Singh case [National Insurance Co. Ltd. v. Swaran Singh, (2004) 3 SCC 297 : 2004 SCC (Cri) 733] followed in Laxmi Narain Dhut [National Insurance Co. Ltd. v. Laxmi Narain Dhut, (2007) 3 SCC 700 :

(2007) 2 SCC (Cri) 142] and other cases hold the field. The award passed by the Tribunal directing the insurance company to pay the compensation amount awarded to the claimants and thereafter, recover the same from the owner of the vehicle in question, is in accordance with the judgment passed by this Court in Swaran Singh [National Insurance Co. Ltd. v. Swaran Singh, (2004) 3 SCC 297 : 2004 SCC (Cri) 733] and Laxmi Narain Dhut [National Insurance Co. Ltd. v. Laxmi Narain Dhut, (2007) 3 SCC 700 : (2007) 2 SCC (Cri) 142] cases. While so, in our view, the High Court ought not to have interfered with the award passed by the Tribunal directing the first respondent to pay and recover from the owner of the vehicle. The impugned judgment [Shamanna v. Laxman, 2016 SCC OnLine Kar 6928] of the High Court exonerating the insurance company from its liability and directing the claimants to recover the compensation from the owner of the vehicle is set aside and the award passed by the Tribunal is restored.

14. *So far as the recovery of the amount from the owner of the vehicle, the insurance company shall recover as held in the decision in Oriental Insurance Co. Ltd. v. Nanjappan [Oriental Insurance Co. Ltd. v. Nanjappan, (2004) 13 SCC 224 : 2005 SCC (Cri) 148] wherein this Court held that: (SCC p. 226, para 8)*

“8. ... For the purpose of recovering the same from the insured, the insurer shall not be required to file a suit. It may initiate a proceeding before the executing court concerned as if the dispute between the insurer and the owner was the subject-matter of determination before the Tribunal and the issue is decided against the owner and in favour of the insurer.”

15. *In the result, the impugned judgment [Shamanna v. Laxman, 2016 SCC OnLine Kar*

6928] of the High Court insofar as enhancement of the compensation to Rs 4,94,700 is concerned is affirmed. Insofar as direction of the impugned judgment directing the appellant claimants to recover the compensation from the owner of the vehicle is concerned, is set aside and the appeal is partly allowed. The first respondent insurance company shall pay the enhanced compensation to the appellant claimants along with the accrued interest and the insurance company shall recover the same from the owner of the vehicle. No costs”.

3. What emanates from the above discussion is that apropos third party liability, the insurer is liable to indemnify the amount. In view of the above, the impugned award is modified to the extent that the compensation amount shall be paid by the insurance company to the beneficiaries of the award. It shall, of course, have the right of recovery of the amount from respondent no. 1, who is the driver-cum-owner of the vehicle.
4. Let the awarded amount, alongwith interest accrued thereon, be deposited before the learned Tribunal within three weeks of copy of receipt of this order, for the same be released to the beneficiaries of the Award in terms of the scheme of disbursement as specified therein.
5. The appeal is disposed-off in the above terms.

NAJMI WAZIRI, J

SEPTEMBER 23, 2019

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