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

% **Judgment delivered on: 03.04.2019**

\+ **MAC.APP. 739/2018 and CM APPL. 33081/2018**

M/S A G ENVIRO INFRA PROJECTS PVT LTD ..... Appellant

Through: Mr.Dhirander Mathur, Advocate

versus

RAVI KUMAR & ORS ( THE NEW INDIA ASSURANCE CO LTD ) ..... Respondent

Through: Mr.D.K. Sharma, Advocate

**CORAM:**
**HON'BLE MR. JUSTICE A.K. CHAWLA**

**J U D G M E N T**

**A.K. CHAWLA, J. (ORAL)**

1. By the instant appeal, the appellant, who is the owner of the insured vehicle, i.e. truck bearing No.DL-1M 5783 (for short, 'offending vehicle'), assails the finding returned by the tribunal, whereunder, the liability to pay the compensation awarded on account of motor accident, has come to be fastened on the owner of the offending vehicle, i.e. the appellant. Since the issue agitated in the appeal is limited and hinges on the plea that the driving licence held by the driver of the offending vehicle was not valid or he had possessed a valid licence, the other facts giving rise to the filing of the claim petition under Section 166 of the Motor Vehicles Act, do not invite

advertence.

2. The tribunal has given the recovery rights to the insurer / respondent no.3-The New India Assurance Company Limited, and, reached to the conclusions on the issue in question, as under:

> "*31. I have taken note of the submissions of the Ld. Counsel for insurer for recovery rights for the breach of the terms and conditions of the policy.*
>
> *32. During the course of arguments, Ld. Counsel for the insurance company vehemently argued that the offending vehicle was being used by the respondent no.1 without having a valid and effective license and hence, the insurance company is not liable to pay the compensation to the petitioner. It was further submitted by insurance Company that because of the reason that the owner of the offending vehicle has committed breach of the terms and conditions of the policy (as the driver of the offending vehicle was holding the fake driving license at the time of accident), the insurance company be absolved of the liability.*
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> *33. In order to substantiate its claim, Respondent no.3/ insurance company has examined Sh.Govind Singh, Senior Clerk, RTO Office, Sarvodaya Nagar, Kanpur, in support of its contention. During his examination, he states that on verification of record, it was revealed that no driving license bearing No.12351/KP 2007 was issued from their office. In view of the aforesaid discussion, I am of the considered opinion that the Respondent no.1/ Driver was not having a valid and effective DL as on the date of accident which took place on 24.04.2012.*
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> *34. In order to decide the defence raised by the Ld. Counsel for insurer, I am being guided by the judgment of the Hon'ble*

*High Court in MAC.App.476/2011 in case titled as '**National Insurance Company Ltd. Vs. Sarita Hasija & Ors.**' decided by Hon'ble Justice G.P. Mittal wherein Hon'ble High Court have relied upon its own judgment in case titled as **New India Assurance Company Ltd. Vs. Sanjay Kumar & Ors. ILR (2007) 11, Delhi 733** wherein it was held as under:*

> *"23. Where the assured chooses to run away from the battle i.e. fails to defend the allegation of having breach 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 license. 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."*

35. *In view of the aforesaid judgments of Hon'ble High Court of Delhi, this court has come to the conclusion that the insurance company is entitled to recovery rights against Respondent nos.1 and 2 but only after the disbursement of claim to the claimant in terms of the judgment of the Hon'ble*

*<u>Supreme Court in Swaran Singh's case, 2004 ACJ 1 (SC) (Supra)."</u>*

3. Assailing the findings so arrived at by the tribunal, learned counsel for the appellant, strenuously contends that such findings have come to be given by the tribunal ignoring the substantive evidence that had come to be led by the appellant by way of deposition of R2-W1. Perusal of the TCR shows that R2-W1, in his deposition by way of affidavit Ex.R2-W1/1, relevant to the context, deposed as under:

> *"3. That the R1 was employed as driver after seeing his driving licence and on the face of it nothing was suspicious. A photocopy of the DL was retained by the company and the same is Ex.R2W1/C. The driving test of the R1 was also taken at that time in which he was found an efficient and good driver."*

This witness was cross-examined by the insurer/ respondent no.3 to the following effect:

> *"xxxxxxx by Sh.Surender Singh, Ld. Counsel for Respondent No.3/Insurance Company.*
>
> *The company has not got the DL of R-1 verified. It is correct that as the respondent No.1 knew to drive the vehicle and that is why we did not verify his DL. I cannot say whether the DL of R-1 was fake or not."*

The cross-examination so effected, by no means, even suggests that, what was deposed by R2W1 in the testimony, was either belied or even shaken to the effect that the owner had taken due care to see the driving licence and took the driving test also, at the time of employing the driver. This deposition of R2W1 has remained unshaken and the ld. counsel for the insurer-the respondent no.3, during the course of hearing, on being queried, concedes that the insurer on its part, did not lead any evidence to rebut such evidence that had come to be adduced on record before tribunal. The tribunal has failed to take notice of such a vital piece of evidence, but, for placing reliance upon a judgment in ***Sarita Hasija case (Supra)***, which relates to a case, where, the owner had failed to defend the allegation of breach of the terms and conditions of the insurance policy. Placing reliance on the judgment supra, without adverting to the vital and relevant evidence on record, this court, has no hesitation to say, was wholly perverse. In ***Swaran Singh's case (Supra)***, the Supreme Court has observed that unless the owner of the insured vehicle is found to be in wilful default or breach of the terms and conditions of the insurance policy, the owner cannot be said to have violated the terms and conditions of the insurance policy and thereby, held liable to pay compensation.

4. For the aforegoing reasons, the finding of the tribunal, fixing the liability on the owner-the appellant, cannot be sustained, and is set aside. Consequently, the right of recovery of the award given to the insurer / respondent no.3, from the appellant or the driver, is set aside.

5. Impugned judgment/Award stands modified accordingly. Appeal and the pending application(s) stand disposed off, accordingly.

**(A.K. CHAWLA)**
**JUDGE**

**APRIL 03, 2019**
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