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

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Decided on: 23.09.2019

+ MAC.APP. 777/2016, CM APPL. 35523/2016 & CM APPL.
33917/2018

UNITED INDIA INS CO LTD

..... Appellant

Through: Mr. Nikhil Jain, Advocate.

versus

SAMINUDDIN & ORS

..... Respondents

Through:

CORAM:

HON'BLE MR. JUSTICE NAJMI WAZIRI

NAJMI WAZIRI, J. (Oral)

1. This appeal impugns the award of compensation dated 28.07.2016 passed by the learned MACT in Suit No. 607/14 on the ground that liability has been fastened upon the insurer to pay the compensation, whereas it should have been upon the owner and driver because there was a fundamental breach of policy condition.
2. It is the appellant's case that the driver of the vehicle did not possess a requisite valid driving licence i.e. there was no endorsement on the driving licence, of the driver to drive a hazardous-goods carrying vehicle.
3. The accident happened on 07.12.2013. It was the case of the owner of the vehicle that the driver of the vehicle had been trained at a

Government-licenced motor driving training school, namely M/s Om Sai Motor Driving Training School, Noida, UP and a certificate had been issued in favour of the driver on 23.02.2013. It was valid upto 22.04.2014.

4. In this regard, the learned Tribunal has observed and reasoned as under:

“9. Respondent No. 2 got examined Shri Ankit Tyagi, Instructor, Om Sai Motor Driving Training School, Noida, UP as R2W1 in its defence. He has proved certificate issued from Dy. Transport Commissioner Authority, Meerut, UP as Ex. R2W1/A which authorized Om Sai Motor Training School to operate driving training school. In this regard, he has also placed on record copy of Gazette Notification issued by Govt. of UP as Mark A. He has deposed that respondent No. 1/ Dharmender Kumar was given a certificate Ex. R2W1/B by their training school for driving vehicles carrying hazardous goods.

20. Respondent No. 2/ owner of offending vehicle has got examined Shri Ankit Tyagi, Instructor at Om Sai Driving Training School, Noida, UP as R2W1 in its defence. R2W1 Shri Ankit Tyagi has deposed that driver/R-1 had taken training for driving hazardous goods from their Q Training School and has proved certificate Ex. R2W1/B in this regard. Perusal of certificate Ex. R2W1/B reveals that training programme was conducted on 21.02.2013 and certificate was issued on 23.02.2013 which was valid upto 22.02.2014.

23. From the evidence adduced, it emerges that offending vehicle came under the category of 'transport vehicle' meant to carry dangerous or hazardous goods. The driver was having a valid DL for driving heavy.-transport vehicle but it is evident that there was no endorsement on the said DL as required under proviso of Section 14 (2) (a) MV Act. The question which is to be

determined is that whether the absence of endorsement would entitle the Insurance Company to avoid its liability to pay the compensation.

24. In the case of 'National Insurance Co. Ltd vs Swaran Singh & Ors' 2004 ACJ 1(SC), which is a Full Bench judgment, Hon'ble Apex Court had noted that Chapter XI of the Motor Vehicles Act, 1988 providing compulsory insurance of vehicles against third party risks is a social welfare legislation to extend relief by compensation to victims of accidents caused O by use of motor vehicles. The provisions of compulsory insurance coverage of all vehicles are with this paramount object and the provisions of the Act have to be so interpreted as to effectuate the said object. However, it was that insurer is entitled to raise a defence in a claim petition filed under Motor Vehicle Act in terms of Section 149 (2) (a) (ii) of the said Act. The breach of the policy condition e.g., disqualification of driver or invalid driving licence of the driver have to be proved to have been committed by the insured for avoiding liability by the insurer. Even where the insurer is able to prove breach regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards insured unless the said breach or breaches on the condition of driving licence is/ are so fundamental as are found to have contributed to the cause of the accident. "The rule of main purpose" and the concept of "fundamental breach" would have to be applied while interpreting the policy conditions.

25. In the light of these observations, it has to be ascertained whether there is a fundamental breach on account of absence of endorsement in terms of proviso of Section 14 (2) (a) of MV Act. The first aspect which emerges from the evidence on record is that the accident has occurred due to negligence of truck driven by respondent No. 1 who hit the pedestrian while he was crossing road. There is nothing on record to suggest

that the carrying of hazardous goods in the truck has contributed in any manner in causing the accident.

26. The second aspect which needs to be considered is that respondent No. 2 had examined R2W1 Shri Ankit Tyagi who has proved that driver/R-1 had undergone necessary training from their Institute. This is a case where it has been proved on record that the driver had necessary training for driving vehicle carrying hazardous goods but did not have an endorsement to this effect on his DL. It is also pertinent to note that the main purpose of the qualification and training prescribed under in Rule 9 of the Rules to equip the driver of vehicle transporting hazardous substances to meet certain emergencies and to make him aware of certain basic emergency procedures, in case of any spillage of hazardous substance transported in the vehicle. Mere absence of endorsement on the DL of respondent No. 1 cannot be termed as a fundamental breach especially when he had already undergone necessary training for driving vehicle carrying hazardous goods.”

5. What emanates from the above is that the owner was able to establish that the driver possessed the requisite driving skills as certified by the aforementioned Government-licenced Motor Driving Training School. However, it is nobody's case that mere possession of the certificate will necessarily result in the Transport Authority certifying and/or licencing the person as having the requisite skills to drive a hazardous-goods carrying vehicle. As the name itself suggests, a motor driving training school is a school/institute which trains candidates to drive motor vehicles. It purports to impart a trainee the requisite skills as well as teach them the basic road signs and rules related to driving of motor vehicles on roads.

6. Nevertheless, at the end of any such training, whenever a candidate appears before the Transport Authority, his motor driving skills and knowledge of the applicable rules are tested by the Authority. It is only when the candidate passes the tests that he is issued a driving licence. Mere possession of a certificate from a training school cannot substitute the statutory requirement of a Driving Licence to be issued by the relevant authority. For driving of hazardous-goods carrying vehicles, a further endorsement is required on the Driving Licence.
7. In the present case, for indemnification against insurance claims under the said policy, the insurer had proceeded in good faith, that the driver of the hazardous-goods carrying motor vehicle would have been duly licenced by the relevant Licencing Authority, to drive the said vehicle. But on the driving licence, there was no such endorsement. In other words, the driver had neither been tested nor approved by the Licencing Authority to drive the hazardous-goods carrying vehicle. There is a breach of policy condition, therefore, the owner of the vehicle would be liable to indemnify the loss. Be that as it may, in view of the decision of the Supreme Court in ***Shamanna & Anr. vs. Divisional Manager, Oriental Insurance Co. Ltd. & Ors.***, (2018) 9 SCC 650, it has been held 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 fundamental and the Supreme Court taking contrary view that the insurance companies were not liable to pay the 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.”*

(Emphasis supplied)

In *Giriraj vs. Vinit Kohli & Anr (United India Insurance Company Ltd)*, MAC.APP. 639/2019, decided on 23.09.2019, this Court has already taken the view that:

“....

apropos third party liability, the insurer is to first pay the compensation amount to the beneficiaries of the award and shall have the right of recovery against the owner of the vehicle.”

8. In view of the above, the insurer will have the right to recover the awarded amount from the owner of the vehicle but first it shall pay the amounts to the claimants. It is so ordered.
9. Since the appellant has succeeded in the appeal, the statutory amount, alongwith interest accrued thereon, would be returned to the appellant.
10. The appeal is disposed-off in the above terms.

NAJMI WAZIRI, J

SEPTEMBER 23, 2019

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