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

% *Decided on: 16.12.2019*

\+ MAC.APP. 1049/2017 & CM APPL. 16446/2019

THE NEW INDIA ASSURANCE CO LTD ..... Appellant

Through: Mr. Anshum Jain, Advocate.

versus

PREM VARDHAN & ORS ..... Respondents

Through:

CORAM:
HON'BLE MR. JUSTICE NAJMI WAZIRI

NAJMI WAZIRI, J. (Oral)

1. This appeal impugns the award of compensation dated 08.09.2017, passed by the learned MACT in Suit No. 89/2014 (MACT No. 357247/16), on the ground that right of recovery has not been granted to the appellant-insurer which has been held liable for payment of the compensation amount jointly and severally with respondent no. 2-owner of the vehicle; the owner has been served through publication.

2. The impugned order in this regard has reasoned as under:

> *"14. Now conning to the fact of the case at hand.*
>
> *i) From the testimony of R3W1, it becomes crystal clear that the licence possessed by respondent No.1 at the time of accident was forged and fabricated. It means that he was driving the offending TSR without any valid driving licence which amounts violation of the terms and condition of the insurance policy. However, the testimony of R3W1 is not sufficient to*

establish that there was any willful breach on the part of respondent no. 2 as there is no evidence that he had any knowledge that the said licence was forged or fabricated. The possibility that respondent no.1 might have cheated respondent no.2 to get employment cannot be ruled out. The onus was on the insurance company to establish that there was a willful breach of terms and condition of the policy on the part of respondent no. 2. But the testimony of witnesses examined by the insurer is not sufficient to prove this fact. Though insurance company has a right to recover the said amount from the driver of the vehicle, yet since he had already died, no such right can be conferred upon the insurer. Since insurance company failed to establish any willful breach of terms and condition of the policy on the part of respondent no.2, insurance company is not entitled for recovery rights qua respondent no. 2 without filing a separate suit.

ii) Since the offending vehicle belonged to respondent no. 2 and it was insured with respondent no. 3, both are jointly and severally liable to pay compensation. Accordingly, issue no. 2 is decided in favour of petitioner and against the respondents."

3. It is the appellant's case that respondent no. 2 had not led any evidence after filing his written statement and he abandoned the proceedings. His written statement, to the effect that he had seen the driving licence and tested the skills of the driver, remained unverified. In the circumstances, the same cannot be taken as defence.

4. It is argued that such defence would be available only in terms of the decisions of the Supreme Court in *United India Insurance Co. Ltd. vs. Lehru & Ors.,* AIR 2003 SC 1292, *Pepsu Road Transport Corporation vs.*

National Insurance Co., (2013) 10 SCC 217 and *National Insurance Co. Ltd. vs. Swaran Singh & Ors.*, (2004) 3 SCC 297.

5. As noted hereinabove, no monies can be recovered from the driver. However, since respondent no. 2-the owner of the vehicle has not been able to lead the evidence to the effect that he had indeed seen the driver's licence and *ex-facie* found it to be valid and that he had employed the driver after testing his driving skills, the requirement of the test as laid down in the aforementioned judgments has not been satisfied.

6. In the circumstances, the appellant-insurer is granted right of recovery against respondent no. 2-the owner of the vehicle.

7. The statutory amount, alongwith interest accrued thereon, be returned to the appellant.

8. The appeal is disposed-off in the above terms.

NAJMI WAZIRI, J

DECEMBER 16, 2019

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