REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 8144 OF 2018
[Arising out of SLP(C) No.26955 of 2017]

SHAMANNA AND ANOTHER ...Appellants

Versus

THE DIVISIONAL MANAGER
THE ORIENTAL INSURANCE CO. LTD. AND ORS.
...Respondents

J U D G M E N T

R. BANUMATHI, J.

Leave granted.

2. This appeal arises out of the judgment dated 14.09.2016 passed by the High Court of Karnataka at Dharwad Bench in MFA No.24534 of 2010 in and by which the High Court reversed the award passed by the Tribunal for "pay and recover" holding that the owner of the vehicle is liable to pay the compensation to the appellants/claimants. The High Court enhanced the compensation from Rs.3,55,500/- to Rs.4,94,700/- with interest at the rate of 6% per annum.

3. On 14.04.2008, Shankareppa Pattar son of the appellants/claimants was travelling in a jeep bearing Reg.No.KA-22/M-3805. The jeep was driven negligently due to which door of the

jeep suddenly opened and Shankareppa was thrown out of the vehicle and sustained grievous injuries and died in the hospital. In the claim petition filed by the appellants/parents of the deceased Shankareppa, the Tribunal awarded compensation of Rs.3,55,500/- with interest at 6% per annum from the date of claim petition till realisation. Since the driver of the jeep had no valid driving licence at the time of the accident and since there was violation of the terms of the insurance policy, the Tribunal directed the insurance company to pay the compensation to the claimants and granted liberty to the insurance company to recover the same from the owner of the offending vehicle.

4. Being aggrieved by the award directing the insurer to pay the compensation amount to the claimants and recover the same from the owner of the vehicle, the insurance company filed appeal before the High Court. The claimants have also filed appeal seeking enhancement of compensation. The High Court referred to its own judgment in the case of ***Oriental Insurance Co. Ltd. v. K.C. Subramanyam*** MANU/KA/0945/2012 : ILR 2012 KAR 5241 and held that the Supreme Court directed the insurance company to make payment to the claimants and to recover the same from the owner of the vehicle in exercise of its discretionary power under

Article 142 of the Constitution of India. The High Court observed that power under Article 142 of the Constitution is vested only with the Supreme Court and such power is not vested with the High Court or the Tribunal and set aside the award passed by the Tribunal directing the insurance company to pay compensation to the claimants and recover the same from the owner of the vehicle is not sustainable. The High Court held that only the owner of the offending vehicle is liable to make the payment of the compensation amount awarded by the Tribunal. The High Court has enhanced the compensation awarded by the Tribunal from Rs.3,55,500/- to Rs.4,94,700/-. To determine the loss of dependency, the High Court has taken into consideration the age of the deceased Shankareppa and has adopted multiplier of '18' instead of multiplier of '14'. Being aggrieved by the judgment of the High Court setting aside the direction to the insurance company to "pay and recover", the appellants/claimants have preferred this appeal.

5. We have heard the learned counsel for the parties. We have gone through the impugned judgment and perused the materials placed on record.

6. In the case of third party risks, as per the decision in ***National Insurance Company Ltd. v. Swaran Singh and others*** (2004) 3

SCC 297, the insurer had to indemnify the compensation amount payable to the third party and the insurance company may recover the same from the insured. Doctrine of "pay and recover" was considered by the Supreme Court in ***Swaran Singh case*** wherein the Supreme Court examined the liability of the insurance company in cases of breach of policy condition due to disqualifications of the driver or invalid driving licence of the driver and held that in case of third party risks, the insurer has to indemnify the compensation amount to the third party and the insurance company may recover the same from the insured. Elaborately considering the insurer's contractual liability as well as statutory liability vis-a-vis the claims of third parties, the Supreme Court issued detailed guidelines as to how and in what circumstances, “pay and recover” can be ordered. In para (110), the Supreme Court summarised its conclusions as under:-

> “110. The summary of our findings to the various issues as raised in these petitions is as follows:
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> (i) 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 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.
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> (ii) An insurer is entitled to raise a defence in a claim petition filed under Section 163-A or Section 166 of the Motor Vehicles Act, 1988, inter alia, in terms of Section 149(2)(a)(ii) of the said Act.

(iii) The breach of policy condition e.g. disqualification of the driver or invalid driving licence of the driver, as contained in sub-section (2)(a)(ii) of Section 149, has to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards the insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by a duly licensed driver or one who was not disqualified to drive at the relevant time.

(iv) Insurance companies, however, with a view to avoid their liability must not only establish the available defence(s) raised in the said proceedings but must also establish "breach" on the part of the owner of the vehicle; the burden of proof wherefore would be on them, (v) The court cannot lay down any criteria as to how the said burden would be discharged, inasmuch as the same would depend upon the facts and circumstances of each case.

(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition 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 the 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 Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insurer under Section 149(2) of the Act.

(vii) The question, as to whether the owner has taken reasonable care to find out as to whether the driving licence produced by the driver (a fake one or otherwise), does not fulfill the requirements of law or not will have to be determined in each case.

(viii) If a vehicle at the time of accident was driven by a person having a learner's licence, the insurance companies would be liable to satisfy the decree.

(ix) The Claims Tribunal constituted under Section 165 read with Section 168 is empowered to adjudicate all claims in respect of the accidents involving death or of bodily injury or damage to property of third party arising in use of motor vehicle. The said power of the Tribunal is not restricted to decide the claims inter se between claimant or claimants on one side and insured, insurer and driver on the other. In the course of adjudicating the claim for compensation and to decide the availability of defence or defences to the insurer, the Tribunal has necessarily the power and jurisdiction to decide disputes inter se between the insurer and the insured. The decision rendered on the claims and disputes inter se between the insurer and insured in the course of adjudication of

claim for compensation by the claimants and the award made thereon is enforceable and executable in the same manner as provided in Section 174 of the Act for enforcement and execution of the award in favour of the claimants.

(x) Where on adjudication of the claim under the Act the Tribunal arrives at a conclusion that the insurer has satisfactorily proved its defence in accordance with the provisions of Section 149(2) read with sub-section (7), as interpreted by this Court above, the Tribunal can direct that the insurer is liable to be reimbursed by the insured for the compensation and other amounts which it has been compelled to pay to the third party under the award of the Tribunal. Such determination of claim by the Tribunal will be enforceable and the money found due to the insurer from the insured will be recoverable on a certificate issued by the Tribunal to the Collector in the same manner under Section 174 of the Act as arrears of land revenue. The certificate will be issued for the recovery as arrears of land revenue only if, as required by sub-section (3) of Section 168 of the Act the insured fails to deposit the amount awarded in favour of the insurer within thirty days from the date of announcement of the award by the Tribunal.

(xi) The provisions contained in sub-section (4) with the proviso there under and sub-section (5) which are intended to cover specified contingencies mentioned therein to enable the insurer to recover the amount paid under the contract of insurance on behalf of the insured can be taken recourse to by the Tribunal and be extended to claims and defences of the insurer against the insured by relegating them to the remedy before regular court in cases where on given facts and circumstances adjudication of their claims inter se might delay the adjudication of the claims of the victims," **(Underlining added)**

7. As per the decision in ***Swaran Singh case***, 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 fulfill*

the requirements of law or not will have to be determined in each case.

8. The Supreme Court considered the decision of ***Swaran Singh case*** in subsequent decision in ***National Insurance Co. Ltd. v. Laxmi Narain Dhut,*** (2007) 3 SCC 700, wherein this Court held that "*the decision in **Swaran Singh case** 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*". The same principle was reiterated in ***Prem Kumari v. Prahlad Dev and others*** (2008) 3 SCC 193.

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 and others***, (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 and others*** (2007) 7 SCC 56, 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 and another*** (2009) 8 SCC 785 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***, the Supreme Court pointed out that Article 142 of the Constitution of India does not cover such type of cases and that “*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". The above reference in ***Parvathneni case*** has been disposed of on 17.09.2013 by the three-Judges Bench keeping the questions of law open to be decided in an appropriate case.

12. Since the reference to the larger bench in ***Parvathneni case*** 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*** followed in ***Laxmi Narain Dhut*** 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*** and ***Laxmi Narain Dhut 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 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.

13. 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 and others*** (2004)

13 SCC 224 where this Court held that "….*that 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 concerned Executing Court 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."*

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

……J.
[RANJAN GOGOI]

……J.
[R. BANUMATHI]

New Delhi;
August 08, 2018