

(2012) 01 DEL CK 0229

In the Delhi High Court

Case No : MAC APP 727 of 2011 and 728 of 2011

Bajaj Allianz General Insurance Co Ltd

APPELLANT

Vs

Bhikhari Yadav and Others

RESPONDENT

Date of Decision : 03-01-2012

Acts Referred:

Citation : (2012) 01 DEL CK 0229

Hon'ble Judges : G.P. Mittal, J

Bench : Single Bench

Advocate : Joy Basu, for the Appellant; Advocate (Appearance not given), for the Respondent

Final Decision : Dismissed

Judgement

G.P. Mittal, J.—These two Appeals arise of the common judgment in suit No.429/2010 titled Asha v. Bhikhari Yadav & Ors. and Suit No.473/2010 titled Asha & Ors. v. Bhikhari Yadav & Ors. The claims relate to death of one Dharmesh, who was aged about 25 years and one Sumit (Dharmesh's son) who was aged about four years at the time of the accident which took place on 19.04.2009. During inquiry before the Tribunal, it was claimed that Dharmesh was working as a driver with Mrs. Mamta Dutt and was getting a salary of Rs. 7,000/- per month. In the absence of any cogent evidence as to the deceased's income, the Tribunal took the minimum wages of a skilled worker as the deceased's income and computed the loss of dependency as Rs. 11,29,680/-. After adding notional sums under conventional heads an overall compensation of Rs. 12,29,680/- (including the interim compensation) was awarded. Regarding death of Sumit, while relying on Lata Wadhwa and Others Vs. State of Bihar and Others, and a judgment of this Court in National Insurance Co. Ltd. Vs. Farzana and Others, , the Tribunal awarded a compensation of Rs. 3,75,000/- (including the interim compensation).

2. The Appellant Bajaj Allianz General Insurance Co. Ltd. contested the claims by way of filing written statements and raised defence u/s 149 of the Motor Vehicles

Act, 1988 (the M.V. Act) that the insured was guilty of breach of conditions of policy and thus the Insurance Company could avoid the liability.

3. At the time of hearing the Appeals, challenge to the impugned award is made only on the ground that in view of the breach of the policy conditions the Appellant was not liable to indemnify the owner of the vehicle which admittedly was a commercial (transport) vehicle. First Respondent Bhikhari Yadav's driving licence collected by the police at the time of filing of Accident Information Report (AIR) was got verified by the Appellant from Kamrup Transport Authority, Guwahati and it was established that the driving licence was not issued by the said Authority. It is contended that the owner and the driver failed to produce any other driving licence of First Respondent as also the permit of vehicle number DL-1G-2715 and thus, the Appellant Insurance Company established breach of the policy conditions and was not liable to indemnify the owner of the vehicle involved in the accident.

4. It is urged that even if the Appellant was directed to satisfy the award, it should have been allowed to recover the compensation awarded from the owner of the vehicle involved in the accident.

5. Section 149 of the Motor Vehicles Act, 1988 is extracted hereunder:-

149. Duty of insurers to satisfy judgments and awards against persons insured in respect of third party risks-

(1) If, after a certificate of insurance has been issued under sub-section (3) of section 147 in favour of the person by whom a policy has been effected, judgment or award in respect of any such liability as is required to be covered by a policy under clause (b) of sub-section (1) of section 147 (being a liability covered by the terms of the policy) [or under the provisions of section 163A] is obtained against any person insured by the policy, then, notwithstanding that the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy, the insurer shall, subject to the provisions of this section, pay to the person entitled to the benefit of the decree any sum not exceeding the sum assured payable thereunder, as if he were the judgment debtor, in respect of the liability, together with any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.

(2) No sum shall be payable by an insurer under sub-section (1) in respect of any judgment or award unless, before the commencement of the proceedings in which the judgment or award is given the insurer had notice through the Court or, as the case may be, the Claims Tribunal of the bringing of the proceedings, or in respect of such judgment or award so long as execution is stayed thereon pending an appeal; and an insurer to whom notice of the bringing of any such proceedings is so given shall be entitled to be made a party thereto and to defend the action on any of the following grounds, namely:- (a) that there has been a breach of a specified condition of the policy, being one of the following

conditions, namely:-

(i) a condition excluding the use of the vehicle-

(a)

(b).....

(c) for a purpose not allowed by the permit under which the vehicle is used, where the vehicle is a transport vehicle, or (d) (ii) a condition excluding driving by a named person or persons or by any person who is not duly licensed, or by any person who has been disqualified for holding or obtaining a driving licence during the period of disqualification; or.

6. It is settled that in order to avoid the liability the onus is on the Insurance Company to prove that there is breach of the policy conditions by the insured. The breach committed by the insured must be willful e.g. where the insured entrusts a vehicle to a duly licensed driver and it is unlawfully driven by any other person not holding a valid and effective driving licence, it cannot be said that the owner is guilty of willful breach. Similarly, where a vehicle is stolen by a thief holding no licence and meets with an accident, it cannot be said that the insured is guilty of a willful breach. Rather, the insured himself is a victim.

7. In *National Insurance Co. Ltd. Vs. Swaran Singh and Others*, , a three Judges Bench of the Supreme Court held as under:-

84. We have analysed the relevant provisions of the said Act in terms whereof a motor vehicle must be driven by a person having a driving licence. The owner of a motor vehicle in terms of Section 5 of the Act has a responsibility to see that no vehicle is driven except by a person who does not satisfy the provisions of Section 3 or 4 of the Act. In a case, therefore, where the driver of the vehicle admittedly did not hold any licence and the same was allowed consciously to be driven by the owner of the vehicle by such person, the insurer is entitled to succeed in its defence and avoid liability. The matter, however, may be different where a disputed question of fact arises as to whether the driver had a valid licence or where the owner of the vehicle committed a breach of the terms of the contract of insurance as also the provisions of the Act by consciously allowing any person to drive a vehicle who did not have a valid driving licence. In a given case, the driver of the vehicle may not have any hand at all, e.g. a case where an accident takes place owing to a mechanical fault or vis-major.

8. In *Swaran Singh (supra)* it was laid down that the liability of the Insurance Company vis-?-vis the insured would depend upon several factors. The owner would be liable for payment of compensation in a case where the driver was not having a licence at all. It was the obligation on the part of the owner to take adequate care to see that the driver had an appropriate licence to drive the vehicle.

9. In this case, the driver and the owner i.e. the First and the Second

Respondents (herein) preferred not to appear before the Tribunal and were proceeded ex-parte. The driving licence of the First Respondent was very much available. The Insurance Company tried to verify the genuineness of the said licence. The Appellant filed an Affidavit Ex.R3W1/A of Ms. Sunanda Nimisha, Senior Executive (Legal) to prove the copy of the Insurance Policy Ex.R3W1/2. She testified that the legal Notice dated 07.09.2010 was served upon the First and the Second Respondents to produce the First Respondent's driving licence, original Insurance Policy and a copy of the permit. She deposed that a driving licence number B-10471/06 issued from the Licensing Authority, Gawahati (Assam) and valid upto 23.11.2009 for the category of HMV was seized by the Investigating Officer in the criminal case relating to the accident and was placed on record of this case. She deposed that as per the report of the District Transport Authority, Guwahati, the said licence had not been issued by it.

10. The Appellant also examined one Udaiveer (R3W2), an investigator who testified that as per his verification the driving licence seized by the IO was not genuine.

11. The Tribunal while repelling the Appellant's plea held as under:-

39. Generally, insurance company is liable to make the payment where all the necessary documents are in order and there is no violation of terms and conditions between the insured and insurer. In the present case, it has been contended on behalf of the insurance company that R-1 was not holding a valid licence at the time of accident and as such, R-3/Insurance Company is not liable to make any payment. The counsel for insurance company has drawn my attention towards the statement of R3W1 and R3W2. R3W2 Udaiveer Singh has categorically deposed that DL of R-1 bearing No.B-1041/06 issued from Licensing Authority Kamrup, Betkuchi, Guwahati-34 was not genuine and he also drew my attention towards the report Ex.R3W2/A. He further contended that the insurance company had issued notice to the driver and owner of the offending vehicle for production of driving licence and original insurance policy but they had not submitted the same despite service. It is true that mere service of notice under Order 12 Rule 8 of CPC to the driver and owner for production of DL, etc. does not absolve the insurance company of its liability. Even otherwise, the report Ex.R3W2/A pertaining to the DL appears to have been referred to Shir Dayal K. Choudhary, Investigator who has not been examined by the insurance company nor the person who got the report Ex.R3W2/A from the RTO office has been examined. The stamp of the RTO office does not bear the date of issuance of report Ex.R3W2/A. Accordingly, no reliance can be placed on the report Ex.R3W2/A. The plea of the insurance company regarding DL of the driver of the offending vehicle is thus over-ruled."

12. Mr. Joy Basu, learned counsel for the Appellant contended that the certificate Ex.R3W2/A is a certificate in terms of Section 79 of the Evidence Act, 1872 and a rebuttable presumption regarding genuineness of the certificate arises. In the absence of any rebuttal by the Respondents, The Tribunal ought to have relied on

the certificate which clearly established that the licence was not genuine. Thus, it was proved that there was breach of the conditions of policy giving a right to the Appellant to avoid the liability.

13. Section 79 of the Indian Evidence Act, 1872 (the Act of 1872) is extracted hereunder:-

79. Presumption as to genuineness of certified copies - The Court shall presume [to be genuine] every document purporting to be a certificate, certified copy, or other document, which is by law declared to be admissible as evidence of any particular fact, and which purports to be duly certified by any officer [of the Central Government or of a State Government, or by any officer [in the State of Jammu and Kashmir] who is duly authorized there to by the Central Government]: Provided that such document is substantially in the form and purports to be executed in the manner directed by law in that behalf. The Court shall also presume that any officer by whom any such document purports to be signed or certified, held, when he signed, the official character which he claims in such paper.

14. A bare reading of Section 79 of the Act of 1872 shows that a rebuttable presumption about genuineness of a certified copy or a certificate can be drawn subject to certain conditions as given in the Section. Firstly, the certified copy or the certificate must be declared by law to be admissible as evidence of a particular fact and such document i.e. the certificate (in this case) must be substantially in the form and purports to be executed in the manner as directed by law in that behalf. In this case, neither of these two conditions has been satisfied. Otherwise any document including a public document has to be proved as provided u/s 67 of the Act of 1872.

15. The question of proof of a Sanction Order signed by the Sanctioning Authority i.e. Secretary (Medical) Delhi Administration came up before this Court in State Vs. Brij Mohan, where it was held as under:-

(8) Section 61 of the Evidence Act lays down that the contents of a document may be proved either by primary or by secondary evidence. Section 62 thereof defines primary evidence as meaning the document itself produced for the inspection of the court. In other words, the primary documentary evidence of a transaction (evidenced by writing) is the document itself which should be produced in original to prove the terms of the contract/ transaction, if it exists and is obtainable. Since the original sanction was admittedly placed on record by the prosecution, the requirements of this provision stood satisfied and the question of any secondary evidence for proving the contents of the sanction as such did not arise. Primary evidence in the context of oral evidence, however, means an oral account of the original evidence i.e. of a person who saw what happened and gives an account of it recorded by the court. That question does not appear to have arisen in the instant case because the matter was still at the stage of proof of the consent accorded by the Secretary (Medical). Since Sections

61 to 66 of the Evidence Act deal with the mode of proving the contents of the documents, either by primary evidence or by secondary evidence, I need not dwell upon the same in view of the original document having been placed on the record.

(9) Then comes the most important question viz. the genuineness of a document produced in evidence i.e. is a document what it purports to be and this is dealt with in Sections 67 to 73 of the Evidence Act. Section 67 refers to documents other than documents required by law to be attested. It simply requires that the signature of the person alleged to have signed a document (i.e. the executant) must be proved by evidence that the signature purporting to that of the executant is in his handwriting. Further it requires that if the body of the document purports to be in the hand-writing of someone, it must be proved to be in the hand-writing of that person. However, Section 67 does not in terms prescribe any particular mode of proof and any recognised mode of proof which satisfies the Judge will do. Thus, the execution/ authorship of a document may be proved by direct evidence i.e. by the writer or a person who saw the document written and signed or by circumstantial evidence which may be of various kinds, for example, by an expert or by the opinion of a non-expert who is acquainted with the hand-writing in any of the ways mentioned in Explanation to Section 47 or even by comparison etc. (See Sections 45, 47, 73 & 90 of the Evidence Act).....

16. The question of proof of a public document came up before Bombay High Court in C.H. Shah Vs. S.S. Malpathak and Others, , where it was held as under:-

4..... In all cases of secondary evidence u/s 65 read with Section 63 of the Evidence Act when a copy or an oral account of a document is admitted as secondary evidence, the execution of the original is not required to be proved but if the original itself is sought to be tendered it must be duly proved and there is no reason for applying a different rule to public documents. Secondly, in the case of a certified copy, before a presumption of its genuineness can be raised u/s 79, as laid down by the Supreme Court in Bhinka's case already referred to above it must be shown that the certified copy was executed substantially in the form and in the manner provided by law. There would, therefore, be a check or safeguard in so far as the officer certifying it in the manner required by law would have to satisfy himself in regard to the authenticity of the original and in regard to the accuracy of the copy which he certifies to be a true copy thereof. On the other hand if the original of a public document is to be admitted in evidence without proof of its genuineness, there would be no check whatever either by way of scrutiny or examination of that document by an officer or by the Court. The third and perhaps the most important reason, for not accepting Mr.Shah's argument on the point which I am now considering is that neither Section 67 nor Section 68 of the Evidence Act which lay down that the signature and the handwriting on a document must be duly proved do not make any exception in the case of public documents. In view of the provisions of the said section all documents whatever

be their nature must be therefore be proved in the manner provided by Section 45, 47 or 73 of the Evidence Act.....

5. The only question which remains for consideration is whether a presumption of the genuineness of the original of a public document should be drawn by reason of Illustration (e) to Section 114 of the Evidence Act to the effect that official acts have been regularly performed. It is no doubt true that it has been held by a Division Bench of this Court in the case of East India Trading Co. Vs. Badat and Co., that Section 114 of the Evidence Act is wide enough to permit the Court to raise a presumption not only with regard to oral evidence, but also with regard to documentary evidence. It may be mentioned that the decision of the Division Bench in the said case was reversed on appeal by the Supreme Court by a majority Badat and Co. Vs. East India Trading Co., , but in the judgment of the majority the Supreme Court has not referred to the point mentioned above. Apart from the undesirability of taking a view which would let in any and every document tendered by Government in suits to which it is a party without proof of genuineness, in my opinion, no presumption u/s 114 can be drawn in view of the mandatory and unqualified term of Sections 67 and 68 of the Evidence Act. Section 114 which to put it in popular language, merely empowers the Court to use its commonsense, cannot be used to contravene an express provision of the Act itself. I, therefore, hold that if the original of a public document is sought to be tendered in evidence, it must be proved in the manner required by law.....

17. Turning to the case in hand, the Appellant relies on a certificate dated 22.09.2009. It is not the Appellant's case that any form is prescribed for issuance of such certificate. In any case, the contents of the certificate can be presumed to be genuine it has to be proved that it is signed by the District Transport Officer, Gawahati. That having not been done, the certificate was not of any value and the same was not rightly taken into consideration by the Tribunal. Since the Insurance Company failed to discharge the onus that the driving licence held by the First Respondent was fake, it cannot avoid liability on this ground.

18. Turing to the second limb of argument i.e. issuance of permit to ply vehicle number DL-1G-2715 on the date of the accident, the Appellant Insurance Company did not summon any record from the relevant office of the Delhi Transport Authority that on the date of the accident, the vehicle did not have any permit to ply on the road. Here again, the Insurance Company failed to discharge the onus that there was breach of the condition of policy in this regard.

19. A similar question came up for consideration before the Supreme Court in Kamala Mangalal Vayani and Others Vs. United India Insurance Co. Ltd. and Others, , it was held that it was open to the insurer to apply to the Transport Authority concerned for a certificate to show the date on which the permit was granted and that on the date of the accident the vehicle did not have a valid permit. Paras 6, 7 and 8 of the report are extracted hereunder:-

6. As noticed above, the owner-cum-driver had remained ex parte. Once it was established that the vehicle was comprehensively insured with the insurer to cover the passenger risk, the burden to prove that it was not liable in spite of such a policy, shifted to the insurer. The claimants are not expected to prove that the vehicle had a valid permit, nor prove that the owner of the vehicle did not commit breach of any of the terms of the policy. It is for the insurer who denies its liability under the policy, to establish that in spite of the comprehensive insurance policy issued by it, it is not liable on account of the requirements of the policy not being fulfilled.

7. In this case, the insurer produced a certified copy of the proceedings of the Registering Authority and Assistant Regional Transport Authority, Bangalore, dated 7.7.1990 to show that the application for registration of the vehicle filed by the third respondent was rejected with an observation that it was open to the applicant to apply for registration in the appropriate class. But that only proved that on 7.7.1990, the vehicle did not have a permit. But that does not prove that the vehicle did not have a permit on 27.7.1990, when the accident occurred. It was open to the insurer to apply to the concerned transport authority for a certificate to show the date on which the permit was granted and that as on the date of the accident, the vehicle did not have a permit, and produce the same as evidence. It failed to do so.

8. The High Court committed an error in expecting the claimants to prove that the vehicle possessed a valid permit. We are of the view that there was no justification for the High Court to interfere with the judgment and awards of the Tribunal in the absence of relevant evidence.

20. For the aforesaid reasons, it is clear that the Insurance Company has failed to prove that there was breach of the policy conditions. The Insurance Company, therefore, could not avoid liability.

21. The Appeals are devoid of any merit; these are accordingly dismissed. No costs.

22. Pending applications also stand dispose of.