(2011) 03 DEL CK 0116

In the Delhi High Court

Case No : Regular First Appeal (OS) No. 32 of 1998

Daljit Singh APPELLANT

Vs

New India Assurance Co. Ltd. RESPONDENT

Date of Decision : 23-03-2011

Acts Referred:

Citation : (2011) 03 DEL CK 0116

Hon'ble Judges : Vikramajit Sen, J;Siddharth Mridul, J

Bench : Division Bench

Advocate : Tarun Dewan, for the Appellant; Ramesh Kumar, for the Respondent

Judgement

Vikramajit Sen, J.—This Appeal is directed against the judgment dated 7.8.1997 passed in Suit No. 331/1987. Briefly stated, the facts are that the Appellant had purchased an insurance cover for carrying a consignment of cotton bales from Delhi to Bangalore. At Ujjain, a fire took place as a result of which the entire consignment of cotton bales as well as the truck were completely destroyed. This incident took place on 5.2.1985. The claim in the Plaint is for a sum of Rs. 1,66,840/-, which is the value of the truck owned by the Plaintiff which had to be written off. The insurance claims have not been paid out to the Plaintiff/Owner, leaving the Plaintiff/Appellant with no alternative but to file the subject recovery Suit. The following Issues were framed by the Court on 21.4.1989:

1. Whether the Plaintiff has no locus standi to file the suit?

2. What was the carrying capacity of the Truck, in question?

3. Whether the carrying capacity given in the policy as 10 Tons was mentioned by mistake or inadvertence? If so, its effect?

4. What was the weight of the bales loaded in the truck at the time it caught fire and was burnt?

5. Whether Defendant No. 1 was liable to pay the assured amount even if it was proved that the Truck was carrying more than 10 Tons of goods at the time it

was burnt?

6. Whether the Plaintiff was entitled to interest? If so, at what rate?

7. Whether the Defendant No. 1 provided coverage for the weight beyond licensed carrying capacity and such restriction/condition in the policy of Insurance would be deemed to be non-existent and waived? OPP

8. Whether the Plaintiff is entitled to interest? If so, at what rate?

2. The controversy lies in a very short compass. The first question is what is the weight of freight which was being transported on 5.2.1985. Secondly, is that consignment covered by the Insurance Policy.

3. In the Plaint, the relevant pleadings are to be found in paragraph 12 wherein it has been averred that "the unladen weight is recorded to be 6520 Kgs. and laden weight to be 15240 Kgs and thus the licensed capacity of the weight to be carried is 8720 Kgs equivalent to 8.8 tones i.e. difference between the unladen and the laden weight."

4. In response thereto, the Insurance Company, that is, the concerned Defendant has replied that "the contents of paragraph 12 of the Plaint is a matter of record and relates to the contents of R.C Book. As per the R.C. book the truck could carry load of 8720 Kgs."

5. The statements of the parties were recorded. So far as documents are concerned, the Appellant has filed Exhibit PW-1/1 which is the Goods Receipt (GR) dated 1.2.1985 bearing No. 27005 in respect of Truck No. DEG 5535 recording the number of packets to be 50, having an aggregate weight of 8703 Kgs., that is, the weight mentioned in the Plaint itself. The owner of the vehicle, that is, the Appellant has entered the Witness Box and has deposed that the weight of the consignment to correspond to what was mentioned in the GR. He has also deposed that whereabouts of the truck driver, who was driving the vehicle on 5.2.1985/6.2.1985 was not within his knowledge since the Driver did not report/meet him after the Truck was destroyed by fire. It is commonplace that the drivers are engaged from time to time by different parties and that their movement from owner to owner is almost as frequent as the journeys they undertake.

6. With respect to the learned Single Judge, we are unable to subscribe to his view that failure to produce the driver was suspicious in nature. The best evidence is most often documentary in nature. Very little purpose would have been served by producing the concerned driver and recording his statement to the effect that the consignment was of the weight mentioned in the G.R. An adverse inference could have been drawn if the Insurance Company, that is, the contesting Defendant had led evidence to substantiate the stance, apparently taken at the time of arguments, that there were two GRs in respect of the consignment being carried by the truck on that fateful journey. Had this evidence been led, perhaps the failure to produce evidence in rebuttal may have justified

the learned Single Judge in arriving at a conclusion adverse to the Appellant. We are also unable to agree with the view expressed in the impugned judgment that the failure of the Defendant to lead proper evidence must lead to the conclusion of complicity with the Plaintiff, and that the latter should be visited with an adverse inference. We may immediately note that Exhibit DW1/1, which is the Investigation Report, contains an unproved and unsubstantiated statement to the effect that the - "Carriers M/s. Milap Transport Roadways gave us a copy of Challan No. 13882 Dt. 5.4.1985 according to which 91 Nos. F.P. Cotton Bales weighing 15839 Kg. were loaded into the subject vehicle i.e. the vehicle was overloaded."

7. Significantly, there is a diametrically opposite noting in Exhibit DW-1/1 itself which reads as under:

Proximate cause of loss: Exact cause of fire could not be ascertained. Possible the fire might have originated due to friction of strips on the bales which would have given sparks and than ignited the F.P. Cotton Bales. This is only a presumption and therefore, the cause of fire may be taken as an accidental fire.

(Emphasis added).

8. The author of this Investigation Report, namely, Shri Bhagwan Dass Maheshwari, is the main Witness produced by the Insurance Company. He has deposed that as a part of his investigation, he had made inquiries at the Raipur Check Post as well as with the Ujjain Fire Station and that he had verified the Goods Receipt regarding consignment loaded in the truck at the time of the accident. This verification was carried out from the transporter, namely, Milap Roadways. In cross-examination, however, he states that no entry had been made at the Raipur Check Post pertaining to the weight loaded in the truck and, therefore, the certified copy was not available. Importantly, he states that - "it is correct that I could not know about the actual weight carried out by the truck from the Raipur Check Post." Thereafter, he has candidly admitted that he could not remember the details/number of goods under carriage by the Truck since he has carried out 100 such surveys in that period. He has also not disclosed the weight that was covered by the subject Insurance Policy, or whether any additional premium had been paid in respect of the particular carriage by road.

9. Onus of proof shifts from one party to another as the Trial proceeds much like the movements of a see-saw on which children play. Initially, it rests on the party who makes an assertion in the pleadings or on whom the burden of proof has been laid by the Court. It is for the opposite party to consider the need to lead evidence keeping in mind what has already been brought on the record by the party on whom the onus was original laid. It seems to us that on the proving of the concerned GR, that is, Exhibit PW-1/1, showing that only 50 packets were being carried having a total weight of 8703, no further evidence need have been led by the Plaintiff. If this fact was to be disproved by the Insurance Company, they ought to have in the first place pleaded that there were two GRs

simultaneously being carried in the said Truck on that fateful journey. This could easily have been proved by summoning documents/witnesses from Milap Transport Roadways. No such effort has been made by the Defendants. Furthermore, the only witness produced by the Respondent, that is, their Surveyor, Shri Maheshwari has merely stated that he had visited the site in question. Thereafter, his statement does not further the case of the Respondents even a bit; on the contrary, he has opined that the fire was accidental.

10. The second controversy covers the question of the quantum of weight carried by the Appellant. It has been explained by learned Counsel for the Respondent that a perusal of Exhibit PW-2/1 will make it abundantly clear that only ten tons (10) had been insured. The basic premium was for five (5) tons is Rs. 850 with Rs. 200 extra charge for every extra tons. This aspect of the case becomes relevant for the reason that learned Counsel for the Appellant has contended that even if the bald statement of the DW-2 is taken into consideration, i.e. that there were ninety bales being carried, the premium for the extra weight had been duly paid for and even if the Truck had been overloaded, the Defendant/Insurance Company was bound to pay for the value of the Truck as per the Insurance Policy. In this regard reliance has been placed in B.V. Nagaraju Vs. M/s. Oriental Insurance Co. Ltd., Divisional Officer, Hassan, . We are of the opinion that this precedent does not further the case of the Appellant. In that case the vehicle was carrying more human beings than was permitted. Their Lordships had gone into the question of whether carrying of extra human-beings could have resulted in the accident. Finding that the extra weight could not have had any proximate cause to the accident, the fact that the insurance policy had been violated was held to be a factor which should have been ignored. In the case in hand, what has been proved by the Appellant is that the Truck was carrying weight of 8703 Kgs. When it is recalled that 1016 Kgs corresponds to one ton, the need to get extra insurance would become immediately evident. The basic Insurance Cover was for five tons only. It was, therefore, prudent and necessary for the Appellant to take out an extra cover which did not transgress the maximum limit of ten tons which was permissible to be carried by the Truck. We say this because ten tons is also the maximum weight prescribed by the manufacturers of the truck to be transported in the Truck.

11. We cannot ignore the fact that the Investigation Report itself speaks of the incident to be one of an accidental fire caused by friction of bales rubbing against each other. This is exactly why people take out and pay for insurance cover. In our view, this was not a case which justified the Respondents from resisting the claim on tenuous grounds. There is not even a shred of evidence proving overloading of the Truck, and an oral submission even in the fact of absence of pleadings cannot be countenanced.

12. The impugned judgment is accordingly set aside. We are satisfied that the Appellant has proved the Issues, the onus probandi of which were placed on the Appellant. The consequence is that the suit shall stand decreed as prayed for in

the Plaint.

13. Learned Counsel for the Plaintiff/Appellant argues that his client has paid interest at the rate of fifteen per cent per annum on the Bank Loan taken by him for purchase of the Truck which was destroyed by fire. We, however, are inclined to grant simple interest restricted to eight per cent per annum.

14. Decree be prepared for a sum of Rs. 1,66,840/-along with interest at the rate of eight per cent per annum together with costs.