(2020) 02 DEL CK 0581

In the Delhi High Court

Case No : MAC.APP. No. 43 Of 2020, Civil Miscellaneous Application No. 3817, 3819, 3822 Of 2020

M/S N.K. Builders APPELLANT

Vs

New India Assurance Co. Ltd. & Ors RESPONDENT

Date of Decision : 12-02-2020

Acts Referred:

Code Of Civil Procedure, 1908 — Order 12 Rule 8

Citation : (2020) 02 DEL CK 0581

Hon'ble Judges : Najmi Waziri, J

Bench : Single Bench

Advocate : Dhanesh Relan, Arindam Dey, Shuchi Singh

Final Decision : Allowed

Judgement

Najmi Waziri, J

CM APPL.3821/2020 (Exemption)

1. Allowed, subject to all just exceptions.

2. The application stands disposed-off.

CM APPLs. 3818/2020, 3821/2020 (For Condonation of Delay)

3. For the reasons mentioned in the applications, the same are allowed, subject to payment of costs of Rs. 10,000/- to be deposited into the "AASRA" Fund created by this Court for the amelioration or the conditioning and rehabilitation of burns victims.

MAC.APP. 43/2020 & CM APPLs. 3817/2020, 3819/2020, 3822/2020

4. This appeal impugns the order dated 05.08.2019 of learned MACT in petition no. 313/2017 granting the insurer right of recovery against the appellant owner of the vehicle. Earlier in the insurer"s appeal being MAC. APP. 610/2011, this Court on 09.02.2016 had noted, inter alia, as under:-

"12. The issue as to whether there was any breach of terms and conditions of the policy and, consequently, as to whether the insurance company is entitled to recovery rights against fourth respondent requires to be properly inquired into by giving fresh opportunity not only to the insurance company but also to fourth respondent to prove their respective contentions about the driving license and permit. Though some evidence respecting the driving license was led,, as noted above, before this Court through Suman Suri (RW4) examined at the instance of the fourth respondent but that cannot constitute a complete inquiry.

13. The inquiry into the above aspects is, thus, remitted to the tribunal which shall give opportunity first to the insurance company to prove its contentions and then to the fourth respondent (the owner of the offending vehicle) to prove its case about the driving license and permit.

14. The appellant/insurance company and the fourth respondent shall appear before the tribunal for further proceedings in above regard on 05th April, 2016. The tribunal shall hold the proceedings expeditiously and should it reach the finding that there has been breach of policy, it shall grant recovery rights to the insurance company against the fourth respondent. The evidence recorded before this court is part of the record of the appeal at hand. The tribunal may summon the same for its inquiry.

15. The insurance company, undoubtedly, did not prosecute its defences diligently. It failed to avail the opportunity to prove its contentions before the tribunal. It has dragged even the claimants in this appeal which has remained pending for almost five years. In these circumstances, the appeal is disposed of with cost of Rs. 50,000/- which shall be paid to the claimants. The cost shall be deposited with the tribunal within 30 days of today, failing which the claimants shall be entitled to take out appropriate execution proceedings before the tribunal to recover the same."

5. The present impugned order arises out of the adjudication in remand, the reasons for granting the insurer right of recovery are as under:-

10. It is now important to take note the judgment as passed by our own High court in " Sheela Rani Vs. National Insurance co. ltd. & Ors., in MAC APP No. 701/2012 and National Insurance company Ltd. Vs. Beera Devi @ Meera Devi & Ors in MAC. APP . 388/2014, passed on 01.03.2016'. In this case, the owner of the vehicle joined the proceedings of the case but failed to file written statement and was proceeded ex-parte and took the defence of taking driving test and seeing the driving licence of the driver only in response to the notice as Issued by the Insurance company under Order 12 Rule 8 CPC. The Hon'ble High Court observed that the owner took the defence at a belated stage and the same was afterthought. In the case In hand also, despite due service of notice of the petition, the respondent no. 2 chose not to appear and was proceeded ex-parte and took the relevant defence at a much belated stage by calling the witnesses R2W1 and R2W2. Therefore, the defence of the respondent no. 2, that it

examined the driving licence of the driver and took his driving test Is not tenable.

11. In view of the facts as discussed above, to the mind of the Tribunal, the respondent no.2 has failed to prove that It complied the formalities as were necessary In view of the judgment of the Hon'ble Supreme court In 'United India insurance co. Ltd. Vs. Lehru & Ors'. On the other hand, the Insurance company, by examining the witness from the ARTO has proved that the driving licence of the respondent no.1 was fake. Thus, as there was breach of Insurance policy, the respondent no.2 was liable to make payment to the petitioners. As, being the Insurer, the insurance company has already made payment to the petitioners, it Is now entitled to recover the same from the respondent no.2. Thus, the Tribunal grants recovery rights to the insurance company to recover the awarded amount from the respondent no.2 ie M/s N.K. Builders, the owner of the vehicle."

6. The primary reason for aforesaid conclusion, is that, respondent no.2 had chosen not to appear in the claim proceedings and was proceeded ex parte and the defence in terms of United India Insurance Co. Ltd. v. Lehru, (2003) 3 SCC 338, was belated, therefore, the same could not be taken into consideration. The Court would note that by order dated 09.02.2016, all parties were granted fresh opportunity to prove their respective contentions about the driving licence and permit. The effect of this Court"s direction was that the parties would be permitted to put up their case fully. The appellant/owner had led evidence to the effect that he had seen the driving licence which appeared to be genuine, thereafter he took the driving test of the driver and found him to be skilled enough to drive the vehicle and he was thereafter employed as a driver. This is the only test prescribed under Lehru (supra). That having been proven, nothing more was required to be done by the vehicle owner. What needs to be shown by the insurer is that despite the owner having prior knowledge that the driving licence was fake, he persisted to employ the driver. In the absence of such evidence the principle laid down in Lehru (supra) would be applicable to the benefit of the vehicle owner.

7. The learned counsel for the appellant submits that indeed a Senior Clerk from the Office of ARTO, Firozabad, U.P. had admitted despite having an experience of 27 years in the said office that he was not be able to verify the genuineness of the driving licence merely just by looking at it.

8. The impugned order has recorded the same as under:

"It is pertinent to mention that aftger remanding back of the matter, only the insurance company examined Shri Laxmender Kumar, Sr. Clerk from the ARTO, Ferozabad, UP and he deposed that as per record, the licence of the driver had not been issued from his office. He clarified that the licence bearing No. 235478/99 was fake. Ld. Counsel for the respondent no.2 cross examined the witness and he stated that the genuineness of the licence could be verified only aftger checking the record. This witness further stated that even he cannot verify the genuineness of the licence could be verified only after checking the record.

This witness further stated that even he cannot verify the genuineness of the licence only by looking at the driving licence. Thus, the respondent no.2 did not examine any witness. Lateron, the respondent no.2 moved an application to permit him to examine some more witnesses and then he examined Shri Kumud Suri as R2W1 and Rishi Pal Tomar as R2W2."

In other words even a trained eye could not tell whether the driving licence was fake or not. A layman would not have such an expertise or look for technicalities in the driving licence. Insofar as the insurer has not been able to prove that the appellant knew fully well that the driving licence was fake, yet the driver was employed, the right of recovery cannot be granted.

9. In view of the above, the impugned order granting the right of recovery to the insurer is erroneous and is therefore set aside.

10. The appeal is allowed and disposed off in the above terms.

