

(2012) 07 DEL CK 0047
In the Delhi High Court
Case No : MAC. APP. 10 of 2008

National Insurance Co. Ltd.	Vs	APPELLANT
K.R. Murgeshan and Others		RESPONDENT

Date of Decision : 02-07-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 12 Rule 8
Evidence Act, 1872 — Section 63

Citation : (2012) 07 DEL CK 0047

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

Bench : Single Bench

Advocate : Pradeep Gaur and Mr. Dev Dutt, for the Appellant;

Final Decision : Dismissed

Judgement

G.P. Mittal, J.—The Appeal is directed against the judgment dated 19.04.2006 and 04.08.2007 whereby a compensation of Rs. 1,86,000/- was awarded in favour of the First Respondent for having suffered injuries in a motor accident which occurred on 09.07.1988. While awarding the compensation, the Motor Accident Claims Tribunal (the Claims Tribunal) opined that the Appellant's liability was limited to Rs. 50,000/-. However, it ordered the Insurance Company to pay the entire compensation and recover the excess compensation from Respondents No.2 and 3 (the driver and owner) of the bus involved in the accident. On 09.07.1988 at about 5:30 P.M., the First Respondent suffered serious injuries while boarding a bus near Virat Cinema. On appreciation of evidence, the Claims Tribunal found that the accident was caused on account of rash and negligent driving of bus No.DEP-4614 by its driver, the Second Respondent. The bus was owned by the Third Respondent. The Claims Tribunal found that the First Respondent had suffered 50% disability in respect of his right lower limb. The Claims Tribunal awarded an overall compensation of Rs. 1,86,000/- along with interest @ 10% per annum.

2. The rashness or negligence on the part of the Second Respondent or the

amount of compensation awarded has not been disputed by the Appellant Insurance Company. The finding on the quantum of compensation and the Appellant's limited liability to the extent of 50,000/- has not been challenged by the driver or the owner of the bus.

3. Even during hearing of the Appeal none appeared on behalf of the Claimant (the First Respondent), the driver (the Second Respondent) and the owner of the bus (the Third Respondent) The Claims Tribunal did not give any reason to make the Insurance Company liable to pay the entire compensation and then recover it from the Second and the Third Respondent.

4. During inquiry before the Claims Tribunal it was proved that in spite of service of the notice under Order XII Rule 8 CPC, the original insurance policy was not produced by Gyan Singh (the Third Respondent), owner of the bus. The Appellant Insurance Company in the circumstances was entitled to lead secondary evidence to prove the policy. I would advert a little later, as to whether the office copy of the insurance policy was proved or not. (It may, however, be noted that the Claimant, the driver and the owner have not filed any Appeal).

5. It is urged by the learned Counsel for the Appellant Insurance Company that since the premium of just Rs. 240/- was paid towards the liability to public risk, the Appellant Insurance Company's obligation to indemnify the insured was only to the extent of Rs. 50,000/-.

6. It is urged that although the Third Respondent obtained a comprehensive policy, but the same need not necessarily cover a higher risk vis-?-vis the third party. There has to be a specific contract for coverage of a higher risk by paying additional premium towards the third party risk, which has not been done in this case. Thus, the liability of the Insurance Company was limited to Rs. 50,000/- only. Reliance is placed on a three Judge Bench decision of the Supreme Court in National Insurance Co. Ltd., New Delhi Vs. Jugal Kishore and Others, and a Constitutional Bench judgment of the Supreme Court in New India Assurance Co. Ltd. Vs. C.M. Jaya and Others,

7. Suffice it to say that as per the first Page of the Insurance Policy issued for the period 27.11.1985 to 26.11.1986 (which was allegedly renewed from 27.11.1986 to 26.11.1987 and then from 27.11.1987 to 26.11.1988) there was an avoidance clause, which is extracted hereunder:-

IMPORTANT NOTICE

The insured is not indemnified if the vehicle is used or driven otherwise than in accordance with this Schedule. Any payment made by the Company by reason of wider terms appearing in the Certificate in order to comply with the Motor Vehicles Act, 1939 is recoverable from the insured. See the clause headed "AVOIDANCE OF CERTAIN TERMS.

8. Complete insurance policy for the period 1985-1986 or for the subsequent

period during which the accident took place was not placed on record by the Appellant Insurance Company.

9. The learned Single Judge of this Court in *Narender Singh, Joginder Singh, Dalal Singh and Sushila Devi Vs. Sudarshan Kumar (Deceased) through his legal heirs and Others*, relied on *New India Assurance Co. Ltd. Vs. C.M. Jaya and Others*, wherein the Constitution Bench reconciled the apparent conflict in *New India Assurance Co. Ltd. Vs. Smt. Shanti Bai and others*, and *Amrit Lal Sood v. Kaushalya Devi Thapar* (1998) 2 SCR 284. On the basis of *C.M. Jaya (supra)*, the learned Single Judge held that the Insurance Company and the insured can, through a contract increase the liability by enhancing the amount of premium and even provide for a wider coverage in respect of the third party risk. The learned Single Judge referred to *New Asiatic Insurance Co. Ltd. Vs. Pessumal Dhanamal Aswani and Others*, to hold that the wider terms appearing in the insurance policy (in the shape of avoidance clause) do not affect the right of a third party to recover any amount if the contract between the Insurance Company and the assured provides for the Insurance Company undertaking the liability to third party. The relevant portion of the report in *Narender Singh (supra)* is extracted hereunder:-

38. To answer the question, the Supreme Court analyzed three of its earlier decisions namely *National Insurance Co. Ltd., New Delhi Vs. Jugal Kishore and Others*, . After a comprehensive analysis of these three judgments, the Supreme Court concluded in paragraph 8 of the Report:-

Thus, a careful reading of these decisions clearly shows that the liability of the insurer is limited, as indicated in Section 95 of the Act, but it is open to the insured to make payment of additional higher premium and get higher risk covered in respect of third party also. But in the absence of any such clause in the insurance policy the liability of the insurer cannot be unlimited in respect of third party and it is limited only to the statutory liability.

39. Thereafter, the Supreme Court culled out what was held in *Shanti Bai* (which followed *Jugal Kishore*). The threefold conclusion arrived at have been mentioned in paragraph 9 of the Report and these are as follows:-

In *Shanti Bai* case a Bench of three learned Judges of this Court, following the case of *Jugal Kishore* has held that:

(i) a comprehensive policy which has been issued on the basis of the estimated value of the vehicle does not automatically result in covering the liability with regard to third-party risk for an amount higher than the statutory limit,

(ii) that even though it is not permissible to use a vehicle unless it is covered at least under an "Act only" policy, it is not obligatory for the owner of a vehicle to get it comprehensively insured, and

(iii) that the limit of liability with regard to third-party risk does not become unlimited or higher than the statutory liability in the absence of specific

agreement to make the insurer's liability unlimited or higher than the statutory liability.

40. The Supreme Court then stated the conclusions arrived at in *Amrit Lal Sood*. This is given in paragraph 10 of the Report in the following words:-

On a careful reading and analysis of the decision in *Amrit Lal Sood* it is clear that the view taken by the Court is no different. In this decision also, the case of *Jugal Kishore* is referred to. It is held:

(i) that the liability of the insurer depends on the terms of the contract between the insured and the insurer contained in the policy;

(ii) there is no prohibition for an insured from entering into a contract of insurance covering a risk wider than the minimum requirement of the statute whereby risk to the gratuitous passenger could also be covered; and

(iii) in such cases where the policy is not merely statutory policy, the terms of the policy have to be considered to determine the liability of the insurer.

41. In the light of the above conclusions, the Supreme Court found no conflict between the decisions rendered in *Shanti Bai* and *Amrit Lal Sood*. On the contrary, the Supreme Court found "consistency on the point that in the case of an insurance policy not taking any higher liability by accepting a higher premium, the liability of the Insurance Company is neither unlimited nor higher than the statutory liability fixed u/s 95(2) of the Act." (Paragraph 11 of the Report). Consequently, the Supreme Court answered the question referred to the Constitution Bench (in paragraph 14 of the Report) in the following terms:

In the case of the Insurance Company not taking any higher liability by accepting a higher premium for payment of compensation to a third party, the insurer would be liable to the extent limited u/s 95(2) of the Act and would not be liable to pay the entire amount.

42. The Supreme Court made a vital distinction between a statutory liability and a contractual liability. This distinction, which is important so far as the present appeals are concerned, has been made in paragraph 10 of the Report. The sum and substance of the distinction made by the Supreme Court is that under the statute the liability is limited to what is provided in the statute, but that does not prohibit the contracting parties from creating an unlimited or higher liability and to this I may add, creating a wider liability so long as it is not contrary to the provisions of the Act.

10. While referring to *New Asiatic Insurance Co. Ltd. Vs. Pessumal Dhanamal Aswani and Others*, the learned Single Judge observed as under:-

46. Apart from *Amrit Lal Sood*, the question of a wider contractual liability arose in *New Asiatic Insurance Co. Ltd. Vs. Pessumal Dhanamal Aswani and Others*, and *Oriental Insurance Co. Ltd. Vs. Nafeessu and Others*. It is, therefore, necessary to discuss all three decisions, in the context of the wider contractual

liability.

47. In Aswani, a car driven by Pesumal met with an accident. This car was insured with the appellant New Asiatic Insurance Co. Pesumal himself owned a car, which was insured with another company. On a claim having been made for compensation against Pesumal, the appellant relied upon proviso (a) to Clause 3 in the insurance policy to the effect that it is not liable to indemnify the insured if the driver of the vehicle (Pesumal) is entitled to indemnity under any other policy.

48. While dealing with the terms of the insurance policy given by the appellant, the Supreme Court referred to some clauses such as avoidance of certain terms and right of recovery and an important notice in the Schedule to the policy. These clauses are similar to those found in the present case and read as follows:-

Under the heading "Avoidance of certain terms and right of recovery", the policy states:

Nothing in this policy or any endorsement hereon shall affect the right of any person indemnified by this policy or any other person to recover an amount under or by virtue of the provisions of the Motor Vehicles Act 1939, Section 96.

But the Insured shall repay to the Company all sums paid by the Company which the Company would not have been liable to pay but for the said provisions.

49. At the end of the Schedule to the policy is an important notice that reads:-

The insured is not indemnified if the Vehicle is used or driven otherwise than in accordance with this Schedule. Any payment made by the Company by reason of wider terms appearing in the Certificate in order to comply with the Motor Vehicles Act 1939 is recoverable from the Insured. See the clause headed "Avoidance of certain terms and right of recovery.

50. The Supreme Court considered the effect of these wide terms appearing in the insurance policy and held that the provisions of the Act do not affect the right of a third party to recover any amount if the contract between the insurance company and the assured provides for the insurance company undertaking a liability to third parties. A clause such as the avoidance clause is effective only between the insured and the insurance company; it is ineffective when considering the liability of the insurance company to a third party. This is what the Supreme Court said in paragraphs 21 and 22 of the Report:

The Act contemplates the possibility of the policy of insurance undertaking liability to third parties providing such a contract between the insurer and the insured, that is, the person who effected the policy, as would make the company entitled to recover the whole or part of the amount it has paid to the third party from the insured. The insurer thus acts as security for the third party with respect to its realizing damages for the injuries suffered, but vis-a-vis the insured, the company does not undertake that liability or undertakes it to a limited extent. It is in view of such a possibility that various conditions are laid

down in the policy. Such conditions, however, are effective only between the insured and the company, and have to be ignored when considering the liability of the company to third parties. This is mentioned prominently in the policy itself and is mentioned under the heading "Avoidance of certain terms and rights of recovery", as well as in the form of "an important notice" in the Schedule to policy. The avoidance clause says that nothing in the policy or any endorsement thereon shall affect the right of any person indemnified by the policy or any other person to recover an amount under or by virtue of the provisions of the Act. It also provides that the insured will repay to the company all sums paid by it which the company would not have been liable to pay but for the said provisions of the Act. The "Important Notice" mentions that any payment made by the company by reason of wider terms appearing in the certificate in order to comply with the Act is recoverable from the insured, and refers to the avoidance clause. Thus the contract between the insured and the company may not provide for all the liabilities which the company has to undertake vis-a-vis the third parties, in view of the provisions of the Act. We are of opinion that once the company had undertaken liability to third parties incurred by the person specified in the policy, the third parties' right to recover any amount under or by virtue of the provisions of the Act is not affected by any condition in the policy. Considering this aspect of the terms of the policy, it is reasonable to conclude that proviso (a) of para 3 of Section II is a mere condition affecting the rights of the insured who effected the policy and the persons to whom the cover of the policy was extended by the company, and does not come in the way of third parties' claim against the company on account of its claim against a person specified in para 3 as one to whom cover of the policy was extended.

11. In the instant case, the first Page of the policy which is valid from 25.11.1985 to 26.11.1986 (which as per the Appellant Insurance Company was renewed from time to time) shows that there is an avoidance clause under which the Appellant Insurance Company was liable to pay the compensation in order to comply with the Motor Vehicles Act, 1939 and the excess amount paid was recoverable from the insured. Thus the claimant was entitled to recover the amount of compensation from the Insurance Company. However, as stated earlier, the policy for the relevant period has not been placed on record by the Appellant Insurance Company.

12. Can in such circumstances, the Insurance Company claim the liability to be limited.

13. Service of notice under Order XII Rule 8 CPC simply entitles the Appellant to lead secondary evidence about the contract of insurance. Secondary evidence has been defined u/s 63 of the Indian Evidence Act, 1872 (the Evidence Act), which is extracted hereunder:-

63. Secondary Evidence - Secondary evidence means and includes:-

(1). Certified copies given under the provisions hereinafter contained;

- (2). Copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies;
- (3). Copies made from or compared with the original;
- (4). Counterparts of documents as against the parties who did not execute them;
- (5). Oral accounts of the contents of a document given by some person who has himself seen it.

14. The Insurance Company says that the original policy was sent to the insured and that is why a notice under Order XII Rule 8 CPC was issued to him to produce the original policy valid from 27.11.1987 to 26.11.1988. Office copy of the policy, however, was not produced. The first page of the policy for the period 27.11.1985 to 26.11.1986 even if admitted would not be a substitute for the policy for the period 27.11.1987 to 26.11.1988.

15. Thus, the Appellant Insurance Company has failed to produce secondary evidence within the meaning of Section 63 of the Evidence Act regarding insurance policy in force on the date of the accident. Consequently, the Appellant has failed to prove that its liability was limited to Rs. 50,000/-. Thus, it shall have to be held that the Appellant's liability was unlimited. I am supported in this view by the report of the Supreme Court in *Tejinder Singh Gujral v. Inderjit Singh & Anr.*, (2007) 1 SCC 508. Relevant para of the report is extracted hereunder:-

13. The learned Tribunal, however, committed an error in opining that the insurance policy was not required to be proved. Learned Single Judge of the High Court, in our opinion, rightly held that the insurance policy having not brought on records, a presumption would arise that the liability of the insurer was unlimited.....

16. In *Chandro Devi and Others Vs. Jit Singh and Others*, this court held that in the absence of proof of the insurance policy by the insurance company it shall be presumed that the liability of the insurance company is unlimited. Relevant para of the report says:-

The insurance company must prove that the policy in question is the "Act only" policy. The amount mentioned by the statute is the minimum amount. But the policy can always cover higher risk to third party by taking additional premium. It is obligatory on the part of the insurance company to prove the insurance policy and its terms and conditions. In a number of decisions by this court, it has been held that where the insurance company has to produce the insurance policy or prove the same in accordance with law, then, it shall be presumed that the liability of the insurance company is unlimited. As I have already held that the insurance company has failed to prove the insurance policy in accordance with law, so I hold that the liability of the insurance company is unlimited in the present case.

17. A Division Bench of this Court in *New India Assurance Co. Ltd. Vs. Darshan Singh and Others*, held that where the Insurance Company wish to take a defense (in a Claim Petition) that its liability was not in excess of statutory liability it should file a copy of the insurance policy along with its defense. It was observed that a printed copy of the policy would not be enough to prove the plea of limited liability.

18. As stated above, there is no Appeal by the insured against the impugned judgment. Thus, the discussion that the policy for the relevant period was not proved and the liability of the insurance company was unlimited is only academic.

19. The Appeal is devoid of any merit; the same is accordingly dismissed.

20. By order dated 09.01.2008, the operation of the impugned judgment was stayed, subject to deposit of the 50% of the award amount with the Claims Tribunal. Rest of the amount along with interest, as awarded by the Claims Tribunal, up to the date of the award and then from the award till the payment, shall be deposited with the Claims Tribunal within eight weeks and shall be released to the First Respondent. The statutory amount of Rs. 25,000/- shall be refunded to the Appellant Insurance Company on filing proof of deposit of the award amount with the Claims Tribunal.