
(2012) 07 DEL CK 0231
In the Delhi High Court
Case No : MAC.APP. 479 of 2004

New India Assurance Co. Ltd.

APPELLANT

Vs

Geeta and Others

RESPONDENT

Date of Decision : 02-07-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 12 Rule 8
Evidence Act, 1872 — Section 114, 63

Citation : (2012) 6 ILR Delhi 582

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

Bench : Single Bench

Advocate : L.K. Tyagi and Ms. Debopama Roy, for IRDA, for the Appellant;
Ashok Popli, for R-1, for the Respondent

Final Decision : Dismissed

Judgement

G.P. Mittal, J.—The Appellant New India Assurance Company Limited takes exceptions to the judgment dated 31.07.2004 passed by the Motor Accident Claims Tribunal (the Claims Tribunal) whereby while awarding a compensation of Rs. 1,75,000/- for the death of Indeshwar Rai, the Appellant's plea of limited liability of Rs. 50,000/- in terms of the policy was rejected. The Appellant was directed to pay the entire compensation of Rs. 1,75,000/- as awarded by the Claims Tribunal. On 07.10.1988 at about 11:00 A.M. the deceased and one Surrender (PW-2) were proceeding on their respective bicycles towards Nehru Place. The deceased was run over by a speeding bus No.DEP-7259 driven by the Fourth Respondent (Ved Prakash).

2. During inquiry before the Claims Tribunal, it was claimed that the deceased was working as a mason with M/s. S.Tirath Singh Engineers and was getting a salary of Rs. 1500/- per month. The Claims Tribunal assessed the deceased's income to be Rs. 1125/- per month and computed the loss of dependency as Rs. 1,62,000/-. On adding a sum of Rs. 13,000/- towards non-pecuniary heads, the overall compensation of Rs. 1,75,000/- was awarded.

3. The finding on negligence or on quantum of compensation is not challenged by either of the parties.

4. The sole ground of challenge is that the Appellant having successfully proved that there was limited liability of Rs. 50,000/-, as a premium of Rs. 240/- only was charged for covering third party risk, the Claims Tribunal erred in fastening the entire liability on the Insurance Company.

5. It is important to note that Respondents No.4 and 5 (the driver and the owner of the bus) did not contest the proceedings before the Claims Tribunal and they were ordered to be proceeded ex-parte. The written statement was filed by the Appellant Insurance Company pleading limited liability. The issue of limited liability was dealt with by the Claims Tribunal as under:-

12. As regards preliminary objection No.5, it was submitted by the Respondent No.3 Insurance Company that its maximum liability was limited to Rs. 50,000/- only, as set out in Section 95 of the Motor Vehicles Act, 1939 and the terms of the policy issued by it for third party claims. In order to substantiate this plea of limited liability, the Respondent No.3 Insurance Company adduced the evidence of RW-1 Shri Surender Kalra, Claims Assistant, M/s. New India Assurance Company Limited. RW-1 Shri Surinder Kalra, in his testimony, testified that he had brought the carbon copy of the insurance policy issued in the name of Shri Chand Singh (Respondent No.2). He further testified that a notice dated 20.7.2000 had been issued to the insured, copy whereof was Exhibit RW1/A, that the said notice had been sent by registered cover and its postal receipt was Exhibit RW1/B. He further deposed that the carbon copy of the policy was Exhibit RW1/C and the carbon copy of the cover note was Exhibit PW1/D. As per the terms of the policy, he deposed, third party risk covered by the policy was Rs. 50,000/- for one accident as the premium charged for this risk was Rs. 240/- only. Cover note had been issued by Shri P.K. Mahant, Development Officer while the policy had been issued by Shri J.R. Nagpal, Assistant Administrative Officer and he identified their respective signatures on the said documents. He had brought the Indian Motor Tariff, copy whereof was Exhibit PW1/E. No extra premium, he stated, had been charged from the insured for any increase in the insurer's liability beyond the statutory limit of liability.

13. The cross-examination of RW-1 Surinder Kalra is significant. In the course of his said cross-examination by the counsel for the petitioners, the witness was compelled to admit that both Shri P.K. Mahant who had issued the cover note and Shri J.R. Nagpal who had issued the insurance policy were still working with the company, and as such both were available in the office of the Company, while he had been posted in the office of the Company in August, 1988, that is, after the issuance of both the cover note the policy. He was further compelled to admit that he could not say what were the conditions of the insurance policy as the policy had not been dispatched in his presence. Relying upon these admissions made by the witness, counsel for the petitioners vehemently contended that neither of the author of the cover note nor the author of the insurance policy had

been examined by the Insurance Company although both were admittedly still working with the Insurance Company and available at the time when the statement of RW-1 was recorded. RW-1, it was further contended by counsel for the petitioners, had no knowledge of the terms and the conditions of the insurance policy as he had been posted in the office of the insurance company on a subsequent date.

14. Counsel for the petitioners further placed reliance upon the admission made by RW-1 Surender Kalra in his cross-examination, that he had not brought the office copy of the policy of insurance, to contend that the office copy of the insurance policy not having been produced by the Insurance Company, it was not at all clear from which copy the carbon copy Exhibit PW1/C had been prepared. Learned counsel for the petitioners also strongly relied upon the admission made by the RW-1 in his cross-examination that in the Certificate of Insurance the work "Unlimited" was recorded.

15. From the above evidence on record, in my view, it is abundantly clear that there is no proof regarding service of notice on the insured for production of the original insurance policy. No Acknowledgement Due Card etc. has been filed. It also emerges from the record that a copy of the policy was sent to the concerned bank, viz., the Bank of India, Parliament Street, New Delhi, but admittedly no notice has been given by the Insurance Company to the said bank to produce the same. Then again, it has been admitted by RW-1 that the authors of the cover note and the insurance policy were still working in the Insurance Company. The question which begs an answer is; Why have the authors of the cover note and the insurance policy not being produced in the witness box? I am afraid no answer is forthcoming. Significantly also, in answer to a query put to him in this regard, RW-1 admitted that in the certificate of insurance the word "unlimited" was recorded. I also find on the record a copy of the proposal form, in Column No.11 whereof extra premium is shown to have been paid for third party claims. In the circumstances, in my view, it is not possible to hold that the liability of the insurance company was limited to Rs. 50,000/- only, that is, the amount of statutory limit of liability.

5. The Fifth Respondent (Chand Singh) was the owner of the bus No.DEP-7259. The insurance policy was issued to him. RW-1 Surender Kalra deposed that a notice (copy of which is Ex.RW-1/A) under Order XII Rule 8 CPC was sent to the Fifth Respondent under registered cover. The witness proved the postal receipt as Ex.RW1-B. He deposed that despite service of the notice, the insured failed to produce the original insurance policy.

6. The Claims Tribunal rejected the plea of limited liability on the grounds:-

(i) that service of notice on the owner of the bus to produce the original policy has not been established;

(ii) that a copy of the policy was sent to the Bank of India, Parliament Street, New Delhi Branch but no notice was given to the said Bank to produce the same;

and

(iii) that authors of cover note and Insurance Policy were still alive and working with the Appellant Insurance Company, still they were not produced to prove the policy.

8. As far as service of notice is concerned, the office copy of the notice Ex.RW-1/A and its postal receipt Ex.RW-1/B were duly proved. The service of the notice was disbelieved on the ground that the acknowledgement card was not produced by the Appellant Insurance Company. It may be noticed that many a time when a letter is sent through Registered Post, an acknowledgement card is not received back. The question is whether presumption of service can be raised when letter is dispatched and a postal receipt is proved on record.

9. In C.C. Alavi Haji Vs. Palapetty Muhammed and Another, a three Judge Bench of the Supreme Court dealt with the question of presumption of service when a letter is posted. The relevant portion of the report in C.C.Alavi Haji (supra) is extracted hereunder:-

12. Therefore, the moot question requiring consideration is in regard to the implication of Section 114 of the Evidence Act, 1872 insofar as the service of notice under the said proviso is concerned. Section 114 of the Evidence Act, 1872 reads as follows:

114. Court may presume existence of certain facts.-

The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

Illustrations

The court may presume-

(f) that the common course of business has been followed in particular cases;

13. According to Section 114 of the Act, read with Illustration (f) thereunder, when it appears to the court that the common course of business renders it probable that a thing would happen, the court may draw presumption that the thing would have happened, unless there are circumstances in a particular case to show that the common course of business was not followed. Thus, Section 114 enables the court to presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business in their relation to the facts of the particular case. Consequently, the court can presume that the common course of business has been followed in particular cases. When applied to communications sent by post, Section 114 enables the court to presume that in the common course of natural events, the communication would have been delivered at the address of the addressee. But the presumption that is raised u/s

27 of the GC Act is a far stronger presumption. Further, while Section 114 of the Evidence Act refers to a general presumption, Section 27 refers to a specific presumption. For the sake of ready reference, Section 27 of the GC Act is extracted below:

27. Meaning of service by post.-Where any Central Act or Regulation made after the commencement of this Act authorises or requires any document to be served by post, whether the expression "serve" or either of the expression "give" or "send" or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.

14. Section 27 gives rise to a presumption that service of notice has been effected when it is sent to the correct address by registered post. In view of the said presumption, when stating that a notice has been sent by registered post to the address of the drawer, it is unnecessary to further aver in the complaint that in spite of the return of the notice unserved, it is deemed to have been served or that the addressee is deemed to have knowledge of the notice. Unless and until the contrary is proved by the addressee, service of notice is deemed to have been effected at the time at which the letter would have been delivered in the ordinary course of business. This Court has already held that when a notice is sent by registered post and is returned with a postal endorsement "refused" or "not available in the house" or "house locked" or "shop closed" or "addressee not in station", due service has to be presumed.....

10. Admittedly, no evidence was led by the owner (the Fifth Respondent) that the notice was not received by him. Rather he preferred himself to be proceeded ex-parte. The notice and the postal receipt were duly proved. In the circumstances, the Claims Tribunal's finding that the notice under Order XII Rule 8 CPC was not proved to have been served upon the owner cannot be sustained.

11. Similarly, the Claims Tribunal's rejection of the service of notice on the ground that notice ought to have been sent to Bank of India, to whom the policy was sent, is also misconceived. It appears from Ex.PW-1/C and PW-1/D that the vehicle was hypothecated to Bank of India. A copy of the Insurance Policy might have been sent to the Bank of India. There is nothing to indicate on the copy of the policy Ex.RW-1/C and the copy of the cover note Ex.RW-1/D that the original policy was sent to the Bank of India. In the circumstances, the Appellant's right to lead secondary evidence on the ground that no notice was sent to the Bank of India cannot be defeated.

12. The Claims Tribunal's observations that the word "unlimited" finds mention in the printed form of Ex.RW-1/C at one place, is also of not much consequence as the Court is concerned with the payment of premium under various clauses. Similarly, a copy of the proposal form "Mark B" (the same has not been proved)

was placed on record in the course of his cross-examination recorded on 19.09.2002. The Claims Tribunal opined that in para 11 there was mention of payment of premium towards the unlimited liability. This finding was without any material, in as much as a premium of Rs. 440/- and Rs. 1700/- was towards own damage and Rs. 60/- was towards terrorist risk. Thus, it cannot be said that there was unlimited coverage in respect of third party risk vide proposal form "Mark B."

13. The vital question for consideration, however, is whether the Appellant produced secondary evidence within the meaning of Section 63 of the Indian Evidence Act, 1872 (the Evidence Act) so as to rely on the copy of the insurance policy Ex.RW-1/C produced by the Appellant. It would be fruitful to extract Section 63 of the Evidence Act 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 ensure 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. An illegible carbon copy of the insurance policy which was marked as Ex.RW-1/C was produced by RW-1. An equally illegible photocopy "Mark A" was also produced. A perusal of Ex.RW-1/C reveals that it is only a renewal notice. Ex.RW-1/C does not appear to be signed by any person. When RW-1 was cross-examined on the alleged carbon copy of the insurance policy, he admitted that he did not bring the office copy of the insurance policy. Thus, it is apparent that Ex.RW-1/C was not a carbon copy of the policy prepared in the same process. However, the process through which Ex.RW-1/C was prepared is not known. Ex.RW-1/C does not fall under any of the five Clauses of Section 63 of the Evidence Act. Therefore, it cannot be said to be secondary evidence so as to admit the same u/s 63 of the Evidence Act. Apart from this, RW-1 made very important admission. He stated that policy was issued by Mr. Nagpal and also admitted that Mr. Nagpal was still available and was working with the Appellant Insurance Company. He then stated that the cover note was prepared by Mr. P.K. Mahant, who was also available in the office. Mr. Nagpal and Mr. Mahant were the persons who could have stated about the insurance policy purported to have been issued in favour of Chand Singh, the owner of the vehicle. Since the carbon copy Ex.RW-1/C does not satisfy the test of secondary evidence, the same is not admissible in evidence and was rightly rejected by the Claims Tribunal. This

finding is supported by the judgment of the Supreme Court in Smt. J. Yashoda Vs. Smt. K. Shobha Rani, In para 8, the Supreme Court held as under:

8. Essentially, secondary evidence is an evidence which may be given in the absence of that better evidence which law requires to be given first, when a proper explanation of its absence is given. The definition in Section 63 is exhaustive as the section declares that secondary evidence "means and includes" and then follow the five kinds of secondary evidence.

15. The document produced is only a photocopy of the renewal notice. The same does not fall under any of the five clauses of Section 63 of the Evidence Act and, therefore, the same cannot be looked into. In the absence of proof of the insurance policy, the Appellant has failed to prove that its liability was limited to Rs. 50,000/-. I, therefore, hold that the Appellant's liability was unlimited. I am supported in this view by the report of the Supreme Court in Tejinder Singh Gujral Vs. Inderjit Singh and Another, . 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 defence (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 defence. It was observed that a printed copy of the policy would not be enough to prove the plea of limited liability.

18. In view of the foregoing discussion, the Claims Tribunal's finding that the Appellant's liability was unlimited cannot be faulted.

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

20. By an order of this Court dated 07.12.2004 the execution proceedings were ordered to be stayed, subject to deposit of the entire award amount with the Claims Tribunal. It appears that a sum of Rs. 25,000/- along with proportionate interest was ordered to be released by order dated 18.05.2005. Rest of the amount lying deposited with the Claims Tribunal shall be released in favour of the Respondents No.1 to 3 (the Claimants) in terms of the order passed by the Claims Tribunal. The statutory amount of Rs. 25,000/- shall be refunded to the Appellant Insurance Company.