
(2012) 07 DEL CK 0458
In the Delhi High Court
Case No : FAO 311 of 1998

New India Assurance Company Limited APPELLANT
Vs
Nazia and Others RESPONDENT

Date of Decision : 02-07-2012

Acts Referred:

Evidence Act, 1872 — Section 63, 64, 65, 66, 74

Citation : (2012) 07 DEL CK 0458

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

Bench : Single Bench

Advocate : Salil Paul with Mr. Dipak K. Nag and Mr. Debopama Ray, for Irda, for the Appellant;

Final Decision : Dismissed

Judgement

G.P. Mittal, J.—The Appellant New India Assurance Company Limited takes exception to the judgment dated 22.05.1998 passed by the Motor Accident Claims Tribunal (the Claims Tribunal) whereby while awarding a compensation of Rs. 1,08,000/- for the death of one Raju, the Appellant's plea of limited liability to the extent of Rs. 15,000/- in terms of the contract of Insurance between the Appellant and the Insured (the owner of the bus No.DEP-593) was rejected. The Appellant was directed to pay the entire compensation of Rs. 1,08,000/- as awarded by the Claims Tribunal. On 10.08.1987, deceased Raju was travelling in bus No. DEP-5593. According to the Respondent No.1 (the deceased's mother) while proceeding to Dhaula Kuan the bus was being driven in a rash and negligent manner by the Second Respondent (Ram Kumar). The Second Respondent suddenly applied brakes, as a result of the jerk, the deceased fell off the bus and suffered injuries which proved fatal.

2. The Claims Tribunal opined that the accident was caused on account of rash and negligent driving of the bus by the Second Respondent. The Claims Tribunal accepted the deceased's income to be Rs. 900/- per month, deducted one-third towards the personal and living expenses and awarded a compensation of Rs.

1,08,000/-.

3. The finding on negligence and on quantum of compensation is not disputed by either the Appellant (the Insurance Company) or the First Respondent (the Claimant).

4. The sole ground of challenge is that the Appellant having successfully proved that its liability was limited to Rs. 15,000/- per passenger, the Claims Tribunal erred in fastening the liability on the Appellant.

5. The Claims Tribunal while dealing with issue of liability held that in the absence of proof of service of notice on the owner to produce the original policy, the Appellant Insurance Company was not entitled to lead secondary evidence to prove the insurance policy. It was held that the reason for preparing certified copy from the copy of the policy was also not explained. The Claims Tribunal refused to admit secondary evidence and held that the liability of the Insurance Company was unlimited.

6. Admittedly, the original insurance policy is not on record. As per the Appellant's case, the original policy was sent to the third Respondent (Jaipal), the owner of the bus. A notice was given to him to produce the original policy. He having failed to do so, the Appellant was entitled to lead secondary evidence. It is argued by the learned counsel for the Appellant that the true copy of the policy Ex.RW-1/2 shows the Appellant's liability to be only Rs. 15,000/-. Thus, the impugned judgment cannot be sustained.

7. It is well settled that a party to litigation must produce the best evidence. If an adversary is in possession of the best evidence, the party interested in producing that evidence must seek the same from the said person or give proper explanation of its absence. Secondary evidence is admissible only in the absence of primary evidence. Section 65 of the Indian Evidence Act, 1872 (the Evidence Act) entitles a party to lead secondary evidence in respect of a document on satisfying certain conditions. Section 65 of the Evidence Act is extracted hereunder:-

65. Cases in which secondary evidence relating to documents may be given - Secondary evidence may be given of the existence, condition; or contents of a document in the following cases:-

(a) When the original is shown or appears to be in the possession or power of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the Court, or of any person legally bound to produce it, and when, after the notice mentioned in Section 66, such person does not produce it;

(b) When the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;

(c) When the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;

(d) When the original is of such a nature as not to be easily movable;

(e) When the original is a public document within the meaning of Section 74;

(f) When the original is a document of which a certified copy is permitted by this Act, or by any other law in force in India to be given in evidence;

(g) When the originals consist of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection.

In cases (a), (c) and (d), any secondary evidence of the contents of the document is admissible.

In case (b), the written admission is admissible.

In case (e) or (f), a certified copy of the document, but no other kind of secondary evidence, is admissible.

In case (g), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents.

8. Section 63 of the Evidence Act defines secondary evidence. It would be fruitful to extract the same 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.

9. The instant case is covered by Clause (a) of the Section 65. The Appellant was under an obligation to require the Third Respondent to produce the insurance policy before the Court. On Third Respondent's failure to produce the original, the Appellant would have become entitled to bring in secondary evidence.

10. In the instant case, no notice is proved to have been sent to the Third Respondent. Neither postal receipt nor UPC nor even the dispatch register through which the notice was allegedly posted to the Third Respondent, were proved on record. In the circumstances, the Claims Tribunal was justified in

holding that the Appellant was not entitled to lead secondary evidence. I am fortified in this view by the report of the Supreme Court in Smt. J. Yashoda Vs. Smt. K. Shobha Rani, where it was held as under:-

9. The rule which is the most universal, namely that the best evidence the nature of the case will admit shall be produced, decides this objection. That rule only means that, so long as the higher or superior evidence is within your possession or may be reached by you, you shall give no inferior proof in relation to it. Section 65 deals with the proof of the contents of the documents tendered in evidence. In order to enable a party to produce secondary evidence it is necessary for the party to prove existence and execution of the original document. u/s 64, documents are to be provided (sic proved) by primary evidence. Section 65, however permits secondary evidence to be given of the existence, condition or contents of documents under the circumstances mentioned. The conditions laid down in the said Section must be fulfilled before secondary evidence can be admitted. Secondary evidence of the contents of a document cannot be admitted without non-production of the original being first accounted for in such a manner as to bring it within one or other of the cases provided for in the Section.....

11. In Chandro Devi & Ors. v. Jit Singh & Ors., 1989 ACJ 41, a learned Single Judge of this court emphasized that the documents must be proved by primary evidence except in cases mentioned in section 65 of the Evidence Act. Para 35 of the report is extracted hereunder:-

35. It is thus clear that the contents of documents can be proved either by primary or by secondary evidence. Primary evidence means the document itself produced for the inspection of the court. It is settled law that the documents must be proved by primary evidence, except in cases mentioned in section 65 of the Evidence Act. It is also settled law that mere production of a document is not proof of its contents, especially when the person producing it is neither the writer nor the one on whose behalf it is written. A person, who is not producing the primary evidence, must explain the reasons for that.

12. Thus, the Appellant failed to prove that the notice as required u/s 66 of the Evidence Act was served upon the Third Respondent. Therefore, the Appellant was not entitled to adduce secondary evidence.

13. Moreover, the Appellant Insurance Company proved only a true copy of the policy as Ex. RW-1/2. It is not proved as to from which document the true copy was prepared. Thus, the case is not covered under any of the five Clauses to Section 63 of the Evidence Act to bring it within the definition of secondary evidence.

14. It is thus proved that there was a contract of insurance between the Appellant and the Third Respondent. The Appellant having failed to prove that its liability was limited to Rs. 15,000/-, 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 Vs. Inderjit Singh and Another, Relevant part 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.....

15. In Chandro Devi (supra) 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.

16. In view of the foregoing discussion, the Appeal must fail; the same is accordingly dismissed. The statutory amount of Rs. 25,000/- shall be refunded to the Appellant Insurance Company.