

(2011) 09 DEL CK 0501
In the Delhi High Court
Case No : FAO 357 of 2003

New India Assurance Company Ltd.

APPELLANT

Vs

Zarina and Others

RESPONDENT

Date of Decision : 29-09-2011

Acts Referred:

Motor Vehicles Act, 1939 — Section 110A, 92A

Citation : (2011) 09 DEL CK 0501

Hon'ble Judges : Reva Khetrapal, J

Bench : Single Bench

Advocate : Pankaj Seth, for the Appellant;

Final Decision : Allowed

Judgement

Reva Khetrapal, J.—The Appellant, the New India Assurance Company Ltd., seeks to assail the judgment and award of the Motor Accidents Claims Tribunal dated 10.02.2003, whereby a sum of Rs. 1,80,000/- with interest at the rate of 9% per annum for 9 years was awarded in favour of the Respondents No. 1 to 4/claimants and against the Appellant.

2. The essential facts leading to the passing of the aforesaid award are not in dispute. On 09.12.1984, one Fazruddin while going on a bicycle was hit by a truck bearing No. DHL-3096, being driven in a rash and negligent manner by the Respondent No. 5. He sustained grievous injuries to which he succumbed. The legal heirs of the deceased filed a Claim Petition under Sections 110A and 92A of the Motor Vehicles Act, 1939 claiming compensation in the sum of Rs. 2.5 lakhs on account of his untimely demise from the Respondent No. 5-the driver of the offending truck, the Respondents No. 6 and 7-the joint owners of the truck and the Appellant/Insurance Company-the insurer of the offending truck. After conducting an enquiry, the Motor Accidents Claims Tribunal held the Appellant-Insurance Company liable to pay compensation to the Respondents No. 1 to 4 and passed an award as set out hereinabove. Aggrieved by the aforesaid award, the Appellant has preferred the present appeal.

3. The sole contention of Mr. Pankaj Seth, the learned Counsel for the Appellant, is that the Appellant-Insurance Company having filed and proved the copy of the policy pertaining to the truck involved in the accident to show that the liability under the policy was limited to the extent of Rs. 1,50,000/- only, the impugned award is liable to be set aside, inter alia, on the following grounds:

(i) The learned Tribunal erroneously came to the conclusion that no notice had earlier been issued by the Appellant-Insurance Company to the owner to produce the original policy and that it was issued only on 15.01.2003 and, therefore, the production of the policy Ex.RW1/1 at this stage, was of no avail to the Insurance Company.

(ii) The learned Tribunal failed to take into consideration the fact that the owner of the offending vehicle had contested the petition and was aware of the defence of the Appellant that its liability under the insurance policy was limited. It was only when the owners of the truck, that is, the Respondents No. 6 and 7, failed to produce the original policy, that the Appellant was left with no alternative but to serve upon them a notice calling for the production of the original policy so that the Appellant, in the event of their failure to produce the original policy, could adduce secondary evidence by proving the carbon copy of the policy.

(iii) The learned Tribunal did not take into account the judgment of the Five-Judge Bench of the Supreme Court in *New India Assurance Co. Ltd. Vs. C.M. Jaya and Others*, wherein it has been held that the Insurance Company cannot be asked to pay the amount beyond its limit of liability.

(iv) The learned Tribunal erroneously relied upon the decisions of the Supreme Court in *New India Assurance Company v. Krishna Dev* 1998 RLR 387 and *Oriental Insurance Co. Ltd. Vs. Nafeessu and Others* to come to the conclusion that the Appellant-Insurance Company, even if its liability under the policy is limited, is liable to pay the entire amount of compensation.

4. At the outset, it may be stated that the records of the learned Tribunal, requisitioned by this Court, show that the Respondents No. 5, 6 and 7 though they initially appeared before the learned Tribunal and the Respondent No. 6 even filed written statement, subsequently, all the three Respondents chose not to contest the case and were proceeded ex parte in default of appearance. In this Court also, none appeared on behalf of the Respondents to address arguments, though initially upon service of notice upon them the Respondents No. 5 and 7 had entered appearance through counsel.

5. Having perused the records of the Motor Accidents Claims Tribunal, including the insurance policy (Ex.RW1/1), I am of the view that the judgment and award of the learned Tribunal is liable to be set aside to the extent prayed for by the Appellant-Insurance Company. I say so for the reason that a bare glance at the carbon copy of the policy (Ex.RW1/1) affirms the fact that the liability of the Insurance Company in terms of the insurance policy issued by it was limited to Rs. 1,50,000/- only. RW1 Yogesh Chand Gupta, an official from the Appellant-

Insurance Company, appeared in the witness-box to state on oath that he had brought the attested true copy of the policy No. 4518356239/968, which was issued on 18th February, 1984 in the name of M/s. Kamruddin & Johny, Village Chaudullah, Police Station Mehrauli, New Delhi in respect of truck No. DHL-3096. He proved on record the carbon copy of the policy as Ex.RW1/1 and deposed that as per RW1/1, the liability of the Insurance Company was limited to Rs. 1,50,000/- and that the policy had been issued from 18th February, 1984 to 17th February, 1985. The testimony of this witness was not challenged in cross-examination nor any evidence in rebuttal was led.

6. In view of the aforesaid, I am inclined to agree with the contention of the learned Counsel for the Appellant-Insurance Company that the Appellant, who is the insurer, cannot be called upon to indemnify the insured beyond the limits of its liability. I say so on the strength of the judgment of the Supreme Court rendered in the case of C.M. Jaya (supra). While I am not oblivious of the fact that the Supreme Court in a subsequent judgment rendered in Cheruvakkara Nafeessu (supra) has held that the Insurance Company shall, in the first instance, indemnify the insured by making payment of the award amount to the claimants and shall thereafter be entitled to recover the amount paid by it from the insured, I am constrained to hold that the aforesaid judgment is not applicable to the facts of the present case, for the reason that reliance was placed by the Supreme Court in the aforesaid case on the "Avoidance Clause" in the insurance policy in that case. A bare glance at the insurance policy in the present case (Ex.RW1/1) shows that it does not contain any avoidance clause, and thus I have no hesitation in holding that the facts in the aforesaid case are clearly distinguishable from the facts in the present case.

7. Mr. Pankaj Seth, the learned Counsel for the Appellant, has informed me that the award amount has already been paid to the claimants and this fact is also borne out by the records of the learned Tribunal. Accordingly, the only relief which can be granted to the Appellant by this Court at this stage is to afford to the Appellant the right to recover the amount paid by it in excess of its liability of Rs. 1,50,000/- with interest thereon from the Respondents No. 6 and 7, who are the co-owners of the offending truck.

8. The award is accordingly modified to the extent that the Appellant is granted recovery rights to recover the amount exceeding its liability from the insured.

9. The appeal is allowed in the above terms. Parties shall bear their own costs.

10. Records of the Claims Tribunal shall be sent back to the concerned Tribunal forthwith.