
(2008) 03 DEL CK 0029
In the Delhi High Court
Case No : MAC App. No. 606 of 2005

Oriental Insurance Co. Ltd.

APPELLANT

Vs

Ms. K. Leela and Others

RESPONDENT

Date of Decision : 28-03-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13

Citation : (2008) 03 DEL CK 0029

Hon'ble Judges : Kailash Gambhir, J

Bench : Single Bench

Advocate : Tatini Basu, for the Appellant; Jhuma Bose, for the Respondent

Judgement

Kailash Gambhir, J.—The present appeal arises out of the award dated 26th February, 2005 of the Motor Accident Claims Tribunal, Delhi whereby the Tribunal awarded a sum of Rs. 93,000/- along with interest @ 6% per annum as compensation.

2. The facts of the case in nutshell for the proper appreciation of the matter are as follows:

Claimant/respondent No. 1 Ms. Leela, aged 46 years, met with an accident on 24/4/2001 at about 6:35pm at Mini Bus Terminal, Azadpur, within the jurisdiction of P.S. Adarsh Nagar, Delhi. When the respondent No. 1 was in the process of boarding the blue line bus bearing registration No. DL 1PA 1651 and while her one foot rested on the foot board of the front door of the bus, then suddenly driver of the bus, Sh. Braham Prakash recklessly and negligently started moving the bus with a sudden jerk, as a result, she fell down and the left rear wheel of the bus went over the posterior side of her right leg from below knee to the heel causing compound fracture in her left leg apart from degloving of her skin due to which, she remained under prolong medical treatment for about 7 months.

3. A claim petition was preferred by the claimant on 2/1/2002 and the Motor Accident Claims Tribunal, Delhi, made an award on 26/2/2005. Aggrieved with

the said award the present appeal is preferred by the appellant insurance company.

4. Ms. Tatini Basu, counsel for the appellant has assailed the impugned award dated 26/2/2005 on the ground that the learned tribunal erred in not appreciating the fact that on receipt of the summons of the claim petition, the appellant had not only appointed an advocate but had also filed a written statement along with the copy of the cover note, which clearly showed that the vehicle in question was not insured with the appellant at the time of the accident. The accident had occurred at 18:15 hrs whereas the insurance was taken at 21:25 hrs on 24/4/2001, Therefore, clearly the said insurance was taken only after the accident had occurred and thus liability could not be extended to the appellant. The counsel further contended that the trial court failed to appreciate that the advocate of the appellant had expired on 11.4.2004 and the appellant had no knowledge of the same, Therefore, it was unable to appoint another advocate to conduct the case to appear before the tribunal and proceed with the matter. The counsel contended that the trial court failed to appreciate that a copy of the award was sent to the appellant which, was received only in March 2005. Even otherwise, review of the cases take place at the end of the financial year, Therefore, during the said exercise only it came to the knowledge of the appellant that their earlier advocate had expired. Further, the counsel maintained that as soon as the appellant gained knowledge of the demise of the advocate, it immediately appointed another advocate and moved an application for setting aside the ex parte award. The counsel thus submitted that the non-appearance of the appellant was for bona fide reasons. The counsel urged that the tribunal erred in holding that the application filed by the appellant for setting aside the ex-parte award was not supported by any affidavit, when the application was duly supported by an affidavit of a senior officer, who was fully conversant with the facts of the case. The counsel raised the contention that the tribunal failed to appreciate that it is a settled position of law that every case has to be decided on its own merits, after considering the case set up by both the sides. The counsel further submitted that the appellant has been denied an opportunity to lead its evidence and prove that the cover note on which reliance has been placed upon by the respondent was fabricated and manipulated which could be clearly seen but the tribunal has overlooked and ignored the same. The counsel submitted that the time of 21:25 hrs has been manipulated as 14:25 hrs by the respondent and the copy of the cover note placed on record by the appellant was also not considered by the tribunal. The counsel further urged that the learned tribunal failed to appreciate that the contract of insurance is a contract of good faith. Also since the insurance was taken at 21:25hrs whereas the accident occurred at 18:15hrs on the same date, Therefore, the liability of the appellant cannot be said to be extended for the period even prior to the issuance of the same and even otherwise, the contract of insurance found on fraud is no contract in the eyes of law and so no liability could be fastened on to the appellant on the basis of the same.

5. Per Contra, Ms. Jhuma Bose, counsel for the respondent has refuted the contentions of the counsel for the appellant. The counsel urged that the tribunal has made just, reasonable, fair and equitable award and the same does not require any interference by this Court. The counsel urged that the offending vehicle was duly insured at the time of accident. The counsel submitted that the tribunal had recorded in its order dated 28/4/2005 that due to the non-appearance of the appellant on various dates, a Court notice was issued to the appellant company, which was duly served upon the appellant company on 11/12/2004 and on the non-appearance of the appellant, the ex-parte award was passed, Therefore, the trial court rejected the application for setting aside of the ex-parte award made by the appellant later on. Also, it is incorrect that the appellant gained knowledge of the death of the advocate on review of the files at the end of the financial year. It was pointed out by the counsel that the appellant failed to bring anything on record to prove date of knowledge of ex-parte award or any internal communication regarding the death of the advocate who conducted the case on their behalf. Further, the counsel contended that the said application for setting aside of the ex-parte award was also defective in as much as the same was not filed, signed and verified by a competent person of the Appellant Company as would be evident from the observations in the order dated 28/4/2005 by the tribunal. The counsel urged that the appellant has suppressed material facts from the court, Therefore, the appellant is disentitled from claiming any relief whatsoever from the court and consequently, the present appeal is liable to be dismissed. The counsel further urged that the allegation that the cover note was fabricated and manipulated is a concocted story and is merely a device to prolong the litigation and the sufferings of the answering respondent. The counsel also submitted that the trial court after duly considering the evidence on record only reached to the conclusion that the offending vehicle was insured for the period commencing from 24/4/2001 to 23/4/2002. The cover note filed on record was also duly examined by the Tribunal and thus, it had recorded that the policy was taken at 14:25 hrs, Therefore, the contention of the appellant on this aspect is challenged as incorrect and without any merit.

6. I have heard counsel for the parties and have perused the record.

7. The impugned ex-parte award was passed by the Tribunal on 26.2.2005. Initially the case was being contested by the appellant through Shri N.D. Bhardwaj, Advocate who had even filed the written statement on behalf of the appellant company. As per the appellant the said advocate had expired on 11.4.2004 and due to his demise the case of the appellant insurance company could not be contested before the Tribunal. In the application moved by the appellant under Order 9 Rule 13 CPC, the stand was taken by the appellant that in the first week of March 2005, the said fact of case not being entrusted to a new advocate after the death of Shri N.D. Bhardwaj, Advocate came to the knowledge of the concerned official who was reviewing all the files pertaining to the concerned office. Thereafter, steps were taken to engage the services of another panel lawyer for taking necessary steps to get the ex-parte award set

aside. Since the said application of the appellant was dismissed vide order dated 28.4.2005, Therefore, the first hurdle which stands in the way of the appellant is to first satisfy this Court regarding any illegality or infirmity in the said order dated 28.4.2005. The Tribunal in the impugned award has observed that nobody from the side of the appellant insurance company appeared on 18.10.2004 and thereafter court notice dated 1.12.2004 was directed upon the insurance company which was duly served for 11.12.2004 on which date due to non-appearance of the insurance company ex-parte proceedings were directed against the company. Thereafter, the matter was listed for evidence of the claimant/respondent on 21.12.2004, 13.1.2005, 18.2.2005 and finally vide order dated 26.2.2005 the impugned judgment-cum-award was passed.

8. Counsel for the appellant has disputed the above position and hence contended that the court notice was never sent to the insurance company but the same was sent to the counsel which too was returned back with the remarks that the address of the advocate was not complete.

9. I have perused the trial court record and found the contention of the counsel for the appellant to be correct. The Tribunal has wrongly observed that the court notice was served upon the insurance company while the fact borne out from record shows that no such court notice was served upon the appellant insurance company but the same was sent to the insurance company through its advocate. The insurance company in its appeal has also stated that Mr. N.D. Bhardwaj, Advocate had expired on 11.4.2004 and due to his demise the insurance company could not keep track of the case and it is only at the time of review of the cases by the concerned official, non representation on behalf of the insurance company could be noticed. In my view, the appellant insurance company has given sufficient grounds for seeking setting aside of the ex-parte order. Although, the public sector undertakings and its officials are expected to remain active, vigilant and diligent in pursuing their cases but in reality it is seen that these public officials invariably are found lacking in properly and effectively pursuing their matters. Nevertheless, death of an advocate who was representing the insurance company is in itself a strong circumstance to give the benefit of indulgence to the insurance company. The insurance company was not totally negligent as it had already presented its defense by filing the written statement. The appellant insurance company has taken the defense that respondent had fabricated the cover note and there was no insurance existing at the time of the accident which had occurred on 24.4.2001 at 18:15 hours. The contention of the counsel for the appellant is that the insurance was taken on the same date but the time was manipulated as 21:25 hours so as to take advantage of the insurance cover of the said accident.

10. Without commenting upon the merits of this contention, the present matter is remanded back to the Tribunal for fresh trial on its merits. Since due to ex-parte proceedings and consequent filing of the present appeal, enormous delay has taken place, Therefore, in such circumstance, the Tribunal shall make every

endeavor to complete the entire proceedings after remand within a period of six months and in any case not later than a period of one year. The amount of award as already deposited by the appellant insurance company shall be kept in a fixed deposit for a period of one year to ensure for the benefit of successful party.