
(2012) 08 DEL CK 0423
In the Delhi High Court
Case No : Mac. App. 562 of 2009

Oriental Insurance Company Ltd.

APPELLANT

Vs

Arvind Kumar and Others

RESPONDENT

Date of Decision : 06-08-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 12 Rule 8
Evidence Act, 1872 — Section 114, 45, 47, 61, 62

Citation : (2012) 08 DEL CK 0423

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

Bench : Single Bench

Advocate : Manjusha Wadhwa, for the Appellant;

Final Decision : Dismissed

Judgement

G.P. Mittal, J.—The Appellant Oriental Insurance Company Limited takes exception to a judgment dated 29.04.009 passed by the Motor Accident Claims Tribunal (the Claims Tribunal) whereby a compensation of Rs. 1,50,353/- was awarded in favour of the First Respondent for having suffered injuries in a motor vehicle accident which occurred on 11.09.1993. There is a twin challenge to the judgment:-

(i) Firstly, it is urged that the award cannot be sustained as the driver of the truck No. RJ-14G-1405, because of whose negligence the accident allegedly occurred, was not impleaded as a party and, therefore, the owner and consequently the Appellant Insurance Company are not liable.

(ii) Second, the Insurance Company successfully proved the breach of the terms of policy by examining R3W10 Ashok Khanna and proving report Ex.R3W1/7 that the licence held by the driver was fake. Thus, the Appellant Insurance Company could not have been saddled with the liability to pay the compensation. In any case, the Appellant was entitled to recovery rights against the owner.

2. It may be noticed that the Claim Petition was instituted in January, 1994.

Amrit Singh, driver of the offending vehicle was very much impleaded as the First Respondent in the petition. The driver was resident of Village Bullam, P.S. Sadar Ambala Cantt., District Ambala, Haryana. Summons of the Petition were repeatedly sent to him by registered post as well as by ordinary process. The summons sent by ordinary process appears to have not been returned, whereas summons sent by registered post were returned back with the report that such a person was not residing in the village. It was only on 10.07.2003 (after more than nine years) that the Counsel for the Claimant (the First Respondent herein) made a request for deletion of the name of the driver as he was not being served and was not a necessary party.

3. The Claims Tribunal dealt with the issue of proving negligence in great detail. Paras 10 to 16 of the report are extracted hereunder:-

10. PW-1, the petitioner deposed of having met with an accident on 11/09/93 at 7 a.m while going on bicycle, at the corner of Government Press, Maya Puri when truck bearing No. RJ-14G-1405 while overtaking his cycle dragged him with his cycle. Even despite raising alarm by the public, the truck driver did not stop the truck which kept dragging him for 10/15 meters. The truck driver and the police took PW-1 to DDU Hospital where he was admitted for 3 days. From there he was shifted to ESI Hospital. The left foot of the petitioner was crushed in the accident.

11. Ld. Counsel for Insurer relied upon the case of The Oriental Insurance Company Limited Vs. Meena Variyal and Others, contending that since the driver of the vehicle was necessary party, in his absence the claim petition deserves dismissal.

12. Careful perusal of above said authority reveals that therein was in controversy the fact whether at the time of accident the Regional Manager of the owner of the vehicle was himself driving the vehicle in question or the driver employed was driving.

13. Ld. Counsel for petitioner relied upon the cases (1) Machindranath Kernath Kasar Vs. D.S. Mylarappa and Others, ; (2) New India Assurance Co. Ltd. & Anr Vs. Sabitri Devi & Ors, reported in III (2007) ACC 236 ; (3) Simon Pathrose Vs. United India Insurance Co. Ltd. and Another, (4) Madhavan Pillai Vs. K.S.R.T.C. Ltd., ; (5) Navyug Oil and Dal Mills Vs. Nathi Devi and Others, ; (6) Rachhpal Singh and others Vs. Bhagat Ram and another, ; (7) Manager, National Insurance Co. Ltd. Vs. Koya Ratnam and Others, ; (8) Biju K. Francis Vs. K.S.R.T.C., ; (9) Oriental Insurance Co. Ltd. Vs. Raghunath Srichandan and Others, ; (10) Malati alias Mala alias Mita Goon and Ranadhir Goon and Another Vs. Union of India (UOI), submitting non impleadment of the driver would not be fatal in the present case.

14. The factual matrix of this case is entirely different to the facts of the cases herein above cited and it is revealed on their perusal that it is not the case here, where the petitioner at the outset has not impleaded the driver Amrit Singh as

respondent. The chequered history of the case remains that despite several efforts done by the petitioner, the driver initially impleaded as respondent No. 1 Amrit Singh, could not be served upon and his summons through Registered covers were received back with report of no such named driver with such given parentage being there in the given village. Even for seeking production of the documents including the valid and effective driving licence as on the date of accident, the Insurer through counsel served upon a notice u/o 12 R 8 CPC, Ex. R3W1/1 & 2 on said driver vide postal receipts Ex.R3W1/3 and despite service of said registered notice, the said driver did not turn up in this matter. The notice also mentioned the fact that he was impleaded as the driver of the offending vehicle. In this back drop of the facts, it can be said that the said driver Sh. Amrit Singh was having the notice of the pendency of these proceedings. FIR No. 183/93, P. S. Maya Puri Ex. P1, lodged by the petitioner/ PW-1 finds mention of the fact of injuries sustained by the petitioner by the said offending vehicle, driven by driver Sh. Amrit Singh.

15. The driver of the offending vehicle having the notice of the pendency of the proceedings, in the present set of facts had not turned up in this matter. In the case of Machindranath Kernath Kasar (Supra), the Apex Court had held that the driver was aware of the pendency of the proceedings but did not file any appeal to get rid of finding of negligence against him despite the fact that he was not a party to the proceedings. It was also held that the finding on negligence would operate against him in his claim petition. Herein also despite being aware of the pendency of the proceedings, the said driver did not join the proceedings. Deletion of the driver from the array of the parties, accordingly cannot be said to be fatal to the case of the petitioner in the present set of facts.

16. The version of the petitioner finds corroboration from the version borne in the aforesaid first information report. There is nothing in the testimony of P" W-1 to discredit him or disbelieve on the count of his receiving injuries due to rashness and negligence on the part of the driver of the offending vehicle and having caused the accident. Even the owner of the said vehicle, the insured did not step into the witness box nor led any evidence in contrary to the version of the petitioner.

4. Learned Counsel for the Appellant places reliance on Machindranath Kernath Kasar Vs. D.S. Mylarappa and Others, in support of the proposition that without impleading the driver, the Claims Tribunal could not have proceeded to pass an award against the Appellant.

5. The reliance is misplaced.

6. The Supreme Court referred to the decision of various High Courts adopting divergent views one holding that the driver was a necessary party and the other that the driver was not a necessary party.

7. In Badri Narain Prasad Vs. Anil Kumar Gupta and Another, the argument that non-joinder of the driver was fatal to the Claim Petition, was rejected by a

Division Bench of Patna High Court. It was held that since the driver and the owner are joint tortfeasors, it was not necessary to sue the driver. Para 13 of the report is extracted hereunder:-

13. It was argued rather vehemently by Mr. S. C. Ghose, learned counsel for respondent No. 1, that the application before the Claim Tribunal was not maintainable as the driver of the tempo in question had not been a party to the case. It was submitted that if respondent No. 1 was to be saddled with the liability for the rash and negligent driving on the part of the driver who was in his employment, such liability could be fastened only when the driver concerned had been made a party to the proceeding, who would have been at liberty to refute the case made out against him in absentia. The non-joinder of the driver Chandrika Lal, according to learned counsel for respondent No. 1, was fatal to the appellant's claim application before the Tribunal. This argument proceeds, in my view, upon a misconception of the law with regard to vicarious liability or in relation to the law of joint tortfeasors. The complete answer to the point raised by Mr. Ghose can well be given in the words of Winfield on Tort, 7th Edition, Chap. 29, at page 762 -

Thus, I am liable for the torts of my servant committed in the course of his employment, and generally I alone am sued because I alone am worth suing, but of course he is in general personally liable and he can be sued separately; or, as the law regards us as joint tortfeasors, we can be sued jointly. It is no excuse for me that I may have forbidden him to do the act; so long as he does it in the course of his employment we are joint tortfeasors." And again, at page 764 it has been said-

The liability of joint tortfeasors is joint and several, each may be sued alone, or jointly with some or all the others in one action; each is liable for the whole damage, and judgment obtained against all of them jointly may be executed in full against any one of them.

It is thus futile to argue that in the absence of the driver Chandrika Lal, the claim application of the appellant is not maintainable.

8. Similar view was taken by Andhra Pradesh High Court in Andhra Pradesh State Road Transport Corporation v. T. Yashoda, 1996 (4) ACJ 1133 (AP); Allahabad High Court in Babu Singh Vs. Smt. Champa Devi and Others, ; and the Bombay High Court in Gaurabai and Another Vs. Jagsih Prasad and Another, .

9. In Machindranath, the Supreme Court noticed a Division Bench judgment of Karnataka High Court in Patel Roadways and Another Vs. Manish Chhotalal Thakkar and Others, where it was held that the driver was not a necessary party. Para 20 of the report in Patel Roadways is extracted hereunder:-

20. The position that clearly emerges is as follows: (a) Neither the Motor Vehicles Act nor Rules thereunder require the driver to be impleaded as a party to the claim petition, (b) Under Law of Torts, the owner and driver of the Motor Vehicle

being joint tortfeasors, who are jointly and severally liable for the negligence of the driver, the claimant can sue either the owner or the driver or both. But, whether driver is impleaded or not, a owner (master) can be made vicariously liable for the acts of his driver (servant), only by proving negligence on the part of the driver (servant), (c) Therefore a claim petition can be maintained against the owner and insurer of the vehicle causing the accident, without impleading the driver. However proving the negligence of the driver is a condition precedent to make the owner vicariously liable for the act of the driver, (d) But where the driver is not impleaded as a party, no decree or award can be made against him. A driver can be held liable personally only when he is impleaded as a party and notice of the proceedings is issued to him.

10. In *New India Assurance Company Ltd. Vs. Smt. Suman Bhaskar Pawar, Dinesh Pawar, Ramesh Pawar and Subhash Shinde*, , the Bombay High Court referred to *Machindranath* and held that the driver of the offending vehicle is not a necessary party. However, no decree or award can be made personally against the driver of the offending vehicle unless he is involved in a Claim Petition as a party.

11. In *Machindranath* it was not laid down as a proposition that the driver of a vehicle was a necessary party. It was stated that he was a proper party.

12. In the instant case, as stated above, the driver was impleaded as a party but he did not come forward to contest the proceedings as he was not available at the stated address. The owner also did not come forward to contest the proceedings. It was in these circumstances that the First Respondent preferred to delete the name of the driver after making an attempt to serve him for nine years. From the First Respondent's testimony as PW-1 which remained un rebutted, it was established that the accident was caused on account of rash and negligent driving of truck No. RJ-14G-1405 by Amrit Singh. Thus, it cannot be said that the driver of the vehicle was not impleaded as a party in the Application.

13. The first contention raised on behalf of the Appellant is, therefore, rejected.

14. It is urged by the learned counsel for the Appellant that the notices under Order XII Rule 8 CPC Ex.R3W-1/1 and R3W1/2 were sent to the driver and the owner to produce the driving licence. The Appellant obtained a report from its investigator which was proved as Ex.R3W-1/7. The Claims Tribunal erred in rejecting the report issued by the Cuttack Authority. The learned counsel for the Appellant places reliance on *National Insurance Co. Ltd. Vs. Geeta Bhat and Others*, and urges that in similar circumstances, a report issued by the Alwar Transport Authority was taken into consideration by the Supreme Court. It is true that in the abovementioned case the Supreme Court referred to the report of the investigator. It was, however, not laid down as a preposition of law that the report obtained by an Investigator without formal proof is admissible in evidence.

15. Section 67 of the Indian Evidence Act, 1872 (the Evidence Act) lays down the

mode of proof of a document, which is extracted hereunder:-

67. Proof of signature and handwriting of person alleged to have signed or written document produced -

If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his hand writing.

16. R3W1 examined by the Appellant Insurance Company did not say that the report on the reverse of the letter Ex.R3W1/7 contains signatures of the concerned Licensing Authority or any responsible official. Any document including a public document has to be proved as provided u/s 67 of the Evidence Act.

17. The question of proof of a Sanction Order signed by the Sanctioning Authority i.e. Secretary (Medical) Delhi Administration came up before a learned Single Judge of this Court in State Vs. Brij Mohan, where it was held as under:-

(8) Section 61 of the Evidence Act lays down that the contents of a document may be proved either by primary or by secondary evidence. Section 62 thereof defines primary evidence as meaning the document itself produced for the inspection of the court. In other words, the primary documentary evidence of a transaction (evidenced by writing) is the document itself which should be produced in original to prove the terms of the contract/ transaction, if it exists and is obtainable. Since the original sanction was admittedly placed on record by the prosecution, the requirements of this provision stood satisfied and the question of any secondary evidence for proving the contents of the sanction as such did not arise. Primary evidence in the context of oral evidence, however, means an oral account of the original evidence i.e. of a person who saw what happened and gives an account of it recorded by the court. That question does not appear to have arisen in the instant case because the matter was still at the stage of proof of the consent accorded by the Secretary (Medical). Since Sections 61 to 66 of the Evidence Act deal with the mode of proving the contents of the documents, either by primary evidence or by secondary evidence, I need not dwell upon the same in view of the original document having been placed on the record.

(9) Then comes the most important question viz. the genuineness of a document produced in evidence i.e. is a document what it purports to be and this is dealt with in Sections 67 to 73 of the Evidence Act. Section 67 refers to documents other than documents required by law to be attested. It simply requires that the signature of the person alleged to have signed a document (i.e. the executant) must be proved by evidence that the signature purporting to that of the executant is in his handwriting. Further it requires that if the body of the document purports to be in the hand-writing of someone, it must be proved to be in the hand-writing of that person. However, Section 67 does not in terms prescribe any particular mode of proof and any recognised mode of proof which

satisfies the Judge will do. Thus, the execution/ authorship of a document may be proved by direct evidence i.e. by the writer or a person who saw the document written and signed or by circumstantial evidence which may be of various kinds, for example, by an expert or by the opinion of a non-expert who is acquainted with the hand-writing in any of the ways mentioned in Explanation to Section 47 or even by comparison etc. (See Sections 45, 47, 73 & 90 of the Evidence Act).

18. The question of proof of a public document came up before Bombay High Court in C.H. Shah Vs. S.S. Malpathak and Others, , where it was held as under:-

4..... In all cases of secondary evidence u/s 65 read with Section 63 of the Evidence Act when a copy or an oral account of a document is admitted as secondary evidence, the execution of the original is not required to be proved but if the original itself is sought to be tendered it must be duly proved and there is no reason for applying a different rule to public documents. Secondly, in the case of a certified copy, before a presumption of its genuineness can be raised u/s 79, as laid down by the Supreme Court in Bhinka's case already referred to above it must be shown that the certified copy was executed substantially in the form and in the manner provided by law. There would, therefore, be a check or safeguard in so far as the officer certifying it in the manner required by law would have to satisfy himself in regard to the authenticity of the original and in regard to the accuracy of the copy which he certifies to be a true copy thereof. On the other hand if the original of a public document is to be admitted in evidence without proof of its genuineness, there would be no check whatever either by way of scrutiny or examination of that document by an officer or by the Court. The third and perhaps the most important reason, for not accepting Mr. Shah's argument on the point which I am now considering is that neither Section 67 nor Section 68 of the Evidence Act which lay down that the signature and the handwriting on a document must be duly proved do not make any exception in the case of public documents. In view of the provisions of the said section all documents whatever be their nature must be therefore be proved in the manner provided by Section 45, 47 or 73 of the Evidence Act.....

5. The only question which remains for consideration is whether a presumption of the genuineness of the original of a public document should be drawn by reason of Illustration (e) to Section 114 of the Evidence Act to the effect that official acts have been regularly performed. It is no doubt true that it has been held by a Division Bench of this Court in the case of East India Trading Co. Vs. Badat and Co., that Section 114 of the Evidence Act is wide enough to permit the Court to raise a presumption not only with regard to oral evidence, but also with regard to documentary evidence. It may be mentioned that the decision of the Division Bench in the said case was reversed on appeal by the Supreme Court by a majority Badat and Co. Vs. East India Trading Co., , but in the judgment of the majority the Supreme Court has not referred to the point mentioned above. Apart from the undesirability of taking a view which would let in any and every

document tendered by Government in suits to which it is a party without proof of genuineness, in my opinion, no presumption u/s 114 can be drawn in view of the mandatory and unqualified term of Sections 67 and 68 of the Evidence Act. Section 114 which to put it in popular language, merely empowers the Court to use its commonsense, cannot be used to contravene an express provision of the Act itself. I, therefore, hold that if the original of a public document is sought to be tendered in evidence, it must be proved in the manner required by law.....

19. Thus, the certificate purported to be issued by a Transport Authority could not be admitted into evidence unless signatures thereon were proved by examining a witness.

20. It is true that there are some difficulties in summoning the witnesses from the registering authorities. This aspect was taken into consideration while framing the Delhi Motor Accidents Claims Tribunal Rules, 2008. Under Rule 7 it has been provided that the submission of report as per Form "D" (provided in the Rules) by the registering authority would be made admissible without any formal proof. Rule 7 is extracted as under:

7. Presumption about reports- The contents of reports submitted to the Claims Tribunal in Form "A" and Form "D" by investigating police officer and concerned registering authority respectively, and confirmation under clause (b) of rule 5 by the insurance company shall be presumed to be correct, and shall be read in evidence without formal proof, till proved to the contrary.

21. Since the report of the Transport Authority was not proved in accordance with law, the same is not admissible in evidence. There is no error or infirmity in the impugned judgment.

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

23. No costs.

24. The statutory deposit of Rs. 25,000/- be refunded to the Appellant Insurance Company. Pending Applications stand disposed of.