

(2012) 10 DEL CK 0108
In the Delhi High Court
Case No : MAC App. 74 of 2004

Smt. Shakuntala Devi and Others

APPELLANT

Vs

Rakesh Kumar and Others

RESPONDENT

Date of Decision : 31-10-2012

Acts Referred:

Evidence Act, 1872 — Section 63, 65, 66, 74
Motor Vehicles Act, 1988 — Section 166

Citation : (2012) 10 DEL CK 0108

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

Bench : Single Bench

Advocate : Peeush Sharma, for the Appellant; Mohan Babu Agarwal, with Mr. Rakesh Chand Agarwal, for R-2, for the Respondent

Final Decision : Allowed

Judgement

G.P. Mittal, J.—This Appeal is directed against a judgment dated 31.10.2003 passed by the Motor Accident Claims Tribunal (the Claims Tribunal) whereby a compensation of Rs. 1,50,000/- was awarded in favour of the Appellants for the death of Joginder Singh who died in a motor vehicle accident which occurred on 28.06.1984. At the same time, the Claims Tribunal held that the liability of the Insurance Company is limited to Rs. 20,000/-. The owner of the taxi was made liable to pay the rest of the compensation. In the absence of any Appeal by the driver, owner or the Insurer, the finding on negligence has attained finality.

2. The following contentions are raised on behalf of the Appellants:-

(i) The deceased was earning Rs. 3,000/- per month. The Claims Tribunal erred in awarding compensation on assuming the deceased's income to be Rs. 750/- per month.

(ii) The compensation awarded towards non-pecuniary damages was on the lower side.

(iii) The Claims Tribunal erred in holding that the liability of the Insurance

Company was limited to Rs. 20,000/-.

(iv) The Insurance Company failed to produce any reliable evidence to show that its liability was limited to Rs. 20,000/-. Thus, the Insurance Company's liability shall be deemed to be unlimited.

3. A Claim Petition u/s 166 of the Motor Vehicles Act, 1988 (the Act) was filed by the Appellants alleging that the deceased was a taxi driver and owned a taxi. It was stated that he was earning Rs. 900/- per month. During evidence PW-1 who was an eye witness to the accident and was co-taxi-driver stated that Joginder Singh was earning Rs. 1,000/- to Rs. 1500/- per month from his taxi business. PW-3 Smt. Shakuntla Devi, deceased Joginder Singh's widow produced RC Ex. PW-3/2 to prove that the deceased owned a taxi. She stated that after the death of her husband, the taxi which was financed by New Bank of India had to be sold.

4. The Minimum Wages of a skilled worker in the year 1984 were Rs. 472/- per month. The deceased, however, owned a taxi and the income claimed in the Claim Petition was only Rs. 900/- per month. A person who owned a taxi and would drive it himself would be in a position to earn about Rs. 900/- per month in the year 1984. Any income in the AY-1985-86 beyond Rs. 18,000/- was subject to payment of income tax. In the circumstances, in my view the deceased's income should have been taken as Rs. 900/- per month as claimed in the Petition.

5. There was no evidence with regard to deceased's future prospects. Thus, there should be an addition of 30% towards inflation/future prospects on the strength of the judgment of the Supreme Court in Santosh Devi Vs. National Insurance Company Ltd. and Others, .

6. The number of dependents including the deceased's father were seven. As per Smt. Sarla Verma and Others Vs. Delhi Transport Corporation and Another, subject to evidence to the contrary, father is not to be considered as a dependent. Considering the number of dependents to be six, one-fourth was required to be deducted towards personal and living expenses. The appropriate multiplier at the age of 27 would be 17.

7. The loss of dependency thus comes to Rs. 1,79,010/- ($900/- + 30\% \times \frac{3}{4} \times 12 \times 17$).

8. Keeping in view that this accident occurred in the year 1984, the Appellants were further entitled to a sum of Rs. 10,000/- towards loss of love and affection; Rs. 10,000/- towards loss of consortium as awarded by the Claims Tribunal and a sum of Rs. 5,000/- each towards funeral expenses and loss to estate. The overall compensation thus comes to Rs. 2,09,010/-.

9. The compensation stands enhanced by Rs. 59,010/- which shall carry interest @ 8% per annum from the date of filing of the Petition till its payment.

LIABILITY

10. Respondent Oriental Insurance Company Limited in its written statement claimed that its liability was limited to Rs. 20,000/-. During evidence, the Insurance Company examined RW-1 H. Mehan, Assistant Divisional Manager. He sought to prove a copy of the insurance policy as Ex. RW-1/1 in support of the plea that its liability was limited to Rs. 20,000/-. Admittedly, the Insurance Company did not seek the insured, that is, Respondent No. 1 herein, to produce the original insurance policy.

11. 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.

12. Since the Insurance Company did not serve any notice upon the First Respondent to produce the original insurance policy, it was not entitled to lead secondary evidence. Moreover, copy of the insurance policy Ex. RW-1/1 cannot be taken as secondary evidence in respect of the original insurance policy as per the meaning of Section 63 of the Evidence Act. 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 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.

13. RW-1 H. Mehan simply stated that Ex. RW1/1 was the carbon copy of the policy. He did not state a word that the carbon copy was prepared while processing the original to ensure accuracy of the copy. Thus, the copy of the insurance policy cannot be looked into as secondary evidence.

14. In the absence of proof of insurance policy, the Appellant has failed to prove that its liability was limited to Rs. 20,000/-. 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....

15. 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.

16. Thus, the Insurance Company's plea that its liability was limited to Rs. 20,000/- cannot be accepted. The Claims Tribunal erred in holding that the Insurance Company's liability was only to the extent of Rs. 20,000/-.

17. Only a sum of Rs. 20,000/- was paid to the Claimants by the Respondent Insurance Company. Rest of the compensation along with interest as stated earlier shall be deposited with the Claims Tribunal within six weeks.

18. This accident took place 28 years ago. All the children must have attained majority. Ten percent of the compensation now payable shall be paid to each of the Appellants No. 2 to 7. Rest 40% shall be paid to the First Appellant.

19. The compensation deposited shall be released to the Appellants No. 2 to 7 on deposit. 50% of the compensation awarded to the First Appellant shall be held in fixed deposit for a period of two years. Rest shall be released to her on deposit.

20. The Appeal is allowed in above terms. Pending Applications stands disposed of.