(2008) 02 DEL CK 0160

In the Delhi High Court

Case No : CM No. 859 of 1983 in FAO No. 85 of 1983

The New India Assurance Co. Ltd. APPELLANT

Vs

Shri Mohinder Dev and Others RESPONDENT

Date of Decision : 20-02-2008

Acts Referred:

Citation : (2009) ACJ 1208 : AIR 2008 Delhi 116

Hon'ble Judges : Kailash Gambhir, J

Bench : Single Bench

Advocate : S.K. Paul, for the Appellant; V.P. Chaudhary and Ninjya Chaudhary, for the Respondent

Final Decision : Dismissed

Judgement

Kailash Gambhir, J.—This order shall dispose of the application moved by the appellant under Order 41 Rule 27 read with Section 151 CPC. The appellant has invoked the said provision of law so as to bring on record carbon copy of the original insurance policy. The only reason given by the appellant in the application is that the appellant insurance company could not file the carbon copy of the insurance policy before the Tribunal as the same was misplaced during shifting of the records of the Branch Office of the appellant insurance company at Malout to its Divisional Office and despite due diligence and best efforts the same could not be traced out. It has been further stated that true copy of the policy in question was proved on record as Exhibit RW1/A and carbon copy of the same has now been traced out after great efforts have been put by the appellant insurance company to trace the same from its old records. The application filed by the appellant is duly supported by an affidavit of Mr. M.M. Dani, Administrative Officer of the appellant insurance company.

2. The said application has been opposed by respondents No. 3 to 5. In the reply submitted by these respondents serious objection has been taken on the filing of the carbon copy now at this appellate stage when before the Tribunal the appellant failed to take any such steps to prove the insurance policy. Other

grounds for objection taken by these respondents are that the appellant did not serve any notice under Order 12 Rule 8 of the CPC so as to seek production of the original policy from the insured. The appellant made a wrong attempt to prove the insurance policy by moving an application under Order 11 Rule 14 read with Section 151 CPC that too at the stage when the appellant was in the process of examining its witnesses and at that point of time sought direction from the Court to produce the original policy. Rejecting the said application of the appellant the Tribunal held that since the carbon copy of the policy of the insurance was available with the appellant insurance company and the same having not been produced or proved by the appellant, Therefore, there was a failure on the part of the insurance company to prove its liability being limited to Rs. 50,000/- only. The appellant also failed to produce the best witness so as to prove the true copy of the policy. One Mr. S.S. Sharma, who had attested the true copy of the policy did not enter the witness box while one Mr. Parveen Wadhawan, who was an Assistant with the Legal Department of the appellant insurance company appeared as RW-1, who failed to prove even the signatures of Mr. S.S. Sharma on the true copy of the policy. The said witness was also never posted at Malout office in District Jalandhar, from where the said policy in question was issued. No Explanation was also given by the appellant insurance company as to why the carbon copy, which was available in the Mechanization Department of the insurance company at New Delhi, was not traceable, even if the other carbon copy got misplaced during the shifting of the records from branch office to the Divisional office. Even office copy of the premium receipt which could have thrown light to show that no extra premium had been received by the insurance company so as to cover any extra liability, was also not proved on record. Subject to these objections these respondents have further opposed the said application on the ground that no details in the application have been given as to how the carbon copy of the original policy got traced at this stage, no particulars as to when the office was shifted, who made the efforts to trace the said carbon copy and from where it was traced have been detailed in the application. Not only this, no Explanation has been given as to what happened to the carbon copy, record of which is maintained at the Mechanization Department of the appellant insurance company. Even no Explanation has been offered for filing such vital document at such a belated stage. Above all, the appellant has failed to show exercise of due diligence in not producing the said copy of the insurance policy at the appropriate stage. The respondents have thus prayed that there is no ground to entertain the said application and the same merits dismissal.

3. I have heard learned Counsel for the parties and have perused the record. The only ground taken by the appellant in the present application is that the appellant insurance company could not produce the carbon copy of the insurance policy as the records of their branch office at Malout wherefrom insurance policy was issued, were being shifted to its divisional office. It has been further averred that the carbon copy of the policy has now been traced by the appellant

insurance company after putting great efforts to trace the said documents from old records. The appellant has not given any detail as to when the branch office at Malout was shifted to divisional office and as to when the said carbon copy of the policy got traced from the old records and from which office the same was traced out. The averments made in the application are totally vague and unspecific and in a most casual manner, the application under consideration has been made. There cannot be two opinions that the insurance policy is a very vital document to be proved by the insurance company and authenticity of such document ordinarily cannot be in dispute but however, at the same time the insurance company cannot be permitted to file the same at such a belated stage unless the delay on the part of the insurer has been fully explained with sufficient and cogent reasons. The main defense of the appellant before the tribunal was that it had limited liability and for proving the said fact it was imperative on the part of the appellant to have proved the carbon copy of the insurance policy in accordance with law. On the failure of the appellant to prove the insurance policy before the tribunal, the appellant cannot be permitted to fill the lacuna and gaps at this belated stage, more particularly when the appellant has failed to give any plausible Explanation for filing the carbon copy of the policy at this stage. It is matter of record that appellant did not send any notice under Order 12 Rule 8 CPC to the owner of the offending vehicle for production of the original insurance policy and also failed to offer any Explanation as to why the carbon copy could not be produced from the Mechanization Department of the insurance company where also the parallel records are maintained.

4. Order 41 Rule 27 clearly mandates that the party to an appeal can be permitted to produce additional evidence, whether oral or documentary, if a party seeking such a relief qualify the circumstances contemplated in Clauses (a), (aa) and (b) of the said provision. For better appreciation of the matter, Order 41 Rule 27 is reproduced as under:

27. Production of additional evidence in Appellate Court-(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if-

(a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have admitted, or

(aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or

(b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to produce judgment, or for any other substantial cause, the Appellate Court may allow such evidence or document to be produced, or witness to be examined.

5. The exercise of due diligence, both when such evidence was either not within

his knowledge or could not be produced at the relevant stage and also when the same is sought to be produced at the belated stage is required to be explained by the party invoking the said provision of Order 41 Rule 27 CPC. In the present case, the appellant has failed to disclose such exercise of due diligence on its part. Therefore, I do not find any merit in the present application and the submissions made by the counsel for the appellant. There is no merit in the present application Therefore, the same is hereby dismissed.

