

(2009) 08 DEL CK 0036
In the Delhi High Court
Case No : F.A.O. No. 56 of 1989

United India Assu. Co. Ltd.

APPELLANT

Vs

Prabha Gulati and Others

RESPONDENT

Date of Decision : 03-08-2009

Acts Referred:

Constitution of India, 1950 — Article 12
Evidence Act, 1872 — Section 95

Citation : (2009) 08 DEL CK 0036

Hon'ble Judges : J.R. Midha, J

Bench : Single Bench

Advocate : Udit Kumar Chaturvedi fo A.K. De, for the Appellant; V.P. Choudhary Nitinjya Choudhary and Sushma, for the Respondent

Judgement

J.R. Midha, J.—The appellant has challenged the award of the learned Tribunal whereby compensation of Rs. 1,92,000/- has been awarded to claimants/respondents No. 1 to 5.

2. The accident dated 22nd December, 1982 resulted in the death of Rajesh Kumar Gulati. The deceased was survived by his widow, one minor son aged 6 years, one minor daughter aged 3 years and parents who filed the claim petition before the learned Tribunal.

3. The deceased was aged 34 years at the time of the accident and was carrying on the business of sale and purchase of motor vehicles on commission basis under the name and style of M/s Satya Sai Finance Company earning Rs. 2,500/- per month. The learned Tribunal took the income of the deceased to be Rs. 1,200/- per month and deducted Rs. 400/- per month towards the personal expenses of the deceased and took the dependency of the claimants to be Rs. 800/- per month. The learned Tribunal applied the multiplier of 20 to compute the loss of dependency to be Rs. 1,92,000/-. No compensation has been awarded towards loss of love and affection, loss of consortium, loss of estate and funeral expenses.

4. The appellant has challenged the impugned award on the sole ground that the liability of the appellant is limited to Rs. 50,000/- only. Claimants/respondents No. 1 to 5 have filed the cross-objections seeking enhancement of the award amount.

5. The learned Counsel for the appellant submits that the liability of the appellant under the Insurance policy is limited to Rs. 50,000/- only and, therefore, the impugned award be set aside in so far as the learned Tribunal has imposed the entire liability of the award amount on the appellant.

6. The owner of the offending vehicle bearing No. DLY- 1373 appeared in the witness box as R3W1 and deposed that he purchased the offending vehicle in 1989 and at the time of the purchase, cover note - Ex.RW1/1 and the certificate of Insurance - Ex.RW1/2 were issued to him.

7. The appellant produced one witness, RW2 who deposed that the offending vehicle was insured with the appellant vide policy No. 40400/24/1/01857. The witness further deposed that as per the cover note, Rs. 1,090/- was received as premium from the owner. The break-up of the premium of Rs. 1,090/- was given by the witness. The witness deposed that the Insurance Company had not covered extra risk against the third party under the policy. The typed copy of the Insurance policy was produced by the appellant which was marked as Mark "C". The carbon copy of the certificate of Insurance was marked as Mark "D" and the cover note was marked as Mark "E". The proposal form was marked as Mark "F".

8. The learned Tribunal held the liability of the appellant to be unlimited because the Insurance policy issued by the appellant was not proved in accordance with law. The carbon copy of the Insurance policy was neither produced nor proved by the appellant. The true copy of the policy was placed on record but was not proved. The relevant findings of the learned Tribunal in this regard are reproduced hereunder:

I have heard both the parties and perused the statement of the witnesses as well RW-2 Assistant Divisional Manager from the Insurance Company and the documents brought by him. In the present case the factum of insurance is admitted. The only plea to be decided is whether the liability is limited or unlimited. The proposal from which has been placed on record was alleged to have produced from the company. It is admitted by the witness that there is nothing on record to show that it was accepted. This proposal form has not been put to the owner to get it admitted whether this was the cover asked for by him and it was properly signed by him specially when the owner himself has appeared in the witness box. Secondly the policy has not been proved. Only true copy of the policy has been placed on record without explaining about the carbon copy which is generally retained by the insurance company. There is nothing on record to show that whether this was the true copy, whether any officer verified and tallied it with the original, whether this was the only cover issued by the company. In these circumstance, no reliance can be placed on this certificate. So

far as the certificate of insurance or cover note is concerned, it is not mentioned whether this cover was for unlimited liability or liability was limited. This only shows that the vehicle was insured w.e.f. 19-11-82. So far as the factum of payment of premium is concerned, the only document is the cover note explaining this fact that the total premium paid was Rs. 1,090/-. Moreover, it is alleged that the endorsement was cancelled but it is alleged that the endorsement was cancelled but it has not been proved by which letter it was cancelled and whether the original policy was ever issued. Since the factum of insurance is admitted and the terms regarding the limitation of the policy has not been established on record by the insurance company, I hold the liability was unlimited.

9. The law with respect to the mode and manner of proving the Insurance policy is well settled. The Insurance company is required to produce the carbon copy of the Insurance policy and to prove the same by examining the witness who has either signed the same or who identifies the signatures of the author or who has seen the author signing and writing. In the present case, the carbon copy of the Insurance policy was not produced. A typed copy of the Insurance policy was produced but it was not proved. There is no evidence on record as to who prepared the typed copy of the policy and from which document it was prepared and whether it was compared with the original or not. No witness was produced who could identify the typed copy of the policy. In fact, Mark "C" has not even been signed by any person. The policy has not been exhibited in the evidence recorded before the learned Tribunal.

10. The learned Counsel for claimants/respondents No. 1 to 5 refers to and relies upon the following judgments:

(i) Om Wati and Others Vs. Mohd. Din and Others,

In this case, the learned Tribunal held the liability of the Insurance Company to be limited to Rs. 50,000/- which was challenged before this Court. This Court set aside the findings of the learned Tribunal and held the liability of the Insurance Company to be unlimited. The order of the learned Single Judge of this Court was challenged before the Division Bench. The Division Bench of this Court held the liability of the Insurance Company to be unlimited holding that the Insurance Company had failed to substantiate and prove its plea of limited liability. The Division Bench of this Court upheld the findings of the learned Single Judge of this Court. It was held as under:

Even though strict principles of Evidence Act are not applicable but at the same time one cannot lose sight of the fact that the document on which the Insurance Company wants the Court to rely must be either original or photo-copy or at least office copy. Mark-A is prepared on a totally different form. Therefore, it cannot be called true copy of the original or of office copy. In the absence of the original or the office copy, no reliance can be placed on this attested copy of the insurance policy. It has not been explained as to from which document Mark-A

was compared. In the absence of any explanation, to my mind, Mark-A must have been prepared from imagination. R.K. Khanna, RW-1, has not explained as to from where and when this attested copy was prepared, because the original was not in company's possession and the office copy stood destroyed. Therefore, in the absence of the original as well as of the office copy, how could he prepare Mark-A and attest it unless he was doing it from his imagination. The owner of the truck has categorically stated that the vehicle was fully insured and the entire liability of the third party was that of the Insurance Company in the event of the accident. If the liability was limited or was "Act only" policy then nothing prevented the Insurance Company from calling the original or produce the office copy. No record has been produced to show that office copy has been destroyed nor the premium receipt book and the proposal cost application had been produced. RW-1 could not deny the suggestion that these records were available in the office at Asaf Ali Road. This shows that the Insurance Company withheld the best evidence from the Court deliberately. Had the original or the office copy of the policy and other record been produced, it would have belied the plea of limited liability. The premium for covering Section 95 risk policy at the relevant time was Rs. 84 and for third party liability Rs. 295 per year as per motor tariff. The premium receipt register if produced could have clinched the whole issue. It was a very relevant record to prove whether extra premium was paid to cover unlimited liability as alleged by the owner of the truck. In the absence of the original policy or the office copy and the premium receipt book, to my mind, the Tribunal fell in grave error in relying on Mark-A and coming to the conclusion that the liability of insurance company was limited.

(ii) *Tejinder Singh Gujral v. Inderjit Singh* 2007 ACJ 37.

The Hon'ble Supreme Court upheld the findings of this Court that the Insurance policy having not been brought on record, a presumption would arise that the liability of the insurer was unlimited. Para 13 in this regard of the said judgment is reproduced 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 record, a presumption would arise that the liability of the insurer was unlimited.

(iii) *Subhadara Kumari and others Vs. Lallu Ram and others*, In this case, the carbon copy maintained by the Insurance officer was destroyed and a copy prepared on the basis of the carbon copy was produced before this Court. Since neither the original policy nor the carbon copy was produced, this Court set aside the finding of limited liability of Rs. 50,000/- and held the liability of the Insurance company to be unlimited. Para 6 in this regard of the said judgment is reproduced hereunder:

6. The Tribunal has dealt with the first point in favour of respondent No. 6 merely on the ground that the statute provides the liability of respondent No. 6 to pay

compensation to the extent of Rs. 5,000/- in respect of death of a passenger. The policy in respect of the offending bus has not been proved. The evidence of RW 6, Shri R. P. Sawhney, Senior Assistant, New India Assurance Co. Ltd., clearly indicates that the bus was insured with effect from 9.11.1971 to 8.11.1972. The original policy was issued to respondent No. 5. The said witness further states that the carbon copy maintained by the office has been destroyed because all records are destroyed after 3 years. The copy which was produced before the Tribunal was prepared on the basis of the carbon copy of the letter dated 21.9.1973 issued to counsel, Mr. S.R. Sarna on that date. Therefore, it is clear that the said respondent could neither produce the original policy nor the carbon copy was available. The learned Judge was right in attaching no significance to the said copy of the policy which was prepared in the above circumstances. In this background it was wrong to hold that the liability of the company was only to the extent of Rs. 5,000/- when no such plea can be held to be established on the basis of evidence on record. There is force in the contention of learned Counsel for the appellants. The same is, accordingly, upheld.

(iv) Krishna Gupta and Others Vs. Madan Lal and Others, In this case also the liability of the Insurance Company was held to be unlimited by the Division Bench of this Court on the ground that the original policy was not produced or proved. Para 25 in this regard of the said judgment is reproduced hereunder:

25. Submissions of the learned Counsel for the insurance company to the effect that its liability was limited, cannot be accepted for more than one reason which are: (a) no such plea had ever been taken; (b) in view of the fact that a joint written statement was filed together with owner and driver of the truck, such a plea could not have been raised; (c) the insurance policy, whether the original or the photocopy, had not been produced or proved. What was brought on record was merely a proforma of the insurance policy which was not and could not have been termed as a contract of insurance; (d) the respondent insurance company being a State within the meaning of Article 12 of the Constitution of India, was under a moral obligation to produce all the records before the court including the contract of insurance and non-production thereof would give rise to drawal of an adverse inference.

11. Following the aforesaid judgments, the findings of the learned Tribunal are upheld and the liability of the appellant is held to be unlimited as neither the original nor the carbon copy of the Insurance policy was produced. A typed copy of the Insurance policy was produced but even that document was not proved in accordance with law.

12. The findings of the learned Tribunal are, therefore, upheld and the appeal is dismissed

Cross Objections No. 1406/1989

1. The claimants/respondents No. 1 to 5 have filed the cross-objections for enhancement of the award amount.

2. The widow of the deceased appeared in the witness box as PW - 9 and deposed that the deceased was engaged in sale and purchase of motor vehicles on commission basis. She further deposed that the deceased started a finance company about one year before his death and the deceased used to give her Rs. 2,500/- per month for household expenses. PW - 9 further deposed that the deceased had provided all the facilities such as telephone, T.V., fridge, cooler, conveyance and the income of the deceased would have increased by Rs. 5,000/- per month in future.

3. PW - 4 carried on the business of scooter repair and sale and purchase of motor vehicles at 18, Masjid Road, Bhogal, Jangpura and he deposed that he knew the deceased for the last 15 years. PW-4 deposed that the deceased was dealing in sale and purchase of motor vehicles at 19, Masjid Road, Jangpura and in his estimation, the deceased was earning Rs. 2,000/- to Rs. 2,500/- per month.

4. PW-1 deposed that the deceased had T.V., Refrigerator and scooter and as per his standard of living, the deceased must have the income of Rs. 2,500/- to Rs. 3,000/- per month.

5. The learned Tribunal assessed the income of the deceased for the purposes of computation of compensation as Rs. 1,200/- per month considering that the deceased was not paying Income Tax. The learned Senior Counsel for claimants/respondents No. 1 to 5 submits that the Income Tax limit during the year 1982-83 was Rs. 60,000/- per annum and, therefore, even applying the yardstick of Income Tax limit, the income of the deceased should be taken to be at least Rs. 2,500/- per month.

6. Considering the evidence on record that the deceased was carrying on the business of sale and purchase of motor vehicles and had a shop in Jangpura which is a very prominent market and further the evidence of the widow of the deceased who appeared as PW-9 and deposed that the deceased had all the amenities of life and was maintaining a good standard of living and the father of the deceased was in bed for the last three years and was entirely dependent upon him and further that the deceased belonged to a respectable family and the mother of the deceased was president of Arya Samaj Women Branch, the income of the deceased for the purposes of computation of compensation is taken to be Rs.1,800/- per month instead of Rs. 1,200/- per month.

7. The deceased left behind five dependents, namely, widow, two minor children and parents and, therefore, the appropriate deduction towards the personal expenses of the deceased is 1/4th instead of 1/3rd. Taking the income of the deceased to be Rs. 1,800/- per month, deducting 1/4th towards personal expenses of the deceased and applying the multiplier of 16, the loss of dependency is computed to be Rs.2,59,200/- (Rs. 1,800 x 3/4 x 12 x 16).

8. The learned Tribunal has not awarded any compensation towards loss of consortium, loss of love and affection, loss of estate and funeral expenses. The

Courts are now awarding Rs. 10,000/- under the aforesaid heads. However, considering that the accident took place in the year 1982, Rs. 5,000/- is awarded towards loss of consortium, Rs. 5,000/- towards loss of love and affection, Rs. 5,000/- towards loss of estate and Rs. 2,500/- towards funeral expenses. The total compensation to the claimants/respondents is computed to be Rs. 2,76,700/- (Rs. 2,59,200 + Rs. 5,000 + Rs. 5,000 + Rs. 5,000 + Rs. 2,500).

9. The learned Tribunal has not awarded any interest on the award amount on the ground that claimants/respondents No. 1 to 5 took two years and three months to complete the evidence. This cannot be a ground to deny the interest to the claimants. It is well settled that the compensation becomes due and payable immediately upon the accident and the claimants are entitled to the interest on the award amount because the Insurance company has retained the amount due to the claimants and has also earned interest by way of investment on the said amount and also on the ground that the claimants have been deprived of their amount when it became due. For the delay caused by the claimants/respondents, lower rate of interest can be provided to them but to deny the interest altogether is unjust, unfair and unreasonable. The rate of interest in the year 1992 was to the tune of 12% per annum. However, the interest of justice will be served by awarding 7% interest to the claimants.

10. The cross-objections are allowed and the award amount is enhanced from Rs. 1,92,000/- to Rs. 2,76,700/- along with interest @7% from the date of filing of the petition till realization.

11. The appellant is directed to deposit the enhanced award amount along with interest thereon with the Registrar General of this Court within 30 days.

12. Claimants/respondents No. 4 and 5 have expired during the pendency of the appeal and their rights have devolved upon claimants/respondents No. 1 to 3 who are already on record. The shares of claimants/respondents No. 1 to 3 in the award amount shall be equal. Upon the award amount being deposited, the Registrar General of this Court is directed to release a sum of Rs. 50,000/- to each of the three claimants/respondents No. 1 to 3 and the remaining amount be kept in fixed deposit for a period of five years on which periodical interest be paid to them but no loan, advance or withdrawal be permitted without the permission of this Court.

13. The learned Counsel for the claimants submits that the original award amount was deposited by the appellant with this Court and the same was released to the claimants against the surety bond dated 5th September, 1994 marked as Mark ?A1.. Since the appeal has been dismissed, the surety bond given by the claimants is discharged. The Registrar General is directed to release the surety bond to claimants/respondents No. 1 to 3 through counsel within two weeks.

14. Copy of this order be given "Dasti" to learned Counsel for the parties under the signature of Court Master.