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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 1st May, 2012

+ **FAO. No.224/2002**

ORIENTAL INSURANCE CO. LTD. Appellant
Through: Mr. Ram N. Sharma, Advocate

Versus

SMT. ANARA DEVI & ORS. Respondents
Through: None

CORAM:
HON'BLE MR. JUSTICE G.P.MITTAL

J U D G M E N T

G. P. MITTAL, J. (ORAL)

1. The Appellant Oriental Insurance Co. Ltd. impugns a judgment dated 11.02.2002 whereby a compensation of ₹3,58,500/- was awarded in favour of the Respondents No.1 to 6 for the death of the deceased Shitla Prasad Shukla who died in a motor accident which occurred on 13.01.1995.
2. The ground of challenge is that the cover note Ex.RW1/A in respect of the offending vehicle bus No.DBP-906 was fraudulently obtained after the accident and the Insurance Company had no liability to pay the compensation.
3. It is the admitted case of the parties that the cover note Ex.RW1/A was issued on 13.09.1994 i.e. on the date of the

accident. The amount of compensation was released to the Claimants by an order of this Court dated 26.04.2002 and 15.09.2003. Thus, what is required to be seen in the instant Appeal is whether the cover note was fraudulently obtained and if the Appellant Insurance Company is entitled to recovery rights against the Respondent No.8, owner of the offending vehicle.

4. A perusal of the Trial Court record reveals that the Respondent No.8(Respondent No.2 before the Trial Court) initially appeared through the counsel. He was ordered to be proceeded ex parte by an order dated 20.04.1998 and thereafter did not appear and contest the proceedings. Section 149 of the Motor Vehicles Act lays down certain statutory defences. Section 149 is extracted hereunder:

“149. Duty of insurers to satisfy judgments and awards against persons insured in respect of third party risks-

(1) If, after a certificate of insurance has been issued under sub-section (3) of section 147 in favour of the person by whom a policy has been effected, judgment or award in respect of any such liability as is required to be covered by a policy under clause (b) of sub-section (1) of section 147 (being a liability covered by the terms of the policy) [or under the provisions of section 163A] is obtained against any person insured by the policy, then, notwithstanding that the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy, the insurer shall, subject to the provisions of this section, pay to the person entitled to the benefit of the decree any sum not

exceeding the sum assured payable thereunder, as if he were the judgment debtor, in respect of the liability, together with any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.

(2) No sum shall be payable by an insurer under sub-section (1) in respect of any judgment or award unless, before the commencement of the proceedings in which the judgment or award is given the insurer had notice through the Court or, as the case may be, the Claims Tribunal of the bringing of the proceedings, or in respect of such judgment or award so long as execution is stayed thereon pending an appeal;

(a).....

(b) that the policy is void on the ground that it was obtained by the non-disclosure of a material fact or by a representation of fact which was false in some material particular.”

5. It is urged by the learned counsel for the Appellant that in this case the accident took place on 13.01.1995 at about 12:35 pm, whereas the cover note was issued at about 5:00 pm. The Claims Tribunal discussed the testimony of RW2 Anil Kumar Sethi in detail and disbelieving him held as under:

“30. RW2 Anil Kumar Sethi has stated that he issued above referred cover note on 13.1.95 at 12.45 p.m. and during his subsequent testimony he corrected himself by saying that aforesaid cover note was issued by him at around 5 or 5.15 pm. after the inspection of the offending vehicle it was parked

outside his office. The aforesaid version of Anil Kumar Sethi is firstly contradictory in respect of the time of issue of cover note. Otherwise also aforesaid version is not believable because perusal of certified copy of the charge sheet pertaining to the impugned accident would reveal that as per details in this charge sheet the accident took place at around 12.40 p.m. on 13.1.95 and the offending bus was seized by the Investigation Officer at the spot of accident. As per certified copy of the mechanical inspection report of the offending bus and the superdarinama of the bus offending bus was mechanically inspected on 15.1.95 and it was released on superdari to Sanjay Kumar on 18.1.95 This imply that after the accident the offending bus stopped at the spot of accident from where it was seized and thereafter it remained in custody of the police till 18.1.95 That being the case the offending bus could not have reached the insurance office on 13.1.95 at around 5 or 5.15 p.m. Therefore, the version of RW-2 regarding the issue of cover note pertaining to the offending bus after accident after the impugned accident is not reliable. Perusal of the cover note Ex.RW1/A would reveal that on this cover note no time is mentioned. Therefore, it cannot be concluded that cover note Ex.RW1/A was issued after the impugned accident on 13.1.95. Thus, under the circumstances, I am of the view that respondent No.3 has failed to establish that cover note was obtained by the insured Sanjay Kumar after the accident by concealment of fact. Thus, respondent no.3 being the insurer of the offending vehicle, in my opinion, is also under contractual as well as statutory obligation to compensate the petitioners. In view of my discussion above, I am of the opinion, that all the three respondents are jointly and severally liable to pay the award amount to the petitioners.”

6. It is established on record that the accident took place on 13.01.1995 at about 12:40 pm. The cover note Ex.RW1/A does not bear any time of issue. The cover note No.240327(Ex.RW1/D) was issued by RW2 prior to Ex.RW1/A. A perusal of Ex.RW1/D reveals that the same was issued at 12:45 pm. Thus, the cover note No.240329 (Ex.RW1/A) could be issued after cover note 240327 and 240328. It is, therefore, evident and as stated by RW2, the cover note Ex.RW1/A could not have been issued before 12:40 pm i.e. before the time of the accident. This is further supported from the fact that the premium amount in respect of the cover note Ex.RW1/A was deposited with the Insurance Company only on 16.01.1995. It is important to note that a written statement dated 02.03.1998 was filed by the Appellant before the Claims Tribunal on 23.03.1998. In para 2 of the preliminary objections, the Appellant stated as under:

“II. That the answering respondent has no liability towards the subject claim because the Insured – Respondent No.2, Sanjay Kumar, obtained cover Note No.2403029 for offending vehicle DBP-906 effective for the period 13.1.95 to 12.1.96 (date of accident 13.1.95) by concealment and suppression of material facts re.the accident already occurred on the same day i.e. 13.1.95, of taking Policy. The Policy, so obtained, is therefore void-ab-initio.”

7. Although, the counsel for the Respondent No.8 was present before the Claims Tribunal on 23.03.1998, but the Respondent No.8 preferred not to contradict the averments made in the written statement filed by the Appellant. Rather thereafter, he preferred not to contest the proceedings and was ordered to be proceeded ex-parte. This shows Respondent No.8's conduct. The Appellant Insurance Company, therefore, established that the cover note Ex.RW1/A was issued after the accident and thus this policy was void as the factum of accident was not disclosed by the Respondent no.8. The Appellant Insurance Company was, therefore, entitled to avoid the policy. It, however, having paid the amount is entitled to recover the same from Respondent No.8, owner of the bus No.DBP-906 involved in the accident.
8. The Appeal is accordingly allowed. It is directed that the Appellant Insurance Company shall be entitled to recover the amount of compensation paid along with interest without undertaking separate proceedings in execution of this very judgment.
9. The statutory amount of ₹25,000/- shall be refunded to the Appellant Insurance Company.
10. The Appeal is allowed in above terms.

(G.P. MITTAL)
JUDGE

MAY 01, 2012

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