

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

Reserved on: 13th January, 2012

Pronounced on: 2nd July, 2012

+ **FAO 338/2003**

NATIONAL INSURANCE COMPANY LIMITED

..... Appellant

Through: Mr. L.K.Tyagi, Advocate
Mr. Dipak K. Nag, Advocate &
Mr. Debopama Ray, Adv. for
IRDA.

versus

ANGELINA & ORS.

..... Respondents

Through: Mr. Bhupesh Narula, Advocate
for R-1 to R-3.

CORAM:

HON'BLE MR. JUSTICE G.P.MITTAL

J U D G M E N T

G. P. MITTAL, J.

1. This Appeal is directed against a judgment dated 26.03.2003 passed by the Motor Accident Claims Tribunal (the Claims Tribunal) whereby a compensation of ₹2,85,000/- was awarded for the death of Michael Fazal Massey in a motor accident which occurred on 09.04.1987.
2. On appreciation of evidence, the Claims Tribunal found that the accident was caused because of rash and negligent driving of bus No.DEF-2999 by Munna Lal (the Fourth Respondent). The bus was owned by Ashok Kumar (the Fifth Respondent).

3. The Claims Tribunal accepted the deceased's income to be ₹2,000/- per month and computed the loss of dependency as ₹2,72,000/-. On adding a sum of ₹13,000/- towards non pecuniary damages, the overall compensation of ₹2,85,000/- was awarded.
4. The Appellant National Insurance Company Limited in its written statement filed before the Claims Tribunal, apart from raising other pleas took the stand that its liability in respect of the injury to a third party was limited to ₹50,000/- only and thus, it was under obligation to indemnify the insured only to the extent of ₹50,000/-. It was averred that the payment of rest of the compensation would be the driver's and the owner's liability.
5. The plea did not find favour with the Claims Tribunal. Para 12 of the impugned judgment is extracted hereunder:-

“12. Though a number of preliminary objections were taken in the written statement by Respondent No.3, but not an iota of evidence has been led to prove the same. Neither the plea of limited liability nor the contention that there was breach of the terms of insurance policy have (sic has) been substantiated.”

6. The finding on negligence and on quantum of compensation is not disputed by the Appellant. It is only the finding on the issue of limited liability, which is the subject matter of the Appeal. No Cross-Objections or Cross Appeal has been filed by the

Respondents No. 1 to 4 (the Claimants) or the owner and the driver of the bus involved in the accident.

7. Along with the Appeal, an application under Order XLI Rule 27 CPC was moved by the Appellant Insurance Company to lead additional evidence, to prove the Insurance policy. The application was allowed by an order of this Court dated 23.01.2006 and the photo copy of the insurance policy was taken on record.
8. It is urged by the learned counsel for the Appellant that from the photocopy of the insurance policy it is evident that only a sum of ₹240/- was paid towards the third party risk which would show that liability of the insurance company in respect of third party risk was limited to ₹50,000/-.
9. Admittedly, the original insurance policy is not on record. Normally, the original insurance policy would be issued to the insured (the owner of the vehicle). No notice was given to him (Respondent No.5) to produce the original policy.
10. 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.”

11. Section 63 of the Evidence Act defines secondary evidence. It would be fruitful to extract the same 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.”

12. In *J. Yashoda v. K. Shobha Rani*, (2007) 5 SCC 730, the Supreme Court dealt with the question as to when a party can be permitted to lead secondary evidence. Para 9 of the report is extracted hereunder:-

“9. The rule which is the most universal, namely that the best evidence the nature of the case will admit shall be produced, decides this objection. That rule only means that, so long as the higher or superior evidence is within your possession or may be reached by you, you shall give no inferior proof in relation to it. Section 65 deals with the proof of the contents of the documents tendered in evidence. In order to enable a party to produce secondary evidence it is necessary for the party to prove existence and execution of the original document. Under Section 64, documents are to be provided (sic proved) by primary evidence. Section 65, however permits secondary evidence to be given of the existence, condition or contents of documents under the circumstances mentioned. The conditions laid down in the said Section must be fulfilled before secondary evidence can be admitted. Secondary evidence of the contents of a document cannot be admitted without non-production of the original being first accounted for in such a manner as to bring it within one or other of the cases provided for in the Section.....”

13. In *Chandro Devi & Ors. v. Jit Singh & Ors.*, 1989 ACJ 41, a learned Single Judge of this court emphasized that the documents must be proved by primary evidence except in cases mentioned in section 65 of the Evidence Act. Para 35 of the report is extracted hereunder:-

“35. It is thus clear that the contents of documents can be proved either by primary or by secondary evidence.

Primary evidence means the document itself produced for the inspection of the court. It is settled law that the documents must be proved by primary evidence, except in cases mentioned in section 65 of the Evidence Act. It is also settled law that mere production of a document is not proof of its contents, especially when the person producing it is neither the writer nor the one on whose behalf it is written. A person, who is not producing the primary evidence, must explain the reasons for that.”

14. As stated earlier, the Fifth Respondent was in possession of the original insurance policy. In law, the Appellant was under obligation to require the Fifth Respondent to produce the original insurance policy before the Court. On Fifth Respondent's failure to produce the original insurance policy, the Appellant would have become entitled to adduce secondary evidence.
15. However, no notice was issued to the Fifth Respondent to produce the original insurance policy. Thus, the Appellant was not entitled to lead secondary evidence to prove the insurance policy.
16. Moreover, the document produced is only a photocopy of the alleged office copy. The same cannot be looked into as the same is not secondary evidence under any of the five clauses of Section 63 of the Evidence Act, extracted earlier. In the absence of proof of the insurance policy, the Appellant has failed to prove that its liability was limited to ₹50,000/-. Therefore, I 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 v. Inderjit Singh & Anr.*, (2007) 1 SCC 508. Relevant part 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.....”

17. In *Chandro Devi (supra)* 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.”

18. A Division Bench of this Court in *New India Assurance Company Limited v. Darshan Singh & Ors.*, 1992 ACJ 533 held that where the Insurance Company wish to take a defence (in a Claim Petition) that its liability was not in excess of statutory liability it should file a copy of the insurance policy along with its defence. It was observed that a printed copy of the policy would not be enough to prove the plea of limited liability.
19. In view of the foregoing discussion, I am of the opinion that in the absence of proving the insurance policy, the Appellant Insurance Company has failed to establish that its liability was limited.
20. The Appeal must fail. The same is accordingly dismissed.
21. The balance amount lying deposited shall be released in favour of the Claimants in terms of the order passed by the Claims Tribunal.
22. The statutory amount of ₹25,000/- shall be refunded to the Appellant Insurance Company.

(G.P. MITTAL)
JUDGE

JULY 02, 2012

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