

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

Reserved on: 10th July, 2012
Pronounced on: 6th August, 2012

+ **MAC.APP. 229/2004**

NATIONAL INSURANCE COMPANY LTD Appellant
Through: Mr. Pradeep Gaur, Advocate

versus

KRISHNA & ORS Respondents
Through: None

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

J U D G M E N T

G. P. MITTAL, J.

1. The Appeal is directed against a judgment dated 05.02.2004 passed by the Motor Accident Claims Tribunal (the Claims Tribunal) whereby a compensation of ₹4,98,600/- was awarded in favour of the Claimants (Respondents No.1 to 6) for the death of Vijender Singh who died in a motor vehicle accident which occurred on 11.02.1996.
2. A Claim Petition under Section 166 of the Motor Vehicles Act, 1988 (the Act) was preferred by the Respondents No.1 to 6 alleging that the deceased Vijender Singh was employed as a driver with Respondent No.7 Joginder Singh on a salary of ₹3,500/- per month. It was averred that on the fateful day, that

is, on 11.02.1996 at about 1:00 A.M., the deceased was sleeping in the truck No.DL-1H-9503 as the second driver. Respondent No.7 while driving the truck in a rash and negligent manner and at a high speed struck against the rocks as a result of which the deceased suffered injuries which proved to be fatal. A compensation of ₹15 lacs was claimed by the Respondents No.1 to 6.

3. Respondent No.7 contested the Claim Petition by way of filing written statement and admitted that the deceased was working as a driver on the earlier said truck. Respondent No.7 denied that the deceased was getting a salary of ₹3,500/- per month, on the other hand, it was stated that he was getting a salary of ₹3,000/- per month. It was denied that the accident was caused on account of rash and negligent driving of the truck. Respondent No.7 took the plea that the accident had taken place on account of natural calamity and because of penetration of rock into the truck.
4. The Appellant Insurance Company in its written statement, which was filed after the written statement of the Respondent No.7 had been filed, took the plea that the deceased was travelling as a gratuitous passenger and thus, it had no liability to pay the compensation awarded.
5. During inquiry before the Claims Tribunal, the following issues were framed:-

“(i) Whether deceased had died due to rash and negligent driving of truck no.DL-1G-9503 by its driver?

(ii) Whether petitions are the only LRs of the deceased?

(iii) Whether petitioners are entitled for any amount of compensation or if so for what amount or from whom?

(iv) Relief.”

6. While dealing with the issue of negligence, the Claims Tribunal relied upon *Gujarat State Road Corporation v. Raman Bhai Prabhat Bhai*, AIR 1987 561 (SC); *Kaushnuma Begum v. New India Assurance Co. Ltd.*, 2001 (1) AD, 5 (SC) and applying the principle of strict liability held that the accident was caused on account of rashness or negligence on the part of Respondent No.7.
7. This finding is not disputed by the Appellant Insurance Company.
8. At the time of hearing, the following contentions are raised on behalf of the Appellant Insurance Company:-
 - (i) The deceased was a gratuitous passenger and thus, the Appellant had no liability to pay the compensation at all.
 - (ii) Even if, the deceased is held to be Respondent No.7's employee, the Appellant was liable to pay the compensation as provided under the Workmen's Compensation Act, 1923 (the WC Act). Rest of the compensation was liable to be paid by Respondent No.7, the owner of the offending vehicle.

9. It is true that in the written statement a plea was raised that the deceased was a gratuitous passenger. At the same time, the averments in Paras 4 and 5 of the Claim Petition that the deceased was an employee of Respondent No.7 Joginder Singh, owner of the truck, were not traversed by the Appellant.
10. PW-1 Smt. Krishna, the deceased's widow also testified that her husband was working as a driver with Joginder Singh (Respondent No.7). This part of her testimony was not challenged in cross-examination. In the circumstances, the plea that the deceased was a gratuitous passenger was not established, rather, there is sufficient evidence on record to show that the deceased Vijender Singh was a driver on the truck No.DL-1H-9503. Although, at the time of the accident, Respondent No.7, who is the owner of the truck, was driving the same.
11. Under section 147 (1) (b) of the Act, the owner of a vehicle is under obligation to take a policy to cover the risk of an employee arising under the Workmen's Compensation Act. The Insurer is also under obligation to cover the risk of employees under the WC Act. At the same time, the owner can always take any policy for extending the risk by paying an additional premium. I am supported in this view by the Supreme Court report in *National Insurance Co. Ltd. v. Prembai Patel & Ors.*, (2005) 6 SCC 172, a three Judge Bench of the Supreme Court held that under Section 147(1)(b) of the Act, the owner is under

obligation to take a policy to cover the risk of an employee arising only under the W.C. Act. The owner could take any policy for extending the risk by paying an additional premium. Paras 12, 13, 16 and 17 of the report are extracted hereunder:

“12. The heading of Chapter XI of the Act is Insurance of Motor Vehicles Against Third Party Risks and it contains Sections 145 to 164. Section 145(1) of the Act provides that no person shall use, except as a passenger, or cause or allow any other person to use, a motor vehicle in a public place, unless there is in force in relation to the use of the vehicle by that person or that other person, as the case may be, a policy of insurance complying with requirements of Chapter XI. Clause (b) of sub-section (1) of Section 147 provides that a policy of insurance must be a policy which insures the person or classes of persons specified in the policy to the extent specified in sub-section (2) against any liability which may be incurred by him in respect of death of or bodily injury to any person or passenger or damages to any property of a third party caused by or arising out of the use of the vehicle in public place. Sub-clause (i) and (ii) of clause (b) are comprehensive in the sense that they cover both “any person” or “passenger”. An employee of owner of the vehicle like a driver or a conductor may also come within the purview of the words “any person” occurring in sub-clause (i). However, the proviso (i) to clause (b) of sub-section (a) of Section 147 says that a policy shall not be required to cover liability in respect of death, arising out of and in the course of his employment, of the employee of a person insured by the policy or in respect of bodily injury sustained by such an employee arising out of and in the course of his employment other than a liability arising under the Workmen’s Act in respect of death of or bodily injury to any such employee as is described in sub-clause (a) or (b) or (c). The effect of this proviso is that if an insurance policy covers the

liability under the Workmen's Act in respect of death of or bodily injury to any such employee as is described in sub-clause (a) or (b) or (c) of proviso (i) to Section 147(1)(b), it will be a valid policy and would comply with the requirements of Chapter XI of the Act. Section 149 of the Act imposes a duty upon the insurer (insurance company) to satisfy judgments and awards against persons insured in respect of third-party risks. The expression – "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" – occurring in sub-section (1) of Section 149 is important. It clearly shows that any such liability, which is mandatorily required to be covered by a policy under clause (b) of Section 147(1), has to be satisfied by the insurance company. The effect of this provision is that an insurance policy, which covers only the liability arising under the Workmen's Act in respect of death of or bodily injury to any such employee as described in sub-clause (a) or (b) or (c) to proviso (i) to Section 147(1)(b) of the Act is perfectly valid and permissible under the Act. Therefore, where any such policy has been taken by the owner of the vehicle, the liability of the insurance company will be confined to that arising under the Workmen's Act.

13. *The insurance policy being in the nature of a contract, it is permissible for an owner to take such a policy whereunder the entire liability in respect of the death of or bodily injury to any such employee as is described in sub-clauses (a) or (b) or (c) of proviso (i) to Section 147(1)(b) may be fastened upon the insurance company and insurance company may become liable to satisfy the entire award. However, for this purpose the owner must take a policy of that particular kind for which he may be required to pay additional premium and the policy must clearly show that the liability of the insurance company in case of death of or bodily injury to*

the aforesaid kind of employees is not restricted to that provided under the Workmen's Act and is either more or unlimited depending upon the quantum of premium paid and the terms of the policy.

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16. *The High Court, in the impugned judgment, has held that if the legal representatives of the deceased employee approach the Motor Accidents Claims Tribunal for payment of compensation to them by moving a petition under Section 166 of the Act, the liability of the insurance company is not limited to the extent provided under the Workmen's Act and on its basis directed the appellant Insurance company to pay the entire amount of compensation to the claimants. As shown above, the insurance policy taken by the owner contained a clause that it was a policy for "Act Liability" only. This being the nature of policy the liability of the appellant would be restricted to that arising under the Workmen's Act. The judgment of the High Court, therefore, needs to be modified accordingly.*

17. *The judgment of the High Court insofar as it relates to quantum of compensation and interest, which is to be paid to the claimants(Respondents 3 to 6 herein) is affirmed. The liability of the appellant Insurance Company to satisfy the award would be restricted to that arising under the Workmen's Act. Respondents 1 and 2(owners of the vehicle) would be liable to satisfy the remaining portion of the award."*

12. It is sought to be contended on behalf of the Appellant Insurance Company that in this case as per the policy Ex.RW1/A and the cover note Ex.RW1/B risk of only two employees was covered.

13. A perusal of the policy and the cover note mentioned earlier shows that these are only illegible photocopies of the document. It appears that a sum of ₹30/- was paid to cover the risk of two employees. It is, however, not proved as to what was the rate of premium for coverage under the WC Act and for unlimited coverage.
14. 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.”

15. No notice was served upon the Respondent No.7 to produce the policy. Thus, the Appellant was not entitled to lead secondary evidence. Moreover, the photocopies of the cover note and

Insurance policy Ex.RW1/A and Ex.RW1/B respectively are not secondary evidence within 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.”

16. It is not stated as to from which document these photocopies were prepared. The photocopies Ex.RW1/A and Ex.RW1/B do not satisfy the test of secondary evidence and the same are not admissible in evidence, even if, it is assumed that the Appellant was entitled to lead secondary evidence. I am supported in this view by the Supreme Court report in *J. Yashoda v. K. Shobha Rani*, (2007) 5 SCC 730. In para 8, the Supreme Court held as under:-

“8. Essentially, secondary evidence is an evidence which may be given in the absence of that better evidence which law requires to be given first, when a proper explanation of its absence is given. The definition in Section 63 is exhaustive as the section declares that secondary evidence “means and includes” and then follow the five kinds of secondary evidence.”

17. In the absence of proof of insurance policy, the Appellant has failed to prove that its liability was limited to the one under the WC Act. 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 v. Inderjit Singh & Anr.*, (2007) 1 SCC 508. 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.....”

18. In *Chandro Devi & Ors. v. Jit Singh & Ors.*, 1989 ACJ 41, 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.”

19. Thus, the Insurance Company’s plea taken only during the hearing of the Appeal without any pleading in this behalf cannot be accepted.
20. The compensation of ₹4,98,600/- awarded by the Claims Tribunal is just and reasonable.
21. The Appeal is devoid of any merit; the same is accordingly dismissed.
22. The compensation shall be released in favour of the Claimants in terms of the order passed by the Claims Tribunal.
23. The statutory deposit of ₹25,000/- be refunded to the Appellant Insurance Company.
24. Pending Applications stands disposed of.

(G.P. MITTAL)
JUDGE

AUGUST 06, 2012
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