

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

Date of decision: 26th November, 2012

+ **MAC.APP. 246/2010**

NEW INDIA ASSURANCE COMPANY LTD. Appellant
Through: Mr. Kanwal Chaudhary, Adv.

versus

ROSHINI DEVI & ORS. Respondents
Through: Mr. Navneet Goyal, Adv. with
Ms. Suman N. Rawat, Adv. for R-7.

+ **MAC.APP. 247/2010**

NEW INDIA ASSURANCE COMPANY LTD. Appellant
Through: Mr. Kanwal Chaudhary, Adv.

versus

PRAVEEN KUMARI & ORS. Respondents
Through: Mr. Navneet Goyal, Adv. with
Ms. Suman N. Rawat, Adv. for R-5.

+ **MAC.APP. 248/2010**

NEW INDIA ASSURANCE COMPANY LTD. Appellant
Through: Mr. Kanwal Chaudhary, Adv.

versus

KAMLESH RANI & ORS. Respondents
Through: Mr. Navneet Goyal, Adv. with
Ms. Suman N. Rawat, Adv. for R-7.

+ **MAC.APP. 249/2010**

NEW INDIA ASSURANCE COMPANY LTD. Appellant
Through: Mr. Kanwal Chaudhary, Adv.

versus

ROSHINI DEVI & ORS.

..... Respondents

Through: Mr. Navneet Goyal, Adv. with
Ms. Suman N. Rawat, Adv. for R-7.

CORAM:

HON'BLE MR. JUSTICE G.P.MITTAL

J U D G M E N T

G. P. MITTAL, J. (ORAL)

CM APPL.7098/2010 (for Additional Evidence) in MAC.APP. 246/2010
CM APPL.7102/2010 (for Additional Evidence) in MAC.APP. 247/2010
CM APPL.7118/2010 (for Additional Evidence) in MAC.APP. 248/2010
CM APPL.7098/2010 (for Additional Evidence) in MAC.APP. 249/2010

1. The Appellant New India Assurance Company Limited seeks permission to lead additional evidence. It is stated that in the written statement filed by the Appellant Insurance Company it was pleaded that since the driver was not holding a valid and effective driving licence on the date of the accident, the insured committed breach of the terms and conditions of the Insurance policy. In support of the plea, the Appellant also placed on record the investigator's report dated 27.11.2008. It is stated that the Motor Accident Claims Tribunal (the Claims Tribunal) failed to take into account the Investigator's report as the same was not proved by examining any witness from the licensing Authority, Kanpur.
2. It is further stated that Permit Verification Report dated 26.11.2009 of the offending vehicle also revealed that the permit was not valid for the State of Delhi but the said report was misplaced by the official of the Appellant Insurance Company and, therefore, could not be placed on record.

3. The Applications are opposed by the Respondent M/s. Asian Re-Surfacing of Road Agency Pvt. Ltd. (the owner of the vehicle).
4. Order XLI Rule 27 CPC is extracted hereunder:-

“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 been admitted, or

1[(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 pronounce judgment, or for any other substantial cause, the Appellate Court may allow such evidence or document to be produced, or witness to be examined.

(2) Wherever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission.”

5. It is not the Appellant’s case that the Claims Tribunal refused to admit the evidence which ought to have been admitted.
6. I have before me the Trial Court record which shows that the case was fixed for evidence of the Appellant (Insurance Company) on 24.09.2008. No evidence was produced by the Appellant Insurance Company and the case was adjourned from time to time. On 03.032009 no witness of the Appellant was present and the case was adjourned for 19.03.2009 with

the direction to the Appellant to take steps for summoning/production of the witnesses within two days. On the next date, i.e. on 19.03.2009 none appeared on behalf of the Appellant. The Appellant's evidence was, therefore, closed and the case was fixed for final arguments on 28.04.2009. Even, thereafter certain adjournments were sought and ultimately on 25.09.2009 the Investigator's report in respect of some driving licence (DL) was placed on record stating that the DL was fake. In spite of the fact that the Appellant was granted sufficient opportunities to prove the breach of the terms and conditions of the policy, the Claims Tribunal again permitted the Appellant to produce evidence. On 30.10.2009 when two witnesses were examined further request was made by the Appellant Insurance Company to prove notice under Order XII Rule 8 CPC purported to have been served upon the owner and driver. Even though there was no sufficient ground to grant further opportunity, the Claims Tribunal again permitted the Appellant to prove the same on 20.11.2009. The Appellant's witness was not present nor any explanation was given. Thus, the evidence of the Appellant was closed.

7. Since it is not the Appellant's case that the Claims Tribunal refused to admit evidence which ought to have been admitted, it was expected to bring the case within Clause (aa) of Rule 27 of the CPC. The Appellant was under obligation to show that in spite of due diligence the evidence sought to be produced could not be produced. Provisions of Order XLI Rule 27 CPC do not allow the party to patch up weak point and make up for omissions made by it. Proof of service of notice under Order XII Rule 8 CPC was not produced on the Trial Court record till the time the Claim Petition was decided. The same is not available even today. A party guilty of remissness cannot be allowed to produce evidence in

Appeal. Even otherwise, since the Appellant is not possession of any evidence regarding proof of service of notice under Order XII Rule 8 CPC, a report of the investigator or even the evidence of the Licensing Authority would not be of any avail unless the owner and the driver are asked to produce the driving licence.

8. As far as proof of permit is concerned, the Appellant's case is that the report was misplaced. It has not been stated as to when the report was obtained and who misplaced the same. Thus, there is no ground to grant any opportunity to the Appellant to produce additional evidence.
9. The Applications for additional evidence are consequently dismissed.

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10. In these Appeals, the Appellant Insurance Company does not challenge the quantum of compensation. It only wants recovery rights on the ground that there was willful and conscious breach of the terms and conditions of the policy.
11. The Applications for additional evidence moved by the Appellant Insurance Company have been dismissed by an order passed above. No notice was served upon the owner and the driver to produce the driving licence, possessed by the driver. Unless the owner is put to notice that the driving licence possessed by the driver was fake and he is asked to produce the driving licence or his explanation in this regard. It cannot be said that there is willful and conscious breach of the terms and conditions of the policy. Moreover, the Appellant Insurance Company could lead secondary evidence to prove the contract of the Insurance only after

failure of the insured to produce the primary evidence, that is, original insurance policy. The Appellant, as stated above, failed to prove that the insured was required to produce original policy. The Claims Tribunal rightly held that the Appellant Insurance Company failed to prove the breach of the terms and conditions of the policy.

12. The Appeals, therefore have to fail; which are accordingly dismissed.
13. The statutory deposit of ₹25,000/- be refunded to the Appellant Insurance Company in each of the Appeals.
14. Pending Applications also stand disposed of.

(G.P. MITTAL)
JUDGE

NOVEMBER 26, 2012

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