

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

Date of decision: 19th October, 2012

+ MAC. APP. 538/2010

THE NEW INDIA ASSURANCE CO.LTD. Appellant
Through: Ms. Shakshi Gupta, Advocate

versus

SMT. ALKA JAIN & 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 New India Assurance Company takes exception to the judgment dated 12th May, 2010 solely on the ground that the Appellant New India Assurance Company proved willful breach of the terms of policy inasmuch as the deceased Pawan Jain was found to be travelling in the offending Tata Sumo No.UP-70AD-0261 as a paid passenger. Thus, the offending vehicle was being used for hire and reward. It was a private vehicle and there was a restriction to use the vehicle for hire and reward. It is urged that the Appellant New India Assurance Company was entitled to avoid the liability as it had proved the breach of the terms of policy.
2. The Appellant New India Assurance Company relied on the statement purported to be made by Smt.Alka Jain to an

Investigator, Mr.Subhash Chand Srivastava. The Claims Tribunal did not take into account the said statement primarily on the ground that the Investigator who had allegedly recorded the statement of Smt.Alka Jain, did not come into the witness box to prove the statement. The Claims Tribunal dealt with the issue in para 18 of the impugned judgment, which is extracted hereunder:-

“18. Now coming to the aspect as to from whom the Petitioners are entitled for compensation. Learned counsel for Respondent no.3 has argued that the Insurance Company is not liable to pay compensation as in the statement given to the investigator by the Petitioner No.1, it is clear that the deceased was travelling as a paid passenger whereas the vehicle was registered as private vehicle and therefore, is violation of condition No.16 according to which the private vehicle cannot be used for the commercial purpose and therefore, the Insurance Company is not liable to indemnify the insured. The only statement which the Respondent No.3 is relying upon the statement made by the wife of the deceased. This statement is made at the house of the Petitioner No.1 to the investigator as appointed by the Insurance Company. Apart from this, there is no other evidence collected by the said investigator. Admittedly, Petitioner No.1 is neither an eye witness nor she was accompanying her husband. It has nowhere come in the evidence that the deceased has talked with his wife prior to accident by which he would have informed the wife that he was going in an hired taxi. The investigator has not collected any other evidence from any other passenger of the vehicle. How much was fare or how many other passenger were travelling has also not been stated in the evidence at all. Under what circumstances, the statement which has been taken by the investigator at the house of the wife of the deceased i.e.

Petitioner No.1 is not amply clear as what was the base/source of this information with the investigator has not been explained. How this issue crept in is also not explained. It simply appears that the investigator has talked with the Petitioner No.1 in ordinary course, and then got it signed from the Petitioner No.1 and therefore, in the absence of any corroborative piece of evidence, this statement of the Petitioners regarding her husband's travelling on hired taxi is of no evidential value to the extent that it can held that her husband was travelling as paid passenger. The appropriate evidence would have been coming from the spot where from this taxi is allegedly hired. Some witnesses from that taxi stand would have been called who could have deposed as to what was fare and who has to charge it. The said investigator has not done any of the investigation at all. Therefore, the Court is of the opinion that contention of learned counsel for Respondent No.3 is not well found and it cannot be held on the sole statement of the investigator that the deceased was travelling as a paid passenger and particularly when the said investigator himself has not entered into the witness box."

3. Section 60 of the Evidence Act, enjoins that the oral evidence produced in all cases must be direct. Thus, it was not only that the Investigator was not produced by the Appellant Insurance Company, Smt.Alka Jain herself entered into the witness box as PW1, the Appellant Insurance Company had an opportunity to inquire from her as to the circumstances in which the deceased Pawan Kumar was travelling in the offending vehicle Tata Sumo No.UP-70AD-0261. It had also an opportunity to inquire from her if the deceased Pawan Kumar had paid any fare. It was the least which could have been done by the Appellant.

Thus, the Appellant having failed to do so, it cannot be said that the Insurance Company has proved that there was willful breach of the terms and conditions of the insurance policy by the Insured.

4. The Appeal, therefore, has to be fail; it is accordingly dismissed.
5. Statutory amount of ₹25,000/-, if any, shall be refunded to the Appellant Insurance Company.
6. The award amount deposited with the Registrar General of this Court shall be released/ held in fixed deposit in terms of the order passed by the Claims Tribunal.
7. Pending applications stand disposed of.

(G.P. MITTAL)
JUDGE

OCTOBER 19, 2012

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