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

Date of decision: 4th December, 2012

+ **MAC. APP. 1165/2012**

NEW INDIA ASSURANCE CO. LTD. Appellant
Through: Mr. J.P.N. Shahi, Advocate.

Versus

YOGENDRA NARAYAN YADAV & 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)

CM.APPL.18836/2012

1. The Appellant seeks permission to lead additional evidence in Appeal on the ground that the report from RTO, Farrukhabad was not proved by any legal evidence and that is why the same was not relied upon by the Motor Accident Claims Tribunal(the Claims Tribunal) and its plea of avoiding liability was rejected. It is stated that a party should not be made to suffer because of fault of its counsel and the Appellant should now be permitted to produce an witness from RTO, Farrukhabad to prove that the driving licence possessed by the driver was fake.
2. I have before me the Trial Court record. The Appellant was repeatedly asked by the Claims Tribunal to disclose its statutory defence, if any but it was not done by the Appellant Insurance Company. Ultimately, on 06.01.2012 a witness N.K. Saxena(R3W1), its Assistant was examined who sought to prove a fax report purported to have been sent by their

Advocate Subodh Kumar Mishra. The same was marked as R3W1/X. None appeared on behalf of the Appellant Insurance Company on the next date, that is, 01.03.2012, 03.07.2012 and 10.07.2012.

3. Order XLI Rule 27 CPC deals with production of evidence in an Appeal which 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.”

4. 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. A party guilty of remissness cannot be allowed to produce evidence in Appeal.

5. The Application for additional evidence is accordingly dismissed.

MAC.APP.1165/2012

1. While dealing with the issue of liability, the Claims Tribunal observed as under:

“23. The insurer has taken the objection that the driver of the offending vehicle was having a fake license and thus was not authorised to drive.

24. In order to substantiate its claim, the insurer examined its own witness R3W1 Sh. N. K. Saxena, Assistant. He proved the Fax copy of report of its advocate Sh. Subhodh Kumar Mishra . In the Fax copy, it has been mentioned that the Advocate/investigator advocate had sought report from the transport authority wherein the transport authority reported that driving license of the driver of the offending was fake one.

25. I have taken care of submissions of Ld. Counsel for insurer.

26. No cognizance can be taken on the documents relied upon by the insurer as only fax copy have been filed . The insurer have chosen not to file the same in original, neither any official from transport authority has been examined to substantiate the claim of the insurer. The investigator who had collected report from transport authority was also not examined by insurer. Hence the prayer of the insurance company stands rejected.”

2. Section 67 of the Indian Evidence Act, 1872 (the Evidence Act) lays down the mode of proof of a document, which is extracted hereunder:-

“67. Proof of signature and handwriting of person alleged to have signed or written document produced -

If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his hand writing.”

3. Thus, all documents including the public document are required to be proved as per Section 67 of the Evidence Act. In this case, no effort was made to prove the signature of the concerned Licensing Officer on the report Mark ‘R3W1/X’ and that is why the same was not exhibited.
4. The question for proof of a sanction order signed by the sanctioning authority, that is, Secretary(Medical), Delhi Administration came up before a learned Single Judge of this Court in *State (Delhi Administration) v. Brij Mohan*, 27 (1985) DLT 322. This Court held that the sanction order is to be proved like any other document. Paras 8 and 9 of the report are extracted hereunder:

“(8) Section 61 of the Evidence Act lays down that the contents of a document may be proved either by primary or by secondary evidence. Section 62 thereof defines primary evidence as meaning the document itself produced for the inspection of the court. In other words, the primary documentary evidence of a transaction (evidenced by writing) is the document itself which should be produced in original to prove the terms of the contract/transaction, if it exists and is obtainable. Since the original sanction was admittedly placed on record by the prosecution, the requirements of this provision stood satisfied and the question of any secondary evidence for proving the contents of the sanction as such did not arise. Primary evidence in the context of oral evidence, however, means an oral account of the original evidence i.e. of a person who saw what happened and gives an account of it recorded by the court. That question does not appear to have arisen in the instant case because the matter was still at the stage of proof of the consent accorded by the Secretary (Medical). Since Sections 61 to 66 of the Evidence Act deal with

the mode of proving the contents of the documents, either by primary evidence or by secondary evidence, I need not dwell upon the same in view of the original document having been placed on the record.

(9) Then comes the most important question viz. the genuineness of a document produced in evidence i.e. is a document what it purports to be and this is dealt with in Sections 67 to 73 of the Evidence Act. Section 67 refers to documents other than documents required by law to be attested. It simply requires that the signature of the person alleged to have signed a document (i.e. the executant) must be proved by evidence that the signature purporting to that of the executant is in his handwriting. Further it requires that if the body of the document purports to be in the hand-writing of someone, it must be proved to be in the hand-writing of that person. However, Section 67 does not in terms prescribe any particular mode of proof and any recognised mode of proof which satisfies the Judge will do. Thus, the execution/authorship of a document may be proved by direct evidence i.e. by the writer or a person who saw the document written and signed or by circumstantial evidence which may be of various kinds, for example, by an expert or by the opinion of a non-expert who is acquainted with the hand-writing in any of the ways mentioned in Explanation to Section 47 or even by comparison etc. (See Sections 45, 47, 73 & 90 of the Evidence Act).....”

5. The question of proof of a public document came up before Bombay High Court in *C.H. Shah v. S.S. Malpathak & Ors.*, AIR 1973 Bom. 14, where it was held as under:-

“4..... In all cases of secondary evidence under Section 65 read with Section 63 of the Evidence Act when a copy or an oral account of a document is admitted as secondary evidence, the execution of the original is not required to be proved but if the original itself is sought to be tendered it must be duly proved and there is no reason for applying a different rule to public documents. Secondly, in the case of a certified copy, before a presumption of its genuineness can be raised under Section 79, as laid down by the Supreme Court in Bhinka's case already referred

to above it must be shown that the certified copy was executed substantially in the form and in the manner provided by law. There would, therefore, be a check or safeguard in so far as the officer certifying it in the manner required by law would have to satisfy himself in regard to the authenticity of the original and in regard to the accuracy of the copy which he certifies to be a true copy thereof. On the other hand if the original of a public document is to be admitted in evidence without proof of its genuineness, there would be no check whatever either by way of scrutiny or examination of that document by an officer or by the Court. The third and perhaps the most important reason, for not accepting Mr.Shah's argument on the point which I am now considering is that neither Section 67 nor Section 68 of the Evidence Act which lay down that the signature and the handwriting on a document must be duly proved do not make any exception in the case of public documents. In view of the provisions of the said section all documents whatever be their nature must be therefore be proved in the manner provided by Section 45, 47 or 73 of the Evidence Act.....

5. The only question which remains for consideration is whether a presumption of the genuineness of the original of a public document should be drawn by reason of Illustration (e) to Section 114 of the Evidence Act to the effect that official acts have been regularly performed. It is no doubt true that it has been held by a Division Bench of this Court in the case of East India Trading Co. v. Badat & Co., AIR 1959 Bom. 414 that Section 114 of the Evidence Act is wide enough to permit the Court to raise a presumption not only with regard to oral evidence, but also with regard to documentary evidence. It may be mentioned that the decision of the Division Bench in the said case was reversed on appeal by the Supreme Court by a majority AIR 1964 SC 538, but in the judgment of the majority the Supreme Court has not referred to the point mentioned above. Apart from the undesirability of taking a view which would let in any and every document tendered by Government in suits to which it is a party without proof of genuineness, in my opinion, no presumption under Section 114 can be drawn in view of the mandatory and unqualified term of Sections 67 and 68 of the Evidence Act. Section 114 which to put it in popular language, merely empowers the Court to use its commonsense, cannot be used to contravene an express provision

of the Act itself. I, therefore, hold that if the original of a public document is sought to be tendered in evidence, it must be proved in the manner required by law.....”

6. Thus, the report Mark ‘R3W1/X’ purported to be issued by the Licensing Officer, Farrukhabad cannot be looked into unless signatures thereon were proved by examining a witness.
7. A fax message containing the report of Assistant Licensing Authority purported to have been sent by Subodh Kumar Mishra, Advocate was not sufficient to prove that the driver did not possess a driving licence. The Claims Tribunal, therefore, rightly made the Appellant Insurance Company liable to pay the compensation.
8. The Appeal is devoid of any merit; the same is accordingly dismissed.
9. Statutory amount of ₹25,000/-, if any, shall be refunded to the Appellant Insurance Company.
10. Pending Applications stand disposed of.

(G.P. MITTAL)
JUDGE

DECEMBER 04, 2012

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