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

% *Date of Decision : 01st December, 2015*

+ **MAC.APP. 728/2010**

NATIONAL INSURANCE COMPANY LTD Appellant

Through: Mr. Manoj Ranjan Sinha, Advocate

versus

DEEPAK JINDAL & ORS Respondents

Through: Mr. Harish Chandra Pant, Advocate
for R-2

PRATIBHA RANI, J. (Oral)

CM No. 24278/2015

1. By way of this application, appellant is seeking restoration of the appeal which was dismissed in default for non-prosecution on 8th October, 2015.
2. Counsel as above appeared on behalf of the respondent No. 2 and he does not oppose the restoration application.
3. In view of the above, this application is allowed and the appeal is restored to its original number.

CM No. 19515/2010 (U/O XLI R. 27 CPC)

1. Learned counsel for the appellant submits that while filing the appeal an application under Order XLI Rule 27 CPC was filed for permission to lead additional evidence about the driving license being fake.
2. In the application the reasons for which evidence could not be led before the Tribunal are enumerated as under:-
 - (i) The Insurance Company deputed Sh. Ajay Kumar Jain, Investigator

for verifying the driving license immediately after filing the written statement.

(ii) On failure of Sh.Ajay Kumar Jain to do the needful, another investigator Mr. Ambrish Kumar Gaur was deputed for the same purpose.

(iii) The driving license was verified and the **investigator submitted his report on 12th May, 2008.**

(iv) The **verification report got misplaced and could be found only in March, 2009** which has been annexed with this appeal.

(v) **Request to learned Tribunal to grant more time to lead respondent's evidence was declined by the Tribunal on 11th February, 2009 and case was fixed for passing the award on 15th May, 2009.**

(vi) Driver was impleaded as a party at the stage of passing the award and case was adjourned for 29th July, 2009.

(vii) **After impleadment of driver, on 26th August, 2009, the Insurance Company filed an application for leading respondent's evidence which was dismissed by the Tribunal on 17th February, 2010.**

(viii) **The counsel representing the Insurance Company could not pay proper attention to the work and sent proxy counsel who informed that the application has been dismissed on merits and the matter has been simply adjourned for arguments.**

(ix) **On 22nd April, 2010 the Tribunal after hearing the arguments reserved the award.**

(x) **The concerned counsel after receiving the award applied for certified copy and the passing of order for non-prosecution came to her knowledge only after obtaining certified copy on 20th July, 2010 in order to file an appeal.**

3. It has been prayed on behalf of the appellant Insurance Company that

in the above circumstances report of the investigator along with Form 54 issued by Licensing Authority, Bulandshahar, U.P. be admitted on record.

4. LCR has been perused which shows that on 12th December, 2007 petitioner's evidence was completed and case was adjourned to 19th March, 2008 for respondent's evidence.

5. No RW was present on 19th March, 2008 and adjournment was sought on the ground that witness has gone out of Delhi. Thereafter on 28th July, 2008 no witness was present. Thereafter the case was transferred to another Tribunal and again on 11th February, 2009 no witness was summoned or present by the Insurance Company. The learned Tribunal has noted that adjournment has been prayed on the ground that DL is fake and issued by the transport authority outside Delhi. Noting that more than three years have been elapsed, the respondent's evidence was closed and claim petition was adjourned for final arguments on 9th April, 2009.

6. The order dated 11th February, 2009 closing the respondent's evidence has not been challenged by the Insurance Company at any point of time. Thereafter the driver was impleaded as party on 15th May, 2009 but till passing of the award on 5th May, 2010 no steps were taken to place on record the report of the investigating officer or summon the concerned witness from the Licensing Authority. It is also noted by the learned Tribunal in the proceedings dated 17th September, 2010 at 3.20 p.m that the application for reopening the case for RE has been dismissed for non-prosecution.

7. The application under Order XLI Rule 27 CPC filed along with the appeal is supported by an affidavit of Mr.N.Wadawan, AIM of the Insurance Company. There is no explanation either on the LCR or in this application as to who was the person responsible to place on record the report of the

investigator submitted by him on 12th May, 2008 when it was lost. It is also not mentioned as to in whose custody the file was when the verification report was misplaced and by whom it was traced out in March, 2009 and why for such a long period till passing of the award in 5th May, 2010 no steps were taken either to impugn the order closing the respondent's evidence or to get the application for leading respondent's evidence restored.

8. In the case reported as Union of India Vs. Ibrahim Uddin & Anr., 2013(4) ALJ 66, the Supreme Court has laid down the following principles governing the exercise of discretion vested with the Appellate Court while exercising its power under Order XLI Rule 27 CPC. The relevant paragraphs No.25 to 30 are extracted as under:-

*“25. The general principle is that the Appellate Court should not travel outside the record of the lower court and cannot take any evidence in appeal. However, as an exception, Order XLI Rule 27 CPC enables the Appellate Court to take additional evidence in exceptional circumstances. The Appellate Court may permit additional evidence only and only if the conditions laid down in this rule are found to exist. The parties are not entitled, as of right, to the admission of such evidence. Thus, provision does not apply, when on the basis of evidence on record, the Appellate Court can pronounce a satisfactory judgment. The matter is entirely within the discretion of the court and is to be used sparingly. Such a discretion is only a judicial discretion circumscribed by the limitation specified in the rule itself. (Vide: **K. Venkataramiah v. A. Seetharama Reddy & Ors.**, AIR 1963 SC 1526; **The Municipal Corporation of Greater Bombay v. Lala Pancham & Ors.**, AIR 1965 SC 1008; **Soonda Ram & Anr. v. Rameshwaralal & Anr.**, AIR 1975 SC 479; and **Syed Abdul Khader v. Rami Reddy & Ors.**, AIR 1979 SC 553).*

26. The Appellate Court should not, ordinarily allow new evidence to be adduced in order to enable a party to raise a new point in appeal. Similarly, where a party on whom the onus of proving a certain point lies fails to discharge the onus, he is not entitled to a fresh opportunity to produce evidence, as the

Court can, in such a case, pronounce judgment against him and does not require any additional evidence to enable it to pronounce judgment. (Vide: **Haji Mohammed Ishaq Wd. S. K. Mohammed & Ors. v. Mohamed Iqbal and Mohamed Ali and Co.**, AIR 1978 SC 798).

27. Under Order XLI , Rule 27 CPC, the appellate Court has the power to allow a document to be produced and a witness to be examined. But the requirement of the said Court must be limited to those cases where it found it necessary to obtain such evidence for enabling it to pronounce judgment. This provision does not entitle the appellate Court to let in fresh evidence at the appellate stage where even without such evidence it can pronounce judgment in a case. It does not entitle the appellate Court to let in fresh evidence only for the purpose of pronouncing judgment in a particular way. In other words, it is only for removing a lacuna in the evidence that the appellate Court is empowered to admit additional evidence. [Vide: **Lala Pancham & Ors.** (supra)].

28. It is not the business of the Appellate Court to supplement the evidence adduced by one party or the other in the lower Court. Hence, in the **absence of satisfactory reasons for the nonproduction of the evidence in the trial court**, additional evidence should not be admitted in appeal as a party guilty of remissness in the lower court is not entitled to the indulgence of being allowed to give further evidence under this rule. So a party who had ample opportunity to produce certain evidence in the lower court but failed to do so or elected not to do so, cannot have it admitted in appeal. (Vide: **State of U.P. v. Manbodhan Lal Srivastava**, AIR 1957 SC 912; and **S. Rajagopal v. C.M. Armugam & Ors.**, AIR 1969 SC 101).

29. The inadvertence of the party or his inability to understand the legal issues involved or the wrong advice of a pleader or the negligence of a pleader or that the party did not realise the importance of a document does not constitute a "substantial cause" within the meaning of this rule. The mere fact that certain evidence is important, is not in itself a sufficient ground for admitting that evidence in appeal.

30. The words "for any other substantial cause" must be read with the word "requires" in the beginning of sentence, so that it is only where, for any other substantial cause, the Appellate Court requires additional evidence, that this rule will apply,

e.g., when evidence has been taken by the lower Court so imperfectly that the Appellate Court cannot pass a satisfactory judgment.”

9. The grounds on which the Insurance Company wants to lead additional evidence when tested on the anvil of judicial principles referred to above, the only conclusion that can be drawn is that it is a case of serious lapse on the part of the Insurance Company in not taking required steps at the relevant stage.

10. The grounds taken in the application under Order XLI Rule 27 CPC are contrary to what was submitted before the Tribunal for seeking adjournment for the purpose of leading evidence.

11. Since the appellant Insurance Company has failed to give any satisfactory explanation for non-production of the evidence at the appropriate stage, no indulgence can be shown for the gross-negligent conduct by the appellant Insurance Company during inquiry before the learned Tribunal.

12. The application is dismissed.

MAC.APP. 728/2010

1. Learned counsel for the appellant submitted that it was a case of fake driving license hence the appellant Insurance Company is entitled to have recovery rights against the owner driver of the offending vehicle.

2. It is a case where at the appropriate stage the appellant-Insurance Company failed to lead any evidence to prove the breach of conditions of the policy.

3. In the case of National Insurance Company Limited v. Swaran Singh & Ors. 2004 (3) SCC 297, it was held that to avoid its liability towards the insured, the insurer has to prove that the insured was guilty of negligence

and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by a duly licenced driver or one who was not disqualified to drive at the relevant time. It cannot be said that the Insurance Company has been able to discharge the onus of proving negligence on the owner's part.

4. In the case of United India Insurance Company Ltd. v. Lehru & Ors. 2003 (3) SCC 338, it was held by the Supreme Court that owner of a vehicle while hiring a driver is not expected to check the records of the licencing officer to satisfy himself that the driving licence is genuine. If the driver produces a driving licence which on the face of it looks genuine, the owner cannot said to be negligent. The relevant para of the report is extracted as under:-

“20. When an owner is hiring a driver he will therefore have to check whether the driver was a driving licence. If the driver produces a driving licence which on the face of it looks genuine, the owner is not expected to find out whether the licence has in fact been issued by a competent authority or not. The owner should then take the test of the driver. If he find that the driver is competent to drive the vehicle, he will hire the driver. We find it rather strange that Insurance Companies expect owners to make enquiries with RTO's, which are spread all over the country, whether the driving licence shown to them is valid or not. Thus where the owner has satisfied himself that the driver has a licence and is driving competently there would be no breach of Section 149(2)(a)(ii). The Insurance Company would not then be above of liability. If it ultimately turns out that the licence was fake the Insurance Company would continue to remain liable unless they prove that the owner/insured was aware or had notice that the licence was fake and still permitted that person to drive. More importantly even in such a case the Insurance Company would remain liable to the innocent third party, but it may be able to recover from the insured. This is the law which has been laid down in Skiandia's Sohan Lal Passi's and Kamla's cases. We are in full agreement with the views expressed therein and see no reason

to take a different view.”

5. Since the Insurance Company failed to prove that the driver of the offending vehicle was not having a valid driving licence on the date when the accident has taken place, merely because at its own level Insurance Company deputed some investigator and obtained a report which remained confined to its file and never proved before the learned Tribunal, no recovery rights can be granted to the Insurance Company on this ground.

6. The appeal has no merit and the same is dismissed.

7. Statutory amount of ₹25000/- deposited by the insurance company/appellant at the time of filing of this appeal be released to the insurance company.

PRATIBHA RANI, J.

DECEMBER 01, 2015

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