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

Date of Decision: 21st January, 2016

+ MAC.APP. 213/2004

THE NEW INDIA ASSURANCE CO.LTD Appellant
Through: Mr. Pankaj Seth, Adv.

versus

RADHA & ORS. Respondents
Through: None

CORAM:
HON'BLE MR. JUSTICE R.K.GAUBA

JUDGMENT

R.K.GAUBA, J (ORAL):

1. The short question raised in this appeal by the insurance company under the provisions of Section 173 of Motor Vehicles Act, 1988 ("MV Act" is to the effect that its claim as to limited liability in terms of the provision contained in Section 95 of Motor Vehicles Act, 1939 ("MV Act") was wrongly rejected by the Motor Accident Claims Tribunal ("the Tribunal") by judgment dated 04.02.2004 in accident claim case registered as suit No.81/00 (old number 88/1989) respecting the death of Ashok Kumar in a motor vehicular accident that occurred on 7.20 AM on 18.02.1989 involving bus bearing registration No.DEP 4461 ("the offending vehicle").

2. By the impugned judgment, compensation in the sum of Rs.3,20,000/- along with interest was awarded in favour of the claimants (the first to fourth respondents herein). The insurance company (the

appellant) was directed to satisfy the award on the ground the offending vehicle was insured with it for the relevant period. It may be mentioned here that as per the facts established the offending vehicle was driven at the relevant time and date by the fifth respondent herein, the bus originally owned by one S K Sethia having been transferred to M/s Uttarakhand Travels, a proprietary concern of Lalit Parshad (the sixth respondent herein).

3. When notices were issued by the Tribunal, the driver and the owner put in contest through their respective written statements. The appellant-insurance company submitted its written statement, *inter alia*, taking the plea that its liability would be in accordance with the Motor Vehicles Act, 1939 which was prevalent and in force at the relevant point of time.

4. During the inquiry into the claim petition, evidence was led on behalf of the claimants. No evidence was adduced by the owner or the driver. On its part, the insurance company examined Mr. K K Mishra, assistant as RW1 essentially to prove the copy of the insurance policy (Ex.RW1/1) and an endorsement on the policy (Ex.RW1/2) transferring the benefits of the policy in favour of the sixth respondent (the transferee of the vehicle) w.e.f. 16.12.1988. It may be mentioned here that the insurance policy taken out by the previous owner covered the period 01.04.1998 to 31.03.1989. The witness examined by the insurance company also proved notice under Order 12 Rule 8 CPC that had been issued by it on 24.09.1993 to the sixth respondent calling upon him to produce the original policy document. It was submitted through the witness that though the notice was duly served by registered AD post, the registered owner (the transferee) had failed to produce the

policy document in response.

5. The issue raised by the insurance company was considered and rejected by the Tribunal through the following observations :

“18. RW-1 Slid K.K. Mishra was extensively cross-examined by counsel for the petitioner. In the course of the said cross-examination of RW-1, it emerged on record that notice under Order XII Rule 8 CPC had been sent to Respondent No. 2, Lalit Prasad Upreti on 24.9.2003 (Exhibit RW1/3) by counsel for respondent No. 3 insurance company, knowing fully well that Shri Lalit Prasad Upreti had died during the pendency of the proceedings and a statement to this effect had been made by counsel for the petitioner on 7.7.2000 in the presence of counsel for the respondent insurance company, and thereafter the legal heirs of the Respondent No. 2, namely his parents had been brought on record. Subsequently, as per the record, the father of Respondent No. 2 was also reported to have died, but Smt. Mantha Devi, mother of Respondent No. 2 appeared through counsel.

19. A few facts and circumstances are significant. The first is the issuance of notice under Order XII Rule 8 CPC to the deceased Respondent No. 2 which, quite obviously, was meaningless. The second is that the said notice is dated 24.9.2003 while the instant petition was instituted as far back as on 25.2.2989 (sic). Why the insurance company did not choose to demand the production of the insurance policy for so many years (14 years), is to say the least, mystifying. The third is that the notice under Order XII Rule 8 CPC seeks production of the original insurance policy from the deceased Respondent No. 2, but simultaneously the original policy has been produced and proved in evidence by the respondent insurance company as Exhibit RW1/1. This, despite the objection raised by counsel for the petitioner that the original policy could not possibly be in the possession of the Insurance company and hence the policy being produced before the Court was a fabricated one. The fourth is that despite the objection raised by counsel for the petitioner that original policy

cannot be in the possession of the Insurance Company, no attempt was made by the Insurance Company to explain how the insurance policy, which ought to have been in possession of the insured (owner), was in the possession of the insurer.

20. In the above context, in the course of the cross-examination RW-1, (the sole witness examined by the respondent Insurance company) admitted that the insurance policy had been sent to Shri S.K. Sethia, the original owner. He further stated that the policy had been prepared on 1.4.1988 and bore the signatures of one Shri Sushil Ratra, Administrative Officer. The said Sushil Ratra Administrative Officer has not been produced in the witness box nor any explanation given as to why he could not appear in the witness box to prove the policy on record. In the course of further cross-examination, RW-1 vehemently denied the suggestion that Exhibit RW1/1 was not sent to Shri S.K. Sethia and that is why he had brought the same, meaning thereby that it had been sent to Shri S.K. Sethia. If it was sent to Shri S.K. Sethia, it is not understandable as to how it was produced by the Insurance Company. No explanation has been given by the Insurance Company in this regard. Then again, when asked to produce the proposal form of the insured S.K. Sethia, RW/1 merely stated that he had not brought the same. He also candidly admitted that when the insurance policy in question was issued, he was not posted in the concerned office. A suggestion was put to him by learned counsel for the petitioner that the insurance policy got exhibited was a fabricated document while the original insurance policy, which provided for unlimited liability was being suppressed from the Court, which suggestion was denied by the witness, again without giving any explanation whatsoever. In my view, the fact that the Insurance company had given notice to the insured (deceased) to produce the original policy, but had simultaneously produced the same from its own pocket and that too without giving any explanation as to how original policy came to be in its possession, casts a

shadow of doubt on the case of limited liability sought to be put up by the Insurance Company.

21. Another important facet of the whole issue is that though the so called original policy has been produced in evidence by the insurance company, the endorsement made in favour of Shri Lalit Prasad Upreti (Respondent No. 2) has been produced in carbon. But this document (RW 1/ 2) also is not free from doubt as it purports to bear the signatures in original of the duly constituted attorney of the Insurance Company (though the endorsement is in carbon). Still worse is the fact that the endorsement is dated 16.12.1989, though the period of insurance expired on 31.3.1989 as per the so called original policy (Exhibit RW1/1).

22. In view of the above, it is clear that if the version of the Insurance Company is to be believed, the original insurance policy was sent to the insured and the carbon copy remained with the Insurance Company. It was for the Insurance Company to have produced in evidence the said carbon copy instead of which it has produced an original policy while simultaneously giving notice to the insured (who is dead to the knowledge of the insurance company is dead) to produce the original policy. Thus, the authenticity of the Insurance policy (Exhibit RW1/1) is doubtful. There is a strong possibility that the said policy has been subsequently prepared by the Insurance Company with a view to avoid its liability. In the circumstances, I am constrained to hold that the Insurance Company will have to be held liable for the payment of such compensation to the petitioners as may be awarded to them in the facts and circumstances of the case.”

6. On careful consideration, this Court finds no error in view taken by the Tribunal. The moot factor against the cause raised by the insurance company is that in spite of due knowledge that Lalit Prasad Upreti had died, it chose to address and send notice under Order 12 Rule

8 CPC in his name. A notice to a non-existent person would be inconsequential. In the result, the insurance company had failed to justify or make out a good cause for secondary evidence to be led. This, aside from the other reasons set out by the Tribunal in the impugned order extracted as above, renders the appeal unmerited. It is dismissed.

7. The statutory deposit, if made, be refunded.

**R.K. GAUBA
(JUDGE)**

JANUARY 21, 2016
VLD