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

Decided on: 23.01.2020

+ **MAC.APP. 1112/2017**

COL V K KAPOOR

.....Appellant

Through: Mr. Anunaya Mehta, Mr. Rishab
Kapur and Mr. Akshay Deep Singhal,
Advocates.

versus

THE ORIENTAL INSURANCE COMPANY LTD & ORS

..... Respondents

Through: Mr. R.K. Tripathi, Advocate for R-1.

CORAM:

HON'BLE MR. JUSTICE NAJMI WAZIRI

NAJMI WAZIRI, J. (Oral)

1. On the previous date, the following order was passed:-

“This appeal impugns the award of compensation dated 29.08.2017 passed by the learned MACT in MACT No. 3506/16 and the judgment dated 31.10.2013 passed by the learned MACT in Suit No: 331/11, primarily on three grounds. Firstly, that the service of notice was not effected insofar as it was never sought to be served upon the noticee directly but by the other person. In the absence of ability to serve upon the noticee directly, the notice will not be considered as complete. The learned counsel for the appellant relies upon the decision of this Court in Keshav Sud vs. Ansals Buildwell Ltd. & Ors. in CS (OS) 2797/2011 dated 23.04.2015, which, inter alia, reads as under:

“13. xxx

14. Provisions of Order V of the Code relates to service of summons. Order V, Rule 12 of the Code enjoins that wherever it is practicable, service should be made on the person concerned unless the person has an agent empowered to accept service. Thus the requirement under law is that attempt should be made to serve notice personally on the party unless there is an agent empowered to accept service. Order V, Rules 13 and 14 of the Code relate to service of summons on an agent in certain circumstances. The said Rules, however, are not applicable to the present case. Order V, Rule 15 of the Code empowers the process server to serve summons on any adult male member of the family, if the party is found to be absent when service of summons is sought to be effected on him at his residence and there is no likelihood of the party being found at the residence within reasonable time and he has no agent empowered to accept service. Explanation to the said Rules clarifies that a servant is not regarded as a member of the family within the meaning of Order V, Rule 15 of the Code. However, while effecting service under Order V, Rule 15 of the Code, process server has to record a specific finding that the party is absent from his residence and there is no likelihood of the party being found at the residence within reasonable time. The service can be effected only on an adult member of the family of the party. Process server has therefore, to take care and caution on noting down the name and details of the adult member of the family.

20. However, any judicial decision, where adequate opportunity is not given to a party to present his version of the case, can result in injustice. The Courts have to strike a delicate and difficult balance between both the parties. It is difficult to prove and establish the facts, allegations and counter allegations without going deeper into the matter and giving opportunity to the parties to examine witnesses and

cross-examine them. Sometimes it can become difficult for the Court to decide the question of "sufficient cause" as required under the provisions of Order IX, Rules 7 and 13 of the Code without recording evidence, thus delaying the matter and prolonging the litigation. Weighing and balancing equities on both the sides and with a view to expedite the progress of the case and not to stall the same by asking the parties to lead evidence, we feel it would be appropriate to allow the present appeal and set aside the ex-parte order subject to payment of costs of Rs. 50,000/- to the respondent. In taking this view we are also keeping in mind the principle of law that no person should be condemned unheard and just and fair opportunity should be granted. Normally, principles of natural justice require that proceedings should not be conducted in the absence of parties, unless there are compelling circumstances, costs can be imposed to award adequate compensation. Supreme Court in the case of Rani Kusum v. Kanchan Devi and Ors. , while examining the provisions of Order VIII, Rule 1 of the Code has observed that processual law has the object of advancing cause of justice. In adversarial system, a party should be given adequate opportunity to participate in the proceedings and processual law should not be construed in a manner so as to leave the party helpless. Processual law has to do substantial justice and is always subservient to and is an aid of justice. It should not be construed in a manner to obstruct a party from pleading its case and representing himself. Keeping these principles in mind we feel that substantial justice will be done in case we allow the appellant to appear in the matter subject to payment of costs as aforesaid. This we feel will do substantial justice. We may mention here that the appellant is already appearing in the suit and the case has been fixed now for cross-examination of the witnesses of the appellant who have filed affidavit by

way of evidence. We also find that after the appellant was proceeded against ex-parte, the respondent had taken a long time to file affidavit by way of evidence of his witnesses. The matter was repeatedly adjourned at the request of the respondent herein.”

The learned counsel for the applicants further submits that Process Server’s report is deficient with respect to the particulars as required in law for effecting service; therefore, it could not be deemed that service had been effected. It is the applicant’s case that service was sought to be effected on 21.12.2011 and on 02.01.2012, but it could not be done so, as the status of the defendant was stated to be “not found” and the lessee had informed the process server that defendant No. 2 stays in Oman; another service sought to be effected through Speed Post dispatched on 24.12.2011; however, it was not delivered on account of insufficient address; the third mode of service was sought to be effected through Power of Attorney holder of defendant No.2 at Ghaziabad; however, it was not served upon the said PoA holder but through his wife on 10.12.2011; the wife is neither authorized by the POA holder in this regard nor can she be recognised in law as an agent of D-2; furthermore, there is no noting in the service report that the POA holder of D-2 was not likely to be available at the aforesaid address in the near future; hence, there was neither any occasion nor justification to serve the summons upon the spouse of the POA holder. Apropos the service report upon defendant No.6 and defendant No.3, it is submitted that summons were received by their sister-in-law and daughter-in-law respectively. Therefore, the learned counsel for the applicants submits that there is no service in the eyes of law, if a notice/summons is served upon a person not authorized to receive it or otherwise when the justification for serving it on a family member is not recorded by the process server. It

is therefore, contended that the order dated 04.01.2012 should be set aside.

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In rebuttal, Mr. Mehta the learned counsel for the applicants submits that the Process Server's report states upon whom the summons was served, i.e. the wife of the agent of defendant No.2; the only difference between defendant No.2 and defendant Nos.3 & 6 is that service was not personally effected on them but through their daughter in law on 29.11.2011 and sister in law on 31.11.2011 respectively; that neither of the defendants i.e. defendant Nos.3 and 6 have any agent in India; that on 29.11.2011, D-3 was not in India and could return only on 30.11.2011, a day thereafter, but the service was not in terms of the dicta of this Court in Renu Sharma (supra) i.e. the Process Server did not ascertain whether the noticee would not be available within a reasonable time; therefore, the service cannot be deemed to have been effected as per the requirement of law. It is further submitted that there is no period of limitation prescribed in law for moving an application under Order 9 Rule 7 of the CPC. He further submits that indeed, CS (OS) No.2363/2008 was dismissed on 19.11.2013 whereas the present applications were filed on 21.11.2013.

This Court is of the view that according to the dicta of this Court in Renu Sharma strict compliance of the requirements of Order V Rule 15 CPC has to be ensured, otherwise the party concerned could be condemned without being heard. The notice was to be served upon the noticee and not on anyone else; the occasion for serving it upon an adult member of the noticee's family, residing with him would arise only when it was ascertained by the process server that there is no likelihood of the noticee being found at the

residence within a reasonable time. Service of notice on anyone else, in breach of the prescribed procedure is no service; and it would result in injustice. In the interest of fairness and justice, every party should be given full opportunity to put forth its case. This principle would be squarely applicable to the present case when the law stipulates service in a particular way and that mode ought to be followed. Insofar as the purported service by the process server was not in compliance with Order V Rule 15 of the CPC, i.e., he failed to record why the service was not effected upon the concerned defendant but on some other person, it would not be deemed due service in law.....”

Secondly, it is argued that for the insurer to get discharged from any liability apropos the payment of compensation, the onus is on the insurer to first prove that the driving licence of the driver of the offending vehicle was fake and/or that the owner knew this fully well and yet permitted the driver to ply the said vehicle. He relies upon the dicta of the Supreme Court in National Insurance Co. Ltd. vs. Swaran Singh & Ors., (2004) 3 SCC 297, which, inter alia, held as under:

“Where the driver's licence is found to be fake

92. It may be true as has been contended on behalf of the petitioner that a fake or forged licence is as good as no licence but the question herein, as noticed hereinbefore, is whether the insurer must prove that the owner was guilty of the wilful breach of the conditions of the insurance policy or the contract of insurance. In Lehru case [(2003) 3 SCC 338 : 2003 SCC (Cri) 614] the matter has been considered in some detail. We are in general agreement with the approach of the Bench but we intend to point out that the observations made therein must be understood to have been made in the light of the requirements of the law in terms whereof the insurer is to establish wilful breach on the part of the insured and not for

the purpose of its disentitlement from raising any defence or for the owners to be absolved from any liability whatsoever. We would be dealing in some detail with this aspect of the matter a little later.

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99. So far as the purported conflict in the judgments of Kamla [(2001) 4 SCC 342 : 2001 SCC (Cri) 701] and Lehru [(2003) 3 SCC 338 : 2003 SCC (Cri) 614] is concerned, we may wish to point out that the defence to the effect that the licence held by the person driving the vehicle was a fake one, would be available to the insurance companies, but whether despite the same, the plea of default on the part of the owner has been established or not would be a question which will have to be determined in each case."

Lastly, the learned counsel for the appellant argues that in its written statement there is not even a whisper by the insurance company, doubting the veracity of the driving licence. He submits that in the absence of a case being set up in the first place apropos the driving licence being fake, the owner and the driver of the vehicle had no occasion to contend otherwise. He further contends that the insurer has also not proven that the driving licence was fake. Therefore, in the absence of any such evidence to that effect, anything to doubt the veracity of the driving licence and to conclude otherwise, it would be an error in law."

2. The learned counsel for the appellant contends that in the Written Statement, the insurer has denied the involvement of the driver in the motor accident. He submits that when the identity of the driver is in doubt, no liability could possibly be apportioned either upon the driver/respondent no. 5 or against the owner; that if the very involvement of the said driver was doubted, then there was no question of his driving licence being verified for

its genuineness. More significantly, since the owner was not effectively served, he was deprived of the rightful defence, that he had examined the driving licence presented by the prospective driver and tested his driving skills before employing him. In other words, having done so, he would have the benefit of the dicta of the Supreme Court in: (i) *United India Insurance Co. Ltd. v. Lehru*, (2003) 3 SCC 338, (ii) *Pepsu Road Transport Corporation vs. National Insurance Company* (2013) 10 SCC 217 and (iii) *National Insurance Co. Ltd. v. Swaran Singh*, (2004) 3 SCC 297.

3. It is argued that: (a) this is the dual test, which the owner of the vehicle has to plead in such matters; (b) the presumption that the owner permitted the driver to ply the vehicle despite knowing that the said licence was fake, is ill-founded, because the insurer has not taken such plea either in his Written Statement or his Affidavit. Therefore, the presumption would be erroneous.

4. In the Written Statement of the insurer, it is averred that since it did not know as to whether respondent no. 1 was actually driving the vehicle, they could not comment on the issue and if he were the driver then the driving licence could be produced by him. However, the validity and genuineness of the driving licence would need to be verified first. The insurer has averred as under:-

“2. That without prejudice to the above and without admission of any liability, unless and until, it proved that the respondent No. 1 on 12.07.2008 as alleged in the petition is the driver of offending vehicle and while driving that offending vehicle(BUS) bearing REGD. NO. DL-1PB-3720 was holding a valid and effective driving license as well badge required as per Motor Vehicle Act to drive the type of vehicle involved in

the alleged accident, no liability can be imposed and attached on the answering respondent. Also there should be valid permit at the time of the accident.

16. That the contents of para 16 of the petition is denied for want of knowledge. The petition be put to strict proof of the same. It is respectfully submitted that the answering respondent does not have the knowledge as to who was the real driver of the alleged offending vehicle bearing Regd. No. DL-1PB-3720 alleged to be involved in the alleged accident on the alleged date and time and also whether the alleged driver driving the said offending vehicle was holding valid and effective driving licence required as per M.V Act to drive the type of vehicle involved in the alleged accident. The petitioner be put to strict proof of the contentions raise in this para."

5. The learned counsel for the appellant contends that there is no assertion anywhere in the insurer's pleadings that there was breach of a policy condition. In effect, the breach would arise only if the vehicle was being driven by a person who was not holding a valid driving licence at the time of the motor accident, provided that the owner knew fully well that the said driving licence was fake/invalid. The appellant also contends that right of recovery granted to the insurance company against the appellant/owner is erroneous.

6. In view of the above, the impugned order is set aside. The case is remanded to the learned Tribunal. The parties shall appear before the learned Tribunal on 24.02.2020. The learned counsel for the appellant submits that the appellant is an 85 years old senior citizen and in the twilight years of his life, and would like to see a closure of this case.

7. In the circumstances, the learned Tribunal is requested to expedite the hearing of the case to determine the aforesaid issues and dispose-off the case, preferably within two months, from the date when the case is next listed before it. The learned counsel for the parties assure the Court that they would not seek any adjournment and will assist the learned Tribunal promptly on each date whenever the case will be listed.

8. The requisite monies have been deposited by the appellant and shall be kept in an interest bearing FDR subject to further orders.

9. The appellant is given the right of filing a Written Statement.

10. The statutory amount, alongwith interest accrued thereon, be returned to the appellant.

11. The appeal stands disposed-off in the above terms.

JANUARY 23, 2020

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NAJMI WAZIRI, J