(8) The result of the above discussion is that the revision petition succeeds and is allowed with costs. The order of the executing Court dated September 20, 1979 is set aside and the case is sent back to it for proceedings further in accordance with law. The parties have been directed to appeal before it on 9th January, 1989.

S.C.K.

Before S. S. Kang and D. V. Sengal, JJ.

ORIENTAL FIRE AND GENERAL INSURANCE COMPANY LIMITED,—*Appellant.*

versus

SMT. CHANDRAWALI AND OTHERS,—*Respondents.*

First Appeal from Order No. 272 of 1984

December 5, 1988.

Code of Civil Procedure (V of 1908)—O. XII, Rls. 2 and 3 A—Evidence Act (I of 1872)—Ss. 64, 65 and 66—Admission and denial of documents—Prior notice for said purpose—Necessity of—Court requiring party to admit documents—No prior notice needed—Copy of insurance policy admitted in evidence and exhibited—Original in possession of owner—Conditions for leading additional evidence not fulfilled—Insurance policy—Whether admissible in evidence.

Held, that O. XII, Rl. 2 of the Code of Civil Procedure, 1908 provides that either party may call upon the other party to admit any document and if the latter neglects to do so certain consequences follow. A vital consequence laid down by Rule 2 A is that the Court shall, in the given circumstances, deem the document to be admitted. Under Rl. 3A even without prior notice, the Court may call upon any party to admit any document. Where a document is admitted by a party against which it is sought to be adduced in evidence, its formal proof is not necessary before it is so admitted in evidence. In all other cases a document can be admitted in evidence on its proof in accordance with the provisions of Chapter V of the Act. Whatever the document, it cannot be used in evidence unless its genuineness has been either admitted or established by proof which shall be given before the document is exhibited by the

Court. Therefore, despite its being marked as copy of the policy of insurance does not amount to have been admitted in evidence, and its proof is not dispensed with.

(Para 11).

Held, that the insurer was required under S. 66 of the Evidence Act, 1872 to have previously given a notice to the owner to produce the original policy of insurance and on his failure to do so it could have produced its copy under clause (a) of S. 65. None of the steps as contemplated by the Code of Civil Procedure, 1908 or the Act was, however, taken by the insurer. It could not, therefore, at a late stage of the proceedings simply shove in a copy of the policy of insurance and mark it as an exhibit through the statement of its counsel.

(Para 10).

First Appeal from the order of the court of Shri A. P. Chowdhari, Motor Accidents Claims Tribunal, Narnaul, dated 30th November, 1983, allowing the petition to the extent of Rs. 760 × 12 × 10 = 91,200 with proportionate costs and interest at the rate of 12 per cent per annum from the date of the petition upto date of payment and further ordering that the Insurance Company respondent No. 3 will be liable to satisfy the Award.

S. K. Sharma, Advocate, *for the Appellant*

M. S. Singla, Advocate, *for Respondents No. 1 to 4.*

Hari Mittal with Prabodh Mittal and Jaswant Jain, *for Respondent No. 6.*

JUDGMENT

D. V. Sehgal, J.

(1) For the purpose of dealing with the questions of law involved herein, it is not necessary to set out the facts in detail. It would suffice to mention that the offending vehicle Matador being registration number HRM-1808 which caused the death of Attar Singh was insured with the Oriental Fire and General Insurance Company Limited (for short 'the insurer'). On a claim application made under section 110-A of the Motor Vehicles Act, 1939 by the widow and the children of the deceased (for short 'the claimants'), the Motor Accident Claims Tribunal (for short 'the Tribunal') awarded in their favour a sum of Rs. 91,200 as compensation holding that the accident was caused due to the rash and negligent driving of the said vehicle.

F.A.O. No. 232 of 1984 has been filed by the claimants who have a grievance that the compensation awarded is inadequate. F.A.O. No. 272 of 1984 is by the insurer which, besides impugning the award of the Tribunal on other grounds, contends that according to the policy of insurance its liability to the payment of compensation is limited to Rs. 50,000. At the stage of the trial of the claim application before the Tribunal, the insurer did not lead any evidence. Its counsel, however, made a statement to the following effect on 20th September, 1983 :—

> "I produce true copy of insurance policy Ex. R.1 and close my evidence."

(2) The copy of the policy of insurance Ex. R.1 purports to have been attested as a true copy by the Assistant Divisional Manager of the insurer. It was produced before the Tribunal on 20th March, 1983 when the above statement was made by its counsel. No objection to the above statement by the counsel for the insurer and the copy of the policy of insurance being marked as Ex. R.1 was taken by the claimants before the Tribunal. Its admissibility as such, however, was disputed by them when the above appeals came up for hearing before S. S. Sodhi, J. They placed reliance on my judgment in *M/s Malwa Bus Service (P) Ltd. Moga, District Faridkot, through its Managing Director* v. *Amrit Kaur and another* (1), wherein I, *inter alia*, observed thus :—

> "Respondent No. 1 in the present case took a false plea denying the fact that the bus was insured with it. Thus, once it is proved that this plea is wrong and the bus was in fact insured with respondent No. 8, it must be held liable to payment of the entire amount of compensation. The learned counsel for the respondent No. 8, however, has made two submissions in defence. Firstly, he has submitted that the insurance policy has been brought on the record before the learned Tribunal as exhibit R.1 and a perusal of the same shows that the liability of respondent No. 8 was limited to such amount as is necessary to meet with the requirements of the Act. I, however, find that exhibit R.1 is only a copy of the insurance policy. It was tendered in evidence by the statement of the counsel at

(1) 1987 (1) P.L.R. 618.

the stage of closing the case. Section 64 of the Indian Evidence Act, 1872, provides that documents must be proved by primary evidence except in the cases mentioned in section 65. Section 65 *ibid* lays down that secondary evidence relating to a document may be given of its existence. Condition or contents in the case where the original is shown or appears to be in the possession or power of the person against whom the document is sought to be proved or, of any person out of reach of, or not subject to, the process of the Court, or of any person legally bound to produce it and when, after the notice mentioned in section 66, thereof such person does not produce it. Secondly, evidence of a document can also be produced where the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any reason not arising from his own fault or neglect, produce it in reasonable time or, where any of the conditions specified in section 65 exists. In the present case none of these conditions has been proved. Therefore, copy of the insurance policy exhibit R-1, was not admissible in evidence as conditions of section 65 of the Indian Evidence Act, 1872, were not met with. The copy of the insurance policy exhibit R-1, therefore, cannot be read in evidence."

(3) Reliance by the insurer, on the other hand, was placed on *Gopal Das and another* v. *Sri Thakurji and others* (2), *Dogar Mal & others* v. *Sunam Ram and others* (3), *U Po Kin and another* v. *U So Gale* (4), and *Umar-ud-din* v. *Ghulam Mohammad and another* (5), In the face of the same the learned Single Judge was of the view that my observations in *M/s Malwa Bus Service's case* (supra) required reconsideration. The matter was, therefore, referred to a larger Bench and has thus been placed before us.

(4) The matter gives rise to the following questions of law :—

(1) Whether the policy of insurance could be proved by production of its copy Ex R-1 unless a case was made out

(2) A.I.R. 1943 P.C. 83.
(3) AIR 1944 Lah. 58.
(4) AIR 1936 Rangoon 277.
(5) AIR 1935 Lah. 628.

for production of secondary evidence within the meaning of section 65 of the Indian Evidence Act, 1872 (for short 'the Act') ?

(2) Whether marking of the copy of the policy of insurance as Ex. R.1 amounts to its admission in evidence and the requirement of its proof in accordance with law stands dispensed with ?

(3) If the answer to question Nos. (1) and (2) is in the negative, whether the appellate Court can exclude from consideration Ex. R. 1 when no objection to its admissibility was taken before the Tribunal ?

(5) Sub-section (2) of section 110-C of the Motor Vehicles Act, 1939 vests the Tribunal with the power of Civil Court of compelling discovery and production of documents. The provisions in this regard contained in the Code of Civil Procedure (for short 'the Code') are, therefore, applicable to the proceedings before the Tribunal. Section 1 of the Act, *inter- alia* lays down that it applies to all judicial proceedings in or before any Court but not to affidavits presented to any Court or officer, nor to proceedings before an arbitrator. Section 3 of the Act lays down that 'Court' includes all Judges and Magistrates, and all persons except arbitrators, legally authorised to take evidence. Therefore, the provisions of the Act apply to the proceedings before the Tribunal. The insurer in its written statement filed before the Tribunal on 17th December, 1982 took the following plea in para 5 of its preliminary objections :—

"That the answering respondent is liable only upto the limit of Rs. 50,000 if the Claim petition is succeeded because the insurance was limited upto Rs. 50,000 in respect of any one claim or series of claims arising out of the event."

(6) The claimant in their replication to the same controverted this assertion and stated thus :—

"That para No. 5 of the preliminary objections in the written statement is wrong, and hence denied. "The petition is maintainable for the amount claimed even against the respondent Insurance Company."

(7) Order VIII, rule 8-A of the Code lays down that where a defendant bases his defence upon a document in his possession or power, he shall produce it in Court when the written statement is presented by him and shall, at the same time, deliver the document or a copy thereof, to be filed with the written statement. A document which ought to be produced in Court by the defendant under this rule, but is not so produced, shall not, without the leave of the Court, be received in evidence on his behalf at the hearing. Strangely enough, however, the insurer did not attach a copy of the policy of insurance along with its written statement.

(8) The original policy of insurance, of course, could not be in the possession of the insurer. It is supposed to be in the possession and power of the owner of the insured vehicle (for short 'the owner') Therefore, the insurer ought to have applied to the Tribunal for an order directing the owner to make discovery of the same on oath. The Tribunal, at any time, during the pendency of the claim before it, could lawfully order the production of the original policy of insurance by the owner. Such steps are vouchsafed by Order XI, rules 12 and 14 of the Code. The insurer could call upon the owner and the claimants to admit the policy of insurance or its copy. Their failure to admit or deny the same could entail the consequences laid down by order XII of the Code.

(9) Section 64 of the Act lays down that documents must be proved by primary evidence. Copy of the insurance policy Ex. R.1 produced by the insurer is in the nature of secondary evidence of the existence, condition and contents of the original and could be given, *inter-alia,* in any of the following cases set out in section 65 *ibid* :—

(a) when the original is shown or appears to be in the possession or power :—

of the person against whom the document is sought to be proved or,

of any person out of reach of, or not subject to the process of the Court, or

of any person legally bound to produce it, and when, after the notice mentioned in section 66, such person does not produce it;

(b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;

(c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;

(d) when the original is of such a nature as not to be easily movable."

(10) The insurer was required under section 66 of the Act to have previously given a notice to the owner to produce the original policy of insurance and on his failure to do so it could have produced its copy under clause (a) of section 65 *ibid.* None of the steps as contemplated by the Code or the Act was, however, taken by the insurer. It could not, therefore, at a late stage of the proceedings simply shown in a copy of the policy of insurance and mark it as an exhibit through the statement of its counsel. Question No. (1) is, therefore answered in the negative.

(11) Order XII, rule 2 of the Code provides that either party may call upon the other party to admit any document and if the latter neglects to do so certain consequences follow. A vital consequence laid down by rule 2-A *ibid* is that the Court shall, in the given circumstances, deem the document to be admitted. Under rule 3-A *ibid*, even without prior notice, the Court may call upon any party to admit any document. Where a document is admitted by a party against which it is sought to be adduced in evidence, its formal proof is not necessary before it is so admitted in evidence. In all other cases a document can be admitted in evidence on its proof in accordance with the provisions of Chapter V of the Act. Whatever the document, it cannot be used in evidence unless its genuineness has been either admitted or established by proof which shall be given before the document is exhibited by the Court. Therefore, despite its being marked as Ex. R.1 copy of the policy of insurance does not amount to have been admitted in evidence, and its proof is not dispensed with. Question No. (2) is, therefore, answered in the negative.

(12) The third and the last question, in the light of answers to the questions preceding it, has two aspects. First, that Ex. R. 1 was

produced as secondary evidence of the original policy of insurance without making out a case under section 65 of the Act. Second, it was marked as Ex. R. 1 without its contents having been admitted by the other party and without its having been proved in accordance with law. The crucial question, therefore, is whether the appellate court can exclude Ex. R. 1 from consideration when no objection to its admissibility and mode of proof was taken before the Tribunal. In *U Po Kin's* case (supra), a learned Single Judge of the Rangoon High Court held thus—

> "No doubt under section 66 a notice to produce the document must previously have been given to the party in whose possession or power the document is before giving secondary evidence of its contents, but such notice is not essential to render secondary evidence admissible in certain cases, e.g., where the Court in its discretion thinks it fit to dispense with it the objection should however be raised at the time of the reception of the evidence and no objection should be allowed to be taken in appellate court as to the admissibility of secondary evidence which was admitted in evidence in trial Court without any objection."

(13) The ratio of *U Po Kin's* case (supra) can be applied where certain conditions are attendant; namely, where the Court in its discretion thinks it fit to dispense with a notice under section 66 on the party in possession or power of the original document and where the copy of the document is admitted in evidence in the trial Court without objection.

(14) As would be noticed from the brief narration of the facts of the present case, there was no conscious application of the mind by the Tribunal to the question whether the requirement of the issuance of a notice under section 66 on the owner who is supposed to be in possession or power of the original policy of insurance should be dispensed with. There is also no specific order of the Court admitting the copy of the policy of insurance in evidence. In fact, the whole thing started and ended with the statement dated 20th September, 1983 of the counsel for the insurer by which he produced the true copy of the policy of insurance Ex. R. 1 and closed his case. The production of the copy of the policy of insurance could not by itself amount to its production and admission in evidence. As held by a Division Bench in *Baldev Sahai* v. *Ram Chander and others*, A.I.R. 1931 Lahore 546, there are two stages relating to

documents. One is the stage when all the documents on which the party relies are filed in the Court. The next stage is when the documents are proved and formally tendered in evidence. It is difficult to hold that both the stages of production and admission of the document took place simultaneously. In fact, the statement of the counsel for the insurer does by no means amount to the proof and formal tender of the copy of the policy of insurance Ex. R. 1 in evidence.

(15) In *Umar-ud-din's* case (supra), it was held by a learned Single Judge that where secondary evidence of the contents of a deed is led without objection by the other party, objection cannot be raised in second appeal. The view taken by the Supreme Court is, however, to the contrary and must prevail. *Sital Das* v. *Sant Ram and others* (6), was a case where reliance was placed on a copy of a registered will dated 7th October, 1911. This document had not been proved by any of the witnesses nor did it bear any exhibit mark. The final Court held that no foundation was laid for reception of secondary evidence under section 65 of the Act nor can the copy produced be regarded as secondary evidence within the meaning of section 63. *The Roman Catholic Mission* v. *The State of Madras and another* (7), was a case where certified copies of certain leases from the record of an old case of the Court of the Subordinate Judge, Madhurai, were produced as Exs. B-4, 5, 6 and A-68, 69 and 77. The originals of these documents were not produced before the trial Court at any time. In reaching the conclusion in favour of the appellants the District Judge took into consideration these exhibited certified copies of the documents. The High Court in appeal, however, excluded the same from consideration. The Supreme Court observed, *inter-alia,* as under:—

> "The originals were not produced at any stage nor was any foundation laid for the establishment of the right to give secondary evidence. The High Court rejected them and it was plainly right in so doing. If we leave these documents out of consideration, the other documents do not show that the *inam* comprised the Kudiwaram also."

(16) It is, thus, abundantly clear that *U Po Kin's* case (supra) and *Umar-ud-din's* case (supra) do not lay down good law.

(6) A.I.R. 1954 S.C. 606.
(7) A.I.R. 1966 S.C. 1457.

(17) The following observations find place in *Gopal Das's* case (supra):—

> "Where the objection to be taken is not that the document is in itself in admissible but that the mode of proof put forward is irregular or insufficient, it is essential that the objection should be taken at the trial before the document is marked as an exhibit and admitted to the record. A party cannot lie by until the case comes before a Court of appeal and then complain for the first time of the mode of proof."

(18) Before the above observations can be applied, a finding has to be recorded that the document is in itself not admissible. That is not the case as regards Ex. R. 1 in view of the law laid down in *The Roman Catholic Mission's* case (supra). A division Bench in *Dogar Mal's* case (supra) observed thus—

> "The mode of proof of a document is a question of procedure and is capable of being waived. When the objection as to manner of proof of a document such as that the entries in the account books could not be looked at without formal proof was not taken at the time when the document was sought to be proved in the lower Court and the document was freely referred to by the parties and the Court, it is too late to raise it for the first time in second appeal."

(19) If the above observations are construed to mean that where the entries in the account books of a party are in dispute but are exhibited in evidence without formal proof, in the absence of an objection in the trial court, no objection thereto can be raised in appeal, with respect it is stated that the same runs counter to the law laid down by the Supreme Court.

(20) In *Sait Tarajee Khimchand and others* v. *Yelamarti Satyam and others* (8), it was *inter-alia* observed thus :—

> "The plaintiffs wanted to rely on Exs. A-12 and A-13, the day-book and the ledger respectively. The plaintiffs did not

(8) A.I.R. 1971 S.C. 1865.

prove these books. There is no reference to these books in the judgment. The mere marking of an exhibit does not dispense with the proof of documents."

(21) Thus, no reliance can be pleaced on *Dogar Mal's* case (supra) for the propositition that since Ex. R.1 has been exhibited its formal proof stands dispensed with and no objection to its admissibility can be taken in appeal.

(22) Question No. (3) is, therefore, answered in the affirmative.

(23) In all fairness to the learned counsel for the insurer it may be mentioned that he placed strong reliance on the Supreme Court judgment in *National Insurance Co. Ltd.* v. *Jugal Kishore and others* (9), and in particular on the following observations :—

"Before dealing with the submission we may point out that the policy under which the bus aforesaid was insured had not been filed either before the Tribunal or before the High Court. A photostat copy of the policy has, however, been filed in this Court and learned counsel for the respondents did not have objection in the same being admitted in evidence."

(24) It is difficult to understand how these observations could be of any help to the insurer. The counsel for the respondents therein had no objection to the admission in evidence of the photostat copy of the policy of insurance. That is certainly not the case here.

(25) In view of the questions of law having been answered above, this appeal will now go back to the learned Single Judge for its decision on merits.

S.C.K.

(9) 1988 A.C.J. 270.