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

Date of decision: 13th January, 2015

\+ **MAC.APP. 1050/2011**

NEW INDIA ASSURANCE CO.LTD. ..... Appellant
Through: Mr. K.L. Nandwani, Adv.

versus

RAJ KUMARI SHARMA & ORS. ..... Respondents
Through: Ms. Shantha Devi Raman, Adv. for R-1 to R-3.

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CORAM:
HON'BLE MR. JUSTICE G.P.MITTAL

G. P. MITTAL, J. *(ORAL)*

1. By virtue of this appeal, the Appellant New India Assurance Company Limited impugned the judgment dated 16.08.2011 passed by the Motor Accident Claims Tribunal (the Claims Tribunal) whereby a compensation of Rs.4,61,440/- was awarded in favour of Respondents no.1 to 3 for the death of deceased Chander Shekhar who died on the night of 30.11.2002 while driving Tata Qualis bearing registration no.DL-5CB-5034.

2. The only ground of challenge led by the learned counsel for the Appellant at the time of hearing of the appeal is that since the Appellant had proved conscious and willful breach of the terms and

conditions of the insurance policy, the Appellant Insurance Company was entitled to be exonerated.

3. The manner of death of deceased Chander Shekhar can be extracted from para 6 of the impugned judgment:-

> *"6. PW1 stated in his affidavit Ex. PW1/A, deceased Chander Shekhar was his son who was employed to drive Tata Qualis bearing registration no. DL5CB5034 owned by respondent no. 2. On 30/11/02 at about 7 pm, some passengers including one lady hired the Tata Qualis for journey from Delhi towards Hardoi, UP. When they reached Aligarh, after taking tea and Jalpan, they proceeded for further journey. When at night, they reached in thick forest some kilometers ahead of U.P., the passengers decided to steel the Tata Qualis for which they had made a planning. The lady passenger got the Tata Qualis stopped on the pretext that she wanted to vomit. The deceased driver stopped the Tata Qualis, he was strangulated by the passengers and they threw his dead body in a river in the jungle. When the Tata Qualis did not return to Delhi within stipulated schedule on 30.11.02, respondent no. 1 lodged a written complaint in police station Seelampur. On the basis of the said complaint, FIR NO.424/02 U/s 365 IPC was registered. During investigations, the lady passenger was apprehended and on her disclosure, other accused persons who were also the passengers in Tata Qualis were arrested. They were all charge sheeted for the offences punishable U/s 365/302/201/120B/34 IPC. However, the dead body of the deceased as well as the Tata Qualis could not be recovered."*

4. Relying on *Rita Devi v. New India Assurance Company Ltd., 2000 AIR (SC) 1930,* the Claims Tribunal held that the death of the deceased was caused accidently while committing theft of Tata Qualis

bearing registration no.DL-5CB-5034 belonging to the insured. The finding of the Claims Tribunal to this extent is not challenged.

5. As far as the liability of the Insurance Company is concerned, the facts leading to the death of Chander Shekhar have already been extracted above. It is apparent that on 30.11.2002, some passengers including a lady had hired the Qualis for journey from Delhi to U.P. It is therefore, apparent that the taxi was being run for hire and reward. The Appellant Insurance Company examined R3W1 Ashok Kumar, Assistant, working in the concerned Branch of the Appellant Company to prove the terms and conditions of the policy. Carbon copy of the policy was proved as Ex.R3W1/A.

6. The question for consideration is whether the copy of the insurance policy produced on record by the Appellant can be looked into to prove the terms and conditions of the policy.

7. Admittedly, no notice was given to the insured, owner of Tata Qualis bearing registration no.DL-5CB-5034 for production of the original insurance policy. Copy of the insurance policy being secondary evidence cannot be looked into unless the Appellant proves that primary evidence is not available. Consequently, I am unable to subscrib to the view taken by the Claims Tribunal that though the

Appellant had failed to prove that the Tata Qualis was being used for hire or as a commercial vehicle, yet nothing absolved the Insurance Company to insure a vehicle even for hire and reward. Since the Insurance Policy has not been legally proved, it cannot be said that the insured committed breach of the terms and conditions of the policy.

8. The appeal, therefore, has to fail; the same is accordingly dismissed.

9. The statutory amount of Rs.25,000/- shall be refunded to the Appellant Insurance Company.

10. Sixty percent of the amount deposited has already been released. Rest of the amount shall be released/held in fixed deposit in terms of the order passed by the Claims Tribunal.

11. Pending application also stands disposed of.

(G.P. MITTAL)
JUDGE

JANUARY 13, 2015
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