$~37 to 42

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

Date of Decision: 03rd March, 2016

\+ **MAC.APP. 388/2007**

NAVEEN KUMAR GUPTA & ORS ..... Appellants

Through: Mr. S. N. Parashar, Adv.

versus

BHUPENDER SINGH & ORS ..... Respondents

Through: Mr. Saurabh Gupta & Mr. Gagan Gupta, Advs. for R-2
Mr. P. R. Sikka & Mr. Amit Sikka, Advs. for R-3.

\+ **MAC.APP. 392/2007**

AMIT KUMAR ..... Appellant

Through: Mr. S. N. Parashar, Adv.

versus

BHUPENDER SINGH & ORS ..... Respondents

Through: Mr. Saurabh Gupta & Mr. Gagan Gupta, Advs. for R-2
Mr. P. R. Sikka & Mr. Amit Sikka, Advs. for R-3.

\+ **MAC.APP. 394/2007**

NAVEEN KUMR GUPTA & ORS ..... Appellants

Through: Mr. S. N. Parashar, Adv.

versus

BHUPENDER SINGH & ORS ..... Respondents

Through: Mr. Saurabh Gupta & Mr. Gagan Gupta, Advs. for R-2
Mr. P. R. Sikka & Mr. Amit Sikka, Advs. for R-3.

\+ **MAC.APP. 532/2007**

UNITED INDIA INSURANCE CO.LTD. ..... Appellant

Through: Mr. P. R. Sikka & Mr. Amit Sikka, Advs.

versus

NAVEEN KUMAR & ORS ..... Respondents

Through: Mr. S. N. Parashar, Adv. for respondent/claimants
Mr. Saurabh Gupta & Mr. Gagan Gupta, Advs. for R-6

\+ **MAC.APP. 533/2007**

UNITED INDIA INSURANCE CO.LTD. ..... Appellant

Through: Mr. P. R. Sikka & Mr. Amit Sikka, Advs.

versus

AMIT KUMAR & ORS ..... Respondents

Through: Mr. S. N. Parashar, Adv. for respondent/claimants
Mr. Saurabh Gupta & Mr. Gagan Gupta, Advs. for R-6

\+ **MAC.APP. 534/2007**

UNITED INDIA INSURANCE CO.LTD. ..... Appellant

Through: Mr. P. R. Sikka & Mr. Amit Sikka, Advs.

versus

NAVEEN KUMAR & ORS ..... Respondents

Through: Mr. S. N. Parashar, Adv. for respondent/claimants
Mr. Saurabh Gupta & Mr. Gagan Gupta, Advs. for R-6

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

JUDGMENT

R.K.GAUBA, J (ORAL):

1. These six appeals arise out of common judgment passed on 04.04.2007 by the motor accident claims tribunal (the tribunal) on three separate claim cases presented under Sections 166 & 140 of the Motor Vehicles Act, 1988 (the MV Act), all relating to a motor vehicular accident that took place on 23.09.1999 involving three vehicles including Maruti car bearing registration no.DL-8CC-1720 (the car), gypsy bearing registration no.HR-26B-9327 (the gypsy) and truck bearing registration no.CH-01A-8247 (the truck).

2. The car was moving from Delhi in the direction of Jaipur on way to a place known as Khatu Shamji in Rajsthan. The gypsy, on the other hand, was moving in the opposite direction i.e. from Jaipur towards Delhi. The truck was parked on the side of the road along the carriage way used by the traffic moving from the side of Delhi to Jaipur. The accident occurred at about 01:00 PM in broad day light. The evidence brought before the

tribunal clearly proved that the gypsy coming from the opposite direction was moving in the lane meant for traffic heading from Delhi towards Jaipur. There was a head-on-collision between the car and the gypsy, as a result of which impact the car was hurled towards side of the road where it came to hit against the truck stationary on road side.

3. In the car, Hanuman Prasad Gupta was travelling, accompanied by his wife Sarita Rani, son Amit Kumar and brother-in-law Kanhaiya Lal. All occupants of the car statedly suffered injuries, with Hanuman Prasad Gupta and Sarita Rani dying in the consequence. In the narration of facts, there is reference to one Sunita Gupta also suffering injuries and having resultantly died. Be that as it may, the judgment which is impugned in these appeals would not cover any claim arising out of death of Sunita Gupta. Similarly, this judgment does not pertain to any claim that may have been preferred by Kanhaiya Lal for the injuries suffered by him.

4. Whilst Amit Kumar, injured, filed claim registered as suit no.169/2004 seeking compensation for the injuries suffered by him, the legal heirs/dependants of Hanuman Prasad Gupta and Sarita Rani brought separate claim cases for compensation on account of their respective deaths, such cases having been registered as suit no.168/2004 & 170/2004.

5. In the claim petition, Bhupender Singh, registered owner of the gypsy was impleaded as the first respondent on the ground that he would be vicariously liable to pay the compensation as his driver Shailender Kumar had caused the accident due to rash/negligent driving. Shailender Kumar was impleaded as second respondent in the claim cases. Whilst Bhupender Singh chose to suffer the proceedings *exparte*. Shailender Kumar contested

by filing written statement which contained vague denial of his responsibility pleading false implication. United India Insurance Co. Ltd. (the insurer) was impleaded as third respondent in the claim cases on the ground that it had issued an insurance policy against third party risk covering the period in question. The insurer contested the claim case on the averments that the cover note on the basis of which benefit was claimed from the insurance company was a fake document and further that a manipulation had been carried out by its agent to issue a wrong cover note showing a policy to have been taken out on 23.09.1999 which fact having come to the notice, in as much as the premium was also paid by a cheque dated 24.09.1999, suitable correction was carried out in the insurance policy later.

6. The claimants impleaded Swaran Singh, the driver of the truck as fourth respondent. Though they had indicated that they would implead the owner and insurer of the truck as well, the said party stood deleted by the subsequent direction of the tribunal as necessary particulars were not forthcoming.

7. By the impugned judgment, the tribunal returned clear finding that there could not have been any fault on the part of the truck driver, since it was stationary on the road side and, thus, no liability was fastened against Swaran Singh, the truck driver. The controversy has survived involving primarily the driver and the owner of the gypsy and United India Insurance Company Ltd., which is stated to have issued an insurance policy against third party risk.

8. The tribunal, during the course of inquiry, called upon both sides to lead evidence. Amit Kumar, one of the claimants (the injured) admittedly was the driver of the car. He stepped into the witness box as PW2 to prove necessary facts about the sequence of events which had resulted in the collision. On the other hand, Shailender Kumar, the driver of gypsy appeared as witness in his defence (R2W1) on the basis of his own affidavit (Ex.R-2).

9. The tribunal considered the evidence of both sides and on that basis concluded that there was a head-on collision. Referring to the ruling in *National Insurance Co. Ltd. vs. Chinto Devi*, (2000) 7 SCC 50, it returned the finding that since there was a head-on collision, the drivers of both, the car and gypsy, were equally responsible. Primarily, on the basis of this finding, after making assessment of compensation awardable in the three cases, the tribunal held the driver and owner of gypsy to be responsible to the extent of fifty percent (50%). It rejected the contention of the insurance company about the cover note relied upon being fake document and in the result, directed the said insurance company to indemnify.

10. It may be added here that in the case on account of death of Hanuman Prasad Gupta (suit no.168/2004), compensation in the sum of ₹5,40,667/- was assessed and due to element of contributory negligence the contesting respondents were directed to pay ₹2,70,334/- only. Similarly, in the claim case arising out of death of Sarita Rani (suit no.170/2004), the tribunal assessed the compensation to be ₹5,57,334/-, but directed fifty percent (50%) of the said amount i.e. ₹2,78,667/- to be paid. Pertinent to note here that in both these cases, the tribunal held that the evidence of dependency of

the claimants was not forthcoming and, thus, loss of income was to be treated as compensation towards loss of love & affection. It, however, added ₹5,000/- towards loss of estate, funeral expenses and expenses for transportation of dead body.

11. In the claim case arising out of injuries of Amit Kumar, the tribunal assessed the compensation in the sum of ₹25,000/- but directed only ₹12,500/- to be paid due to the element of contributory negligence.

12. The insurance company, by its appeals MAC appeals (nos. 532/2007, 533/2007 & 534/2007) raises only one issue, viz. that its evidence about forgery in the cover note by the agent has not been properly appreciated and, therefore, denial of recovery rights against the owner of the gypsy is not fair or proper.

13. The claimants, on the other hand, have come up with independent appeals registered as MAC appeal nos. 388/2007, 392/2007 & 394/2007. In each of the said appeals, the claimants question the correctness and propriety of the conclusion of the tribunal holding Amit Kumar (PW2), the driver of the car also responsible. It has been contended that in the given facts and circumstances, the accident had occurred solely due to negligent driving on the part of Shailender Kumar, the driver of gypsy. By their appeals, the claimants in suit no.168/2004 and 170/2004 on account of death of Hanuman Prasad Gupta and Sarita Rani, also pray for enhancement of non-pecuniary damages under the heads of loss of love & affection and funeral expenses.

14. Having heard both sides, this court finds the contention of the claimants against the finding of contributory negligence on the part of Amit Kumar, the driver of the car to be correct. The facts as brought out in the testimony of Amit Kumar (PW2) clearly show that the accident had occurred with the gypsy having emerged from opposite side in the wrong lane. The site plan prepared by the local police, during investigation of the first information report (FIR) no.186/1999, copy whereof had been submitted on the record of the tribunal, clearly shows that it was the gypsy which had entered in a wrong lane. There is no explanation whatsoever offered by the gypsy driver Shailender Kumar (R2W1), either in the pleadings submitted in the answer to the claim petitions or in the course of his testimony through affidavit (Ex.R-2), as to why he had entered into the carriage way which was meant for movement of traffic from opposite direction.

15. It has to be borne in mind that the accident had occurred on a national highway where vehicles are permitted to move at a speed higher than ordinarily permissible speed limits enforced within the vicinity of a town or city. It is nobody's case that there was any speed limit enforced in the area where the accident had occurred. With no justification whatsoever for the gypsy to have come in the wrong lane, the driver of the car moving in the opposite direction within his own rights would have been taken by surprise when the gypsy emerged in front. In such fact situation, it is not fair to attribute any negligence on the part of the car driver. The view taken in *Chinto Devi* (supra) is not an unexceptional or thumb rule in all cases of head-on collision. The head-on collision does give rise to the need to

examine if both the drivers could have been at fault. But it cannot always clinch the issue, particularly when there is no justification for one of the said drivers to be in the wrong lane which led to such a head-on-collision.

16. For the above reasons, the finding of contributory negligence on the part of Amit Kumar, the driver of the car, must be set aside.

17. The grievance of the claimants in appeals relating to the awarded compensation arising out of deaths of Hanuman Prasad and Sarita Rani is primarily under the non-pecuniary heads of damages. This court cannot approve of the view taken that the loss of income has to be treated as compensation towards loss of love & affection. The loss of income in these cases was a loss to the estate. Therefore, separate award under the head of loss of love & affection was called for. Since the deaths had occurred in 1999, in the considered opinion of this court, separate awards under the head of loss of love & affection in the sum of ₹50,000/- (as per judgment passed on 01.02.2016 in FAO no.102/2001 of this court) in each of the said two cases deserves to be granted.

18. Thus, the compensation in the case of death of Hanuman Prasad Gupta is increased by ₹50,000/- so as to be in the sum of (5,40,667+50,000) ₹5,90,667/-, rounded off to ₹5,90,000/-, entire of which would be payable by the driver and the owner of the gypsy held jointly and severally liable.

19. Similarly, in case of death of Sarita Rani, the award of compensation is increased to (5,82,334+50,000) ₹6,32,334/-, rounded off to ₹6,32,000/-, the entire amount being payable by the driver and the owner of gypsy, held jointly and severally liable.

20. This brings one to the issue of forgery of the cover note, as raised by the insurance company in its appeals. The issue was considered by the tribunal in the following manner:-

> *"It is vehemently contended by the Ins. Co. respondent number 3 which is the insurer of the vehicle HR26-B-9327. The respondent number 3 has taken as specific contention that the policy is fake. The insured, namely, the Bhupender Singh, the owner of the vehicle remained ex-parte. On behalf of the Ins. Co. one witness was examined. R3W1 P.K.Rastogi, the Branch Manager of respondent number 3 office at Behroar Rajasthan, deposed that he has brought the photocopy of the insurance policy at Ex.R3W1/1 which includes the attested copy of the policy, endorsement, letter addressed to the insured, attested copies of the dispatch register, cancellation of agency of their Agent Jitender Kumar Gupta, collectively marked Ex.R3W1/1. There is no say by the witness of the Ins. Co. that the Co. is not liable to act under the policy. It was argued by the Ld. Counsel that the Ins. Co. is not liable since the policy was a forged one. I have carefully gone through the Ex. R3W1/1, this is a policy in favour of one Bhupender Singh (respondent number 1 the owner) regarding the offending vehicle for the period 23.09.1999 to 22.09.2000 bearing cover note number 892854 dated 24.09.1999. The endorsement which is a part of the policy shows that the subject policy cover note number 892854 was issued wrongly for the period of insurance as 23.09.1999 to 22.09.2000 instead of 25.09.1999 lo 24.09.2000. The premium received is declared as agreed for the period 25.09.1999 to 24.09.2000. This endorsement bears the date as 13.10.1999. There is a letter also addressed to the insured. The copies of dispatch register is also shown. He also produced the letter addressed to the Agent terminating the agency. The letter of termination is dated 28.01.2000. The allegation against the Agent Jitender Kumar Gupta, is that the Agent prevailed upon R.K. Meena, RC, BO Behroar to prepare the policy with the changed dates. It is alleged that the Agent acted in the manner pre-judicial to the interest of the Co. With this allegation, the agency is terminated. It is to be noted that in the letter of termination the Ins. Co. has made a specific allegation that the Agent has submitted a cheque bearing number 298053 dated 24.09.1999, for a*

sum of Rs.583/- as premium against the vehicle HR36-B-9327 and accordingly, the Agent prepared the cover note on 24.09.1999 bearing number 892854 for insuring the vehicle in question for the period 23.09.1999 to 24.09.2000.

It is seen from the record that the policy cover note 892854 insuring the offending vehicle dated 24.09.1999 is not cancelled. Only an endorsement was issued dated 13.10.1999. There is no document that the said endorsement was served on the insured. Apart from the above, it is to be noted that even if it is held that the Agent has manipulated the records, the Ins. Co. can not disown cover note since it emanated from its office. It is settled principle of law that the principal shall be held liable for all the acts of the Agent. The complicity if any of the Agent would not efface the responsibilities of the principal. Furthermore, it is nowhere stated that the cover note dated 23.09.1999 is not rescinded and the contract is not terminated in accordance with law. Mere making amends to the policy or the cover note unilaterally without the consent of the insured can not be called a lawful amendment to the policy conditions whether it be with regard to the period, premium or any such other changes. If the ins. Co. had to amend the period it could have done only with the express consent of the insured. In the above context, I am unable to hold the endorsement attached to Ex.R3W1/1 as a lawful one to treat the policy as not binding on the Ins. Co. Any loss suffered by the acts of the Agent of the Ins. Co. can not be a ground to deny the contractual liability of the Ins. Co. under the cover note in so far as the same having been believed bonafide by the insured who tendered the requisite payment of premium. Therefore, I am unable to agree with the arguments advanced by Smt. A. Sangeeta, that the policy is a fake one entailing no liability on the Ins. Co. Thus, the Ins. Co. shall abide by the terms and conditions of the policy in making good the third party liability. No recovery rights arc granted. Hence, liability is answered accordingly."

21. It may be mentioned at this stage that Bhupender, the owner of the offending vehicle (the gypsy), a respondent in all these appeals of the insurance company, has chosen not to appear inspite of notices. As

mentioned earlier, he had suffered the proceedings before the tribunal as well *exparte*.

22. The observations of the tribunal, as extracted above, indicate that it was not satisfied with the plea of the insurance company primarily for three reasons, one, that the insurance company had not canceled the cover note dated 24.09.1999; the second, that the amendment to the insurance policy was carried out unilaterally and without consent of insured; and, third, since the cover note had been issued by its own agent, the insurance company was liable it being the principal.

23. In the facts and circumstances of the case, this court finds it difficult to uphold all the above mentioned reasons set out by the tribunal. The owner/insured did not appear to put in any contest. Only he would have been in a position to contend that the cover note or the policy had been amended unilaterally or without his consent. In fact, the evidence adduced by the insurance company indicates that due intimation was given to him, prior to the amendment being carried out. The evidence also showed that the premium was paid by a cheque issued only on 24.09.1999. In these circumstances, it is apparent that the insurance document was fabricated. The insurance policy against third party risk in respect of the gypsy, therefore, could not have taken effect from any date anterior to 24.09.1999. Since the accident had occurred on 23.09.1999 during day time (01:00 PM), the insurance policy in question, or its cover note, cannot be held to be enforceable for indemnity in respect of the accident in question.

24. Since the cover note did indicate 23.09.1999 to be the date of issue, justice demands that the insurance company be called upon to pay to the

claimants the amounts of compensation in terms of the modification as above and given liberty to recover the same from the owner. Ordered accordingly.

25. It is noted that the insurance company has already paid its liability in terms of the awards as were passed by the tribunal. The insurance company shall now deposit with the tribunal the balance payable within 30 days of this order and be at liberty to take out appropriate execution proceedings to recover the amounts from the owner of the gypsy (the offending vehicle) i.e. Bhupender Singh, or Shailender Kumar, the driver, both of whom have been held to be jointly and severally liable.

26. The statutory deposit, if made, shall be refunded.

27. The awards are modified and the appeals stand disposed of in above terms.

R.K. GAUBA
(JUDGE)

MARCH 03, 2016
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