

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Date of Decision: February 07, 2017

(i) + **MAC.APP. 207/2009**

THE NEW INDIA ASSURANCE CO.LTD. Appellant
Through: Ms. Neerja Sachdeva, Advocate

Versus

RAKESH KUMAR JINDAL & ORS.Respondents
Through: Mr. Rahul Sharma, Advocate for
respondent No.1
Mr. Gopal Jha & Mr. G.R. Pandey,
Advocates for respondents No.2 &
3

(ii) + **MAC.APP. 1001/2016**

RAKESH KUMAR JINDAL Appellant
Through: Mr. Rahul Sharma, Advocate

Versus

NEW INDIA ASSURANCE CO LTD & ORS.Respondents
Through: Ms. Neerja Sachdeva, Advocate
for respondent No.1

(iii) + **MAC.APP. 1002/2016**

MAKHAN LAL SHAH & ANR.Appellants
Through: Mr. Gopal Jha & Mr. G.R.
Pandey, Advocates

Versus

THE NEW INDIA ASSURANCE CO LTD & ANR. ..Respondents
Through: Ms. Neerja Sachdeva, Advocate
for respondent No.1

Mr. Rahul Sharma, Advocate for
respondent No.2

CORAM:
HON'BLE MR. JUSTICE SUNIL GAUR

JUDGMENT
ORAL

%

1. In the above captioned first appeal, Insurer seeks exoneration from paying the awarded amount, whereas the above captioned second appeal is of claimant by way of cross-objections against the finding returned by learned Motor Accident Claims Tribunal of claimant being a gratuitous passenger in the matador in question. The above captioned third appeal is owner's cross-objections to the grant of recovery rights against owner and driver of the vehicle in question.

2. Since the above captioned three appeals arise out of common impugned Award of 4th February, 2009, therefore, these appeals have been heard together and are being decided by this common judgment.

3. Impugned Award of 4th February, 2009 grants compensation of ₹4,39,200/- with interest @ 7.5% p.a. on account of injuries sustained by claimant- *Rakesh Kumar Jindal* in a road accident on 27th November, 2003. The factual matrix of this case already stands noted in the impugned Award and so, needs no reproduction. Suffice to note that claimant-*Rakesh Kumar Jindal* alongwith two companions was purportedly travelling in a matador from *Ajmeri Gate* to *Karol Bagh* with heavy bags of photographic films. Recovery rights have been granted to the Insurer by Motor Accident Claims Tribunal (*hereinafter referred to as Tribunal*) while holding that claimant-*Rakesh Kumar Jindal* was a

gratuitous passenger. Apart from the evidence of claimant-*Rakesh Kumar Jindal* and other formal witnesses, there is evidence of R3W1 on behalf of Insurer to the effect that Notice under order 12 Rule 8 CPC was given to owner of the vehicle in question. Regarding the accident in question, FIR was got registered and a copy of FIR and charge-sheet has been tendered by the claimant in his evidence. On the strength of evidence on record, impugned Award has been rendered. It is relevant to note that driver and owner of the vehicle in question were *ex parte* before the learned Tribunal.

4. During the pendency of above-captioned first appeal, vide order of 17th August, 2009, out of the awarded amount deposited by the Insurer, a sum of ₹50,000/- was released to Claimant and rest of the deposited amount has been directed to be retained by the learned Tribunal in fixed deposit receipts.

5. Learned counsel for Insurer has drawn attention of this Court to copy of FIR on record to point out that the version of eye-witness, who was travelling with claimant, is that eye witness and claimant took a lift in the matador and so, cross-objections filed by claimant are without any basis. Learned counsel for Insurer relies upon Supreme Court's decision in *National Insurance Co. Ltd. Vs. Kaushalaya Devi & ors.* (2008) 8 SCC 246 to submit that in view of finding of claimant being a gratuitous passenger, the liability to pay the compensation is of owner and driver of the vehicle in question and not of Insurer and so, exoneration from paying the awarded amount is sought. Regarding cross-objections filed by claimant as well as by driver and owner of the vehicle in question, it is

submitted by learned counsel for Insurer that the finding of claimant being a gratuitous passenger is well justified in the face of evidence on record.

6. On the contrary, learned counsel for claimant draws attention of this Court to the chief-examination of Claimant to point out that on the day of accident, claimant was carrying ten heavy bags containing photographic films and papers and so, he had hired a matador from *Ajmeri Gate* to *Karol Bagh* for getting photographic films developed. It is pointed out that in the cross-examination, claimant has denied the suggestion that that he was unauthorizedly travelling in a goods vehicle i.e. Matador. It is asserted by learned counsel for claimant that the Claimant was travelling along with his heavy bags containing photographic films and so, he cannot be termed as a gratuitous passenger. To submit so, reliance is placed upon a decision of Coordinate Bench of this Court in *National Insurance Co. Ltd. Vs. Hansu & ors.* 2011 ACJ 123. Learned counsel for owner and driver of vehicle in question submits that grant of recovery rights to Insurer by Tribunal is unjustified. Nothing else is urged by either side.

7. Upon hearing and on perusal of impugned Award, evidence on record and the decisions cited, I find that learned Tribunal has arrived at a conclusion that claimant was a gratuitous passenger on the premise that it is not stated in the claim petition that claimant had hired the matador in question for transporting ten heavy bags of photographic films. Upon a bare reading of the claim petition, it becomes evident that there was no occasion for Claimant to have said so. Pertinently, it has come in the

chief examination of Claimant that he had hired a matador to carry ten heavy bags to get photographic films developed and in the cross-examination of Claimant, there is no suggestion that he was not carrying the photographic films and papers. So, mere non-recovery of photographic films/papers in criminal proceedings is of no avail. All that has come in the cross-examination of claimant is that he does not know the fate of luggage/goods. In the considered opinion of this Court, this suggestion by itself is not sufficient to conclude that Claimant was a gratuitous passenger. Claimant in his cross-examination has specifically denied the suggestion that he had not hired the matador. There is one stray line in cross-examination of Claimant to the effect that Claimant had not requested for lift but was voluntarily taken by the matador driver. On the strength of this stray line in the cross-examination of claimant, it cannot be concluded that Claimant was a gratuitous passenger. Such a view is being taken in light of a decision of Coordinate Bench of this Court in *Hansu (supra)*.

8. The finding returned by the learned Tribunal regarding claimant being a gratuitous passenger is unsustainable because version in the chief examination of Claimant does not get diluted in cross-examination of Claimant. Otherwise also, judicial notice can be taken of the fact that nobody would give a lift to a person who is having ten heavy bags of photographic films/paper. Merely because the first informant of FIR in question had stated that lift was taken in the matador, would not dilute the evidence of Claimant for the reason that version of first informant has not been put to Claimant in the cross-examination. In the light of view taken

as above, reliance placed by Insurer's counsel upon the decision in *Kaushalaya Devi (supra)*, is of no avail because the finding of Claimant being a gratuitous passenger is unsustainable.

9. The quantum of compensation awarded, appears to be just and reasonable. Impugned Award is modified to the extent that liability to pay the awarded amount shall be of Insurer, with no recovery rights.

10. Statutory deposit, if any, be released to the Insurer as per rules and deposited amount be released to Claimant by Tribunal in the manner as provided in the impugned Award.

11. The above captioned three appeals are disposed of while modifying impugned Award to the extent indicated above.

(SUNIL GAUR)
JUDGE

FEBRUARY 07, 2017

r