IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No. 4814 of 2008
To
FIRST APPEAL No. 4815 of 2008
With
CIVIL APPLICATION No. 11692 of 2008
To
CIVIL APPLICATION No. 11693 of 2008
In FIRST APPEAL No. 4815 of 2008

For Approval and Signature:

HONOURABLE MR.JUSTICE H.K.RATHOD Sd/-

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1 Whether Reporters of Local Papers may be allowed to see the judgment ? YES

2 To be referred to the Reporter or not ? YES

3 Whether their Lordships wish to see the fair copy of the judgment ? YES

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ? NO

5 Whether it is to be circulated to the civil judge ? NO

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BAJAJ ALLIANZ GENERAL INSURANCE CO. LTD - Appellant(s)
Versus
DIPAKKUMAR NARAYANBHAI NAI & 4 - Defendant(s)

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Appearance :
MR SHALIN N MEHTA for Appellant(s) : 1,
None for Defendant(s) : 1 - 5.

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CORAM : HONOURABLE MR.JUSTICE H.K.RATHOD

Date : 30/09/2008

ORAL JUDGMENT

1. Heard learned advocate Mr. Shalin N. Mehta appearing on behalf of appellant – Bajaj Allianz

General Insurance Company Limited.

2. The appellant – Insurance Company has challenged common award passed by Motor Accident Claims Tribunal, Baroda in Motor Accident Claim Petition No.327 of 2006 filed by Dipakkumar Narayanbhai Nai and Motor Accident Claim Petition No.328 of 2006 filed by Nilaben Dipakkumar Nai. The Claims Tribunal has awarded amount of compensation in both cases which comes to Rs.4,13,892/- and 51,050/- with 9% interest from the date of filing application by award dated 19th March 2008.

3. Learned advocate Mr. Shalin Mehta raised contention that driver of tractor was not having licence to drive tractor with trailer and that copy of licence was produced vide Exh.62 and there was also a receipt from RTO, Rajasthan Exh.61 and Insurance Policy Exh.63. He also raised contention that if driver of tractor is not having valid licence at the time of accident and this breach is proved by Insurance Company placing documents on record, then, Claims Tribunal shall have to examine such contention raised by Insurance Company and in such condition, Insurance Company is not liable to pay compensation to respondent claimant. He also emphasis on this that breach committed by owner and driver driving tractor with trailer, for which, driver is not authorised by valid licence. Therefore, Claims Tribunal has committed gross error in awarding compensation holding liability of Insurance Company to pay

compensation. He also submitted that before Claims Tribunal, a detailed written statement was filed and also written arguments were placed on record, Insurance Company has not led any oral evidence before Claims Tribunal. Therefore, he submitted that it is a duty of Claims Tribunal to examine such contention raised by Insurance Company and must have to be answered by Claims Tribunal.

4. Learned advocate Mr. Mehta relied upon recent two decisions of Apex Court; one is in case of *National Insurance Co. Ltd. v. Vidhyadhar Mahariwala and Ors.*, reported in *2008 (12) Scale 577* and another is in case of *United India Insurance Company Ltd. v. A.N. Subbulakshmi & Ors.,* reported in *2008 (12) Scale 595.* He submitted that in aforesaid two decisions, when at the time of accident, driver has no effective licence then Insurance Company is not liable to indemnify the award.

5. It was held that merely because of gap in renewal of driving licence which cannot be a ground for exoneration whether appellant – Insurance Company is liable to pay compensation of claimant, answer is given 'No'. Challenge in this appeal before Apex Court is to judgment of a learned Single Judge of Rajasthan High Court at Jabalpur dismissing appeal filed by appellant under Section 173 of Motor Vehicles Act, 1988. Challenge before Apex Court was to the award made by Motor Claims Appellate Tribunal, Ratangarh (Churu) in Claim Case No.89 of 2004. By

said award, a sum of Rs.4,03,650/- was awarded to claimant – respondent No.1 in appeal. The dispute related to rejection of appellant's claim for exoneration on the ground of violation of policy condition. It was pointed out that driving licence of driver of offending vehicle was not in force on the date of accident.

6. Thereafter, Apex Court has considered contentions raised by Insurance Company and examined question of law while referred decision of Apex Court in case of *National Insurance Co. Ltd. v. Swaran Singh and Ors.,* reported in *2004 (3) SCC 297*, wherein, Apex Court has considered decision in case of *Ishwar Chandra and Ors. v. Oriental Insurance Co. Ltd.,* reported in *2007 (10) SCC 650*. So, in this case, facts are not clear as to whether claimants or victims are third party or not. In other decision, in case of A.N. Subbulakshi & Ors. (supra) as referred above, where, Apex Court has considered facts that matter arises from an unfortunate accident, in which, two lives were lost. On 14th May 1981 at about 6-30 in the morning, a head-on collusion between an Ambassador car bearing registration No.MDO-7789 and a lorry bearing registration No.MDR-3106 took place on Trichy-Chennai highway near Thozhuthur. As a result of collusion, Ambassador Car was badly smashed and turned turtle. Its owner, Annamalai, who was on driver's seat died on the spot. Another person, viz., Sigappi, aged about 24 years who worked as Annamalai's Secretary and who was sitting on the rear

seat along with latter's son was thrown out of the car and she too died on the spot. However, Annamalai's wife and daughter sitting on front seat and his son sitting on rear seat survived. In the accident, truck also suffered substantial damage.

7. In regard to the accident, three claim cases came to be filed before Motor Accidents Claims Tribunal, Cuddalore. MACTOP No.198 of 1982 was filed by owner of lorry, M/s. Aruppukottai Sri Jaya Vilas Pvt. Ltd., claiming compensation of Rs.58,300/- for damage caused to lorry MDR 3106 in the accident, allegedly resulting from rash and negligent driving of car MDO 7789. The claim of lorry's owner was resisted by legal representatives of deceased Annamalai. Another claim petition, MACTOP No.625 of 1981 was filed by heirs and legal representatives of deceased Sigappi against owner of lorry and its insurer claiming damages for her death. A third claim petition, MACTOP No.627 of 1981 was filed by wife and children of deceased Annamalai, owner of car, against owner of lorry and its insurer claiming a sum of Rs.10,04,600/- as compensation for his death. The Tribunal by order dated 22nd January 1986 found and held that accident was caused entirely due to rash and negligent driving of car driver, Annamalai.

8. Thereafter, High Court has held that contributory negligence on the part of lorry driver could be fixed at 50% and that of ambassador car at 50% as seen from place of impact, damages caused to

vehicles.

9. Thereafter, Apex Court has ultimately decided matter considering decision of Constitution Bench in case of *New India Assurance Co. Ltd. v. C.M. Jaya & Ors. r*eported in *(2002) 2 SCC 78*, wherein, same question came for consideration before Constitution Bench of Apex Court and it was held that under Section 95(2)(a) of the Act even in case of a comprehensively insured vehicle, liability of insurer was limited to Rs.50,000/- (raised to Rs.1,50,000/- w.e.f. 1st October 1982). An unlimited or a higher liability than statutory liability of insurer would arise only in case there is a separate contract and payment of additional premium by owner of vehicle.

10. Learned advocate Mr. Mehta relying upon aforesaid two recent decisions of Apex Court and submitted that because of driver was not having driving licence for trailer which was joined with tractor, therefore, Insurance Company was not liable for payment of compensation. He also raised contention that there was a contributory negligence of claimant because four persons were travelling on motorcycle No.GJ-1-HC-8610. The important facts are that driver of tractor was not examined. The written statement was filed by Insurance Company. The written arguments were filed. No oral arguments made on question which has been relied upon by Insurance Company before Claims Tribunal. So, in absence of oral submission where specifically point was not

canvassed by Insurance Company before Claims Tribunal, Claims Tribunal is not supposed to consider merely the pleadings and written arguments placed on record by Insurance Company. It is a duty of Insurance Company to make submission before Claims Tribunal on the point on which they relied in accordance with law. If no such oral submission was made, Claims Tribunal is not supposed to give answer whatever submissions made in written arguments by Insurance Company before Claims Tribunal. Therefore, according to my opinion, in absence of driver's evidence, evidence of claimant has been rightly relied upon by Claims Tribunal and for that, Claims Tribunal has not committed any error.

It is clear from both decisions referred as above relied by learned Advocate Mr. Mehta where no ratio laid down that in case of breach or fundamental breach of insurance policy, in case of third party, insurance company not at all liable. None of the case relating third party so two decisions are not helpful to Learned Advocate Mr. Mehta. The facts of two cases cited above are totally different from facts of present case, therefore, not applicable to said case.

11. The contention raised by learned advocate Mr. Mehta that when more than one person is carrying on motorcycle as a pillion rider, thereby, violating Section 128; whether violation of Section 128, per se, by a motorcyclist raises presumption of contributory negligence on his part, answer is given 'No' by Full Bench of Madhya Pradesh High Court,

Indore Bench reported in case of ***Devisingh v. Vikramsingh and others*** reported in ***2008 ACJ 393*** while conferring earlier decision reported in 2007 ACJ 737 (MP) in case of *Manjo Bee v. Sajjad Khan, relevant Para 14* is quoted as under :

> *"14. Accordingly, our answers to the questions referred to us are :*
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> *(1) Violation of section 128 of the Act, per se, by by a motorcyclist does not raise a presumption of contributory negligence on his part.*
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> *(2) Similarly, violation of section 128 of the Act per se does not amount to contributory negligence on the part of the pillion riders.*
>
> *(3) A pillion rider cannot put up a plea of composite negligence by the driver of the motor cycle, if the driver only violates section 128 of the Act."*

12. Therefore, merely more than one person is riding as pillion rider on motorcycle itself would not consider to be a case of contributory negligence of claimant. Therefore, that contention raised by learned advocate Mr. Mehta cannot be accepted and same is rejected.

13. Vehemently, learned advocate Mr. Mehta

raised contention that driver of tractor who has not valid licence for trailer and has only a licence of tractor, therefore, owner has committed breach, therefore, there is no liability of Insurance Company to pay compensation. This contention raised by learned advocate Mr. Mehta relying upon recent decisions of Apex Court as referred above. The Apex Court has considered this question in case of **Oriental Insurance Company v. Zaharulnisha & Ors.** *reported in* ***2008 AIR SCW 3251***. The Apex Court has held that liability of insurer for third party risks; statue raises legal fiction that insurer would be deemed to be a judgment-debtor in respect of liability. The violation of provisions of Act may result in absolving insurers but, same may not necessarily hold good in case of a third party. The liability of insurer to satisfy decree passed in favour of third party as a statutory. The relevant Para 10, 14 to 19 are quoted as under :

> *"10. In order to appreciate the rival contentions of the learned counsel for the parties, the legal question that needs to be considered by us is : Whether the appellant-insurance company could be held liable to pay the amount of compensation for the default of the scooterist who was not holding licence for driving two wheeler scooter but had driving licence of different class of vehicle in terms of Section 10 of the MV Act ?*
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> *14. Sub-section (1) of Section 149 casts a*

liability upon the insurer to pay to the person entitled to the benefit of the decree "as if he was the judgment debtor", that is, the Statute raises a legal fiction to the effect that for the said purpose the insurer would be deemed to be a judgment-debtor in respect of the liability of the insurer in respect of third party risks.

15. It is beyond any doubt or dispute that under Section 149(1) of the MV Act, insurer, to whom notice of bringing of any proceeding for compensation has been given, can defend the action on any of the grounds mentioned therein. A three Judge Bench of this Court in National Insurance Company Limited v. Swaran Singh [(2004) 3 SCC 297] has extensively dealt with the meaning, application and interpretation of various provisions, including Ss.3(2), 4(3), 10(2) and 149 of the MV Act. In paragraph 47 of the judgment, the learned Judges have held that if a person has been given a licence for a particular type of vehicle as specified therein, he cannot be said to have no licence for driving another type of vehicle which is of the same category but of different type. As for example, when a person is granted a licence for driving a light motor vehicle he can drive either a car or a jeep and it is not necessary that he must have driving licence both for car and jeep separately. In paragraph 48, it is held as under :

"Furthermore, the insurance company with a view to avoid its liabilities is not only required to show that the conditions laid down under Section 149(2)(a) or (b) are satisfied but is further required to establish that there has been a breach on the part of the insured. By reason of the provisions contained in the 1988 Act, a more extensive remedy has been conferred upon those who have obtained judgment against the user of a vehicle and after a certificate of insurance is delivered in terms of Section 147(3). After a third party has obtained a judgment against any person insured by the policy in respect of a liability required to be covered by Section 145, the same must be satisfied by the insurer, notwithstanding that the insurer may be entitled to avoid or to cancel the policy or may in fact have done so. The same obligation applies in respect of such a liability but who would have been covered if the policy had covered the liability of all persons, except that in respect of liability for death or bodily injury."

16. The judgment proceeds to hold that under the MV Act, holding of a valid driving licence is one of the conditions of contract

of insurance. Driving of a vehicle without a valid licence is an offence. However, the question herein is whether a third party involved in an accident is entitled to the amount of compensation granted by the Motor Accidents Claims Tribunal although the driver of the vehicle at the relevant time might not have a valid driving licence but would be entitled to recover the same from the owner or driver thereof. It is trite that where the insurers, relying upon the provisions of violation of law by the assured, take an exception to pay the assured or a third party, they must prove a willful violation of the law by the assured. In some cases, violation of criminal law, particularly violation of the provisions of the MV Act, may result in absolving the insurers but, the same may not necessarily hold good in the case of a third party. In any event, the exception applied only to acts done intentionally or "so recklessly as to denote that the assured did not care what the consequences of his act might be". The provisions of sub-sections (4) and (5) of Section 149 of the MV Act may be considered as to the liability of the insurer to satisfy the decree at the first instance. The liability of the insurer is a statutory one. The liability of the insurer to satisfy the decree passed in favour of a third party is also statutory.

17. The learned judges having considered the

entire material and relevant provisions of the MV Act and conflict of decisions of various High Courts and this Court on the question of defences available to the insurance companies in defending the claims of the victims of the accident arising due to the harsh and negligent driving of t he vehicle which is insured with the insurance companies, proceeded to record the following summary of findings.

(i)Chapter XI of the Motor Vehicles Act, 1988 providing compulsory insurance of vehicles against third party risks is a social welfare legislation to extend relief by compensation to victims of accidents caused by use of motor vehicles. The provisions of compulsory insurance coverage of all vehicles are with this paramount object and the provisions of the Act have to be so interpreted as to effectuate the said object.

(ii) Insurer is entitled to raise a defence in a claim petition filed under Section 163A or Section 166 of the Motor Vehicles Act, 1988 inter alia in terms of Section 149(2)(a)(ii) of the said Act.

(iii) The breach of policy condition, e.g. disqualification of driver or invalid driving licence of the driver, as

contained in Sub-section (2)(a)(ii) of Section 149, have to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time.

(iv) The insurance companies are, however, with a view to avoid their liability must not only establish the available defence(s) raised in the said proceedings but must also establish 'breach' on the part of the owner of the vehicle; the burden of proof wherefor would be on them.

(v) The court cannot lay down any criteria as to how said burden would be discharged, inasmuch as the same would depend upon the facts and circumstances of each case.

(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards insured unless the said breach or breaches on the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insured under Section 149(2) of the Act.

(vii) The question as to whether the owner has taken reasonable care to find out as to whether the driving licence produced by the driver, (a fake one or otherwise), does not fulfill the requirements of law or not will have to be determined in each case.

(viii) If a vehicle at the time of accident was driven by a person having a learner's licence, the insurance companies would be liable to satisfy the decree.

(ix) The claims tribunal constituted under

Section 165 read with Section 168 is empowered to adjudicate all claims in respect of the accidents involving death or of bodily injury or damage to property of third party arising in use of motor vehicle. The said power of the tribunal is not restricted to decide the claims inter se between claimant or claimants on one side and insured, insurer and driver on the other. In the course of adjudicating the claim for compensation and to decide the availability of defence or defences to the insurer, the Tribunal has necessarily the power and jurisdiction to decide disputes inter se between the insurer and insured in the course of adjudication of claim for compensation by the claimants and the award made thereon is enforceable and executable in the same manner as provided in Section 174 of the Act for enforcement and execution of the award in favour of the claimants.

(x) Where on adjudication of the claim under the Act the tribunal arrives at a conclusion that the insurer has satisfactorily proved its defence in accordance with the provisions of Section 149(2) read with Sub-section (7), as interpreted by this Court above, the Tribunal can direct that the insurer is liable to be reimbursed by the

insured for the compensation and other amounts which it has been compelled to pay to the third party under the award of the tribunal. Such determination of claim by the Tribunal will be enforceable and the money found due to the insurer from the insured will be recoverable on a certificate issued by the tribunal to the Collector in the same manner under Section 174 of the Act as arrears of land revenue. The certificate will be issued for the recovery as arrears of land revenue only if, as required by Sub-section (3) of Section 168 of the Act the insured fails to deposit the amount awarded in favour of the insurer within thirty days from the date of announcement of the award by the tribunal.

(xi) The provisions contained in Sub-section (4) with proviso thereunder and Sub-section (5) which are intended to cover specified contingencies mentioned therein to enable the insurer to recover amount paid under the contract of insurance on behalf of the insured can be taken recourse of by the Tribunal and be extended to claims and defences of insurer against insured by, relegating them to the remedy before, regular court in cases where on given facts and circumstances adjudication of their claims inter se might delay the

adjudication of the claims of the victims.

18. In the light of the above-settled proposition of law, the appellant-insurance company cannot be held liable to pay the amount of compensation to the claimants for the cause of death of Shukurullah in road accident which had occurred due to rash and negligence driving of scooter by Ram Surat who admittedly had no valid and effective licence to drive the vehicle on the day of accident. The scooterist was possessing driving licence of driving HMV and he was driving totally different class of vehicle which act of his is in violation of Section 10(2) of the MV Act.

19. In the result, the appeal is allowed to the limited extent and it is directed that the appellant-insurance company though not liable to pay the amount of compensation, but, in the nature of this case it shall satisfy the award and shall have the right to recover the amount deposited by it along with interest from the owner of the vehicle, viz. respondent No.8, particularly in view of the fact that no appeal was preferred by him nor has he chosen to appear before this Court to content this appeal. This direction is given in the light of the judgments of this Court in National Insurance Co. Ltd. v. Baljit Kaur and Others [(2004) 2 SCC 1] and Deddappa and Others v. Branch Manager, National Insurance

Co. Ltd. [(2008) 2 SCC 595].“

Recently, in respect to owner of goods travelled in goods vehicle after amendment of 1994, the insurance company is held liable under section 147 of MV Act being statutory liability in case of New India Insurance Company versus Darshana Devi and others, reported in (2008) 7 SCC 416 = 2008 (2) GLH 393 SC, observed as under in para 11, 13, 14, 16 to 19:

> “11. The liability of an insurance company to recompense the owner and driver of a vehicle, who are primarily responsible for payment of compensation to a victim or dependent of a deceased arising out of use of a motor vehicle, is statutory in nature. Whereas an owner of a motor vehicle is under a statutory obligation to get it compulsorily insured, the defence of an insurance company is limited. Sub-section (2) of Section 149 of the Motor Vehicles Act, 1988 reads thus :
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> “149(2) No sum shall be payable by an insurer under sub-section (1) in respect of any judgment or award unless, before the commencement of the proceedings in which the judgment of award is given the insurer had notice through the Court or, as the case may be, the Claims Tribunal of the bringing of the proceedings, or in respect of such judgment or award so long as execution is stayed thereon pending an appeal; and an insurer to whom notice of the bringing of any such proceedings is so given shall be entitled to be made a party thereto and to defend the action on any of the following grounds, namely:-
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> (a) that there has been a breach of a specified condition of the policy, being one of the
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> following conditions, namely:-
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> (i) a condition excluding the use of the vehicle-
>
> (a) for hire or reward, where the vehicle is on the date of the contract of insurance a vehicle not covered by a permit to ply for hire or reward, or

(ii) a condition excluding driving by a named person or persons or by any person who is not duly licensed, or by any person who has been disqualified for holding or obtaining a driving licence during the period of disqualification; or

(iii) a condition excluding liability for injury caused or contributed to by conditions of war, civil war, riot or civil commotion; or

(b) that the policy is void on the ground that it was obtained by the nondisclosure of a material fact or by a representation of fact which was false in some material particular."

13. In Dhanraj v. New India Assurance Co. Ltd. & Anr. [(2004) 8 SCC 553], this Court held :

"9. In the case of Oriental Insurance Co. Ltd. v. Sunita Rathi [(1998) 1 SCC 365] it has been held that the liability of an insurance company is only for the purpose of indemnifying the insured against liabilities incurred towards a third person or in respect of damages to property. Thus, where the insured i.e. an owner of the vehicle has no liability to a third party the insurance company has no liability also."

14. In United India Insurance Co. Ltd., Shimla v. Tilak Singh & Ors.

[(2006)4 SCC 404], it was opined :

"21. In our view, although the observations made in Asha Rani case were in connection with carrying passengers in a goods vehicle, the same would apply with equal force to gratuitous passengers in any other vehicle also. Thus, we must uphold the contention of the appellant Insurance Company that it owed no liability towards the injuries suffered by the deceased Rajinder Singh who was a pillion rider, as the insurance policy was a statutory policy, and hence it did not cover the risk of death of or bodily injury to a gratuitous passenger."

This Court, inter alia, opined that in a case where the driver has no licence to drive a particular category of motor vehicle, the insurance company would not be

liable. [See National Insurance Company v. Swaran Singh & Ors. [(2007) 3 SCC 297, para 84].

16. In New Indian Insurance Company Ltd. v. Vedwati & Ors. [2007 (3) SCALE 397], this Court held that passenger of a motor vehicle is not a third party, stating :

"9. The difference in the language of "goods vehicle" as appear in the old Act and "goods carriage" in the Act is of significance. A bare reading of the provisions makes it clear that the legislative intent was to prohibit goods vehicle from carrying any passenger. This is clear from the expression "in addition to passengers" as contained in definition of "good vehicle" in the old Act. The position becomes further clear because the expression used is "good carriage" is solely for the carriage of goods. Carrying of passengers in a goods carriage is not contemplated in the Act. There is no provision similar to Clause (ii) of the proviso appended to Section 95 of the old Act prescribing requirement of insurance policy. Even Section 147 of the Act mandates compulsory coverage against death of or bodily injury to any passenger of "public service vehicle". The proviso makes it further clear that compulsory coverage in respect of drivers and conductors of public service vehicle and employees carried in goods vehicle would be limited to liability under the Workmen's Compensation Act, 1923 (in short 'WC Act"). There is no reference to any passenger in "goods carriage".

10. The inevitable conclusion, therefore, is that provisions of the Act do not enjoin any statutory liability on the owner of a vehicle to get his vehicle insured for any passenger travelling in a goods carriage and the insurer would have no liability therefor."

17. In Oriental Insuirance Co. Ltd. v. Smt. Jhuma Saha & Ors. [AIR 2007 SC 1054], it was held :

"11. Liability of the insurer-company is to the extent of indemnification of the insured against the respondent or an injured person, a third person or in respect of damages of property. Thus, if the insured cannot be fastened with any liability under the provisions of Motor Vehicles Act, the question of the insurer being liable to indemnify insured, therefore, does not arise."

{See also New India Assurance Co. Ltd. v. Asha Rani &

Ors. [(2003) 2 SCC 428}.

18, In Oriental Insurance Co. Ltd. v. Meena Variyal & Ors. [(2007) 5 SCC 428], this Court held :

“12. It is Section 147 that sets out the requirement of policies and limits of liability. It is provided therein that in order to comply with the requirements of Chapter XI of the Act, a policy of insurance must be a policy which is issued by an authorised insurer; or which insures the person or classes of persons specified in the policy to the extent specified in Sub-section (2) against any liability which may be incurred by the owner in respect of the death of or bodily injury or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place. With effect from 14.11.1994, injury to the owner of goods or his authorised representative carried in the vehicle was also added. The policy had to cover death of or bodily injury to any passenger of a public service vehicle caused by or arising out of the use of the vehicle in a public place. Then, as per the proviso, the policy shall not be required to cover liability in respect of the death, arising out of and in the course of his employment, of the employee of a person insured by the policy or in respect of bodily injury sustained by such an employee arising out of and in the course of his employment, other than a liability arising under the Workmen’s

Compensation Act, 1923 in respect of the death of, or bodily injury to, an employee engaged in driving the vehicle, or who is a conductor, if it is a public service vehicle or an employee being carried in a goods vehicle or to cover any contractual liability. Sub-section (2) only sets down the limits of the policy.

13. As we understand Section 147(1) of the Act, an insurance policy thereunder need not cover the liability in respect of death or injury arising out of and in the course of the employment of an employee of the person insured by the policy, unless it be a liability arising under the Workmen’s Compensation Act, 1923 in respect of a driver, also the conductor, in the case of a public service vehicle, and the one carried in the vehicle as owner of the goods or his representative, if it is a goods vehicle. It is provided that the policy also shall not be required to cover any contractual liability.”

Swaran Singh (supra) was also distinguished stating that therein the vehicle involved having a third party risk stating :

"17. It is difficult to apply the ratio of this decision to a case not involving a third party. The whole protection provided by Chapter XI of the Act is against third party risk. Therefore, in a case where a person is not a third party within the meaning of the Act, the insurance company cannot be made automatically liable merely by resorting to the Swaran Singh (supra) ratio. This appears to be the position. This position was expounded recently by this Court in National Insurance Co. Ltd. v. Laxmi Narain Dhut [2007 (4) SCALE 36]. This Court after referring to Swaran Singh (supra) and discussing the law summed up the position thus:

'38. In view of the above analysis the following situations emerge:

1. The decision in Swaran Singh's case (supra) has no application to cases other than third party risks.

2. Where originally the licence was a fake one, renewal cannot cure the inherent fatality.

3. In case of third party risks the insurer has to indemnify the amount and if so advised, to recover the same from the insured.

4. The concept of purposive interpretation has no application to cases relatable to Section 149 of the Act.

The High Courts/Commissions shall now consider the mater afresh in the light of the position in law as delineated above.

We are in respectful agreement with the above view."

Asha Rani (supra) was followed.

19. Yet again, in Oriental Insurance Co. Ltd. v. Brij Mohan & Ors. [2007 (7) SCALE 753], wherein one of us (S.B. Sinha, J.) was a member, this Court noticed Asha Rani and other decisions. Following the same, it

was stated :

"10. Furthermore, respondent was not the owner of the tractor. He was also not the driver thereof. He was merely a passenger travelling on the trolley attached to the tractor. His claim petition, therefore, could not have been allowed in view of the decision of this Court in New India Assurance Co. Ltd. v. Asha Rani and Ors. [(2003) 2 SCC 223] wherein the earlier decision of this Court in New India Assurance Co. v. Satpal Singh [(2000) 1 SCC 237] was overruled. In Asha Rani (supra) it was, inter alia, held:

'25. Section 147 of the 1988 Act, inter alia, prescribes compulsory coverage against the death of or bodily injury to any passenger of "public service vehicle". Proviso appended thereto categorically states that compulsory coverage in respect of drivers and conductors of public service vehicle and employees carried in a goods vehicle would be limited to the liability under the Workmen Compensation Act. It does not speak of any passenger in a "goods carriage".

26. In view of the changes in the relevant provisions in the 1988 Act vis-`a-vis the 1939 Act, we are of the opinion that the meaning of the words "any person" must also be attributed having regard to the context in which they have been used i.e. "a third party". Keeping in view the provisions of the 1988 Act, we are of the opinion that as the provisions thereof do not enjoin any statutory liability on the owner of a vehicle to get his vehicle insured for any passenger travelling in a goods vehicle, the insurers would not be liable therefor.

27. Furthermore, Sub-clause (i) of Clause (b) of Sub-section (1) of Section 147 speaks of liability which may be incurred by the owner of a vehicle in respect of death of or bodily injury to any person or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place, whereas Sub-clause (ii) thereof deals with liability which may be incurred by the owner of a vehicle against the death of or bodily injury to any passenger of a public service vehicle caused by or arising out of the use of the vehicle in a public place.'

[See also National Insurance Co. Ltd. v. Bommithi Subbhayamma and Ors. [(2005) 12 SCC 243]; United India Insurance Co. Ltd., Shimla v. Tilak Singh and Ors. [(2006) 4 SCC 404]; Prem Kumar & Ors. v. Prahlad Dev & Ors. [2008 (1) SCALE 531] and Oriental Insurance Co. Ltd. v. Prithvi Raj."

14. In view of recent decision of Apex Court in case of Zaharulnish & Ors. and Darshana Devi (supra), contention raised by learned advocate Mr. Mehta cannot be accepted.

15. In facts of present case, claimants are undisputedly third party, then, I fail to understand the contention raised by learned advocate Mr. Mehta when it is not disputed that claimant is a third party. The contention is that third party risks is not covered when owner committed breach of terms and conditions of Insurance Company. Such submission itself is contrary to statutory provisions of Section 147 of MV Act. The owner having insure from Insurance Company of vehicle on terms and conditions after paying premium to Insurance Company and Insurance Company is issuing insurance policy after receiving premium from owner accepting liability as per Section 147 of MV Act. Any person is defined as a third party. Therefore, in case, if, driver or owner if committed any breach of terms and conditions of Insurance Company, then, Insurance Company cannot be exonerated from statutory liability which has been cast upon Insurance Company under the provisions of Section 147 of MV Act. Otherwise, according to my opinion, there is no need to have MV Act for compensation to third party. The liability for third party risks is a statutory cannot be denied by Insurance Company even in case of breach of terms and conditions committed by driver as well as owner. The

remedy is available to Insurance Company, as per their terms and conditions incorporated in insurance policy that in case if breach is committed by driver and owner, then, they are entitled to recover the amount, for which, indemnify by Insurance Company for risks of owner to third party. The stand taken by Insurance Company as if for avoiding liability on technical grounds that because breach has been established by Insurance Company covered under Section 149 (2) of MV Act. Therefore, a moment breach is established by Insurance Company, then, claim of third party also can be denied by Insurance Company. Only owner having liability to pay compensation to a third party. If owner has to pay to third party, then, whereas question of having insurance under provisions of MV Act. Therefore, a beneficial Act has been enacted by legislation to give a protection to third party in a road accident, Insurance Company will pay compensation or indemnify owner in case of vehicular accident occurred on road. Therefore, liability of Insurance Company under Section 147 is statutory and that has been rightly examined by Claims Tribunal and rightly awarded amount of compensation in favour of claimant. For that, according to my opinion, Claims Tribunal has not committed any error which required interference by this Court.

16. I also fail to understand such type of arguments advanced by Insurance Co. before this Court, which was not at all raised by Insurance Co.

before claims Tribunal. This Court is exercising power as an appellate authority and it must have to be considered whether, there is an error either on facts or on law, committed by Tribunal or not while awarding compensation to claimants. The basic law on this subject is that a point which was not raised at all before claims Tribunal, can not be considered that such point is not decided by claims Tribunal and it amounts to error committed by Claims Tribunal. Such arguments are totally unreasonable for claimants as well as Claims Tribunal. Normally, Tribunal has to rely upon Section 163A and 2nd schedule, which has been attached to Section. At that occasion, these facts were not brought to notice of Claims Tribunal by Insurance Co. That even in 2nd schedule also, while deciding application, Claims Tribunal should have to taken into account age of parents at the time of applying multiplier. The Apex Court has rightly observed in recent decision which is delivered on 30.7.2008 in case of *Dharmendra Goel v. Oriental Insurance Co. Ltd. in SLP No. 14054 of 2006.* No doubt, this decision of Apex Court is under the consumer forum but, observations are squarely applicable to the facts of this case. Not only that, this case also squarely applicable to conduct of Insurance Co. In the aforesaid decision, Apex Court has observed that “we are, therefore, unable to accept company's contention that within a span of seven month from 13th February 2002 to the date of accident, value of vehicle had depreciated from Rs.3,54,000/- to Rs.1,80,000/-. It must be borne in

mind that Section 146 of Motors Vehicles Act, 1988 casts an obligation on owner of a vehicle to take out an insurance policy as provided under Chapter 11 of the Act and any vehicle driven without taking such a policy invites a punishment under Section 196 thereof. It is therefore, obvious that in light of this stringent provision and being in a dominant position insurance companies often act in an unreasonable manner and after having accepted the value of a particular insured good disown that very figure on one pretext or other when they are called upon to pay compensation. This 'take it or leave it' attitude is clearly unwarranted not only as being bad in law but ethically indefensible. We are also unable to accept submission that it was for appellant to produce evidence to prove that surveyor's report was on lower side in light of the fact that a price had already been put on vehicle by company itself at the time of renewal of policy.”. The Apex Court in aforesaid decision has further observed that “even otherwise, we believe that in such matters, court must take realistic view and if a particular claim to compensation is possible on the material on record, it should not be denied on hyper technical pleas, as has been argued by respondent's counsel.”

17. Learned advocate Mr. Mehta has not raised any contention about quantum awarded by Claims Tribunal in favour of claimant. Therefore, question of quantum is not examined by this Court. Only legal issue which has been raised is examined by this

Court. Therefore, contention raised by learned advocate Mr. Mehta cannot be accepted and therefore, same is rejected.

18. Therefore, there is no substance in present appeals. Accordingly, present appeals are dismissed.

19. In view of above order passed by this Court in Appeals, no order is required to be passed in Civil Applications. Accordingly, Civil Applications are disposed of.

Sd/-

[H.K. RATHOD, J.]

#Dave