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**IN THE HIGH COURT OF SIKKIM : GANGTOK**

**M.A.C.APPEAL NO.01 OF 2009**

SENIOR BRANCH MANAGER,  
NATIONAL INSURANCE CO. LTD.  
31 A, NATIONAL HIGHWAY,  
OPPOSITE TOURISM DEPARTMENT,  
GANGTOK, EAST SIKKIM.

..... **Appellant**

**Versus**

1. SMT. NAMITA DIXIT,  
W/O LATE JAI KANTA DIXIT
2. SHRI VINEET DIXIT,  
S/O LATE JAI KANTA DIXIT  
BOTH REISDENTS OF  
DEVELOPMENT AREA,  
GANGTOK,  
EAST SIKKIM.
3. SMT. NEELAM TAMANG,  
W/O SHRI TSHERING SHERPA,  
RESIDING NEAR KRISHI BHAWAN,  
P.O.TADONG,  
P.S.GANGTOK.  
(Owner of Maruti Alto SK-02A/0457)

..... **Respondents**

FOR THE APPELLANT : MR. RAMESH SHARMA, ADVOCATE.

MR. A. K. UPADHYAYA, SENIOR ADVOCATE  
APPEARING AS AMICUS CURIAE BY THE  
COURT WITH MR. DHURBA TEWARI AND  
MR. ASHIM CHETTRI, ADVOCATES

FOR THE RESPONDENT : MR. A. MOULIK, SENIOR ADVOCATE  
NOS. 1 AND 2. WITH MR. AJAY RATHI AND MS. SUSHMA  
PRADHAN, ADVOCATES

FOR THE RESPONDENT : MR. N. RAI, ADVOCATE WITH MS. JYOTI  
NO.3 KHARKA, ADVOCATE

**AND**

**M.A.C.APPEAL NO.02 OF 2009**

THE BRANCH MANAGER,  
NATIONAL INSURANCE CO. LIMITED,



16, DR. YEN SING ROAD,  
DIST. DARJEELING,  
WEST BENGAL.

..... Appellant

**Versus**

1. SMT. SUMITRA DEVI,  
W/O SHRI J. P. GUPTA  
R/O SINGTAM,  
P.O. & P.S. SINGTAM,  
EAST SIKKIM.
2. SHRI J. P. GUPTA,  
S/O LATE RAM CHANDRA PRASAD,  
R/O SINGTAM,  
P.O. & P.S. SINGTAM,  
EAST SIKKIM.
3. SHRI AJAY GUPTA,  
S/O SHRI J. P. GUPTA,  
RESIDENT OF SINGTAM,  
P.O. & P.S. SINGTAM,  
EAST SIKKIM.
4. MR. ANIL PRASAD,  
R/O SINGTAM,  
P.O. & P.S. SINGTAM,  
EAST SIKKIM.

(Owner of the Vehicle No.SK-02/9933)

..... Respondents

FOR THE APPELLANT : MS. NAVTARA SARDA, ADVOCATE.

FOR THE RESPONDENTS : MR. AJAY RATHI, ADVOCATE WITH  
1, 2 AND 3 MS. SUSHMA PRADHAN, ADVOCATE

FOR THE RESPONDENT : MS. SABINA GURUNG, ADVOCATE  
NO.4.

**PRESENT : THE HON'BLE MR. JUSTICE S. P. WANGDI, JUDGE**

**DATE OF LAST HEARING : 16.11.2009**

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**DATE OF JUDGMENT : 01.12.2009**

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## **J U D G M E N T**


**Wangdi, J.**

The two appeals have been taken up together for disposal by this common judgment as the issues involved in them are the same.

### **M.A.C. Appeal No.1 of 2009**

In M.A.C. Appeal No.01 of 2009 the appellant, who is the Senior Branch Manager, National Insurance Company Limited, Gangtok, has preferred this appeal under Section 173 of the Motor Vehicles Act, 1988 against the judgment of the learned Motor Accident Claims Tribunal, East and North Sikkim at Gangtok, dated 19.05.2008 in M.A.C.T. Case No.33 of 2006.

2. The facts of the case material for the purpose of disposal of this appeal are that on 05.02.2005, the deceased Jai Kant Dixit was travelling by a Maruti Alto Car along with some other persons from Kaluk, West Sikkim to Gangtok, East Sikkim, after attending a marriage ceremony. On the way, the vehicle met with an accident at a place called Charcharey Bhir on the Jorethang Melli Road, South Sikkim, resulting in the death of the deceased on the spot. The respondents 1 and 2 who are the wife and son of the deceased, filed an application under Section 166 of the Motor Vehicles Act, 1988 against the appellant in the present case and the owner of the vehicle who is the present respondent No.3, for award of death compensation of Rs.18,10,052.00. The claim was contested




primarily by the appellant here who was the respondent No.1 before the learned trial Court by filing a written objection to the claim petition substantially on the following grounds: -

- (i) The driver of the accident vehicle did not possess a valid driving licence at the time of the accident;
- (ii) The claim petition was not maintainable and the terms and conditions of the Insurance Policy had been grossly violated as the vehicle in question registered as a private vehicle was used for the purpose of hire and reward at the time when the accident took place;
- (iii) There being neither a statutory liability nor any contractual obligation on the part of the appellant to pay the compensation or to indemnify the owner of the vehicle, no liability could be fastened on the appellant, and that, if at all the petition would be maintainable only against the opposite party no.2 (the respondent no.3 in this appeal), the owner of the vehicle in question.

Apart from the above, some formal objections had been taken in the written objections which were not pressed before the tribunal and are also immaterial and irrelevant for the purpose of disposal of this appeal.

3. The respondent no.3 who was the owner of the vehicle and impleaded as the respondent no.2 before the Claims Tribunal in her written objection, simply stated that the accident vehicle had indeed been insured with the appellant.

4. On the basis of the pleadings of the parties, learned Claims Tribunal framed two issues which are as under: -

- 1. Whether the deceased (late Jai Kant Dixit) died on 05.02.2005 due to motor accident involving vehicle bearing
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registration No.SK-02 A/0457 at Charcharey Bhir, near Jorethang Bazar, South Sikkim?

2. Whether the claimants are entitled for the compensation, and if so, who is liable for the same?

5. It appears that the respondent no.2, as the claimant no.2 before the learned Tribunal, had entered into the witness box and deposed on the facts of the case and exhibited all relevant documents including the Certificate of Insurance/Insurance Policy as Ext. 12 with the object to substantiate the fact that the deceased Jai Kant Dixit died on 05.02.2005 due to motor accident involving the accident vehicle and that the vehicle was indeed insured with the appellant and that it belonged to the respondent no.3. In his cross-examination, no material contradictions were brought out on behalf of the appellant and his evidence remained unshaken leading to the tribunal deciding Issue No.1 in favour of the respondents.

6. It is quite significant to note that although in its written objection, the appellant had denied the claims and made certain assertions, substance of which have been set out hereinbefore, the appellant chose not to adduce any evidence to substantiate them. Based upon the materials available, the learned Tribunal decided issue no.2 also in favour of the claimants and passed the impugned judgment awarding a compensation of Rs.19,50,252.00 and interest @ 10% per annum if the amount was not paid within a period of two months from the date of the judgment.

7. Before this Court, amongst the grounds set up for assailing the impugned judgment, the appellant only preferred to



press the ground that since the deceased was a gratuitous passenger whose risk was not covered by the Insurance Policy, the appellant was not liable for payment of the compensation. Mr. Sudipto Majumdar, learned Advocate, appearing on behalf of the appellant in support of this contention, placed reliance upon the decision of the Hon'ble Supreme Court in the case of **New India Insurance Company Ltd. vs. Asha Rani and Others : 2003 (2) SCC 223** in which it was held that as the Motor Vehicles Act, 1988 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 and that in order to cover such risk, an owner of passenger carrying vehicle must pay additional premium. As per him although the accident vehicle in the present case was not a passenger carrying vehicle but a private car, the principle in the case of Asha Rani would apply in equal force. Since no additional premium had been paid to cover the passengers by the owner, the claim petition was not maintainable against the appellant.

8. Mr. A. Moulik, learned Senior Advocate, appearing on behalf of the respondents no.1 and 2, the claimants, at the outset raised a preliminary objection and submitted that as the present objection was never raised before the learned tribunal either in the written objection filed on behalf of the appellant or in the oral arguments it was not permissible to raise it for the time in appeal. It was submitted that the matter involved the question of a concluded contract and all objections as regards such contracts



ought to have been raised specifically. Having not done so, the appellant is estopped from raising them at the appellate stage and should be deemed to have been waived and extinguished. Mr. Moulik further submitted that even on the merits, such objection was clearly misconceived and unsustainable in law. As per him, the case of Asha Rani, the principle of which was adopted in the case of **United India Insurance Company Ltd. vs. Tilak Singh and Others : 2006 (4) SCC 404**, is clearly distinguishable in as much as those two decisions related to "statutory or Act policies" whereas in the present case we are dealing with a "package policy" as was evident from Certificate of Insurance Exhibit 12 filed as Annexure 'C' to the memo of appeal. Mr. Moulik went on to submit that the Tariff Advisory Committee constituted under Section 64(u) of the Insurance Act, 1938 has prescribed a number of tariffs termed as The India Motor Tariff (IMT for short) and the policy we are presently dealing with is Section II(1)(i) of the IMT.

9. Taking his arguments further, Mr. Moulik submitted that under Section 95(2) of the Motor Vehicles Act, 1939 there was a limit capped on the amount of compensation which has since been superseded in Section 147(2)(a) of the Motor Vehicles Act, 1988. This provision read with Section II (1)(i) of the IMT Policy of 2002 which presently holds the field, includes a gratuitous passenger and the liability of the Insurance Company rendered unlimited. In support of his submission, Mr. Moulik relied upon a Single Bench decision of the Madras High Court in C.M.A. Nos. 4203 and 4204 of



2008 in the matter of **Royal Sundaram Alliance Insurance vs. A. Pappathi & Others** and **Royal Sundaram Alliance Insurance vs. Lakshmi and Others** respectively, and drew the attention of this Court to paragraphs 28 and 30 thereof, relevant portions of which are reproduced below: -

"28. Since the policy in this case is a package policy and Section II (page 119 to IMT) third party liability clearly covers occupants in a private car which is the case on hand, the appellant insurance company cannot avoid their liability merely on the ground that no additional premium was paid. ....But the fact remains that Section II liability specifically covers occupants, passengers of a private car and its limit will be governed by the terms contained therein. The difference by reading the terms of the policy. In Tilak Singh's case which is a case of act only policy, the Apex Court clearly held that the IMT-70 endorsement covering the liability to pillion passengers was not made."

"30. In view of the above discussion, the contention of the learned counsel for the appellant on the above stated issue stands rejected. The package policy issued in this case clearly covers the liability in respect of death of or bodily injury to any persons including occupants carried in the vehicle, the ill fated Maruti Car."

Mr. Moulik contended that since the facts in the present case was identical and that the policy was also a package policy with the limits of liability covered under Section II(1)(i) of the IMT Rules, the case of the claimants was fully covered thereby.

10. Mr. N. Rai, learned Counsel appearing on behalf of the respondent No.3, the owner of the car, generally supported the case of the respondents no.1 and 2 and rather inappropriately placed reliance upon the case of **Satpal Singh** reported in **AIR 2000 SC 235** in para 11 of which it had been held that there was no upper limit to the liability of Insurance Company to pay compensation and that the term 'third party' included a gratuitous passenger.





Needless to state that this decision has since been categorically overruled in the Asha Rani Case (supra).

11. Mr. A. K. Upadhyaya, learned Senior Advocate, who had been requested to conduct the case amicus curiae by this Court supplemented the arguments placed by Mr. A. Moulik and referring to and relying upon the case of **United India Insurance Co.Ltd. vs. Alka Mangla : AIR 2008 Delhi 201**, submitted that in a package policy of the kind under consideration, a gratuitous passenger should be deemed to have been covered and is inherent in the policy due to the higher premium required to be paid therefor.


12. I have heard the learned Counsels on behalf of the parties and I am inclined to agree with the submissions made by Mr. Moulik, learned Senior Counsel for the respondent nos. 1 and 2 and Mr. Upadhyaya, the learned Senior Counsel appearing as amicus curiae. Before proceeding to deal with the case, it is relevant to put on record at the outset, that on 08.09.2009 when the case was taken up for final hearing, Mr. Sudipto Majumdar, Advocate, who had argued the case on behalf of the appellant on 07.09.2009 conveyed to this Court through his junior colleague, Mr. Ramesh Sharma, Advocate that he had nothing further to add to his submissions made on the previous day.

13. Coming to the case, although the matter could have been decided on the preliminary objection raised by Mr. Moulik, I have felt it necessary to deal with the merit of the case first, keeping in



view the larger public interest. The fact that the deceased was a gratuitous passenger is an admitted position between the parties. The questions that require determination are (i) whether they are covered by the Insurance Policy subscribed by the insured and (ii) having regard to the policy, whether the insurer, i.e., the appellant is liable to defray the entire amount awarded by the tribunal. To answer these questions we need to examine the scope of certain provisions of the Motor Vehicles Act, 1988 more particularly Sections 146 and 147 which are the amended forms of Sections 94 and 95 of the Motor Vehicles Act, 1939 for the purpose of adjudication of the issues involved in the present case.

14. Chapter XI has been provided in the Motor Vehicles Act, 1988 specifically to cater to the requirement of insurance of motor vehicles against third party risks. Section 146 falling under the chapter makes it mandatory for a vehicle to have insurance policy covering third party risks before it can be used in a public place. This statutory compulsion has been created so that the victims of motor vehicle accidents are guaranteed of their security in as much as they would be able to get damages without delay and the recovery of such damages would not be dependent upon the financial condition of the driver or the owner of the vehicle. Section 147 is a composite provision which prescribes the requirement of policies, the limits of coverage and the extent of the liability of the Insurer. It will be useful to reproduce sub-sections 1(b)(i), 2 and 5 of Section 147 for convenience which are as follows: -





"Section 147. **Requirement of policies and limits of liability.** (1) In order to comply with the requirements of this Chapter, a policy of insurance must be a policy which -

(a) .....

(b) Insures the persons or classes of persons specified in the policy to the extent specified in sub-section (2).

(i) against any liability which may be incurred by him in respect of the death of or bodily (injury to any person, including owner of the goods or his authorised representative carried in the vehicle) or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place;

Provided .....

(2) Subject to the proviso to sub-section (1), a policy of insurance referred to in sub-section (1), shall cover any liability incurred in respect of any accident, up to the following limits, namely:-

(a) save as provided in clause (b), the amount of liability incurred;

(b) in respect of damage to any property of a third party, a limit of rupees six thousand;

Provided .....

(5) Notwithstanding anything contained in any law for the time being in force an insurer issuing a policy of insurance under this section shall be liable to indemnify the person or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of that person or those classes of persons."

It can be seen from the above that sub-section 1(b)(i) prescribes as to what should be covered under an Insurance Policy to comply with the requirement of Chapter XI. Sub-section 2 requires to be read with sub-section 1 and sets the limit of liability and sub-section 5 places a statutory obligation upon the insurer to indemnify those persons specified in the policy against the liabilities covered in the policy.

15. It is now well settled that Section 147(1)(b)(i) brings within its ambit all persons in the 'third party' category including passengers travelling gratuitously by interpretation of the term 'any



person' appearing therein. Under sub-section 2 of Section 147 the limits of liability has been prescribed as the amount of liability incurred under the terms of the policy of insurance involved in the case.


16. Therefore, when we examine the certificate of insurance (Annexure C to the memo of appeal) we find it endorsed as "under Section II-1(i) of the policy - death of or bodily injury. Such amount as is necessary to meet the requirements of Motor Vehicles Act, 1988....." against the column for limits of liabilities. In order to understand the scope and extent of the provision Section II-1(i) of the policy relevant portion thereof is reproduced below: -

"Section II-1- Subject to the limits of liability laid down in the schedule hereto the company will indemnify the insured in the event of an accident caused by or arising out of the use of the vehicle against all sums which the insured shall become legally liable to pay in respect of: -

(i) death of or bodily injury including occupants carried in the vehicle (provided such occupants are not carried for hire or reward) but except so far as it is necessary to meet the requirements of Motor Vehicles Act, the Company shall not be liable where such death or injury arises out of and in the course of the employment of such person by the insured.

(ii) ....."

It can be seen from the above that the limits of the liability of the appellant and the person or classes of persons that it is liable to indemnify under the policy in pursuance to section 147(5) of the Act are "such amount as is necessary to meet the requirements of the Motor Vehicles Act, 1988". In other words, it covers risks in respect of all categories of third party in pursuance of Section 147(1) to the extent of the amount that maybe awarded by a Claims Tribunal in terms of Section 147(2) read with Section 147(5). This remains a





well established position of law as will be revealed from the discussions that will follow hereafter.

17. In the case of ***Amrit Lal Sood vs. Kaushalya Devi Thapar : (1998) 3 SCC 744***, the Apex Court while dealing with a policy termed as comprehensive policy containing amongst others "**SECTION – II LIABILITY TO THIRD PARTIES**" held that the expression "**any person**" appearing therein, includes an occupant of a car who is gratuitously travelling and that under the terms of the policy, the insurer is liable to satisfy the award passed in favour of the complainant. Para 8 of the judgment is quite explicit to that effect and is reproduced below: -

"8. Thus under Section II 1(a) of the policy the insurer has agreed to indemnify the insured against all sums which the insured shall become legally liable to pay in respect of death of or bodily injury to 'any person.' The expression 'any person' would undoubtedly include an occupant of the car who is gratuitously travelling in the car. The remaining part of clause (a) relates to cases of death or injury arising out of and in the course of employment of such person by the insured. In such cases the liability of the insurer is only to the extent necessary to meet the requirements of Section 95 of the Act. In so far as gratuitous passengers are concerned, there is no limitation in the policy as such. Hence under the terms of the policy, the insurer is liable to satisfy the award passed in favour of the claimant. ...."

( Emphasis supplied )

18. In the case of ***New India Assurance Co.Ltd. vs. C. M. Jaya & Others (supra) : (2002) 2 SCC 278*** a Constitution Bench, while deciding on a reference made to it to settle an apparent conflict in a two Judge Bench decisions of the Apex Court, in ***Amrit Lal Sood vs. Kaushalya Devi Thapar (supra)*** and ***New India Assurance Co. Ltd. vs. Shanti Bai : (1995) 2 SCC 529***, accepted the observations in ***New India Assurance Co.Ltd. vs. Kaushalya Devi Thapar (supra)*** in view of the express term in the policy.



the portions of the judgment relevant so far as the present case is concerned, are reproduced below: -

"6. ....The question that came up for decision before this Court was whether the insurer was liable to satisfy the claim for compensation made by a person travelling gratuitously in the car. In deciding this question the Court took the view that: (SCC p. 747, para 4)

"4. The liability of the insurer in this case depends on the terms of the contract between the insured and the insurer as evident from the policy. Section 94 of the Motor Vehicles Act, 1939 compels the owner of a motor vehicle to insure the vehicle in compliance with the requirements of Chapter VIII of the Act. Section 95 of the Act provides that a policy of insurance must be one which insures the person against any liability which may be incurred by him in respect of death or bodily injury to any person or damage to any property of third party caused by or arising out of the use of the vehicle in a public place. The section does not however require a policy to cover the risk to passengers who are not carried for hire or reward. The statutory insurance does not cover injury injury suffered by occupants of the vehicle who are not carried for hire or reward and the insurer cannot be held liable under the Act. But that does not prevent an insurer from entering into a contract of insurance covering a risk wider than the minimum requirement of the statute whereby the risk to gratuitous passengers could also be covered. In such cases where the policy is not merely a statutory policy, the terms of the policy have to be considered to determine the liability of the insurer."

"7. ....

Distinguishing the judgment in *Pushpabai Purshottam Udeshi v. Ranjit Ginning & Pressing Co. (P) Ltd.* the Court observed that the said judgment was based upon the relevant clause in the insurance policy, which restricted the legal liability of the insurer to the statutory requirements under Section 95 of the Act and so that decision had no application to the case as the terms of the policy stated in paragraph 6 of the judgment were wide enough to cover a gratuitous occupant of the vehicle. The Court also referred to the case of Jugal Kishore in which it is held that though it is not permissible to use a vehicle unless it is covered at least under "Act only" policy, it is not obligatory for the owner to get a comprehensive policy but it is open to the insurer to take a policy covering a higher risk.

8. Thus, a careful reading of these decisions clearly shows that the liability of the insurer is limited, as indicated in Section 95 of the Act, but it is open to the insured to make payment of additional higher premium and get higher risk covered in respect of third party also. But in the absence of any such clause in the insurance policy the liability of the



insurer cannot be unlimited in respect of third party and it is limited only to the statutory liability. ....

10. On a careful reading and analysis of the decision in *Amrit Lal Sood* it is clear that the view taken by the Court is no different. In this decision also, the case of *Jugal Kishore* is referred to. It is held:

- (i) that the liability of the insurer depends on the terms of the contract between the insured and the insurer contained in the policy;
- (ii) there is no prohibition for an insured from entering into a contract of insurance covering a risk wider than the minimum requirement of the statute whereby risk to the gratuitous passenger could also be covered; and
- (iii) in such cases where the policy is not merely statutory policy, the terms of the policy have to be considered to determine the liability of the insurer.

Hence, the Court after noticing the relevant clauses in the policy, on facts found that under Section II(1)(a) of the policy, the insurer has agreed to indemnify the insured against all sums which the insured shall become legally liable to pay in respect of death of or bodily injury to "any person". The expression "any person" would undoubtedly include an occupant of the car who is gratuitously travelling in it. Further, referring to the case of *Pushpabai Purshottam Udeshi* it was observed that the said decision was based upon the relevant clause in the insurance policy in that case which restricted the legal liability of the insurer to the statutory requirement under Section 95 of the Act. As such, that decision had no bearing on *Amrit Lal Sood* case as the terms of the policy were side enough to cover a gratuitous occupant of the vehicle. Thus, it is clear that the specific clause in the policy being wider, covering higher risk, made all the difference in *Amrit Lal Sood* case as to unlimited liability. The Court decided that case in the light of the specific clause contained in the policy....."

16. ....As already stated above, in *Amrit Lal Sood* case the Court found an express term in the policy for covering wider risk and to meet the higher liability unlike in the case of *Shanti Bai*. ...."

( Emphasis supplied )

19. In the case before us, the policy involved is a package policy in which as already noted above, Section II(1)(i) of IMT Rules is covered. No decision later in the point of time overruling the C. M. Jaya's case (*supra*) has been placed before this Court on behalf of the appellant. No such decision also exists.

9



20. The decision of the Delhi High Court in the matter of ***United India Insurance Co.Ltd. vs. Alka Mangla : AIR 2008 Delhi 201*** cited by Mr. Upadhyaya, only supplements the decision of the Constitution Bench of the Apex Court. The case of ***Royal Sundaram Alliance Insurance vs. A. Pappathi and Others (supra)*** cited by Mr. A. Moulik has also dealt with a situation where a package policy containing Section II(1)(i) of the IMT was involved. The Single Bench of the Madras High Court in that case while drawing conclusion in paragraph 30 of the judgment as extracted hereinbefore dealt with all the leading cases on the subject, i.e., the extent of the liability of an insurer with regard to third party risks including gratuitous passengers. The judgment is consistent with the ratio laid down in C. M. Jaya's case (*supra*). I, therefore, have no hesitation in concurring with the views expressed therein.

21. The decisions rendered by the Apex Court are consistent on the view that in an 'Act' or 'statutory policy' the insurer's liability would be limited to the extent provided in the Act, but the law does not restrict or prohibit the insured and the insurer to enter into a special contract for the purpose of providing larger coverage of risk on payment of special or higher premium. This view has been reiterated in the case of C. M. Jaya (*supra*) which is a Constitution Bench decision consisting of 5 Judges of the Hon'ble Supreme Court. In paragraphs 8 and 11 of the judgment after dealing with the apparent conflict in various judgments of the Hon'ble Supreme Court it was held as follows : -





apparent conflict in various judgments of the Hon'ble Supreme Court it was held as follows : -

"8. Thus, a careful reading of these decisions clearly shows that the liability of the insurer is limited, as indicated in Section 95 of the Act, but it is open to the insured to make payment of additional higher premium and get higher risk covered in respect of third party also. But in the absence of any such clause in the insurance policy the liability of the insurer cannot be unlimited in respect of third party and it is limited only to the statutory liability. ....

11. In the light of what is stated above, we do not find any conflict on the question raised in the order of reference between the decisions of two Benches of three learned Judges in *Shanti Bai* and *Amrit Lal Sood* aforementioned and, on the other hand, there is consistency on the point that in case of an insurance policy not taking any higher liability by accepting a higher premium, the liability of the Insurance Company is neither unlimited nor higher than the statutory liability fixed under Section 95(2) of the Act. In *Amrit Lal Sood* case the decision in *Shanti Bai* is not noticed. However, both these decisions refer to the case of *Jugal Kishore* and no contrary view is expressed."

( Emphasis supplied )

22. In the case of ***United India Insurance Co.Ltd. vs. Alka Mangla : AIR 2008 Delhi 201*** cited by Mr. Upadhyaya, which is also a case under Section II(1)(i) of the policy notified by the Tariff Advisory Committee referred to above, held that the Notification of the Tariff Advisory Committee which prescribes that the package policy should be treated as a part and parcel of the insurance policy. In this regard, we may refer to relevant portions of paragraphs 9 and 14 of the judgement: -

"9. Whether a Gratuitous Passenger travelling in a private car would fall within the meaning of 'third party' and covered by 'Statutory Policy' within the meaning of S. 147 of the Act is no more debatable, but in the instant case in contra distinction to this, on perusal of the policy it becomes manifest that the policy in question taken out by the insured and issued by the appellant is a 'PRIVATE CAR PACKAGE POLICY' and as notified by the Tariff Advisory Committee, with effect from 1-7-2002, the terms and conditions of a private car package policy mandates as under :-



## "SECTION II - LIABILITY TO THIRD PARTIES"

1. Subject to the limits of liability as laid down in the schedule hereto the company will indemnify the insured in the event of an accident caused by or arising out of the use of the vehicle against all sums which the insured shall become legally liable to pay in respect of :-

- (i) death of or bodily injury to any person including occupants carried in the vehicle (provided such occupants are not carried for hire or reward) but except so far as it is necessary to meet the requirements of Motor Vehicles Act, the Company shall not be liable where such death or injury arises out of and in the course of the employment of such person by the insured.
- (ii) Damage to property other than property belonging to the insured or held in trust or in the custody or control of the insured."

The law pertaining to the "Statutory/Act Policy" cannot be same for the "Private Car Package Policy." Where the policy is a statutory policy or an Act only policy, a gratuitous passenger in a private vehicle would not be covered for a bodily injury or death under the policy of insurance. But, nothing prevents the insurance company from issuing a wider coverage i.e. assuming a greater risk liability. ...."

"14. Coming back to the case at hand, the insurance policy is Private Car Package Policy, dated 10-8-2002, thus the notification dated 1-7-2002 of the Tariff Advisory Committee shall be treated as a part and parcel of the said policy. Accordingly, in view of the terms and conditions of the policy and the terms of the notification dated 1-7-2002 of the Tariff Advisory Committee, the respondent No.1-Smt. Alka Mangla is liable to be compensated."

(Emphasis supplied)

Therefore, it can be seen that in a case like the present one where the insurance policy has specifically incorporated "SECTION II - LIABILITY TO THIRD PARTIES" there can be no room for doubt that the policy also covers gratuitous passengers and the insured who is the respondent no. 3 herein, is fully covered of all risks connected with such category of passengers setting at naught the only ground of appeal set up by the appellant.



23. There is another aspect to this appeal which by itself would have been sufficient to call for its dismissal. There can be no denying the fact that insurance policy is a matter of contract between the insurer and the insured. Under the law, it is essential for the appellant to have raised all objections permissible under Section 149(2) of the Motor Vehicles Act, 1988 before the learned Tribunal which as already stated earlier was not done. The written objection filed on behalf of the appellant appears to have been filed only for the sake of filing because there was no effort at all made for substantiating its stand taken in the written objection. Had the objection been taken before the tribunal, the claimant would have had an opportunity to rebut it and an issue would have been struck and the claimant could have the opportunity to lead evidence that the appellant/insurance company was liable. It is not permissible for the appellant to raise the question as an abstract question of law in appeal. We find support on this proposition in the case of **National Insurance Co. Ltd. vs. Ravinder Goyal : 1993(1) AccCC 530 (P&H)(DB)**. In any case, the law enjoins the insurer to pay to the person entitled to the benefit of the decree and the only grounds for avoiding such payment are prescribed under sub-section 2 of Section 149 of the Motor Vehicles Act, 1988. It is a well settled position of law that the liability of the insurer is a statutory one and that the liability of the insurer to satisfy the decree passed in favour of a third party is also statutory. I am of the firm view that the present objection having not been taken before the learned

tribunal apart from the fact that the objections do not fall under sub-section 2 of Section 149, the appellant is now estopped from raising it for the first time in this appeal, having waived his right to do so. The appeal appears to have been filed as an afterthought bordering on frivolity.

24. It is rather unfortunate to note the recalcitrant and insensitive attitude of the Insurance Company in discharging its obligation under a law which is benevolent in nature. Under Section 149(1) of the Motor Vehicles Act, 1988 there is statutory obligation on the part of the Insurance Companies to comply with the awards passed by the Motor Accidents Claims Tribunal with the limited grounds of avoidance of such compliance as provided under Section 149(2). Such obligation has been statutorily placed on the Insurance Company considering the object of the law contained in Chapter XI of the Motor Vehicles Act, 1988. The interest of the insurer has been duly protected under proviso 3 to sub-section 4 of Section 149 by which payments made in excess of the liability of the insurer can be recovered from the insured. In the case of ***National Insurance Co. Ltd. vs. Swaran Singh : 2004(3) SCC*** it has been held in paragraphs 78 and 83 as under: -

"78. The social need of the victim being compensated as enacted by Parliament was the subject-matter of consideration before a three-Judge Bench of this Court as early as in 1959 in *British India General Insurance Co. Ltd. v. Captain Itbar Singh* wherein Sarkar, J. speaking for the Bench observed : (AIR p. 1335, para 16)

"16. Again, we find the contention wholly acceptable. The statute has no doubt created a liability in the insurer to the injured person but the statute has also expressly confined the right to avoid that liability to certain grounds specified in it. It is not for us to add

to those grounds and therefore to the statute for reasons of hardship. We are furthermore not convinced that the statute causes any hardship. First, the insurer has the right, provided he has reserved it by the policy, to defend the action in the name of the assured and if he does so, all defences open to the assured can then be urged by him and there is no defence that he claims to be entitled to urge. He can thus avoid all hardship, if any, by providing for a right to defend the action in the name of the assured and this he has full liberty to do. Secondly, if he has been made to pay something which on the contract of the policy he was not bound to pay, he can under the proviso to sub-section (3) and under sub-section (4) recover it from the assured. It was said that the assured might be a man of straw and the insurer might not be able to recover anything from him. But the answer to that is that it is the insurer's bad luck. In such circumstances the injured person also would not have been able to recover the damages suffered by him from the assured, the person causing the injuries."

"83. Sub-section (5) of Section 149 which imposes a liability on the insurer must also be given its full effect. The insurance company may not be liable to satisfy the decree and, therefore, its liability may be zero but it does not mean that it did not have initial liability at all. Thus, if the insurance company is made liable to pay any amount, it can recover the entire amount paid to the third party on behalf of the assured. If this interpretation is not given to the beneficent provisions of the Act having regard to its purport and object, we fail to see a situation where beneficent provisions can be given effect to. ...."

( Emphasis supplied )

#### M.A.C.APPEAL NO.2 OF 2009

25. In M.A.C. Appeal No.2 of 2009 also, the appellant has raised the very objection with regard to the victim being a gratuitous passenger who was purportedly not covered under the insurance policy. Miss Navtara Sarda, Advocate, appearing on behalf of the appellant submitted that it would not be necessary to go into the facts of the case as the appeal can be disposed of on the finding in M.A.C. Appeal No. 01 of 2009. It was fairly conceded by





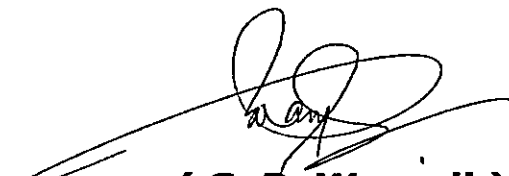
Ms. Sarda that the point with regard to gratuitous passenger had not been taken up before the Tribunal and it was for the first time that it was being raised here and that, that was the only point she would press before this Court. It was further submitted that she would adopt the arguments placed on behalf of the appellant in M.A.C. Appeal No.01 of 2009. Mr. Ajay Rathi, learned Advocate, appearing on behalf of respondents no. 1, 2 and 3 in MAC Appeal No.02 of 2009, also adopted the arguments placed by Mr. A. Moulik, Senior Advocate, for the respondents no. 1 and 2 in M.A.C. Appeal No.01 of 2009.

26. Under the facts and circumstances and in view of the findings in M.A.C. Appeal No.1 of 2009 as set out above, I do not find any reason to interfere with the findings of the Ld. Tribunal in both the cases.

27. In the result, the appeals are dismissed with cost of Rs.10,000/- (Rupees ten thousand) only in each of the above cases, half of which will go to the Bar Association of Sikkim and half to the respondents/claimants. The appellants shall comply with the terms of the impugned judgments of the learned Motor Accident Claims Tribunal within a period of 30 days, failing which an additional interest @ 2% shall be liable to be paid by the appellants retrospectively with effect from the date of the claim.



28. The records of the learned Motor Accident Claims Tribunal, East and North Sikkim at Gangtok be sent back forthwith.

  
( S. P. Wangdi )  
J U D G E