IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/FIRST APPEAL NO. 1736 of 2007

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE HEMANT M. PRACHCHHAK 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 ?	**No**
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	**No**

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ORIENTAL INSURANCE CO. LTD.
Versus
MERAMAN DANA HARIJAN & 6 other(s)

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Appearance:
MR MAULIK J SHELAT(2500) for the Appellant(s) No. 1
ADVOCATE NOTICE SERVED for the Defendant(s) No. 1,3
DELETED for the Defendant(s) No. 2
NOTICE SERVED for the Defendant(s) No. 4,5,6
UNSERVED EXPIRED (N) for the Defendant(s) No. 7

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CORAM:**HONOURABLE MR. JUSTICE HEMANT M. PRACHCHHAK**

Date : 25/08/2022

ORAL JUDGMENT

1. The present appeal is filed by the Oriental Insurance Company Limited against the judgment and award dated 6.10.2006 passed by the learned Motor Accident Claims Tribunal (Aux) Fast Track Court No.4, Gadhidham-Kutchchh in M.A.C.P. No.441 of 1999 whereby the learned Tribunal has partly allowed the claim petition by awarding Rs.4,16,000/- with the interest @ 9% and held both the insurance companies as 50% liable to pay the compensation to the claimants.

2. The brief facts giving rise to the present First Appeal are as under:

2.1 On 9.1.1994 when the deceased was travelling in Motor Vehicle Tempo bearing registration No.GRP-5506 with his luggage from Samkhiali to Surajbari at about 13-45 O'clock when they reached near Samkhiali Morbi Road, at that time Truck No. GJ-3-T-2482 driven by opponent No.1 came in rash and negligent manner and dashed and collided with the tempo. Due to said accident, the deceased

sustained serious injuries and subsequently succumbed to the injuries.

2.2 The claim petition was filed by legal heirs of the deceased against the opponents for Rs.5,93,000/- towards compensation for the unfortunate death of the deceased in a vehicular accident.

2.3 The Tribunal after evaluating pleadings and evidence tendered by the parties, partly allowed the claim petition for Rs. 4,16,000/- with 9% interest per annum from the date of filing of the claim petition.

4. Mr. Maulik J. Shelat, learned advocate for the appellant Oriental Insurance Company Limited has submitted that the appellant has challenged the impugned order mainly on the ground that the learned Tribunal has committed an error while fastening the liability on the appellant Insurance Company overlooking the fact that the deceased was travelling in the goods vehicle and the

accident is prior to the date of amendment and therefore, the learned Tribunal has committed a grave error. It is also further contended that the learned Tribunal has not considered the decision of the Hon'ble Apex Court in the case of ***New India Assurance Company Limited vs. Asha Rani and others reported in 2003 (2) SCC 223*** and therefore, the impugned judgment and award is erroneous and bad in law. It is also further contended that the policy of the vehicle involved in the accident namely the Tempo bearing Registration No. GRP 5506, no extra premium was paid by the owner of the vehicle and therefore, no additional coverage or risk is covered by the present appellant insurance company. It is also contended that the accident was took place on 9.1.1994 prior to the date of amendment and therefore, also present appellant insurance company is not held liable to pay compensation. It is also further contended that so far as the liability of both the vehicles is concerned, the Tribunal has committed an error by coming to a conclusion that both the drivers are equally responsible and negligent for the accident.

4.1 So far this contention is concerned, the learned Counsel appearing for the appellant insurance company submitted that the tempo was in correct side and therefore, the liability of 50% fastened on present appellant is erroneous and bad in law and therefore, the impugned judgment and award requires to be quashed and set aside. He relied upon the deposition of the father of the claimant which is recorded at Exh.45. He has also relied upon the judgment of this Court in First Appeal No. 4550 of 2009 and allied matters. He has also relied upon the judgment of the Hon'ble Apex Court in case of ***National Insurance Company Limited vs. Baljit Kaur reported in 2004 (2) SCC 1***. Lastly he has contended that if it comes to a conclusion that there is a joint liability of both the insurance company then the claimant can recover the amount from the any of the tortfeasor, as per the judgment of Hon'ble Apex Court in case of ***Kenyei vs. New India Insurance Company and others reported in 2015 (9) SCC 273***. He relied upon paragraph Nos. 21 and 22 of the

said decision which read as under:-

"21. The same analogy can be applied to the instant cases as the liability of the joint tortfeasor is joint and several. In the instant case, there is determination of inter se liability of composite negligence to the extent of negligence of 2/3rd and 1/3rd of respective drivers. Thus, the vehicle – trailer-truck which was not insured with the insurer, was negligent to the extent of 2/3rd. It would be open to the insurer being insurer of the bus after making payment to the claimant to recover from the owner of the trailer-truck the amount to the aforesaid extent in the execution proceedings. Had there been no determination of the inter se liability for want of evidence or other joint tortfeasor had not been impleaded, it was not open to settle such a dispute and to recover the amount in execution proceedings but the remedy would be to file another suit or appropriate proceedings in accordance with law.

22. What emerges from the aforesaid discussion is as follows:

22.1 In the case of composite negligence, the plaintiff / claimant is entitled to sue both or any one of the joint

tortfeasors and to recover the entire compensation as liability of joint tortfeasors is joint and several. 22.2 In the case of composite negligence, apportionment of compensation between two tortfeasors vis-a-vis the plaintiff / claimant is not permissible. He can recover at his option whole damages from any of them.

22.3 In case all the joint tortfeasors have been impleaded and evidence is sufficient, it is open to the Court / Tribunal to determine inter se extent of composite negligence of the drivers. However, determination of the extent of negligence between the joint torfeasors is only for the purpose of their inter se liability so that one may recover the sum from the other after making whole of the payment to the plaintiff / claimant to the extent it has satisfied the liability of the other. In case both of them have been impleaded and the apportionment / extent of their negligence has been determined by the Court / Tribunal, in the main case one joint tortfeasor can recover the amount from the other in the execution proceedings.

22.4 It would not be appropriate for the court /

Tribunal to determine the extent of composite negligence of the drivers of two vehicles in the absence of impleadment of other joint tortfeasors. In such a case, impleaded joint tortfeasor should be left, in case he so desires, to sue the other joint tortfeasor in independent proceedings after passing of the decree or award."

5. Heard Mr. Maulik J. Shelat learned advocate appearing for the Oriental Insurance Company Ltd. Though the notices served to the claimants, no one is present.

6. I have gone through the record and proceedings and the material available on record of the appeal. I have also considered the submissions made by learned advocate for the appellant and the ratio laid down by this Court and Hon'ble Apex Court in above referred judgments.

7. The present appeal is filed mainly on a ground that the deceased was travelling in a goods vehicle and therefore, there is a clear breach of the condition of the policy.

8. Looking to the facts and circumstances of the case, the present appeal is required to be allowed and the impugned judgment and award is required to be modified to the extent that the present appellant insurance company is exonerated from the liability fasten upon it as the deceased was travelling in goods vehicle and it is clearly breach of the policy and therefore, the insurance company is not held liable.

9. Considering the ratio laid down by Hon'ble Apex Court and considering the fact that the date of accident is of 9.1.1994 i.e. prior to the date of amendment in Section 147 of the Motor Vehicles Act which has come into force in November 1994 and therefore, the present appeal deserves to be allowed.

10. At this stage, it is relevant to take into account the observations made by Hon'ble Apex Court in case of ***Asha Rani (supra)*** in paragraph Nos. 14, 15, 18, 19, 20, 22, 23,

24, 25, 27, 28 and 29 as under:

“14. Before adverting to the pointed issue, we may notice the definitions of "goods vehicles", "public service vehicle" and "stage carriage" and "transport vehicle" occurring in Sections 2(8), 2(25), 2(29) and 2(33) of 1939 Act, which are as under :-

"2(8) "goods vehicle" means any motor vehicle constructed or adopted for use for the carriage of goods, or any motor vehicle not so constructed or adapted when used for the carriage of goods solely or in addition to passengers;"

"(25) "public service vehicle" means any motor vehicle used or adapted to be used for the carriage of passengers for hire or reward, and includes a motor cab, contract carriage, and stage carriage;"

"(29) "stage carriage" means a motor vehicle carrying or adapted to carry more than six persons excluding the driver which carries passengers for hire or reward at separate fares paid by or for individual passengers, either for the whole journey or for stages of the journey;"

(33) "transport vehicle" means a public service vehicle or a goods vehicle;" (emphasis supplied)

15. Sections 2(14), 2(35), 2(40) and 2(47) of 1988 Act define "goods carriage", "public service vehicle", "stage carriage" and "transport vehicle" in the following terms :-

"2(14) "good carriage" any motor vehicle constructed or adapted for use solely for the carriage of goods, or any motor vehicle not so constructed or adapted when used for the carriage of goods;"

"2(35) "public service vehicle" means any motor vehicle used or adapted to be used for the carriage of passengers for hire or reward, and includes a maxi cab, a motor cab, contract carriage, and stage carriage;"

"2(40) "stage carriage" means a motor vehicle constructed or adapted to carry more than six passengers excluding the driver for hire or reward at separate fares paid by or for individual passengers, either for the whole journey or for stages of the journey;"

"2(47) "transport vehicle" means a public service vehicle, a goods carriage, an educational institution bus or a private service vehicle;" (emphasis supplied)

18. Liability has been defined in Section 145(c) as under -

"'liability', wherever used in relation to the death of or bodily injury to any person, includes liability in respect thereof under Section 140;

19. Section 146 specifies the necessity for insurance against third party risk. In terms thereof an owner of a motor vehicle is statutorily enjoined to have a policy of insurance complying with the requirements of the said chapter before he uses or causes or allows any other person to use a motor vehicle in public.

20. Section 147 deals with requirements of policies and limits of liability. Proviso appended thereto, however, makes an exception to the main provision which reads thus :- "Provided that a policy shall not be required -

(i) to cover liability in respect of the death, arising out of an 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 (8 of 1923) in respect of the death of, or bodily injury to, any such employee -

(a) engaged in driving the vehicle, or

(b) if it is a public service vehicle engaged as conductor of the vehicle or in examining tickets on the vehicle, or

(c) if it is a goods carriage, being carried in the vehicle, or (ii) to cover any contractual liability."

21. xxx xxx xxx

22. Thus, it may be noticed that so far as employees of the owner of the motor vehicle are concerned, an insurance policy was not required to be taken in relation to their liability other than arising in terms of the provisions of the Workmen's Compensation Act, 1923. On the other hand, proviso (ii) appended to Section 95 of 1939 Act, enjoined a statutory liability upon the owner of the vehicle to take out an insurance policy to cover the liability in respect of a person who was travelling in a vehicle pursuant to a contract of employment. The Legislature has consciously not inserted the said provision in 1988 Act.

23. The applicability of decision of this Court in Mallawwa v. Oriental Insurance Company Ltd & Ors. (1999) 1 SCC 403 in this case must be considered keeping that aspect in view.

Section 2(35) of 1988 Act does not include passengers in goods carriage whereas Section 2(25) of 1939 Act did as even passengers could be carried in a goods vehicle. The difference in the definitions of the "goods vehicle" in 1939 Act and "goods carriage" in 1988 Act is significant. By reason of the change in the definitions of the terminology, the Legislature intended that a goods vehicle could not carry any passenger, as the words "in addition to passengers" occurring in the definition of goods vehicle in 1939 Act were omitted. Furthermore, it categorically states that 'goods carriage' would mean a motor vehicle constructed or adapted for use "solely for the carriage of goods". Carrying of passengers in a 'goods carriage', thus, is not contemplated under 1988 Act.

24. We have further noticed that Section 147 of 1988 Act prescribing the requirements of an insurance policy does not contain a provision similar to clause (ii) of the proviso appended to Section 95 of 1939 Act. The decisions of this Court in Mallawwa's case (supra) must be held to have been rendered having regard to the aforementioned provisions.

25. Section 147 of 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's Compensation Act. It does not speak of any passenger in a 'goods carriage'.

26. In view of the changes in the relevant provisions in 1988 Act vis-a-vis 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 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-clauses (i) of clause (b) of subsection (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.

28. An owner of a passenger carrying vehicle must pay premium for covering the risks of the passengers. If a liability other than the limited liability provided for under the Act is to be enhanced under an insurance policy, additional premium is required to be paid. But if the ratio of this Court's decision in New India Assurance Company v. Satpal Singh & Ors. (2000) 1 SCC 237 is taken to its logical conclusion, although for such passengers, the owner of a goods carriage need not take out an insurance policy, they would be deemed to have been covered under the policy wherefor even no premium is required to be paid.

29. We may consider the matter from another angle. Section 149(2) of the 1988 Act enables the insurers to raise

defences against the claim of the claimants. In terms of clause (c) of sub-section (2) of Section 149 of the Act one of the defences which is available to the insurer is that the vehicle in question has been used for a purpose not allowed by the permit under which the vehicle was used. Such a statutory defence available to the insurer would be obliterated in view of the decision of this Court in Satpal Singh case."

11. Considering all the above referred facts and the ratio laid down by the Hon'ble Apex Court in case of ***Asha Rani (supra)*** and this Court in ***First Appeal No.4550 of 2009 and allied matters*** and also considering the material available on record of the appeal, present First Appeal deserves to be allowed and the impugned judgment and award passed by the learned Motor Accident Claims Tribunal (AUX) Fast Track Court No.4, Gadhidham-Kutchchh in M.A.C.P. No.441 of 1999 requires to be modified.

12. Accordingly, the present appeal is hereby allowed. The

impugned judgment and award passed by the learned Motor Accident Claims Tribunal (AUX) Fast Track Court No.4, Gadhidham-Kutchchh in M.A.C.P. No.441 of 1999 is hereby modified to that extent.

13. The present appellant - insurance company is hereby exonerated from the liability fasten upon it.

14. The original claimants however, are entitled to get the compensation from the other insurance company and in turn the other insurance company can satisfy the impugned judgment and award, at the first instance then they can recover the 50% amount from the owner and the driver of the tempo by filing appropriate proceedings.

15. The amount deposited by the present appellant insurance company lying in FDR with Tribunal be refunded to the appellant insurance company through R.T.G.S. after verifying the account details of the insurance company. Necessary details of account of appellant – insurance

company be submitted before Tribunal.

16. The amount if any is lying with the registry of this Court is also to be transmitted to the Tribunal then paid to the appellant insurance company.

17. However, the amount which has already been disbursed in favour of the original claimants cannot be recovered from the original claimants but same is to be recovered from the original owner and the driver of the tempo.

18. The record and proceedings be sent back to the concerned Tribunal forthwith.

Sd/-
(HEMANT M. PRACHCHHAK,J)

SURESH SOLANKI