

(2002) 08 GUJ CK 0005
In the Gujarat High Court

Case No : First Appeal No's. 188, 189, 190, 191, 192, 428 to 434 and 861 of 1983

Gulamhussen Mohmadbhai Kazi

APPELLANT

Vs

Jahur Suleman Luhar

RESPONDENT

Date of Decision : 23-08-2002

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 13

Evidence Act, 1872 — Section 106

Motor Vehicles Act, 1939 — Section 105, 108, 115, 116, 123

Citation : (2002) 08 GUJ CK 0005

Hon'ble Judges : K.M. Mehta, J

Bench : Single Bench

Advocate : G.N. Shah, No. 1 in First Appeal No. 188 of 1983, P.M. Raval, No. 1 in First Appeal No. 189 of 1983, Harin Raval, for P.M. Raval, No. 1 in First Appeal No. 190 of 1983, P.M. Raval, in First Appeal Nos. 191 and 192 of 1983 and Aspi Kapadia for S.B. Vakil, in First Appeal Nos. 428 to 434 of 1983, for the Appellant; Aspi Kapadia, for S.B. Vakil and Anil C. Thakore, in First Appeal No. 188 of 1983, Aspi Kapadia, for S.B. Vakil, in First Appeal No. 189 of 1983, Aspi Kapadia, for S.B. Kapadia, for Respondent 2 and Anil C. Thakore, for Respondent Nos. 3-6 in First Appeal No. 190 of 1983, Aspi Kapadia, for S.B. Vakil and Anil C. Thakore, for Respondent 3/1 and 5 in First Appeal No. 191 of 1983, Aspi Kapadia for S.B. Vakil, for Respondent No. 2, Anil C. Thakore, for Respondent Nos. 3 and 4 in First Appeal No. 192 of 1983 and P.M. Raval and Anil C. Thakore, in First Appeal Nos. 428 to 434 of 1983, for the Respondent

Judgement

K.M. Mehta, J.—The Oriental Fire and General Insurance Company the appellants-original opponent No. 3 have filed this group of First Appeals being FA Nos. 428, 429, 430, 431, 432, 433, 434 and 861 of 1983 before this Court against the judgment and award dated 30.3.1982 passed by the Motor Accidents Claims Tribunal (Aux.), Sabarkantha at Himatnagar arising out of MACP No. 106, 123, 258, 282, 285 of 1979, 28, 253 and 105 of 1979 respectively.

2. Gulamhussen Mohmedbhai Kazi the owner of the truck involved in the accident

has filed First Appeals Nos. 188, 189, 190, 191 and 192 of 1983 against the same judgment and award arising out of MACP Nos. 154, 155, 221, 261 and 220 of 1979 respectively. As all these group of appeals arise out of the same common judgment & award and accident, I am dealing with all these First Appeals together.

2.1 In the appeals arising out original claim applications all claimants will be known as applicant and driver as opponent No. 1, owner as opponent No. 2 and insurance company as opponent No. 3.

3. In these cases the Tribunal by its judgment and award partly allowed the claim of the claim petitions of the claimant. The Tribunal by relying upon the Full Bench judgment of this court in the case of New India Assurance Company v. Nathiben reported in has held that as regards the passengers who were travelling in the truck as gratuitous passengers, the insurance company is not liable to pay compensation. However the owner and the driver of the vehicle are liable for damages on account of the rash and negligent driving the truck driver. Therefore, to that extent the claim petition against the insurance company are allowed. However as regards First No. 429 of 1983 arising out of M.A.C.P. No. 123 of 1979 the Tribunal held that the passengers were travelling in truck with goods and therefore the owner, driver and Insurance Company are liable to pay compensation. However, the Tribunal, as regards the passengers who are on the road held that the owner, driver and the insurance company i.e. all the three opponents are liable and to that extent claim petitions are allowed. So Insurance Company has filed First Appeals.

4. The common facts of these appeals are as under:

4.1 Between 25.2.1979 and 26.2.1979 i.e. about 0.45 hours during night on Bayad Demsi High Way opposite Demsi High School (Dist. Himatnagar) opponent No. 1 Jethabhai Chhaganbhai Patel the driver of the truck was driving the truck No. GRS 5022 belonging to Gulamabbas Mohmedhussen Kazi-opponent No. 2 the owner of the truck. The truck left Bayad for going to Demsi. The opponent No. 1 was driving the truck belonging to opponent No. 2 in a rash and negligent manner and because of such rash and negligent driving the truck dashed against one neem tree and turned turtle near the Hotel of one Bholenath situated near the High School of the village Demsi. Certain occupants of the truck sustained fatal injuries and succumbed to their injuries. Certain persons who were standing on the road side at the place of this accident also received fatal injuries and succumbed to their injuries.

4.2 It may be noted that in this case First Appeal Nos. 188/1983, 189/1983, 190/1983, 191/1983, 192/1983 are filed by the owner of the truck against judgment and award passed by the Motor Accident Claims Tribunal in M.A.C.P. Nos. 154/1979, 155/1979, 221/1979, 261/1979 and 220/1979 which are filed by the heirs and legal representatives of the deceased persons who were passengers in the truck. First Appeal No. 430/1983 arose out of MACP No.

189/83 owner 155/79 " 100000/- 50000/- " " 190/83 owner 221/75 " 75000/- 55000/- " " 191/83 owner 261/79 " 75000/- 50000/- " " 192/83 owner 220/79 " 50000/- 50000/- " " 428/83 Ins.Co. 106/79 on road 25000/- 15000/- Injury Owner & Ins. Co. liable 429/83 Ins.co. 123/79 in truck 35000/- 23000/- death " (with goods) 430/83 Ins.co. 258/79 cleaner 50000/- 43000/- " " 431/83 Ins.co. 282/79 on road 50000/- 20000/- death " 432/83 Ins.co. 285/79 " 100155/- 67000/- injury " 433/83 Ins.co. 28/80 " 75000/- 50000/- death " 434/83 Ins.co. 253/80 " 9999/- 9999/- " " 861/83 105/79 " 25000/- 15000/- injury "

8.1 All the claimants in (MACP No. 154 of 1979) First Appeal No. 188 of 1983 are relatives of passengers in the truck who have died. Thus their heirs and legal representatives have filed application claiming compensation of Rs. 1,00,000/- from all the opponents as total compensation for the death of deceased Jashwantlal aged about 22 years who died as a result of the injuries sustained by him at the time of his accident. The claimants nos. 1 and 2 are the father and mother respectively of deceased Jashwantlal. Claimants nos. 3 and 4 are the two sisters of the deceased Jashwantlal. The claimants nos. 5 and 6 are the brothers of the deceased Jashwantlal. In this petition they have claimed damages against the owner, driver and the insurance company in this behalf.

8.2. Identical facts arising out of FA Nos. 189/83, 190/83, 191/83 and 192 of 1983 where the claimants have claimed the amount of compensation and therefore, I am not narrating these facts in this behalf.

Appeals filed by the Insurance Company i.e. Appeal Nos. 428, 429, 430, 431, 432, 433, 434 and 861 of 1983

9. As indicated earlier, the Insurance Company has filed appeal against passengers who are on the road in all matters particularly First Appeal Nos. 428/1983, 431/1983, 432/1983, 433/1983, 434/1983 and 861/1983. As regards First Appeal No. 429 of 1983, as indicated earlier the Tribunal has held in that case that passengers were travelling in the truck with their goods and therefore all the opponents are liable to pay compensation to that extent. The Insurance Company has therefore filed First Appeal No. 429 of 1983 against passengers travelling in the truck.

9.1 First Appeal No. 428 of 1983 arising out of MACP No. 106 of 1979 has been filed by the claimant who was standing on the road claiming total compensation of Rs. 25,000/- from all the three opponents for the injuries sustained by him as a result of this accident.

Appeals relate to the persons who were injured when they were standing on the road FA 432 of 83.

9.1 First Appeal No. 432 of 1983 arises out of MACP No. 285 of 1979. In this the

claimant has claimed Rs. 1,00,155/- as total compensation for the injuries suffered by him as a result of this accident. In that case it is proved from the evidence on record that the applicant injured person Kanubhai Ramanlal Patel sustained injuries as a result of this accident while he was returning on foot to his village Demai from Bayad.

First Appeals No. 433 of 1983, 434 of 1983 and 861 of 1983

9.2 These Appeals are identical appeals relating to the persons standing of the road. Therefore, I am not narrating the facts of these cases for the sake of convenience and brevity.

10. First Appeal No. 430 of 1983 arises out of MACP No. 258 of 1979. In this case the claimants have claimed Rs. 50000/- as compensation from all the three opponents for the death of deceased Ramabhai Ranchhodbhai who died as a result of the accident while he was travelling in the truck as a cleaner. The claimant No. 1 is the mother of the deceased Ramabhai Ranchhod and claimant No. 2 is the widow of deceased Ramabhai Ranchhodbhai. This appeal relates to the cleaner of the truck.

11. The statement of the number of First Appeals, MACPs, whether the passengers were on truck or on the road, Amounts claimed before the Tribunal, Amounts awarded by the Tribunal, Death or injury etc. is shown above table in order to make the position clear.

The case of the opponents:

12. Before the Tribunal, opponent No. 1 in MACP No. 154 of 1979 has filed written statement against the claim petition at exh.15. The opponent No. 2 the owner has filed written statement against the claim petition at exh.14. The opponent No. 3 the Insurance Company has filed written statement at exh.17. In all these claim petitions all of them filed written statement and raised common defence in all these matters. The driver and owner of the truck involved in the accident have denied the allegation of rash and negligent driving made against the driver in all the applications in the respective claim petition. They have contended that the opponent No. 1 -driver was very careful in driving the truck in question but due to sudden bursting of the tyre of the truck the truck was dragged beyond the road side and it fell down in a pit and therefore, they are not liable for this accident and consequently they are not liable to pay any compensation to the applicants. Opponents nos. 1 and 2 have further contended that the claim made by the applicants in each case is excessive and exaggerated.

12.1 The opponent No. 3 Insurance Company has contended in its written statement that the claim petition of the applicants in each case is not tenable and maintainable at law. It has been contended that the persons who died as a result of receiving injuries in this accident and the persons who suffered injuries as a result of this accident were travelling in the truck No. GRH 5022 as gratuitous passengers at the time of the accident, according to the say of the

applicants themselves and since the risk of the passengers is not covered under the policy of insurance and therefore, the Insurance Co. is not liable for any amount of compensation arising out of the accident. Opponent No. 3 has further contended that the motor truck No. GRH 5022 was a "goods vehicle" and that travelling in a goods vehicle is against the provisions of the Act, provisions of insurance policy, traffic rules and regulations and also against the permit issued by the RTO authorities. The goods vehicles are not allowed to carry the passengers for hire or reward and since the persons who died as a result of this accident and the persons who suffered injuries as a result of this accident were travelling in the said goods truck as passengers, opponent No. 3 is not liable to pay any amount of compensation arising out of this accident. The opponent No. 3 Insurance company is in the alternative contended that the claim made by the applicants in each case is highly excessive, exaggerated, exorbitant and speculative.

13. On behalf of the claimant's oral evidence has been recorded of various persons supporting the case for compensation. Each individual claimants have also examined their different witnesses in support of their claim before the Tribunal. The parties have also filed necessary affidavit and produced documentary evidence in this behalf.

14. Thereafter the parties have led evidence on record. In each claim petition the claimants have been examined. On behalf of the opponent one P.N. Barot, PSI of Bayad Police Station was examined at exh.153. He has stated that he had investigated the offence which was registered with Bayad Police Station and the case was in respect of offence u/s 279, 304-A and 115 and 116 of the Motor Vehicles Act and the charge sheet was also filed before the learned JMFC, Modasa and he has produced the charge sheet on the record of the case. It has been stated from the evidence on record that he has stated during the investigation of the above said offence it was found that 28 passengers were travelling in the truck involved in this accident and said vehicle overturned and fell in a pit and during the investigation it was found that out of these 28 passengers some of them died as a result of the injury sustained in the accident and some of the passengers also received injuries in this behalf. He has drawn a panchnama and the same was also produced by him in this behalf. The charge sheet has been produced at exh. 154.

Finding of the Tribunal

15. The Tribunal has considered the oral evidence of the claimants, evidence on behalf of the opponents and after relying upon the judgment of the Full Bench of this Court in Nathiben's case (supra) has held that in all these cases particularly the passengers who were travelling in the truck viz. (as gratuitous passengers) { i.e. case of First Appeal Nos. 188, 189, 190, 191, 192, 183 and 429 of 1983} the owner and driver the opponents nos. 1 and 2 are liable but the insurance company is not liable in this behalf. As regards First Appeal No. 188 of 1983 the Tribunal has awarded a total compensation of Rs. 50,000/-, as regards First

Appeal No. 189 of 1983 the Tribunal has awarded a total compensation of Rs. 55,000, as regards First Appeal No. 191 of 1983 the Tribunal has awarded a total compensation of Rs. 50,000/- As regards First Appeal No. 192 of 1983 the Tribunal has awarded a total compensation of Rs. 50,000/-.

15A. As regards the First Appeal No. 429 of 1983 the Tribunal has awarded a total compensation of Rs. 23,000/- against all opponents on the ground that though passengers were travelling in truck but they were travelling in the truck with their goods.

15.1 As regards First Appeal No. 430 of 1983 which relates to the claim petition of the cleaner the Tribunal has held that the claimants of the said case were awarded Rs. 43,000/- as compensation and fixed the liability of payment of compensation on the respondents nos. 1,2 and 3.

15.2 As regards the First Appeals Nos. 428 of 1983 (MACP No. 106 of 1973), 431 of 1983 (MACP No. 282/73), 432 of 1983 (MACP No. 285 of 1973), 433 of 1983 (MACP No. 28 of 80), 434 of 1983 (MACP No. 253 of 1980) and 861 of 1983 (MACP No. 105 of 1979) which relate to the passengers who were standing on the road the Tribunal partly allowed the claims of the claimants and awarded the amount in favour of the claimant and held that all the opponents nos. 1,2 and 3 are liable to pay the amount of compensation in this behalf.

15.4 It may be noted that as regards the First Appeal No. 428 of 1983 (MACP No. 106 of 1979) the Tribunal has awarded Rs. 15,000/- as compensation. As regards First Appeal No. 431 of 1983(MACP No. 282 of 1979) the Tribunal has awarded Rs. 20000/- as compensation, as regards First Appeal No. 432 of 1983 (MACP No. 285 of 1979 the Tribunal has awarded Rs. 67,0000/- as compensation, as regards First Appeal No. 433 of 1983 (MACP No. 28 of 1980) the Tribunal has awarded Rs. 50,000/as compensation and as regards First Appeal No. 434 of 1983 (MACP No. 253 of 1980) the Tribunal has awarded compensation of Rs. 9999/- and as regards First Appeal No. 861 of 1983 (MACP No. 105 of 1979) the Tribunal has awarded compensation of Rs. 15,000/-. In all these cases the Tribunal held that all the 3 opponents are jointly and severally liable to pay the compensation to the claimants in this behalf.

Contentions of appellant-Insurance Company

16. It may be noted that in these cases though these are group of appeals I have decided these group of appeals in two groups viz. (1) Appeals relate to passengers who were travelling in the truck (Appeals Nos. 188, 189, 190,191,192 and 429 of 1983). Their cases are considered together because the facts and questions of law are similar and identical.

16.1 As regards First Appeal No. 430 of 1983 (MACP No. 258 of 1979) which relates to the cleaner in the truck his case will be decided separately.

16.2 As regards First Appeals Nos. 428 of 1983 (MACP No. 106 of 1973), 431 of 1983 (MACP No. 282 of 1979), 432 of 1983 (MACP No. 285 of 1979), 433 of

1983 (MACP No. 28 of 80), 434 of 1983 (MACP No. 253/80) and 861 of 1983 (MACP No. 105 of 1979, the relate to the persons who were standing on the road and their appeals will also be decided separately.

17. Mr. Aspi Kapadia learned advocate for Mr. S.B. Vakil appeared for Insurance Company Opponent No. 3 raised the following contentions:

17.1 The facts in the instant case are that on account of motor vehicle accident that took place at 0.45 hours during the night between 25.2.1979 and 26.2.1979 on Bayad-Demai Highway (District Himatnagar), several persons travelling in the truck No. GRH 5022 involved in the accident as well as persons standing on the road suffered injuries whereas certain people succumbed to death on account of the accident. ?In all, 13 claim petitions were filed by claimants against the appellant i.e. Oriental Fire & General Insurance Company Ltd. the owner of the vehicle and the driver of the vehicle. The vehicle in question was belonging to Shri Gulam Hussain Mohmed and was driven by Luhar Jahurbhai Sulaiman. The accident occurred on account of bursting of tyre of the vehicle resulting in the truck going turtle and dashing against one neem tree thereby resulting in death and injury to certain inmates of the vehicle as well as the persons standing on the road. The vehicle in question was a goods carriage vehicle meant for carrying goods. The insurance company was the insurer of the owner of the said vehicle. The policy of insurance is on record at exh. 170. Under clause of limits of liability, the liability of the insurance company qua the third parties in respect of anyone accident is such amount as is necessary to meet the requirements of the Motor Vehicles Act 1939 (for short the Act) The clause of the policy in respect of limitation as to use is transcribed below.

"Limitation as to use:-

Use only under a public carrier's permit with the meaning of the Motor Vehicles Act 1939- The policy does not cover:

- (1) Use for organized racing pace-making reliability trial or speed testing.
- (2) Use whilst drawing a trailer except the towing(other than for reward) of anyone disabled mechanically propelled vehicle.
- (3) Use for the conveyance of passengers for hire or reward.

18. Mr. Kapadia learned advocate for the appellants has referred to the provisions of Motor Vehicles Act 1939 (hereinafter referred to as the old Act). Chapter VIII of the said old Act relates to insurance of motor vehicles against third party risks. Section 2(8) of the said old Act provides for definition of "goods vehicle" means any motor vehicle constructed or adapted 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. Thereafter he has stated to Section 93 provides for definition of insurance of motor vehicles against third party risks in which Government is also a party. Section 94 provides for necessity for insurance against third party risk. Section 95 provides for requirements of

policies and limits of liability. Section 95(ii) provides for different liabilities incurred in this behalf. Section 95(2)(a) provides that where the vehicle is a goods vehicle, a limit of fifty thousand rupees in all including the liabilities if any, arising under the Workmen Compensation Act 1923(8 of 1923) in respect of death of or bodily injury to employees (other than the driver) not exceeding six in number being carried in the vehicle. Section 95(2)(b)(ii) provides in respect of persons other than passengers carried for hire or reward or by reason of or in pursuance of a contract of employment. Section 95 provides for duty of insurers to satisfy judgments against persons insured in respect of third party risks. Sections 94, 95 and 96 of the old Act is reproduced below which reads as under:

"94. Necessity for insurance against third party risk.

(1) No person shall use except as a passenger or cause or allow any other person to use a motor vehicle in a public place, unless there is in force in relation to the use of the vehicle by that person or that other person, as the case may be, a policy of insurance complying with the requirements of this Chapter.

Explanation. As person driving a motor vehicle merely as a paid employee, while there is in force in relation to the use of the vehicle no such policy as is required by this sub section, shall not be deemed to act in contravention of the sub-section unless he knows or has reason to believe that there is no such policy in force.

(2) Sub-section (1) shall not apply to any vehicle owned by the Central Government or a State Government and used for Government purposes unconnected with any commercial enterprise.

(3) The appropriate Government may by order exempt from the operation of sub section (1) any vehicle owned by any of the following authorities, namely:

(a) the Central Government or a State Government, if the vehicle is used for Government purposes connected with any commercial enterprise;

(b) any local authority;

(c) any State transport undertaking within the meaning of Section 68-A

Provided that no such order shall be made in relation to any such authority unless a fund has been established and is maintained by that authority in accordance with their rules made in that behalf under this Act for meeting any liability arising out of their use of any vehicle of that authority which that authority or any person in its employment may incur to third parties.

Explanation. For the purpose of this sub section appropriate Government means the Central Government or the State Government as the case may be, and

(i) in relation to any corporation or company owned by the Central Government or any State Government means the Central Government or that State Government;

(ii) in relation to any corporation or company owned by the Central Government and one or more State Governments, means the Central Government;

(iii) in relation to any other State Transport Undertaking or any local authority, means that Government which has control over that Undertaking or authority"

"95. 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) is issued by a person who is an authorised insurer or by a cooperative society allowed u/s 108 to transact the business of an insurer and

(b) insures the person 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 or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place;

(ii) 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

Provided that a policy shall not be required

(i) 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 (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 a conductor of the vehicle or in examining tickets on the vehicle, or

(c) if it is goods vehicle, being carried in the vehicle or

(ii) except where the vehicle is a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract or employment, to cover liability in respect of the death of or bodily injury to persons being carried in or upon or entering or mounting or alighting from the vehicle at the time of the occurrence of the event out of which a claim arises, or

(iii) to cover any contractual liability

Explanation.- For the removal of doubts it is hereby declared that the death of or bodily injury to any person or damage to any property of a third party shall be deemed to have been caused by or to have arisen out of the use of a vehicle in a public place notwithstanding that the person who is dead or injured or the

property which is damaged was not in a public place at the time of the accident if the act or omission which led to the accident occurred in a public place.

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

(a) where the vehicle is a goods vehicle, a limit of fifty thousand rupees in all including the liabilities if any arising under the workmen's Compensation Act 1923 (8 of 1923) in respect of death of, or bodily injury to, employees other than the driver not exceeding six in number being carried in the vehicle.

(b) where the vehicle is a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment,

(i) in respect of persons other than passengers carried for hire or reward, a limit of fifty thousand rupees in all;

(ii) in respect of passengers

(1) a limit of fifty thousand rupees in all where the vehicle is registered to carry out more than thirty passengers

(2) a limit of seventy five thousand rupees all where the vehicle is registered to carry more than thirty but not more than sixty passengers;

(3) a limit of one lakh rupees in all where the vehicle is registered to carry more than sixty passengers; and

(4) subject to the limits aforesaid then thousand rupees for each individual passenger where the vehicle is a motor cab and five thousand rupees for each individual passengers in any other case.

Section 96 of the Act reads as under :

96 Duty of Insurers to satisfy judgments against persons insured in respect of third party risks.-(1) If, after a certificate of insurance has been issued under sub section (4) of Section 95 in favour of the person by whom a policy has been effected judgment in respect of any such liability as is required to be covered by a policy under clause (b) of subsection (1) of Section 95(being a liability covered by the terms of the policy) is obtained against any person insured by the policy then notwithstanding that the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy the insurer shall subject to the provisions of this section pay to the person entitled to the benefit of the decree any sum not exceeding the sum assured payable there under as if he were the judgment debtor in respect of the liability together with any amount payable in respect of costs and any sum payable in respect of interest at that sum by virtue of any enactment relating to interest of judgments.

(2) No sum shall be payable by an insurer under sub section (1) in respect of any judgment unless before or after the commencement of the proceedings in which the judgment is given the insurer had notice through the Court of the bringing of

the proceedings or in respect of any judgment 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.

(a) that the policy was cancelled by mutual consent or by virtue of any provision contained therein before the accident giving rise to the liability and that either the certificate of insurance was surrendered to the insurer or that the person to whom the certificate was issued has made an affidavit stating that the certificate has been lost or destroyed or that either before or not later than fourteen days after the happening of the accident the insurer has commenced proceedings for cancellation of the certificate after compliance with the provisions of Section 105; or

(b) that there has been a breach of specified condition of the policy being one of the following conditions namely:

(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

(b) for organised racing and speed testing or (c) for a purpose not allowed by the permit under which the vehicle is used where the vehicle is a transport vehicle or (d) without side car being attached where the vehicle is a motor cycle or

(ii) a condition excluding driving by a named person or persons or by any person who is not duly licenced 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 condition of war civil war riot or civil commotion; or

(2-A) Where any such judgment is referred to in sub section (1) if obtained from a court in a reciprocating country and in the case of a foreign judgment is by virtue of the provisions of section 13 of the CPC 1908 (5 of 1908), conclusive as to why matter adjudicated upon by it the insurer being an insurer registered under the Insurance Act 1938(4 of 1938) and whether or not be is registered under the corresponding law of the reciprocating country shall be liable to the person entitled to the benefit of the decree in the manner and to the extent specified in sub section (1) as if the judgment were given by a Court in India....."

18.1 The learned counsel for the appellant submitted that the insurance company is not required to cover the passengers carried in the goods vehicle. He submitted that the insurance company is not liable for payment to passenger carried in goods vehicle either for hire or reward or a gratuitous passenger including the owner or his representative who travelled in a goods vehicle. In support of the same, he has relied upon the following decisions.

19. The learned advocate for the appellants has relied upon the judgment of the

Honourable Apex Court in the case of Smt. Mallawwa Etc. Vs. The Oriental Insurance Co. Ltd. and Others, . In this judgment in para 7 8 and 9 the Honourable Apex Court has referred to section 95 before it was amended by Act of 56 of 1969. Thereafter in para 10 the Honourable Apex Court observed as under:

"For the purpose of Section 95 ordinarily a vehicle could have been regarded as vehicle in which passengers have carried if the vehicle was of that class. Keeping in mind the classification of vehicle, by the Act the requirement of registration with particulars including the class to which it belonged requirement of obtaining a permit for using the vehicle for different purposes and compulsory coverage of insurance risk, it would not be proper to consider a goods vehicle as a passenger vehicle on the basis of a single use or use on some stray occasions of that vehicle for carrying passengers for hire or reward. For the purpose of construing a provision like proviso (ii) to Section 95(1)(b) the correct test to determine whether a passenger was carried for hire or reward, would be whether there has been systematic carrying of passengers. Only if vehicle is so used then that vehicle can be said to be a vehicle in which passengers are carried for hire or reward.

19-A In para 12 of the said judgment the Honourable Supreme Court has considered Pushpavati's case and in para 12 the Honourable Supreme Court in its judgment has observed as under:

" 12. We will now consider whether the decision of this Court in Pushpabai Purshottam Udeshi and Others Vs. Ranjit Ginning and Pressing Co. (P) Ltd. and Another, requires reconsideration. That was a case of a passenger travelling in a motor car. He was not travelling for hire or reward. The vehicle was neither a public service vehicle nor a goods vehicle but it was a different class of vehicle. It was in that context that this court made the following observations in paragraphs 21 and 22.

"..The plea that the words "third party" are wide enough to cover all persons except the person and the insurer is negative as the insurance cover is not available to the passengers is made clear by the proviso to sub section which provides that a policy shall not be required

(ii) except where the vehicle is a vehicle in which passengers are carried for hire or reward or by a reason of or in pursuance of a contract of employment to cover liability in respect of the death or of bodily injury to persons being carried in or upon or entering or mounting or alighting from the vehicle at the time of occurrence of the event out of which a claim arises.

(22) Therefore it is not required that a policy of insurance should cover risk to the passengers who are not carried for hire or reward. As u/s 95 the risk to a passenger in air vehicle who is not carried for hire or reward is not required to be insured the plea of the counsel for the insurance occupy will have to be accepted and the insurance company held not liable under the requirements of the Motor

Vehicles Act.

19.B. What was held in that case is with respect consistent with our interpretation of Section 95 as it stood before and after its Amendment by Act 56 of 1969"

19.1 In this Connection the Honourable Supreme Court in the case of Ramesh Kumar Vs. National Insurance Co. Ltd. and Others, has held in para 6 as under:

"6. Category I cases are all in which a claim petition has been filed by the claimants on account of death or bodily injuries of either the owners or their representative or the gratuitous passengers. In all these cases the claimants claimed compensation u/s 95(1)(b)(i) and clause (ii) of the proviso after its amendment in 1969 under the old Act. The submission is, it is the Insurance Company, which is liable to pay the compensation notwithstanding that the vehicle involved in the accident is a goods vehicle. On the other hand, submission for the Insurance Company is that they are not liable for those passengers who travel by a goods vehicle, in view of the language used in Section 95 of the old Act. The cases under this category need not detain us long as this question has been directly raised and decided in the case of Mallawwa v. Oriental Insurance Co. Ltd. In this case the accidents were in the period between 1971 and 1985. This Court held the Insurance Company is not liable for any damage in cases of the gratuitous passengers including owner of the goods or his representative who travelled in a goods vehicle. So the first category of cases is disposed of in terms of this declaration that liability to pay compensation to the claimants of such person is not on the Insurance Company but on the owner of the goods vehicle..."

19.1.A. The learned counsel for the appellant submitted that in view of the judgment of the Honourable Supreme Court in Mallawa's case which has been subsequently followed in Rakeshkumar's case, the passengers who were travelling in a truck as gratuitous passengers, the insurance company is not liable to pay compensation for the same.

19.1B As regards First Appeal No. 429 of 1983 when the Tribunal has held that the Insurance Company is liable against the passengers who were travelling in the truck with goods, that finding of the tribunal is required to be quashed and set aside in view of the judgment of the Hon"ble Supreme Court in the cases of MALLAWA and RAKESHKUMAR (supra) because the distinction drawn by the tribunal no longer survive in the light of the above said decisions and to that extent First Appeal No. 429 of 1983 filed by the Insurance Company is allowed and only the driver and the owner of the truck is liable.

Liability of the Insurance Company qua third parties i.e. persons on the road.

20. The learned counsel further submitted that it is the defence of the insurance company that as the vehicle was used by the insured for conveyance of passengers for hire and reward the insurance company is absolved of its liability

to indemnify the insured and to make any payment u/s 96(1) to the third parties as there has been a breach for condition enumerated in Section 96(2)(b)(i)(a) of the Act excluding the use of the vehicle for hire and reward. As mentioned above there is a clause contained in the policy regarding the limitation of use which expressly states that the policy does not cover use for the conveyance of passengers for hire or reward. Despite the specified condition of the policy excluding the use of vehicle for hire and reward for carrying passengers the vehicle was carrying about 26 passengers for hire and reward in breach of the specified condition of the policy. In the aforesaid circumstances the insurance company has a statutory defence available to it u/s 96(2)(b) of the Act as there has been a breach committed by the insured of the specified condition of the policy, the insurance company is absolved of its liability to make any payment to the third parties who have sustained injuries or who have expired in the accident and who were standing on the road.

21 The learned advocate for the appellant has relied upon paras 11, 12 and 13 of the judgment reported in Bhoi Vanaji Dhulaji and Another Vs. Patel Shivabhai Kashibhai and Others, In that case the learned Judge has observed in paras 11, 12 and 13 of the said judgment on page 347 and 348 which reads as under:

"11. In the case at hand the question which directly arises is as to whether by virtue of a specific condition in the policy lying down that the user was restricted for agricultural and forestry purposes and that the policy did not cover use for carriage of passengers for hire or reward coupled with a specific mention in the caption "Important Notice" that the insured would not be indemnified if the vehicle is used or driven otherwise than in accordance with the schedule which contained these restrictions with regard to the use of the vehicle the insurance company would be absolved from the liability of satisfying the award with regard to third party risk by virtue of the provision contained in subsection (2) of section 96 and as discussed above on analysis of the section we are of the view that in such a case if it is proved that the vehicle at the time of the accident was used for carriage of passengers for hire or reward, in breach of a specific condition to that effect in the policy as aforesaid, then the insurance company would not be bound to satisfy the award so far as third party risk is concerned.

12. We are fortified in the view which we take the Division Bench of this court in the case of Jam Shri Satji Digvijaysingji and Others v. Daud Taib and others 19 GLR 404. The observations appear at page 410 and they were made in support of the view taken by the court that any motor vehicle used for carrying passengers on hire or reward should be regarded when so used as a public service vehicle and therefore, a transport vehicle, because it was the use of the motor vehicle for carrying passengers for hire or reward which determined the category of the motor vehicle whether it was adapted for that purpose or not. The said observations run thus:

That is why under sec. 96(2)(b)(i)(a) the insurance company is provided a special statutory defence by enacting that it can defend the action on the ground

that there has been a breach of a specified condition of the policy being one of the following conditions namely a condition excluding the vendors of the vehicle 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"

13. We are therefore, unable to accept any of the submissions made by Mr. Shah in support of his case that the insurance company is liable to satisfy the award in the instant case."

22. Learned advocate for the appellants has further relied upon the Full Bench decision of this court in the case of New India Assurance Co. Ltd. v. Smt. Nathiben Chatrabhuj & ors reported in . In that case in para 1 of the judgment it has been stated that the Full Bench has been constituted to consider the correctness of Vanaji's case (supra). The Full Bench has considered the entire scheme of the Motor Vehicles Act. In para 7 the Full Bench has considered Pushpabai's case. Then the Scheme of section 95 and 96 has been considered in paras 10 to 12 of the judgment. Learned advocate for the appellant has referred to paras 13 to 19 of the judgment which has considered the definition of "goods vehicle" in this behalf. Then in para 32 the Full Bench has considered 3 conditions which the insurance company has to satisfy to successfully disclaim their liability in this behalf. Pars 32 and 33 of the said judgment read as under:

"32. In the light of the foregoing discussion we answer the question referred to us as follows:

The liability in respect of the death of or bodily injury to a passenger carried for hire or reward on the insured vehicle when the accident giving rise to the claim occurred, including the liability in respect of the owner or hirer of the insured vehicle on his bona fide employees within the permissible limit will be covered by the statutory insurance either by virtue of sec.95(1)(b)(i) read with the second clause of the proviso or by reasons of sec. 95(1)(b)(ii) of the Act. In such a case the insurer will have to pay to the person entitled to the benefit of the award the sum assured which shall not be less than the sum specified in sec. 95(2) subject however to the right of the insurer to disclaim the liability inter alia under sec.96(2)(b)(i)(a). The insurer in order to successfully disclaim his liability on that ground will have to establish

1. that on the date of the contract of insurance the insured vehicle was expressly or implicitly not covered by a permit to carry any passenger for hire or reward.
2. that there was a specified condition in the policy which excluded the use of the insured vehicle for the carriage of any passenger for hire or reward and
3. that the vehicle was in fact used in breach of such specified condition on the occasion giving rise to the claim by reason of the carriage of the passenger therein for hire or reward.

If all these facts are established by the insurer the benefit of statutory insurance will not be available in respect of such passenger. In other words the claimant in

such a case be he the passenger himself or his dependent will not be able to recover from the insurer the amount if any, awarded in his favour to the extent specified in sec. 95(2) and the insurer will not be liable to satisfy such award.

33. We wish to make it clear that nothing that we have stated in the course of this judgment should be considered as affecting Their liability of the insurer in respect of persons other than passengers who are carried for hire or reward in the insured vehicle at the time of occurrence of the event which gives rise to the claim against the insurer and that even in respect of such passengers the observations made herein are to be understood as confined to a case where the plea under sec.96(2)(b)(i)(a) is successfully raised.

23. Thereafter the learned advocate for the appellant has again relied upon another Full Bench decision of this court in the case of New India Assurance Co. Ltd. Vs. Kamlaben Sultansinh Jadav and Others, . Though the entire matter was covered by Full Bench, the Full Bench has raised the questions which are to be considered in this behalf are reproduced as under:

" (i) What would be the extent of liability of the insurer under Sec.95(2) in respect of death or bodily injury to the passengers carried for hire or reward in a truck ?

(ii) Which clause amongst (a)(b) or (c) will apply.

(iii) Whether the judgment of the Division Bench in Oriental Fire & General Insurance Company Ltd. v. Husseinbhai Abdullbhai Shaikh & Ors. First Appeal No. 851 of 1977 decided on 26th July 1983 (reported in 1984 GLH 8, is correctly decided and is directly followed in some other cases ?

24. The Full Bench thereafter considered the question as to whether the risk of passengers travelling by a goods vehicle by paying fare is covered u/s 95(2)(b)(ii) (4) and ultimately the court rejected the contention of the insurance company and held that the present case is not covered u/s 95(2)(b)(4) of the Act. The court further also considered as to whether risk of passengers travelling by a goods vehicle by paying fare is statutorily required to be covered? There the court considered the contention of the claimant and insurance company and various provisions of the Act and also the judgment of the Full Bench of this court in Nathiben's case which I have referred to earlier. The Full Bench also considered the judgment of the Hon'ble Supreme Court in the case of Motor Owners' Insurance Company Limited Vs. Jadavji Keshavji Modi and Others, and on page 799 in para 30 the court has observed as under:

" Considering the principles discussed in the aforesaid judgment while interpreting sub-sec. (2) of Sec.95 and other decisions discussed above the ratio laid down by Full Bench of this Court in the case of Nathiben {(1982 (1) GLR 411} (supra) does not call for reconsideration. It accommodates the claims of the Society as reflected in the underlying legislative purpose of the necessity of compulsory insurance coverage for a motor vehicle. The practice of carrying

passengers in a "goods vehicle" is fairly wide spread. Further, even if two interpretations are equally plausible, as observed by the Supreme Court "what the legislature has given, the Court cannot deprive of by way of an exercise in interpretation when the view which renders the provision potent is equally plausible as the one which renders the provision impotent"

24.1 Again in para 31, the Court discussed the Law of Tort which reads as under:

"31. At this stage, we could deal with the contention of the learned advocates for the Insurance Company that the act of carrying passengers in a goods vehicle would be in violation of Section 42 and as that act is punishable under Sec. 123 of the Motor Vehicles Act, the Insurance Company would not be liable to cover such risk. This contention requires to be rejected because the liability under "Tort" arises out of a wrongful act which also can be illegal. The basis of damages under "Tort" is wrongful or illegal act. The illegal or wrongful act would hardly be a ground for holding that the person is not liable to pay damages under "Tort" Under Sec. 95, insurance coverage is given to tortious or wrongful act of using vehicle in a public place.

24.1A The Full Bench thereafter considered the judgment of the Hon"ble Supreme Court in the case of Pushpabai Purshottam Udeshi and Others Vs. Ranjit Ginning and Pressing Co. (P) Ltd. and Another, . In that behalf the Full Bench considered para 8 of the judgment of the Hon"ble Supreme Court in the case of PUSHPABAI PARSHOTTAM UDESHI (supra) and observed as under:

"Para 8 -xxxxxxxxxxxxxxxx In my opinion, when the owner of a lorry sends his servant on a journey with it, thereby putting the servant in a position, not only to drive it, but also to give people a lift in it, then he is answerable for the manner in which the servant conducts himself on the journey, not only in the driving of it, but also in giving lifts in it, provided of course, that in so doing the servant is acting in the course of his employment."

24.1B The Full Bench further observed as under:

"After discussing other decisions cited at Bar, the Court further observed in paragraph 14 as under:

Before we conclude, we would like to point out that the recent trend in law is to make the master liable for acts which do not strictly fall within the term "in the course of the employment" as ordinarily understood."

24.2. In view of the aforesaid judgment of this Court in Kamalaben's case, Mr. Kapadia submitted that the Full Bench of this Court again reaffirmed the decision of the full Bench of this Court in the case of Nathiben (supra) However, the full Bench of this Court in Kamalaben's case added a fourth condition which was required to be established by the insurance company to successfully disclaim its liability on the ground mentioned in Section 96(2)(b).

24.3. Therefore, in order that the insurance company successfully disclaims its

liability in defence u/s 96(2)(b) of the Act the breach has to be proved by establishing the aforesaid all four conditions:(In submitting these conditions three which were referred in Nathibai's case)

Condition No. (i)

Admittedly the vehicle is the goods vehicle and therefore on the date of the contract of the insurance the insured vehicle is implicitly not covered by permit to carry any passenger for hire or reward. As the vehicle was a goods vehicle it is implicitly that it is not covered by a permit to carry out passenger for hire or reward and therefore the condition no (i) is established.

Condition No. (ii)

In the instant case there is a specified condition in the policy which excludes the use of the insured vehicle for carriage of any passenger for hire or reward and therefore condition No. (ii) is also established.

Condition No. (iii)

Factually the vehicle at the time of accident was in fact carrying about 26 passengers for hire and reward in breach of the aforesaid specified condition, therefore the condition NO. (iii) is also satisfied.

Condition No. (iv)

To establish condition No. (iv) it has to establish that the vehicle was used by the insured or at his instance in breach of the aforesaid specific conditions excluding the use of the vehicle for carrying passengers for hire and reward.

24.4 In view of the Full Bench decision of this Court learned advocate for the insurance company submitted that it is the case of the insurance company that as the fact where the vehicle was used by the driver at the instance of the insured in breach of the specified condition is a fact which is especially within the knowledge of the insured i.e. the owner of the vehicle. In view of the fact that the where vehicle was used by the driver at the instance of the insured or not is a fact especially within the knowledge of the person and therefore under the provisions of Section 106 of the Indian Evidence Act 1972(hereinafter referred to as the Evidence Act) the burden of proving the fact is upon the insured. Section 106 of the Evidence Act is as under:

"106. When any fact is especially within the knowledge of any person the burden of proving that fact is upon him.

24.5. The learned advocate for the insurance company has relied upon a decision of the Honourable Supreme Court in the case of Gopal Krishnaji Ketkar Vs. Mahomed Haji Latif and Others, . On page 1416 of its judgment it has been held as under:

"..Even if the burden of proof does not lie on a party the court may draw an adverse inference if he withholds an important document in his possession which

can throw light on the facts at issue. It is not, in our opinion, a sound practice for those desiring to rely upon a certain state of facts to withhold from the court the best evidence which is in their possession which could throw light upon the issues in controversy and to rely upon the abstract doctrine of onus of proof.."

Similarly he has also relied upon the decision of the Honourable Supreme Court reported in *Ramdas Oil Mills Vs. Union of India (Military Deptt.)*,

24.6. The learned counsel thereafter submitted that it would be impossible for the insurance company to establish the fact where the insured was used by the driver at the instance of the insured or otherwise because of the said facts are implicitly within the knowledge of the insured and therefore, a presumption is required to be raised that there was an implied authority of the insured to allow such paid passengers in the vehicle. To rebut the aforesaid presumption the onus then shifts upon the insured to prove that it was not at his instance that the driver of the vehicle had used the vehicle in breach of the specified condition. Therefore said view has been laid down by this Court in the matter of *Bai Dahiben v. Jesinghbhai Bijalbai & Ors.* reported in 1984 *Accident Claims Journal* 150. In para 5 of this judgment it has been held as under:

"5. In the present case I have come to the conclusion that deceased Naranbhai was a passenger for hire or reward in the said truck and he had paid the amount to the cleaner on behalf of both, namely the cleaner and the driver of the truck. In view of this situation the owner of the truck would be vicariously liable for the act of his employees i.e. the driver and the cleaner of the truck in question. From this evidence of the truck driver it is clear that the driver was driving the truck at the relevant point of time that is to say at the time of accident during the course of his employment and on the owner's business or for the owner's purpose and there is no evidence to suggest that the owner had prohibited the driver or the cleaner of the truck to give the lift to the passengers. Therefore, in view of the fact that the accident had taken place at the time when the driver was driving truck for the owner's business or for owner's purpose and during the course of his employment the owner is also liable. A presumption can be raised that there was an implied authority of the owner to allow such paid passengers in the truck as there is no evidence to show that the driver and or cleaner of the truck was prohibited from carrying the passengers in the truck. Therefore it is clear that the action of the driver and the cleaner is in the course of the employment and hence the owner is vicariously liable for the negligence....."

25. In view of the aforesaid judgment of this court it is submitted that in such a case a presumption can be raised that there was implied authority of the owner to allow such passengers in the truck as there was no evidence to show that a driver and or cleaner of the vehicle was prohibited from carrying the passengers in the said truck. As per section 106 of the Evidence Act also the burden of proving that the vehicle was not used at his instance for carrying passengers for hire and reward. In the aforesaid proposition the learned advocate for the

insurance company has relied upon the judgment of the Honourable Supreme Court in the case of Kulkarni Patterns Pvt. Ltd. and others Vs. Vasant Baburao Ashtekar and others, .

26. In view of the aforesaid judgment it is submitted that unless the aforesaid contention of the insurance company in respect of establishing the condition No. (iv) is accepted statutory defence available to the insurance company u/s 96(2) (b)(i)(a) of the Act would never be available to the insurance company and the aforesaid provision would become otiose because the insurance company would never be able to fulfill the aforesaid condition because of the reason that the fact whether the insured of the vehicle had expressly authorised the driver of the vehicle to carry on the passengers for hire and reward is within the knowledge of the insured. It is therefore, submitted that it is necessary to raise a presumption as aforesaid and thereupon shifting the onus on the insured i.e. owner of the vehicle to prove that the vehicle was not used in breach of the specified condition at his instance.

27. On the point of vicarious liability it is submitted that even though the insurance company may be absolved of its liability in statutory defence available u/s 96 (2)(b)(i)(a) of the Act the owner of the vehicle shall be liable to pay compensation to the applicants on the grounds of vicarious liability. It has been held by the Hon''ble Supreme Court and this court that if the act was done by the driver in course of the employment the owner of the vehicle shall be vicariously liable irrespective of the fact that the vehicle was used in breach of the specified condition at his instance or not. In support of the aforesaid proposition reliance is placed on the judgment of the Full Bench of this court in the case of New India Assurance Co. Ltd. Vs. Kamlaben Sultansinh Jadav and Others, wherein the Full Bench has referred to and relied on the judgment of the Hon''ble Supreme Court in the case of Pushpabai Purshottam Udeshi and Others Vs. Ranjit Ginning and Pressing Co. (P) Ltd. and Another, (para 31).

28. Regarding the liability, the learned counsel for the appellant has also submitted relying upon the recent Constitution Bench judgment reported in New India Assurance Co. Ltd. Vs. C.M. Jaya and Others, . In para 7 of the said judgment the Hon''ble Supreme Court after considering the judgments in the case of Amrit Lal Sood and Another Vs. Smt. Kaushalya Devi Thapar and Others, and also National Insurance Co. Ltd., New Delhi Vs. Jugal Kishore and Others, , has held as under:

" 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(supra) 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 u/s 95 of the Act.

The liability could statutory contractual. A statutory liability cannot be more than what is required under the statute itself. However, there is nothing in Section 95

of the Act prohibiting the parties from contracting to create unlimited or higher liability to cover wider risk. In such an event the insurer is bound by the terms of the contract as specified in the policy in regard to unlimited or higher liability as the case may be. In the absence of such a term or clause in the policy, pursuant to the contract of insurance, a limited statutory liability cannot be expanded to make it unlimited or higher. If that is so done, it amounts to rewriting the statute or the contract of insurance which is not permissible."

28.1 The learned counsel for the claimants have also relied on the recent Division Bench judgment of this court in the case of *New India Assurance Co. Ltd. Vs. Ketanbhai Bhagvandas Shah and Others*, in which on page 700 at para 12 the court has observed as under:

"In the context of the above discussion, it becomes obvious that the view canvassed by the appellant Insurance Company requires to be accepted. In other words, in order to qualify for enforcement of the award against the Insurer u/s 149(1) of the said Act, the driver of insured must firstly hold an effective driving licence on the date of the accident, if he, in fact, holds such a licence, it is nevertheless open to the Insurance Company to establish by appropriate evidence on record that after the issuance of the licence he acquired a disability, either physical or legal, on account of which, on the date of the accident, he was disqualified from holding or obtaining an effective driving licence."

28.2 The court further observed on page 702 at para 15 thus:

"In the premises aforesaid, we find that the grounds raised by the appellant are eminently sustainable and require that the appeal be allowed. Consequently the appeal is allowed. The impugned award is quashed and set aside only to the extent that the same holds the appellant-Insurance Company liable to satisfy the award passed against the owner and driver of the offending vehicle. On the facts and circumstances of the case, there shall be no order as to costs. Decree accordingly."

Contention of Mr. H.P. Raval learned advocate for the owner

29. Mr. Raval learned advocate for the owner submitted that even if the contention of the insurance company is accepted that the insurance company is not liable in any case even the owner is also not liable because in this case the vehicle involved in the accident is a goods vehicle and the driver was instructed to carry only goods in the vehicle and contrary to the instruction of the owner of the truck the driver has allowed passengers to travel and therefore he has not acted in terms of his employment and therefore in any view of the matter even if the driver is found to be rash and negligent in driving the vehicle he has not acted within the terms of his employment and therefore, the owner is not liable.

29.1 In support of their contention the learned advocates for the claimants relied upon the judgment of the Honourable Supreme Court reported in *New Asiatic Insurance Co. Ltd. Vs. Pessumal Dhanamal Aswani and Others*, . In that case the

fact was like that as S.N. Asnani owned Chevrolet Car bearing registered No. AA 4431. He insured it with the New Asiatic Insurance Co. Ltd. under a policy dated November 26,1957. Asnani permitted Pesumal Dhanamal Aswani hereinafter called Pesumal to drive that car. When Pesumal was driving the car with Daooji Radhamohan Meherotra and Murli Dholandas in the car, the car met with an accident as a result of which Meherotra died and Murli received injuries. Pesumal himself owned a Pontiac car which had been insured with the Indian Trade and General Insurance Co. Ltd. under policy No. Bombay P.C. 42733-2 dated November 18,1957. The heirs of Meherotra instituted suit No. 70 of 1959 against Pesumal for the recovery of Rs. 2,50,000/- by way of damages with interest. Murli instituted suit No. 71 of 1959 against Pesumal to recover Rs. 1,50,000/- by way of damages. In that matter notice u/s 96(2) of the Motor Vehicles Act 1939, Act IV of 1939 hereinafter called the Act were issued to the New Asiatic Insurance Co. Ltd. The notice was given to the company as the defendant's liability to third parties had been insured with it under its policy No. MV/4564. The company then took out Chamber summons and it was contended that notice under S. 96(2) of the Act was bad in law and should be set aside and that the company was not liable to satisfy any judgment which might be passed in the suit against defendant. Alternatively it was prayed that the company be added as a party defendant to the suit or be authorized to defend the suit in the name of the defendant. Tharkunde-J held that the notice issued to the company in the suits under S.96(2) of the Act, to be bad in law and accordingly, set them aside.

29.2 Being aggrieved by the said decision the plaintiffs then filed Letters Patent Appeals which were allowed and the Chamber Summonses were dismissed. It was directed that the trial Judge would hear the alternative prayers in the Chamber Summons and make the necessary orders. It is against this order in each of the appeals that the company preferred these appeals after obtaining special leave. In that context the Honourable Supreme Court considered the provisions of sections 94 and 95 of the Act and in para 12 regarding Chapter VIII the Honourable Court in page 1739 has observed as under:

(12) Chapter VIII of the Act it appears from the heading makes provision for insurance of the vehicle against third party risks that is to say it provision ensure that third parties who suffer on account of the user of the motor vehicle would be able to get damages for injuries suffered and that their ability to get the damages will not be dependent on the financial condition of the driver of the vehicle whose user led to the causing of the injuries. The provision have to be construed in such a manner as to ensure this object of the enactment."

29.3 In para 22 on page 1741 the Honourable Court has observed as under:

"(22) Thus the contract between the insured and the company may not provide for all the liabilities which the company has to undertake vis-a-vis the third parties in view of the provisions of the Act. We are of opinion that once the company had undertaken liability to third parties incurred by the persons

specified in the policy the third parties right to recover any amounts under or by virtue of the provisions of the Act is not affected by any conditions in the policy. Considering this aspect of the terms of the policy, it is reasonable to conclude that proviso (a) of para 3 of Section II is a mere condition affecting the rights of the insured who effected the policy and the person to whom the cover of the policy was extended by the company and does not come in the way of third parties claim against the company on account of its claim against a person specified in para 3 as one to whom cover of the policy was extended. "

29.4 After referring to the aforesaid judgment of the Supreme Court in *New Asiatic Insurance Company (supra)* Mr. Harin Raval learned advocate for the owner submitted that the driver who got indemnity from other company under any other policy is under the contractual term not to get indemnity from the company. Such a provision thus affects the question of indemnity between particular driver and the company and has nothing to do with the liability which the driver has incurred to the third party for the injuries caused to him. He has relied upon paras 19 and 22 of the said judgment in this behalf. Thereafter he submitted that the Honourable Supreme Court has held that the contract between the insured and the company may not provide for all liabilities which the company has to undertake vis-a-vis third party in view of the provisions of the Act. It is further held that once the company has undertaken liability to third party incurred by the persons specified in the policy, third party right to recover any amount under or by virtue of the provisions of the Act is not affected by any condition in the policy. Thus such a term of policy is a mere condition affecting the right of the insured and the persons to whom cover of the policy was extended by the company and does not come in the way of the third party claim against the company. Said provisions has been so construed so as to ensure object of the agreement of the Motor Vehicles Act and making provisions for insurance of vehicles against third party risk as held in para 12 of the above mentioned judgment.

29.5. He has also relied upon the judgment of the Honourable Supreme Court in the case of *Pushpabai Purshottam Udeshi and Others Vs. Ranjit Ginning and Pressing Co. (P) Ltd. and Another*, on the point of requirement of policy. Honourable Supreme court in para 20 has held that it is not required that a policy of insurance should cover risk to the passengers who are not carried for hire or reward.

29.5.A On another point while considering the scope of vicarious liability and the doctrine of scope of employment it is held in the paragraphs No. 8,9 and 15 that for the master's liability to arise the test is whether the act was done on the owners' business or that it was proved to have been impliedly authorised by the owners. The Honourable Supreme Court held that the law is settled that master is vicariously liable for the acts of his servants acting in the course of his employment. It is further held that unless act is done under the course of employment servants act does not make employer liable. In para 14 it is held

that the risk drawn is in law is to make master liable for acts of the servants which do not strictly follow within the term "in the course of employment" However, it is held that the consent of the owner is necessary to make the owner liable for the acts of the driver. While holding the company liable in para 15 in the facts of the said case the Honourable Supreme Court has held that the right to give leave to the deceased the right in the matter was within ostensible authority of the Manager of the company who was driving car and that the Manager was acting in the course of employment in giving leave to the deceased and therefore, company was liable. The argument of the insurance company is that the present case there was whether any consent nor any knowledge nor any ostensible or implied authority given to the driver by the owner of the truck to carry any person as passengers for hire or reward. That it was an act which is to be considered an illegal act as it is an offence under the Motor Vehicle Act and therefore it is an act within the scope and ambit of the contract of employment between the driver and the owner in the ordinary course of employment as the driver was engaged only to drive goods carrier and not to carry passengers for hire or reward. Therefore, the owner cannot be fastened with the liability to satisfy the claim of the claimants on the ground of his being vicariously liable.

29.6 The learned counsel further submitted that in a full Bench decision of this court in the case of *Ambaben v. Ussman Amir Miya* reported in 19 GLR 913 it has been held while considering section 95(1) that the business test applied in *Shakinabibi*'s case no longer applied for the purpose of finding out liability of the insured as to whether at the time when the accident occurred the vehicle was vehicle in which passengers are carried for hire or reward or whether passengers are carried in vehicle by reason of or in pursuance of a contract of employment on that particular occasion at the time of accident. It is further held by applying said decision that ultimately insure's liability will have to be judged and if particular passenger is not in fact passenger for hire or reward then policy would not cover the risk arising out of death or of bodily injuries to such passenger. The court further held that so far as policy contemplated by section 96(1)(b) of the Motor Vehicles Act is concerned it does not cover the risk to the (a) persons other than those who were carried for hire and/or reward at the time of accident (b) passengers other than those who were bonafide employees of the owner or hirer of the vehicle not succeeding six in number carried in pursuance of or by reason or a contract by employment. He has referred to para 6 and 8 of the said judgment.

29.7. He has referred to the judgment of this court in the case of *Bharat Kasturchand v. Mafatlal Bababhai* reported in 20 GLR 517----- wherein this court held that in the facts of the said case policy had contained a provision that the insured was not indemnified if the vehicle was driven otherwise than in accordance with the schedule. It is further held that the contract of insurance may provide for all liabilities but once company undertakes liability to third party the claimant entitled to recover any amount by virtue of the act and his right so not affected by any condition in the policy. He has referred to paras 7 and 8 of

the said judgment).

29.8 The learned counsel has referred to the judgment of the Division Bench of this court in the case of *United India Insurance Co. v. Surendrasingh Gurasingh* reported in 22 GLR 963 wherein this court has held that in view of the fact that considering the position of an insured in context of the provisions of Sections 95 and 96 of the Motor Vehicles Act 1939 and the limited defence available with the insured in a proceedings under the said Act having regard to the decision of the Honourable Supreme Court in *Bisandevi v. Sirvali*'s case it is the duty of the insured to substantiate the plea that the facts of the case would govern by exclusion in the policy and a mere averment in the written statement or suggestion is not sufficient to discharge the said duty. In that case the plea was that the vehicle being driven by the person who was not duly licenced. The court while disposing the appeal in absence of substantiation of such a plea held the company liable.

30. The learned counsel has also relied upon the decision of this court reported in 32 GLR 1161----- the learned single Judge in the case of *Oriental Fire and General Insurance Co. v. Rabari Gandu Punja* held that a combined reading of section 95(1)(b)(i) and 96(1) of the Motor Vehicles Act clearly shows that the statutory provision enjoin the insurance company to compulsorily cover risk of accident caused to third party out of the user as motor vehicle in the public place subject to offer of limits of liability. The affidavit of the said case showed that the accident occurred in a private place and therefore, the appeal was allowed since the policy covered the contract of insurance of the vehicle being involved in an accident only in a public place.

30.1 The learned counsel has also referred to the decision of the Full Bench judgment of Punjab High Court in the case of *Oriental Fire and General Insurance Co v. Smt. Gurudev Kaur & ors* reported in AIR 1967 Pun 468 and judgment of the Madras High Court in the case of *Vaidyanatha Pillai Vs. Narasimhan and Others*, .

30.2 He has also relied upon the Full Bench judgment of this court in the case of *New India Assurance Co. Ltd. v. Kamalaben* reported in (1) GLR 779. He has also referred to the judgment of the Madhya Pradesh High Court in the case of *Oriental Insurance Co. Ltd. Vs. Smt. Radharani and Others*, .

30.3 In view of the aforesaid legal position, the learned counsel for the owner has made the following submissions:

(a) That the Insurer (Insurance Company) would not be liable to pay any amount of claim as compensation for death and/or bodily injury if the vehicle involved in the accident being a goods carrier and not having a permit of public service vehicle was carrying passengers in such vehicle for hire or reward or even gratis. Of course such a claim would be relatable to passengers travelling in the vehicle and such exclusion would not apply to third parties such as person on road etc.

(b) For the above exclusion to apply the following conditions must necessarily exist in the facts of a particular case.

(i) That the vehicle is not goods carrier and does not have a permit as a public service vehicle.

(ii) That the policy of insurance contains a specific clause of exclusion

(iii) That the passengers were in fact being carried for hire or reward at the time of accident.

(iv) That such a case has been specifically pleaded by the Insurance Company in defence in response to the claim for compensation and has been proved.

(v) Needless to state that if any of the conditions mentioned in clause (b)(i) to (iv) above are not satisfied the Insurance Company will not be able to seek exclusion of the liability.

(vi) Even in case of an accident of vehicle being goods carrier the liability to satisfy the claim would be fastened on the Insurance with respect to claims of third parties who were not travelling in the vehicle as passengers for hire or reward or gratis.

(vii) Merely because the Insurer is successful in avoiding its liability in view of (a) and (b) above the liability would not be automatically be fastened upon the owner of the vehicle since for the claimants to hold the owner liable they must necessarily prove that the driver of the truck had carried the passengers for hire reward or gratis and such an act was with the express consent or knowledge of the owner of the vehicle.

(viii) The owner cannot be fastened with the liability to satisfy the claim on the ground of vicarious liability since the act of the driver to carry passengers for hire, reward or gratis is itself an illegal act and offence under the M.V. Act and it has to be considered to be an act out of the scope and ambit of the contract of employment between Driver and owner in the ordinary course of employment as a Driver engaged to drive a goods carrier.

Case of the claimants

31. The learned counsel for the claimants submitted that so far as passengers who are travelling in truck who found to be gratuitous passengers, it may be true that the judgment of the Hon"ble Supreme Court in the case of SMT. MALLAWWA v. ORIENTAL INSURANCE CO. LTD. (supra) and other cases will govern the case and Insurance Company may not be liable to pay the damages. However, in any view of the matter, the owner and the driver of the truck is liable.

31.1 The learned counsel for the claimants further submitted that in any view of the matter when there are certain persons who are standing on the road and some of the persons are died and some of the persons are injured due to the accident, so far as the claim petitions arising out of the accident qua those

persons, the Insurance Company cannot be absolved from the liability and in those cases the Insurance Company is liable to pay damages along with owner and driver of the truck. They have already referred to Section 94, 96 and the scheme of the said sections and they have stated that there are judgments of the Hon'ble Supreme Court which state that persons who are standing on the road have not done anything by which the Insurance Company can claim breach of terms of policy and therefore Insurance Company is liable.

31.2 In support of the above contention the learned advocates for the claimants have relied upon the judgment in the case of Skandia Insurance Co. Ltd. Vs. Kokilaben Chandravadan and Others, . In para 2 of the said judgment the facts of the case have been set out in which it is stated that when the truck was standing. The accident in question took place on November 14, 1964. The truck had come from Barejadi and had been unloaded at Baroda. The driver had gone for bringing snacks from the opposite shop leaving the engine running. The ignition key was in the ignition lock and not in the cabin in the truck as alleged by the driver. The driver had handed over control of the truck to the cleaner. On these facts the driver having been grossly negligent in leaving such a truck with its running engine in the control of the cleaner. This being the immediate cause of the accident the owner of the car viz. the insured was held vicariously liable along with the driver and the cleaner. In the facts of that case the High Court held that the insurer cannot plead any exemption on the ground that the owner had committed breach of the specified condition. Against that judgment the matter went to the Supreme Court. The Honourable Supreme Court considered the view in favour of the injured in view of the judgment of the High Court of Andhra Pradesh, High Court of Gujarat and also contrary view of Assam, Madhya Pradesh, Orissa and Patna High Courts. The Apex Court has considered provisions of section 95 of the Motor Vehicles Act and in para 12 the court rejected the contention that the insurance company cannot put up a defence of exclusion clause in this behalf. In para 12 the Honourable Supreme Court has observed as under:

" The defence built on the exclusion clause cannot be succeed for three reasons viz.

(1) On a true interpretation of the relevant clause which interpretation is at peace with the conscience of Section 96 the condition excluding driving by a person not duly licensed is not absolute and the promisor is absolved once it is shown that he has done every thing in his power to keep honour and fulfil the premise and he himself is not guilty of a deliberate breach.

(2) Even if it is treated as an absolute promise there is substantial compliance therewith upon an express or implied mandate being given to the licensed driver not to allow the vehicle to be left unattended so that it happens to be driven by and unlicensed driver.

(3) The exclusion clause has to be read down in order that it is not at war with

the main purpose of the provisions enacted for the protection of victims of accidents so that the promisor is exculpated when he does everything in his power to keep promise.

31.3 Honourable Supreme Court in the case of Skandia Insurance Co. Ltd. Vs. Kokilaben Chandravadan and Others, and also consider some English case and in para 14 the Honourable Apex Court has observed as under:

"14. Section 96(2)(b)(ii) extends immunity to the Insurance Company if a breach is committed of the condition excluding driving by a named person or persons or by any person who is not fully licensed or by any person who has been disqualified for holding or obtaining a driving licence during the period of disqualifications. The expression breach is not of great significance. The dictionary meaning of breach is "infringement or violation of a promise or obligation" (see Collins English Dictionary). It is therefore abundantly clear that the insurer will have to establish that the insured is guilty of an infringement or violation of a promise that a person who is not (sic) duly licensed will have to be in charge of the vehicle. The ivory concept of infringement or violation of the promise that the expression "breach" carries within itself induces an inference that the violation or infringement on the part of the promisor must be a wilful infringement or violation. If the insured is not at all at fault and has not done anything he should not have done or is not amiss in any respect how can it be conscientiously posited that he has committed a breach ? It is only when the insured himself places the vehicle in charge of a person who does not hold a driving licence that it can be said that he is "guilty" of the breach of the promise that the vehicle will be driven by a licensed driver. It must be established by the Insurance Company that the breach was on the part of the insured and that it was the insured who was guilty of violating the promise or infringement of the contract. Unless the insured is at fault and is guilty of a breach the insurer cannot escape from the obligation to indemnify the insured and successfully contend that he is exonerated having regard to the fact that the promisor (the insured) committed a breach of his promise. Not when some mishap occurs by some mischance. When the insured has done everything within his power inasmuch as he has engaged a licensed driver with the express or implied mandate to drive himself it cannot be said that he insurer is guilty of any breach. And it is only in case of a breach or a violation of the promise on the part of the insured that the insured can hide under the umbrella of the exclusion clause. In a way the question is as to whether the promise made by the insured is an absolute promise or whether he is exculpated on the basis of some legal doctrine. The discussion made in paragraph 239 of Breach of Contract by Carter(1984 Edition) under the head of Proof of Breach gives an inkling of this dimension of the matter. In the present case even if the promise were to be treated as an absolute promise the grounds for exculpation can be found from S.84 of the Act which reads thus:

"84 Stationary Vehicle- No person driving or in charge of a motor vehicle shall

cause or allow the vehicle to remain stationary in any public place unless there is in the driver's seat a person duly licensed to drive the vehicle or unless the mechanism has been stopped and a brake or brakes applied or such other measures taken as to ensure that the vehicle cannot accidentally be put in motion in the absence of the driver"

31.4 In view of this provision apart from the implied mandate to the licensed driver not to place a non licensed person in charge of the vehicle there is also a statutory obligation on the said person not to leave the vehicle unattended and not to place it in charge of an unlicensed driver. What is prohibited by law must be treated as a mandate to the employee and should be considered sufficient in the eye of law for excusing non compliance with the conditions. It cannot therefore in any case be considered as a breach on the part of the insured. To construe the provision differently would be to rewrite the provision by engrafting a rider to the effect that in the event of the motor vehicle happening to be driven by an unlicensed person regardless of the circumstances in which such a contingency occurs the insured will not be liable under the contract of insurance. It needs to be emphasised that it is not the contract of insurance which is being interpreted. It is the statutory provision defining the conditions of exemption which is being interpreted. These must therefore be interpreted in the spirit in which the same have been enacted accompanied by an anxiety to ensure that the protection is not nullified by the backward looking interpretation which serves to defeat the provision rather than to fulfil its life aim. To do otherwise would amount to nullifying the benevolent provision by reading it with a non benevolent eye and with a mind not tuned to the purpose and philosophy of the legislation without being informed of the true goals sought to be achieved. What the legislature has given the court cannot deprive of by way of an exercise in interpretation when the view which renders the provision potent to equally plausible as the one which renders the provision impotent. In fact it appears that the former view is more plausible apart from the fact that it is more desirable. When the option is between opting for a view which will relieve the distress and misery of the victims of accidents or their dependents on the one hand and the equally plausible view which will reduce the profitability of the insurer in regard to the occupational hazard undertaken by him by way of business activity there is hardly any choice. The court cannot but opt for the former view. Even if one were to make a strictly doctrinaire approach the very same conclusion would emerge in obedience to the doctrine of "reading down" the exclusion clause in the light of the "main purpose of the provision so that the "exclusion clause" does not cross swords with the "main purpose" highlighted earlier. The effort must be to harmonize the two instead of allowing the exclusion clause to snipe successfully at the main purpose. This theory which needs no support is supported by Carter's "Breach of Contract" vide paragraph 25. To quote- "Notwithstanding the general ability of contracting parties to agree to exclusion clauses which operate to define obligations there exists a rule usually referred to as the "main purpose rule" which may limit the application of wide exclusion

clauses defining a promisor's contractual obligations. For example in *Glynn v. Margetson & Co.* (1983 AC 351) Lord Halsbury LC stated:

"It seems to me that in construing this document which is a contract carriage between the parties one must be in the first instance look at the whole instrument and not at one part of it only. Looking at the whole instrument and seeing what one must regard as its main purpose one must reject words indeed whole provision, if they are inconsistent with what one assumes to be the main purpose of the contract." Although this rule played a role in the development of the doctrine of fundamental breach the continued validity of the rule was acknowledged when the doctrine was rejected by the House of Lords in *Suisse Atlantique Societe d' Armement Maritime SA v. N.V Rotterdamche Kolen Centrale* (1967) 1 AC 361 at pp 393, 412-413, 427-428, 430. Accordingly wide exclusion clauses will be read down to the extent to which they are inconsistent with the main purpose, or object of the contract."

32. The learned advocates for the claimants have also relied upon the judgment of the Apex Court in the case of *Sohan Lal Passi Vs. P. Sesh Reddy and others*, . In that case the accident took place on 8.6.1980 at Panaji between a bus and a scooter as a result whereof one Dr. P. Ramachandra Reddy who was driving the scooter fell down and succumbed to the injuries, the same day. A claim petition was filed before the Motor Accident Claims Tribunal by Respondent 1 and 2 claiming compensation against the owner as well as insurance company.

33. It was the case of the claimant that respondent No. 4 Rajendra Pal Singh who was the cleaner/conductor of the bus was driving the bus at the relevant time when the accident took place resulting in the death of Dr. P. Ramachandra Reddy on account of his rash and negligent driving. The claim for compensation was resisted by the appellant (owner of the vehicle) contending that when the accident took place the bus was driven by Gurbachan Singh who was employed by him as a driver and who had the licence to drive the bus in question and as such the respondent Insurance Company was liable to pay the compensation. The Insurance Company however took the defence that as the bus was being driven by respondent No. 4 Rajinder Pal Singh cleaner/conductor of the bus who was not holding the driving licence and therefore, the Insurance Company cannot be held liable to pay compensation because under the terms of the policy only persons holding a driving licence could have driven the bus in question.

34. The Tribunal on consideration of the materials on record came to the conclusion that the accident was the result of rash and negligent driving of the bus by Respondent 4 who did not have a driving licence. On that finding the Tribunal discharged the liability of the Insurance Company. On appeal the High Court enhanced the amount of compensation but in respect of liability to pay compensation between the owner of the bus and the insurance company the High Court came to the conclusion that the Insurance Company was not liable because the vehicle was being driven by a person at the time of accident who was not holding a valid driving licence. The High Court rejected the claim of the

appellant holding that at the time of the accident the vehicle was being driven by Gurbachan Singh who was holding the driving licence.

35. In that set of circumstances the Honourable Supreme Court considered the liability of damages from Salmond's Law of Torts and Halsbury's Laws of England and also Pushpavati's case (supra) has been considered and thereafter the court considered section 96 of the old Act. The Court also considered correctness of Skandia's case (supra). After considering the same, on page 31 of this judgment he Honourable Supreme Court has observed as under:

"To examine the correctness of the aforesaid view (i.e. Skandia's case) this appeal was referred to a three Judge Bench because of half of the insurance company a stand was taken that when Section 96(2)(b)(ii) has provided that the insurer shall be entitled to defend that action on the ground that there has been breach of a specified condition to the policy i.e. the vehicle should not be driven by a person who is not duly licenced then the insurance company cannot be held to be liable to indemnify the owner of the vehicle. In other words once there has been a contravention of the condition prescribed in sub-section (2)(b)(ii) of Section 96 the person insured shall not be entitled to the benefit of sub section (1) of Section 96. According to us, Section 96(2)(b)(ii) should not be interpreted in a technical manner. Sub section (2) of section 96 only enables the insurance company to defend itself in respect of the liability to pay compensation on any of the grounds mentioned in sub section (2) including that there has been a contravention of the condition excluding the vehicle being driven by any person who is not duly licensed. This bar on the face of it operates on the person insured. If the person who has got the vehicle insured has allowed the vehicle to be driven by a person who is not duly licensed then only that clause shall be attracted. In a case where the person who has got insured the vehicle with the insurance company has appointed a duly licensed driver and if the accident takes place when the vehicle is being driven by a person not duly licensed on the basis of the authority of the driver duly authorized to drive the vehicle whether the insurance company in that event shall be absolved from his liability? The expression "breach occurring in Section 96(2)(b) means infringement or violation of a promise or obligation. As such the insurance company will have to establish that the insured was guilty of an infringement or violation of a promise. The insurer has also to satisfy the Tribunal or the Court that such violation or infringement on the part of the insured was wilful. If the insured has taken all precautions by appointing a duly licensed driver to drive the vehicle in question and it has not been established that it was he insured who allowed the vehicle to be driven by a person not duly licensed then the insurance company cannot repudiate its statutory liability under sub section (1) of Section 96."

36. Again in para 13 of this judgment the Honourable Supreme Court has referred to Khasiram Yadav case and also Skandia case and after referring to both the cases observed as under:

"13. This court in the case of Kashiram Yadav v. Oriental Fire and General

Insurance Co. reiterated the views expressed in *Skandia Insurance Co. Ltd. v. Kokilaben Chandravadan*. While referring to that case it was said.

There the facts found were quite different. The vehicle concerned in case was undisputedly entrusted to the driver who had a valid licence. In transit the driver stopped the vehicle and went to fetch some snacks from the opposite shop leaving the engine on. The ignition key was at the ignition lock and not in the cabin of the truck. The driver had asked the cleaner to take care of the truck. In fact the driver had left the truck in care of the cleaner. The cleaner meddled with the vehicle and caused the accident. The question arose whether the insured (owner) had committed a breach of the condition incorporated in the certificate of insurance since the cleaner operated the vehicle on the fatal occasion without driving licence. This court expressed the view that it is only when the insured himself entrusted the vehicle to a person who does not hold a driving licence, he could be said to have committed breach of the condition of the policy. It must be established by the Insurance Company that the breach is on the part of the insured. Unless the insured is at fault and is guilty of a breach of the condition the insurer cannot escape from the obligation to indemnify the insured. It was also observed that when the insured has done everything within his power inasmuch as he has engaged the licensed driver and has placed the vehicle in his charge the express or implied made to drive himself, it cannot be said that the insured is guilty of any breach.

37. We affirm and reiterate the statement of law laid down in the above case. We may also state that without the knowledge of the insured, if by driver's acts or omission others meddle with the vehicle and cause an accident the insurer would be liable to indemnify the insured. The insurer in such a case cannot take the defence of breach of the condition in the certificate of insurance.

We are in the respectful agreement with the view expressed in the case of *Skandia Insurance Co. Ltd. v. Kokilaben Chandravadan*"

"14. As in the facts of the present case the appellant shall be deemed to be liable to pay compensation applying the principle of vicarious liability because the accident took place when the act authorised was being performed in a mode which may not be proper but was directly connected with the course of employment, sub section (1) of Section 96 of the Act shall come into play and the insurance company shall be deemed to be the judgment debtor so far the claim made by the heirs and legal representative of the deceased is concerned."

38. The learned counsel for the appellant has further relied upon the judgment in the case of *New India Assurance Co., Shimla Vs. Kamla and Others* etc. etc., the Honourable Apex Court has referred to the judgment in *Skandia's* case and also the judgment of *Sohanlal's* case and thereafter in para 25 has observed as under:

"25. The position can be summed up thus:

The insurer and the insured are bound by the conditions enumerated in the policy and the insurer is not liable to the insured if there is violation of any policy condition. But the insurer who is made statutorily liable to pay compensation to third parties on account of the certificate of insurance issued shall be entitled to recover from the insured the amount paid to the third parties if there was any breach of policy conditions on account of the vehicle being driven without a valid driving licence. Learned counsel for the insured contended that it is enough if he establishes that he made all due enquiries and believed bonafide that the driver employed by him had a valid driving licence, in which case there was no breach of the policy condition. As we have not decided on that contention it is open to the insured to raise it before the Claims Tribunal. In the present case if the insurance company succeeds in establishing that there was breach of the policy conditions, the claims Tribunal shall direct the insured to pay that amount to the insurer. In default the insurer shall be allowed to recover that amount (which the insurer is directed to pay to the claimant third parties) from the insured person."

38.1 The learned counsel for the claimants submitted that in the case of 10 persons have died 3 persons have injured arising out of only one accident but for the purpose of insurance all the 13 persons are entitled to compensation because all the 13 different passengers, it is a separate accident and insurance company is liable to pay compensation for all the 13 persons including the heirs and legal representatives of the deceased as well as injured. In support of the same, he has relied upon the following judgments.

38.1A. The learned advocate for the claimants has relied upon the judgment of the Honourable Supreme Court in the case of Motor Owner's Insurance Co. Ltd. v. Jadavji Keshavji reported in 1981 SC 2059. In para 17 on page 2064 of its judgment the Honourable Supreme Court has observed as under:

"17. The expression "any one accident" is susceptible of two equally reasonable meanings or interpretations. If a collision occurs between a car and a truck resulting in injuries to five persons, it is as much plausible to say that five persons were injured in one accident as it is to say that each of the five persons met with an accident. A bystander looking at the occurrence objectively will be right in saying that the truck and the car met with an accident or that they were concerned in one accident. On the other hand a person looking at the occurrence subjectively like the one who is injured in the collision, will say that he met with an accident. And so will each of the five persons who were injured. From their point of view which is the relevant point of view "any one accident" means "accident to any one". In matters involving third party risks it is subjective considerations which must prevail and the occurrence has to be looked at from the point of view of those who are immediately affected by it. If the matter is looked at from an objective point of view, the insurer's liability will be limited to Rs. 20,000/- in respect of injuries caused to all the five persons considered en bloc as a single entity since they were injured as a result of one single collision. On the other hand, if the matter is looked at subjectively as it

ought to be, the insurer's liability will extend to a sum of Rs. 20,000/in respect of the injuries suffered by each one of the five persons, since each met with an accident though during the course of the same transaction. A consideration of considering importance in a matter of this nature is not whether there was any one transaction which resulted in injuries to many but whether more than one person was injured giving rise to more than one claim or cause of action even if the injuries were caused in the course of one single transaction. If more than one person is injured during the course of the same transaction, each one of the person has met with an accident.

38.1B. The learned advocate for the claimants have also relied upon the judgment in the case of *Narcinva V. Kamat and Another Vs. Alfredo Antonio Doe Martins and Others*, . In view of the aforesaid judgment they contended that the insurance company failed to prove that there was a breach of terms of contract of insurance as evidenced by the police of insurance. It was submitted that the owner has given the truck to a driver who was holding a valid and legal licence. In view of the same the insurance company failed to prove that aspect, and therefore, its liability under the contract of insurance remains in tact and unhampered and it was bound to satisfy the award under the comprehensive policy of insurance.

38.1C. The learned advocate for the appellant has also relied upon the judgment of the Honourable Supreme Court in the case of *B.V. Nagaraju Vs. M/s. Oriental Insurance Co. Ltd.*, Divisional Officer, Hassan, In that case the there was a breach of carrying human beings in a good vehicle more than the number permitted in terms of the insurance policy. In that case from the terms of insurance policy when the insured vehicle was entitled to carry 6 workman excluding driver. However, more number of passengers were carried. In this case the Honourable Supreme Court has observed in para 7 as under:

"7. It is plain from the terms of insurance policy that the insured vehicle was entitled to carry 6 workmen, excluding the driver. If those 6 workmen when travelling in the vehicle are assumed not to have increased any risk from the point of view of the Insurance Company on occurring of an accident, how could those added persons be said to have contributed to the causing of it is the poser, keeping apart the load it was carrying. Here, it is nobody's case that the driver of the insured vehicle was responsible for the accident. In fact it was not disputed that the oncoming vehicle had collided head on against the insured vehicle which resulted in the damage. Merely by lifting a person or two or even three by the driver or the cleaner of the vehicle, without the knowledge of the owner cannot be said to be such a fundamental breach that the owner should in all events, be denied indemnification. The misuse of the vehicle was somewhat irregular though but not so fundamental in nature so as to put an end to the contract, unless some factors existed which by themselves had gone to contribute to the causing of the accident."

39. The learned advocate for the claimants thereafter relied upon a judgment of

the Division Bench judgment of this court (Coram: N.J. Pandya and A.R. Dave-JJ) in First Appeal No. 2870 of 1993 decided on 16.9.1996 in the case of United India Insurance Co. Ltd. v. Shri Ramanbhai Khimabhai Chauhan & Ors. and in para 39 this court has considered Skandia "s case (Supra) and observed as under:

"39. With regard to the interpretation of the policy, the aforesaid Skandia decision has been cited and on the same line is 1996 Supreme Today 557 (i.e. B.V. Navaraju (supra)) where in case of a goods vehicle found to be carrying instead of 6 workmen, 9 workmen, relying on the aforesaid Skandia decision, the learned Judges of the Supreme Court held that the misuse of a vehicle is somewhat irregular but not so of fundamental so as to put an end to the contract. The learned Judges have expressed themselves to the effect that exclusion term of the Insurance Policy must be read down so as to serve the main purpose of policy i.e. to identify the damage which in that case was to the vehicle."

Conclusion

40. I have considered the contentions of the learned advocate for the insurance company, owner of the truck and the claimants in this behalf. From the facts of the case, the vehicle involved in the accident is a goods vehicle and 28 persons were boarded and carried in the same who were gratuitous passengers. I have also considered the judgment of the Honourable Supreme Court in Mallawa's case and also the case of Rakeshkumar v. National Insurance Company. In view of these two judgments of the Honourable Supreme Court it is now settled law that the insurance company cannot cover the liabilities of passengers carried in the "goods vehicle" as per policy. It has been held by the Honourable Supreme Court that the insurance company is not liable for payment to passenger carried in goods vehicle either for hire and reward or for gratuitous passengers. In view of the aforesaid judgment the heirs of deceased as well as injured persons who were travelling in the truck as gratuitous passengers and who have claimed compensation in this behalf would not be entitled to obtain compensation from the insurance company. However, they are entitled to obtain compensation from the owner and driver of the truck. In view of the same, First Appeals Nos. 188, 189, 190, 191 and 192 of 1983 filed by owners of the truck are dismissed with no order as to costs. To that extent the judgment and award of the Motor Accident Claims Tribunal is fully confirmed.

40A. As already stated above, First Appeal No. 429 of 1983 arising out of MACP No. 123 of 1979 relates to passengers who were travelling in the truck with their goods where the Tribunal held that the owner, driver and the Insurance Company are liable to pay compensation. I have already discussed this issue in the earlier part of the judgment and in view of the judgments of the Hon'ble Supreme Court in the cases of MALLAWA and RAKESHKUMAR (supra), the Insurance Company cannot be fastened with the liability when the passengers were travelling in the truck with their goods and the owner and the driver of the vehicle are liable. Therefore, First Appeal No. 429 of 1983 filed by the Insurance

Company is allowed and I hold that the owner and the driver are liable in this behalf.

Regarding passengers who were standing on the road

41. Section 93(g) defines the term "third parties" which includes Government. Section 94 provides for insurance against third party risk. The said Section requires that the policy must provide insurance against any liability to third parties incurred by the person using the vehicle. The policy should be with reference to that particular vehicle i.e. must be a policy by which a particular vehicle is insured, though it may mention the person specifically or by specifying the class to which that person may belong. The object of this section is to provide insurance to all vehicles which are to be used in public places. If a third party suffers any damage due to the use of the said vehicle in a public place, the third party would be able to get damages for the same straightaway from the insurance company. A perusal of the said Section clearly discloses that the statute intended is to give protection to a third party in respect of death or bodily injury or damages to their property while using the vehicle in a public place. Hence the insurance of the vehicle u/s 94 read with section 95 is made compulsory. It is therefore, intended that compulsory insurance is for the benefit of third parties. Hence it is clear that the insurance policy covering three kinds of risks i.e. person (owner), property (vehicles) and third parties is clearly in the nature of composite one. Third party liability alone is compulsory.

42. If a policy is taken in respect of a motor vehicle from an insurer in compliance with the requirements of Chapter VIII the insurer is under an obligation to pay the compensation payable to a third party on account of any injury to his/her person or property or payable to the legal representatives of the third party in case of death of the third party caused by or arising out of the use of the vehicle at a public place. The liability to pay compensation in respect of death of or injury caused to the person or property of a third party undoubtedly arises when such injury is caused when the insured is using the vehicle in a public place. It also arises when the insurer has caused or allowed any other person (including an independent contractor) to use his vehicle in a public place and the death of or injury to the person or property of a third party is caused on account of the use of the said vehicle during such period.

43. A reading of the sub section (1) of Section 95 of the Act along with the limits of liability as mentioned in the insurance policy itself also indicates that the insurance was in respect of damages to third party and to the owner and the insured of the vehicle.

43.1 Section 95(b)(i) evidently makes the insurance company liable against any liability which may be incurred. The case will not fall under sub clause (i) of section 95. It makes the Insurance Company liable straightaway 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. The emphasis in this sub

clause is on the nature and situation of the vehicle at the time of the accident rather on the liability of the insured in respect of the vehicle.

44. Regarding liability of insurance company qua third parties, I have considered the case of this court in Boi Vanaji Dhulaji (Supra), Full Bench judgment of this court in Nathiben's case and also Full Bench judgment of this Court in Kamalaben's case and also submissions of learned counsel for the insurance company that the claimants must prove all the four conditions laid down in these cases for obtaining compensation. I have also considered the contentions of learned counsel for the appellant regarding burden of proof and also recent judgment in the case of J.M. Jaya. I have also considered the contention of the learned counsel for the owner. I have also considered the decision cited by the learned counsel for the claimant particularly the case of Skindia's case, Sohanlal's case, Kashiram's case. in the case of New India Assurance Company v. Kamala (Supreme Court Case), judgment in Jadavj Keshavji's case, Alfredo Antonio's case and B.V. Navaraju's case. In view of all these decisions the claimants have been able to prove that the accident arose because of the owner as well as driver's negligence. It may be noted that as far as the persons who were on the road, they have not contributed anything in connection with the accident. Only the driver and the owner are liable for the accident and there was no breach of conditions of the policy by the persons who were on the road and therefore, the insurance company failed and neglected to fulfil all the four conditions laid down by the Full Bench of this court in the case of Kamalaben. The judgment of the Supreme Court in Skindia's case which has been subsequently affirmed in Roshanlal's case clearly applies and to that extent the insurance company is liable to pay compensation to the heirs and legal representatives of the persons who were standing on the road as well as injured who were also standing on the road. Thus in view of all these decisions the insurance company is liable to pay compensation to the persons in this behalf.

45. These appeals relate to the claim arising out of the injury and death of the passengers who were standing on the road. The expression "third party" could only mean a person outside the vehicle and on the road. It is now well accepted that the insurer or the insurance company being one party to the contract the insured or the policy holder being another, the claims made by the others in respect of the negligent use of the motor vehicle would be claims made by the third parties. The contention of the learned counsel for the insurance company is that since there is breach of condition by the owner, the insurance company is not liable to make payment of compensation. I have considered the section 95(1) (b)(i) which is generally couched in respect of death or bodily injury to any person without restricting it to any particular person or classes of person. The exemption is with reference to the nature of the vehicle and not with reference to the persons carried in the vehicle. Thus the rigour of sub section (2)(b) of section 95 (now section 140) would fully come into play and by clauses (i) and (ii) provision has been made to cover two categories; one in respect of person other than the passengers carried for hire or reward: and the other in respect of

passengers. In view of the same the insurance company is liable to pay compensation to the third parties who are pedestrians in this case.

46. In view of the aforesaid discussion the insurance company cannot contend that there is breach of failure on the part of the persons who were standing on the road and therefore, the insurance company is not liable to make payment to the third party who is not responsible for the breach of conditions or failure. The persons on the road are not concerned whether there is breach of policy or not. Even if there is breach the same is directory in view of the judgment of the Honourable Supreme Court in Skindia's case which has been further affirmed in Sohanlal's case. Therefore, I am of the view that the third party is entitled to claim damages against the insurance company and to that extent the contention of the insurance company is not accepted. Hence First Appeals Nos. 428/1983, 431/1983, 432/1983, 433/1983, 434/1983, 861/1983 filed by the Insurance Company against compensation qua persons who were standing on the road are dismissed and the owner, driver and Insurance company are jointly and severally liable to make payment of compensation to the claimants in those First Appeals.

47. However, it may be noted that so far as First Appeal No. 432 of 1983 is concerned the Tribunal has awarded Rs. 67,000/- for the injury. The liability of the insurance company is limited only to the extent of Rs. 50,000/-. Therefore, the insurance company is liable to make payment of only Rs. 50,000/- with proportionate costs and interest. The remaining amount will be paid by the owner and the driver of the truck jointly. In all other appeals the claim is below Rs. 50,000/- and therefore, this order is not necessary to be passed in other appeals. In all other appeals the insurance company is liable to make payment of the decretal amount to the claimants.

48. Appeal relating to cleaner's case - First Appeal No. 430 of 1983 filed by the Insurance Company qua the cleaner of the vehicle in question has to be dismissed. The insurance company is liable to make payment of compensation to the heirs of the deceased cleaner in this behalf. In fact even the cleaner is entitled to compensation under the provisions of Workmen Compensation Act also but in this case the heirs of the deceased cleaner have claimed compensation before the Tribunal. The Insurance covers an amount of Rs. 50,000/- whereas the Tribunal has awarded Rs. 43,000/to the heirs of deceased cleaner. In view of the same the judgment and award dated 30.3. 1982 in MACP No. 258 of 1979 in favour of the heirs of deceased cleaner awarding them compensation of Rs. 43,000/- with interest at the rate of 12 percent from the date of filing of the claim petition with proportionate costs is confirmed.

INTEREST:

49. In this case accident took place on 25.2.1979. The trial court decided the matter on 30.3.1982. The appeals were filed in 1983. When the appeals were admitted, the Division Bench of this court (Coram: N.H. Bhatt and J.P. Desai, JJ) passed the following order on 21.10.1983.

"Though Mr. Shah had appeared for the respondent-claimants, his name was not shown on the day the concerned Civil Applications had come to be finally disposed of. So ex-parte order passed is hereby set aside in all the three Civil Applications.

Heard the learned advocates M/s. Soparkar and Shah and we make the rule absolute on condition that within six weeks from to-day the amount awarded is deposited with the Tribunal with liberty to the claimants to withdraw 1/5th of the award amount on furnishing security to the satisfaction of the Tribunal. Rest of the amount to be deposited by the Tribunal on long term basis with some nationalised bank. Quarterly interest is to be paid to the claimants."

50. When the appeals were kept for hearing before this court on 22.3.2002 and in May 2002, the learned counsel for the claimants has drawn the attention of this court to the effect that the amount as directed earlier on 21.10.1983 by this court is not deposited. Therefore, the court may further direct the Insurance Company to deposit the amount. Therefore, this court by orders dated 22.3.2002 and in May 2002 directed the Insurance Company to deposit the amount with the Tribunal. However, the learned counsel for the claimants has informed this court that the amount is still not deposited by the Insurance Company. The Insurance Company failed and neglected to deposit the decretal amount despite three orders of this court.

51. The Hon"ble Supreme Court in the case of MOTOR OWNERS INSURANCE COMPANY LTD. v. J.K. MODI (1981) ACJ 507 held as follows:

"that the delay in the final disposal of motor accident compensation cases, as in all other classes of litigation, takes a sting out of the laws of compensation and added to that the monstrous inflation and the consequent fall in the value of rupee makes the compensation demanded years ago, less than quarter of its value when it is received after such a long time.

51.1 The Hon"ble Supreme Court in the case of INDIA INSURANCE CO. LTD. v. NIRMLA DEVI (1980) ACJ 55 held as under:

"The determination of the quantum must be liberal, not niggardly since the law values life and limb in free country in generous scales."

52. In view of the above judgments of the Hon"ble Supreme Court, I direct the Insurance Company to pay interest at the rate of 12% from 30.3.1982, i.e. the date on which the Tribunal passed the order till payment on the principal amount to all the claimants or legal heirs/representatives of the claimants. The amount is to be deposited with the concerned Motor Accident Claims Tribunal within four months from today. Thereafter, Tribunal will disburse the amount to the claimants or legal heirs/representatives of the claimants after verifying their identity. I am aware that recently the Hon"ble Supreme Court has directed that only 9% interest be awarded in Motor Accident Claim cases. However, in this case the Insurance Company is liable to pay the amount from 30.3.1982 and still

the Insurance Company has not deposited the amount before the tribunal. In view of the fact only recently the rate of interest has gone down but previously the rate of interest was higher, I direct the Insurance Company to pay interest at the rate of 12% on the decretal amount from 30.3.1982.

53. In the result, First Appeal Nos. 188/1983, 189/1983, 190/1983, 191/1983, 192/1983 filed by the owner are dismissed. First Appeal Nos. 428/1983, 430/1983, 431/1983, 432/1983, 433/1983, 434/1983 and 861/1983 filed by the Insurance Company are dismissed to the aforesaid extent. First Appeal No. 429 of 1983 is allowed to the extent which has been stated as above.

54. Before parting with the judgment, I may quote the following:

"This court will not deny the equal protection of the law to the unwashed, unshod, unkempt and uninhibited"