
(1998) 12 CAL CK 0009

In the Calcutta High Court

Case No : Circuit Bench at Port Blair Civil Appellate Jurisdiction F.M.A. No. 1 of 1998

M/s. United India Insurance Co. Ltd.

APPELLANT

Vs

B. Hemawati and Others

RESPONDENT

Date of Decision : 21-12-1998

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 8 Rule 2
Insurance Act, 1938 — Section 64
Motor Vehicles Act, 1939 — Section 94, 95, 95(1), 96
Motor Vehicles Act, 1988 — Section 146, 147, 147(1), 147(5)

Citation : (2001) ACJ 749 : (2000) 2 CALLT 449 : 2 CWN 153

Hon'ble Judges : Shyamal Kumar Sen, J; Amitava Lala, J

Bench : Division Bench

Advocate : Mr. D.R. Parekh, for the Appellant; Mr. M.N. Nag and Mr. R.S. Saroop, for the Respondent

Judgement

S.K. Sen, J.—This appeal is directed against the award passed by the Accident Claims Tribunal (District Judge), Port Blair arising out of an application u/s 166(A) of the Motor Vehicles Act, 1988 as amended in 1994, filed by the respondents being the heirs and legal representatives of the victim, directing the appellant, Insurance Co. and the respondent No.3 to pay jointly and severally the compensation of Rs. 2,47,000/-only.

2. The facts inter alia involved in this appeal are that on 29.6.1996 at about 14-10 hrs. the victim was travelling on the body of the truck bearing Regn. No. AN O1/A-4501 belonging to and driven by O.P. No. 1 S. Venkatoswar Rao from Phoenix Bay APWD godown to Haddo Wharf via Pelanlpur after unloading the cement bags at the godown. The driver of the truck turned the truck rashly and negligently in increased speed towards the right in order to go to Haddo side at the traffic junction at Delanlpur as a result of which the victim who was sitting on the left side of the body of the truck, fell down on the road and he sustained fatal injuries. Other three mazdoors and S. Narayan shouted and the driver stopped

the vehicle after proceeding to some distance. S. Narayan and other three mazdoors got down from the truck and found that the victim was not able to get up. The victim thereafter was shifted to G.B. Pant Hospital by taxi bearing No. AN-1988 by the said mazdoors. On examination the doctor declared the victim dead. S. Narayan went to Aberdeen P.S. and lodged a report to the police where a crime No.30 of 1996 was registered against the driver. Postmortem examination on the body of V. Lakshmi Narayan, the victim, was held. The victim died in the accident as the offending truck was being driven rashly and negligently. The truck was covered under a policy of insurance with O.P. No.2 M/s. United Indian Insurance Co. Ltd. At that time the truck had the registration number of Andhra Pradesh bearing no. ADM-8062 which was brought by O.P. No.1 to Port Blair from Andhra Pradesh, At Port Blair the truck has been registered as AN O1/A-4509. The victim at the time of death was 26 years of age having a good health. He was working as a mazdoor in ATI Bambooflat getting a monthly salary of Rs. 1569/-. By filing this claim case the claimant prayed for a total compensation of Rs. 4.22.400/- as compensation for loss of consortium, funeral expenses and loss of estate.

3. O.P.No. 1 did not file any written statement, but O.P.No.2 filed written statement wherein all the material facts excepting the facts of accident are denied. It is admitted that the offending vehicle belongs to O.P.No. 1 and it was duly insured with O.P.No.2. By filing this written statement this O.P. No. 2 has stated that they are not liable to pay the compensation to the claimant as there has been violation of the terms and conditions of the policy of insurance by the insured O.P. No.2.

4. On the basis of the pleadings the following issues were framed for proper adjudication :--

1. Is the case maintainable in its present form and in law?
2. Did B. Laxminarayan die in a vehicular accident occurred on 20.6.1996 at Delanjpur?
3. Was the truck AN O1-4501 involved in that accident? If so, was O.P. No.1 Sri Venkateshwar Rao the owner of the said truck?
4. Was the truck covered under insurance at the relevant time?
5. Are the claimants entitled to get compensation? If so, what would be the quantum of compensation and who will be liable to payment of compensation?
6. To what other relief, if any, are the claimants entitled?

5. Considering the evidence and the facts on record and also considering the third party liability under the insurance policy the Tribunal was of the view that both the owner of the vehicle and the insurance Co, are liable to pay compensation. It has been awarded by the Tribunal as follows :--

"That the case be and the same is allowed on contest against the O.P. No.1 and

O.P. No.2 but in the circumstances without costs. The claimant do get an award for herself and for her minor children of Rs. 2,47,000/-against the O.P.No. 1 in the compensation, O.P.No.2 being the Indemnifier of O.P.No.1 In the use of the offending truck AN 01/4509. Both O.P.No. 1 and the O.P.No.2 are directed to pay the said amount by an account payee cheque through this Tribunal within a period of 65 days from date falling which the award shall carry a simple Interest at the rate of 10% per annum from the date till the date of realisation of the award. On expiry of 65 days from this date the claimant is entitled to put the award into execution. Within 15 days from the date of receiving the compensation the claimant No. 1 do deposit the share of the minors In a separate long term fixed deposit scheme in the name of the minors in any nationalised bank or Post Office."

6. The contention of the appellant insurance Co. is that the award is not sustainable in view of the fact that there is breach of condition of the insurance policy since the victim happens to be a gratuitous passenger and on such the same is not covered under the insurance policy. The appellant has also challenged the amount of compensation under the Act.

7. According to Mr. Parekh, learned Advocate for the appellant, the policy in question being an Act policy a gratuitous passenger travelling in goods vehicle does not come under its covered thereby absolving the appellant Insurance Co. from its liability thereunder.

8. It has further been submitted by Mr. Parekh, the carrying of a passenger in a goods vehicle amounts to violation of the terms of the policy of insurance.

9. It has also been argued on behalf of the appellant that the evidence on record establishes the fact that the deceased was an employee of a private company and had no connection whatsoever with the goods or the owner of the vehicle. In fact the respondent No. 1 pleaded the same is the statement of claim and also deposed to that effect which was not challenged by the respondent No.3 owner and driver of the offending vehicle.

10. Mr. Parekh has also submitted that the absence of any finding and conclusion by the learned presiding officer regarding the status of the deceased, silence on the part of respondent No.3, absence of any specific issue, denial of opportunity to the parties to adduce proper evidence, makes it a fit case for remand with certain specific directions fixing a time limit.

11. It has been contended on behalf of the appellant that the offending truck of the respondent No. 2 was carrying the victim as "gratuitous passenger". He has further urged that since there is a breach of the insurance policy the petition claim is not tenable.

12. It has been urged on behalf of the respondent No. 1 that the said plea was not taken before the Tribunal and such as such there is no scope for contending the same at the appellate stage.

13. In support of his contention learned Advocate for the respondent No. 1 has relied upon the judgment and decision in the case of Shivraj Vasant Bhagwat Vs. Smt. Shevanta Dattaram Indulkar and another,

14. It has further been submitted on behalf of the respondent No. 1 that the appellant could not contest the claims proceedings in the instant case where the respondent had initiated the proceedings against the owner and the insurer by invoking the provisions of the newly enacted provisions u/s 163-A of the said Act which came into force on 14.11.1994 where under sub-section (2) the claimant is not required to prove negligence to get an award for compensation as per the schedule appended to the said section. u/s 163-A the Tribunal is required to determine the quantum for compensation only. The Tribunal is not required to adjudicate upon the question of "negligence". He has referred to section 49(2) of the said Act and has submitted that the insurer can contest the claim proceeding when the said proceeding is initiated by any claimant u/s 160 and where the Tribunal is required to make an enquiry and adjudicate upon the question of negligence in order to award compensation on the negligence being proved as required u/s 168 of the said Act,

15. Mr. Nag learned Advocate for the respondent No. 1 has contended that if the award is passed u/s 163-A of the Act as has been done in the present case, on the basis of the proceedings initiated by the claimant u/s 163-A, then the insurer cannot urge the ground of breach of condition of insurance policy in view of the explanation inserted at the end of section 149 of the Motor Vehicles Act. The said explanation is set out here in below :--

"For the purpose of this section, "claims tribunal" means a claims tribunal constituted u/s 165 and "Award" means an award made by that tribunal u/s 168."

16. Accordingly, Mr. Nag has submitted that on the basis of the provisions contained in the explanation of the section 149, whereby award made u/s 163-A has been deliberately omitted, the appellant under no circumstances can challenge the impugned award by urging that there has been a breach of condition of licence by alleging that the respondent No. 1's husband was travelling as a gratuitous passenger in the offending vehicle in question in the above case. The appellant could have legally contested had the claim proceeding been initiated by the respondent No.1 u/s 166 and thereupon an award passed u/s 168 of the Act.

17. The appellant has also challenged the correctness and legality of the quantum of compensation awarded which is not permissible according to the learned Advocate for the respondent No. 1. In support of his contention he has relied upon judgment and decision In the case of Reddipilli Chinna Rao and Vs. Reddi Lorudu and Others, and the Judgment and decision in the case of M/s. United India Insurance Co. Vs. Shaik Saibaqtulla and Others,

18. It has been contended on behalf of the respondent No. 1 that In view of the provisions contained in sections 149(1) and 147(5) of the said Act the appellant-

Insurer is liable to pay compensation under the impugned award to the respondent No.1.

19. We have considered the respective submissions of the parties and the decisions cited. It has been admitted in the written statement filed by Insurance Company that the vehicle was under the coverage of insurance at the relevant time with the said insurance Company and the truck was duly insured by the policy. From the evidence of O.P No.2 on behalf of the Insurance Company, it appears that the truck in question was insured as a goods carrier truck and the insurance was a third party insurance. Exhibit-A is the original certificate copy of the insurance policy. It also appears from the evidence of O.P No.2 that the vehicle was under the coverage of insurance with O.P No.2, Insurance Company and at present also it is under the coverage of insurance. The question that arises what is the effect of insurance policy under which the said truck was covered.

20. The question if the "gratuitous passenger* is entitled to compensation has been considered by the Supreme Court in the case of Amrit Lal Sood and Another Vs. Smt. Kaushalya Devi Thapar and Others, . In the aforesaid decision a car which was being driven by the brother (first appellant) of its owner (second appellant) collided with a goods carrier as a result of which another person who was travelling in the car sustained injuries and was hospitalised for some time. The car was insured under a comprehensive policy. The relevant clause in the policy regarding liabilities to third parties was "the Company will indemnify the insured in the event of accident caused by or arising out of the use of the motor car against all sums including claimant's cost and expenses which the insured shall become legally liable to pay in respect of

(a) death of or bodily injury to any person but except so far as is necessary to meet the requirements of section 95 of the M.V. Act, 1939, the Company shall not be liable where such death or injury arises out of and in the course of the employment of such person by the insured.

21. There was another clause under the heading "Avoidance of certain terms and right of recovery" which read thus :--

"Nothing in this policy or and endorsement herein shall affect the right of any person indemnified by this policy or any other person to recover an amount under or by virtue of the provisions of the Motor Vehicles Act, 1939, section 96. But the insured shall repay to the Company all sums paid by the Company which the Company would not have been liable to pay but for the said provisions."

22. The injured person claimed compensation before the Motor Accidents Claims Tribunal impleading the owners and drivers of both the vehicles as well as the insurers. The Tribunal found that the accident occurred due to negligence of the insurer (fifth respondents). The claimant filed an appeal in the High Court claiming more compensation while the insurer, filed an appeal disputing its liability to satisfy the claim. The claimant's appeal was allowed in part and the

compensation was enhanced. The single Judge of the High Court held that the claimant was a gratuitous passenger travelling in the car and the insurer was therefore not liable. In the Letters Patent Appeal, the Division Bench confirmed the view of the single Judge that the insurer was not liable as the claimant was only a passenger in the vehicle but it further enhanced the compensation. The driver and the owner of the car preferred the present appeal.

23. In the aforesaid decision the Supreme Court held that the insurance company is also liable to meet the claim of the claimant and satisfy the award passed by the Tribunal and modified by the High Court. Section 95 requires a policy to cover the risk to passengers who are not carried for hire or reward. The statutory insurance does not cover injury suffered by occupants of the vehicle who are not carried for hire or reward and the insurer cannot be held liable under the Act. But that does not prevent an insurer from entering into a contract of insurance covering a risk wider than the minimum requirement of the statute whereby the risk to gratuitous passengers, could also be covered. In such cases where the policy is not merely a statutory policy, the terms of the policy have to be considered to determine the liability of the insurer. The expression "any person" in the insurance policy would include an occupant of the car who is gratuitously travelling in the car. The remaining part of clause (a) relates to cases of death or injury arising out of and in the course of employment of such person by the insured. In such cases the liability of the insurer is only to the extent necessary to meet the requirements of section 95 of the Act. In so far as gratuitous passengers are concerned there is no limitation in the policy as such. Hence under the terms of the policy, the insurer is liable to satisfy the award passed in favour of the claimant.

24. In the instant case the clause in the insurance policy is almost similar in nature to that of the case considered by the Supreme Court. Applying the said principles, accordingly it cannot be said that there is no scope for depriving the victim of the compensation under the policy, since there is no limitation of the policy so far as the gratuitous passengers are concerned. The Supreme Court, in fact, in the aforesaid decision has made a distinction between statutory insurance and contractual insurance.

25. The Supreme Court in paragraph 4 of the said judgment at page 747 of the said report held and observed as follows :--

"The liability of the insurer in this case depends on the terms of the contract between the insured and the insurer as evident from the policy. Section 94 of the M.V. Act, 1939 compels the owner of a motor vehicle to insure the vehicle in compliance with the requirements of Chapter VIII of the Act Section 9A of the Act provides that a policy of insurance must be one which insures the person against any liability which may be incurred by him in respect of death or bodily injury to any person or damage to any property of third party caused by or arising out of the use of the vehicle in a public place. The section does not however require a policy to cover the risk to passengers who are not carried for

hire or reward. The statutory insurance does not cover injury suffered by occupants of the vehicle who are not carried for hire or reward and the insurer cannot be held liable under the Act. But that does not prevent an insurer from entering into a contract of insurance covering a risk wider than the minimum requirement of the statute whereby the risk to gratuitous passengers could also be covered. In such cases where the policy is not merely a statutory policy, the terms of the policy have to be considered to determine the liability of the insurer."

26. In the case of National Insurance Co. Ltd., New Delhi Vs. Jugal Kishore and Others, it was held that though it is not permissible to use a vehicle unless it is covered at least under an "act only" policy, it is not obligatory for the owner of a vehicle to get it comprehensively insured, but it is open to the insurer to take a policy covering a higher risk.

27. Judgment and decision in the case of New Asiatic Insurance Co. Ltd. Vs. Pessumal Dhanamal Aswani and Others, may be taken note of. In that case, the insurer permitted another person to drive his car and while the said person was driving the car. it met with an accident. The driver of the car faced an action for damages. The question was whether the Insurance policy would enable the said driver to claim indemnity from the Insurance company. On a consideration of the terms of the policy, the Court held that the company would be liable to indemnify him. In the course of the Judgment, the Court said :

"The Act contemplates the possibilities of the policy of Insurance undertaking liability to third Parties providing such a contract between the insurer and the insured, that is, the person who effected the policy, as would make the company entitled to recover the whole or part of the amount it has paid to the third party from the insured. The insurer thus acts as security for the third party with respect of its realising damages for the injuries suffered, but vis a-vis the insured, the company does not undertake that liability or undertakes it to a limited extent. It is in view of such a possibility that various conditions are laid down in the policy. Such conditions, however, are effective only between the insured and the company, and have to be ignored when considering the liability of the company to third parties. This is mentioned prominently in the policy itself and is mentioned under the heading "Avoidance of certain terms and rights of recovery", as well as in the form of "an important notice" in the Schedule to the policy. The avoidance clause says that nothing in the policy or any endorsement thereon shall affect the right of any person indemnified by the policy or any other person to recover an amount under or by virtue of the provisions of the Act. It also provides that the insured will repay to the company all sums paid by it which the company would not have been liable to pay but for the said provisions of the Act. The "Important Notice" mentions that any payment made by the company by reason of wider terms appearing in the certificate in order to comply with the Act is recoverable from the insured, and refers to the avoidance clause.

Thus the contract between the insured and the company may not provide for all the liabilities which the company has to under take vis-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 amount under or by virtue of the provisions of the Act is not affected by any condition in the policy. Considering this aspect of the terms of the policy, it is reasonable to conclude that proviso (a) of para 3 of the section 11 is a mere condition affecting the rights of the insured who effected the policy and the persons to whom the cover of the policy was extended by the company, and does not come in the way of third parties' claim the company on account of its claim against a person specified in para 3 as one to whom cover of the policy was extended."

28. Considering the principles decided in the aforesaid decisions it appears to us that the policy in the instant case clearly covers the risk and the heirs and the deceased victim are entitled to compensation and the insurance Company cannot avoid the liability.

29. It appears that the new Act has come out in the year 1988 enacting various changes from the old Act and subsequently in the 1994 some amendments were done with regard to section 95(1) (b) (1) of the Act of 1939 which specified classes of persons from the statutory requirement of insurance coverage has been omitted in section 147 of the said Act. An analysis of the language of section 147(1)(b)(1) of the M.V. Act, 1988 leaving no doubt that the words "any person" means not only third party but also other persons and the word "Vehicles" covers all kinds of vehicles including a goods vehicle in case of death or bodily injury the legislature has used the word "any person" while in case of damage to property the legislature has meant it only to be the property of a third party. This difference in language is indicative of the wider coverage in case of death or bodily injury. In this connection. Judgment and decision in the case of Divisional Manager, Oriental Insurance Co. Ltd. v. Jasoda Mahanta & Ors. reported in 1 (1997) ACC 175 may be taken note of.

30. In the aforesaid decision it was held by learned single Judge of Orissa High Court that an analysis of the language of section 147(1)(b)(1) of the M.V. Act, 1988 leaves no doubt that the words "any person" means not only third party, but also other persons and the word "Vehicles" covers all kinds of vehicles including a goods vehicle. In case of death or bodily injury the Legislature has used the words "any person" while in case of damage to property the Legislature has confined it only to property of a third party. This difference in language is indicative of wider coverage in case of death or bodily injury. It was further held that by the M.V. Act, 1994, section 147(1)(b)(1) has been amended substituting the words "injury to any person, including owner of the goods or his Authorised Representative carried in the vehicle" for the words "Injury to any person". The said amendment has made it further clear that "any person" has been used in a wider sense.

31. It was made clear in the said decision that under M.V. Act, 1988 the words "any person" used in section 147(1)(b)(1) include persons carried by even a

goods vehicle and are not confined to third party only, the Insurance Company cannot escape their statutory liability.

32. Learned Judge of the Orissa High Court also held in paragraph 16 at page 181 of the said report as follows :--

"It is not possible to accept the submission that the words "any person" used in unamended section 147(1)(b)(1) were to be given a restricted meaning and kept confined to third party only. Such a restricted meaning would be doing violence to the common and dictionary meaning of the words used in the section. Moreover, it is an accepted principle of interpretation of statutes that in case of beneficial legislation construction of any provision, which is more favourable to the person for whose benefits the law has been enacted, should be adopted. There cannot be any dispute that Motor Vehicles Act particularly the provision relating to compensation for the victims of road accidents and the requirement of compulsory insurance coverage are meant for the benefit of the victims and members of their family."

33. Judgment and decision in the case of Oriental Insurance Co. Ltd. v. Inderjit Kaur reported in AIR 1998 SC 588 may be taken note of. In the aforesaid decision, a bus met with an accident; its policy of insurance issued by the appellant on 30.11.1989. The premium for the policy was paid by cheque. The cheque was dishonoured. A letter stating that it has been dishonoured was sent by the appellant to the insured on 23.1.1990. The letter claimed that as the cheque had not been encashed, the premium on the policy had not been received, and that therefore, the appellant was not at risk. The premium was paid in cash on 2.5.1990. In the meantime, on 19.4.1990 the accident took place : the bus collided with a truck, whose driver died. The truck driver's widow and minor sons filed the claim petitions. The appellant denied the claim asserting that under the terms of section 64-VB of the Insurance Act. 1938, no risk was assumed by an insurer unless the premium thereon had been received in advance. The Motor Accident Claims Tribunal rejected the appellant's contention and awarded the claimants compensation in the sum of Rs. 96.000/- with interest at the rate of 12% per annum from the date of the petition, to be paid by the insured and the appellant jointly and severally. The appeal filed by the appellant before the High Court of Punjab and Haryana was summarily dismissed, and it is that order which now under challenge.

34. The Supreme Court considered the scope of section 64-VB as also Chapter II of the Motor Vehicles Act. 1938 and the scope of sections 146, 147, 149 under the said Chapter and after referring to the said provisions of the Act held *inter alia* in paragraph 7 and 8 of the said judgment as follows :--

"7. Dispite the bar created by section 64-VB of the Insurance Act, the appellant, an authorised insurer, issued a policy of insurance to cover the bus without receiving the premium therefor. By reason of the provisions of sections 147(5) and 149(1) of the Motor Vehicles Act, the appellant became liable to indemnify

third parties in respect of the liability which that policy covered and to satisfy awards of compensation in respect thereof notwithstanding its entitlement (upon which we do not express any opinion) to avoid or cancel the policy for the reason that the cheque issued in payment of the premium thereon had not been honoured.

8. The policy of insurance that the appellant issued was a representation upon which the authorities and third parties were entitled to act. The appellant was not absolved of its obligations to third parties under the policy because it did not receive the premium. Its remedies in this behalf lay against the insured."

35. The aforesaid decision of the Supreme Court clearly goes to show that once having accepted the third party risk under the policy it is not open to the insurance policy to repudiated the same.

36. Judgment and decision in the case of Skandia Insurance Co. Ltd. Vs. Kokilaben Chandravadan and Others, may be taken note of. The said case also relates to a claim against an Insurance Company in respect of an accident which took place due to negligence on the part of the driver of the vehicle handing over the same to cleaner to park it. The Insurance Company took the plea of breach of condition of insurance under the clause in the contract of insurance. It is only the licensed driver who can drive the vehicle. The Supreme Court held that there is no breach on the part of the insurer since the insurer entrusted the vehicle to a licensed driver. But the licensed driver left it to the cleaner. The Supreme Court further observed that the insurer cannot avoid the statutory liability in the instant case. The observation of the Supreme Court at page 1191 of the said report in this connection appears to be relevant, and set out as follows :

"9. On behalf of the respondents support is sought from Kilari Mammi and Others Vs. Barium Chemicals Ltd. and Others, decided by the Andhra Pradesh High Court which has taken the same view as has been taken by the Gujarat High Court in the judgment under appeal. Says the High Courts :--

"If the first respondent had authorised only a licensed driver to drive the vehicle, then defence u/s 96(2) could be rightly invoked by the 4th respondent, a third person drove the vehicle and, But this is a case where due to the negligence of the authorised driver, the third respondent, a third person drove the vehicle and, therefore, I do not think the decision relied upon by the learned counsel is of any relevance to the facts of this case."

This decision is also exposed to the same criticism. It is but tressed by "ipse dixit" rather than railonation."

37. It may also be appropriate to consider the scope of section 147 of the Motor Vehicles Act, section 147 describes requirements of policies and limits of liability. The section lays down that 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: 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, including owner of the goods, or his authorised representative carried in the vehicle or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place; against the death of or bodily injury to any passenger of a public service vehicle caused by or arising out of the use of vehicle in a public place.

38. The aforesaid view has been adopted by the Division Bench of Jammu & Kashmir High Court in the case of United India Insurance Co. Ltd. Vs. Mst. Sharief Jan and Others,

39. It may also be noted in this connection that the appellant (Insurer) while contesting the claimant's application filed u/s 163-A of the Act before the learned Tribunal has not specifically pleaded in his written objection before the Tribunal in respect of which condition in the insurance policy, there was a breach by the owner of the offending vehicle as required u/s 149(2) of the said Act. The appellant for the first time has urged before us that the offending truck of the respondent No. 2 was carrying the respondent's husband as "gratuitous passenger" contending that there was a breach of the insurance policy which is not tenable.

40. The learned Advocate for the respondent No. 1 has raised strong objection to such point being taken for the first time in appeal. In support of his contention Judgment and decision in the case of Shivraj Vasant Bhagwat Vs. Smt. Shevanta Dattaram Indulkar and another, relied upon by learned Advocate for the respondent No.1 may be taken note of.

41. In the aforesaid decision the clause No.3 relied upon by the Insurance Company is coming under the caption "Limitation* as to use which is as under :--

"3. Carrying passengers in the vehicle except employees (other than the driver) not exceeding six in number coming under the purview of Workmen's Compensation Act, 1923."

42. In the said case, point was taken on behalf of the claimant to the effect that even presuming without admitting that truck on the date of incident was carrying more than six collies still, according to him, the contract of insurance is not vitiated. Firstly, it was argued that respondent No.2, Insurance Company cannot take the aforesaid plea of the breach of conditions of insurance policy more particularly in view of the fact that the said contention of the Insurance Company relied upon by the trial Court is conspicuously absent in the W.S. It was further contended that the trial Court has not framed any issue in that behalf and in spite of that, the trial Court allowed the Insurance Company to raise this point at the time of argument only on the ground that the aforesaid point being legal point can be taken at the stage of argument even though there are no pleading

to that.

43. Accepting the objection of the respondent it was held by the Division Bench of the Bombay High Court, that "In view of the fact that in the written statement the said stand was not taken by respondent No.2 and in view of the fact that no issue to that effect was framed by the trial Court, according to our opinion, appellant's attention was not pointedly drawn towards this important aspect and, therefore, the trial Court ought not to have allowed Insurance Company to take the point which is dependent upon the facts which were not stated in their written statement i.e. pleading. The aforesaid point taken by the Insurance Company, according to our opinion, is in variance with their pleadings and, therefore, the trial Court ought not to have allowed Insurance Company to have advanced that for the first time at the stage of final hearing without allowing Insurance Company to amend their pleadings to that effect."

44. In the instant case, not only that in the written statement the said contention of the appellant was absent, it was also not urged nor any issue raised before the trial Court.

45. In that view of the matter, we are of the view that the appellant should not be allowed to raise such point for the first time in the appeal.

46. In this connection, Order 8 Rule 2 of the CPC may be taken note of and it is set out hereinbelow :--

"O.8. R.2--The defendant must raise by his pleading all matters which show the suit not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence as, if not raised, would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the plaint as, for instance, fraud, limitation, release, payment, performance, or facts showing illegality."

47. It, therefore, appears to us that in view of the aforesaid provision of Order 8, Rule 2 of the Civil Procedure Code, the appellant is not entitled to raise the said question before us for the first time. In our view, the said Act as amended is a piece of beneficial legislation intended to confer the benefit of expeditious payment to the heirs of the victim and such purpose should not be allowed to be defeated on such plea of technicality.

Accordingly, we find no merit in the appeal. The appeal stands dismissed. There will be no order as to costs.

A. Lala, J.

48. I agree.

49. Appeal dismissed