

(2009) 12 GUJ CK 0056

In the Gujarat High Court

Case No : First Appeal No"s. 2454 to 2461 of 1996

New India Assurance Co. Ltd.

APPELLANT

Vs

Ramaben Babubhai Parmar and Others

RESPONDENT

Date of Decision : 03-12-2009

Acts Referred:

Bombay Motor Vehicles Taxation Rules, 1959 — Rule 118
Constitution of India, 1950 — Article 136
Criminal Procedure Code, 1973 (CrPC) — Section 157
Evidence Act, 1872 — Section 101, 102, 52
Motor Vehicles Act, 1939 — Section 95, 95(2), 96
Motor Vehicles Act, 1988 — Section 147, 147(1), 166, 173, 173(1)

Citation : (2009) 12 GUJ CK 0056

Hon'ble Judges : H.K. Rathod, J

Bench : Single Bench

Advocate : Rajni H. Mehta, for the Appellant; Shakeel A. Qureshi, for Defendant Nos. 1, 1.2.1 and Deepak M. Shah, for Defendant Nos. 2 - 3, for the Respondent

Judgement

H.K. Rathod, J.—Heard learned advocate Mr. Sunil B. Parikh for learned advocate Mr. Rajni H. Mehta appearing on behalf of appellant - New India Assurance Co. Ltd. and learned advocate Mr. Shakeel A. Qureshi appearing on behalf of respondent - claimant.

2. Notice served to respondent Nos. 1/2, 1/3, 1/4 and 3, but, no appearance is filed by them. Learned advocate Mr. Deepak M. Shah is appearing on behalf of respondent Nos. 2 and 3.

3. The appellant - insurance company has challenged common award passed by Motor Accident Claims Tribunal, Bhavnagar in various Motor Accident Claim Petitions arising out of one accident Exh.18 dated 19th January 1996. The claims tribunal has awarded Rs. 4,52,000/- in MACP No. 241 of 1995, Rs. 38,000/- in MACP No. 325 of 1995, Rs. 1,40,000/- in MACP No. 324 of 1995, Rs. 60,000/- in MACP No. 326 of 1995, Rs. 90,000/- in MACP No. 421 of 1995, Rs. 40,000/- in MACP No. 420 of 1995, Rs. 90,000/- in MACP No. 422 of 1995 and Rs.

1,88,000/- in MACP No. 336 of 1995 with 15% interest in favour of respondents claimants.

4. Learned advocate Mr. S.B. Parikh raised contention before this Court that risk of passengers travelling in goods vehicle is not covered in insurance policy issued by insurance company in favour of insured. The date of accident is 20th March 1995, means, accident is occurred subsequent to amendment made in Motor Vehicles Act dated 14th November 1994. He submitted that claims tribunal has decided claim petition relying upon old MV Act, 1939 and considered Section 95 of MV Act, 1939. He further submitted that claims tribunal has wrongly relied upon decision in case of New India Assurance Co. Ltd. and Anr. v. Smt. Nathiben Chatrabhuj and Ors. of this Court reported in : 1982(1) GLR 411. He also submitted that claims tribunal has also committed error in relying upon another decisions of this Court reported in 1982 GLH 43 and New India Assurance Co. Ltd. Vs. Kamlaben Sultansinh Jadav and Others, He referred the discussion made by claims tribunal in respect of Issue No. 4, where, question of liability has been examined by claims tribunal in respect of insurance company. He read before this Court entire paragraphs 22 to 25 before this Court for highlighting the contentions that claims tribunal has committed gross error in deciding Issue No. 4 that passengers those who were travelling in goods vehicle are not covered by insurance policy as no additional payment of premium was paid by insured to insurance company. He also read before this Court the averments made in claim petition filed by claimant at page 5 - paragraph 10 of Paper Book. He also submitted that in aforesaid averments made in paragraph 10 - page 5 of claim petition, claimant has relied upon FIR, therefore, it should have to be considered a part of claim petition. According to FIR, the persons those who were travelling as owner of goods but goods which are with claimant or deceased were their personal belonging which cannot consider to be the goods because it does not satisfied the definition of goods given in Section 2(13) of MV Act. The definition of "Goods" in Section 2(13) of MV Act has been relied upon by learned advocate Mr. S.B. Parikh. He relied upon certain decisions of Apex Court; (i) National Insurance Co. Ltd. Vs. Cholleti Bharatamma and Others, and (ii) National Insurance Co. Ltd. Vs. Rattani and Others, and one decision of Cheekati Nageswara Rao Vs. G. Rama Rao and Another, Relying upon aforesaid three decisions, he submitted that if owner of goods wants to travel in goods vehicle, he must have to travel in cabin of driver cleaner. He also submitted that even Andhra Pradesh High Court has considered that passenger travelling along with his "goods" means deflated tyre to get it repaired sustained injury when the truck met with an accident that has not been considered the "Goods" within definition of Section 2(13) of MV Act. He also submitted that a members of marriage party travelling in truck allegedly transporting gift received by party; held - cannot held into above category of as owner of goods. Therefore, in short, his submission is that claims tribunal has wrongly examined the issue relying upon old provision of MV Act, 1939 though accident is occurred on 20th March 1995 means subsequent to amendment made in MV Act i.e. 14th November

1994. Therefore, award passed by claims tribunal is required to be set aside and to remand the matter back to claims tribunal concerned for fresh consideration. Except that, no contention is raised by learned advocate Mr. Parikh before this Court. Not only that but learned advocate Mr. Parikh has not raised any contention about quantum of compensation which has been awarded by claims tribunal. Therefore, this Court has to examined only one contention of liability of insurance company which has been decided by claims tribunal while examining Issue No. 4. Therefore, this Court has not examined any other issue which has not been raised by learned advocate Mr. Parikh before this Court.

5. Learned advocate Mr. Qureshi appearing on behalf of respondent claimant submitted that onus upon company to prove the contentions raised before claims tribunal. The persons those who were travelling in goods vehicle and not travelling as owner of goods, then, such contention must have to be proved before claims tribunal by insurance company which has not been proved before claims tribunal. Therefore, claims tribunal has rightly examined matters in respect of liability. He also submitted that claims tribunal has rightly considered Panchnama, FIR and rightly come to conclusion that person those who were travelling on the date of accident 20th March 1995 as owner of goods, therefore, they were not gratuitous passengers travelling in goods vehicle. Therefore, they are entitled compensation from insurance company because of Section 147(1), where, "any person include a person travelling as owner of goods". Therefore, this being a statutory liability accepted by insurance company while issuing insurance policy in favour of insured. Therefore, that aspect has been rightly considered by claims tribunal. He submitted that claims tribunal has not committed any error which requires interference by this Court.

6. I have considered submissions made by both learned advocates appearing on behalf of respective parties. I have also perused common award passed by claims tribunal.

7. The brief facts of present appeals are that; accident occurred on 20th March 1995 at about 2-30 p.m., on Bhavnagar-Tarapur State Highway in between village Adhelai and Ganeshgadh near culvert which is known as "Sonarai Khadi" Bridge No. 2 under Bhavnagar District. All claims petitions were consolidated and disposed of by common judgment by claims tribunal. In this unfortunate accident, seven persons have lost their lives, while one person sustained serious injuries and therefore, u/s 166 of MV Act, 1988, claim petition is filed by each claimant. This unfortunate accident has happened on 20th March 1995 as discussed above. The details of facts which have been narrated by claims tribunal in Para 5 of award as quoted as under:

5. The facts of the petitioners case can briefly be narrated as under:

This tragic and unfortunate incident has happened on 20.3.1995 as discussed above. Deceased Babubhai was a teacher and other persons were traveling in the said public carrier involve in this incident as the owners of the goods. According

to them, they were carrying goods with them in this carrier. Family members of Bhavsang and Kamabhai had gone to village Jankhi for religious purpose. Two days prior to the day of incident, they had gone to village Jankhi along with 3 bicycles, quilts, household articles and other goods. On the day of incident, firstly, they had come to village Ahelai and they started their journey in this public carrier from village Ahelai. According to them, they paid fare of Rs. 300/- towards goods to Opponent No. 1. That amount was paid by petitioner Kamabhai. Further, it is the case of the petitioner of MACP No. 241/1995 that deceased Babubhai was coming to Bhavnagar along with 2 bags of Jower at the house of his brother in law. According to the petitioners of MACP No. 336/95, deceased Rajubhai was also coming with bags of jower in this carrier. Therefore, according to the petitioner, they were travelling as the owner of the goods in this public carrier. Opponent No. 1 was driving the said carrier in a rash and negligent manner and that also in exclusive and uncontrollable speed and when it reached near the scene of offence, due to fortious act on the part of opponent No. 1, he lost his control over the public carrier and it turned and went in the bank of the culvert. All the persons were thrown away on the ground and sustained serious injuries. Out of them, 8 persons except minor Dinesh, all the 7 persons died. Offence was registered against opponent No. 1, investigation was carried out and Panchnama of scene of offence was prepared. PM examination on the body of all the 7 deceased persons were performed. According to the petitioner, they have sustained serious damages and a great loss and therefore, they have filed their respective claim petitions to recover compensation against all the opponent as discussed above.

8. While referring contents of Para 5, persons those who were travelling in said public career involved in this accident, they were travelling as owners of goods and each claimants having bags of Juvar and other goods as well as three bicycles, households articles and other goods. According to claimant, they paid Rs. 300/- towards goods to opponent No. 1. That amount was paid by petitioner Kamabhai. The summons issued by claims tribunal have been received by opponents. Opponent Nos. 1 and 2 - owner and driver have filed their reply Exh.18 and contended that claim petitions are neither true nor legal nor bonafide and all the petitions should be dismissed against them. So, all the averments made in claim petitions have been denied by driver and owner. The opponent No. 3 - present appellant - insurance company has filed its reply Exh.13, wherein, averments made in claim petition have also been denied by insurance company and further contention was raised in written statement that opponent No. 1 was driving said career in contravention of conditions incorporated in insurance policy. Therefore, also, insurer is not liable for the damages if any caused to petitioners. It is also denied that opponent No. 1 driving said career in a rash and negligent manner. It is contended that opponent No. 3 is not the insurer of vehicle involved in this accident and opponent No. 1 was not holding valid driving licence. Therefore, in short, insurance company has denied averments made in each claim petitions.

9. Thereafter, issues have been framed by claims tribunal at Exh.15 on 31st August 1995. The question of negligence is not raised before this Court. Therefore, this Court is not examined question of negligence. The relevant question about liability discussed by claims tribunal while deciding Issue No. 4 in paragraph Nos. 22 to 26 which are quoted as under:

Issue No. 4:

22. It is vehemently argued by LA Shri A.A. Oza for the insurer that all the deceased persons as well as injured Dinesh were travelling as unauthorized passengers in the goods vehicle I.e. in the public carrier. According to him, the passengers are not allowed to be travelled in the goods vehicle. Therefore, according to him, all these persons were unauthorized passenges in this carrier. According to him, there is a permit of goods vehicle only. Therefore, the insurer is not liable for the damages, if any caused to the petitioners. However, arguments advanced by LA. Shri Oza for the insurer cannot be accepted.

23. It is laid down in AIR 1982 Guj 112 judgment delivered by Hon"ble Mr. Justice S.B. Majmudar Saheb in the case of Mamanji Rustomji Ginwala v. Ibrahim Vali and Ors., REF. Para 26. That breaches of statutory rules committed by the driver of insured vehicle not falling within conditions in Section 95(2)(b)(1) to (iii) It is also laid down that such breaches cannot enable insurance company to escape from its liability to third parties.

24. Moreover, it is laid down in New Asiatic Insurance Co. Ltd. Vs. Pessumal Dhanamal Aswani and Others, that the contract between the injured 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. 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, it is also laid down that considering this aspect of the terms of the policy, it is reasonable to conclude that proviso (a) of para 3 or section II of the policy is a more condition affecting the right of the insured 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 against the company.

25. Moreover, it is laid down in New India Assurance Co. Ltd. Vs. Kamlaben Sultansinh Jadav and Others, that the insurer has to prove all the contentions raised by them. Further, the insurer has to prove that all these persons were travelling with the absent of the owner. If the insurer failed to prove, then the insurer is liable for the amount of compensation. Reliance has been placed on (Nathiben"s Case). Moreover, it is laid down in 1982 GLR 43 that the owner of the goods can travel in the goods vehicle along with his goods. It is also laid down in this authority that goods vehicles can be lawfully used for carrying persons such as hirer or his employees within specified limits by virtue of Rules 118 of the Bombay M.V. Rules, 1959 and that the risk of the hirer or his bonafide

employees carried within limits on the goods vehicles is covered by virtue of the Second clause of the proviso of Section 96. Moreover, it is laid down in 1995 CCR 553 (Ker) in the case of United India Insurance Co. Ltd. v. Appu Kutan, judgment delivered by Hon"ble Mr. Justice K.T. Thomas, & N. Dinakar, JJ. That the position has completely been changed when the New M.V. Act 1988 came into force. In Section 147 of the new act, which corresponds to Section 95 of the old act, there is no limit entertain cases as contained in Clause (ii) of the old act. The corresponding proviso in the act contained three clauses whereas there are only two clauses. What was dropped in the new act is the clause which excluded the coverage for the death of bodily injury to persons carried on or upon the vehicle. That means such liability can not be excluded from the policy. The result is, when a policy or insurance is "an act policy" it does not necessarily means that the insurance company will stand absolved from the liability in respect of the pillion rider of motorcycle.

26. Therefore, considering all these principles laid down in aforesaid authorities, I am of the opinion that the insurer cannot be absolved from its liability. Thus, on the principles of vicarious liability, all the opponents are jointly and severally liable for the damages caused to the petitioners. Hence, I decide issue No. 4 accordingly.

10. The contention raised by learned advocate Mr. Parikh that while deciding question of liability, claims tribunal has considered Section 95(2) of old MV Act, 1939. The contention raised by learned advocate Mr. Parikh cannot be accepted because amendment is made in MV Act on 14th November 1994 and accident occurred on 20th March 1995. Therefore, considering provisions of Section 95 and amendment provision of Section 147 reads together, the relevant question is whether in goods vehicle, passengers are not allowed to be travelled and all persons those who were travelling on the date of accident, they were travelling as unauthorised passengers in the goods vehicle and there is a permit of goods vehicle only and therefore, insurance company is not liable for payment of compensation or not ? The risk of such persons are also not covered in terms of insurance policy. No additional premium was paid by insured to insurance company. The claims tribunal has considered old provision as well as Section 147 of new Act which corresponds to Section 95 of old Act, there is no limit to entertain cases as contained in Clause (ii) of Section 95 of old Act. The corresponding proviso of the Act contained three Clauses, whereas, there are only two Clauses. What was dropped in the new Act is a clause which include the coverage for the death or bodily injuries to persons carried in or upon the vehicle. That means, such liability cannot excluded from the policy. Therefore, claims tribunal has considered that risk of hirer or his bonafide employees carried within limited on the goods vehicles is covered by virtue of Second Clause of proviso of Section 96. Moreover, it is laid down in 1995 Civil Court Ruling 553 by Kerala High Court in case of United India Insurance Co. Ltd. v. Appu Kutan. This judgment has been delivered by Justice K.T. Thomas and Justice N. Dinakar that the position has completely been changed when new MV Act, 1988 came into

force. Therefore, in reality or in fact, claims tribunal has merely discussed the old law of 1939 with Section 95 while comparing provisions of new Act, 1988 r/w. Section 147(1). Therefore, it cannot be considered that question of liability has been examined by claims tribunal merely based on old Act. Such contention is apparently, while considering discussion in Para 25, cannot be accepted, because, claims tribunal has considered old and new, both, Acts and what is change in new Act has also been considered while relying upon Section 147 and decision of Kerala High Court as referred above. Therefore, contention raised by learned advocate Mr. Parikh cannot be accepted.

11. Further contention is that claims tribunal has wrongly relied upon decision of this Court in case of Nathiben (supra). But, merely discussing the case of Nathiben (supra) as decided by this Court while appreciating old provision as well as new provision and what is the change came into effect while amending the Act of MV Act, 1988 on 14th November 1994, for that purpose only, discussing and referring certain decisions which are relating to old Act cannot consider to be argued to the effect that entire matter has been discussed and decided including question of liability by claims tribunal relying upon old provisions of Section 95 of MV Act, 1939. Therefore, that contention also cannot be accepted.

12. Learned advocate Mr. Parikh relied upon averments made in claim petition at page 5 - paragraph 10. I have considered paragraph 10 - page 5 of Paper Book. In paragraph 10, it is made clear by claimants that on 20th March 1995, they were travelling in goods vehicle Truck No. GTB-2443 along with their goods. At that time, when deceased along with other persons were travelling in truck, certain other passengers were also travelling in said truck. The complaint was filed against driver of truck and due to rash and negligent driving of driver, accident is occurred. Therefore, learned advocate Mr. Parikh submitted that FIR has been relied upon by claimants, therefore, it becomes a part of claim petition, which cannot be accepted, because, merely referring the fact that complaint was filed against respondent No. 1 - driver and he was arrested and police case was lodged against him which does not mean that FIR has been relied upon by claimants as per averments made in para 10 of claim petition. The type copy of FIR dated 20th March 1995 has been shown to this Court which was given by one Mansukhbhai Chothabhai who was one of the passenger travelling in goods vehicle. In this FIR, persons those who were travelling on 20th March 1995 in goods vehicle are the owner of goods and certain item including three bicycles were also loaded and some of the persons having the bags of Juvar. So, contention raised by learned advocate Mr. Parikh that FIR is filed by Mansukhbhai Chothabhai referred in claim petition in Para 4, therefore, it considers to be a part of claim petition which cannot be accepted. The paragraphs 10 only referred the facts of complaint filed against driver and police case was registered against him and he was arrested by police. Except that, it is not stated by claimant that FIR is considered to be a part of claim petition. It is also necessary to consider Panchnama after accident. The goods which were taken by persons at the time of accident, were lying at the place of accident which found from place of accident

has recorded in Panchnama. Three bicycles were also found from place of accident and bags of Juvar also found from place of accident which were taken by persons at the time when accident occurred in goods vehicle. Therefore, contention raised by learned advocate Mr. Parikh that FIR relied upon by claimants or FIR is considered to be a part of claim petition cannot be accepted.

13. Learned advocate Mr. Parikh relied upon definition of "Goods" u/s 2(13) of MV Act, which is quoted as under:

Section 2(13) - "Goods" includes livestock, and anything (other than equipment ordinarily used with the vehicle) carried by a vehicle except living persons, but does not include luggage or personal effects carried in a motor car or in a trailer attached to a motor car or the personal luggage of passengers travelling in the vehicle.

14. While relying upon aforesaid definition of "Goods", he emphasises that the personal luggage of passengers or luggage or personal effects carry in motor car or in trailer attached to motor car does not include. In support of that, he relied upon aforesaid three decision as referred above. The Head Note of three decisions are quoted as under:

(1) In case of Cheekati Nageswara Rao Vs. G. Rama Rao and Another, of Andhra Pradesh High Court. The Head Note is as under:

Head Note : Motor Vehicles Act, 1988, Section 147(1)(b)(i) read with Section 2(13) Motor Insurance-Goods vehicle-Passenger risk-Passenger travelling along with his "goods"- Liability of insurance company-Person travelling in truck along with deflated tyre to get it repaired sustained injuries when the truck met with accident-Tribunal awarded compensation against owner of vehicle exonerating the insurance company-Contention that injured was travelling in the truck along with his goods and insurance company is liable-whether the Tribunal was justified in exempting insurance company from liability-Held: yes; deflated tyre does not constitute "goods" as defined in the Act. (Para 5)

Motor Vehicles Act, 1988, Section 147(1)(b)(i) - Motor insurance-Goods vehicle-Passenger risk-Liability of insurance company-Injured was travelling in the goods vehicle as passenger and the Tribunal exempted insurance company from liability - contention that where there is breach of policy by insured, insurance company has to pay compensation to the claimant and recover that amount from the owner-Whether insurance company is liable in the first instance to pay compensation and then entitled to recover from the owner-Held: no; there has no breach of terms and conditions of the policy; carrying passenger in a goods vehicle is a violation of the provisions of the Act. (Para 5)

(2) In case of National Insurance Co. Ltd. Vs. Cholleti Bharatamma and Others, The Head Note is as under:

Head Note - (A). Motor Vehicles Act, 1988-Section 147-Goods carriage - Liability in respect of owner of goods or authorised representative- Scope of - Person(s)

who can be covered as "owner or his authorised representative" - Necessity of determination of the mode of travel and number of person(s) so covered-Owner, if must travel only in the cabin of the vehicle and not with the goods so as to be covered under S.147-Nature of goods-Effect of, on mode of travel necessary by owner to claim protection u/s 147. Hence necessary to show that the deceased was travelling in the lorry along with the driver or the cleaner as the owner of the goods-Travelling with the goods itself does not entitle anyone to protection u/s 147.

B). Motor Vehicles Act, 1988-Section 147-Goods carriage-Passengers travelling in goods carriage whether gratuitous or otherwise, reiterated, are not covered.

(3) In case of National Insurance Co. Ltd. Vs. Rattani and Others, The Head Note is as under:

Head Note - A). Motor Vehicles Act, 1988-Section 147-Representative(s) of owner of goods-Persons covered-Members of marriage party travelling in truck allegedly transporting gifts received from bride party, held, cannot fall into the above category-In any case, on facts, it was admitted that there were no gift articles in the vehicle concerned - Victims of the accident were travelling in truck as gratuitous passengers.

B). Motor Vehicles Act, 1988 - Sections 147 and 173(1) - Appeal - Appreciation of evidence by Supreme Court - When warranted - FIR made part of claim petition- Admissibility of - Held, ordinarily Supreme Court would not have entered into realm of appreciation of evidence but as High Court failed and / or neglected to do so, no other option exists- Ordinarily allegations made in FIR not admissible in evidence per se but as the allegation made in FIR had been made a part of the claim petition, Tribunal and the appellate courts entitled to look into the same - Furthermore, an admission made in the pleadings is admissible in evidence proprio vigore - Evidence Act, 1872-Section 58 - Criminal Procedure Code, 1973-Section 157-Civil Suit - Constitution of India - Article 136-Interference of motor vehicle matters - Reappreciation of evidence - When warranted.

C). Evidence Act, 1872-Sections 101, 102 and 52 - Discharge of burden of proof in case of admitted facts-Need to produce direct evidence - Held, there is no such need.

15. Learned advocate Mr. Parikh heavily relied upon definition of "Goods" u/s 2(13) of MV Act, 1988. But, it is necessary to note that in written statement filed by insurance company before claims tribunal Exh.13, nowhere such contention is raised by appellant - insurance company before claims tribunal that persons those who were travelling on the date of accident, they were travelling as owner of goods, but, goods which are lying with persons is not covered by definition of goods given in Section 2(13) of MV Act, 1988. Before claims tribunal, in written statement Exh.13, only contention was raised that opponent No. 1 was driving said Career in contravention of condition incorporated in insurance policy.

Therefore, insurance company is not liable to pay compensation to claimants. Except that, in written statement, no other contention is raised by appellant - insurance company before claims tribunal. Therefore, para 7 of award is quoted as under:

7. Opponent No. 3 i.e. Insurer has filed its written statement at exh. 13 and contended that the petitioners are neither true, nor legal, nor bonafide and they do not admit the claims or any part thereof unless it is specifically admitted in the written statement. It appears that the insurer has also raised almost same contentions in all the petitions they have also requested to dismiss all the claim petitions with cost etc. It is contended that opponent No. 1 was driving the said carrier in contravention of the conditions incorporated in the insurance policy and therefore also the insurer is not liable for the damages, if any caused to the petitioners. It is denied that opponent No. 1 was driving the said carrier in a rash and negligent manner, it is contended that opponent No. 3 is not the insurer of the vehicle involved in this incident, it is contended that Opponent No. 1 was not holding a valid driving license. It appears that they have taken almost all the same contentions in all the petitions and have denied all the averments averred by the petitioners regarding rash and negligent driving of opponent No. 1 quantum of compensation, age income, injuries etc. of the deceased as well as injured petitioners and have prayed to dismiss all the petitions etc.

16. The appellant - insurance company while cross-examining claimant not raised any question about kind of goods lying with persons those who are travelling in goods vehicle on the date of accident. On the contrary, in cross-examination, a denial was given in respect of fact that person was not travelling along with goods by claimant, meaning thereby that claimant has made clear statement in chief that persons those who were travelling in goods vehicle, they were travelling along with their goods. Even this evidence remains intact in cross-examination made by advocate of insurance company before claims tribunal. It is necessary to note that each claimant has made clear statement that they were travelling along with their goods and Rs. 300/- amount was paid only for carrying goods along with them. But, in cross-examination, advocate of insurance company was not able to take out any adverse facts to the claimant. It was also denied by claimants in their evidence that they were travelling as unauthorised passengers. Therefore, considering entire evidence of claimants including cross-examination, facts were proved by claimants that persons those who were travelling on date of accident in goods vehicle, they were not travelling as unauthorised passenger, but, they were travelling as owner of goods. The advocate of insurance company has not put up any question that which kind of goods were lying with them at the time of accident and on the basis of aforesaid evidence, no arguments have been made by advocate of insurance company before claims tribunal that whatever goods were lying with persons those who were travelling in goods vehicle are not covered under definition of "Goods" u/s 2(13) of MV Act. This being a question which has been raised first time before this Court which is relating to mixed question of facts and law. If at this stage, it

is entertained, then, it cause great prejudice to claimant because they may not have any opportunity to meet with such contention before claims tribunal. Therefore, according to my opinion, definition of goods was in old Act remains as it is even though this contention was not specifically raised before claims tribunal by appellant - insurance company, meaning thereby that such contention has been waived by appellant - insurance company. Now, such contention cannot be permitted to be raised first time before this Court.

17. It is also necessary to note that in para 22 where contention raised by advocate of insurance company where only contention was raised that persons those who were travelling at the time when accident occurred in goods vehicle, they were unauthorised passengers and passengers are not allowed to be travelling in goods vehicle and all these persons were unauthorised passengers in this Career. For that, there is no permit issued by RTO Authority and only having permit of goods vehicle. Therefore, insurance company is not liable for the damages. Except that, no other contention is raised by appellant - insurance company before claims tribunal. Therefore, claims tribunal has not examined this issued as to whether claimants or persons those who were travelling as owner of goods is satisfied definition of "Goods" u/s 2(13) of MV Act, 1988 or not ? This contention has been raised first time before this Court by appellant - insurance company.

18. I have scanned and perused entire appeal memo filed by appellant - insurance company before this Court. In entire appeal memo while giving facts, grounds have been made about 31 in number. In none of the ground, appellant - insurance company has raised that persons those who were travelling at the time when accident occurred in goods vehicle as owner of goods, that goods lying with persons is not satisfied definition of "Goods" given in Section 2(13) of MV Act, 1988. So, grounds which are not raised in appeal memo, appellant insurance company is not entitled to raise such contention before this Court first time. Therefore, contention in respect of that persons those who were travelling as owner of goods, but, that goods is not satisfied the requirement of definition of Section 2(13) of MV Act, 1988. Such contention is not raised in appeal memo. It is not in dispute from the record that looking to FIR, Panchnama, averments made in claim petition - para 10, it was made clear by claimant and also found from record that on the date of accident, persons those who were in goods vehicle in question, were travelling as owner of goods. For that also, appellant - insurance company has not raised any dispute because it was reflected in FIR, Panchnama and Para 10 of claim petition, where, specific averments made. Therefore, if no dispute is raised by appellant - insurance company before claims tribunal that persons those who were travelling as owner of goods, then, amended Act, 1988 is squarely covered Section 147(1) of MV Act, 1988 as "any person including owner of goods or is authorised representative carried in vehicle". Therefore, when accident occurred on 20th March 1995, amended Act is came into force, therefore, u/s 147 is applicable to the facts of this case and according to Section 147(1)(b)(i) of MV Act, 1988, where, against any liability

which may be incurred by him in respect of death or bodily injury to any person including the owner of goods or is authorised representative carried in vehicle. This being a statutory coverage given by provisions of Section 147 of MV Act, 1988, therefore, at the time when accident occurred, persons those who were travelling in goods vehicle, they were all travelling as owner of goods, against which, no rebuttal evidence produced by appellant - insurance company. Not only that, these facts of travelling as owner of goods is not disputed by appellant - insurance company before claims tribunal either in written statement or in oral submission. Therefore, contention which has been raised first time by learned advocate Mr. Parikh, was not raised in memo of appeal and neither stated in written statement nor argued this point before claims tribunal by appellant - insurance company. In such circumstances, first time, if such contention is raised by appellant - insurance company before this Court, this Court cannot entertain such contention which is relating to mixed question of facts and law as per decisions of Apex Court; (I) in case of *Krishi Utpadan Mandi Samiti through its Krishi Utpadan Mandi Samiti v. Arvind Chaubey*, (2002) 9 SCC 549 (ii) in case of *Orissa Industrial Infrastructure Development Corporation v. Ashok Kumar Sing and Ors.* reported in 2006 SCC (Lab. & Service) 999 (iii) in case of *National Fertilizers and Ors. v. Somvir Singh* reported in 2006 AIR SCW 2972 . Recently, Apex Court has also decided that first time raising contention in appeal is not permissible when appeal is preferred u/s 173 of MV Act in case of *Smt. Usha Rathore and Others Vs. National Insurance Company Limited and Others*, (Madhyra Pradesh High Court, Gwalior Bench) Therefore, decisions which have been relied upon by learned advocate Mr. Parikh as referred above are not helpful to learned advocate Mr. Parikh, because, in absence of contention, such decisions cannot be applied to the facts of present case.

19. Recently, Apex Court has decided the said question in case of *National Insurance Company Ltd. Vs. Smt. Saroj and Others*, The relevant paragraph 17 is quoted as under:

17. Contention raised on behalf of the appellant that the claimant had not disclosed as to what amount they had received from the insurance company with whom the scooter driven by the deceased was insured cannot be considered by us for the first time as no such contention has been raised before the courts below. The legal representatives of the deceased examined themselves as witnesses. They should have cross-examined on the said question. The insurance company could have found out from other insurance company also as to whether, in fact, a claim had been advanced and whether insurance company paid any amount to them.

20. In view of above observations made by this Court and considering entire matter as discussed by claims tribunal and also keeping in mind contention raised by learned advocate Mr. Parikh, according to my opinion, persons those who were travelling at the relevant time as owner of goods in goods vehicle are squarely covered u/s 147(1)(b)(i) of MV Act, 1988. Therefore, insurance

company is liable to pay amount of compensation to claimant being a statutory liability and risk of such persons is also covered statutorily in insurance policy issued by insurance company to insured. Therefore, insurance company cannot be denied such statutory liability for payment of compensation to claimants which has been rightly decided and examined by claims tribunal. For that, claims tribunal has not committed any error which required interference by this Court. Therefore, contentions raised by learned advocate Mr. Parikh cannot be accepted, hence, same are rejected.

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

22. R. & P., if received, be sent to claims tribunal concerned, forthwith.

23. The claims tribunal concerned is directed to pay amount of compensation which are lying in FDR by encashing such FDR with accruing interest whatever amount is available to claimants in respect of each claim petition, same is to be paid to respective claimant by account payee cheque as per order passed by claims tribunal concerned, after proper verification, as early as possible.