
(1992) 07 BOM CK 0013
In the Bombay High Court
Case No : F.A. No. 50 of 1985

Oriental Fire and Genl. Ins. Co. Ltd.

APPELLANT

Vs

Hemlata and Others

RESPONDENT

Date of Decision : 02-07-1992

Acts Referred:

General Clauses Act, 1897 — Section 6
Motor Vehicles Act, 1988 — Section 140, 147, 166, 217

Citation : (1994) ACJ 173

Hon'ble Judges : H.W. Dhabe, J;B.U. Wahane, J

Bench : Division Bench

Advocate : N. Kamlakar, for the Appellant; V.A. Masodkar, M.V. Masodkar, S.D. Naik, S.S. Deshpande, C.P. Sen and A.M. Deshmukh, for the Respondent

Final Decision : Allowed

Judgement

H.W. Dhabe, J.—The appellant insurance company has challenged the award of the learned Motor Accidents Claims Tribunal (District Judge), Nagpur (for short "the Claims Tribunal") only on the ground that its liability to make the payment to the claimants is restricted to Rs. 50,000/-.

2. The facts are that the respondent Nos. 1 to 3 are the claimants who made the claim of Rs. 2,52,900/- against the respondent No. 4 and the appellant on account of compensation for loss of life of late S. Laxmanan, the husband of the respondent No. 1, who died in the motor accident. The deceased S. Laxmanan had come to Nagpur in October, 1981, in connection with the work of his company, namely, the Teletherm Instrument Company Private Limited, Madras, which had taken a contract of construction of a Thermal Power Station at Koradi. He visited the site on 2.11.1981 on scooter and when he was returning back from the site at night on Nagpur-Chhindwara Road, the truck bearing No. CPH 7452 belonging to the respondent No. 4 dashed against his scooter as a result of which he and his colleague who was sitting on the pillion seat were thrown away. Some hours after his admission in the Mayo Hospital, Nagpur, Laxmanan died.

3. According to the claimants, Laxmanan could have survived at least for 30 years and rendered the benefit of his earnings to his family. The claimants claimed compensation of Rs. 2,00,000/- for the loss of dependency. In addition they claimed Rs. 50,000/- by way of compensation for the loss of the company, mental torture, etc. Thus the total compensation of Rs. 2,52,900/- has been claimed by the claimants.

4. The appellant and the respondent No. 4, i.e., the owner of the truck, it appears, have filed a common written statement opposing the claim made by the claimants. They had engaged common advocate and although the written statement is alleged to be filed on behalf of both, it is signed by the Divisional Manager of the appellant insurance company on its behalf as well as on behalf of the respondent No. 4. The signature of the respondent No. 4 as such is not there upon the written statement. From the point of view of this appeal what is material to be seen is that it is averred in the written statement that the liability of the appellant insurance company, in any case, is limited to Rs. 50,000/- only.

5. The claimants led evidence before the learned Claims Tribunal. However, no evidence was led on behalf of the appellant and the respondent No. 4. The learned Claims Tribunal, on the basis of the evidence on record, upheld the claim of the claimants to the extent of Rs. 2,10,000/-. As regards the liability of the appellant insurance company, it held that since the appellant insurance company did not lead any evidence to show its exact contractual liability and did not even produce the insurance policy of the truck in question, it must bear the whole liability along with the insured, i.e., the respondent No. 4. Feeling aggrieved, the appellant insurance company has preferred the instant appeal in this court claiming that its liability is restricted only to Rs. 50,000. No appeal is preferred by the respondent No. 4 and as such the award against him is final, and thus the question about the factum of the accident cannot be reopened in this appeal.

6. Along with the memo of appeal, the appellant insurance company has filed an application for permission to file the true copy of the insurance policy of the truck in question as an additional evidence in the instant appeal. The said application was directed to be considered at the time of final hearing. The appellant has also placed on record the affidavit of one Kanwarlal Lunia, Senior Divisional Manager of the appellant insurance company at Nagpur, which is in the nature of an evidence on affidavit to show that under the insurance policy the liability taken by the insurance company was Rs. 50,000/- only and the said limit was not increased by charging higher premium from the respondent No. 4 for the insured truck. It is thus stated in the affidavit that the liability of the insurance company is restricted only to Rs. 50,000/- and for the rest the respondent No. 4 alone is liable.

7. The respondent Nos. 1 to 3 by their reply dated 11.6.1992 opposed the application for permission to adduce the additional evidence by way of placing on record the insurance policy of the truck in question. The respondent No. 4 also filed his reply on 22.6.1992 opposing the application of the appellant to adduce

additional evidence. In his reply, the respondent No. 4, i.e., the owner of the truck has denied that the original insurance policy after its execution was handed over to him. He has also stated that he had taken out a comprehensive policy of the truck in question to cover all risks, including the third party risk. According to him, he was assured while premium was paid by him to the insurance agent that there was comprehensive policy of the truck in question. Further, he has stated that he is an illiterate small truck operator and can only sign in Gurumukhi script. It is thus his case that he was never issued any policy but only given cover note.

8. It is first necessary to consider the question in the instant appeal whether the appellant insurance company can be allowed to adduce additional evidence by way of placing on record the insurance policy of the truck in question. It is not in dispute that for the said purpose the appellant insurance company has to make out a case under Order 41, Rule 27, Civil Procedure Code, which deals with the question of adducing additional evidence in appeal. It is well settled that no evidence can be adduced in appeal as a matter of course. The appellant insurance company has stated in its application for permission to file the insurance policy by way of additional evidence that the insurance policy could not be filed in the trial court because even after due diligence in tracing out the same, the same could not be traced out during the pendency of the proceeding in the trial court, because of which it could not be produced in the said proceedings. Obviously, the appellant is trying to make out a case under Clause (aa) of Sub-rule (1) of Rule 27 of Order 41, Civil Procedure Code. Perusal of the said application shows that except the bare statement that in spite of due diligence on the part of the appellant and its Gwalior office the true copy of the insurance policy in question could not be produced before the Claims Tribunal because the same was misplaced and could not be traced, there are no averments as to what particular steps were taken by the insurance company to trace out the said policy.

9. The respondents have stoutly opposed the admission of additional evidence in the instant appeal. The learned counsel appearing for the respondent No. 4 has brought to our notice that in similar circumstances the other High Courts have declined to allow the insurance company to place on record the insurance policy in question in the said cases. In particular, he has brought to our notice the following judgments: *New India Assurance Co. Ltd. Vs. Pamula Bala Prabhavatamma and Others*, , *Thimmappa Basappa Khrhatti v. Samappa Venkappa Nagnur*, ILR 1988 Kar 165, *General Assurance Society Ltd. v. Avtar Singh* 1986 ACJ 652 and *United India Fire and Genl. Ins. Co. Ltd. v. Pallamparty Indiramma* 1982 ACJ 521. He has then urged before us that there is gross negligence on the part of the insurance company in not producing the insurance policy in the trial court and, therefore, the insurance company cannot be allowed to produce the said document for the first time in this appeal, which requires remand as there is a dispute about the same between the parties, since, according to the respondent No. 4, he had taken out the comprehensive policy and the same was not handed over to him by the insurance company.

10. As already pointed out, except the bare statement that the insurance policy was misplaced and could not be traced out during the pendency of the proceeding before the learned Claims Tribunal, there is neither any averment nor any material placed on record to show as to what efforts were made by the insurance company to trace out the policy. Perusal of the record of the learned Claims Tribunal does not show that any time was asked for to produce the insurance policy on the ground that it was misplaced. There is also no correspondence placed on record between the Nagpur office and the Gwalior office showing that the policy was misplaced and was being traced. Further, the application for filing the additional document contains solemn affirmation of the Senior Divisional Manager of Nagpur office of the appellant and no affidavit of any officer concerned from the Gwalior office is filed to show that the policy was misplaced and could not be traced in Gwalior office during the pendency of the proceeding before the Claims Tribunal. It is material to see that the insurance policy was taken out by the Gwalior office.

11. It is also material to see that although there was common advocate appearing for the appellant insurance company and the respondent No. 4, no attempt was made by the insurance company to get the insurance policy produced from the respondent No. 4 to whom, according to it, the original policy was handed over if the insurance policy with the appellant insurance company was misplaced. Even otherwise, if the appellant and the respondent No. 4 were to contest the case separately and if the insurance policy was really misplaced, an application could have been made or notice could have been given to the respondent No. 4 to produce the original insurance policy with him.

12. The learned counsel appearing for the appellant has brought to our notice the judgment of the Supreme Court in the case of National Insurance Co. Ltd. v. Jugal Kishore 1988 ACJ 270, to show that in the said case the insurance policy was for the first time filed in the appeal before the Supreme Court and was taken on record in the said case. Perusal of the said judgment would show that the insurance policy was taken on record because the owner of the vehicle which was insured had admitted the same and had claimed only the right to show from the same that it was a comprehensive policy covering higher risk and thus to show that the insurance company was liable for the whole claim in the said case. The said judgment is of no assistance to the appellant in the instant case where the copy of the insurance policy filed on record in the instant case is denied by the owner of the truck. In fact, perusal of the said judgment would further show that a duty is cast upon the insurance company to produce the insurance policy before the Claims Tribunal. It is, therefore, all the more necessary for the appellant to make out a proper case as to why the same could not be produced before the Claims Tribunal. It has, therefore, to be held that the appellant insurance company has failed to make out a proper case for adducing additional evidence by way of production of the copy of the insurance policy in the instant case. The said application has thus to be rejected.

13. Once the insurance policy is not taken on record the question which has to be examined is whether the appellant insurance company has still made out its claim for its limited liability of Rs. 50,000/- as urged by it in the instant appeal. It has to be borne in mind that while considering the above case none of the parties can take recourse to the said policy to show either limited or full liability under the same. It has further to be borne in mind that in the claim petition of the respondent Nos. 1 to 3 there is no specific averment that the truck was fully insured and that the insurance company had undertaken the full liability on account of the accident. The said application appears to be in the prescribed form and there are even no allegations that the liability of both the appellant and the respondent No. 4 is joint and several.

14. As regards the written statement, we have already pointed out that common written statement is filed on behalf of the appellant insurance company and the respondent No. 4. Perusal of the said written statement would show that there is averment in para 11 thereof that the liability of the appellant insurance company is limited to Rs. 50,000/- only. As already pointed out, there was a common advocate appearing on behalf of the appellant and the respondent No. 4. Although the written statement does not appear to have been signed actually by the respondent No. 4 but is signed by the appellant for itself as well as for the respondent No. 4, the respondent No. 4 has not taken any exception before the Claims Tribunal about the filing of the above written statement and, in particular, about the averment that the liability of the appellant insurance company is restricted to Rs. 50,000/-. It is not thus open to the respondent No. 4 to resile from the above averment in the written statement, particularly when he was represented by an advocate before the Claims Tribunal although originally by a common advocate, later, it appears from the order-sheet dated 26.4.1984 that he was represented by a separate advocate from that date.

15. As regards the oral evidence, the only evidence is of the claimants as there is no evidence led on behalf of the appellant and the respondent No. 4. None of the witnesses on behalf of the claimants deposed to anything about the extent of the liability of the appellant insurance company. Even otherwise, they would not be aware personally of the contents of the policy of the truck in question. As there is no evidence led on behalf of the appellant or the respondent No. 4 also, the question which falls for consideration is as to who would suffer if there is no evidence led or material placed on record in regard to the question of the extent of the liability of the insurance company. In fact, had the respondent No. 4 admitted the copy of the insurance policy sought to be filed in this appeal by the appellant, the question could have been examined on the basis of the same as in the case of the National Insurance Co. Ltd. 1988 ACJ 270, in which the insurance policy filed by the insurance company in the Supreme Court was admitted by the owner of the vehicle. Be that as it may, we are left with no other alternative but to consider the said question in the absence of evidence and in particular in the absence of the most material document in that regard, viz., the insurance policy.

16. The other question which needs consideration in this appeal and which is raised by the learned counsel for the respondent No. 4 before us is that during the pendency of the appeal in this court the new Motor Vehicles Act, 1988 (for short "the new Act") has come into force and according to Section 147(2) of the said Act corresponding to Section 95(2) of the Motor Vehicles Act, 1939 (for short "the old Act"), the whole of the liability of the respondent No. 4 has to be undertaken by the insurance company.

17. To appreciate the rival submissions, it is necessary first to refer to the relevant provisions of the old Act. Chapter VIII of the said Act deals with the question of insurance of motor vehicles against third party risk. Section 94 provides that no person can use the motor vehicle unless it is covered by a policy of insurance complying with the requirements of the said Chapter VIII. Section 95 then deals with the requirements of policies and limits of liability. Clause (a) of Sub-section (1) of Section 95 requires the policy to be issued by the person who is an authorised insurer. Clause (b) of the said sub-section then provides that the said insurance policy is a policy which insures the person or classes of persons to the extent specified in Sub-section (2) of Section 95 in regard to the following matters:

(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; and

(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.

18. Sub-section (2) of Section 95 then provides the extent of liability covered by the insurance policy. Clause (a) of Sub-section (2) is relevant in the instant case and at the time of the accident in the instant case the said Clause (a) of Sub-section (2) of Section 95 read as follows:

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, in respect of the death of, or bodily injury to, employees (other than the driver), not exceeding six in number, being carried in the vehicle.

It is material to see that the extent of liability covered under the said clause prior to its amendment with effect from 2.3.1970 by the Act No. 56 of 1969 was Rs. 20,000/-. By the aforesaid Act, the said limit was raised to Rs. 50,000/- which was applicable in the instant case in which the accident had taken place on 2.11.1981. It is further pertinent to see that with effect from 1.10.1982 by the Act No. 47 of 1982 the said limit of Rs. 50,000/- was raised to Rs. 1,50,000/- and under the new Act which came into force with effect from 14.10.1988 (Sic. 1.7.1989) the extent of liability of the insurance company is unlimited.

19. Section 147 of the new Act corresponds to Section 95 of the old Act. Section 147(1) of the new Act is similar to Section 95 (1) of the old Act. Sub-section (2)

of Section 147 of the said Act, however, lays down that a policy of insurance referred to in Sub-section (1) thereof shall cover any liability incurred in respect of any accident, up to the limits provided therein. Clause (b) of Sub-section (2) of Section 147 of the new Act provides a limit of rupees six thousand in respect of damage to any property of a third party and as regards the other claims the liability of the insurance company is to the extent of the amount of the liability incurred which means that in case of accident to any person the full liability of the owner of the vehicle insured with the insurance company has to be undertaken by it.

20. In the context of the above provisions, we shall first examine the question whether the provisions of the new Act can be held to be applicable in the instant case because the said clause has come into force during the pendency of the instant appeal. In our view, in fact, the matter is no more *res integra* in view of the two judgments of this court as well as the decision of the Supreme Court.

21. In the case of *Padma Srinivasan v. Premier Insurance Co. Ltd.* 1982 ACJ 191, cited on behalf of the respondent No. 4, the Supreme Court has held that the liability to pay compensation must be determined at the relevant time, that is to say, at the time when the liability arises. It has further observed that since the liability of the insurer to pay a claim under a motor accident policy arises on the occurrence of the accident and not until then, one must necessarily have regard to the state of the law obtaining at the time of the accident for determining the extent of the insurer's liability under a statutory policy. In the said case the claim petition was filed u/s 110-A of the old Act in which the insurance company had pleaded that its liability was restricted to the extent of Rs. 20,000/- only as the insurance policy therein was taken out prior to the raising of the said limit to Rs. 50,000/- by the Amending Act No. 56 of 1969 but since the accident had taken place after the said Amending Act had come into force, the learned Claims Tribunal, whose decision reversing the decision of the High Court was upheld by the Supreme Court, had determined its liability at Rs. 50,000/- applying the amended law which was in force at the time of the accident. The Supreme Court also held that the policy taken out by the owner of the vehicle, in the said case, contained a clause that the insurance company had undertaken the liability under Chapter VIII of the old Act which would mean the law as it was in force at the time of the accident. It is true that the above decision is not a direct authority for the proposition canvassed in the instant case because it is essentially interpreting the provisions of the insurance policy in the said case.

22. Turning next to the case relied upon on behalf of the respondent No. 4, it may be seen that the learned single Judge of this court in *Oriental Fire and Genl. Ins. Co. Ltd. v. Aleixo Fernandes* 1986 ACJ 1137, had held that Section 92-A of the old Act relating to "no fault liability" is retrospective in operation. The correctness of his decision was, however, doubted by the Division Bench of this court in the case of *Inderjeet Singh and Co. v. Kamal Prakash Pawar* 1989 ACJ 132. In the recent judgment of the Division Bench of this court in the case of

Prakash Chandumal Khatri and another Vs. Suresh Pahilajrai Makhija and another, , this court has held that the provisions about "no fault liability" in Section 140 of the new Act are not retrospective in operation and, therefore, the compensation payable on account of "no fault liability" in that case was Rs. 15,000/- as was fixed under the law obtainable on the date of the accident and not Rs. 25,000/- as fixed u/s 140(2) of the new Act. In taking the above view, the Division Bench has also relied upon the recent judgment of the Supreme Court in the case of R.L. Gupta and Others Vs. Jupiter General Insurance Company and Others, , in which the Supreme Court has observed that the compensation under the principle of "no fault liability" provided by the statute is prospective in operation. It is thus clear that as held by the Supreme Court the law which is applicable to determine the liability to pay compensation is on the date when the accident has occurred.

23. It is, however, urged by the learned counsel for the respondent No. 4 that the said cases have not taken into consideration the effect of Section 217 of the new Act relating to repeal and savings, as also the decisions of the Supreme Court wherein the subsequent changes in the law occurring during the pendency of the appeal are taken note of and given effect to upon the principle that the appeal is a continuation of the original proceedings. According to him, the effect of the said Section 217 of the new Act is that even though the accident has taken place prior to the coming into force of the new Act, the provisions of the new Act will still be applicable to determine the liability to pay compensation. As such, it is his contention that in view of the provisions of Section 147(2)(b) of the new Act, the appellant insurance company must be held to have undertaken unlimited liability.

24. As regards the effect of Section 217 relating to repeal and savings, the learned counsel for the respondent No. 4 has, in support of his above contention, brought to our notice Clause (a) of Sub-section (2) of the said section according to which any notification, rule, regulation, order or notice issued, or any appointment or declaration made or exemption granted, or any confiscation made, or any penalty or fine imposed, any forfeiture, cancellation or any other thing done, or any other action taken under the repealed enactment which was in force immediately before the commencement of the new Act insofar as it is not inconsistent with the provisions of the new Act is deemed to have been issued, made, granted, done or taken under the corresponding provisions of the new Act. It is difficult to see how Clause (a) of Sub-section (2) of Section 217 of the new Act is of any assistance to the respondent No. 4. As we shall presently show, in view of saving of Section 6 of the General Clauses Act by Sub-z (4) of Section 217 of the new Act, the accrued rights and obligations under the repealed enactment are, unless a different intention appears, not affected by enactment of the new Act.

24-A. The learned counsel for the respondent No. 4 has then relied upon the judgment of the Supreme Court in the case of Lakshmi Narayan Guin and Others

Vs. Niranjan Modak, , in support of his above contention. Perusal of the said judgment would show that there was an amendment to the West Bengal Premises Tenancy Act during the pendency of the appeal against the decree for eviction of the tenant, by which the said Act was extended to the area in question during the pendency of the appeal, thus giving protection to the tenants in the said area. It is obvious that the decree for eviction passed by the trial court is subject to the decree of the appellate court as the appeal is a continuation of the original proceeding and, therefore, when before the appellate court confirms the said decree of eviction, if there is a change in law the Supreme Court has held that such a change in law can be taken note of and given effect to.

25. It is, however, material to see that the above rule about taking into consideration the subsequent changes in law during the pendency of the proceedings in appeal is not a hard and fast rule and thus it is not necessary that in all circumstances or the contents, it would be held that the subsequent change in law would be taken note of and given effect to because an appeal is a continuation of the original proceeding. This is clear from the judgment of the Supreme Court in the case of Dewaji v. Ganpatlal 1969 MLJ 495. In the said case a decree for ejectment was passed by the civil court in a suit for ejectment filed by the landlord against his agricultural tenant who claimed that he was a protected lessee under the Berar Regulation of Agricultural Leases Act, 1951. However, the said Act was amended during the pendency of the appeal filed by the tenant and by virtue of Sections 16, 16-A and 16-B the jurisdiction of the civil court to try such suits was ousted. In the context of the above amending provisions the Supreme Court negated the contention raised by the tenant that the appeal being a continuation of the original proceeding in the suit, the above amending provisions would oust the jurisdiction of the civil court. It held that Sections 16, 16-A and 16-B of the aforesaid Act as amended in 1953 would not apply to the appellate proceeding unless the said provisions were made applicable to it either expressly or by necessary implication.

26. However, the above question also is no more *res Integra* in view of the judgment of the Supreme Court in the case of M/s. Gurcharan Singh Baldev Singh Vs. Yashwant Singh and others, . The Supreme Court has construed Section 217 of the new Act in the said judgment. The question in the said case was whether the appellant operator who had applied for renewal of the permit u/s 55 (2) of the old Act prior to coming into force of the new Act had a right of renewal accrued to him which would not be affected in spite of the repeal of the old Act by Section 217(1) of the new Act. Referring to Sub-section (4) of Section 217 of the new Act, the Supreme Court held that the mention of particular matters in Section 217 of the new Act did not affect the application of Section 6 of the General Clauses Act with regard to the effect of repeal of an enactment.

27. The Supreme Court observed in the facts of the above case that although the right to claim renewal of permit might not be a vested right or a fundamental

right, it was a civil right which could be enforced in the court of law. It thus held that the said right had accrued to the appellant in the said case for renewal of which the legal machinery was set in motion by him before the new Act came into force. Applying, therefore, clause (c) of Section 6 of the General Clauses Act and finding that there was no intention to the contrary in the new Act, it held that the appellant had a right to get his application considered and decided in accordance with the provisions of the old Act.

28. The judgment of the Supreme Court in the case of Vinod Gurudas Raikar Vs. National Insurance Co. Ltd. and others, , needs to be distinguished at this stage. In the said case, the accident had taken place before the new Act had come into force. There was delay in filing the claim petition. In fact, the application for condonation of delay in filing the claim petition was filed after the new Act came into force. Since the accident had taken place before the new Act came into force, it was claimed in the said case that the application for condonation of delay would be governed by the old Act. It may be seen that the period of limitation for filing a claim petition under the old Act and the new Act was the same, i.e., six months from the date of the accident. However, the difference in the two Acts was that in regard to the provisions regarding the condonation of delay, according to proviso to Sub-section (3) of Section 166 of the new Act, the maximum period of delay, which could be condoned was six months. However, there was no such limitation for condonation of delay in the old Act.

29. The Supreme Court has held in the above case that since the provision relating to the condonation of delay is a procedural provision, it will operate retrospectively. It further held that since the appellant in the said case had not filed the application for condonation of delay before the new Act came into force, he could not claim any right within the meaning of Clause (c) of Section 6 of the General Clauses Act, which could be said to be accrued to him. It is thus held by the Supreme Court that the application for condonation of delay filed in the said case after the new Act came into force would be governed by the provisions of the new Act. It is pertinent to see that in M/s. Gurcharan Singh Baldev Singh Vs. Yashwant Singh and others, , the application for renewal of the permit was made prior to the coming into force of the new Act and it was held that there was a right accrued to the appellant in the said case for renewal of his permit.

30. However, so far as the instant case is concerned it is material to see that what is involved is a substantive right and not a procedural right. Since Section 6 of the General Clauses Act is applicable in view of Sub-section (4) of Section 217 of the new Act, the right accrued or the liability incurred under the old Act would be saved unless there is an intention to the contrary in the new Act. It is well settled that unless the new Act expressly or by necessary implication says so, it will not be presumed that it has deprived the person of his accrued right or has affected an obligation incurred under the repealed Act.

30-A. There is nothing to show that by any express provision or by necessary intendment the provisions of Section 147(2) of the new Act are retrospective in

operation. It may be seen that the language of Sub-section (2) of Section 147 itself shows that a policy of insurance has actually to cover such liability incurred in respect of any accident, up to the following limits, namely, (a) save as provided in Clause (b), the amount of liability incurred; (b) in respect of damage to any property of a third party, a limit of rupees six thousand. The said provision cannot, therefore, be held to be retrospective in operation. In fact, there is a clear indication against the retrospective operation of the said Sub-section (2) of Section 147 of the new Act in its proviso according to which any policy of insurance issued with limited liability and in force immediately before the commencement of the new Act continues to be effective for a period of four months after its commencement or till the date of expiry of such policy, whichever is earlier. The above contention raised on behalf of the respondent No. 4 that in view of the provisions of Section 147(2) of the new Act the liability undertaken by the insurance company is unlimited cannot thus be accepted.

31. Regarding the question whether the restricted or full liability is undertaken by the insurance company, the learned counsel for the respondent No. 4 has relied upon the judgments in the case of *New India Assurance Co. Ltd. Vs. Pamula Bala Prabhavatamma and Others*, and in the case of *General Assurance Society Ltd. v. Avtar Singh* 1986 ACJ 652, in support of his submission that in the absence of the insurance policy being placed on record the insurance company must be deemed to have taken the full liability for compensation. Perusal of the above judgments would show that in the said cases there was a plea raised that under the insurance policy the insurance company had undertaken the full liability. In fact, in such cases where an averment is made that the full liability is undertaken under the policy by the insurance company, it is possible to draw adverse inference against it since as observed by the Supreme Court in the case of *National Insurance Co. Ltd. v. Jugal Kishore* 1988 ACJ 270 (SC), it is the duty of the insurance company to produce the insurance policy in the trial court. However, in the instant case there is no averment particularly of the respondent No. 4 that full liability was undertaken by the insurance company under the insurance policy. On the other hand, no objection is raised to the common written statement filed by the appellant on its behalf as also on behalf of the respondent No. 4, through their common advocate in which the averment is that the liability undertaken by the appellant is restricted to the extent of Rs. 50,000/-. As pointed out hereinbefore even though subsequently separate advocate represented the respondent No. 4, no exception was taken to the above averment before the Claims Tribunal on behalf of the respondent No. 4.

32. Perusal of para 9 of the judgment of the Supreme Court in the *National Insurance Co. Ltd.*'s case 1988 ACJ 270, shows that since the claimants for compensation are not possessed of either the policy or a copy thereof, the Supreme Court has emphasised that it is the duty of the party which is in possession of a document which would be helpful in doing justice in the cause to produce the said document and such party should not be permitted to take shelter behind the abstract doctrine of burden of proof. The Supreme Court has

further observed that duty is greater in the case of instrumentalities of the State such as the appellant insurance company therein who are under an obligation to act fairly. The Supreme Court has, therefore, emphasised that in all cases where the insurance company takes a defence that its liability is not in excess of the statutory liability, it should file a copy of the insurance policy along with its defence.

33. Although it is emphasised in the above case by the Supreme Court that, as a part of its duty, the insurance company should file the copy of the insurance policy along with its defence irrespective of the question of the burden of proof, it is not further held in the said case that if no such copy is filed, the insurance company should be held liable for full liability despite the question of burden of proof, particularly when as in the instant case wherein although the insurance company has raised a specific plea that its liability is restricted to the statutory liability, there is neither any plea nor evidence led by either the claimants or the owner of the vehicle that the appellant had undertaken the full liability. In the absence of such a plea being raised, if the insurance company has chosen not to lead any further evidence, the question of burden of proof needs to be considered.

34. Naturally the burden of proof would lie upon the person who raises the plea and asserts the positive. Further it may be seen that the provisions of Chapter VIII of the old Act relating to insurance of motor vehicles against third party risks show that what is obligatory upon the owner of a motor vehicle is to cover the third party risk by taking out the insurance policy for the said purpose as emphasised in Section 94 of the said Act. This liability is restricted by Sub-section (2) of Section 95 in the case of goods vehicle to Rs. 50,000/- in respect of any one accident where the accident has resulted in death or a bodily injury. There is no obligation upon the owner of the vehicle to insure the vehicle by taking out a comprehensive policy as held by the Supreme Court in the case of National Insurance Co. Ltd. 1988 ACJ 270.

35. In our view from the point of view of the question of burden of proof, we can usefully refer to the observations of the Supreme Court itself in the case of National Insurance Co. Ltd. 1988 ACJ 270. After observing that it is not obligatory upon the owner to obtain comprehensive policy of the vehicle, the Supreme Court has observed that in case the owner gets his vehicle comprehensively insured a higher premium than for an "Act only" policy is payable depending upon the estimated value of the vehicle. Such insurance, according to it, entitles the owner to claim reimbursement of the entire amount of loss or damage suffered up to the estimated value of the vehicle calculated according to the rules and regulations framed in this behalf. It has then held that comprehensive insurance of the vehicle and payment of higher premium on this score, however, do not mean that the limit of the liability with regard to third party risk becomes unlimited or higher than the statutory liability fixed under Sub-section (2) of Section 95 of the Act. For this purpose, according to it, a

specific agreement has to be arrived at between the owner and the insurance company and separate premium has to be paid on the amount of liability undertaken by the insurance company in this behalf. Likewise, if risk of any other nature, for instance, with regard to the driver or passengers, etc., in excess of statutory liability, if any, is sought to be covered, it has to be clearly specified in the policy and separate premium paid therefor. This, as held by it, is the requirement of the tariff regulations framed for the purpose.

36. When it is sought to be claimed that the insurance company has undertaken liability in excess of the statutory liability, a specific agreement for that purpose and payment of separate premium is necessary. The party asserting such specific agreement and payment of separate premium must, therefore, plead such agreement. In particular, in the instant case, the respondent No. 4 who is the truck owner and who has insured his truck should have pleaded such an agreement. Instead of doing so, the respondent No. 4 appears to have filed a common written statement although signed by the appellant for itself and on behalf of respondent No. 4 through the common advocate which would mean that he had accepted the plea therein of the appellant that its liability is restricted to the statutory liability of Rs. 50,000/- only. After the filing of the above written statement by the common advocate, although the respondent No. 4 engaged separate advocate to represent him, no stand is still taken by him that the insurance company had undertaken the full liability for which he had paid separate premium. In these circumstances and in the absence of any plea or evidence, it is difficult to pass on the full liability upon the appellant insurance company whose liability under the statute is restricted to Rs. 50,000/-.

37. In the result, the instant appeal is allowed. The award of the learned Claims Tribunal is modified and it is directed that the liability of the appellant insurance company shall be restricted to Rs. 50,000/-only and the rest of the liability, i.e., of Rs. 1,60,000/- shall be that of the respondent No. 4. In the circumstances, however, there shall be no order as to costs in this appeal.