
(2012) 01 KL CK 0147
In the High Court Of Kerala
Case No : M.A.C.A. No. 300 of 2007

Oriental Insurance Co. Ltd.

APPELLANT

Vs

Joseph

RESPONDENT

Date of Decision : 24-01-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 13
Motor Vehicles Act, 1939 — Section 147(1), 147(3), 149, 163A, 166
Motor Vehicles Act, 1988 — Section 140

Citation : (2012) ACJ 1441 : AIR 2012 Ker 116 : (2012) 2 KLT 132

Hon'ble Judges : Manjula Chellur, Acting C.J.; T.R. Ramachandran Nair, J; P.R. Ramachandra Menon, J

Bench : Full Bench

Advocate : George Cherian Thiruvalla, for the Appellant; Sojan Micheal, for the Respondent

Final Decision : Allowed

Judgement

Munjula Chellur, Ag. C.J.

1. This appeal is by way of reference before us by order dated 24.08.2009. It reads as under:

Respondents 1 and 2 filed claim petition u/s 163A of the Motor Vehicles Act. They claim to be the legal representatives of their son, who died in a motor accident.

2. The deceased was riding the motor cycle. The learned counsel for the appellant contends that the driver of the motor cycle was not covered by the policy. The learned counsel for the respondents 1 and 2 relied on the decision of the Division Bench of this court which is reported in New India Assurance Co. Ltd. v. Radhika (2009 (2) KLT 488). The same position has arisen for consideration in this appeal. The conditions of Policy providing for liability to third party were as follows, in the said decision:

In terms of and subject to the limitations of the indemnity which is granted by

this Section to the Insured the company will indemnify any Driver who is driving the Motor Cycle on the insured's order or with his permission provided that such Driver shall as though he were the insured observe, fulfill and be subject to the terms, exceptions and conditions of this Policy in so far as they can apply.

In the event of death of any person entitled to indemnify under this Policy the company will in respect of the liability incurred by such person indemnify his personal representatives in the terms of and subject to the limitations of this Policy provided that such personal representatives shall as though there were the insured observe, fulfill and be subject to the terms, exceptions and conditions of this Policy in so far as they can apply.

3. The Division Bench has taken the view that the driver is covered. We are unable to subscribe to the dictum. The liability which appears to be undertaken by Clause 3 and 4 would appear to be the liability under a contract of indemnity. The company has undertaken to indemnify the driver and Clause 4 also provides for the indemnification of the personal representative of such person, who is entitled to indemnity in the event of his default. It is very clear from Clause 4 that the company undertakes to indemnify in respect of the liability incurred by such person. His personal representative would be the beneficiary of such indemnification. The liability is clearly undertaken only to the third parties in our view.

In view of our disagreement, place this matter before the Honorable Chief Justice, for passing appropriate orders for reference to a larger Bench.

It is necessary to refer to the facts of the present case to understand the real question of controversy raised in the matter. The claimants before the Tribunal are the parents of one Mr. Shine aged about 21 years, who met with an accident on 22.08.2000 at Bangalore, while riding a motor cycle belonging to the insured, third respondent. He succumbed to injuries on 30.09.2000. The claimants, parents of the deceased Shine, approached the Tribunal claiming compensation for the death of their son in a motor accident. The respondents were; the owner of the vehicle - the insured and the present appellant -the insurer of the motorcycle in question. The defence raised by the appellant/insurer before the Tribunal was, the rider was negligent and the injury leading to his death was not covered under the policy, therefore, they are not liable to pay compensation. The Tribunal, though held that the accident was due to the negligent riding of the vehicle by the deceased Shine, but assessed compensation, ultimately directing the appellant insurance company to pay the amount and recover from the owner of the vehicle, the insured. Aggrieved by the same, the appellant/insurance company approached this Court. As stated above, the Division Bench referred the matter to a larger Bench.

2. The deceased was not the paid employee of the insured. As a matter of fact, two vehicles involved in the accident i.e., the motor cycle manned by the deceased Shine and also another vehicle. But the details of the other vehicle are

not placed before us. According to the claimants, they could not secure the details of the other vehicle, which collided with the motor cycle in question. Therefore, we have to consider the question, whether insurance company would be liable to pay compensation by indemnifying the owner of the motor cycle in question. In order to understand the liability i.e., under what circumstances the owner would be liable to pay compensation and under the insurer would be liable to indemnify the insured, one has to refer S. 149 of the Motor Vehicles Act and the terms and conditions of the policy, especially Section II - Liability to third parties. It is not in dispute that the deceased was the rider of the vehicle, but he was neither an insured nor a paid driver under the insured. In that situation can he be termed as a third party ?

3. Section 149 of the Motor Vehicles reads as follows:

149. Duty of insurers to satisfy judgments and awards against persons insured in respect of third party risks.-- (1) If, after a certificate of insurance has been issued under subsection (3) of section 147 in favour of the person by whom a policy has been effected, judgment or award in respect of any such liability as is required to be covered by a policy under clause (b) of sub-section (1) of section 147 (being a liability covered by the terms of the policy) [or under the provisions of section 163A] is obtained against any person insured by the policy, then, notwithstanding that the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy, the insurer shall, subject to the provisions of this section, pay to the person entitled to the benefit of the decree any sum not exceeding the sum assured payable there under, as if he were the judgment debtor, in respect of the liability, together with any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.

(2) No sum shall be payable by an insurer under sub-section (1) in respect of any judgment or award unless, before the commencement of the proceedings in which the judgment or award is given the insurer had notice through the Court or, as the case may, the Claims Tribunal of the bringing of the proceedings, or in respect of such judgment or award so long as execution is stayed thereon pending an appeal; and an insurer to whom notice of the bringing of any such proceedings is so given shall be entitled to be made a party thereto and to defend the action on any of the following grounds, namely :-

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

(i) a condition excluding the use of the vehicle -

(a) for hire or reward, where the vehicle is on the date of the contract of insurance a vehicle not covered by a permit to ply for hire or reward, or

(b) for organised racing and speed testing, or

(c) for a purpose not allowed by the permit under which the vehicle is used,

where the vehicle is a transport vehicle, or

(d) without side-car being attached where the vehicle is a motor cycle; or

(ii) a condition excluding driving by a named person or persons or by any person who is not duly licensed, or by any person who has been disqualified for holding or obtaining a driving licence during the period of disqualification; or

(iii) a condition excluding liability for injury caused or contributed to by conditions of war, civil war, riot or civil commotion; or

(b) that the policy is void on ground that it was obtained by the non disclosure of a material fact or by a representation of fact which was false in some material particular.

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

Provided that no sum shall be payable by the insurer in respect of any such judgment unless, before the commencement of the proceedings in which the judgment is given, the insurer had notice through the Court concerned of the bringing of the proceedings and the insurer to whom notice is so given is entitled under the corresponding law of the reciprocating country, to be made a party to the proceedings and to defend the action on grounds similar to those specified in sub-section (2).

(4) Where a certificate of insurance has been issued under sub-section (3) of section 147 to the person by whom a policy has been effected, so much of the policy as purports to restrict the insurance of the persons insured thereby by reference to any condition other than those in clause (b) of sub-section (2) shall as respects such liabilities as are required to be covered by a policy under clause (b) of sub-section (1) of section 147, be of no effect:

Provided that any sum paid by the insurer in or towards the discharge of any liability of any person which is covered by the policy by virtue only of this sub-section shall be recoverable by the insurer from that person.

(5) If the amount which an insurer becomes liable under this section to pay in respect of a liability incurred by a person insured by a policy exceeds the amount for which the insurer would apart from the provisions of this section be liable under the policy in respect of that liability, the insurer shall be entitled to recover the excess from that person.

(6) In this section the expression "material fact" and "material particular" means, respectively a fact or particular of such a nature as to influence the judgment of a prudent insurer in determining whether he will take the risk and if so, at what premium and on what conditions, and the expression "liability covered by the terms of the policy" means a liability which is covered by the policy or which would be so covered but for the fact that the insurer is entitled to avoid or cancel or has avoided or cancelled the policy.

(7) No insurer to whom the notice referred to in sub-section (2) of sub-section (3) has been given shall be entitled to avoid his liability to any person entitled to the benefit or any such judgment or award as is referred to in sub-section (1) or in such judgment as is referred to in sub-section (3) otherwise than in the manner provided for in sub-section (2) or in the corresponding law of the reciprocating country, as the case may be.

Explanation: For the purposes 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.

4. The reference came to be made as the Division Bench in the above appeal disagreed with the view taken by another Division Bench of this Court in *New India Assurance Company Limited v. Radhika* (2009 (2) KLT 488). Reading of paragraph 3 of the above decision would indicate that the Division Bench placing reliance on Section II incorporated in the policy opined, that the driver who was driving the vehicle would also be treated as a third party, therefore the insurer has to pay the compensation. The appellant/insurer is not denying the coverage of the vehicle, but according to the appellant/insurer the rider himself was negligent in causing the accident. Therefore, he cannot seek compensation for his own negligent act. In other words, he being a tort-feasor cannot claim damages. In the present case, the legal representatives of the tort-feasor are before us as claimants.

5. On earlier occasion, the Full Bench of this Court had an occasion to deal with some what similar situation reported in *National Insurance Company Ltd. v. V. Malathi C. Salian* (2003 (3) KLT 460 (F.B.)). In this case the question that arose before their Lordships was, whether insurance company can absolve its liability to pay compensation claimed u/s 163A on the ground that death or disablement had occurred due to the wrongful act, neglect or default on the part of the deceased or disabled person. Their Lordships after referring to several judgments of the Apex Court and this Court ultimately held at paragraphs 13, Hand 15asunder:

13. A Division Bench of the Himachal Pradesh High Court in *Kokla Devi Vs. Chet Ram and Another*, has also considered similar situation. In that case according to the Insurance Company the death had occurred due to negligence of the driver himself and Insurance Company cannot be made liable. After elaborately surveying the various decisions on the point the court held as follows:

Looking to the provisions of law and decisions referred to herein above we are of the view that the claim petition was maintainable on behalf of the claimant under S. 163A of the Act and on fulfillment of the requirements as envisaged there under, she was entitled for payment of compensation. Decisions relied upon by the Tribunal below while rejecting the claim of the appellant, were of no consequence keeping in view the change in law as made by the Acts compared to the provisions of Motor Vehicles Act, 1939 and then by Central Act 54 of 1994. At the risk of repetition we may also observe that S.163A (supra) starts, firstly with non obstante clause and further makes owner of the vehicle or the authorised insurer liable to pay in case of death or permanent disability due to accident arising out of the use of a motor vehicle as indicated in the Second Schedule. Another marked distinction in S. 163A and S. 166 of the Act is that under the former legal heirs or the victim as the case may be, is entitled for payment of compensation under S. 163A, whereas in the latter provision compensation payable in case of death (with which we are concerned in the present case) is claimable by the legal representatives of the deceased.

The court also held as follows:

S.163A brought about drastic change in the concept of tortious liability prevailing prior to it. It by non obstante clause permits even the tortfeasor to claim compensation on the principle of no fault liability which otherwise he is (if employee and has done wrong in the discharge of his duty) entitled to under Workmen's Compensation Act, 1923, or under the contract of insurance.

It was held that Insurance Company can challenge the claim only on the ground of no contract at all, i.e., no insurance or on the above stated grounds. It was not a case of the appellant that the vehicle in question was not insured with it or that the insurance was not in force at the time of accident, or that the accident had never occurred or that the claimants are not the legal heirs of the deceased. The court also held as follows:

Regarding licence the scheme of the provisions of S.163A does not provide a scope to raise a plea in defence so as to challenge the claim on the ground of no licence or category thereof; being different because under S. 163A as stated earlier the sums on ad hoc basis under social obligation has to be paid notwithstanding other provisions.

We are in full agreement with the reasoning of the Division Bench of the Gujarat High Court, Bombay High Court as well as the Himachal Pradesh High Court that Insurance Company cannot defeat a claim under S. 163A on the ground that the death or disablement had occurred due to the wrongful act, neglect or default on the part of the deceased or the disabled person as the case may be.

14. The Apex Court in Smt. Rita Devi and Others Vs. New India Assurance Co. Ltd. and Another, also held that a conjoint reading of the two sub-sections of S. 163A shows that a victim or his heirs are entitled to claim from the owner/ Insurance Company a compensation for death or permanent disablement

suffered due to accident arising out of the use of the motor Vehicle without having to prove wrongful act or neglect or default of anyone. The court held that if it is established by the claimants that the death or disablement was caused due to an accident arising out of the use of the motor vehicle then they will be entitled for payment of compensation. The Apex Court in Smt. Kaushnuma Begum and Others Vs. The New India Assurance Co. Ltd. and Others, found though the accident had occurred not due to any negligence of the driver or the owner as the case may be, directed the Insurance Company to pay the compensation applying the structured formula under S. 163A.

15. The liability to pay compensation under S.163A is on the principle of no fault and, therefore, the question as to who is at fault is immaterial and foreign to an enquiry under S. 163A. S.163A does not make any provision for apportionment of the liability. If the owner of the vehicle or the insurance company is permitted to prove contributory negligence or default or wrongful act on the part of the victim of claimants naturally the claimants will have to lead evidence which would defeat the object and purpose of S. 163A. Legislature never wanted the claimant to plead or establish negligence on the part of the owner or the driver. Once it is established that death or disablement occurred during the course of the user of the vehicle and the vehicle is insured the insurance company or the owner, as the case may be, shall be liable to pay the compensation. This is a statutory obligation. Claimant is therefore entitled to get legitimate amount on the basis of the structured formula based on the no fault theory from the insurance company or the owner or owners of the vehicle on the plea that the liability is joint and several.

As a matter of fact, in this judgment, their Lordships were of the opinion that once the death or disablement occurred during the course of user of a vehicle and if the vehicle was found to be insured with the insurer, then the insurer cannot avoid its liability to pay compensation.

6. However, the latest judgment of the Apex Court in National Insurance Company Ltd. v. V. Sinitha (2011 (4) KLT 821 (SC)) directly deals with a situation of present nature, where, in detail Section 163A with reference to S. 140 of the Motor Vehicles Act as well as Ss.166 & 168 of the Motor Vehicles Act came to be analyzed. The two questions came up for consideration before their Lordships were as under:

(i) Whether S.163A is founded on the "fault" liability ?

(ii) Whether it is open to a concerned party (owner or insurer) to defeat a claim raised under S.163A by pleading and establishing any one of three "faults" namely "wrongful act, neglect" or "default"?

Ultimately, their Lordships at paragraph 13 and 14 held as under :

13. In the second limb of the present consideration, it is necessary to carry out a comparison between Ss. 140 and 163A of the Act. For this, S. 163A of the Act is

being extracted hereunder :

"S.163A Special provisions as to payment of compensation on structured formula basis.-(1) Notwithstanding anything contained in this Act or in any other law for the time being in force or instrument having the force of law, the owner of the motor vehicle or the authorised insurer shall be liable to pay in the case of death or permanent disablement due to accident arising out of the use of motor vehicle, compensation, as indicated in the Second Schedule, to the legal heirs or the victim, as the case may be.

Explanation : For the purpose of this sub-section, "permanent disability" shall have the same meaning and extent as in the Workmen's Compensation Act, 1923 (8 of 1923).

(2) In any claim for compensation under sub-section (1), the claimant shall not be required to plead or establish that the death or permanent disablement in respect of which the claim has been made was due to any wrongful act or neglect or default of the owner of the vehicle or vehicles concerned or of any other person.

(3) The Central Government may, keeping in view the cost of living by notification in the Official Gazette, from time to time amend the Second Schedule."

A perusal of S.163A reveals that sub-s.(2) thereof is in part materia with sub-s. (3) of S.140. In other words, just as in S.140 of the Act, so also under S. 163A of the Act, it is not essential for a claimant seeking compensation, to "plead or establish", that the accident out of which the claim arises suffers from "wrongful act" or "neglect" or "default" of the offending vehicle. But then, there is no equivalent of sub-s. (4) of S.140 in S.163A of the Act. Whereas, under sub-s.(4) of S.140, there is a specific bar, whereby the concerned party (owner of insurance company) is precluded from defeating a claim raised under S.140 of the Act, by "pleading and establishing", "wrongful act", "neglect" or "default", there is no such or similar prohibiting clause in S.163A of the Act. The additional negative bar, precluding the defence from defeating a claim for reasons of a "fault" ("wrongful act", "neglect" or "default"), as has been expressly incorporated in S.140 of the Act (through sub-s.(4) thereof), having not been embodied in S.163A of the Act, has to have a bearing on the interpretation of S.163A of the Act. In our considered view the legislature designedly included the negative clause through sub-s.(4) in S. 140, yet consciously did not include the same in the scheme of S. 163 A of the Act. The legislature must have refrained from providing such a negative clause in S. 163 A intentionally and purposefully. In fact, the presence of sub-s.(4) in S. 140, and the absence of similar provision in S. 163A, in our view, leaves no room for any doubt, that the only object of the Legislature in doing so was, that the legislature desired to afford liberty to the defence to defeat a claim for compensation raised under S. 163A of the Act, by pleading and establishing "wrongful act", "neglect" or "default". Thus, in our

view, it is open to a concerned party (owner or insurer) to defeat a claim raised under S. 163A of the Act, by pleading and establishing any one of the three faults namely "wrongful act", "neglect" or "default". But, for the above reason, we find no plausible logic in the wisdom of the legislature, for providing an additional negative bar precluding the defence from defeating a claim for compensation in S.140 of the Act, and in avoiding to include a similar negative bar in S.163A of the Act. The object for incorporating sub-s.(2) in S.163A if the Act is, that the burden of pleading and establishing proof of "wrongful act", "neglect" or "default" would not rest on the shoulders of the claimant. The absence of a provision similar to sub-s.(4) of S. 140 of the Act from S. 163A of the Act, is for shifting the onus of proof on the grounds of "wrongful act", "neglect" or "default" onto the shoulders of the defence (owner or the insurance company). A claim which can be defeated on the basis of any of the aforesaid considerations, regulated under the "fault" liability principle. We have no hesitation therefore to conclude, that S. 163A of the Act is founded on the "fault" liability principle.

14. There is also another reason, which supports the aforesaid conclusion. S.140 of the Act falls in Chapter X of the Motor Vehicles Act, 1988. Chapter X of the Motor Vehicles Act 1988 is titled as "Liability Without Fault in Certain Cases"". The title of the Chapter in which S.140 falls, leaves no room for any doubt, that the provisions under the chapter have a reference to liability".....without fault.....", i.e...; are founded under the "no-fault" liability principle. It would, however, be pertinent to mention, that S. 163A of the Act, does not find place in Chapter X of the Act. S. 163A falls in Chapter XI which has the title "Insurance of Motor Vehicles Against Third Party Risks". The Motor Vehicles Act, 1988 came into force with effect from 01.07.1989 (i.e. the date on which it was published in the Gazette of India Extraordinary Part II). S. 140 of the Act was included in the original enactment under Chapter X. As against the aforesaid, S. 163 A of the Act was inserted therein with effect from 14.11.1994 by way of an amendment. Had it been the intention of the legislature to provide for another provision (besides S.140 of the Act), under the "no-fault" liability principle, it would have rationally added the same under Chapter X of the Act. Only because it was not meant to fall within the ambit of the title of Chapter X of the Act "Liability Without Fault in Certain Cases", it was purposefully and designedly not included there under.

Reading of paragraphs 13 and 14 of the above judgment clearly indicates that the Apex Court, following its earlier judgment in 2001 (2) KLT 235 (SC) (Oriental Insurance Company Limited v. Hansrajbhai V. Kodala), held that it is open for the owner of the vehicle or insurer to defeat the claim under S. 163A by pleading or establishing any one of the three faults as stated above. This would only mean that to avoid the liability of payment of compensation, the insurer and the insured can always take the defence by pleading any one of the faults as stated above i.e., "wrongful act", "neglect" or "default".

7. In the present case the appellant/insurer is pleading negligent act on the part

of the rider of the motor vehicle, who is none other than the deceased himself. Therefore, in a case, where though a claim is raised under S. 163A, once the insurer or the insured comes up with the defence of absolving the liability to-pay compensation, on the ground, that the deceased was responsible for the death or injury on account of either wrongful act, negligent act or default, then, the liability of the insurer can be absolved, if such plea or defence is established. In the present case, the Tribunal has already concluded the cause for the accident as the negligence of the rider himself i.e., deceased Shine. There is no contra material brought on record indicating that he was not responsible for the accident. Though, a feeble attempt came to be made on the part of the claimants/respondents counsel suggesting that another vehicle was involved in the accident, which was responsible for the accident, unfortunately neither the owner nor the insurer of that vehicle are before us. If the insured and the insurer of other vehicle were to be party to the proceedings, then automatically the deceased and his legal representatives, who are the claimants could be termed as third parties so far as the other vehicle is concerned.

8. On an earlier occasion also, in *Oriental Insurance Co. Ltd. Vs. Rajni Devi and Others*, , the Apex Court had an occasion to deal with a case arising under S. 163A. In this case, the owner of the vehicle himself was involved in the accident and the question that arose for consideration was whether claim on behalf of the owner can be put forth against the insurer, when the owner himself was involved in the accident. Their Lordships had categorically stated that the owner of the vehicle, being both claimant and also a recipient of compensation, S. 163A cannot be taken recourse to. In the said case also, it was the legal representatives of the deceased owner who came up with the claim under S. 163A. Their Lordships held that, the heirs of the deceased could not have maintained a claim in terms of S. 163A of the Act and only by virtue of the terms of the contract of insurance they can take recourse to. In other words, what their Lordships would mean is, unless the terms of the policy cover a case of present nature, the claim by the heirs of the owner, wherein the owner himself was the victim of the accident cannot be considered under S.163A. For example, if the owner of the vehicle insures the vehicle by paying additional premium, as personal accident coverage, then by virtue of the terms of contract of insurance, the insurer would be liable to pay compensation depending upon the limits of liability.

9. Apparently, in the present case it is not the contention of the respondents/claimants that the owner of the motor cycle had paid premium covering the personal accident coverage and therefore, by virtue of terms of policy (Section II), the Insurance company would be liable to pay the compensation. Though, there is a comprehensive policy in the case on hand, neither in "Act" policy, which normally known as "A" Policy nor in "B" Policy covering the 3rd party liability, such coverage is envisaged. As already stated the deceased cannot be equated with the status of a 3rd party in the present case. In order to understand what exactly Section II of the terms of the Policy would mean, it is

just and proper to reproduce the necessary clauses of Section II, they are clauses 3 and 5.

3. In terms and subject to the limitations of the indemnity which is granted by this Section to the insured the company will indemnify any Rider who is driving the Motor Cycle on the insured's order or with his permission provided that such Rider shall as though he were the insured observed, fulfil and be subject to the terms, exceptions, conditions and limitations of this policy in so far as they can apply.

5. In the event of the death of any person entitled to indemnity under this Policy the Company will, in respect of the liability incurred by such person indemnify his personal representatives in the terms of and subject to the limitations of this Policy provided that such personal representatives shall as though they were the insured Observe, fulfil and be subject to the terms exceptions and conditions of this Policy in so far as they can apply.

Reading of Clause 3 would mean, subject to the limitation of indemnity, which is granted by virtue of Section II, the insurance company would undertake to indemnify the owner,

in case, the vehicle which met with an accident was driven by a person with the consent of the owner. In other words, it means, in a case where the rider or driver of a vehicle with the permission of the owner happens to use vehicle, which met with an accident, in that situation the Company would still indemnify the owner. This undertaking of the company to indemnify the owner cannot and would not mean that even for the death of such rider or driver, the company would be liable to pay compensation. In other words, what it says is, if a vehicle handed over to a person by consent of the owner results in an accident, then the claims of the 3rd parties against the owner would be indemnified by the insurer. Then clause 5 is also relevant, which would include the representative of the insured also to be indemnified by the insurer. The reading of the above clauses would explicitly clarify the position that by virtue of terms of contract, the appellant/insurer undertakes to indemnify the owner even in case the vehicle is used by a third person with the permission of the owner meets with accident and claim arises out of such accident. In that view of the matter, we are of the opinion that the law laid down in the case of 2009 (2) KLT 488 (cited supra) is not the correct position of law.

10. It is also pertinent to mention that the Tribunal concluded that the policy in question did not cover the rider of the vehicle, therefore, if the rider was not covered, question of indemnifying the owner would not arise. Only in a case where the coverage of rider is included in the policy or where the owner of the policy is covered and the permitted rider takes the position of a owner by virtue of terms of contract then alone the insurer would be liable to pay compensation. By virtue of sub-s.4 of S. 149, Court has to see whether there has to be a direction to pay and recover. If there are violations of the terms of the policy, the

question of pay and recover would arise. When the case of the deceased is not covered under the policy, the question of pay and recover would not arise.

Reference is answered accordingly. Ultimately, the liability of the insurance company is absolved and the Writ Appeal is allowed.