

(2009) 04 GUJ CK 0066

In the Gujarat High Court

Case No : First Appeal No. 1275 of 2009 and Civil Application No. 3764 of 2009

Oriental Insurance Co. Ltd.

APPELLANT

Vs

Kankuben Jagabhai Vaktara and Others

RESPONDENT

Date of Decision : 01-04-2009

Acts Referred:

Motor Vehicles Act, 1988 — Section 147(1), 147(5), 95(2)

Citation : (2009) 3 GLR 2086

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

Bench : Single Bench

Advocate : K.K. Nair, No. 1, for the Appellant; None for Defendant Nos. 1, 1.2.1, 1.2.2, 1.2.3, 1.2.4 and 5, for the Respondent

Final Decision : Dismissed

Judgement

H.K. Rathod, J.—Heard learned Advocate Mr. K. K. Nair for appellant-Insurance Company.

2. By way of this appeal, appellant-Insurance Co. has challenged award made by M.A.C.T. Rajkot in Claim Petition No. 854 of 1997 dated 8th August, 2008 wherein Claims Tribunal has awarded Rs. 3,15,200-00 in favour of claimants with interest thereon at the rate of 9 percent with a direction to recover same from opponent Nos. 1 to 5 jointly and/or severally.

3. Learned Advocate Mr. Nair for appellant has raised contention that the Claims Tribunal has committed an error in not appreciating that only Rs. 15-00 were paid as premium by owner in respect of paid-driver, and therefore, risk of person driving the vehicle is not covered by Insurance policy issued by Insurance Company. He also raised contention that as per the terms and conditions of policy, risk of deceased driver was not covered. He relied on the provisions of Section 147(5) of M.V. Act. Therefore, Section 147(5) of M.V. Act is reproduced as under:

Section 147(5) : Notwithstanding anything contained in any law for the time-

being in force, an insurer issuing a policy of insurance under this Section shall be liable to indemnify the person or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of that person or those classes of persons.

4. Learned Advocate Mr. Nair also submitted that the Claims Tribunal has misinterpreted and misunderstood policy of insurance, and therefore, impugned award is required to be interfered with by this Court. He also submitted that 50 percent negligence is decided against the driver of Jeep No. 1431, and therefore, he was also negligent in accident and for that also, claimants are not entitled to any compensation from appellant. He also submitted that in respect of damage caused to Vehicle No. 1431, 50 percent has been deducted from compensation awarded by Claims Tribunal. He submitted that Claim Petition No. 1227 of 1997 was filed by owner in which amount of Rs. 50,000-00 was awarded and then Rs. 25,000-00 were deducted being 50 percent negligence on the part of driver of Jeep No. 1431. He relied upon decision of Apex Court in case of New India Assurance Co. Ltd. v. Meera Bai and Ors. 2007 ACJ 821 and submitted that in that case, considering insurance schedule, it was held by Apex Court that the schedule covers "paid-driver and/or conductor", and therefore, obviously, the owner who is himself driving the vehicle is not covered under the policy. He submitted that in the said decision, earlier decision of Apex Court in case of Dhanraj Vs. New India Assurance Co. Ltd. and Another, has considered.

5. Learned Advocate Mr. K. K. Nair for appellant also placed reliance upon the decision of Apex Court in case of Ramashray Singh Vs. New India Assurance Co. Ltd. and Others, and submitted that the Apex Court has considered third party risk, expression "any person" and "any passenger" in Sub-clauses (i) and (ii) of Section 147(1)(b) and it was held that it covers only a driver, a conductor or examiner of tickets and no other employees such as cleaner (khalasi) are covered. He also submitted that in the said decision, it has also been held that comprehensive Insurance policy covers the loss sustained by the insured upto the insured amount irrespective of the actual loss suffered.

6. Learned Advocate Mr. K. K. Nair for appellant also relied upon the decision of Apex Court in case of Jameskutty Jacob Vs. United India Insurance Co. Ltd. and Others, and submitted that in the said decision, liability of the Insurance Company in respect of "Act-only" policy was considered by Apex Court and no documents produced to show that the vehicle insured was a taxi and not a private vehicle and it was held that the case is covered u/s 95(2)(c) and not u/s 95(2)(b)(i) and the liability of the Insurance Company is the liability incurred, even though, it is an "act-only" policy. After citing said decision, he submitted that he is not arguing any principles behind facts which have been decided by Apex Court. According to my opinion, judgment cannot be relied upon for the purpose of facts, it should have to be relied upon for deciding some ratio as per the principles laid down by Apex Court. In this case, Apex Court has considered liability in respect of no documents produced to show that the vehicle insured

was a taxi and not a private vehicle and it was held that the case is covered u/s 95(2)(c) and not u/s 95(2)(b)(i) and the liability of the Insurance Company is the liability incurred even though it is an "act-only" policy, and therefore, in that case, order of the Tribunal was restored by Apex Court.

7. Learned Advocate Mr. K. K. Nair for appellant submitted that the aforesaid decision in Jameskutty Jacob Vs. United India Insurance Co. Ltd. and Others, has been referred to by Apex Court in : 2006 (3) Scale 350 in case of Jameskutty Jacob v. United India Ins. Co. and Ors. And Apex Court considered policy which has been produced by the Insurance Company on record and matter has been decided a fresh explaining reasons why its Counsel could not appear in the Court on the date the matter was listed for hearing. By order dated 15th March 2004, interlocutory application filed by respondent Insurance Company was allowed and appeal was restored to its original number. Appeal filed by claimant has been dismissed. After citing aforesaid decisions, he submitted that the deceased in case before hand was businessman, was not paid-driver of owner and he was selling milk and was receiving income as per claimants" say on affidavit. He also emphasized that before Apex Court, document which was not produced in trial Court was considered by Apex Court. He now made it clear before this Court that he has now no further submissions to be made and no other decision is to be referred to and relied upon by him before this Court.

8. I have considered submissions made by learned Advocate Mr. Nair before this Court. I have also perused impugned award made by Claims Tribunal. I have also considered aforesaid decisions cited by learned Advocate Mr. Nair before this Court. In this appeal, this Court has considered only the award passed in respect of M.A.C.P. No. 854 of 1997 by the Claims Tribunal concerned.

9. Accident occurred on 9-5-1997. On 9-5-1997, deceased Jagabhai was going by driving jeep No. GNG-1431 from Rajkot to Bhavnagar and deceased Naranbhai and deceased Dhusabhai were travelling in said jeep and when they reached near Rangun Mata Mandir on Rajkot-Bhavnagar Road, at that time, one Jeep No. GJ-3K-2399 came from opposite direction, rashly and negligently, and dashed with the Jeep No. GBG-1431 as a result of which, deceased Jagabhai sustained grievous injuries and succumbed to injuries while other deceased Naranbhai and deceased Dhusabhai sustained serious injuries and petitioner Ratilal Tribhovandas travelling in Jeep No. GJ-3K-2399 also sustained grievous injuries and the Jeep No. GBG-1431 was also badly damaged. Therefore, claim for Rs. 6,00,000-00 was made by claimants in Claim Petition No. 854 of 1997 for death of deceased Jagabhai while contending that the deceased was 28 years old at the time of accident and was earning Rs. 3500-00 p.m. and claimants were depending on his income.

10. Before Claims Tribunal, reply was filed by opponent No. 5-Insurance Company of Jeep No. GBG-1431 vide Exhs. 26, 25 and 18 in Claim Petition Nos. 810 of 1997, 854 of 1997 and 1027 of 1997 wherein all allegations made in Claim Petition were denied in toto and it was inter alia contended that the claim

petitions are not true and the petitioners should prove same by strict proof. According to Insurance Company, accident took place because of sole negligence on the part of driver of Jeep No. GJ-3K-2399 and/or contributory negligence. Averments as regards age, income of deceased and injured, time, place of accident etc. are also denied and disputed.

11. Claims Tribunal framed issues at Exh. 18 in Claim Petition No. 854 of 1997. Before Claims Tribunal, learned Advocate Mr. N. M. Sinroja appeared for appellant-Insurance Company argued matter before Claims Tribunal on behalf of present appellant. Oral submissions were made before Claims Tribunal by learned Advocates for respective parties. Before Claims Tribunal, all the parties had come forward with the fair submissions at Exh. 94 in the form of arguments in nutshell that in the present case, there is collusion between two vehicles i.e. Jeep No. GJ-3K-2399 and Jeep No. GBG-1431 and in said accident, driver of Jeep No. 1431 died. It was also submitted that the opponent Nos. 1, 2 and 4 are driver and owner of jeeps and opponent Nos. 3 and 5 are Insurance Company of the said jeeps. Written submissions were also filed at Exh. 44 wherein it was contended that complaint and panchanama is listed at Exh. 57 and drivers of both vehicles caused accident. It was also submitted that driver of Jeep No. GBG-1431 died in accident while driver of other vehicle is not examined. Claimant Kankuben is examined at Exh. 26 but she was not having personal knowledge. Ratilal Maniar, claimant in Claim Case No. 1027 has been examined at Exh. 29 wherein it was admitted by him that the accident was caused due to negligence of drivers of both the vehicles. Therefore, it was observed by Claims Tribunal that on all such grounds, both vehicles have caused accident through head-on, collision, therefore negligence of both drivers may be counted 50:50 percent. In Para 19 of award, Claims Tribunal considered F.I.R. Exh. 57 and observed that it appears that the offence has been registered against driver of unknown jeep and in fact, it was the driver of Jeep Car No. GJ-3K-2399 against whom the offence has been registered. Perusing the F.I.R. and panchnama, it was observed that it appears that both the offending vehicles were on road and both caused damages on front side, and therefore, Claims Tribunal agreed with the arguments advanced by learned Advocates for the parties that the accident is caused due to head-on collision and due to rash and negligence of both the drivers. Before Claims Tribunal, learned Advocate Mr. N. M. Sinroja who was appearing for present appellant-Insurance Company had cross-examined Naranbhai Chhotabhai wherein Naranbhai has admitted that there was head on collision between both the jeep but which jeep was running fast, he was not knowing. However, at the same time, during the course of cross-examination by Shri Desai learned Advocate for New India Assurance Co. Ltd., this witness has replied that if Jagabhai would have taken all care and caution the accident would have been avoided. It was also admitted by him that the accident is caused on middle of the road, and therefore, on all such grounds, pursuant to the F.I.R. and panchnama and on the basis of deposition of witness, it was observed by Claims Tribunal that it is crystal clear that accident is caused by dashing of two vehicles

through head on collision. Thus, after perusing and considering F.I.R., panchnama and deposition of witnesses as referred to above, Claims Tribunal has come to conclusion that drivers of both vehicles were rash and negligent in driving their vehicle and say of claimant is fully corroborated by evidence on record, and therefore, Claims Tribunal held that there is 50:50 percent negligence of both drivers. Such evidence on record as well as the findings given by Claims Tribunal on the basis of such evidence on record is also not challenged by learned Advocate Mr. K. K. Nair in this appeal. Question of liability has been examined by Claims Tribunal in Para 57 of award at page 47. Therefore, Para 57 of impugned award is reproduced as under:

57. So far as liability of opponents is concerned, the opponent No. 1 being the driver of Jeep No. GJ-3K-2399 is liable to pay compensation as a tort-feasor. The opponent No. 2 being the owner of the Jeep No. GJ-3K-2399 is liable to pay an amount of compensation as a co-tort-feasor. The opponent No. 3 is the Insurance Company of Jeep No. GJ-3K-2399. Hence, Insurance Company of Jeep No. GJ-3K-2399 is also liable to satisfy award which may be passed against the opponent No. 2. The opponent No. 4 being the owner of Jeep No. GBG-1431 is liable to pay an amount of compensation to the petitioners as a co-tort-feasor. Learned Advocate for petitioner has argued that driver of Jeep No. GBG-1431 is died and if the driver of the jeep is to be held negligent to some extent, in that case, as the premium of risk of driver is covered, the petitioners of C.C. No. 854 of 1997 should be held liable to pay compensation. I had gone through the policy of insurance and I agree with the submissions made on behalf of petitioner that premium covering the risk of driver is paid. Hence, Opponent the Oriental Insurance Co. Ltd. is liable to pay compensation to the petitioner of C.C. No. 854 of 1997 whichever comes in their share and the other petitioners. Further, it is made clear that C.C. No. 1227 of 1997 has been filed by the owner of Jeep No. GBG-1431 against driver, owner and Insurance Company of Jeep No. GJ-3K-2399 for damages to Jeep. Hence, petitioner of C.C. No. 1227 of 1997 are entitled to get the amount of compensation from opponent Nos. 1 to 3 jointly and severally and other petitioners of C.C. Nos. 854 of 1997, 810 of 1997, 811 of 1997 and 1027 of 1997 are entitled to get the amount of compensation from the opponent Nos. 1 to 4 jointly and severally Hence, I answer issue No. 4 in the affirmative accordingly.

12. Thus, in Paragraph as aforesaid Claims Tribunal has considered liability and held that the opponent No. 1 being the driver of Jeep No. GJ-3K-2399 is liable to pay compensation as a tort-feasor and opponent No. 2 being the owner of the Jeep No. GJ-3K-2399 is liable to pay an amount of compensation as a co-tort-feasor and opponent No. 3 is the Insurance Company of Jeep No. GJ-3K-2399, and therefore, Insurance Company of Jeep No. GJ-3K-2399 is also liable to satisfy award which may be passed against the opponent No. 2. As regards opponent No. 4, it was held by Claims Tribunal that being the owner of Jeep No. GBG-1431 is liable to pay an amount of compensation to the petitioners as a co-tort-feasor. After considering arguments of learned Advocate for petitioner that

driver of Jeep No. GBG-1431 is died and if the driver of the jeep is to be held negligent to some extent, in that case, as the premium of risk of driver is covered, the petitioners of C.C. No. 854 of 1997 should be held liable to pay compensation, Claims Tribunal was agreeing with the submissions made on behalf of petitioner that premium covering the risk of driver is paid, and therefore, Opponent the Oriental Insurance Co. Ltd. is liable to pay compensation to the petitioner of C.C. No. 854 of 1997 whichever comes in their share and the other petitioners. These observations made by Claims Tribunal were objected by learned Advocate Mr. K. K. Nair before this Court after showing policy to this Court. He submitted that premium of Rs. 15-00 was paid by owner in respect of paid-driver whereas Jagabhai who was driving vehicle at the time of accident was not paid-driver of owner of Jeep No. 1431. I have considered this contention raised by learned Advocate Mr. K. K. Nair before this Court. However, considering the impugned award made by Claims Tribunal as it is, question which has been raised by learned Advocate Mr. K. K. Nair before this Court does not appear to have been raised by learned Advocate Mr. Sinroja before Claims Tribunal. Nowhere this contention was raised by appellant-Insurance Company before Claims Tribunal through its learned Advocate that the person Jagabhai who was driving the Jeep No. 1431 was not paid-driver of owner. Not only that, it was also not pleaded by appellant-Insurance Company in its pleadings before Claims Tribunal. This contention was also not raised by appellant in its written arguments submitted before Claims Tribunal. Therefore, appellant-Insurance Company is raising such contention before this Court for the first time without raising it in its pleading and pressing it into service before Claims Tribunal and also without giving an opportunity to other parties to submit their comments thereon and also without giving opportunity to Claims Tribunal to give its findings on such contentions. Whether the deceased Jagabhai who was driving Jeep No. 1431 was paid-driver or not cannot be considered to be pure question of law but in fact, it is a pure question of fact and it would require findings of Claims Tribunal on the basis of facts before it. Pure questions of fact are required to be pleaded before the Claims Tribunal. Question raised by appellant is not pure question of law, and therefore, it cannot be raised before this Court in this appeal as it was not raised by appellant in Claims Tribunal. Merely because claimants admitted in evidence that deceased Jagabhai was selling milk and was having income, that does not mean that deceased Jagabhai was not working as paid-driver of owner. Before Claims Tribunal no evidence was led by Insurance Company on this point. Here, I must say that question of leading evidence on this point would arise provided this question or contention is raised and pressed into service by appellant and since it was not raised, no evidence was led on this question of fact. Therefore, appellant cannot be permitted to raise such question of fact for the first time before this Court. It is true that the premium paid covers risk of paid-driver but contention was not raised on the basis of such policy whether the person driving vehicle at the time of accident was paid-driver or not and no finding is invited on such issue. One fact was very much clear that deceased Jagabhai was driving Jeep No. 1431 at the time of accident not for his

pleasure and leisure but he was working on jeep and jeep was entrusted by owner of jeep to him and he had not committed theft of said jeep and it is not even case of appellant, and therefore, it cannot be said that he was not paid-driver of jeep, meaning thereby, legal presumption is that he was engaged by owner of jeep for driving the jeep, and accordingly, he was driving Jeep No. 1431, means he was paid-driver of said jeep and payment has been received by him, and accordingly, he was working on said, jeep therefore, according to my opinion, contention raised by appellant-Insurance Company before this Court is raised only for the sake of raising it and has been raising it for taking advantage of the situation and to avoid its liability after pocketing amount of premium in respect of paid-driver. According to my opinion, if Insurance Company would have been really serious about the same, then, it would have definitely raised it before Claims Tribunal and would have certainly invited findings of Claims Tribunal on this issue whether person driving Jeep No. 1431 is paid-driver or not. If the Insurance Company was much aware about this contention and not objected submissions made by claimants as recorded in Para 57 "learned Advocate for petitioner has argued that driver of Jeep No. GBG-1431 is died and if the driver of the jeep is to be held negligent to some extent, in that case, as the premium of risk of driver is covered, the petitioners of C.C. No. 854 of 1997 should be held liable to pay compensation. I agree with the submissions made on behalf of petitioner that premium covering the risk of driver is paid." No counter-submission was made by Mr. Sinroja, Advocate for appellant before Claims Tribunal in respect of this contention and in view of that, decisions referred to and relied upon by learned Advocate Mr. K. K. Nair before (his Court are not applicable to facts of this case. With respect to him, no decision relating to this question has been cited by him but has cited decisions only for the sake of citing some decisions without considering real question involved in this appeal.

13. This aspect was examined by Apex Court in Daman Singh and Others Vs. State of Punjab and Others, Relevant Para 13 of said decision is reproduced as under:

13. The final submission of Shri Ramamurthi was that several other questions were raised in the writ petition before the High Court but they were not considered. We attach no significance to this submission. It is not unusual for parties and Counsel to raise innumerable grounds in the petitions and memoranda of appeal etc., but later, confine themselves, in the course of argument to a few only of those grounds, obviously because the rest of the grounds are considered even by them to be untenable. No party or Counsel is thereafter entitled to make a grievance that the grounds not argued were not considered. If indeed any ground which was argued was not considered it should be open to the party aggrieved to draw the attention of the Court making the order to it by filing a proper application for review or clarification. The time of the superior Courts is not to be wasted in enquiring into the question whether a certain ground to which no reference is found, in the judgment of the subordinate Court was argued before that Court or not?

14. In *Shankar K. Mandal and Others Vs. State of Bihar and Others*, also, this aspect is considered by Apex Court. Relevant discussion made by Apex Court is reproduced as under:

Held:

It is not open for the appellants to take such stand before the Supreme Court as they are bound by the observations of the High Court. If there was any wrong recording of the stands or a different stand was taken, the only course open to the appellant was to move the High Court. Statements of fact as to what transpired at the hearing, recorded in the judgment of the Court, are conclusive of the facts so stated and no one can contradict such statements by affidavit or otherwise. If a party thinks that the happenings in Court have been wrongly recorded in a judgment, it is incumbent upon the party while matter is still fresh in the mind of the Judges, to call the attention of the very Judges who have made the record. That is the only way to have the record corrected. If no such step is taken, the matter must necessarily end there. It is not open to the appellant to contend before the Supreme Court to the contrary. It is not open to contend that a plea raised was not considered.

15. This aspect has been considered by Apex Court in case of *Jagvirsingh and Ors. v. State (Delhi Admn.)* reported in 2007 (5) Sc 214. Relevant discussion made by Apex Court in Para 4 of said decision is reproduced as under:

4. If really there was no concession, the only course open to the appellants was to move the High Court in line with what has been said in *State of Maharashtra Vs. Ramdas Shrinivas Nayak and Another, In Bhavnagar University v. Palitana Sugar Mill Pvt. Ltd. and Ors.* AIR 2002 SCW 4939, the view in the said case was reiterated by observing that statements of fact as to what transpired at the hearing, recorded in the judgment of the Court, are conclusive of the facts so stated and no one can contradict such statements by affidavit or other evidence. If a party thinks that the happenings in Court have been wrongly recorded in a judgment, it is incumbent upon the party while the matter is still fresh in the minds of the Judges, to call the attention of the very Judge who has made the record. That is the only way to have the record corrected. If no such step is taken, the matter must necessarily end there. It is not open to the appellants to contend before this Court to the contrary.

16. Similarly, recently also, this aspect has been examined by Apex Court in case of *Mohd. Akram Ansari v. Chief Election Officer and Ors.* reported in AIR 2008 SCW 416. Para 14 of said decision is reproduced as under:

14. In this connection, we would like to say that there is a presumption in law that a Judge deals with all the points which have been pressed before him. It often happens that in a petition or appeal several points are taken in the memorandum of the petition or appeal, but at the time of arguments only some of these points are pressed. Naturally a Judge will deal only with the points which are pressed before him in the arguments and it will be presumed that the

appellant gave up the other points, otherwise he would have dealt with them also. If a point is not mentioned in the judgment of a Court, the presumption is that point was never pressed before the learned Judge and it was given up. However, that is a rebuttable presumption. In case the petitioner contends that he had pressed that point also (which has not been dealt with in the impugned judgment), it is open to him to file an application before the same learned Judge (or Bench) which delivered the impugned judgment, and if he satisfies the Judge (or Bench) that the other points were in fact pressed, but were not dealt with in the impugned judgment, it is open to the concerned Court to pass appropriate orders, including an order of review. However, it is not ordinarily open to the party to file an appeal and seek to argue a point which even if taken in the petition or memorandum filed before the Court below, has not been dealt with in the judgment of the Court below. The party who has this grievance must approach the same Court which passed the judgment, and urge that the other points were pressed but not dealt with.

17. Recently also, Apex Court has delivered judgment on 21st November, 2008 in case of *Md. Rafique @ Chachu v. State of West Bengal* reported in 2008 (15) Scale 15 wherein it was observed by Apex Court that "if a party thinks that the happenings in Court have been wrongly recorded in a judgment, it is incumbent upon the party while the matter is still fresh in the minds of the Judges to call the attention of the very Judges who have made the record. That is the only way to have the record corrected. If no such step is taken, the matter must necessarily end there. It is not open to the appellant to contend before this Court to the contrary." Relevant discussion made in Para 5 of said decision is reproduced as under:

5. It would be logical to first deal with the plea relating to absence of concession. It is to be noted that the appellant conceded certain aspects before the High Court. After having done so, it is not open to the appellant to turn around or to take a plea that no concession was given. This is clearly a case of sitting on the fence and it is not to be encouraged. If really there was no concession, the only course open to the appellant was to move the High Court in line with what has said in *State of Maharashtra Vs. Ramdas Shrinivas Nayak and Another*, In a decision *Bhavnagar University Vs. Palitana Sugar Mill Pvt. Ltd. and Others*, the view in the said case was reiterated by observing that statements of fact as to what transpired at the hearing, recorded in the judgment of the Court are conclusive of the facts so stated and no one can contradict such statements by affidavit or other evidence, if a party thinks that the happenings in Court have been wrongly recorded in a judgment, it is incumbent upon the party while the matter is still fresh in the minds of the Judges to call the attention of the very Judges who have made the record. That is the only way to have the record corrected. If no such step is taken, the matter must necessarily end there. It is not open to the appellant to contend before this Court to the contrary. The above position was highlighted in *Roop Kumar Vs. Mohan Thedani*,

18. The Hon"ble Apex Court in the case of Ex. Constable Ramvir Singh v. Union of India reported in AIR 2009 SCW 163 also, in Para Nos. 9 and 10, observed as under:

9. The question as to whether he was discriminated against vis-a-vis the aforementioned Kalipada Mandal having not been raised by him before the High Court, we are of the opinion that it is not possible for us to consider the said contention which has been raised for the first time. Mr. Pandey submitted that such a contention had been raised in the Writ Petition. It might have been raised but it does not appear from the impugned judgment that the same was pressed before the High Court. This Court is bound by the Judge's record. If the High Court, as contended by Mr. Pandey, despite raising a contention in that behalf did not deal therewith, the only remedy available to him was to move the High Court drawing its attention thereto. Apart from the fact that the said procedure was not adopted by appellant, even before us, neither the Counsel appearing in the High Court nor the appellant, affirmed any affidavit that such a contention, in fact, had been raised before the High Court. It is, therefore, not possible for us to accept that the contention as regards the discrimination against the appellant viz-a-viz the said Kalipada Mandal was raised.

10. In State of Maharashtra v. Ramdas Shrinivas Nayak 1982 (2) SCC 462, this Court held:

4. When we drew the attention of the learned Attorney General to the concession made before the High Court, Shri A. K. Sen, who appeared for the State of Maharashtra before the High Court and led the arguments for the respondents there and who appeared for Shri Antulay before us to peruse the written submissions made by him in the High Court. We are afraid that we cannot launch into an inquiry as to what transpired in the High Court. It is simply not done. Public policy bars us. Judicial decorum restrains us. Matters of judicial record are unquestionable. They are not open to doubt. Judges cannot be dragged into the arena. "Judgments cannot be treated as mere counters in the game of litigation." (Per Lord Atkinson in Somasundaram Chetty v. Subramanian Chetty AIR 1926 PC 136). We are bound to accept the statement of the Judges recorded in their judgment, as to what transpired in Court. We cannot allow the statement of the Judges to be contradicted by statements at the Bar or by affidavit and other evidence. If the Judges say in their judgment that something was done, said or admitted before them, that has to be the last word on the subject. The principle is well settled that statements of fact as to what transpired at the hearing, recorded in the judgment of the Court, are conclusive of the facts so stated and no one can contradict such statements by affidavit or other evidence. If a party thinks that the happenings in Court have been wrongly recorded in a judgment, it is incumbent upon the party, while the matter is still fresh in the minds of the Judges, to call the attention of the very Judges who have made the record to the fact that the statement made with regard to his conduct was a statement that had been made in error (Per Lord Buckmaster in Madhu Sudan

Chodhri v. Chandrabati Chowdhrair AIR 1917 PC 30). That is the only way to have the record corrected. If no such step is taken, the matter must necessarily end there. Of course a party may resile and an appellate Court may permit him in rare and appropriate cases to resile from a concession on the ground that the concession was made on a wrong appreciation of the law and had led to gross injustice; but, he may not call in question the very fact of making the concession as recorded in the judgment.

19. Considering the aforesaid decisions, the principle is well settled that statements of fact as to what transpired at the hearing, recorded in the judgment of the Court, are conclusive of the facts so stated and no one can contradict such statements by affidavit or other evidence. If a party thinks that the happenings in Court have been wrongly recorded in a judgment, it is incumbent upon the party, while the matter is still fresh in the minds of the Judges, to call the attention of the very Judges who have made the record to the fact that the statement made with regard to his conduct was a statement that had been made in error. That is the only way to have the record corrected. If no such step is taken, the matter must necessarily end there. Of course a party may resile and an appellate Court may permit him in rare and appropriate cases to resile from a concession on the ground that the concession was made on a wrong appreciation of the law and had led to gross injustice; but, he may not call in question the very fact of making the concession as recorded in the judgment. There is reason behind it because if lawyer who argued before Court, then, two things happen, either Court may consider it or Court can ignore it and if it is considered, then, it will find place in the judgment and if it is ignored, then, it will not find place in judgment and in that event, Advocate concerned having grievance about non-consideration of his contentions shall have to approach Court or Tribunal concerned. Insurance Company might have raised number of contentions in its written statement as well as written submissions, but not argued any of them or argued only few of them and not all raised, then, in such circumstances, Court or Tribunal is not required to consider each and every contentions raised by party in written statement and written submissions but it has to consider only those which have been pressed into service at the time of arguments and yet if the party concerned is having grievance that it has not been considered or ignored, then, in view of aforesaid decisions, such party has to approach the Court concerned for getting corrected the order passed by it.

20. In State of Maharashtra Vs. Ramdas Shrinivas Nayak and Another, Apex Court observed in Para 7 that "So the Judges" record is conclusive. Neither lawyer nor litigant may claim to contradict it, except before the Judge, himself, but nowhere else." Relevant discussion made by Apex Court in Paras 4 to 7 of said decision is reproduced as under:

4. When we drew the attention of the learned Attorney General to the concession made before the High Court, Shri A.K. Sen, who appeared for the State of Maharashtra before the High Court and led the arguments for the respondents

there and who appeared for Shri Antulay before us intervened and protested that he never made any such concession and invited us to peruse the written submission made by him in the High Court. We are afraid that we cannot launch into an inquiry as to what transpired in the High Court. It is simply not done. Public policy bars us. Judicial decorum restrains us. Matters of Judicial record are unquestionable. They are not open to doubt. Judges cannot be dragged into the arena. "Judgments cannot be treated as mere counters in the game of litigation". (Per Lord Atkinson in *Somasundaram v. Subramanian* AIR 1926 PC 136). We are bound to accept the statement of the Judges recorded in their judgment, as to what transpired in Court. We cannot allow the statement of the Judges to be contradicted by statements at the Bar or by affidavit and other evidence. If the Judges say in their judgment that something was done, said or admitted before them, that has to be the last word on the subject. The principle is well-settled that statements of fact as to what transpired at the hearing, recorded in the judgment of the Court, are conclusive of the facts so stated and no one can contradict such statements by affidavit or other evidence. If a party thinks that the happenings in Court have been wrongly recorded in a judgment, it is incumbent upon the party, while the matter is still fresh in the minds of the Judges, to call the attention of the very Judges who have made the record to "the fact that the statement made with regard to his conduct was a statement that had been made in error (Per Lord Buckmaster in *Madhusudan v. Chandrabati* AIR 1917 PC 30). That is the only way to have the record corrected. If no such step is taken, the matter must necessarily end there. Of course, a party may resile and an Appellate Court may permit him in rare and appropriate cases to resile from a concession on the ground that the concession was made on a wrong appreciation of the law and had led to gross injustice; but he may not call in question the very fact of making the concession as recorded in the judgment.

4-A. In *R. v. Mellor* 1858 (7) Cox CC 454 Martin B. was reported to have said : "We must consider the statement of the learned Judge as absolute verity and we ought to take his statement precisely as a record and act on it in the same manner as on a record of Court which of itself implies an absolute verity.

5. In *The King Emperor Vs. Barendra Kumar Ghose*, Page, J. said.

...these proceedings emphasise the importance of rigidly maintaining the rule that a statement by a learned Judge as to what took place during the course of a trial before him is final and decisive; it is not to be criticised or circumvented; much less is it to be exposed to animadversion.

6. In *Sarat Chandra Maiti and Others Vs. Bibhabati Debi and Others*, Sir Asutosh Mookherjee explained what had to be done:

It is plain that in cases of this character where a litigant feels aggrieved by the statement in a judgment that an admission has been made, the most convenient and satisfactory course to follow, wherever practicable, is to apply to the Judge, without delay and ask for rectification or review of the judgment.

7. So the Judges' record is conclusive. Neither lawyer nor litigant may claim to contradict it, except before the Judge, himself, but nowhere else.

21. Therefore, in view of this background, none of the above decision cited by learned Advocate Mr. Nair are applicable to facts of this case, and therefore, contentions raised by learned Advocate Mr. Nair cannot be accepted because same were not raised by appellant-Insurance Company before Claims Tribunal as discussed above. Not a single question was asked by Advocate for appellant to claimant whether driver was paid-driver or not. Even otherwise, when person driving jeep is not owner of jeep, normal presumption would be that he was engaged by owner of vehicle, and therefore, he is paid-driver. Therefore, contentions raised by learned Advocate Mr. K. K. Nair cannot be accepted and same, are therefore, rejected. Decisions relied upon by learned Advocate Mr. Nair before this Court are not applicable to facts of this case, and therefore, there is no substance in this appeal and same is therefore liable to be dismissed.

22. In result, this appeal is dismissed.

23. Since first appeal is dismissed by this Court today, no order is required to be passed in Civil Application for stay, therefore, Civil Application for stay is disposed of accordingly. Amount, if any, deposited by appellant-Insurance Company in registry of this Court be transmitted to Claims Tribunal immediately.