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**(1998) 09 KL CK 0018**

**In the High Court Of Kerala**

**Case No : M.F.A. No's. 642 and 643 of 1996**

Oriental Insurance Co. Ltd.

APPELLANT

Vs

T.P. Balakrishnan and Others

RESPONDENT

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**Date of Decision : 24-09-1998**

**Acts Referred:**

Motor Vehicles Act, 1988 — Section 147, 149, 96

**Citation :** (1999) ACJ 950 : (1999) 1 ILR (Ker) 349

**Hon'ble Judges :** P.A. Mohammed, J;D. Sreedevi, J

**Bench :** Division Bench

**Advocate :** Jacob Murikan, for the Appellant; A.K. Srinivasan, A.S. Benoy, N.S. Mohammed Usman and Grashious Kuriakose, for the Respondent

**Final Decision :** Dismissed

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## **Judgement**

P.A. Mohammed, J.—These appeals are arising from a common award passed by M.A.C.T., Thalassery dated 28.11.1995 in O.P. (M.V.) Nos. 809 and 810 of 1992. The insurer of the vehicle involved in the accident, Oriental Insurance Co. Ltd., is the appellant in both the appeals. Two persons who had sustained injuries in the accident occurred on 13.2.1992 filed applications for compensation in respect of the injuries sustained by them. The Tribunal after the enquiry awarded a sum of Rs. 13,000 with 12 per cent interest in O.P. (M.V.) No. 809 of 1992. Likewise in O.P. (M.V.) No. 810 of 1992 the Tribunal awarded a sum of Rs. 65,000 with 12 per cent interest. It further ordered that the owner of the vehicle shall be indemnified by the appellant insofar as the compensation awarded to the claimants. The insurer being aggrieved by the said direction, filed these appeals.

2. The learned Counsel for the appellant submitted that there was violation of the permit conditions and, therefore, the insurer was not liable to indemnify the owner of the vehicle. He has specifically brought to our notice the provisions contained in Section 149(2)(a)(i)(c) of the Motor Vehicles Act, 1988. Section 149(1) mandates the liability of the insurer to satisfy judgments and awards against persons insured in respect of third party risks. If after a certificate of

insurance has been issued under Sub-section (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 is obtained against any person insured by the policy, then the insurer shall pay to the person entitled to the benefit of the decree any sum not exceeding the sum assured, as if he were the judgment-debtor in respect of the liability. However, Sub-section (2) of Section 149 provides that no such sum shall be payable by an insurer in respect of any judgment or award unless the insurer had notice through the court or Tribunal of the bringing of the proceedings. An insurer to whom the notice as above is given, shall be entitled to be made a party thereto and to defend the action on any of the grounds mentioned in Clause (a) or (b) thereof. As per Clause (a) (i) (c) the insurer is entitled to defend the action on the ground that there has been a breach of a specified condition of the policy, namely, a condition excluding the use of the vehicle for a purpose not allowed by the permit under which the vehicle is used, where the vehicle is a transport vehicle. The argument is that insured has used the vehicle for the purpose not allowed by the permit. The allegation is that as per the permit condition the maximum carrying capacity of the vehicle is 6 including the driver but it actually carried 11 persons and thus the policy condition had been violated by the owner of the vehicle. Therefore, the insurer is not liable to indemnify the owner in respect of the award obtained against him by the claimants. However, the Tribunal found that there was no evidence in this case to show that the insured had wilfully violated or breached the conditions of the policy. In this context it has to be observed that there is no evidence to the effect that the insured has actually permitted the driver of the vehicle to carry persons in excess of the maximum capacity.

3. In *Skandia Insurance Co. Ltd. v. Kokilaben Chandravadan* 1987 ACJ 411 (SC), the Supreme Court was considering the corresponding provisions contained in the Motor Vehicles Act, 1939, namely, Section 96(2)(b)(ii). There the expression "breach" has been interpreted and observed that the dictionary meaning of "breach" is infringement or violation of a promise or obligation. The Supreme Court further said that it is, therefore, abundantly clear that the insurer will have to establish that the insured is guilty of an infringement or violation of a promise that a person who is duly licensed will be in charge of the vehicle. The very concept of infringement or violation of the promise that the expression "breach" carries within itself induces an inference that the violation or infringement on the part of the promisor must be a wilful infringement or violation. It is only when the insured himself places the vehicle in charge of a person who does not hold a driving licence, it can be said that he is "guilty" of the breach of the promise that the vehicle will be driven by a licensed driver. Unless the insured is at fault and guilty of a breach the insurer cannot escape from the obligation to indemnify the insured and successfully contend that he is exonerated having regard to the fact that the promisor (the insured) committed a breach of his promise.

4. The Apex Court in *B.V. Nagaraju v. Oriental Insurance Co. Ltd* 1996 ACJ 1178 (SC), had occasion to deal with the provisions contained in Section 147 of the

Motor Vehicles Act, 1988. From the above decision it is evident that the Supreme Court had propounded a vivid distinction between the purpose of the vehicle and the knowledge of the owner as to the alleged use made by the driver of the vehicle. The Supreme Court in this context observed thus:

Merely lifting a person or two, or even three, by the driver or the cleaner of the vehicle, without the knowledge of owner, cannot be said to be such a fundamental breach that the owner should, in all events, be denied indemnification. The misuse of the vehicle was somewhat irregular though, but not so fundamental in nature so as to put an end to the contract, unless some factors existed which, by themselves, had gone to contribute to the causing of the accident.

As a matter of fact no such contributory factor is involved in the present case. What is involved here is that without the knowledge of the owner of the vehicle, the driver had carried passengers in excess of the permitted number of passengers. This is an irregularity committed by the driver and that cannot be attributed to the owner of the vehicle. For this reason it cannot be said that the vehicle was used for a purpose not allowed by the permit. In this context, it is apt to recall what Venkataramiah, J. (as the learned Judge then was) said on behalf of the Division Bench of the Karnataka High Court in *B.V. Nagaraju Vs. M/s. Oriental Insurance Co. Ltd., Divisional Officer, Hassan*, . The court said:

Under the permit issued under the Motor Vehicles Act, the owner of the car was entitled to carry passengers. Admittedly, the passengers were being carried in the car at the time of the incident. So it cannot be said that the car was being used for a purpose different from the one for which it had been licensed. Merely because there was overloading, we cannot say that the car was being used for a different purpose.

In view of the principle emerged from the above decisions we are of the view that there is no merit in the contention advanced by the counsel for the appellant. The appeal is accordingly dismissed.