**(2013) 12 GUJ CK 0021**

**In the Gujarat High Court**

**Case No :** First Appeal No''s. 2402 and 2403 of 2009 and Civil Application No. 6502 of 2009 in First Appeal No. 2403 of 2009

Rashilaben APPELLANT

Vs

Mukeshgiri Bhagvangiri Bavaji and Another RESPONDENT

**Date of Decision :** 09-12-2013

**Acts Referred:**

**Citation :** (2013) 12 GUJ CK 0021

**Hon'ble Judges :** M.D. Shah, J

**Bench :** Single Bench

**Advocate :** L.R. Pathan, No. 1, for the Appellant; Palak H. Thakkar, Advocate for the Respondent No. 2, for the Respondent

**Final Decision :** Dismissed

## Judgement

M.D. Shah, J.—These appeals under Sec. 173 of the Motor Vehicles Act have been filed by the original applicants being aggrieved and dissatisfied with the common judgment and awards dated 3-8-2004 passed by the Motor Accidents Claims Tribunal (Aux.), Veraval, in MACP Nos. 328 of 2002 327 of 2002 respectively whereby the claimants were awarded compensation by holding that driver and owner of the offending vehicles were jointly and severally liable to pay the amount. However, the Insurance Company has been exonerated from liability to pay compensation. Heard learned advocates for the respective parties.

2. It is submitted by learned advocate, Mr. L.R. Pathan for the original applicants that as per various decisions of Hon?ble Apex Court, insurance company is liable to pay compensation but insurance company is at liberty to recover from the owner of the vehicle. However, the Tribunal has committed error in fastening liability only on the driver and owner of the vehicle and not on the Insurance Company.

3. It is however submitted by Mr. Palak H. Thakkar for the original opponent No. 2-Insurance Company that the claimants were travelling as unauthorised

 

passengers in the vehicle which is a breach of condition of policy and risk of such passengers were not covered under Sec. 147 of the Motor Vehicles Act and hence, insurance company is not liable to pay any compensation. It is further submitted that there is prima facie breach of condition of policy and hence, it was rightly held by the Tribunal that insurance company is not liable to pay compensation and hence, the appeals deserve to be dismissed.

4. This Court has gone through the impugned judgment and awards. Prima facie it seems that claimants were travelling as unauthorised passengers in the vehicle which is a breach of condition of policy and risk of such passengers is not covered under the policy and, therefore, insurance company is not liable to pay any compensation. This Court (Coram: Chief Justice) in First Appeal No. 2121 of 2008 relying upon several judgments of Hon?ble Apex Court, has held that insurance company is not liable to pay any compensation and direction to pay the amount and to recover amount can only be given in exercise of power conferred under Article 142 of the Constitution of India. It has been observed by this Court in paragraphs 12.2, 13 and 14 as under:

12.2 The above observations make it clear that the direction to pay the amount first and then to recover such amount can only be given in exercise of power conferred under Article 142 of the Constitution and the Supreme Court in the peculiar facts of the above case, exercised such power notwithstanding the pendency of reference to the larger bench.

13. Be that as it may, there is no scope of passing such a direction either at the instance of the Tribunal below or of this court in this appeal u/s 173 of the Act.

14. On consideration of the entire materials on record, I, therefore, hold that the learned Tribunal below erred in law in passing the direction upon the Insurance Company to pay the amount and then recover such amount notwithstanding its finding that the Insurance Company has no liability to pay the amount as the victims are not the third parties within the meaning of law.

5. In view of the above observations of this Court, order to pay the amount and then to recover such amount from the owner can only be passed in exercise of power conferred under Article 142 of the Constitution of India and the Hon?ble Supreme Court in the peculiar facts of the above case, exercised such power notwithstanding the pendency of reference to the larger bench. In view of the above, this Court is of the opinion that the insurance company has been rightly exonerated by the Tribunal and hence, both the appeals require to be dismissed.

6. In view of the above, appeals are dismissed. There shall be no order as to costs.

7. In view of the above order, Civil Application No. 6502 of 2009 in First Appeal No. 2403 of 2009 is disposed of.

8. Records and proceedings are ordered to be sent back forthwith. Office shall place a copy of this judgment in each matter.