

IN THE HIGH COURT OF JUDICATURE AT PATNA

Miscellaneous Appeal No.182 of 2010

1. Branch Manager, United India Insurance Company, Gaziabad

.... Appellant/s

Versus

1. Sita Devi, W/O Rameshwar Sada (Deceased), R/O Vill.- Nirpur Bhararia, Singhia, Distt.- Samastipur

2. Chanda Kumari, D/O Late Rameshwar Sada (Minor, Under Guardianship of Their Natural Guardian Mother Sita Devi), R/O Vill.- Nirpur Bhararia, Singhia, Distt.- Samastipur

3. Dimpal Kumari, D/O Late Rameshwar Sada (Minor, Under Guardianship of Their Natural Guardian Mother Sita Devi), R/O Vill.- Nirpur Bhararia, Singhia, Distt.- Samastipur

4. Skumari Devi, Mother of Late Rameshwar Sada, R/O Vill.- Nirpur Bhararia, Singhia, Distt.- Samastipur

5. Abbas Ali, S/O Baboo Siddiqui Chajja Bazar, Dausa, Ghaziabad, U.P. (Owner of Tata 407 of DDL/4879)

6. Managing Director, Madhya Pradesh Road Transport Corporation Head Office, Habib Ganj Bhopal (Owner of Bus No. M.P. 33F-0006)

.... Respondent/s

Appearance :

For the Appellant/s : Mr. Ram Chandra Lal Das &
Mr. Ashok Kumar-Advocates

For the Respondent/s : Mr. Satyanand Shukla-Advocate

CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
CAV JUDGMENT

Date: 08-02-2016

Instant appeal has been filed by the appellant/ opposite party United India Insurance Company against the judgment dated 20.10.2009 and award dated 18.12.2009 passed by the District Judge-Cum-Claim Tribunal, Samastipur in Claim Case No.76 of 2000 whereby and whereunder claim petition filed on behalf of respondents no.1 to4 has been held maintainable and further, granted a sum of Rs.40,8,000/- in lieu of compensation bifurcating the liability amongst

Appellant/ Opposite Party nos.2 and Respondent no.6/ opposite party no.3 to the extent of half and half along with an interest @ 6% pendente lite in case is paid within three months from the date of receipt of the order, failing which interest @ 10% will be applicable till the realization of the amount.

2. Deceased, Rameshwar Sada along with others boarded Tata-407 bearing Registration No.DDL-4879 on 07.08.2000, met with head on collision with a bus bearing Registration No.MP-33F-0006 owned by Madhya Pradesh Road Transport Corporation and on account thereof, he along with others died at the spot for which Hafizpur P. S. Case No.59 of 2000 was registered. The claimants, who happens to be wife and siblings of deceased Rameshwar Sada have further disclosed that deceased was aged about 35 years at the time of his death and was engaged as an Expert Labour earning Rs.100/- per day and was contributing the family a sum of Rs.25,00/- per month.

3. Abbas Ali, owner of Tata-407, Branch Manager, United India Insurance Company Limited, Gaziabad insurer of Tata-407 bearing Registration No.DDL-4879 as well as Managing Director, Madhya Pradesh Road Transport Corporation were impleaded as party out of whom the Opposite Party No.2, Branch Manager, United India Insurance Company Limited as well as

Managing Director, Madhya Pradesh Road Transport Corporation appeared before the learned lower Court, filed their written statement respectively.

4. It has been pleaded on behalf of Appellant/ Opposite Party No.2, United India Insurance Company Limited, apart from an ornamental objection wherein the factum of insurance has been admitted that it was the vehicle which was coming from other side being rashly and negligently driven and dashed against Tata-407 bearing Registration No.DDL-4879 and so, it happens to be owner of the Bus, who is to be blamed for and further, liable to pay compensation. It has also been submitted that Tata-407 bearing Registration No.DDL-4879 was Mini-Truck, a Goods Carrier and the premium was paid only therefor including three persons and so, could not be identified for transportation of the passengers and that being so, as per terms of policy, the Opposite Party No.2, Insurance Company was not at all liable nor could be fasten with the responsibility to pay compensation. Therefore, even admitting the death of deceased including nine others at the spot itself, Opposite Party No.2 cannot be directed to pay compensation.

5. Furthermore, it has also been pleaded that driving licence should have been placed to infer that the driver on the alleged date and time of accident, was possessing valid licence. In likewise manner, the amount of compensation has also been challenged to be

exorbitant one.

6. Opposite Party No.3, Madhya Pradesh Road Transport Corporation, apart from putting ornamental pleading denied the averments of the petition on each and every aspect that means to say, over the manner of occurrence, the status of the deceased, earning of the deceased in very precise and concise manner. However, it is found from the record that during course of trial, Opposite Party No.3, owner of Tata-407 did not actively participated.

7. No appeal has been preferred by the Madhya Pradesh Road Transport Corporation while insurer of Tata-407 has challenged the judgment and award impugned.

8. On the pleadings of the respective parties, the following issues were framed by the learned lower Court:-

I. Is that the Claim Case as filed maintainable?

II. Is that the accident took place due to rash and negligent driving of the offending vehicle Tata-407 bearing registration DDL.4879 and the Bus bearing registration No.MP-33-0006?

III. Is that the deceased Rameshwar Sada died out of this accident?

IV. Is that the claimants are entitled to compensation as prayed for with interest?

V. Is that the O.P. No.2 and 3 are equally

responsible for the payment of compensation with interest?

Furthermore, decided the issue in favour of applicants against the opposite party. With regard to issue no.5, the same has been discussed under Paras-8, 9 of the judgment wherein, it has been observed that the policy does not disclose that the Tata-407 was a truck. The witnesses also narrated that deceased and others comprising forty in number Boarded in bus at Bus Stand, hence the Tata-407, was Mini-Bus and not truck and on the aforesaid finding as well as considering the case of contributory negligence fastened with liability and directed to share the burden half and half.

9. From the lower court record, it is also apparent that five witnesses have been examined on behalf of Respondent nos.1 to 4/ applicants as well as two exhibits have also been brought up on record viz. Exhibit-1 First Information Report and Exhibit-2, post mortem examination. No witness has been adduced on behalf of Opposite Parties. However, on behalf of Appellant/ Opposite Party No.2, Insurance Company, Two exhibits have been brought on record viz. Exhibit-A, investigation report and Exhibit-B, the copy of the covernote.

10. While challenging the judgment and award impugned, it has been submitted on behalf of Appellant that instant petition suffers from inherent defect. Drivers of the respective



vehicles have not been pleaded as a party. On this score, it has been submitted that owner is vicariously responsible for the act of his employee while any kind of unfortunate event is found committed at the hands of his employee during course of his employment. Therefore, in a claim case, owner of the vehicle will be accountable only when there happens to be presence of driver, who could be held accountable for the fault having committed at his end during course of employment and for that, he was to hold valid driving licence as required under Motor Vehicles Act. In likewise manner, insurer is found responsible to substitute liability of owner, in case there happens to be proper compliance of terms on the policy.

11. In its continuity, it has also been pleaded that presence of driver was necessary in the facts and circumstances of the case, because of the fact that being a Goods Carrier, Transportation of passenger was prohibited, which was disregarded and during said course, met with an accident, the passengers sustained injuries and succumbed. Therefore, driver was the fit person to say whether the aforesaid event, though contrary to the terms and conditions of the policy, was taken up by the driver himself or at the instance of his owner. Therefore, non-pleading of driver happens to be serious lacuna and on that very score, instant petition would have been dismissed.

12. It has further been submitted that learned lower Court in a catalepsy manner bifurcated the award impugned half and half



directing, apart from Madhya Pradesh Road Transport Corporation, appellant also to part with and share the responsibility. In this context, it has been submitted that neither the vehicle was passenger vehicle nor premium was paid against that and so, insurance is not at all responsible to share the burden against gratuitous passengers. So, submitted that the judgment and award impugned, happens to be wrong, illegal, arbitrary as well as also shows non-application of judicial mind.

13. Learned counsel representing respondent Nos.1 to 4 had controverted the submission and submitted that the judgment and award impugned is just, legal and proper whereupon is fit to be confirmed. In order to justify the same, it has been submitted that grant of compensation under Motor Vehicles Act is based upon theory of Tort Feasor. Whether premium was paid or not is irrelevant in the background of the fact that the vehicle was comprehensively insured. Permitting the deceased along with other labourers for journey by Tata-407, even considering the submission made on behalf of appellant was wrong committed at the end of driver, who was employed by his owner and on account thereof, it happens to be the negligence of employer as well as employee which has properly been insured as well as indemnified by the appellant and so, rightly been acknowledged to share half burden by the learned lower Court out of total amount so granted, while half has been attributed against

Madhya Pradesh Road Transport Corporation. On this score, also relied upon **2004(1) P.L.J. 770, 2004(8) SCC 667.**

14. Madhya Pradesh Road Transport Corporation, respondent No.6 in spite of valid notice, failed to appear, at the other end, the owner of the vehicle respondent no.5, Abbas Ali like lower Court event failed to appear.

15. After hearing respective counsels as well as going through the lower court record including the judgment and decree impugned, the following admitted facts emerge:-

- a) Presence of deceased along with other labourers over Tata-407 bearing Registration No.DDL-4879 is admitted one.
- b) Head on collusion in between Madhya Pradesh Road Transport Corporation Bus bearing Registration No.MP-33F-0006 with Tata-407 bearing Registration No.DDL-4879 is also out of controversy and in likewise manner,
- c) Death of ten labourers including deceased Rameshwar Sada.

16. At the present stage, two events are noticeable. The first one, though there happens to be absence of owner of Tata-407 before the lower Court, even then, no petition under Section 170 of the M. V. Act was filed at the end of appellant/ opposite party no.2.

The second event is found traceable from the order dated 19.05.2009, which contains the submission made on behalf of appellant/ opposite party no.2 that it happens to be a case of contributory negligence and further, a liberty be given to realize the amount from the owner.

17. Before delving over the deficiency so pointed out by the appellant, first of all, effect of non-compliance of Section 170 of the M.V. Act has to be seen. For better appreciation, Section 170 of the M. V. Act is quoted below:-

Section-170- Impleading insurer in certain cases:- whose in the course of any inquiry, the claims tribunal is satisfied that

(a) there is collusion between the person making the claim and the person against whom the claim is made or

(b) the person against whom the claim is made has failed to contest the claim

It may, for reasons to be recorded in writing, direct that the insurer who may be liable in respect of such claim, shall be impleaded as a party to the proceeding and the insurer so impleaded shall thereupon have, without prejudice to the provisions contained in Sub-section (2) of Section 149, the right to contest the claim on all or any of the grounds that are available to the person against whom the claim has been made.



18. The grounds, which are available to insured is to be availed by the insurer only in case there happens to be fulfilment of criteria so laid down under Sub-clause (a) or (b), which is itself apparent from plain reading of Section 170 of the Act, and for that the insurance company has to seek permission. In the present context, it is evident that the insurance company had not prayed for granting permission, and on account thereof, was only entitled to oppose, in terms of Section 149(2) of the Act, as is found earmarked in Section 170 itself. The aforesaid view is found substantiated with **National Insurance Company Limited vs. Nicolletes Rohtagi reported in (2002) 7 SCC 456.**

19. The effect of exception so granted in terms of Section 149 (2) of the Act only relates with the violation of terms and conditions of the policy. For this purpose, when the pleading of the appellant/ opposite party has been gone through, from Para-6, it is evident that it has shown intention to share responsibility with the Bus owner. For better appreciation, relevant Para is quoted. “And in this view of the matter, the Bus owner is along liable to pay the compensation, if any, to the heirs of the deceased”. However, in Para-7 of written statement had pleaded specifically “that the insured vehicle was a truck, and was a goods carrier and was not for passenger transportation, nor the insurance policy was issued for the same.

Hence, insurance was not liable to indemnify the liability of the owner.”

20. Although two exhibits have been made on behalf of appellant/ opposite party, out of which Exhibit-‘A’ is investigation report submitted by the surveyor wherein it has been incorporated that the vehicle in question happens to be Tata-407 Truck, but its admissibility on account of non-examination of Surveyor is found out of consideration, while Exhibit-‘B’ is the cover note wherefrom identity of the vehicle is completely vague. Policy has been issued by the Insurance Company/ Appellant and on account thereof, it was incumbent upon the Appellant/ Insurance Company to furnish original/ duplicate police in order to strengthen their claim that the vehicle in question happens to be Truck, and it was not insured for passenger traffic, in order to avail the grounds so enumerated under Section 149(2) of the Act.

21. Now, coming to oral evidence, it is evident that all the applicants/ Respondent witnesses have stated that it was a Bus. During cross-examination, Appellant/ Insurance Company was so reckless that witnesses were not at all cross-examined over type of vehicle and further, failed to cross-examine over kind of the vehicle in question to be Truck. Not only this, the Appellant/ Insurance Company failed to examine any DW in order to bring on record the

vehicle to be Truck, a goods carrier and further, there was violation of terms of policy while allowing the passengers to travel by the Truck.

22. At the present moment, certain salient feature coming out on perusal of cover note (Exhibit-B) has to be taken note of, wherefrom it is evident that at one place, it is incorporated as “Passenger carrying capacity 3 in all,” is not going to support the contention that the vehicle in question was a truck and was public carrier.

23. Had there been positive evidence at the end of Appellant/ Insurance Company, that the vehicle in question was Truck and was a goods carrier, then in that event, presence of deceased along with others, out of whom some were also subject to casualty, would have been found as gratuitous passengers and on that very score, the plea of Appellant would have found duly covered under the principle laid down by the Hon’ble Apex Court in New India Assurance Company Limited vs. **Aasha** Rani and others reported in (2003) 2 SCC 223 and so on, whereunder Insurance Company has been exonerated from sharing the liability against gratuitous passenger travelling on goods carrier. The aforesaid view has also subsequently been followed at different occasion by the Hon’ble Apex Court.

24. In **Sanjeev Kumar Samrat v. National Insurance Company Limited and others with Sanjeev Kumar Samrat v.**

National Insurance Company Limited reported in (2014) 14 SCC**243** it has been as follows:-

“9. To appreciate the controversy, it is necessary to refer to certain statutory provisions. Section 146 of the Act provides for the necessity for injuries against third party risk. On a reading of the said provision, there can be no trace of doubt that the owner of the vehicle is statutorily obliged to obtain an insurance for the vehicle to cover the third party risk, apart from the exceptions which have been carved out in the said provision.

10. Section 147 of the Act deals with requirements of policies and limits of liability. The relevant part of Section 147 (1) is reproduced below:-

“147. Requirements of policies and limits of liability.- (1) *In order to comply with the requirements of this Chapter, a policy of insurance must be a policy which-*

(a) is issued by a person who is an authorised insurer; and

(b) insures the person or classes of persons specified in the policy to the extent specified in sub-section (2)—



(i) against any liability which may be incurred by him in respect of the death of or bodily [injury to any person, including owner of the goods or his authorised representative carried in the vehicle] or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place;

(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:

Provided that a policy shall not be required—

(i) to cover liability in respect of the death, arising out of and in the course of his employment, of the employee of a person insured by the policy or in respect of bodily injury sustained by such an employee arising out of and in the course of his employment other than a liability arising under the Workmen's Compensation Act, 1923 (8 of 1923) in respect of the death of, or bodily injury to, any such employee—

(a) engaged in driving the vehicle, or

(b) if it is a public service vehicle engaged as conductor of the vehicle or in examining tickets on the vehicle, or

(c) if it is a goods carriage, being carried in the vehicle, or (ii) to cover any contractual liability.”

11. Be it noted, before Section 147(1)(b)(i) came into existence in the present incarnation, it stipulated that a policy of insurance must be a policy which insured the person or classes of persons to the extent specified in sub-section (2) against the liability incurred by him in respect of the death of or bodily injury to any person or damage to any property or third party caused by or arising out of the use of the vehicle in public place.

12. Regard being had to the earlier provision and the amendment, this Court in New India Assurance Co. Ltd. v. Satpal Singh [(2000) 1 SCC 237: 2000 SCC (Cri) 130], scanned the anatomy of the provision and also of Section 149 of the Act and expressed the view that under the new Act, an insurance policy covering the third party risk does not exclude gratuitous passenger in a vehicle, no matter that

the vehicle is of any type or class. It was further opined that the decisions rendered under the 1939 Act in respect of gratuitous passengers were of no avail while considering the liability of the insurer after the new Act came into force.

13. *The correctness of the said decision Satpal Singh case (2000) 1 SCC 237: 2000 SCC (Cri) 130 came up for consideration before a three-Judge Bench in New India Assurance Co. Ltd. v. Asha Rani and Others [(2003) 2 SCC 223: 2003 SCC (Cri) 493]. The learned Chief Justice, speaking for himself and H. K. Sema, J. took note of Section 147(1) prior to the amendment and the amended provision and the objects and reasons behind the said provision and came to hold as follows:-*

“9. ...The objects and reasons of clause 46 also state that it seeks to amend Section 147 to include owner of the goods or his authorised representative carried in the vehicle for the purposes of liability under the insurance policy. It is no doubt true that sometimes the legislature amends the law by way of amplification and clarification of an inherent position which is there in the statute, but a plain meaning being given to the words used in the statute, as it

stood prior to its amendment of 1994, and as it stands subsequent to its amendment in 1994 and bearing in mind the objects and reasons engrafted in the amended provisions referred to earlier, it is difficult for us to construe that the expression “including owner of the goods or his authorised representative carried in the vehicle” which was added to the pre-existing expression “injury to any person” is either clarificatory or amplification of the pre-existing statute. On the other hand it clearly demonstrates that the legislature wanted to bring within the sweep of Section 147 and making it compulsory for the insurer to insure even in case of a goods vehicle, the owner of the goods or his authorized representative being carried in a goods vehicle when that vehicle met with an accident and the owner of the goods or his representative either dies or suffers bodily injury.” [Emphasis supplied]

S.B. Sinha, J., in his concurring opinion, stated thus: -(Asha Rani Case (2003) 2 SCC 223: 2003 SCC (Cri) 493

“27. Furthermore, sub-clause (i) of clause (b) of sub-section (1) of Section 147 speaks of liability which may be incurred by the owner of a vehicle in respect of 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, whereas sub-clause (ii) thereof deals with liability which may be incurred by the owner of a vehicle 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.

28. An owner of a passenger-carrying vehicle must pay premium for covering the risks of the passengers. If a liability other than the limited liability provided for under the Act is to be enhanced under an insurance policy, additional premium is required to be paid. But if the ratio of this Court's decision in New India Assurance Co. v. Satpal Singh [(2000) 1 SCC 237: 2000 SCC (Cri) 130] is taken to its logical conclusion, although for such passengers, the owner of goods carriage need not take out an insurance policy, they would be deemed to have been covered under the policy wherefor even no premium is required to be paid.”
[Emphasis supplied]

Being of the aforesaid view, the three-Judge Bench New India Assurance Co. Ltd. V. Asha Rani, (2003) 2 SCC 223: 2003 SCC (Cri) 493

overruled the decision in Satpal Singh ((2000) 1 SCC 237: 2000 SCC (Cri) 130).

14. In Baljit Kaur (2004) 2 SCC 1: 2004 SCC (Cri) 370 and National Insurance Co. Ltd. v. Bommithi Subbhayamma and Others (2005) 12 SCC 243, the aforesaid view was reiterated.

15. In New India Assurance Co. Ltd. v. Vedwati and Others[6], after referring to the scheme of the Act and the earlier pronouncements, it has been held that the provisions of the Act do not enjoin any statutory liability on the owner of a vehicle to get his vehicle insured for any passenger travelling in a goods carrier and the insurer would have no liability therefor.

16. In National Insurance Co. Ltd. v. Cholleti Bharatamma and Others[(2008) 1 SCC 423: (2008) 1 SCC (Cri) 224: (2008) 1 SCC (Civ) 280, the Court laid down that the provisions engrafted under Section 147 of the Act do not enjoin any statutory liability on the owner of a vehicle to get his vehicle insured for any passenger travelling in a goods vehicle and hence, any injury to any person in Section 147(1)(b) would only mean a third party and not a passenger travelling in a goods carriage, whether

gratuitous or otherwise.

17. At this juncture, we may refer with profit to the decision of a three-Judge Bench in National Insurance Co. Ltd. v. Prembati Patel and Others[(2005) 6 SCC 172: 2005 SCC (L & S) 819] wherein the legal representatives of the driver of the truck had succeeded before the High Court and were granted compensation of Rs.2,10,000/- repelling the contention of the insurer that the liability was restricted as provided under the Workmen's Compensation Act, 1923 (for short "the 1923 Act"). After discussing the schematic postulates of the provision, the Court ruled that where a policy is taken by the owner of the goods vehicle, the liability of the insurance company would be confined to that arising under the 1923 Act in case of an employer. It further observed that the insurance policy being in the nature of a contract, it is permissible for an owner to take such a policy whereunder the entire liability in respect of the death of or bodily injury to any such employee as is described in Sub-Sections (a), (b) or (c) of the proviso to Section 147(1)(b) may be fastened upon the insurance company and the insurer may become liable to satisfy the entire award. But for the said

purpose, he may be required to pay additional premium and the policy must clearly show that the liability of the insurance company is unlimited.

25. In **Ramchandra v. Regional Manager, United India Insurance Co. Ltd. reported in A.I.R. 2013 SC 2561**, wherein the fact relates with injury caused to cleaner in a motor vehicle accident due to rash and negligent driving by the driver, in absence of owner, who failed to appear, the Insurance Company appeared and contested the claim on the ground that the vehicle in question was passenger carrying and not goods carrier and further, no premium was paid against cleaner, hence cleaner was not covered under policy, hence Insurance was not liable to indemnify the liability, was ruled out. Further, it has been held:-

“25. At this stage, we deem it appropriate to take note of an important step which the insurance companies generally fail to take and that is related to non-appearance of the owner of the vehicle in spite of service of notice. The insurance companies although contend before the Motor Accidents Claims Tribunal and even at the appeal stage that it is the owner of the vehicle which is liable to bear a part or the entire liability of making the payment of compensation to the claimant in view of the nature of policy, or even due to invalid licence by the driver of the owner of the vehicle, the insurance



company fails to lead any evidence to establish as to how the owner and not the insurance company is liable to pay the compensation and even submits to non-appearance of the owner of the vehicle whose appearance is vital in view of inter se contest between the owner of the vehicle and the insurance company. In absence of the owner of the vehicle, when the Motor Accidents Claims Tribunal or the High Court leaves it open to the insurance company subsequently to realise the amount from the owner of the vehicle by instituting a fresh proceeding in view of the ratio of Kerala State Road Transport Corporation, Trivandrum v. Susamma Thomas (1994) 2 SCC 176: (AIR 1994 SC 1631), it gives rise to a fresh proceeding between the owner and the insurance company putting unnecessary burden on the Motor Accidents Claims Tribunal to try the issue all over again. In fact, if the insurance company were to succeed in establishing by leading cogent evidence at the initial stage itself before the Tribunal that it is the owner of the vehicle which is liable to pay even if the evidence is ex parte in nature, it would at least facilitate the issue in the subsequent proceeding when the insurer initiates proceeding for realising the amount from the owner/insured. But in absence of such evidence, the insurer/companies are a loser and enures advantage to the owner who happens to gain by choosing not to appear. The insurance companies would fare better if

they were to address this issue before the Tribunal itself instead of becoming wiser at the stage of appeal. What is wished to be emphasised is that if the owner chooses not to appear before the Tribunal although his appearance is necessary in a given case, the insurance company would do well instead of acquiescing with their absence to their detriment giving an upper edge to the owner at their own peril.”

26. In Fahim Ahmad & Ors. v. United India Insurance Co. Ltd. & Ors. reported in A.I.R. 2014 SC 2187, it has been held:-

“6. Although the plea of breach of the conditions of policy was raised before the Tribunal, yet neither any issue was framed nor any evidence led to prove the same. In our opinion, it was mandatory for respondent No.1-Insurance Company not only to plead the said breach, but also substantiate the same by adducing positive evidence in respect of the same. In the absence of any such evidence, it cannot be presumed that there was breach of the conditions of policy. Thus, there was no reason to fasten the said liability of payment of the amount of compensation awarded by the Tribunal on the appellants herein.”

27. As discussed above, it is apparent that neither the Madhya Pradesh Road Transport Corporation nor the Appellant substantiated their plea by way of adducing cogent, reliable evidence

and in likewise manner, on account of deficiencies committed at their end, the Appellant cannot be allowed to avail the liberty under heading of 'Presumption', and that being so, it is found and held that the protection in terms of Section 149(2)(a) of the M.V. Act is not all found in their favour.

28. With regard to impleading the party as well as liability of the parties, wherever there happens to be a case of composite negligence, the same is found duly discussed in **Khenyel v. New India Assurance Company Limited & others reported in (2015) 9 SCC 273** wherein it has been held:-

“3. It is a case of composite negligence where injuries have been caused to the claimants by combined wrongful act of joint tortfeasors. In a case of accident caused by negligence of joint tortfeasors, all the persons who aid or counsel or direct or join in committal of a wrongful act, are liable. In such case, the liability is always joint and several. The extent of negligence of joint tortfeasors in such a case is immaterial for satisfaction of the claim of the plaintiff/claimant and need not be determined by the court. However, in case all the joint tortfeasors are before the court, it may determine the extent of their liability for the purpose of adjusting inter-se equities between them at appropriate stage. The liability of each and every joint tortfeasor vis a vis to plaintiff/claimant cannot be bifurcated as it is joint and several liability. In

the case of composite negligence, apportionment of compensation between tortfeasors for making payment to the plaintiff is not permissible as the plaintiff/claimant has the right to recover the entire amount from the easiest targets/solvent defendant.”

29. Then thereafter, after discussing the relevant provisions coupled with judicial pronouncement on this very score, it has been concluded under Para:-

“22. What emerges from the aforesaid discussion is as follows :

(i) In the case of composite negligence, plaintiff/claimant is entitled to sue both or any one of the joint tortfeasors and to recover the entire compensation as liability of joint tortfeasors is joint and several.

(ii) In the case of composite negligence, apportionment of compensation between two tortfeasors vis-a-vis the plaintiff/claimant is not permissible. He can recover at his option whole damages from any of them.

(iii) In case all the joint tortfeasors have been impleaded and evidence is sufficient, it is open to the court/tribunal to determine inter se extent of composite negligence of the drivers. However, determination of the extent of negligence between the joint tortfeasors is only for the purpose of their inter se liability so that one may recover the sum from the other after making whole of



payment to the plaintiff/claimant to the extent it has satisfied the liability of the other. In case both of them have been impleaded and the apportionment/ extent of their negligence has been determined by the court/tribunal, in main case one joint tortfeasor can recover the amount from the other in the execution proceedings.

(iv) It would not be appropriate for the court/tribunal to determine the extent of composite negligence of the drivers of two vehicles in the absence of impleadment of other joint tortfeasors. In such a case, impleaded joint tortfeasor should be left, in case he so desires, to sue the other joint tortfeasor in independent proceedings after passing of the decree or award.”

Thus, as held in **Khenyel** (supra) Case, that it happens to be at the option of the plaintiff/ claimant to sue both or any one of the joint tortfeasors is found complete answer of the dispute raised by the Appellant that on account of non-pleading of Driver, the claim petition must fail.

30. Considering and analyzing the materials available on record, it is found and held that appellant could not succeed in justifying its stand, hence this appeal sans merit and is accordingly, dismissed. However, taking into account the privilege granted to Insurance Company in **Ramchandra** (Supra) Case, it will be at liberty

to recover the amount from the owner. In the facts and circumstances,
parties will bear their own cost.

(Aditya Kumar Trivedi, J)

Patna High Court,
Dated-08.02.2016
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