

Vimal Devi and ors. Vs. Hari Singh and ors.

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Court : Rajasthan

Decided On : Jul-31-2002

Reported in : II(2003)ACC244; 2004ACJ1586; RLW2003(3)Raj2071; 2003(1)WLC468; 2003(1)WLN41

Judge : H.R. Panwar, J.

Acts : Code of Civil Procedure (CPC) - Sections 2(2) - Order 41, Rule 1; [Motor Vehicles Act, 1988](#) - Sections 171 and 173

Appeal No. : S.B. Civil Misc. Appeal No. 337 of 1993

Appellant : Vimal Devi and ors.

Respondent : Hari Singh and ors.

Advocate for Def. : J.M. Bhandari, Adv.

Advocate for Pet/Ap. : L.R. Calla, Adv.; S.D. Rajpurohit, Adv.

Disposition : Appeal dismissed

Judgement :

Panwar, J.

1. These two appeals raise common questions of law and facts and are directed against common judgment and award dated 26th June, 1993 passed by learned

Motor Accident Claims Tribunal, Jodhpur (hereinafter referred to as 'the Tribunal') whereby the Tribunal awarded compensation of Rs. 1,05,000/-including interest in favour of claimant appellants herein in SBCMA No. 337/1993 (hereinafter referred to as 'the claimants') and against Shri C.S. Rathore and Shri hari Singh owner and driver of the offending vehicle bus No. RNQ 1839 (appellants in SBCMA No. 374/1993) and the New India Insurance Company Limited (for short 'the Insurance Company'). However, liability of the Insurance Company was limited to the extent of Rs. 50,000/-. Aggrieved by the judgment and award impugned, the claimants preferred the appeal (SBCMA No. 337/1993) seeking enhancement of the compensation. The owner and driver also preferred appeal challenging the award impugned.

2. Briefly stated facts to the extent they are relevant and necessary for decision of these appeals are that on 8.12.1988 at about 8.00 A.M. Srikishan Vyas was proceeding towards Barqatullah Khan Stadium on the road leading to Geeta Bhawan. He was walking on left side of the road, at that relevant time a mini bus bearing No. RNQ 1839 came from behind and hit him. Due to hitting from behind Srikishan Vyas was thrown about 6 to 7 feet away. Due to this accident the sustained head injuries and became unconscious. He was taken to Mahatma Gandhi Hospital for treatment. Despite efforts made by the doctors his life could not be saved and ultimately on the next date i.e. on 9.12.1988, he succumbed to the injuries. It was averred that the said bus was driven by its driver Hari Singh rashly and negligently and was owned by C.S.Rathore (appellants herein in SBCMA No. 374/1993) and insured with the Insurance Company. A Claim Petition seeking compensation was filed by the claimants before the Tribunal claiming compensation of Rs. 5,93,240/-. Notices were served on the owner, driver and the Insurance Company. Despite notice the driver of the bus did not appear and he was proceeded ex parte. However, the owner C.S. Rathore and the Insurance Company have filed their respective written statements. On pleadings of the parties, the Tribunal framed as many as six issues. The claimants produced PW-1 Vimla Devi, PW. 2 Dr. Tara Chand, PW-3 Amar Dutt Vyas, PW - 4 Roopraj Vyas and PW-5 Ashwini Kumar. In defence DW-1. Shankar Singh was produced by owner of the offending bus. The Insurance Company did not lead any evidence.

(p73 e suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final.

7. This appeal is filed under Section 173 of the Motor Vehicles Act, 1998 (for short 'the Act'). The appeal by statute under Section 173 of the Act reads as under:-

'173. Appeals.-(1) Subject to the provisions of Sub-section (2), any person aggrieved by an award of a Claims Tribunal may, within ninety days from the date of the award, prefer an appeal to the High Court:

Provided that no appeal by the person who is required to pay any amount in terms of such award shall be entertained by the High Court unless he has deposited with it twenty-five thousand rupees or fifty per cent of the amount so awarded, whichever is less, in the manner directed by the High Court.

Provided further that the High Court may entertain the appeal after the expiry of the said period of ninety days, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal in time.

(2) No appeal shall lie against any award of a Claims Tribunal, if the amount in dispute in the appeal is less than ten thousand rupees.'

8. Chapter XII of the Act deals with Claims Tribunals. Section 165(1) of the Act provides that the State Government may, by Notification in the Official Gazette, constitute one or more Motor Accidents Claims Tribunals (hereafter in this chapter referred to as Claims Tribunal) for such area as may be specified in the Notification for the purpose of adjudicating upon claims for compensation in respect of accidents involving the death of, or bodily injury to, persons arising out of the use of motor vehicles, or damages to any property of a third party so arising, or both. Section 166 of the act provides application for compensation. Section 168 deals with award of the Claims Tribunal, which provides that on receipt of an application for compensation made under Section 166, the Claims Tribunal shall, after giving notice of the application to the insurer and after giving the parties (including the insurer) an opportunity of being heard, hold an inquiry into the claim or, as the case may be, each of the claims and, subject to the provisions of

Section 162 may make an award determining the amount of compensation which appears to it to be just and specifying the person or persons to whom compensation shall be paid and in making the award the Claims Tribunal shall specify the amount which shall be paid by the insurer or owner or driver of the vehicle involved in the accident or by all or any of them, as the case may be.

9. Section 169 of the Act deals with procedure and powers of Claims Tribunals. This section provides that in holding any inquiry under Section 168, the Claims Tribunal may, subject to any rules that may be made in this behalf, follow such summary procedure as it thinks fit. A plain reading of Section 169 makes it clear that the Claims Tribunals in holding any inquiry under Section 168 of the Act shall follow such summary procedure as it thinks fit, subject to any rules that may be made in this behalf.

10. In the instant case, inquiry and decision was made by the Tribunal under Section 169 of the Act and under Section 168 the tribunal made the award determining the amount of compensation specifying persons to whom compensation shall be paid and in making the award to Claims Tribunal specified the amount which shall be paid by the insurer, owner and driver of the vehicle involved in the accident. Thus, the Claims Tribunal had followed summary procedure as it thought fit in holding inquiry under Section 168 of the Act and made an award determining the amount of compensation specifying persons to whom compensation shall be paid and also specified the amount which shall be paid by the insurer, owner or driver as the case may be. Thus, on a plain reading of Sections 168 and 169 of the Act, it is clear that there is no requirement to draw a decree as envisaged in Sub-section (2) of Section 2 of C.P.C. The Appeal is provided by statute under Section 173 of the Act, which provides that any person aggrieved by an award of a Claims Tribunal may, within ninety days from the date of the award, prefer an appeal to the High Court. The expression 'award' has been used in Section 168 and 173 of the Act. The Motor Vehicles Act is a special law and it has overriding effect on any other general law. Thus, when making an award, the Tribunal is not required to draw a decree as envisaged in Sub-section(2) of Section 2 of C.P.C. The provisions of Sub-section (2) of Section 2 of C.P.C. have no application.

11. In the instant case, on perusal of the judgment and award it makes clear that the Claims Tribunal has made an award by determining the amount of compensation specifying the persons to whom the compensation shall be paid by the insurer or owner or driver of the vehicle involved in the accident.

12. In Legal Glossary, a publication of Government of India, Ministry of law the expression 'Award' in Hindi means अवार्ड; From perusal of award impugned, it is clear that the award has in clear terms specified the amount of compensation payable and the persons to whom it is payable and by whom it is payable under the caption अवार्ड; Thus, the word अवार्ड means award and an appeal is provided against such an award under Section 173 of the Act. The present appeal filed by the claimants has been preferred against the said award. There is neither any requirement to draw a decree under Section 2(2) of C.P.C. nor memorandum of appeal needs to be accompanied by a decree. Thus, the judgment relief upon by the learned counsel does not apply to the facts of the present case. The contention raised by the learned counsel for the respondents owner and driver in this regard, is devoid of any merit or rather mis-conceived and is rejected.

13. It was next contended by Mr.S.D. Rajpurohit that the Tribunal fell in error in holding the driver of the said bus negligent for the said accident. The accident in question has not been disputed. In order to prove negligence of the driver, the claimants produced PW-5 Ashwini Kumar, an eye witness of the occurrence, who at the relevant time of the accident was passenger occupant in the said bus involved in the accident. He deposed before the Tribunal that he boarded the said bus from Sanischarji Ka than. The route of the bus was via Sewanchi Gate, Geeta Bhawan etc. At that time, the said bus was used to ply under arrangement of time table (To reach every bus stand enroute on a specified time). The bus driver was driving the bus negligently and at a great speed. There were 10 to 12 passengers in the said bus. The passengers requested the driver to drive the bus slow but he did not care. While the said bus was plying opposite to Geeta Bhawan, one person who was walking ahead of the bus was hit from behind by the said bus. Due to hitting from behind by the said bus that person fell down. The said pedestrian was on his correct side and the said accident took place on a foot path.

14. In defence DW-1 Shanker Singh was produced. In his deposition he stated that while he was walking on Geeta Bhawan Road another person was walking and on hearing sound of horn he stopped but the other person did not stop and he was hit by front wheel of the said bus. At that time the said bus was not at a great speed. This witness could not answer various material questions put to him in cross-examination. There is no other eye witness of the occurrence produced by either of the parties. PW-5 Ashwini Kumar stated that he did not go to the police for making statement of the occurrence because he did not want to get himself involved with the police case. The police investigated the case and filed charge-sheet against the driver of the said bus. A certified copy of F.I.R., charge sheet, Site map, Site inspection note and other documents were placed on record. In the Site map the place of the accident is shown to be on the extreme left side to the road, which corroborates the testimony of PW-5 Ashwini Kumar. It is contended by learned counsel for the owner and driver that the Tribunal erred in relying on the testimony of PW-5 Ashwini Kumar, who was not examined in criminal case by the police and, therefore, he cannot be said to be a witness of occurrence. In the cross-examination this witness categorically stated that he was a passenger of the offending bus when the said bus caused the accident. However, he did not make a statement to the police as he did not want to be involved in the police case. This witness is a direct witness, who has seen happening of the accident as he was a passenger of the offending bus. Merely because this witness happened to admit that he has not given a statement to the police could not be conclusive of the fact that he was not a witness of the occurrence. This witness categorically stated on oath before the Tribunal that the deceased was walking on left side of the road with his back towards the offending bus. The offending bus was driven at a great speed, rashly and negligently knocked down the deceased and in that situation the accident speaks its own story and in absence of proper explanation on the part of the driver of the bus maxim '*res ipsa loquitur*' is fully attracted. It is a well known fact that persons from public are not inclined to appear as a witness in a criminal case instituted by the police in order to avoid frequent attending of the court as they are busy in their own affairs. But merely because the police had not examined him as a witness his testimony cannot be disbelieved. This witness has not axe to grind by speaking against the driver of the offending bus as he is not related to

even the deceased and the claimants and, therefore, he is absolutely an independent and disinterested person. There is no infirmity in the statement of PW-5. More so, the statement of this witness further finds corroboration from the defence witness produced by the owner, DW- 1 Shanker Singh, who also deposed that while he was walking on Geeta Bhawan Road, another person was also walking by the side of him and on blowing horn of the said bus he stopped but other person did not stop and he was hit from behind by front wheel of the said bus. Thus, the fact that the deceased was walking ahead of the bus on his correct side of the road i.e. left side of the road when he was hit from behind by the said bus and sustained injuries which ultimately resulted fatal is amply proved.

15. In this view of the matter, the testimony of this witness is fully corroborated from the statement of DW-1 and the site map prepared by the police soon after the accident. Hence, I am of the considered opinion that this witness is wholly reliable.

16. Hon'ble Supreme Court in *Shyam Sunder and Ors. v. The State of Rajasthan* (2), while considering the scope of maxim *res ipsa loquitur* Court held that the principal function of the maxim is to prevent injustice which would result if plaintiff were invariably compelled to prove the precise cause of the accident and defendants responsible for it, even when the facts bearing on the matter are at the outset unknown to plaintiff and often within the knowledge of the defendant. The maxim is based on common sense and its purpose is to do justice when the facts bearing on causation and on the care exercised by defendant are at the outset unknown to the plaintiff and are or ought to be within the knowledge of the defendant.

17. More so, in the instant case, the driver of the bus Hari Singh did not appear in the witness box. The appellant owner, no doubt, took the plea that the said accident occurred due to the negligence of the deceased himself. This fact can be best explained by the driver of the offending bus and if he chose to keep away from the witness box or the owner and insurer of the bus failed to produce him as a witness in the witness box, that too, without any sound reason, then it must indeed be construed as a telling circumstance against the driver, owner and the insurer. It is clearly the duty of the driver, owner or insurer of the offending bus to

place before the Tribunal the best evidence available and the driver of the offending bus is the best evidence to narrate the manner in which the accident took place and if the refrains from doing so, that would only be on the period of an adverse inference being drawn against him.

18. A Division Bench of the Bombay High Court in *Shri Gurunath P. Naik and Ors. v. Shri Narendra Govind Chodankar and Ors.* (3), while considering the doctrine of 'contributory negligence' held that it is a rule of evidence that a person who ought to have been examined is not examined or a person who was required to tender evidence shies away from Court, an adverse inference must be taken against such person. There is no explanation whatsoever as to why the appellant therein, who was driver of the offending bus shied away from the Court and in the facts and circumstances, the court refused to examine the point of contributory negligence on the basis that the evidence of the driver was necessary in that case to understand as to how the accident took place. In this view of the matter, an adverse inference against the driver of the offending bus has to be drawn holding him negligent for the said accident and, therefore, I have no hesitation in affirming the finding of the Tribunal on the point of negligence.

19. In this view of the matter, the claimants succeeded in establishing the fault as also rash and negligent act of the driver in causing the said accident.

20. Having considered the pleadings and the evidence of the parties, I am of the considered opinion that the conclusion reached by the Tribunal holding the bus driver responsible and negligent for the said accident cannot be said to be erroneous and, therefore, I find no error in the finding recorded by the Tribunal holding the bus driver Hari Singh negligent for the said accident.

21. The next question comes for consideration is issue of quantum of compensation. In the Claim petition the claimants specifically pleaded that at the time of the accident the deceased was 48 years of age and was an employee of State Government on the post of Head Master in the Government Middle school, Indroka at salary of Rs. 3,777/- per month. The facts pleaded in the claim petition so far as age, income and occupation of the deceased are concerned, they have not been specifically denied by the owner, driver and the Insurance Company.

More so, the claimants have established the age, income and the contribution made by the deceased by the statements of PW-1 Vimal Devi, PW-3 Amar Dutt Vyas, PW-4 Roopraj Vyas an employee of Government Middle School, Indroka, who has proved the salary certificate Exhibit-2. The evidence of the claimants remain un rebutted. From the evidence on record, it is established that the deceased was 48 years of age and was an employee of Education Department of the State of the post of Head Master in Government Middle School, Indroka, Jodhpur at the salary of Rs. 3,777/- per month.

22. While computing the compensation, the Tribunal deducted Rs. 1200/- per month from the amount of dependency on account of pension payable to the claimants as also has taken into account the fact of lump sum payment and without determining the monthly dependency, the Tribunal awarded a sum of Rs. 80,000/- as compensation for loss of income and further awarded a sum of Rs. 20,000/- for loss of love, affection and consortium etc. The Tribunal awarded a sum of Rs. 5,000/- as consolidated interest. In my considered opinion, the Tribunal failed (o adopt correct principle for determining the compensation.

23. In General Manager Kerala State Road Transport Corporation, Trivandrum v. Susamma Thomas (MRs.) and Ors. (4), the Hon'ble Supreme Court held that the multiplier method is logically sound and legally well established for computing the proper compensation, it has further been held that choice of multiplier is determined by the age of the deceased or of the claimants whichever is higher. It was further held by their Lordships that deduction towards uncertainties of the future life and immediate lump sum payment is not permissible. The proper method of computation is the multiplier method. Any departure, except in exceptional and extraordinary cases, would introduce inconsistency of principle, lack of uniformity and an element of unpredictability for the assessment of compensation, it was further held that it must be borne in mind that the multiplier method is the accepted method of ensuring a 'just' compensation which will make for uniformity and certainty of the awards. Hon'ble Supreme Court reiterated this view in U.P. State Road Transport Corporation and Ors. v. Trilok Chandra and Ors. (5), wherein the Apex Court held that the multiplier method cannot exceed 1 years' purchase factor, which was overall improvement from the earlier judgment

in the case of General Manager Kerala State Road Transport Corporation, Trivandrum v. Susamma Thomas (MRs.) and Ors. (supra). Their Lordships further held that future prospects and advancement in life and career should also be sounded in terms of money to augment the multiplicand.

24. So far as deduction on account of lump sum payment is concerned, Hon'ble Supreme Court held in Susamma Thomas's case (supra) that such deduction is wholly impermissible.

25. In Hardeo Kaur and Ors. v. Rajasthan State Road Transport Corporation and Anr. (6), the Apex Court held that deduction of 173rd out of the assessed compensation on account of lump sum payment is not justified. This view was reiterated by the Apex Court in Urmila Pandey and Ors. v. Khalil Ahmad and Ors. (7), wherein their Lordships held that tribunal fell in error in making 33% deduction for lump sum payment.

26. While computing the compensation the Tribunal considered the fact that wife of the deceased is entitled for pension @ Rs. 1200/- per months and deducted this amount from the monthly dependency. Hon'ble Supreme Court in N.Sivammal and Ors. v. The Managing Director, Pandian Roadways Corporation and Anr. (9), held that there is no jurisdiction for deduction of the amount payable on account of monetary benefit of pension payable to the claimant while computing the compensation.

27. In Mrs. Helen C. Rebello and Ors. v. Maharashtra State Road Transport Corporation and Anr. (9), similar question came up for consideration before Hon'ble Supreme Court. Their Lordships observed that the family pension is also earned by a employee for the benefit of his family in the form of his contribution in the service in terms of the service conditions receivable by the heirs after his death. The heirs receive family pension even otherwise then the accidental death and there is no correlation between the two. Their Lordships further held that such amount cannot come within the periphery of the Motor Vehicles Act to be termed as 'pecuniary advantage' liable for deduction. Their Lordships further held that deceased contributes his own money for which he receives the amount and it has no correlation to the compensation computed as against tort feisor for his

negligence on account of accident. The amount receivable as compensation under the Act is on account of the injury or death without making any contribution towards it, how can fruits of an amount received through, contributions of the deceased be deducted out of the amount receivable under the Motor Vehicles Act.

28. Hon'ble Supreme Court in a recent judgment in *United India Insurance Co. Ltd. Etc. Etc. v. Patricia Jean Mahajan and Ors. etc.etc.* (10), held that the deductions are admissible from the amount of compensation in case the claimant receives the benefit as a consequence of injuries sustained, which otherwise he would not have been entitled to. It does not cover cases where the payment received is not dependent upon any injury sustained on meeting with an accident. Their Lordships disallowed any deduction on account of receipt of insurance policy and social security benefits received by the claimants.

29. Thus, in my considered opinion, the Tribunal was not justified in deducting a sum of Rs. 1200/- per months from the monthly dependency of the claimants while computing the compensation, the Tribunal awarded a sum of Rs. 5,000/- as consolidated interest. Section 171 of the Act, (corresponding Section 110-CC of Old Act) provides that if any claims Tribunal allows a claim for compensation made under this Act, such Tribunal may direct that in addition to the amount of compensation, simple interest shall also be paid at such rate and from such date not earlier than the date of making the claim as it may specify in this behalf. Thus, it is clear that the claimants are entitled to the interest on the sum allowed by the Tribunal as compensation from such date not earlier than the date of making of the claim the Hon'ble Supreme Court held that the interest on the sum paid as compensation is to be awarded from the date of the application.

30. In *Kaushnuma Begum (Smt.) and Ors. v. New India Assurance Co. Ltd. and Ors.* (11), the Hon'ble Supreme Court held that earlier 12% was found to be the reasonable rate of simple interest. With a change in economy and the policy of Reserve Bank of India the interest rate has been lowered. The nationalised banks are no granting interest at the rate of 9% on fixed deposits for one year. This view if reiterated by the Hon'ble Supreme Court in *United India Insurance Co. Ltd. etc.etc. v. Patricia Jean Mahajan and Ors. etc.etc.* (supra).

31. In this view of the matter, I am of the considered opinion that instead of consolidated interest of Rs. 5,000/- the claimants are entitled to the interest on the sum computed @ 9% per annum from the date of application till realisation.

32. Keeping in view the law propounded by the Hon'ble Supreme Court, in the instant case, proper computation of compensation is to be made. The deceased was on a stable job as he was a permanent employee of the State of Rajasthan having future prospects. Thus, taking into account future prospects of the deceased, his monthly income can safely be taken at Rs. 4,600/-. Deducting therefrom Rs. 1600/- per Months as personal living expenses of the deceased, the monthly contribution to the claimants comes to Rs. 3,000/- and as such, annual dependency works out to Rs. 36,000/-. This amount further needs to be multiplied by an appropriate multiplier of 13 years purchase factor, which works out to Rs. $36,000 \times 13 = \text{Rs. } 4,68,000/-$. To this, conventional sum of Rs. 20,000/- be added for loss of love and affection, consortium etc. as has been awarded by the Tribunal and Rs. 2000/- for funeral expenses. This, the total compensation works out to Rs. $4,68,000.00 + \text{Rs. } 20,000.00 + \text{Rs. } 2000.00 = \text{Rs. } 4,90,000/-$, to which the claimants are entitled.

33. Learned counsel for the Insurance Company contended that the liability of the Insurance Company is limited to the extent of Rs. 50,000/-. The policy is on record, which has been admitted by the learned counsel for the claimants as well as by the learned counsel for the owner of the bus involved in the accident.

34. The policy provides as under:-

Limits of Liability

(a) Limits of the amount of the Company's liability under Section II-I(i) in respect of any one accident:

Such amount as is necessary to meet the requirements of the Motor Vehicles Act, 1939.

(b) Limits of the amount of the Company's liability under Section II-I(ii) in respect of any one claim or series of claims arising out of one event: Rs. 50,000/-.

35. However, right of third party claimants to recover entire amount of compensation from the insurance Company is protected by the Insurance Policy under the clause 'Avoidance of Certain Terms and Right of Recovery' contained in the policy. The said clause reads as under:-

Avoidance of Certain Terms and Right of Recovery

'Nothing in this Policy or any Endorsement thereon shall affect the right of any person indemnified by this Policy or any other person to recovery an amount under or by virtue of the provision of the Motor Vehicles Act, 1939, Section 96.

But the Insured shall repay to the Company all sums paid by the Company which the Company would not have been liable to pay but for the said provisions.'

36. In *New Asiatic Insurance Co. Ltd. v. Pessumal Dhanamal Aswani and Ors.* (12), Hon'ble Supreme Court held as under:-

'The Act contemplates the possibility of the policy of insurance undertaking liability to third parties providing such a contract between, the insurer and the insured, that is to person who effected the policy, as would make the company entitled to recover the whole or part of the amount it has paid to the third party from the insured. The insurer thus acts as security for the third party with respect to its realising damages for the injuries suffered, but vis-a-vis the insured, the company does not undertake that liability of undertakes it to a limited extent, it is in view of such a possibility that various conditions are laid down in the policy. Such conditions, however, are effective only between the insured and the company, and have to be ignored when considering the liability of the company to the third party. This is mentioned prominently in the policy itself and is mentioned under the heading 'Avoidance of certain terms and rights of recovery', as well as in the form of 'an important notice' in the Schedule to policy. The avoidance clause says that nothing in the policy or any endorsement thereon shall effect the right of any person indemnified by the policy or any other person to recover an amount under or by virtue of the provisions of the Act. It also provides that the insured will repay to the company all sums paid by it which the company would not have been liable to pay but for the said provisions of the Act. The 'Important Notice' mentions that

any payment by the company by reason of wider terms appearing in the certificate in order to comply with the Act is recoverable from the insured, and refers to the avoidance clause.'

37. In *Oriental Insurance Co. Ltd. v. Cheruvakkara Nafeessu and Ors.* (13), a similar question came up for consideration before the Hon'ble Supreme Court. In that case, the limit of the liability of the Insurance Company in respect of any one accident or series of claims arising out of one event was Rs. 50,000/- only but the clause of the policy provides 'Nothing in this policy or the endorsement hereon shall affect the right of any person indemnified by this policy or any other person to recovery an amount under or by virtue of the provisions of the Motor Vehicles Act, 1939, Section 96.' In that case, the Hon'ble Supreme Court held that the liability under the policy was limited to the extent of Rs. 50,000/-. However, it was further held that the Claims Tribunal and the High Court were not unjustified in directing the appellant Company to pay whole of the awarded amount to the claimants on the basis of contractual obligation contained in clauses relating to liability of third party and avoidance clause. It was also held that the appellant company is liable to pay the entire amount awarded and upon making such payment, the insurance company can recover the excess amount from the insured.

38. In *New India Assurance Co., Shimal v. 'Kamla and Ors.* (14), Sub-sections (4) and (5) of Section 149 of the Act (corresponding Section 96 (4) and (5) of the Old Act) came to be considered. A reading of the proviso to Sub-section (4) as well as the language employed in Sub-section (5) would indicate that they are intended to safeguard the interest of any insurer who otherwise has no liability to pay any amount to the insured but for the provisions contained in Chapter XI of the Act. This means, the insurer has to pay to the third parties only on account of the fact that a policy of insurance has been issued in respect of the vehicle, but the insurer is entitled to recover any such sum from the insured if the insurer were not otherwise liable to pay such sum to the insured by virtue of the conditions of the contract of insurance indicated by the policy. Their Lordships further held that the effect of afore noticed provision is that a valid insurance policy has been issued in respect of a vehicle as evidenced by a certificate of insurance the burden is on the insurer to pay to third parties, whether or not there has been any breach or

violation of the policy conditions, but the amount so paid by the insurer to third parties can be allowed to be recovered from the insured if as per the policy conditions the insurer had no liability to pay such sum to the insured.

39. Thus, it may be that the liability of the insurer company may be limited to an extent but for that reason, the right to be indemnified by the insurance company to the extent of the entire liability where third party risk coverage is in force, will not be affected and the insurance company shall be entitled only to recover such excess amount as it has paid beyond the limit of its liability from the insured.

40. In this view of the matter, the liability of the Insurance Company is held to be limited to the extent of Rs. 50,000/- and interest thereon. However, the claimants shall be entitled to recover entire amount of the compensation alongwith interest from the Insurance Company and the Insurance Company shall be entitled to recover excess amount paid beyond its liability from respondent No.2 the insured C.S. Rathore owner of the bus.

41. In view of the aforesaid discussion, the appeal filed by the claimants (S.B. Civil Misc. Appeal No. 337/1993) is allowed and the compensation is enhanced to Rs. 4,90,000/-. This amount shall carry interest @ 9% per annum from the date of application till realisation. The liability of the Insurance Company is limited to Rs. 50,000/- and interest thereon. However, the insurance company shall pay entire amount awarded alongwith interest to the claimants and shall have right to recover the amount so paid beyond its liability of 50,000/- from respondent No. 2 C.S. Rathore, the insured owner of the said bus, the appeal filed by the owner and driver (S.B. Civil Misc. appeal No. 374/1993) has no merit has accordingly, it is dismissed. However, there shall be no order as to costs.