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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **MAC.A. 805/2010**

% Judgment reserved on: 25th July, 2013
Judgment delivered on: 4th October, 2013

SANTOSH CHHABRA & ORS. Appellants

Represented by: Mr. Jatinder Kamra,
Advocate.

Versus

ABHISHEK GUREJA & ORS. Respondents

Represented by: Ms. Shantha Devi Raman,
Advocate for Respondent No.3/Insurance
Company.

CORAM:
HON'BLE MR. JUSTICE SURESH KAIT

SURESH KAIT, J.

1. The instant appeal has been preferred against the impugned award dated 26.07.2010, whereby, Id. Tribunal has granted compensation for a sum of Rs.29,31,837/- with interest @ 7.5% per annum from the date of filing of the petition till the date of realization.

2. While granting the aforesaid compensation, Id. Tribunal has directed respondent no. 2, insured / owner of the offending vehicle to pay the compensation and has exonerated the Insurance Company from any liability.

3. Ld. Counsel appearing on behalf of the appellant has argued only one ground that the deceased Yashpal Chhabra died in the accident which took place on 29.12.2008 at about 2.20 AM when he was walking on road side and on reaching in front of Pankha Road, A-1/227, Janak Puri, Delhi, a speeding Motorcycle bearing no. DL-4SBJ-3201 driven by respondent no. 1 at high speed, rashly and negligently hit him and he sustained fatal injuries. On being taken to DDU Hospital, he was declared dead. Respondent nos. 1, 2 & 3 are the driver, owner / insured and insurer respectively of the offending vehicle.

4. It is an admitted fact that Motorcycle bearing no. DL-4SBJ-3201 was insured with respondent no. 3 vide its Policy No. V0170344, valid from 27.12.2008 to 26.12.2009. Thus, on the date of accident, insurance policy was valid qua the offending vehicle.

5. The main issue to be considered by this Court is whether the compensation amount has to be paid by respondent no. 2, owner / insured or respondent no. 3 / Insurance Company.

6. It is pertinent to note that no written statement was filed by respondent nos. 1 & 2, despite number of opportunities given to them.

7. During trial, it was established that at the time of accident, the offending vehicle was being driven by respondent no. 1 (minor), therefore the insured / respondent no. 2 committed breach of terms and conditions of the policy. R3W1 has proved the certificate of insurance-cum-policy schedule Ex.R3W1/E. In terms thereof, only a

person holding a valid and effective licence was entitled to drive the insured vehicle.

8. It is also on record that Investigating Agency filed the final report under Section 173 Cr.P.C. before Juvenile Justice Board, mentioning that respondent no. 1 was responsible for the accident caused due to rash and negligent driving. At the time of accident, he was minor having date of birth 02.05.1992.

9. Respondent no. 2, owner / insured had permitted the minor, respondent no. 1 to drive the said vehicle. Thus, it is proved that insured has committed breach of terms of insurance policy.

10. Accordingly, Id. Tribunal while granting the compensation amount directed respondent no. 2, insured / owner of the offending vehicle to pay the aforesaid amount in favour of the appellants.

11. Ld. Counsel for the appellants further submitted that it is established that the vehicle was driven by a minor. The appellants filed a Petition under Section 166 of Motor Vehicles Act, 1988, which is a welfare legislation. If there is any violation of the terms of insurance policy, even then the proper course would have been that the Id. Tribunal should have directed the insurance company to pay the compensation amount, who, thereafter, could recover the same from the respondent no. 2 / owner of the offending vehicle. Thus, the Id. Tribunal has erred in not passing such direction.

12. On this issue, Id. Counsel for the appellants has relied upon a

case of ***Bajaj Allianz General Insurance Co. Ltd. v. Savitri and Ors.*** decided on 21.09.2012 by this court in ***MAC.App. 1050/2012***, wherein it is held as under: -

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The question of statutory liability to pay the compensation was discussed in detail by a two Judge Bench of the Supreme Court in Skandia Insurance Company Limited v. Kokilaben Chandravadan, (1987) 2 SCC 654 where it was held that exclusion clause in the contract of Insurance must be read down being in conflict with the main statutory provision enacted for protection of victim of accidents. It was laid down that the victim would be entitled to recover the compensation from the insurer irrespective of the breach of the condition of policy. The three Judge Bench of the Supreme Court in Sohan Lal Passi analyzed the corresponding provisions under the Motor Vehicles Act, 1939 and the Motor Vehicles Act, 1988 and approved the decision in Skandia. In New India Assurance Co., Shimla v. Kamla and Ors., (2001) 4 SCC 342, the Supreme Court referred to the decision of the two Judge Bench in Skandia, the three Judge Bench decision in Sohan Lal Passi and held that the insurer who has been made liable to pay the compensation to third parties on account of issuance of certificate of insurance, shall be entitled to recover the same if there was any breach of the policy condition on account of the vehicle being driven without a valid driving licence. The relevant portion of the report is extracted hereunder:

21. 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 an 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.

22. To repeat, the effect of the above provisions is this: when 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 the 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.

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.....”

13. Ld. Counsel further submitted that compensation granted towards non-pecuniary heads by the Id. Tribunal are on a very lower side. He pointed out that compensation granted for loss of love and affection is Rs.40,000/-, for loss of consortium is Rs.10,000/- and for funeral expenses is Rs.5,000/-.

14. Ld. Counsel has relied upon a case of ***Rajesh & Ors. Vs. Rajbir Singh, 2013 (6) SCALE 563*** wherein compensation towards non-pecuniary heads are granted as under:

20. The ratio of a decision of this Court, on a legal issue is a precedent. But an observation made by this Court, mainly to

achieve uniformity and consistency on a socio-economic issue, as contrasted from a legal principle, though a precedent, can be, and in fact ought to be periodically revisited, as observed in **Santhosh Devi**(supra). We may therefore, revisit the practice of awarding compensation under conventional heads: loss of consortium to the spouse, loss of love, care and guidance to children and funeral expenses. It may be noted that the sum of Rs. 2,500/- to Rs. 10,000/- in those heads was fixed several decades ago and having regard to inflation factor, the same needs to be increased. In **Sarla Verma's case** (supra), it was held that compensation for loss of consortium should be in the range of Rs. 5,000/- to Rs. 10,000/-. In legal parlance, 'consortium' is the right of the spouse to the company, care, help, comfort, guidance, society, solace, affection and sexual relations with his or her mate. That non-pecuniary head of damages has not been properly understood by our Courts. The loss of companionship, love, care and protection, etc., the spouse is entitled to get, has to be compensated appropriately. The concept of non-pecuniary damage for loss of consortium is one of the major heads of award of compensation in other parts of the world more particularly in the United States of America, Australia, etc. English Courts have also recognized the right of a spouse to get compensation even during the period of temporary disablement. By loss of consortium, the courts have made an attempt to compensate the loss of spouse's affection, comfort, solace, companionship, society, assistance, protection, care and sexual relations during the future years. Unlike the compensation awarded in other countries and other jurisdictions, since the legal heirs are otherwise adequately compensated for the pecuniary loss, it would not be proper to award a major amount under this head. Hence, we are of the view that it would only be just and reasonable that the courts award at least rupees one lakh for loss of consortium.

21. We may also take judicial notice of the fact that the Tribunals have been quite frugal with regard to award of compensation under the head 'Funeral Expenses'. The 'Price

Index', it is a fact has gone up in that regard also. The head 'Funeral Expenses' does not mean the fee paid in the crematorium or fee paid for the use of space in the cemetery. There are many other expenses in connection with funeral and, if the deceased is follower of any particular religion, there are several religious practices and conventions pursuant to death in a family. All those are quite expensive. Therefore, we are of the view that it will be just, fair and equitable, under the head of 'Funeral Expenses', in the absence of evidence to the contrary for higher expenses, to award at least an amount of Rs. 25,000/-."

15. On the other hand, Id. Counsel appearing on behalf of the respondent no. 3 / Insurance Company submitted that if there is any breach of terms of policy, then the Insurance Company is not liable to pay any compensation, therefore, Id. Tribunal has rightly not fastened any liability on respondent no. 3.

16. Settled law is that where there is any breach of policy, the Insurance Company / insurer is entitled for complete exoneration. To strengthen her arguments, Id. Counsel has relied upon a case of **Ram Sagar and Anr. v. New India Assurance Co. Ltd. and Ors.** decided by this Court on 07.07.2010 in **MAC.App. 290/2009**, wherein it is held as under:

"11. The other ground for assailing the order of Tribunal is about the liability fixed by the Tribunal for payment of compensation by the owner. The Tribunal had relied upon Sardari & Ors. vs. Sushil Kumar & Ors. III (2008) SLT 605 where Supreme Court held as under:

"Although, in terms of a contract of insurance, which is in the realm of private law domain having regard to the object for which Sections

147 and 149 of the Act had been enacted, the social justice doctrine as envisaged in the preamble of the Constitution of India has been given due importance. The Act, however, itself provides for the cases where the Insurance Company can avoid its liability. Avoidance of such liability would largely depend upon violation of the conditions of contract of insurance. Where the breach of conditions of contract is ex facie apparent from the records, the Court will not fasten the liability on the insurance Company. In certain situations, however, the Court while fastening the liability on the owner of the vehicle may direct the insurance Company to pay to the claimants the awarded amount with liberty to it to recover the same from the owner.”

12. The Tribunal also relied upon National Insurance Co. Ltd. Co. Ltd. vs. Swaran Singh & Ors. (2004) 3 SCC 297 wherein Supreme Court observed as under:

“We have analysed the relevant provisions of the said Act in terms whereof a motor vehicle must be driven by a person having a driving licence. The owner of a motor vehicle in terms of Section 5 of the Act has a responsibility to see that no vehicle is driven except by a person who does not satisfy the provisions of Section 3 or 4 of the Act. In a case, therefore, where the driver of the vehicle, admittedly, did not hold any licence and the same was allowed consciously to be driven by the owner of the vehicle by such person, the insurer is entitled to succeed in its defence and avoid liability. The matter, however, may be different where a disputed question of fact arises as to whether the driver had a valid licence or where the owner of the vehicle committed a breach of the terms of the

contract of insurance as also the provisions of the Act by consciously allowing any person to drive a vehicle who did not have a valid driving licence. In a given case, the driver of the vehicle may not have any hand in it at all e.g. a case where an accident takes place owing to a mechanical fault or vis major.”

13. I agree that the conclusion arrived at by the Tribunal that where it is established beyond doubt that the driver of the offending vehicle had no licence at the time of accident, it will be responsibility of the owner to pay the damages and not the responsibility of the insurance company. It was one of the prime conditions of the insurance policy that insured vehicle shall MAC 290 of 2009 Page 9 of 10 be driven by a person having valid driving licence and in case it was not driven by a person having valid licence, it would amount to breach of terms and conditions of the insurance policy and the insurer will not be liable to pay the compensation. In view of the fact that insured in this case was father and the driver of the vehicle was his son, who had no driving licence, a clear breach of terms of the policy stood established. The plea taken by the father that scooter was taken out without his permission is not tenable. The manner in which the scooter was being driven on a main road of Delhi shows that son was driving his (father's) scooter with his knowledge & consent for sufficient long time and it was not his first trial drive on the scooter.”

17. She also relied upon a case of **Sardari & Ors. v. Sushil Kumar and Ors. II 2008 ACC 426 (SC)** wherein it is held as under:

“6. Although, in terms of a contract of insurance, which is in the realm of private law domain having regard to the object for which Section 147 and 149 of the Act had been enacted, the social justice doctrine as envisaged in the preamble of the Constitution of India has been given due importance. The Act, however, itself provides for the cases where the insurance Company can avoid its liability. Avoidance of such liability

would largely depend upon violation of the conditions of contract of insurance. Where the breach of conditions of contract is ex-facie apparent from the records, the Court will not fasten the liability on the Insurance Company. In certain situations, however, the Court while fastening the liability on the owner of the vehicle may direct the Insurance Company to pay to the claimants the awarded amount with liberty to it to recover the same from the owner.

7. The concurrent finding of fact herein is that Sushil Kumar never held a license. The owner of the vehicle has a statutory obligation to see that the driver of the vehicle whom he authorized to drive the same holds a valid license. Here again, a visible distinction may be noticed, viz. where the license is fake and a case where the license has expired, although initially when the driver was appointed, he had a valid license.

The question came up for consideration before this Court in *United India Insurance Co. Ltd. v. Gian Chand and Ors.* : AIR1997SC3824, wherein it was held;

12. Under the circumstances, when the insured had handed over the vehicle for being driven by an unlicensed driver, the Insurance Company would get exonerated from its liability to meet the claims of the third party who might have suffered on account of vehicular accident caused by such unlicensed driver....

A three Judges' Bench of this Court in *National Insurance Co. Ltd. v. Swaran Singh and Ors.* : AIR2004SC1531 , upon going through the provisions of the Act as also the precedents operating in the field, laid down the following dicta;

84. We have analysed the relevant provisions of the said Act in terms whereof a motor vehicle must be driven by a person having a driving licence. The owner of a motor vehicle in terms of Section 5

of the Act has a responsibility to see that no vehicle is driven except by a person who does not satisfy the provisions of Section 3 or 4 of the Act. In a case, therefore, where the driver of the vehicle, admittedly, did not hold any licence and the same was allowed consciously to be driven by the owner of the vehicle by such person, the insurer is entitled to succeed in its defence and avoid liability. The matter, however, may be different where a disputed question of fact arises as to whether the driver had a valid licence or where the owner of the vehicle committed a breach of the terms of the contract of insurance as also the provisions of the Act by consciously allowing any person to drive a vehicle who did not have a valid driving licence. In a given case, the driver of the vehicle may not have any hand in it at all e.g. a case where an accident takes place owing to a mechanical fault or vis major. (See Jitendra Kumar 22.)

In National Insurance Co. Ltd. v. [Kusum Rai and Ors.](#): AIR2006SC3440 , a Bench of this Court (wherein one of us was a member) held;

11. It has not been disputed before us that the vehicle was being used as a taxi. It was, therefore, a commercial vehicle. The driver of the said vehicle, thus, was required to hold an appropriate licence therefore. Ram Lal who allegedly was driving the said vehicle at the relevant time, as noticed hereinbefore, was holder of a licence to drive a light motor vehicle only. He did not possess any licence to drive a commercial vehicle. Evidently, therefore, there was a breach of condition of the contract of insurance. The appellant, therefore, could raise the said defence.

14. This Court in Swaran Singh clearly laid down that the liability of the Insurance Company vis-vis the owner would depend upon several factors. The owner would be liable for payment of compensation in a case where the driver was not having a licence at all. It was the obligation on the part of the owner to take adequate care to see that the driver had an appropriate licence to drive the vehicle.

The question as regards the liability of the owner vis-à-vis the driver being not in possession of valid license has also been considered in Para 89 in Swaran Singh (supra).

9. For the reasons aforementioned, there is no merit in this appeal which is accordingly dismissed. However, in the facts and circumstances of this case, there shall be no order as to costs.”

18. She further relied upon a case of ***United India Insurance Co. Ltd. v. Rakesh Kumar Arora and Ors. AIR 2009 SC 24***, wherein it is held as under:

“15. The vehicle in question admittedly was being driven by Karan Arora who was aged about fifteen years. The Tribunal, as noticed hereinbefore, in our opinion, rightly held that Karan Arora did not hold any valid licence on the date of accident, namely 5.2.1997.

16. The learned single Judge as also the Division Bench of the High Court did not put unto themselves a correct question of law. They proceeded on a wrong premise that it was for the Insurance Company to prove breach of conditions of the contract of insurance.

17. The High Court did not advert to itself the provisions of Sections 4 and 5 of the Motor Vehicles Act and thus misdirected itself in law.

18. This aspect of the matter has been considered by this Court in *Oriental Insurance Co. Ltd. v. Prithvi Raj* : AIR2008SC1408 wherein upon taking into consideration a large number of decisions, it was held that the Insurance Company was not liable, stating:

In the instant case, the State Commission has categorically found that the evidence on record clearly established that the licensing authority had not issued any license, as was claimed by the Driver and the respondent. The evidence of Shri A.V.V. Rajan, Junior Assistant of the Office of the Jt. Commissioner & Secretary, RTA, Hyderabad who produced the official records clearly established that no driving license was issued to Shri Ravinder Kumar or Ravinder Singh in order to enable and legally permit him to drive a motor vehicle. There was no cross examination of the said witness. The National Commission also found that there was no defect in the finding recorded by the State Commission in this regard.

19. Yet again this Court in *National Insurance Co.Ltd. v. Kaushalaya Dvi and Ors.* 2008 (8) SCALE 500 took the same view stating:

The provisions relating to the necessity of having a license to drive a vehicle is contained in Section [3](#), [4](#) and [10](#) of the Act. As various aspects of the said provisions, vis-a-vis, the liability of the Insurance Company to reimburse the owner in respect of a claim of a third party as provided in Section [149](#) thereof have been dealt with in several decisions, it is not necessary for us to reiterate the same once over again. Suffice it to notice some of the precedents operating in the field.

In National Insurance Co. Ltd. v. Swaran Singh and Ors. : AIR2004SC1531 this Court held:

88. Section 10 of the Act provides for forms and contents of licences to drive. The licence has to be granted in the prescribed form. Thus, a licence to drive a light motor vehicle would entitle the holder thereof to drive the vehicle falling within that class or description.

89. Section 3 of the Act casts an obligation on a driver to hold an effective driving licence for the type of vehicle which he intends to drive. Section 10 of the Act enables the Central Government to prescribe forms of driving licences for various categories of vehicles mentioned in Sub-section (2) of the said section.

20. It was furthermore observed:

90. We have construed and determined the scope of Sub-clause (ii) of Sub-section (2) of Section 149 of the Act, Minor breaches of licence conditions, such as want of medical fitness certificate, requirement about age of the driver and the like not found to have been the direct cause of the accident, would be treated as minor breaches of inconsequential deviation in the matter of use of vehicles. Such minor and inconsequential deviations with regard to licensing conditions would not constitute sufficient ground to deny the benefit of coverage of insurance to the third parties.

91. On all pleas of breach of licensing conditions taken by the insurer, it would be open to the Tribunal to adjudicate the claim and decide inter se liability of insurer and insured; although where such adjudication is likely to

entail undue delay in decision of the claim of the victim, the Tribunal in its discretion may relegate the insurer to seek its remedy of reimbursement from the insured in the civil court.

The decision in Swaran Singh, however, was held to be not applicable in relation to the owner or a passenger of a vehicle which is insured.

21. In view of the authoritative pronouncement of this Court as noticed hereinbefore, the impugned judgment cannot be sustained. It is set aside accordingly and that of the learned Tribunal is restored. However, keeping in view the admitted fact that as no stay had been granted by the High Court the appellant has deposited the entire amount which has since been withdrawn by the claimant-respondent; we direct that the appellant shall be entitled to recover the amount in question from the owner of the vehicle, namely, respondent No. 1.”

19. I have heard ld. counsel for the parties and perused the material placed on record.

20. The present appeal has been filed by the owner of the vehicle bearing no. DL-4SBJ-3201 which caused the accident, the offending vehicle admittedly was being driven by respondent no. 1 (minor) at the time of accident.

21. Law is settled on the issue of no licence, fake licence or invalid driving licence in the case of ***New India Insurance Company Ltd. v. Darshana Devi 2008 ACJ 1388***. The offending vehicle at the time of accident was being driven by son of the owner of the vehicle, who was

not holding any licence to drive the same. Ld. Tribunal, while awarding the compensation held that the amount shall be payable by the insurer initially, however, the insurer will be at liberty to recover the same from the owner of the offending vehicle. The award passed by Ld. Tribunal was challenged by the Insurance Company, same was affirmed by the High Court and also upheld by the Supreme Court.

22. In ***New India Assurance Co. Ltd. v. Kamla and Ors. etc.*** 2001 **ACJ 843**, wherein it is held as under:

“The position can be summed up thus: The insurer and insured are bound by the conditions enumerated in the policy and the insurer is not liable to the insured if there is violation of any policy condition. But the insurer who is made statutorily liable to pay compensation to third parties on account of the certificate of insurance issued shall be entitled to recover from the insured the amount paid to the third parties, if there was any breach of policy conditions on account of the vehicle being driven without a valid driving licence..”

23. In ***National Insurance Co. Ltd. v. Swarn Singh***, 2004 **ACJ 1** while deciding the issue of driving licence, the Apex Court has held as under:

“(iii) The breach of policy condition e.g., disqualification of driver or invalid driving licence of the driver, as contained in sub-section (2)(a)(ii) of section 149, have to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards insured, the insurer has to prove that the

insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time. (iv) The insurance companies are, however, with a view to avoid their liability must not only establish the available defence(s) raised in the said proceedings but must also establish 'breach' on the part of the owner of the vehicle; the burden of proof wherefor would be on them.

In V. Mepherson vs. Shiv Charan Singh [1998 ACJ 601 (Del.)], the the owner of the vehicle was held not to be guilty of violating the condition of policy by willfully permitting his son to drive the car who had no driving licence at the time of accident. In that case, it was held that the owner and insurer both were jointly and severally liable.”

24. In ***Oriental Insurance Co. Ltd. v. Rakesh Kumar & Ors., 2012, ACJ, 1268***, the Coordinate Bench of this court in Para 44 has held as under:

“44. (ii) Even when there is a willful breach of the terms of the policy under Section [149 \(2\) \(a\)](#) of the Act, the Insurance Company is under obligation to indemnify the liability towards the third parties and recover the same from the owner.

(iii) Once the Insured proves that the driver did not hold any driving licence to drive the Class of vehicle involved in the accident or that the driving licence was fake; requires the owner and driver to produce the driving licence and if they failed to produce the same, the onus of proving breach of policy would be deemed to be discharged. Onus would then shift on the owner to establish that he was not guilty of breach of the terms of policy. In the absence of any evidence being produced by the Insured, in such cases, it will be presumed that he was guilty of a willful breach. The

Insured in such cases, would be entitled to recover the compensation paid to third party in discharge of its statutory liability.

(iv) Where policy is avoided on proof or facts which renders the Insurance policy void under Section 149 (2) (b) of the Act, the Insurance Company would not be under obligation to pay even to third parties, as in such cases the contract of insurance is non est.”

25. No doubt, the respondent no. 3 / insurance company successfully proved that there was breach of terms and conditions of the policy, mere breach of the conditions of the policy would not entitle the insurance company to avoid its liability against the insured.

26. In the present case, the offending vehicle is admittedly an insured vehicle, limited to the terms of the policy of insurance, the insurance company is duty bound to take over the contractual liability of the assured and pay the sum awarded to the claimants by the Ld. Tribunal.

27. The provisions of sub-section 4 and 5 of the Section 149 of Motor Vehicles Act, 1988 may be considered as to the liability of the insurer to satisfy the decree at the first instance.

28. Considering the relied upon judgments and facts of the case, I hold that the insurance company shall pay the compensation amount at the first instance and, thereafter, recover the same from the owner of the offending vehicle, i.e., respondent no.2.

29. Accordingly, respondent No. 3/Insurance Company is directed

to deposit compensation amount with interest @ 7.5% per annum from the date of filing the claim petition till the date of award with Ld. Tribunal within a period of four weeks, failing which the claimants shall be entitled to penal interest @ 12% p.a. on delayed payment .

30. On deposit, Ld. Tribunal is directed to release the compensation amount in terms of award dated 26.07.2010 to the appellants/claimants.

31. In view of the above, Instant appeal is allowed with no order as to costs.

SURESH KAIT, J

OCTOBER 04, 2013

Jg/RS