IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO.538 OF 2013
WITH
CIVIL APPLICATION NO.1911 OF 2013
AND
CIVIL APPLICATION NO.4348 OF 2014

The Divisional Manager,
Bajaj Allianz General Insurance
Co. Limited,
Mumbai-Agra Road, Nashik .... Appellant

Vs.

1 Smt. Shaherabee Ibrahim Pathan
Age : 47 years, Occ.: Household

2 Rafique Pathan Ibrahim Pathan
Age : 28 years

3 Nyajbee Ibrahim Pathan
Age : 23 years

4 Rashmabee Ibrahim Pathan
Age : 20 years

5 Saddam Pathan Ibrahim Pathan
Age : 17 years

Nos. 1 to 5 R/o : Mahalaxmi Temple Road,
Vihitgaon Shivar, Nashik Road
Tal. & Dist. Nashik ... Respondents
(Ori. Claimants)

6 Shri. Rajput Vijay Jalamsingh
Age : Major, Occ. : Vehicle Owner
R/o : Plot No.1, Saptashrungi Bunglow
Trimurti Nagar, Rajrajeshwari Mangal
Karyalaya, Jail Road, Nashik Road. .... Respondents
(Ori. Owner of
motorcycle)

Mr. M.M. Sathaye, Advocate for the appellant in First Appeal and for the applicant in C.A. No.1911 of 2013.

Mr. Makarand Bakare i/by Sudam Kale, Advocate for respondent no.1 to 5 in First Appeal and for applicant in C.A. No.4348 of 2014.

Mr. T.J. Mendon, Advocate for the Applicants in CAF Nos. 666 of 2016 to 668 of 2016.

Mr. Niketan Nakhawa i/by Mr. Ashish Mehta for applicants in CAF No. 3837 of 2015.

Mr. D.S. Joshi, for Appellants in FAs No. 281 of 2015 to 283 of 2015, 1097 of 2014 and for respondents in CAF Nos. 666 of 2016 to 668 of 2016 and CAF No. 3837 of 2015.

Coram : **Smt. R.P. SondurBaldota, J.**
Date : 21st December, 2016

JUDGMENT **:**

1 This appeal preferred by the Insurance Company challenges the judgment and order dtd. 30th November, 2012, by which the Motor Accidents Claims Tribunal, Nashik

awarded the compensation to respondents no. 1 to 5 and directed the appellant to satisfy the award and later recover the amount of compensation from respondent no.6, the owner of the offending vehicle. This direction was given by the Tribunal in view of it's finding that there was breach of the terms and conditions of the insurance policy and as such the appellant is not liable to pay the compensation to respondents no. 1 to 5. None of the respondents have challenged the impugned judgment and order. As such, they have accepted the findings of the Tribunal as regards the negligence and breach on the part of respondent no.6 of the terms and conditions of the insurance policy. The conscious breach on the part of respondent no.6, was to permit the offending vehicle being driven by his minor son, who was subsequently charge-sheeted in Juvenile Court.

2 The challenge of the appellant to the impugned judgment and order is on two grounds. Firstly that the breach of the terms and conditions of insurance policy on the part of respondent no.6 being fundamental and having contributed to the cause of the accident, the appellant is entitled to completely avoid the liability to pay compensation for the death of the husband of respondent no.1 and the father of respondents no.2 to 5 in view of Section 149(2) (a)(ii) of the

Motor Vehicles Act, 1988 ("M.V. Act" for short). The second ground is that if at all, in the facts and circumstances of the case, an order directing the appellant to pay the compensation and later recover the same from respondent no.6 is to be passed, the same can be passed only by the Hon'ble Supreme Court in exercise of it's plenary jurisdiction under Article 142 of the Constitution of India. Neither the Motor Accidents Claims Tribunal under Section 166 and Section 168 of the Motor Vehicles Act, nor this Court under Section 173 read with Sections 166 and 168 of the Motor Vehicles Act can pass such an order. The respondents on the other hand seek to justify the direction contending that the liability to pay the third party is a statutory liability and a social obligation. It is submitted that since M.V. Act is a benevolent legislation it's provisions are required to read accordingly. It is also sought to be contended that the position of law in this regard has been settled by the decisions of this court and the Apex Court.

3 In view of the far reaching consequences of the decision on the above two grounds of challenge and since the very questions of law arise in some other appeals also, the learned advocates appearing in those matters have been permitted to advance submissions on the questions of law. Accordingly, Advocates Mr. D.S. Joshi, T.J. Mendon, Mr.

Niketan Nakhawa and Mr. Makarand Bakare have advanced the submissions alongwith Advocate, Mr. M.M. Sathaye appearing for the appellant herein. While Mr. Joshi has advanced arguments supporting the appellant. Mr. Mendon and Mr. Nakhawa have supported Mr. Bakare for the respondents.

4 The very questions of law have been haunting the Motor Accidents Claims Tribunal and the different High Courts since a long time. The Apex Court had by it's order in National Insurance Company Limited vs. Parvathneni, reported in 2009 (i) Law (Supreme Court), page 982 expressed prima facie opinion that if the Insurance Company proves that it has no liability to pay the compensation to the claimants, the Insurance Company cannot be compelled to make the payment and later on recover it from the owner of the vehicle. It then took note of the other contrary decisions in the field and expressed reservations about the correctness of the same, and referred the following questions for decision of a Larger Bench.

> "(1) If an Insurance Company can prove that it does not have any liability to pay any amount in law to the claimants under the Motor Vehicles Act or any other enactment, can the Court yet compel it to pay the amount in question giving it liberty to later on recover the same from the

> owner of the vehicle.
>
> (2) Can such a direction be given under Article 142 of the Constitution, and what is the scope of Article 142? Does Article 142 permit the Court to create a liability where there is none?"

The Larger Bench by it's order 17th September, 2013 disposed off the Special Leave Petition stating that in view of the fact that the quantum of compensation involved was small, it was not inclined to entertain the petition under Article 136 of the Constitution of India. It kept the question of law raised in the petition open to be decided in an appropriate case.

5 Several decisions of the Apex Court, our High Court and other High Courts have been cited by the advocates so as to assist the court in answering the questions. As Mr. Bakare supported by Mr. Mendon and Mr. Nakhwa contend that the question of law is in fact no longer res integra and that it has been held so by various decisions, it would be convenient to look into those decisions before considering the arguments advanced on behalf of the appellant.

6 Mr. Bakare, the learned advocate for the respondents has relied upon the following decisions of our High Court and a decision of the Apex Court in justification of

the direction given by the Tribunal of "Pay and Recover".

1	United India Insurance Co. Ltd. vs. Branch Office at Rial Toly & Ors., reported in 2008 (4) Bom. C.R. 851.
2	Jawahar Singh vs. Bala Jain & Ors., reported in 2011 (6) SCC 425.
3	The Oriental Insurance Co. Ltd. vs. Suhas s/o Sitaramji Tambe & Ors., reported in 2012 (6) All M.R. 164.
4	United India Insurance Limited vs. Bajrang Shrirang Shinde & Anr., reported in 2013 (4) ALL MR 156.
5	National Insurance Co. Ltd. Vs. Salouni Subhashchandra Nagzarkar and Ors., reported in 2014 ACJ 2762.
6	Bajaj Allianz General Insurance Co. Ltd. Vs. Sangita Bhagwan Raut & Ors., reported in 2015 (2) Mh. L.J., page 77. (Sangita Raut case No.1)
7	Bajaj Allianz General Insurance Co. Ltd. Vs. Sangita Bhagwan Raut & Ors. reported in 2015 (4) Bom. C.R. 740. (Sangita Raut case No.2)

A careful perusal of all the decisions cited will show that in three of the decisions i.e. in Suhas Tambe, Bajrang Shinde and

Sangita Raut's case no.1, there is no discussion of law whatsoever. Consequently, these decisions cannot be treated as precedents. They are the orders passed in the respective matters. In the case of Salouni Nagzarkar, this Court, in the facts of that case held that the driver of the vehicle cannot be said to be ineligible to drive the vehicle. Therefore, that decision is not relevant and as such need not be dilated any further.

7 The decision of the Apex Court in Jawahar Singh's case relied upon by Mr. Bakare states in clear terms that the parties had been heard on a limited question regarding liability to pay compensation on account of contributory negligence by the deceased, who was driving a scooter, in causing the accident to happen. Consequently, though there was a similar direction of “Pay and Recover”, given, the decision does not discuss it's justification in law. The decision merely says that the Tribunal had rightly, after saddling the liability for payment of compensation on the owner of the vehicle directed the Insurance Company to pay the amount to the awardee and recover the same from the owner.

8 In the two decisions of the Single Judge of this Court in Rial Toly case and Yuvraj Rawde case, reliance has

been placed upon the decision of the Apex Court in National Insurance Company Limited vs. Baljit Kaur, reported in 2004 (2) SCC page 1 to hold that the Apex Court has laid down the clear law that the Insurance Company would first satisfy the award and recover the amount from the owner by filing an execution application before the Court and the Insurance Company will not be required to file a separate suit. The specific reliance placed therein is upon para 21 of the decision, which reads as under :

> "21 The upshot of the aforementioned discussions is that instead and in place of the insurer, the owner of the vehicle shall be liable to satisfy the decree. The question, however, would be as to whether keeping in view the fact that the law was not clear so long such a direction would be fair and equitable. We do not think so. We, therefore, clarify the legal position which shall have prospective effect. The Tribunal as also the High Court had proceeded in terms of the decision of this Court in (New India Assurance Co. vs. Satpal Singh, 2000(1) S.C.C. Page 237. The said decision has been overruled only in Asha Rani (supra). We, therefore, are of the opinion that the interest of justice will be sub-served if the appellant herein is directed to satisfy the award amount in favour of the claimant if not already satisfied and recover the same from the owner of the vehicle. For the purpose of such recovery, it would not be necessary for the insurer to file a separate suit but it may

> initiate a proceeding before the Executing Court as if the dispute between the insurer and the owner was the subject matter of determination before the Tribunal and the issue is decided against the owner and in favour of the insurer. We have issued the aforementioned directions having regard to the scope and purport of Section 168 of the Motor Vehicles Act, 1988, in terms whereof, it is not only entitled to determine the amount of claim as put forth by the claimant for recovery thereof from the insurer, owner or driver of the vehicle jointly or severally but also the dispute between the insurer on the one hand and the owner nor driver of the vehicle involved in the accident inasmuch as can be resolved by the Tribunal in such a proceeding."

Careful perusal of the decision in Baljit Kaur's case shows that it does not discuss the question as regards the legality of direction to the Insurer, on being held not liable to pay compensation to the accident victim, to pay the same and recover it subsequently from the owner. The question arising for consideration before it, was whether an Insurance policy in respect of a goods vehicle would also cover gratuitous passengers in view of the Legislative Amendment in 1994 to Section 147 of the M.V. Act. All, that has been said therein is that in view of the change in the law, i.e. the decision of the Apex Court in New India Assurance Company vs. Satpal

Singh, reported in 2000 (1) SCC page 237 being overruled by the decision in New India Assurance Company Limited vs. Asha Rani, reported in 2003(2) S.C.C. Page 233, the interest of justice would be sub-served if the appellant before the Apex Court was directed to satisfy the award impugned in favour of the claimant, if already not satisfied and recover the same from the owner of the vehicle. It has thereafter observed that for the purpose of such recovery, it would not be necessary for the insurer to file a separate suit, but it may initiate the proceedings before the executing court as if the dispute between the insurer and the owner was the subject matter of determination before the Tribunal and the issue is decided against the owner and in favour of the insurer. Thus, it is seen that the direction of "pay and recover" was an order passed by the Apex Court in the facts of that case in exercise of it's jurisdiction under Article 142 of the Constitution of India. This view finds support from the decision dtd. 27th August, 2008 of Division Bench of this Court in The Oriental Insurance Co. Ltd. vs. Smt. Sunanda Machivale & Ors. in Letters Patent Appeal No. 121 of 2000. Therefore, reliance placed by the respondents in Rial Toly's case and Yuvraj Rawde's case would not be correct.

9 As regards the last decision i.e. in Sangita Raut's case (No.2), the justification for upholding the direction of "Pay and Recover" is stated at para 14 thereof. The same reads as under :

> "14 Now the question is, whether the Tribunals, in the facts and circumstances, should have issued the direction to the appellant to first pay the compensation amount and then recover it from the insured or not. Upon going through the impugned judgments and orders, I see no error in exercise of the jurisdiction by the learned Members of the Tribunals in issuing the impugned directions. Respondents no.1 to 3 in both the appeals are the widow and children of very tender age and were dependent upon the income of the deceased. These respondents by a cruel stroke of destiny have been rendered hapless and would find it extremely difficult to once again knock at the doors of the Court by filing execution proceedings against the owner and recover the amount of compensation from him. On the other hand, as the Insurance Company in these appeals has sufficient means, it would be in a better position to recover the amount from the owner. Therefore, I see no illegality in directing the appellant to pay the compensation first and then recover the same from the insured. Point is answered as in the affirmative."

The consideration stated at para 14 quoted above does not arise out of any statutory provision. It arises out of compassion felt for the unfortunate victims of the accident. Resultantly this decision is also of no assistance to the Court.

10 Mr. Nakhwa, by way of support to the respondents, relies upon three additional decisions. They are in :-

1) S. Iyyappan V/s. United Insurance Co. Ltd & Anr. reported in SCC page 62.

2) The Oriental Insurance Co. Ltd V/s. Shri. Nanjappan & Ors., reported in 2004 (2) SCR page 365.

3) Iffco-Tokio General Insurance Co. Ltd. V/s. Ushadevi Ashokkumar Salodia, reported in 2010 (2) AICJ page 90.

11 In ***S. Iyyappans's*** case, the Apex Court was considering liability of the Insurer, in the facts, where the driver had licence to drive light motor vehicle, but was driving a maxicab which though a light motor vehicle was being used as a commercial vehicle. The Apex Court held that, in such facts of the case, the Insurer cannot disown it's liability. This decision is obviously not relevant for deciding the question on hand because the defence taken was a technical defence.

12 The second decision in ***Nanjappan's*** case cited is a mere order passed in the facts of that case. As regards the third decision, the licence of the driver of the offending vehicle was not valid on the date of the accident and the Insurance Company had sought to deny its liability to pay compensation to the accident victim on that ground. The Tribunal had issued similar directions to the Insurer to pay the amount of compensation to the claimant and then to recover it from the owner of the vehicle. The Apex Court, after considering the statutory provisions as also the decisions cited before it, expressed its reservations even as regards exercise of the plenary power of the Apex Court under Article 142 of the Constitution of India to issue directions to the Insurer to pay the compensation amount and later recover it from the owner of the vehicle. It, however, did not interfere with the order of the Tribunal in view of pendency of the reference to the larger bench in ***Parvathneni's*** case (supra). It is thus seen that, even this decision can be of no assistance in answering the question framed for consideration.

13 Mr. Mendon, on his part, has relied upon the following seven decisions of the Apex Court :

1 British India General Insurance Co. Ltd V. Captain Itbar Singh and Ors. Reported in 1958-65 A.C.J.1.

2. Skandia Insurance Co. Ltd V. Kokilaben Chandravadan and Ors. Reported in 1987 ACJ 411.

3 Sohan Lal Passi V. P. Sesh Reddy and Others reported in 1996 ACJ 1044

4 Pepsu Road Transport Corporation v. National Insurance Co. Ltd. Reported in 2013 ACJ 2440.

5 New India Assurance Co.Ltd. V. Kusum and Others, reported in 2009 ACJ 2655.

6 Manager, National Insurance Co. Ltd. v. Saju P. Paul and another, reported in 2013 ACJ 554.

7 United India Insurance Co. Ltd. Versus. Sindhubai and Ors., reported in I (2011) ACC 357.

14 Mr. Mendon, submits that, since the M.V. Act is in the nature of benevolent legislation, it has been so taken note of and appreciated by the Apex Court in its decision in British India (supra) case. In that decision, the Apex Court, considered a question arising under the Old Motor Vehicles Act that whether an Insurer on being made a party to the action for compensation can raise a defence other than that prescribed under Section 96(2) of the Motor Vehicles Act. It was sought to be contended before the Apex Court that, it is

only fair that a person sought to be made bound by a judgment should be entitled to resist his liability under it by all defences which he can under law, advance against passing of it. The Apex Court, rejected the contention stating that though the Statute has created a liability in the Insurer to the injured person but the Statute has also expressly confined the right to avoid that liability to certain grounds specified in it and it is not for the Court to add to those grounds for the reason of hardship. The Apex Court was also not convinced that the Statute causes any hardship to the Insurer. Then, it was sought to be argued before the Apex Court that, if the Insured is a man of straw, the Insurer may not be able to recover anything from him. The Apex Court, dismissed the argument with observation that, in that case, it is Insurer's bad luck. It further observed that, in these circumstances, the injured person would also not be able to recover the damages suffered by him from the Insurer, the person causing the injuries. The loss had to fall on someone and the Statute has thought it fit that it shall be borne by the Insurer. It also felt that, it is equitable for the loss to fall on the Insurer in the course of his carrying on his business, a business out of which he makes profit and so he could arrange his business in such a way that in the net result, he would never suffer a loss. The relevance of this decision is limited to pointing out that, the M.V. Act is a benevolent piece of legislation.

15 In Skandia's case and in Sohan Lal Passi's case, the Apex Court was considering the meaning of the expression "breach". The facts of the two cases are near identical, the driver had left the vehicle in the control of the cleaner/conductor who was not a duly licensed person and the cleaner/conductor drove the vehicle and caused the accident. It was sought to contend that, the accident had occurred when an unlicensed person was at the wheel and the Insurance Company would be exonerated from the liability. The Apex Court, rejected the contention holding that the Insured had engaged a licensed driver and had placed the vehicle in his charge. Thus, the Insured had done everything within his power and there was no allegation that the Insured had willfully violated the condition of policy. The Apex Court held that, the right to claim compensation by the claimants in respect of motor vehicle accidents should not be defeated on technical grounds. These decisions are thus of no assistance to us.

16 In Pepsu Road Transport Corporation's case, the driving licence of the driver of the offending vehicle was alleged to be fake one. But the Apex Court found that on

scanning the evidence of the Licensing Authority before the Tribunal, it cannot be absolutely held that, the licence to the driver had not been issued by the Authority and that the licence was fake. In the circumstances, the Insurer was held liable.

17 The next decision relied upon by Mr. Mendon i.e. the decision in Kusum's and others is absolutely out of context. It arose out of the objection taken by the Insured before the Executing Court in the recovery proceedings filed by the Insurer, that the order to recover by the Tribunal was without authority. The Apex Court held :-

> "9 Whenever, thus, a direction has been issued by the Tribunal, it must be held to have been done in exercise of its inherent power. It would be travesty of justice, if the insurance company which is directed to pay the amount and then face immense difficulties in executing a decree."

The decision only saves the situation for the Insurer where the payment was already made to the claimant.

18 Perusal of the decision in *Saju Paul's* case (supra) would show that, the order was held justified by the Apex Court in fact situation of that case.

19 The decision in *Sindubai's* case (supra) is of the Bench of Single Judge of this Court who has opined with reference to the decision of the Division Bench of this Court referred to at para-8 above, that a power would be vested in the Tribunal and this Court depending upon the facts and circumstances of each case to direct the Insurer to pay compensation amount and thereafter to recover the same from the Insurer.

20 It becomes clear from the above discussion that, there is no final decision as yet on the two questions framed above. The questions continue to lie in the realm of confusion.

21 This brings us to the decisions cited by Mr. Sathaye for the petitioner and Mr. Joshi in support. The decision cited in common by Mr. Sathaye and Mr. Joshi, is of a Bench of three judges of the Apex Court in <u>National Insurance Co. Ltd. Vs. Swaran Singh and others, reported in 2004 (3) Supreme Court Cases, page 297</u>. By that decision, the Apex Court was considering interpretation of Section 149 (2)(a) (ii) vis-a-vis, the proviso appended to Sub-Sections 4 and 5 of the Motor Vehicles Act involved in a batch of Special Leave Petitions filed by the insurer assailing various awards of the Tribunal and High Courts. The defences raised by the Insurance

Company summarised in the decision were (a) driving licence produced by the driver or owner of the vehicle was a fake one; (b) driver did not have any licence whatsoever; (c) licence, although was granted to the concerned driver but on expiry thereof, had not been renewed; (d) licence granted to the drivers being for one class or description of vehicle but the vehicle involved in the accident was of different class or description; and (e) the vehicle in question was driven by a person having a learner's licence.The Apex Court considered various aspects of the liability of Insurance Company towards the insured including the liability to satisfy the award in favour of the third party at the first instance and then to recover the award impugned from the owner or driver of the vehicle. It held that mere absence, fake or invalid license or disqualification of the driver for driving are not themselves defence available to the Insurance Company and that the burden of proof of breach of the Insurance policy was on the Insurance Company. It also held that the Insurance Company will not be allowed to avoid its liability merely on technical breach of conditions concerning the driving license. As regards it's liability to satisfy the award, despite the finding in it's favour as regards breach of the insurance policy, the observations of the Apex Court are made at paras 76, 96, 97 and 102 of the decision. At para 76, it notes that it is one thing to say that the insurance companies are entitled to raise a defence but it is another thing to say that despite the fact that it's defence has been accepted having regard to the facts and circumstances of the case, the Tribunal has power to direct them to satisfy the decree at the first instance and then direct recovery of the same from the owner. These two matters stand apart and require contextual reading. It thereafter referred to the different defences as noted hereinabove relating to the licenses. As regards the defence of "admittedly no licence was obtained by a driver", it has held in no uncertain words that "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. It has thereafter summarised it's findings at para 102 in following terms.

While summarising the findings at para 102, it notes as follows :

> (i) Chapter XI of the Motor Vehicles Act, 1988 providing compulsory insurance of vehicles against third party risks is a social welfare legislation to extend relief by compensation to victims of accidents caused by use of motor vehicles. The provisions of compulsory insurance coverage of all vehicles are with this paramount object and the

provisions of the Act have to be so interpreted as to effectuate the said object.

(ii) Insurer is entitled to raise a defence in a claim petition filed under Section 163 A or Section 166 of the Motor Vehicles Act, 1988 inter alia in terms of Section 149(2)(a) (ii) of the said Act.

(iii) The breach of policy condition e.g. disqualification of driver or invalid driving 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 vehicle 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 defences (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.

(v) The court cannot lay down any criteria as to how said burden would be discharged, inasmuch as the same would depend upon the facts and circumstance of each case.

(vi) Even where the insurer is able to prove breach on the part of the inured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards insured unless the said breach or breaches on the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply 'the rule of main purpose' and the concept of 'fundamental breach' to allow defences available to the insured under Section 149(2) of the Act.

(vii) The question as to whether the owner has taken reasonable care to find out as to whether the driving licence produced by the driver, (a fake one or otherwise), does not fulfil the requirements of law or not will have to be determined in each case.

(viii) If a vehicle at the time of accident was driven by a person having a learner's licence, the insurance companies would be liable to satisfy the decree.

(ix) The claims tribunal constituted under Section 165 read with Section 168 is empowered to adjudicate all claims in respect of the accidents involving death or of bodily injury or damage to property of third party arising in use of motor vehicle. The said power of the tribunal is not restricted to decide the claims inter se between claimant or claimants on one side and insured, insurer and driver on the other. In the course of adjudicating the claim for compensation and to decide the availability of defence or defences to the insurer, the Tribunal has necessarily the power and jurisdiction to decide disputes inter se between insurer and the insured. The decision rendered on the claims and disputes inter se between the insurer and insured in the course of adjudication of claim for compensation by the claimants and the award made thereon is enforceable and executable in the same manner as provided in Section 174 of the Act for enforcement and execution of the award in favour of the claimants.

(x) Where on adjudication of the claim under the Act the Tribunal arrives at a conclusion that the insurer has satisfactorily proved its defence in accordance with the provisions of section 149 (2) read with sub-section (7), as interpreted by this court above, the Tribunal can direct that the insurer is liable to be reimbursed by the insured for the compensation and other amounts which it has been compelled to pay to the third party under the award of the Tribunal. Such determination of claim by the Tribunal will be enforceable and the money found due to the insurer from the insured will be recoverable on a certificate issued by the Tribunal to the Collector in the same manner under section 174 of the Act as arrears of land revenue. The certificate will be issued for the recovery as arrears of land revenue only if, as required by sub-section (3) of section 168 of the Act the insured fails to deposit the amount awarded in favour of the insurer within thirty days from the date of announcement of the award by the Tribunal.

(xi) The provisions contained in sub-section (4) with proviso thereunder and sub-section (5) which are intended to cover specified contingencies mentioned therein to enable the insurer to recover amount paid under the contract of insurance on behalf of the insured can be taken recourse of by the Tribunal and be extended to claims and defences of insurer against insured by relegating them to the remedy before regular court in cases where on given facts and circumstances adjudication of their claims *inter se* might delay the adjudication of the claims of the victims.

After the extensive discussion of law, the Apex Court in the facts of the proceedings before it, did not set aside the awards under challenge and directed that such awards may be satisfied by the Insurance Company subject to their right to recover the same from the owners of the vehicle in the manner as led down. It has however clarified that this order may not be considered as the precedent.

22 Mr. Sathaye submits that in the facts of the case on hand, a minor was driving the insured vehicle at the time of the accident. The owner of the vehicle being the father of the minor was well aware that he had and could have no licence to drive the vehicle. Despite the knowledge, he had permitted the son to drive the vehicle. The Tribunal has come to a categorical finding, on appreciation of evidence, that the insured had allowed the vehicle to be used by the minor and therefore there was breach of condition of the Insurance policy. This finding has been challenged neither by the owner of the offending vehicle nor the claimant. Therefore, the present case falls in the category of "when admittedly no license was obtained by a driver" noted by the Apex Court and that in view of that decision, the insurance company is entitled to avoid the liability. He submits that the Apex Court while considering that category has observed at para 77 that the owner of a motor vehicle in terms of Section 5 of the Act has responsibility to see that the vehicle was driven by a person, who does not satisfy the provisions of Sections 3 and 4 of the

Act. In a case therefore where driver of the vehicle admittedly did not hold any license and the same was allowed consciously to be driven by the owner of the vehicle by such person, the insured is entitled to succeed in it's defence and avoid liability. It is his further argument that in view thereof the Insurance Company cannot be compelled to pay the compensation to the claimant and recover the same from the insured.

23 As regards the direction to the Insurance Company to pay the compensation to the claimants in the first place and later recover the same, Mr. Sathaye and Mr. Joshi rely upon the decision of Single Judge of this court in United India Insurance Company Limited vs. Anubai Gopichand Thakare and Ors., and unreported decision of Karnataka High Court in Oriental Insurance Company vs. Sri. K.C. Subramanyam, in M.F.A./2596/2007. Mr. Joshi has relied upon two more decisions i.e. the decision of the Apex Court in National Insurance Company vs. Vidyadhar Mahariwala, reported in 2008(12), S.C.C. Page 701 and decision of the Apex Court in National Insurance Company vs. Parvathneni, reported in 2009 (8), S.C.C., page 785.

24 In Anubai Gopichand case (supra), the Bench of Single Judge of this Court was considering the question

"whether the Tribunal has any statutory power to direct insurer to pay amount of compensation for which it is exonerated from liability in view of fundamental breach of the policy conditions, and direct that it may be subsequently recovered from the insured?". It answered the question in the negative. For arriving at that answer, it had considered various then prevailing decisions including the decision of the Apex Court in Oriental Insurance Company Limited vs. Sri. Nanjappan and Others, reported in A.I.R. 2004 (1) S.C.C., page 1961, (2004) 2 S.C.R., page 365, which has been cited by Mr. Nakhwa. By referring to the Swaran Singh's case, it noted that the Insurance Company was not liable to indemnify the insured and is also not obliged to satisfy the award of the Tribunal/Court and then have recourse to the insured, the owner of the offending vehicle. On appreciation of the statutory provisions and the various decisions cited before it, the Bench of Single Judge gave following reasons to answer the question before it in the negative.

> "**19** It is conspicuous that the directions were given in respect of the procedure for recovery in the same proceedings having regard to the scope and purport of Section 168 of the Motor Vehicles Act, 1988. The directions in the context of determination of such a dispute after depositing the amount by the insurer are subject matter of the scope of Section 168 of the Motor Vehicles Act, 1988. The Apex Court

did not, however, lay down that in all such cases, the insurer shall first be liable to pay and then to recover it from the insured. The directions in Baljit Kaur's case are given when the Apex Court came to the conclusion that the interest of justice would be subserved if the appellant (insurer) would be directed to satisfy the awarded amount in favour of the claimant, if not already satisfied and recover the same from the owner of the vehicle. Needless to say, in a particular case, when such directions are given to meet ends of justice, then same are given in exercise of extra ordinary jurisdiction of the Apex Court. The same powers, which are available to the Apex Court under Article 136 and under Article 142 of the Constitution, are not available to the Tribunal or High Court.

20 The purposive interpretation of Section 168 of the Motor Vehicles Act would make it manifest that the provision relates to power of the Tribunal to determine the question of justness of the award and quantum of compensation. It may be said that Section 168 is enabling provision but it does not empower the Tribunal to issue direction to the insurer to pay the amount of compensation, though a finding is reached that the insurer is not liable to pay such amount on account of fundamental breach of the page 1799 terms of insurance policy. Considering all the relevant aspects of the matter and having regard to the case law referred to above, I have no hesitation in holding that the directions given by the Tribunal in the bunch of present appeals are

> incorrect, improper and illegal. The impugned order is, therefore, unsustainable."

25 The unreported Karnataka High Court's decision has been heavily relied upon by Mr. Sathaye and Mr. Joshi. In the facts of this decision, the offending vehicle was being driven by a person who did not have valid and effective driving licence to drive the vehicle. In the decision, the Karnataka High Court noted that inspite of several judgments of the Apex Court, on the point, an element of doubt and confusion prevails. It also expressed that it was conscious that even in the Apex Court itself, the question was being referred to the Larger Bench. On this background, it gave hearing to all the persons concerned and tried to reconcile the decisions and passed an order. It further noted that it cannot be disputed that power to be exercised under Article 142, the Constitution of India is only by the Apex Court and not by any other courts and observed that it had to decide rights of the parties strictly in terms of the statutory provisions with an observation that if the particular provision is not interpreted by the Apex Court, the High Court is at liberty to make it's own interpretation.

26 The Karnataka High Court has in paras 63 to 81 of it's decision extensively and lucidly discussed the Scheme

under the M.V. Act. I am in respectful agreement with the entire discussion. It has thereafter at para 82 culled out the scheme in following words.

> 82. From the above discussion, what follows is :-
>
> (a) If the vehicle involved in the accident is duly insured and the insurer has issued the certificate of insurance as provided under Sub-Section (3) of Section 147, the liability of the insurer to satisfy the claim awarded under Section 147(1)(b) is absolute. Once the claimant issues the notice to the insurer in his claim petition and thereafter the Claims Tribunal passes an award, the insurer by virtue of Section 149(1) steps into the shoes of judgment debtor, that is steps into the shoes of the insured and is bound to pay the amount awarded to the third party. The liability is created under the statute.
>
> (b) When the notice is issued under Section 149(2), the insurer gets a right to defend the action, that is the action brought by the claimants. He can defend the action only on the grounds mentioned in Sub-Section (2) of Section 149. No other grounds are available to the insurer.
>
> (c) If the defence of the insurer is that under the terms of the policy he has restricted his liability to indemnify a particular amount and is not liable to pay the amount as statutorily provided under Section 147 (1) (b), though he is entitled to such a defence, the tribunal or Court shall ignore the said restrictive clause in the policy and pass a decree or award directing payment of compensation in terms of Section 147(1)(b) of the

Act. The insurer shall satisfy the decree or award. On such satisfaction, the insurer gets the right to recover the amount which was not liable to be paid under the policy from the insured.

(d) Similarly if the amount paid by the insurer in terms of the award or decree is in excess of the amount agreed to be paid under the policy, the insurer gets a right under sub-section (5) ofSection 149 to recover the same from the insured after paying the said amount to the third party.

(e) The condition precedent for application of the rule 'pay and recover' is, there should be a valid policy of insurance and there is no breach of the terms and conditions of the policy. The dispute is regarding the nature and quantum of liability to be satisfied. If the contract restricts the liability to a particular sum, when the Statute provides for payment of a higher sum, then the liability is not in dispute. It is the quantum, which is in dispute. Therefore, the Legislature advisedly expressed this principle of pay and recover in Sub-Sections (4) and (5) of Section 149 and directed the insurer to pay the amount awarded or decreed and recover the excess amount from the insured. In other words, this principle of pay and recover applies to cases, which fall under Sub-Section (4) and (5) of Section 149 only.

(f) The Legislature consciously has not conferred such a right or obligation while dealing with the cases of breach of terms of the agreement or cases in which the statutory grounds mentioned in Section 149(2) are established. Such a provision is conspicuously missing in Section 149(2) or in Section 149(1). On the contrary, the express provision under Section 149(7) has been introduced. The purport of Sub-Section (7) of Section 149 is if the claimant has issued notice to the insurer and if the insurer wants to avoid the liability under Section 149(1), he is at liberty to do so by establishing the grounds mentioned in Section 149(2). If these grounds are established, then there is no liability on the part of the insurer to pay the amount decreed or awarded under Section 149(1). When the liability itself is not there or when the liability is avoided on one of the grounds mentioned in Section 149(2), there is no liability to pay the amount decreed or awarded. When there is no liability to pay or satisfy the award or decree, the question of directing the insurer in those circumstances to pay and recover would not arise.

(g) The Apex Court after holding that the insurer has no obligation to pay, but still has directed the insurer to pay and recover from the insured. Such a direction is issued by virtue of the power conferred on the Apex Court under Article 142 of the Constitution, which power neither this Court nor the Tribunal can exercise.

(h) Therefore, it is not the law laid down by the Apex Court under Article 141 of the Constitution that when the insurer is not liable to pay still he can be directed to pay and recover.

(i) In fact, one of the Benches of the Supreme Court, doubting the correctness of this practice in the Supreme Court of directing pay and recover by exercising the power conferred under Article 142 of the Constitution, has referred the matter to a larger Bench. We have

> not interpreted in this case the scope and ambit of Article 142 of the Constitution. We are strictly confining our jurisdiction to interpret the statutory provisions in the light of the judgments of the Supreme Court."

27 Karnataka High Court then considers whether the scheme fulfils the social obligation in discharge of which the legislation of Motor Vehicles Act has been introduced. It notes that a claim for compensation by a motor accident victim arises out of tort which is a species of civil injury or wrong. As noted by the Karnataka High Court, the Law of Torts exists for the purpose of preventing men from hurting one and another, whether in respect of their property, their persons, their reputations or in any else which is theirs. The action of tort therefore is usually a claim of pecuniary compensation in respect of damage suffered as a result of invasion of legally protected interest. Therefore, it is a personal liability to be discharged by the person driving the vehicle at the relevant time. In case a vehicle being driven by a driver employed by the owner of the vehicle, recovery of compensation awarded that was found just and reasonable became difficult because of the financial position of the driver. This led to expansion of the law to draw, the owner of the vehicle, into the field of liability by introduction of concept of vicarious liability. The

owner of the motor vehicle then became liable to compensate, the victim of a motor vehicle accident due to the negligence of the driving of his servant. It next refers to the introduction of provisions relating to compulsory insurance in respect of third party insurance in order to advance the social object. As regards the position of the Insurer, the judgment refers to the same at paras 89 to 91, which read as under :

> "89. Further, the Legislature took note of the fact the insurer may restrict his liability to indemnify the insured to a particular amount which is less than the actual amount liable to be paid to a third party under the statute. Therefore, Sub Section (4) and (5) were introduced nullifying those contractual terms and making it obligatory on the part of the insurer to pay the amount awarded or decreed. However, the insurer was given the right to proceed against the insured to recover the excess amount paid.
>
> 90. With the nationalisation of the Insurance Company in India, the social responsibility is now taken over by the instrumentalities of the State. With the passage of time, the concept of 'absolute liability', concept of 'liability without fault' in certain cases was introduced by way of Section 140 of the Act. The amendments were carried out to the law introducing no fault liability. It is a clear departure from the usual common law principle that claimants should establish negligence on the part of the owner or driver of the motor vehicle before claiming any compensation for the death or permanent

disablement caused due to the motor accident. To that extent, the substantive law of the country stands modified. Similarly the concept of no fault liability and payment of compensation on structured formula basis was introduced by introducing Section 163A of the Act.

91. This piece of legislation is enacted by the parliament with a social obligation of providing solace to the victims of the accident or to the legal representatives of persons who died in the accident. Therefore, the Courts have been placing such interpretation which would advance the cause of justice and liberal construction has been placed with a view to implementing the legislative intent. In this background under the scheme, as contained in Chapter XI and XII, the legislature has expressly provided for the principle of 'pay and recover' in Sub Sections (4) and (5) of Section 149. However, the same is not provided in Section 149(2). At the same time, the express provision like sub section (7) of Section 149 is enacted by the Legislature making it very clear that the insurer has a right to avoid the liability on the grounds specified under Section 149(2) of the Act. The question is whether the Courts by an interpretive process read into sub-section (7) of Section 149 of the Act, the principle of "pay and recover", to come to the rescue of third parties for whose benefit the aforesaid scheme is introduced by the Parliament. The law on the point is fairly well settled.

28 The next task undertaken by the Karnataka High Court is of interpreting the provision of Section 149 of the M.V. Act. After taking care of noting for itself the delicate boundary line between the Legislative function and interpretation of statutes by adopting the various principles of interpretation. It observes thus at para 100.

> "100. In the background of this well settled legal principles we have to approach this human problem, a victim of an accident, who had no control over the vehicle which is involved in the accident and who is not a party to the insurance is looking at the society, State, Government and Courts for relief for survival, in a country governed by rule of law, which has accepted Democracy as the way of life. Chapter XI of the Act was introduced for the benefit of the third party. The Parliament has passed this beneficial legislation providing for compulsory insurance to all vehicles before they are brought on roads. They also introduced the concept of 'liability without fault' as contained in Section 140 of the Act. They also provided for 'no fault liability' and payment of compensation on structured formula basis u/s.163-A of the Act. Further they have introduced the principle of 'pay and recover' in Sub Section (4) and (5) of Section 149 of the Act. It provides for payment of the amount awarded as compensation notwithstanding the restrictive clause in the policy of insurance. But the benefit extended under that Chapter is taken away by introduction of Section 149(2) read with sub-

section (7) of Section 149, without expressly providing the principle of pay and recover as was done in the case falling under sub-sections (4) and (5) of Section 149 of the Act. When the Parliament expresses its intention by express words, in particular sub-Section (4), (5) and (7) of Section 149 of the Act, the Court has to presume that the legislature inserted every part thereof for a purpose and the legislative intention is that every part of the statute should have effect. The legislature is deemed not to waste its words or to say anything in vain and a construction which attributes redundancy to the legislature is to be avoided. The legislative intention is to be gathered from the language used, which means that attention should be paid to what has been said as also to what has not been said. The Courts cannot reframe the legislation to make up deficiencies, as it has no power to legislate. Therefore, when the Parliament has expressly provided for the principle of pay and recover in cases falling under sub-Section (4) and (5) and has omitted to extend the said benefit to cases falling under sub-Section (7) or sub-Section (2) of Section 149 of the Act, the Court cannot read the said principle into the said provisions and extend the benefit. It amounts to the Court supplying "casus omissus", which is not permissible. It amounts to the Court reframing the section, and legislating, for which it has no power. That is why the Supreme Court in order to do complete justice between the parties, even after holding that there is no liability on the part of the insurance company to indemnify or pay in terms of the decree or the award passed by the Tribunal, has been issuing directions to the

> insurance company to pay the claim and recover the said amount from the insured, by virtue of its power under Article 142 of the Constitution and extending the said benefit while making it clear that it would not be a precedent. Thus it has demonstrated the judicial restraint and respected the concept of separation of power as enunciated in the Constitution".

This Court is in complete and respectful agreement with the above view of the Karnataka High Court and endorse the same.

29 For the aforesaid reasons, the following order is passed :

i) The appeal is allowed.

ii) The impugned order is quashed and set aside as against the appellant.

iii) The Motor Accident Claim Petition No.342 of 2006 is dismissed as against the appellant.

iv) The parties shall bear their own costs.

(Smt. R.P. SondurBaldota, J)