WWW.LIVELAW.IN

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 12th DAY OF MAY, 2020

PRESENT

THE HON'BLE MRS. JUSTICE B.V. NAGARATHNA
AND
THE HON'BLE MR.JUSTICE K.N. PHANEENDRA
AND
THE HON'BLE MR.JUSTICE B.A. PATIL

M.F.A. No. 30131 OF 2010 (MV-I)

BETWEEN:

NEW INDIA ASSURANCE CO. LTD.,
S.S. FRONT ROAD,
BIJAPUR,
BY ITS DIVISIONAL MANAGER

...APPELLANT

(BY SRI A.N. KRISHNASWAMY,
SRI K. SURYANARAYANA RAO AND
SRI C.R. RAVISHANKAR, ADVOCATES)

AND:

1. YALLAVVA
W/O YAMANAPPA DHARANAKERI,
AGE: ABOUT 43 YEARS,
OCC: COOLIE,
R/O KURABARA ONI, TIKOTA,
TQ: & DIST: BIJAPUR.

2. VINAYAKUMAR
S/O MAHANTAPPA KOTTAGI,
AGE: ABOUT 39 YEARS,
OCC: BUSINESS,

WWW.LIVELAW.IN

R/O NEW KOLHAR,
TQ: B. BAGEWADI,
DIST: BIJAPUR.

...RESPONDENTS

(BY SRI. A. SYED HABEEB, ADVOCATE FOR R1 (ABSENT);
R2 IS SERVED;
SRI A.K. BHAT, ADVOCATE, ASSISTED THE COURT)

THIS MISCELLANEOUS FIRST APPEAL IS FILED UNDER SECTION 173(1) OF THE MOTOR VEHICLES ACT, 1988 PRAYING TO MODIFY THE JUDGMENT AND AWARD DATED 30.09.2009 PASSED BY THE MACT-V AT BIJAPUR IN M.V.C. NO. 1357/2006 AND CONSEQUENTLY DISCHARGE THE APPELLANT INSURANCE COMPANY OF ITS LIABILITY TO PAY COMPENSATION & ETC.

THIS MISCELLANEOUS FIRST APPEAL HAVING BEEN HEARD ON 20.09.2019 AND RESERVED FOR PRONOUNCEMENT OF JUDGMENT AT PRINCIPAL BENCH, BENGALURU, COMING ON FOR '***PRONOUNCEMENT OF JUDGMENT'***, THIS DAY, ***K.N. PHANEENDRA, J.*** DELIVERED THE FOLLOWING:

JUDGMENT

This Special Full Bench is constituted by the Order of Hon'ble the Chief Justice dated 01.07.2015 to decide an important question of law raised by the learned Single Judge in MFA No.30131/2010.

WWW.LIVELAW.IN

2. At the outset, it is necessary to extract the order of reference dated 18.04.2013 as under:

" Dr.JRJ:18.04.2013

MFA NO.30131/2010 (MV)

ORDER

1. The Insurer of offending vehicle involved in motor vehicle accident occurred on 24.04.2006 is in appeal, questioning the direction of the Tribunal to discharge the award in favour of the respondents and to recover it from the insured – owner of the vehicle.

2. From what the learned counsel on both sides have adverted to, it is seen from the records, occurrence of accident on 24.04.2006 at 11.00 AM involving tempo 407 bearing Reg.No.KA-28/B-5434 and consequent injuries to the occupants of the vehicle and validity of the insurance covered, provided by the Appellant in respect of that vehicle to indemnify the owner of it, is not in dispute.

3. The finding of the Tribunal that accident was result of negligent driving of that vehicle has also reached finality as the same is not questioned by the insurer or the driver of the insured. The moot question raised by the appellant – Insurance Company in this appeal is

WWW.LIVELAW.IN

that there was violation of the terms of insurance policy and therefore the case falls under sub-section (2) of Section 149 of the Motor Vehicles Act, 1988 (hereinafter referred to as the 'Act' for brevity) and not under sub-section (1) of Section 149 of the Act. Therefore, they contend they cannot be directed to pay and recover from the insured owner.

4. Learned counsel has placed reliance on the decision of this Court in the case of ***Oriental Insurance Company Limited Vs. K.C. Subramanyam and another*** reported in ***ILR 2012 KAR 5241***, wherein the division bench of this Court has differentiated the circumstances covered by sub-section (1) of Section 149 of the Act and sub-section (2) of Section 149 of the Act to hold that by virtue of sub-section (7) of Section 149 of the Act, the Insurance Company cannot be directed to pay and recover, if it has a valid defence to prove that there was a violation of terms of insurance policy.

5. The claim advanced by the claimants was basically on the ground that a driver of the offending vehicle was rash and negligent. The appellant – Insurance Company had admitted issuance of policy vide Ex.D-1, which shows it is

WWW.LIVELAW.IN

issued in respect of goods vehicle and the appellant has collected Rs.8,274/- as a premium, which is undoubtedly more than the basic premium prescribed by TRl to be paid in respect of said class of vehicle. The break up figures mentioned in the Schedule to the Ex.D-1 is that the Company has collected apart from high premium for the coverage of third party risk, an additional sum to cover two more employees apart from those covered statutorily by Sections 147 and 149 of the Act.

6. The contention of the Insurance Company was they were gratuitous passengers carried in the goods vehicle and therefore it has no liability. The learned Member of the Tribunal accepted that plea and held that the Insurance Company can recover the amount ordered to be paid to claimants from the insured – owner.

7. In this appeal the direction is questioned on the ground as there is a violation of the condition of the insurance policy. There could be no direction to pay and recover. Such a plea has to be tested from language of Section 149 of the Act, which clearly postulates as follows:

WWW.LIVELAW.IN

149. Duty of Insurers to satisfy judgments and awards against persons insured in respect of third party risk. -- (1) If, after a certificate of Insurance has been issued under sub-section (3) of Section 147 in favour of the person by whom a policy has been effected, judgment or award in respect of any such liability as is required to be covered by a policy under clause (b) of sub-section (1) of Section 147 (being a liability covered by the terms of the policy) or under the provisions of Section 163 A is obtained against any person insured by the policy, <u>then, notwithstanding that the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy, the insurer shall, subject to the provisions of this section, pay to the person entitled to the benefit of the decree any sum not exceeding the sum assured payable thereunder, as if he were the judgment debtor, in respect of the liability, together with any amount payable in respect of costs and any sum payable in respect</u>

Not Any Copy

WWW.LIVELAW.IN

> of interest on that sum by virtue of any enactment relating to interest on judgments.

8. The underlined portion of the words appearing in the Section make it clear that even though the Insurance Company may have, notwithstanding that the Insurance Company may be entitled to avoid or cancel or may have avoided or cancelled the policy is liable to pay and recover. This will cover the circumstances even if the Insurance Company can validly cancel the policy for violation of terms or it may even have cancelled the policy, it has to discharge the award. Therefore, sub-section (1) makes it clear that even in cases where prior to claim, if the policy has been cancelled by the Insurance Company, even then under sub-section (1) of Section 149 of the Act, the Insurance Company is bound to pay and recover.

9. Sub-section (2) of Section 149 of the Act to which reference has been made, deals with a situation different. Sub-section (2) makes it clear no sum shall be payable by an insurer under sub-section (1) in respect of any judgment or award unless, before the

WWW.LIVELAW.IN

commencement of the proceedings in which the judgment or award is given the insurer had notice through the court or, as the case may be, the Claims Tribunal of the bringing of the proceedings, or in respect of such judgment or award so long as execution is stayed thereon pending an appeal; and an insurer to whom notice of the brining of any such proceedings is so given shall be entitled to be made a party thereto and to defend the action on any of the following grounds, namely:

(a) that there has been a breach of a specified condition of the policy, being one of the following conditions, namely:-

(i) a condition excluding the use of the vehicle –

(a) for hire or reward, where the vehicle is on the date of the contract of insurance a vehicle is not covered by a permit to ply for higher or reward, or

(b) for organized racing and speed testing, or

(c) for a purpose not allowed by the permit under which the vehicle is used, where

Not Authenticated Copy

WWW.LIVELAW.IN

the vehicle is a transport vehicle, or

(d) without side – car being attached where the vehicle is a motor cycle; or

(ii) a condition excluding driving by a named person or persons or by any person who is not duly licensed, or by any person who has been disqualified for holding or obtaining a driving licence during the period of disqualification; or

(iii) a condition excluding liability for injury caused or contributed to by conditions of war, civil war, riot or civil commotion; or

(b) that the policy is void on the ground that it was obtained by the non-disclosure of a material fact or by a representation of fact which was false in some material particular.

10. Sub-section (2) therefore makes it clear that the mandate of sub-section (1) compel the Insurance Company to pay the amount ordered as compensation, notwithstanding the Insurance Company may be entitled to cancel the policy or has cancelled the policy for violation of terms of policy is

WWW.LIVELAW.IN

bound to pay. Sub-section (2) makes it clear that such an order cannot be passed unless the Insurance Company has been given notice of the proceedings and has been given an opportunity to defend the action on any of the grounds enumerated in sub-section 2 (a) and (b). Therefore, sub-section (2) protects the interest of the Insurance Company to afford an opportunity before an award is passed. But when an award is passed, sub-section makes it clear the Insurance Company has to pay as if he were the judgment debtor, in respect of the liability, together with any amount payable in respect of costs, interests etc. If a notice has been issued to the Insurance Company and Insurance Company had an opportunity to defend the action on any of the grounds enumerated under sub-section (2) (a) and (b), then an order under sub-section (1) is permissible and statutorily the Insurance Company is bound to discharge the award. The division bench has referred to sub-section (7) to hold that Insurance Company can be absolved. Sub-section (7) reads –

> (7) No insurer to whom the notice referred to in sub-section (2) or sub-section (3) has been given shall

WWW.LIVELAW.IN

> be entitled to avoid his liability to any person entitled to the benefit of any such judgment or award as is referred to in sub-section (1) or in such judgment as is referred to in sub-section (3) otherwise than in the manner provided for in sub-section (2) or in the corresponding law of the reciprocating country, as the case may be.

11. In fact sub-section (7) makes it more clear that Insurance Company which has been given notice of award will not be entitled to avoid its liability. The words in sub-section (7) make it more clear "no insurer to whom the notice referred to in sub-section (2) or sub-section (3) has been given shall be entitled to avoid his liability to any person entitled to the benefit of any such judgment or award as is referred to in sub-section (1).

12. Though in the decision, the Hon'ble Division Bench has taken the view that an insurance policy entitles the insurance company to avoid its liability and in such circumstances insurance company cannot be directed to discharge the award. Though the decision in the case of K.C.Subramani and another cited

WWW.LIVELAW.IN

supra is beneficial to the appellant, here the question that confronts us is, when notice is ordered of any claim and the insurance company has opportunity to defend the claim on the ground enumerated under Section 149(2), M.V.Act, can still insurance company be absolved of the liability? Even when legal liability is recognized, is not the insurance company entitled to pay and recover?

13. The concept of Section 149, M.V.Act would show sub-sections (5) and (7) permit the insurer and insured to agree upon terms in which policy will be issued. The decision cited supra of the Division Bench certainly absolves the insurance company of its liability if it is shown the policy issued by it was an 'Act' policy as provided by the provisions of Section 145 and 147, M.V.Act. If the policy is shown to be contractual policy, then the terms governing liability must be in terms of the policy.

14. In the instant case, as could be seen, appellant-insurer has collected extra premium from the insured owner of the vehicle to avoid larger coverage including the risk of gratuitous passengers. In such circumstances, the liability has to be decided treating the policy as

WWW.LIVELAW.IN

contractual policy and not an Act policy in terms of the statute.

15. In view of the decision of the Division Bench that insurance company can avoid liability and it cannot be asked to pay and recover, I am constrained to observe that this issue having not been considered, it will be necessary to refer it to a larger Bench to decide the following:

I) If it is shown the insurance policy is not 'Act' policy in terms of Sections 145 and 147 of the Motor Vehicles Act, but a contractual policy issued collecting extra premium indicating insurance company has enlarged its liability, will not the insurance company be liable to pay and recover even if there is any breach by the insurer?

II) In such cases, is not the rule to 'pay and recover' applicable in view of the mandate in Section 149, M.V.Act that upon issuance of policy, the insurer is bound to discharge the award as if it were a judgment debtor?

16. Being of this view, while holding the claimant is entitled to compensation as determined in this order, appellant is directed to discharge liability subject to result of reference by the larger Bench.

Not An Official Copy

WWW.LIVELAW.IN

> 17. The Registry is directed to place this file before the Hon'ble Chief Justice for reference to the larger bench for a decision. "

3. The order of reference revolves on the interpretation of Section 149 read with section 147 of the Motor Vehicles act, 1988 (hereinafter referred to as the 'Act' for the sake of brevity) as well as correctness or otherwise of the judgment of the Division Bench of this Court in the case of ***Oriental Insurance Company Ltd., Vs. K.C. Subramanyam,*** reported in ***ILR 2012 KAR 5241*** *(Subramanyam).*

4. Before taking up the aforesaid two points for consideration, we would like to refer briefly to the factual matrix of the case:

The claimant, Yallavva W/o. Yamanappa in MVC No.1357 of 2006 filed the Claim Petition before Motor Accident claims Tribunal-V, Bijapur (for short "Tribunal") for compensation for the injuries sustained by her in a motor vehicle accident that took place on 24.04.2006 at about

WWW.LIVELAW.IN

11.00 hours, when the said lady along with other coolies, were proceeding to Dhulkhed village from Tikota, for coolie work in a Tempo bearing Registration No.KA-28/B-5434. The said vehicle was plying from Tikota to Dhulkhed village on NH-13. When it reached near Horti village, the driver of the said vehicle drove the same in a rash and negligent manner, due to which the vehicle turned turtle and grievous injuries were sustained by the claimant. Trying the said case along with other cases, the Tribunal allowed the petition partly and awarded compensation of Rs.1,000/- along with interest at 6% p.a. from the date of petition till the date of deposit of compensation and directed respondent No.2 – New India Assurance Company to pay the compensation and to recover the same from respondent No.1 owner by filing an Execution Petition.

5. The said Order has been called in question by the Insurance Company in this appeal taking a specific ground that the Insurance Company was not at all liable to pay any compensation and the order passed by the Tribunal to pay and recover from the insured was not proper and correct.

WWW.LIVELAW.IN

6. The learned Single Judge after hearing the matter, has directed the appellant to discharge the liability subject to the result of the reference by the larger Bench. The learned Single Judge has made an observation that in the case of a Division Bench of this court had differentiated the circumstances covered by sub-section (1) of Section 149 of the Act, and sub sections (2) to (4) of Section 147 of the Act to hold that by virtue of which, the Insurance Company cannot be directed to pay and recover, if it has a valid defence to prove that there was violation of the terms and conditions of the insurance policy. The contention of the Insurance Company in the instant case was that the claimant was a gratuitous passenger travelling in a goods vehicle and therefore, there was violation of the condition of the policy. therefore, the Insurance Company had absolutely no liability. The Tribunal accepted the plea by holding that, the Insurance Company, though proved the defence, was still liable to pay the amount and recover the same from the insured. The learned Single Judge after narrating the provisions of Sections 147 and 149(1) & (2) of the Act, has come to the conclusion that sub-section (7) of

WWW.LIVELAW.IN

Section 149 of the Act makes it more clear that the Insurance Company which has been given notice of award will not be entitled to avoid its liability. The words in Sub-section (7) make it clear that "no insurer to whom the notice referred to in sub-section (3) has been given, shall be entitled to avoid its liability to any person. The learned Single Judge was also of the opinion that the Division Bench in the case of *Subramanyam*, has taken the view that breach of condition in the Insurance Policy empowers the Insurance Company to avoid its liability. In such circumstances, the company cannot be directed to discharge the award. However, it was also held that in appropriate cases only the Hon'ble Supreme Court, by exercising its extraordinary jurisdiction under Article 142 of the Constitution, can direct the insurance company to pay and recover the award amount.

7. The learned Single Judge has observed, in *Subramanyam* it was not an Act policy, but it was a contractual policy. Therefore, the learned Single Judge has expressed his doubt that if a policy is shown to be a contractual policy, then the terms governing the liability

WWW.LIVELAW.IN

must be in terms of the contract. The learned Single Judge also considered that, the insurer had collected extra premium from the insured owner of the vehicle so as to not avoid a larger coverage including the risk of the gratuitous passenger. In such circumstances, the liability has to be proved as, policy being contractual and not an Act policy, the liability of the insurer must be in terms of the said policy. Therefore, the above said point, not being covered in *Subramanyam*'s case, the learned Single Judge has framed the points to be referred to the Full Bench to decide.

8. Of course, the learned Single Judge has categorically come to a conclusion in the instant case that, it was a contractual policy and extra premium had been collected covering the risk of gratuitous passengers. Therefore, even if there was any violation or breach of condition of the policy, under Section 149(1) of the Act, in such a circumstance, whether the Insurance Company is still liable to pay compensation and then recover it from the insured is the doubt expressed by the learned Single Judge which has to be clarified by this Bench.

WWW.LIVELAW.IN

9. Before adverting to the real question to be decided by this Bench, it should be borne in mind that, law is not static. It is always interpreted in such a manner so as to advance real justice to the needy and those who are really entitled to justice under a particular statute. Whenever a particular provision calls for interpretation, the Courts should always be vigilant in order to provide a new dimension to the said provision so as to interpret the same in order to advance the real intention of the parliamentarians or legislators in bringing that law for the benefit of the public at large including the statutory or corporate authorities. Every time, a Court looks at a particular provision, it would give a new dimension on each and every occasion, depending upon the previous history and also the newer development in that particular arena. Therefore, this Court has to bestow its attention to analyze the legal aspects involved in this particular case so as to answer the points involved under reference, as to, whether, 'pay and recovery' order could be passed by the Motor Accidents Claims Tribunal in all circumstances, for any

WWW.LIVELAW.IN

breach of condition of the policy, as referred to for consideration of this Bench.

10. Learned counsel Shri A.N. Krishna Swamy and Shri Suryanarayana Rao, who appear for various insurance companies as panel advocates and Sri A.K. Bhat, who appears for claimants and are versatile as regards the motor vehicle enactment, have taken us through various provisions of the Motor Vehicles Act as well as the various decisions of the apex Court and other courts in order to answer the reference in an effective, meaningful and purposeful manner.

11. Sri A.N. Krishna Swamy, learned counsel, has taken us through various decisions, which we would discuss a little later. He contended that the Motor Vehicles Act, though a beneficial legislation nevertheless, the Insurance Companies who wish to defend their case, are also given an opportunity under the specific provisions of the Act, particularly under Section 149 (2) of the Act, so as to defend themselves under various circumstances. Though they are not entitled to take any other defence except the

WWW.LIVELAW.IN

defences which are available to them under Section 149(2) of the Act, if they are able to prove the defences available to them under the said provision strictly, in such circumstances, unless the Court finds in rare cases only, no 'pay and recovery' order can be passed in favour of the third party by fixing the liability on the owner and exonerating the insurer but at same time, directing the Insurance Company to pay the said amount to the third party and recover the same from the owner.

12. Therefore, learned counsel for the Insurance Companies strenuously contended, that once a breach of any condition of the policy is proved to the satisfaction of the court and the said breach falls within the defence under Section 149(2) of the Act, in such an eventuality, the Insurance Company must be strictly absolved from the liability. There cannot be any pay and recover order be passed unless, the Court comes to the conclusion that the breach was not a breach simplicitor but a "fundamental breach". Learned Counsel further argued, even such orders cannot be passed by the Tribunal or High Court unless there is a statutory power to pass such an order. Therefore, only

WWW.LIVELAW.IN

the Hon'ble Supreme Court can direct the insurer to pay and recover, exercising the power under Article 142 of Constitution of India but not the other courts or Tribunals.

13. Learned counsel, Shri Krishna Swamy and Shri Suryanarayana Rao and Shri A.K. Bhat, further submitted that, there is a stringent and strict provision under Section 149(1) of the Act where the Insurance Company cannot avoid its liability to the third parties. If, once, the existence of the policy, its currency thereof and the risk covered under the policy are established and owner is held liable, in such an eventuality, though the Insurance Company cannot avoid the policy or can the Insurance Company cancel the policy, and the Insurance Company is liable to pay the compensation. That under Section 149(1) of the Act, it is an absolute liability of the owner and the Insurance Company to pay the compensation. However, the said liability is subject to the defences available to the Insurance Company under Section 149(2) of the Act. Therefore, they strenuously contended that the Court has to examine the various provisions of the Act with reference to various decisions of the Apex Court and consider, whether, any

WWW.LIVELAW.IN

breach of the policy will still enure to the benefit of third party so as to direct the Insurance Company to pay the entire compensation and recover the same from the insured. It was further argued that, if such an interpretation is given, Section 149(2) becomes otiose though the said provision entitles the Insurance Company to prove those defences and even if those defences are proved, it will be of no avail to them if it is interpreted in such a manner, which nullifies the effect and riger of Section 149(2) of the Act. Therefore, it requires to be considered as to under what circumstances exactly the Insurance Company is completely absolved of its liability and it need not pay the amount when the owner only is liable, if there is any fundamental breach in the policy, which falls under the scope of defences available to the Insurance Company under Section 149(2) of the Act.

14. Learned counsel also submitted that, in various decisions of the Apex Court, it has been observed that, under certain rare circumstances, though the liability is fixed on the owner, the Insurance Company under Section 149(1) of the Act cannot be absolved of its complete liability but it has to pay and recover the same from the owner. The said

WWW.LIVELAW.IN

liability is governed under the provisions of the Act under Section 149(4), (5) and (7). Therefore, looking to the observations made by the Apex Court when a direction has been given to pay and recover, whether those circumstances are based on the special or peculiar circumstances if a particular case and only the Apex Court exercising its power under Article 142 of the Constitution of India can issue such direction in order to do complete justice, is the submission. It was further argued that, the Motor Accidents Claims Tribunals and the High Courts have no such extraordinary constitutional powers to extend the benefit to the third parties when the Insurance Company is completely absolved from its liability. Therefore, they specifically contended that, whenever a fundamental breach of a condition of the policy is established and if that breach gives rise to a defence to the Insurance Company under Section 149(2) of the Act , in such an eventuality, no Court other than the Hon'ble Supreme Court, can direct the Insurance Company 'to pay and recover'. Therefore, in this backdrop, they requested the Court to consider the above said reference made to this Bench.

WWW.LIVELAW.IN

15. In light of the above said submissions, the Court has to examine firstly, the statutory provisions so that this Court to could consider what exactly the provisions of law which apply in the context of 'pay and recovery'. First, we will deal with some of the statutory provisions in the Motor Vehicles Act and Rules thereunder which impose the responsibility on the Insurance Company to pay the compensation whenever an accident takes place.

16. In order to answer the question raised in this reference, there are three important provisions which are required to be meticulously scanned, dissected and discussed. Those are Sections 146, 147 and 149 of the Act.

17. We will now first discuss the statutory mandate under the Act with reference to the liability of the Insurance Company more so, as regards the circumstances under which the insurance company is liable to pay compensation to the third parties. Section 146 is the provision which refers to the necessity for insurance against third party risks. The said provision reads as follows:

WWW.LIVELAW.IN

"146. Necessity for insurance against third party risk. —

(1) No person shall use, except as a passenger, or cause or allow any other person to use, a motor vehicle in a public place, unless there is in force in relation to the use of the vehicle by that person or that other person, as the case may be, a policy of insurance complying with the requirements of this Chapter.

Provided that in the case of a vehicle carrying, or meant to carry, dangerous or hazardous goods, there shall also be a policy of insurance under the Public Liability Insurance Act, 1991 (6 of 1991).

Explanation. —A person driving a motor vehicle merely as a paid employee, while there is in force in relation to the use of the vehicle no such policy as is required by this sub-section, shall not be deemed to act in contravention of the sub-section unless he knows or has reason to believe that there is no such policy in force.

(2) Sub-section (1) shall not apply to any vehicle owned by the Central Government or a State Government and used for Government

WWW.LIVELAW.IN

purposes unconnected with any commercial enterprise.

(3) The appropriate Government may, by order, exempt from the operation of sub-section (1) any vehicle owned by any of the following authorities, namely:—

(a) the Central Government or a State Government, if the vehicle is used for Government purposes connected with any commercial enterprise;

(b) any local authority;

(c) any State transport undertaking:

Provided that no such order shall be made in relation to any such authority unless a fund has been established and is maintained by that authority in accordance with the rules made in that behalf under this Act for meeting any liability arising out of the use of any vehicle of that authority which that authority or any person in its employment may incur to third parties.

Explanation. —For the purposes of this sub-section, "appropriate Government" means the Central Government or a State Government, as the case may be, and—

(i) in relation to any corporation or company owned by the Central

WWW.LIVELAW.IN

Government or any State Government, means the Central Government or that State Government;

(ii) in relation to any corporation or company owned by the Central Government and one or more State Governments, means the Central Government;

(iii) in relation to any other State transport undertaking or any local authority, means that Government which has control over that undertaking or authority."

18. This particular provision is *in pari materia* with Section 94 of the erstwhile M.V. Act, 1939. On a meticulous reading of Section 146 of the Act, if prescribes, as a mandate of law, necessity of insurance against third party risks during the use of a motor vehicle by a person in a public place. Unless there exists a policy of insurance in relation to the use of the vehicle by that person or any other person and the policy of insurance complies with the requirements of chapter X of the Act, the vehicle is prohibited from being used. The policy must, therefore, provide for insurance against any third party liability incurred by that person while using that vehicle. The policy

WWW.LIVELAW.IN

should therefore be with respect to that particular vehicle. The provision also mentions about the persons specifically or generally by specifying a class to which that person may belong, as it may not be possible to mention the name specifically of all the persons who use the vehicle with the permission of the owner of the vehicle and affecting the policy and the insurance. Therefore, there must be a policy by which a particular vehicle is insured.

19. On a plain reading of the above said provision, it is observed that it gives protection to a third party in respect of death, bodily injury or damage to the property while using the vehicle in a public place. Therefore, the insurance of a vehicle had been made compulsory under this particular provision read with Section 147 of the Act by incorporating the statutory requirement and also the contractual obligations of the insurer and the insured. When a certificate of insurance is issued, in law, the insurance company is bound to indemnify the owner if the vehicle is the insured as the case may be. If the owner is liable under the facts and circumstances of a particular case, applying the principle, '*in pari delicto*', the Insurance Company is also

WWW.LIVELAW.IN

jointly liable to third parties and to the damage to the property of third parties in view of the indemnity given to the insured of the vehicle. Section 146 of the Act therefore provides for statutory or a compulsory insurance of a motor vehicle. Therefore, once the policy is issued, it should cover all legal requirements as contemplated under Sections 146 and 147 of the Act. Thus, insurance is mandatory requirement to be obtained by a person in charge of or in possession of a vehicle. Therefore, it goes without saying that, once the Insurance Company had undertaken its liability to third parties as incurred by the persons specified in the policy, the third parties right to recover any amount under or by virtue of the provisions of the Act is not affected by any other condition in the policy. Therefore, the object behind the legislation is that no third parties right should suffer on account of failure to comply with any other condition of the Insurance Company by the insured. Therefore, Insurance Company is legally liable under Sections 146 and 147 of the Act which are virtually recognized as statutory policies or 'Act policies'. The liability of the Insurance Company is fixed by virtue of

WWW.LIVELAW.IN

incorporation of legal requirements as contemplated under Sections 146 and 147 of the Act. It is manifest that compulsorily insurance is a benefit to third parties and others covered under the statute, as the said provisions enunciate broad and magnanimous intentions of the Parliament in order to fulfill the social welfare objects of the Act. A third party can enforce liability undertaken by the insurer irrespective of other conditions which are not recognized under any other provision of the Act. However, the aforesaid compulsion does not apply to any vehicle owned by the Central Government or the State Government used for Government purpose and connected with any commercial enterprise, unless a fund has been established and is maintained by that authority in accordance with the rules made in that behalf under the Act for meeting any liability arising out of the use of any vehicle of that authority which that authority or any person in its employment may incur to the third parties. Therefore, the whole object is to cover the third party risk under this provision.

20. In the above backdrop, a policy has to contain statutory conditions and limits of the liabilities as per the

WWW.LIVELAW.IN

statute and may also have other contractual obligations mutually agreed upon by the insurer and the insured. In this background, Section 147 of the Act is also another provision which is required to be understood.

21. Section 147 of the Act is an important provision which deals with the statutory liability and contractual liability of the Insurance Companies. The said provision reads as follows:

> **"147. Requirements of policies and limits of liability. --**
>
> (i) In order to comply with the requirements of this Chapter, a policy of insurance must be a policy which—
>
> (a) is issued by a person who is an authorised insurer; and
>
> (b) insures the person or classes of persons specified in the policy to the extent specified in sub-section (2)—
>
> (i) against any liability which may be incurred by him in respect of the death of or bodily injury to any person, including owner of the goods or his authorised representative carried in the vehicle or damage to any property of a third party

WWW.LIVELAW.IN

caused by or arising out of the use of the vehicle in a public place;

(ii) against the death of or bodily injury to any passenger of a public service vehicle caused by or arising out of the use of the vehicle in a public place:

Provided that a policy shall not be required—

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

(a) engaged in driving the vehicle, or

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

(c) if it is a goods carriage, being carried in the vehicle, or

(ii) to cover any contractual liability.

Explanation. —For the removal of doubts, it is hereby declared that the death of

WWW.LIVELAW.IN

or bodily injury to any person or damage to any property of a third party shall be deemed to have been caused by or to have arisen out of, the use of a vehicle in a public place notwithstanding that the person who is dead or injured or the property which is damaged was not in a public place at the time of the accident, if the act or omission which led to the accident occurred in a public place.

(2) Subject to the proviso to sub-section (1), a policy of insurance referred to in sub-section (1), shall cover any liability incurred in respect of any accident, up to the following limits, namely:—

(a) save as provided in clause (b), the amount of liability incurred;

(b) in respect of damage to any property of a third party, a limit of rupees six thousand:

Provided that any policy of insurance issued with any limited liability and in force, immediately before the commencement of this Act, shall continue to be effective for a period of four months after such commencement or till the date of expiry of such policy whichever is earlier.

(3) A policy shall be of no effect for the purposes of this Chapter unless and until there is issued by the insurer in favour of the person

WWW.LIVELAW.IN

by whom the policy is effected a certificate of insurance in the prescribed form and containing the prescribed particulars of any condition subject to which the policy is issued and of any other prescribed matters; and different forms, particulars and matters may be prescribed in different cases.

(4) Where a cover note issued by the insurer under the provisions of this Chapter or the rules made thereunder is not followed by a policy of insurance within the prescribed time, the insurer shall, within seven days of the expiry of the period of the validity of the cover note, notify the fact to the registering authority in whose records the vehicle to which the cover note relates has been registered or to such other authority as the State Government may prescribe.

(5) Notwithstanding anything contained in any law for the time being in force, an insurer issuing a policy of insurance under this section shall be liable to indemnify the person or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of that person or those classes of persons."

WWW.LIVELAW.IN

22. On a plain reading and meaningful understanding of the above said provision, it is clear that the said provision speaks about the requirements of the policy and the limits of the liability. Therefore, the liability of the insurer is created under the statute itself which are subject to Sections 149(1) and 149(2) of the Act. Therefore, the payment of compensation in terms of Section 147(1)(b), i.e., if the vehicle involved in the accident is duly insured and the insurer has issued any certificate of insurance as provided under sub-Clause 3 of Section 147, the liability of the insurer to satisfy the claim under Section 147(1)(b) is absolute in terms of the policy.

23. Once the claimant, who claims compensation due to the accident, issues notice to the insurer in his claim petition and if the Tribunal passes an award, the insurer, by virtue of Section 149(1) read with Section 147 steps into the shoes of the judgment debtor and he is bound to pay the amount awarded to the third party. Therefore, it is clear that, if the vehicle involved in an accident is duly insured and a certificate of insurance is provided as per Section 147 of the Act, it is a statutory policy, the Insurance Company is

WWW.LIVELAW.IN

absolutely liable to pay compensation. On the other hand, if the policy is both statutory and contractual and in an eventuality, if there is any breach of a condition of policy, then the Insurance company can raise defences under Section 149 (2) of the Act. On a bare reading of Section 147 of the Act, it is found to be quite comprehensive in scope and meaning. Therefore, it has to be given a wider, effective and practical meaning, so that the object of the Legislation and intention of the Parliament (which was faced with divergent views from various Courts of the country giving different interpretations to the provisions and thereby disentitling victims from claiming compensation), is achieved. Therefore, the aforesaid provision clearly discloses that the Insurance Company is absolutely liable under the said provision when once the policy is issued but it mentions the limits of its liability. If the liability of the Insurance Company is otherwise, it can be defended under Section 149(2) of the Act. In the above background, Section 149(1) and (2) of the Act, in our opinion, are also to be examined by us in order to ascertain the extent of liability of the

WWW.LIVELAW.IN

Insurance Company. Section 149(1) and (2) of the Act read as follows:

> "149. **Duty of insurers to satisfy judgments and awards against persons insured in respect of third party risks.**––
>
> (1) If, after a certificate of insurance has been issued under sub-section (3) of section 147 in favour of the person by whom a policy has been effected, judgment or award in respect of any such liability as is required to be covered by a policy under clause (b) of sub-section (l) of section 147 (being a liability covered by the terms of the policy) or under the provisions of section 163A is obtained against any person insured by the policy, then, notwithstanding that the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy, the insurer shall, subject to the provisions of this section, pay to the person entitled to the benefit of the decree any sum not exceeding the sum assured payable thereunder, as if he were the judgment debtor, in respect of the liability, together with any amount payable in respect of costs and any sum payable in respect of

WWW.LIVELAW.IN

interest on that sum by virtue of any enactment relating to interest on judgments.

(2) No sum shall be payable by an insurer under sub-section (1) in respect of any judgment or award unless, before the commencement of the proceedings in which the judgment or award is given the insurer had notice through the Court or, as the case may be, the Claims Tribunal of the bringing of the proceedings, or in respect of such judgment or award so long as execution is stayed thereon pending an appeal; and an insurer to whom notice of the bringing of any such proceedings is so given shall be entitled to be made a party thereto and to defend the action on any of the following grounds, namely:—

(a) that, there has been a breach of a specified condition of the policy, being one of the following conditions, namely:—

(i) a condition excluding the use of the vehicle—

(a) for hire or reward, where the vehicle is on the date of the contract of insurance a vehicle not covered by a permit to ply for hire or reward, or

Not Authorized Copy

WWW.LIVELAW.IN

(b) for organized racing and speed testing, or

(c) for a purpose not allowed by the permit under which the vehicle is used, where the vehicle is a transport vehicle, or

(d) without side-car being attached where the vehicle is a motor cycle; or

(ii) a condition excluding driving by a named person or persons or by any person who is not duly licensed, or by any person who has been disqualified for holding or obtaining a driving licence during the period of disqualification; or

(iii) a condition excluding liability for injury caused or contributed to by conditions of war, civil war, riot or civil commotion; or

(b) that the policy is void on the ground that it was obtained by the non- disclosure of a material fact or by a representation of fact which was false in some material particular.

WWW.LIVELAW.IN

(3) Where any such judgment as is referred to in sub-section (1) is obtained from a Court in a reciprocating country and in the case of a foreign judgment is, by virtue of the provisions of section 13 of the Code of Civil Procedure, 1908 (5 of 1908) conclusive as to any matter adjudicated upon by it, the insurer (being an insurer registered under the Insurance Act, 1938 (4 of 1938) and whether or not he is registered under the corresponding law of the reciprocating country) shall be liable to the person entitled tot he benefit of the decree in the manner and to the extent specified in sub-section (1), as if the judgment were given by a Court in India:

Provided that no sum shall be payable by the insurer in respect of any such judgment unless, before the commencement of the proceedings in which the judgment is given, the insurer had notice through the Court concerned of the bringing of the proceedings and the insurer to whom notice is so given is entitled under the corresponding law of the reciprocating country, to be made a party to the proceedings and to defend the action on grounds similar to those specified in sub-section (2).

WWW.LIVELAW.IN

(4) Where a certificate of insurance has been issued under sub-section (3) of section 147 to the person by whom a policy has been effected, so much of the policy as purports to restrict the insurance of the persons insured thereby by reference to any condition other than those in clause (b) of sub-section (2) shall, as respects such liabilities as are required to be covered by a policy under clause (b) of sub-section (1) of section 147, be of no effect:

Provided that any sum paid by the insurer in or towards the discharge of any liability of any person which is covered by the policy by virtue only of this sub-section shall be recoverable by the insurer from that person.

(5) If the amount which an insurer becomes liable under this section to pay in respect of a liability incurred by a person insured by a policy exceeds the amount for which the insurer would apart from the provisions of this section be liable under the policy in respect of that liability, the insurer shall be entitled to recover the excess from that person.

WWW.LIVELAW.IN

(6) If this section the expression "material fact" and "material particular" means, respectively a fact or particular of such a nature as to influence the judgment of a prudent insurer in determining whether he will take the risk and if so, at what premium and on what conditions, and the expression "liability" covered by the terms of the policy" means a liability which is covered by the policy or which would be so covered but for the fact that the insurer is entitled to avoid or cancel or has avoided or cancelled the policy.

(7) No insurer to whom the notice referred to in sub-section (2) or sub-section (3) has been given shall be entitled to avoid his liability to any person entitled to the benefit of any such judgment or award as is referred to in sub-section (1) or in such judgment as is referred to in sub-section (3) otherwise than in the manner provided for in sub-section (2) or in the corresponding law of the reciprocating country, as the case may be.

Explanation – For the purposes of this section, "Claims Tribunal" means a Claims Tribunal constituted under section 165 and "award" means an award made by that Tribunal under section 168."

WWW.LIVELAW.IN

24. On a plain reading and meaningful understanding of the aforesaid provision, it is abundantly clear that, Section 149(1) and (2) of the Act would come into play only if a certificate of insurance has been issued under sub clause (3) of Section 147 of the Act in favour of a person in whose name a policy has been issued and is in force. The existence of a Certificate of insurance and its currency is a statutory requirement, otherwise Section 149 (1) and (2) may not be applicable. As per our meticulous examination of Section 147 of the Act above, the certificate of Insurance should cover the liability or terms of the policy under Section 147 (1)(a) and (b) and also under the provisions of Section 140 and 163-A, which are statutory liabilities as per the legal requirements. If the insurance policy is based on a contract otherwise than the above said legal requirements, those conditions should also be specifically included in the policy in order to bind the insurer and insured. Thus Insurance policy can incorporate several other terms agreed to between the insurer and the insured. The insurance policy, though a contract, the insurer, under Section 149(1) of the Act, cannot avoid or cancel the

WWW.LIVELAW.IN

insurance policy. Under the law of contract and law in general, if the insured commits breach of any term of the contract, there would be no liability on the part of the insurer to indemnify the insured. Therefore, even though the insurer has issued a certificate of insurance, covering the liability, it is open to him to avoid or cancel the policy only if there is breach of any of the terms of the policy. But, the intention of the Parliament is that the insurer should not be allowed to avoid or cancel the policy on grounds which are not covered under the provisions recognized under Section 149(2) of the Act except as per Section 149(2) of the Act. Thus, the avoidance of liability can be only on the grounds or defences mentioned under Section 149(2) of the Act. Therefore, under Section 149 (1), the specific words have been used, i.e., the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy, the insurer shall pay to the person entitled to the benefit of the decree, the amount of compensation awarded irrespective of the breach of contract, which breach is not recognized under Section 149 (2) of the Act. The provisions of 147(1), 147(5) read with Section 149 (1) and (2) contain non obstante

WWW.LIVELAW.IN

clauses insofar as indemnifying the insured is concerned. Therefore, an insurer issuing a policy of insurance under the said Section shall indemnify the insured and due to such provision of indemnity, the insurer is liable to the third parties. Therefore, under Section 149 of the Act, the Parliament has prevented the insurer from avoiding or canceling the liability on the ground of any breach of contract unless that breach is recognized by the statute under Section 149(2) of the Act which could be conveniently termed as "Statutory Breach".

25. On perusal of the provision under Section 149 (2) of the Act it provides the grounds or defences, on the basis of which the insurer can defend the action. In other words, the insurer can avoid the liability under the Act. Therefore, the specific provision though imposes statutory responsibility, but provides an opportunity to the Insurance Company to take those defences available under Section 149(2) only and resist the action of the claimants and against the insured by proving to the satisfaction of the court, the defence taken in order to avoid liability under the Act. Therefore, it is clarified that, whatever may be the

WWW.LIVELAW.IN

mutual contractual obligations created by incorporating any condition in the policy between the insurer and the insured, and these being a breach of such condition by the owner, will not in any manner enure to the benefit of the insurer, unless the said breach is covered under Section 149 (2) of the Act. Therefore, the legal position is, if the Tribunal passes an award against the insured, then the insurer will step into the shoes of the insured and he has to pay to the person entitled to the benefit of the decree in a sum not exceeding the sum assured payable thereunder, subject to the proof that may be given by the Insurance Company under Section 149 (2) of the Act in order to avoid its liability.

26. On a meticulous reading of Section 149 (2)(a) of the Act, it is clarified that the breach of a specified condition in the policy being one of the conditions mentioned under Section 149(2)(a) and (b) only, in such circumstances, the Insurance Company can defend with reference to breach of those conditions and to seek for avoiding of the liability. It is thus clear that, if the conditions are not being one of the conditions recognized under Section 149 (2)(a) and (b) of

WWW.LIVELAW.IN

the Act and those are other conditions incorporated in the policy and if there is any breach of any of those conditions, the Insurance Company cannot avoid its liability by virtue of Section 149 (1) of the Act. But there is some exception to this liability. Under sub-section (4) of Section 149, where any sum is paid by the insurer towards discharge of any liability of any person which is covered by the policy by virtue of said provision, the same shall be recovered by the insurer from that person, i.e., the insured. That means, where a certificate of insurance has been issued under sub Section (3) of Section 147 of the Act to the person by whom a policy has been effected, and if the policy as per the conditions restricts the amount to be indemnified to the person insured, then under subsection (4) of Section 149 of the Act the 'pay and recover' order is also recognized i.e. where there is a restricted liability of the insurer, if it pays the amount exceeding the restricted amount, the same can be recovered from the insured.

27. Sub Section (5) also deals with a situation to the insurer could 'pay and recover' when the amount which an insurer becomes liable under this Section is in respect of a

WWW.LIVELAW.IN

liability incorporated under a policy but where the amount payable exceeds the amount for which the insurer is liable under the policy in respect of that liability. In such a case also, the insurer shall also be entitled to recover the excess amount from that person.

28. Sub Section (7) of Section 149 of the Act also makes it clear that the insurer under Sub Section (2) or sub section (3) of Section 149 of the Act, cannot avoid its liability, otherwise than in the manner provided under sub Section (2) of Section 149 of the Act or in the corresponding law of the reciprocating Country, as the case may be. Therefore, Section 149(2) is the harbinger in the Act, which regulates avoidance of liability by an Insurance Company.

29. In the above said backdrop, we now consider as to how the Hon'ble Supreme Court and Courts in India have dealt with these two provisions, i.e., Sections 147 and 149 of the Act in the context of liability of the insurer, whenever the liability to indemnify the insured arose and when the insurer was made to pay the amount and under what

WWW.LIVELAW.IN

circumstances the Insurance companies were made to pay and recover the amount.

30. Now, we will discuss the catena of rulings of the Hon'ble Supreme Court, prior to and subsequent to the Larger Bench ruling of the apex Court in ***National Insurance Co. Ltd. Vs. Swaran Singh and Others*** reported in ***(2004) 3 SCC 297*** (hereinafter referred to as *'Swaran Singh'* for brevity), as in that judgment, the aforesaid provisions have been dealt with in detail. We are only relying on the aforesaid decision with reference to the liability of the insurer with reference to breach of conditions in the policy as recognized under Section 149(2) of the Act. After thorough examination of various decisions as well as the provisions of law, the apex Court has laid down summary of the findings with reference to the various issues as raised in the said case. The three Judges Bench of the Supreme Court has considered thoroughly the provisions and has laid a foundation as to under what circumstances the Insurance Company can avoid the liability and under what circumstances the Insurance Company is liable to pay the compensation. At paragraph No. 110 of its judgment,

WWW.LIVELAW.IN

the summary of findings, have been enumerated. For the sake of immediate reference, we would like to extract the same as under:

> "(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 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

WWW.LIVELAW.IN

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.

(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 insured concerning the policy condition regarding

WWW.LIVELAW.IN

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 fulfill 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

WWW.LIVELAW.IN

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

WWW.LIVELAW.IN

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

WWW.LIVELAW.IN

se might delay the adjudication of the claims of the victims."

31. We are concerned with the specific guidelines at sub-paragraphs vi, x and xi items of the above summary specifically in order to answer the questions involved in this particular case though the present case deals with a case of an unauthorized passenger in a goods vehicle. The apex court has observed that, even where the insurer is able to prove the breach of the policy condition concerning holding of a valid licence by the transfer of licence to drive during the relevant period, the insurer would not be allowed to avoid liability towards the insured unless the said breach of the condition of driving licence is so fundamental as to have contributed to the cause of 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 insurer under Section 149(2) of the Act.

32. In light of the above, we would like to discuss in detail with reference to concept of "rule of main purpose" and the concept of "fundamental breach". According to the

WWW.LIVELAW.IN

Hon'ble Supreme court, there should be a "fundamental breach" of a condition which affected the main purpose of the Act, then only the Insurance Company can avoid its liability. Therefore, it is necessary to examine some other rulings in order to ascertain how the Courts have dealt with breach of conditions with reference to the liability of the insurer under various circumstances bearing in mind whether those conditions are fundamental breach of conditions in order to fasten the liability to the third parties on the insurer. We do not wish to discuss the decisions which are already discussed by the apex Court in the *Swaran Singh's* case.

33. A three Judge Bench of the apex Court in the case of ***National Insurance Co. Ltd. Vs. Baljit Kaur and Others*** reported in ***(2004) 2 SCC 1*** *(Baljit Kaur),* considered the question, whether, the insurance policy in respect of goods vehicle is required to cover the gratuitous passenger in view of the amendment to Section 147 of the Act. The apex court, after considering all the previous decisions came to the conclusion that the Insurance Company was not liable as the risk of unauthorized

WWW.LIVELAW.IN

passenger in a goods vehicle or gratuitous passengers are not covered under the policy and there is a breach of condition of the policy in carrying a passenger in a goods vehicle. Therefore, the owner of the vehicle was held liable to satisfy the decree. However, at paragraph No. 21, the Court was of the opinion that interest of justice would be sub-served if the Insurance Company was directed to satisfy the award in favour of the claimant, if not, already satisfied and recover the same from the owner of the vehicle. The court also 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 a proceeding before the executing court as if the dispute between the insurer and the insured was also determined by the Tribunal and the issue being decided against the owner and in favour of the insurer.

34. Further, we would refer to a Five Judge Bench decision of the apex Court reported in ***(2002) 2 SCC 278*** between ***New India Assurance Co. Ltd.*** *and* ***C.M.Jaya,*** *(C.M.Jaya)* wherein the apex Court has made an observation that "the liability of the insurer could be statutory or contractual." The statutory liability cannot be more than

WWW.LIVELAW.IN

what is required under the statute itself as contemplated under the various provisions as noted above. However, there is nothing in the Act prohibiting the parties from contracting unlimited or higher liability or to cover a wider risk. In such an event, the insurer is bound by the terms of the contract as specified in the policy regarding unlimited or higher liability, as the case may be. In the absence of such a specific term or clause in the policy, a limited statutory liability cannot be extended to make it unlimited or higher on the part of the Insurance Company. If it is so extended, it amounts to rewriting the statute or contract by insurance which is not permissible in law.

35. The aforesaid observations make it abundantly clear that, the insurer may have two types of liabilities on contract with the insured; namely, statutory liability and contractual liability. On the basis of contractual liability, any legally valid condition recognized in law for the time being in force, can be incorporated in the contract entered into between the parties that would bind the parties. Such a condition cannot be enforced against third parties to avoid the liability of the insurer, contrary to Section 149(2) of the

WWW.LIVELAW.IN

Act. But, this contractual liability can only be enforced against the insured. Therefore, even if an unlimited or higher liability is agreed to between the insurer and the insured, the insurer is bound by the terms of the contract as specified in the policy. But any such condition in policy, fixing unlimited or higher liability, must not be contrary to Section 149 (2) of the Act. Also the Insurance Company cannot take a defence to avoid its liability, contrary to the provisions of the Act or which are not permissible under Act.

36. However, the question involved in the case before us is, whether, in a case where the Insurance Company has not undertaken any higher liability by not accepting any higher premium, while making payment of compensation to third party, whether the insurer would be liable to the extent limited under Section 149(2) of the Act or the insurer would be liable to pay the entire amount and he may, ultimately recover the same from the insured. On this question there appears to be some apparent conflict between two and three Judges' Bench decisions of the Hon'ble Apex Court in the cases of ***New India Assurance Co. Ltd. Vs. Shanti Bai,*** reported in ***AIR 1993 SC 1113,***

WWW.LIVELAW.IN

*(Shanti Bai)****;*** and ***Amrit Lal Sood Vs. Kaushalyadevi*** reported in **(2008) 8 SCC 246** *(Amrit Lal Sood)*. After considering in detail, the apex Court also observed that, in case an insurance company does not take any higher liability by not accepting higher premium for payment of compensation to a third party, the insurer would be liable to the extent limited under the Act and would not be liable to pay the entire amount.

37. From the above ruling it is clear that the Insurance Company can even accept higher premium for payment of compensation extending the limit under the statute by way of contract with the insured. In such an eventuality, the contractual obligation will prevail over the Act. However, if no higher premium is collected, then the insurance company is only liable to the extent limited under Section 149(2) of the Act and if any excess amount is paid, that can be recovered from the insured.

38. Subsequent to *Swaran Singh's* case, with regard to the liability of the Insurance Company for breach of conditions of policy in a number of cases, similar question

WWW.LIVELAW.IN

fell for consideration. Briefly we would like to discuss some important decisions.

39. In ***National Insurance Co. Ltd. Vs. Challa Bharathamma and Others*** reported in ***(2004) 8 SCC 517*** *(Challa Bharathamma)*, the Hon'ble Apex Court while dealing with Section 149 (2)(a)(i)(a) of the Act held that, "*plying of vehicle which is not covered by a permit to ply for hire or reward*" is an infraction. Therefore, in terms of the said provision such defence is available to the insurer. In the said case, the High Court was of the view that since there was no permit, the question of violation of any condition thereof did not arise. The Apex Court held that, the view of the High Court as fallacious and observed that a person without a permit to ply a vehicle cannot be placed in a better position vis-à-vis one who has a permit, but has violated any condition thereof". Ultimately, the Court held that, "insurer be directed to pay to the injured persons in spite of having established its defence under Section 149 (2) because of the indemnity to the insured. The mode of recovery was also explained."

WWW.LIVELAW.IN

40. In a decision reported in ***(2007) 7 SCC 56*** between ***Oriental Insurance Co. Ltd. and Brij Mohan and Others,*** *(Brij Mohan)****,*** the apex Court has observed that, a gratuitous passenger carried in a goods vehicle is not covered under the Act but the Act has extended the statutory cover to the owner of the goods or his authorized representative carried in the vehicle, and not to gratuitous passengers. A direction however was given by the apex Court to 'pay and recover' though it held that, gratuitous passenger was not covered under the policy. Even though the Insurance Company was found to be not liable, by exercising constitutional jurisdiction under Article 142 of the Constitution of India direction was given to satisfy the award made by the Tribunal in favour of the appellant. Therefore, this decision indicates that the extraordinary jurisdiction under Article 142 of the Constitution of India which is available only to the apex Court can be exercised to direct pay and recovery, even when it finds that the liability of the Insurance Company is absent. In spite of that, a direction can be issued by the apex Court to the Insurance Company

WWW.LIVELAW.IN

to satisfy the award and later recover the said amount from the owner.

41. Similar view was taken in another decision reported in ***(2008) 7 SCC 416*** between ***New India Insurance Company*** *and* ***Darshanadevi and Others*** wherein the apex Court again exercising its jurisdiction under Article 142 of the Constitution, directed the Insurance Company having found not liable under Section 149 (2) of the Act to satisfy the award, to pay the claimants and to recover from the insured the amount paid. In the said case, the driver of the said vehicle did not have a driving license, the deceased fell down and came underneath a tractor which was driven by the said driver. The Court held that the owner was liable to pay the compensation and as the owner was a party to the contract of the insurance, the insurer was directed to pay the award and recover the amount from the insured owner, in order to do complete justice in the matter.

42.In another ruling reported in ***(2008) 9 SCC 100*** between ***Samundradevi and others*** *and* ***Narendra Kaur and others***, the apex Court by referring to Section 149 of

WWW.LIVELAW.IN

the Act and also with reference to third party insurance, found that the insurer was absolutely not liable, to successful raising of defence under Section 149 of the Act and proving the same. Again, the apex Court, exercising power under Article 142 of the Constitution of India issued a direction to the insurer to satisfy the award and recover the same from the owner. In the said case also, the accident took place due to the infraction of the driver who did not possess a valid and effective driving license. Having found that it is a fundamental breach of condition, Insurance Company was not liable, still the apex Court directed the Insurance Company to pay and recover the award amount from the insured.

43. Of course, in the decision reported in ***AIR 2004 SC 1630*** between ***Oriental Insurance Co. Ltd.*** *and* ***Nanjappan and Others***, has been relied upon prior to and after the aforesaid judgment by the apex Court, with reference to the mode and manner of recovery by the insurer, if he has satisfied the award to the third party, when pay and recovery order has been made by stating that the insurer, for the purpose of recovering the amount from

WWW.LIVELAW.IN

the insured shall not be required to file fresh proceedings or a suit; it may initiate a proceeding before the executing Court on the basis of the same judgment as if the dispute between the insurer and the insured was the subject matter of determination and the same has been adjudicated.

44. Another decision, reported in ***(2007) 3 SCC 700*** between ***National Insurance Co. Ltd.,*** *and* ***Laxmi Narain Dhut,*** is an important decision which virtually interpreted the guidelines laid down in *Swaran Singh*. In this case, the apex Court has considered the effect of insurance of motor vehicles against third party risks in the context of the liabilities and obligations relatable to third parties. The statutory liabilities and obligations are fixed under Sections 147 and 149 of the Act and are not contractual. It is further observed that, the terms of the insurance policies should be construed as they are, without adding or subtracting anything thereto. Even in case of a liberal construction, subtraction of words is not permissible. Discussing the trend in favour of rule of legislative intent in comparison to literal interpretation, the Apex Court held that, where the law to be applied in a given case, requires

WWW.LIVELAW.IN

interpretation of statute, the Court should ascertain the facts and then interpret the law to apply to such facts. It ultimately stated that on the aspect of liability and rights of insurer in a case of third party risks, the insurer has to indemnify the amount and if so advised, can recover the same from the insured. Therefore, it goes without saying that, even if there is any violation or breach of condition of a policy, the insurer has to discharge the initial burden of proving the grounds taken under Section 149 (2) of the Act. In spite of that, the insurer has to indemnify the amount and can recover the same from the insured, but it all depends upon facts and circumstances of each case, which has to be specifically, logically and legally decided by the Court, which awards the compensation under the Act.

45. In the decision reported in ***(2008) 3 SCC 193, Premakumari Vs. Prahlad Dev***, the apex Court was discussing with regard to invalid or fake driving licence, leading to absolving the insurer of third party liability. It was considered about the necessity of insurer proving breach on the part of the insured to avoid liability; burden is on the insurer. The proof must be based on facts that need

WWW.LIVELAW.IN

to be proved by the insurer to establish the breach. Owner of the offending vehicle was the brother of the driver who did not have a valid and effective license as on the date of accident. The apex Court without disturbing the concurrent findings of the Tribunal and the High Court by exonerating the insurance company, directed the appellants-claimants to recover the amount from the owner/driver of the vehicle, only after considering the fact that, the appellants were minor children and the widow of the deceased. Therefore, under that circumstance, the insurer was directed to recover the initial amount of Rs.50,000/- paid to the appellant. From this decision it is clear that, whenever the conditions imposed in the policy which falls within the categories recognized under Section 149 (2) of the Act, if the breach is a fundamental breach, then the Insurance Company is not liable to pay the compensation. However, depending upon the facts and circumstances of each case, the apex Court has ordered for 'pay and recovery'. It was also held in the said case that the principles laid down in *Swaran Singh's* case are applicable only to third parties and not to other case.

WWW.LIVELAW.IN

46. In another ruling reported in ***(2008) 8 SCC 246*** between ***National Insurance Company Limited*** *and* ***Kaushalaya Devi and Others***, the apex Court was dealing with the provisions under Sections 149(2)(a)(ii) and 147 of the Act, with reference to third party cover and the defences available to the insurer and exclusion of insurer's liability. The Apex Court made an observation that due to non coverage of gratuitous passenger in goods carriage and when an accident was caused by the driver of the vehicle not possessing a valid and effective driving licence and deceased was traveling as a gratuitous passenger in goods carriage, the owner alone was liable to pay compensation for death of claimant's son caused by rash and negligent driving on the part of the driver of the truck. Further, the deceased was not the owner of any goods which were being carried in the truck. He had been traveling in the truck for the purpose of collecting empty boxes and he was traveling in the truck for a purpose other than the one for which he was entitled to travel in a public carriage goods vehicle. Holding that the insurer was not liable in such circumstances the Apex Court directed that, if the amount deposited by the

WWW.LIVELAW.IN

insurer had not been withdrawn, the deposited amount be refunded and proceedings for release of the amount could be initiated against the owner of the vehicle. In this case also, having found that there was a fundamental breach of the condition which falls under Section 149 (2) of the Act, the apex Court exonerated the liability of the Insurance Company and categorically held that the owner is liable and Insurance Company cannot be directed to 'pay and recover'.

47. Subsequently a different view was expressed in a judgment rendered by the apex Court in the case of ***National Insurance Company Limited vs. Parvathneni and another*** reported in ***(2009) 8 SCC 785***. Again the matter was discussed with reference to Articles 142 and 136 of the Constitution of India with reference to section 149(2) of the Act, as to, whether, the apex Court or any Court exercising their powers under any statute or under Article 142 of the Constitution of India, could issue such direction to the Insurance Company to pay compensation and recover the same from the owner even though the Insurance Company was absolutely not liable under law. The Apex Court doubted the validity and propriety of such a direction

WWW.LIVELAW.IN

given in the earlier cases. Therefore, having come to the conclusion that when the Insurance Company is not liable, there cannot be any direction to pay and recover, the Bench requested the Hon'ble Chief Justice of India for consitution of a Larger Bench to decide the said issue.

48. In ***(2009) 13 SCC 370,*** between ***Balbir Kaur and Others*** and ***New India Assurance Company Limited and Others***, the Apex Court has discussed with regard to the provisions of Sections 146, 147 and 166 of the Act. In the said case, the accident occurred before the effective date of the policy. The Tribunal awarded compensation holding the insurer liable. The High Court reversed the same, holding that the insurer was not liable and directed the dependants of deceased to refund the amount withdrawn. It was also held that, since the vehicle owner accepted the order of the High Court by not questioning it, he was liable to satisfy the award. But considering the facts and circumstances of that particular case, the apex Court exercising jurisdiction under Article 142 of the Constitution of India directed the insurer not to recover the amount from the appellants (claimants) subject

WWW.LIVELAW.IN

to it's right to recover from the owner and driver of the vehicle.

49. In ***ILR 2012 Kar. 5241***, between ***The Oriental Insurance Co. Ltd***. and ***K.S. Subramanyam and another***, this Court has extensively discussed the concept of pay and recovery and liability of the Insurance Company under the said order. It was held that, in order to apply the principle of pay and recovery, there should be a valid policy of insurance and there should not be any fundamental breach of the terms and conditions of the policy, with regard to the nature and quantum of liability to be satisfied, when the liability to pay a particular sum under the statute is higher than the payment under the contract of insurance when the liability is not in dispute, and a direction can be issued to the insurer to pay and recover under sub-sections (4) and (5) of Section 149 of the Act. It further considered that even if the liability is created under the statute, insurer's right to defend the action is provided. If the vehicle involved in the accident is duly insured and a notice to the insurer has been issued, then he steps into the shoes of the judgment debtor and only he can avoid the payment

WWW.LIVELAW.IN

of the amount, if there is any breach of condition as contemplated under Section 149 (2) of the Act. It is specifically observed that, if any condition which is fundamental in nature is violated or breached and if the court comes to the conclusion that the insurer is absolutely not liable to pay compensation, no other court of law can order for pay and recovery but while exercising power under Article 142 of the Constitution of India, the Apex court can only pass an order of pay and recovery, to do complete justice in the case. The above Article empowers only the apex Court to do complete justice in a matter under Article 142 of the Constitution. Therefore, in the aforesaid decisions, it is clarified that only the Supreme Court can pass such orders to pay and recover even in the case where the insurance company is absolutely exonerated from its liability.

50. Subsequently, in ***2013 ACJ 554*** between ***Manager, National Insurance Co. Ltd.*** *and* ***Saju P. Paul and another*** the apex Court dealt with Section 147 of the Act with reference to gratuitous passenger and the liability of the insurance company to pay and recover. In the said

WWW.LIVELAW.IN

case, the driver who was employed by the owner of the truck for some other vehicle owned by him, was traveling in the cabin of the truck, which capsized and the driver sustained injuries. Claimant claimed that he was a spare driver in the vehicle, he was not driving the vehicle at that time but he was directed by his employer to go to the worksite. Premium covering the risk of one driver and one cleaner was paid. Risk of any other employee or second or spare driver was not covered under the policy. It was held, after following the decision of the apex Court reported in ***2003 ACJ 1 (SC)*** *between* ***New India Assurance Company Ltd.,*** *and* ***Asha Rani***, that the claimant could withdraw the amount deposited by insurance company and the insurance company was directed to recover the amount from the insured by initiating proceedings, though it was held that the insurance company was not liable, as the gratuitous passenger was not covered under the contract of insurance.

51. In ***(2016) 3 SCC 100*** between **Lakhmichand** and **Reliance General Insurance**, again the fundamental breach of conditions in the policy fell for consideration.

WWW.LIVELAW.IN

Considering the liability of the insurer towards loss suffered by the owner of the vehicle in the motor accident, the apex court observed that, the insurer has to establish fundamental breach concerned which had causal relationship with the accident. It was further held that the burden of proof to establish the same lies on the insurer. The claim for reimbursement of repairs occasioned by an accident, while carrying more persons in a goods vehicle than permitted, was alleged as a fundamental breach and it had causal relationship with the accident. The insurer, if he established the said breach, it would become a fundamental breach and in such an eventuality the insurer can avoid the liability. Though the Court rejected the contention of the insurance company in the said case and saddled with costs of Rs.25,000/- but it was however reiterated that the Insurance Company can establish fundamental breach under Section 149 (2) of the Act in order to avoid its liability.

52. In ***2017 ACJ 1031*** between ***Manuara Khatun and*** *others and* ***Rajesh Kumar Singh and others***, the apex Court was also dealing with gratuitous passengers and the liability of an insurer and also with reference to pay and

WWW.LIVELAW.IN

recovery concept in a head on collision between a jeep and truck coming from opposite directions resulting in death of two passengers in the jeep. The Tribunal found the driver of the jeep was negligent in causing the accident and there was no negligence of the truck driver. Both passengers who were traveling in the jeep, which was a private vehicle, were held to be gratuitous passengers and liability was saddled on the owner of jeep by exonerating the insurance company. The Apex Court, after a detailed deliberation of the relevant provisions held that the deceased were traveling as gratuitous passengers in the vehicle and insurance company was not liable but it was directed to make the payment of awarded amounts in both the claims and to recover the amount from the insured in execution proceedings. Therefore, in this particular case, it is clear again that if the Insurance company though was able to establish the defence as contemplated under Section 149 (2) of the Act, there would be no liability of the insurance company, but again, depending upon the facts of each case, the Apex Court directed payment of the compensation by

WWW.LIVELAW.IN

the insurance company and recover the same from the owner.

53. The Apex Court in ***(2018) 9 SCC 650,*** between ***Shamanna and another*** *and* ***Divisional Manager, Oriental Insurance Company Limited and others***, has also in fact, dealt with various earlier decisions of the Apex Court with reference to the principle of pay and recover and the law has been summarized in the said case. The apex Court after discussing Sections 147, 149 and 168 of the Act held that in case of a third party, award passed against the owner has to be paid by the insurer and recovered from the insured.

53(a). In the aforesaid case, the apex court has dealt with the principle of pay and recovery and summarized the law by relying upon *Swaran Singh* wherein the apex Court has considered as to whether the Supreme Court alone has got jurisdiction to order for pay and recover by exercising the extraordinary jurisdiction under Article 142 of the Constitution of India or whether the Tribunal and the High Courts have also got such power to order for pay and

WWW.LIVELAW.IN

recovery. The apex court relying upon *Swaran Singh's case* and also *Laxminarayan Dhut's case*, as already referred to above by us in this judgment, has reiterated that the decision in *Swaran Singh's case* has no application to cases other than third party risks. But, in the case of third party risks, the insurer has to indemnify the amount and if so directed to recover the same from the insured. The Hon'ble Supreme Court also relied upon *Premakumari's case* and also distinguished *Parvathneni's case* (supra), in which, Supreme Court doubted the correctness of the decision to exercise jurisdiction under Article 142 of the Constitution, i.e. Insurance Company to pay the compensation amount even though the insurance company has no liability to pay, pointing out that Article 142 of the Constitution of India, does not cover such type of cases.

53(b). The apex Court in *Shamanna's* case also referred to *Parvathneni's* case which was disposed of on 17.09.2013 by a three Judges Bench, keeping the question of law open to be decided in an appropriate case. Therefore, the apex Court, after coming to the conclusion that as the larger Bench has already disposed of the

WWW.LIVELAW.IN

reference by keeping the question of law open to be decided, the guidelines in *Swaran Singh's case* which are followed in subsequent decisions in *Lakshminarayan Dhut* and in *Premakumari's case*, to the effect that the award passed by the Tribunal directing the insurance company to pay compensation amount awarded to the claimant and to recover the same from the owner of the vehicle, has been held to be in accordance with law and to be followed by all the courts in India, as a binding precedent.

53(c). The apex Court also observed that the High Court cannot interfere with the award passed by the Tribunal directing the insurer to pay and recover from the owner of the vehicle. In holding so, the apex court has also discussed about the judgment rendered by this Court in ***ILR 2012 KAR. 5241 (The Oriental Insurance Co. Ltd. Vs. K.C. Subramanyam and another)*** which we have already referred to above.

53(d). Therefore, the apex Court is presently of the opinion that the 'pay and recovery order' can also be passed by the Tribunal and the High Court, as the case may

WWW.LIVELAW.IN

be, and the said power is not vested only with the Supreme Court but with other courts also. Therefore, it is made abundantly clear that a pay and recovery order can also be passed by the court having jurisdiction to pass awards under the Act.

53(e). Subsequently, in various other decisions also the apex court has followed the same principle of ***Swaran Singh*** with some small modifications.

54. In ***AIR 2018 SC 592*** between ***Pappu and Others*** *and* ***Vinod Kumar Lamba and another***, the three Judges Bench of the Apex Court at paragraph No. 14, relying upon ***Swaran Singh's case*** has observed that, even if the insurer succeeds in establishing its defence under Section 149(2), the Tribunal or the Court can direct the insurance company to pay the award amount to the claimant(s) and, in turn, recover the same from the owner of the vehicle. The three-Judges Bench, after analyzing the earlier decisions on the point, held that there was no reason to deviate from the said well settled principle, laid down in ***Swaran Singh's case***.

WWW.LIVELAW.IN

55. Having come to that conclusion, the Court also observed that, exercising of jurisdiction by the tribunal to issue such direction of pay and recovery is discretionery and must be based on consideration of the facts and circumstances of each case and in the event such a direction has been issued despite arriving at a finding to the effect that the insurer has been able to establish that the insured has committed breach of condition in contract of insurance as envisaged under sub-clause (ii) of clause (a) of sub-section (2) of Section 149 of the Act, the Insurance Company shall be entitled to recover the awarded amount from the owner or driver of the vehicle, as the case may be, in execution of the same. Therefore, in this particular case, the apex Court added that, the Tribunal has to consider the facts and circumstances of each case in order to give such a direction after fastening the liability on the insured. Having come to such conclusion, the apex Court also directed the insurer to pay and recover the amount from the owner by satisfying the award.

56. Subsequently, in the year 2018, the Apex Court in a decision reported in ***2018 ACJ 1264*** between ***Singh***

WWW.LIVELAW.IN

Ram and ***Nirmala and Others***, considered the same point with reference to a fake driving licence and liability of the insurance company and pay and recovery order. In that case, the trial Court (Tribunal) observed that owner cum driver produced a licence which was fake and the same had been proved by the insurer and owner did not step into the witness box and the Tribunal directed the insurance company to pay and recover on the ground that, the owner cum driver was not holding a valid licence at the time of accident. The High Court affirmed the Tribunal's finding. Answering the issue as to whether the High Court was justified in affirming the Tribunal's order by directing to pay and recover, in the affirmative, the apex Court by relying upon guidelines issued in ***Swaran Singh's*** did not interfere with the judgments of the Tribunal and the High Court and affirmed the order of pay and recovery.

57. In another ruling reported in ***2018 ACJ 2430*** between ***Rani and Others*** *and* ***National Insurance Co. Ltd. And Others***, again a three Judges Bench was called upon to answer with regard to pay and recovery order passed by the Tribunal. In the said case, the Insurance

WWW.LIVELAW.IN

Company disputed its liability on the ground that the truck had no permit for being plied in the State of Karnataka as its permit was restricted to the State of Maharashtra. The Tribunal allowed compensation and directed the insurance company to deposit the amount, however the High court exempted the insurance company from liability but the Apex court, in appeal, directed the insurance company to deposit the amount with liberty to recover the same from the owner of the vehicle. Dealing with the aforesaid aspect, at paragraph Nos.5, 7 and 15, the apex Court again reiterated the earlier principles in ***Swaran Singh***, and modified the judgment of the High Court and restored the Tribunal's order directing the Insurance Company to pay and recover.

58. Recently in the year 2019 also, in ***Civil Appeal Nos. 6231-6232 of 2019,*** a two Judge bench of the apex Court between ***Anu Bhanavara, etc. and Iffco Tokio General Insurance Company Limited and Others***, again relying upon ***Swaran Singh's case*** and ***Balbir Kaur's case*** and all other previous decisions, held that the principle of pay and recovery would be invoked even in case of gratuitous passenger travelling in a goods vehicle. The

WWW.LIVELAW.IN

insurance company should thus be made liable for payment of compensation and in turn they would have right to recover from the owner and driver of the vehicle. However, the apex court observed that keeping in view the peculiar facts and circumstances of each case, the principle of pay and recover order should be passed.

59. On a careful perusal and meaningful understanding of all the aforesaid decisions, it is clear that, in various decisions prior to ***Swaran Singh***, the apex Court had divergent opinions with regard to pay and recovery concept. However, prior to and even after ***Swaran Singh's case***, the apex Court in some cases, as discussed, exercised its extraordinary jurisdiction under Article 142 of the Constitution and directed the insurer to satisfy the award of the Tribunal and recover the amount from the insured, even after coming to the conclusion that there was no liability on the part of the insurer but in order to uphold the main object of Section 149(1) and 149(2) of the Act, particularly in ***Shamanna's case*** and subsequent rulings of the apex court. Though there are divergent decisions of the apex Court both prior to and after the decision in *Swaran Singh,*

WWW.LIVELAW.IN

we find there is a strong, continuous, consistency in following the principles laid down by the apex Court in *Swaran Singh's case* which is of a larger Bench compared to all other Benches subsequent to it, particularly the principles with reference to the concept of pay and recovery. That is to say, on the purpose and concept of fundamental breach and also the liability of the insurer to satisfy the award inspite of satisfactorily proving a defence under Section 149(2) of the Act, to pay and recover from the insured. Precisely, as per the decision in *Swaran Singh*, even when the insurer has proved the breach on the part of the insured considering the policy condition and even if the said breach of condition is fundamental and which has contributed to the cause of accident, the Tribunal can interpret the policy condition on the basis of rule of main purpose and concept of fundamental breach with reference to Section 149(1) and(2). Even if the Tribunal is to arrive at a conclusion that the insurer has satisfactorily proved its defence in accordance with the provisions under Section 149(2) read with sub Section (7) of section 149 of the Act, the Tribunal can direct that the insurer make the payment and recover

WWW.LIVELAW.IN

the same from the insured, which, it has been compelled to pay to third party under the award by the Tribunal.

60. Therefore, sub Section (4) and (5) of Section 149 of the Act are enumerated as special contingencies where the statute itself provides the insurer to recover the amount paid under the award by it from the insured. Apart from that, the apex Court has observed that, under Section 149(2) of the Act, despite the defence taken by the insurer so far as the fundamental breach of conditions are concerned, then also the Tribunal can order for 'pay and recovery'. But, it all depends upon the facts and circumstance of each case, where the Tribunal has to consider each and every circumstances of a case before passing such an order of 'pay and recovery'.

61. In this background, this Court has to understand what is meant by 'fundamental breach' and what is meant by 'violation of other contractual conditions of the policy' and what is meant by 'main purpose'. Now, we would like to discuss the aforesaid points.

WWW.LIVELAW.IN

62. It is worth reiterating here that the insurance policy between the insurer and insured is a contract which is purely binding upon the parties to the contract. The parties on a consensus can enter into any type of legal agreement between themselves which is recognized as a valid contract. On an offer and acceptance of consideration, if the contract is entered into between the parties, it will create a binding contract between the parties. Under the provisions of the Act, the policy should contain all the statutory liabilities of the insurer irrespective of other conditions that may be agreed upon by the parties incorporated in the contract. So far as on "Act policy" is concerned, or a policy which should contain the statutory liabilities and requirements there is no problem in interpreting the same, because the statute itself imposes the liability on the insurer to incorporate those legal requirements as per the provisions of the Act. Apart from incorporating those requirements, the Insurance Company may also incorporate other conditions which are legally recognized under Section 147 (2) of the Act. Therefore, it goes without saying that the contract of insurance may contain conditions as recognized under Section 147 (2) of

WWW.LIVELAW.IN

the Act and any other conditions which are mutually agreed upon by the parties.

63. In this background, it can be safely understood that the policy of insurance may also contain conditions otherwise than the conditions which are recognized under Section 147 (2) of the Act. But breach of only those conditions, which are recognized under Section 149(2) of the Act, can be permitted to be raised by the insurer against third parties. The other conditions though incorporated in the insurance policy cannot be pressed into service in order to resist a claim before the Tribunal because the other conditions, even though mutually agreed upon between the parties, can only be enforced between the insurer and the insured but it will not have any effect so far as the third parties are concerned. So, those conditions which are within the statutory purview of Section 149 (2) of the Act are considered as defendable conditions by the insurer. However, all those conditions can be enforced between the insurer and insured *inter se* exclusively between themselves if they are not void or voidable at the instance of the said parties.

WWW.LIVELAW.IN

64. Once there is breach of any of the conditions of the policy and the conditions are recognized under Section 149(2) of the Act, still the legal aspect remains, whether breach of those conditions are recognized under Section 149(2) as fundamental breach i.e., whether the particular breach can be called as a breach which has contributed to the cause of accident. In this regard, main purpose rule will have to be also borne in mind. Therefore, we have to understand the concept of fundamental breach in this regard. After going through various provisions of the Contract Act, it can be safely said that, when a party having a duty to perform a contract, fails to perform that duty or does an act whereby the performance of the contract by the other become impossible or, if a party fails to do or refuses to perform the contract, there is said to be a breach of contract on his part. On there being a breach of conditions by one party, the other party is discharged of his obligation to perform his part of the obligation. But, breach of contract of an insurance policy by one party does not discharge the other party to the contract and thereby automatically does not terminate the obligation towards an innocent party, if an

WWW.LIVELAW.IN

innocent party dies or sustains injury or damage due to such breach by the insured. Though the primary obligation of the parties to the contract is determined but the indemnifying party becomes liable for payment of compensation to the third party. However, law also permits the insurer to waive the defective performance or any breach and elect to pay the damages instead of avoiding the contract due to a special reason or special agreement with the insured. Therefore, the breach of contract may be either actual, i.e., non-performance of the contract on due date of performance, or anticipatory, i.e., before due date of performance is given. Thus, when the party to the contract refuses to do an act or does any act at the time of performance of the contract contrary to the agreed terms, then it is said to be the actual breach of the contract but when the party to the contract refuses to do an act or does an act before the time for performance by the parties of contract, such breach is termed as an anticipatory breach of contract.

65. The above are general concept of breach of contract. But, in the context of fundamental breach of a

WWW.LIVELAW.IN

contract of insurance, it is necessary to explain the expression fundamental breach with reference to the Act. Of course, insurance companies would not draw up a separate contract with every individual but they will prepare a standard form contract containing various conditions whereby a standard form with a large number of terms and conditions are imposed on the insured, restricting the liability of the insurer to the contract. Therefore, the individual can hardly bargain with the insurers which are mighty organizations and third parties may also suffer due to such conditions. Thus, the only option available to the insured is either to accept or reject the terms of insurance except what are stipulated in Section 147 of the Act.

66. The doctrine of fundamental breach in law of contract is developed mainly in the areas of bailment and carriage and also in motor vehicle insurance in order to protect innocent parties particularly persons who suffer injury or death due to the accidents and preventing exploitation of claimants and denying justice to them. This is as per the intention of the Parliament in enacting the Motor Vehicles Act. Ascertainment of fundamental breach is a

WWW.LIVELAW.IN

method innovated for controlling unreasonable consequences of innumerable conditions and sweeping exemption clauses in the policies. The law makers have introduced Section 149 (1) and (2) of the Act, perhaps in order to avoid the above said mischief that may be caused to the third party sustaining injuries and third party death in any motor vehicle accident. Therefore, if the conditions which are incorporated in the policies, do not fall under any one of the categories recognized under Section 149 (2) of the Act, those conditions cannot be said to be the conditions which can be defendable by the Insurance company before the Court of law. Thus, the breach of those conditions which are specifically recognized under the said section and further, particularly the breach of those conditions which are referable to the cause of accident only, can be called as fundamental conditions and breach of those conditions amount to fundamental breach of conditions. Therefore, the intention of the Parliament is very clear indicating that whatever may be the breach of conditions recognized under Section 149 (2) of the Act, if breach of those conditions has no connection with the cause of accident, such breach

WWW.LIVELAW.IN

cannot be called as fundamental breach. Therefore, a mere breach of any condition, even if it falls under Section 149 (2) of the Act but which is not responsible for the cause of accident, in such an eventuality, the insurance company cannot absolve itself from its liability because under the doctrine of indemnity, the insurer is liable to reimburse the awarded amount to the insured.

67. The point can be further simplified by observing that, if a fundamental breach of a condition has occurred which is the cause for the accident or the incident and such breach is successfully proved to the satisfaction of the Courts by the insurer, even as per the guidelines in *Swaran singh's* and *Shamanna's case* noted above, the courts have the discretionary power to direct the insurance company to pay the compensation and recover the same from the owner so far as third parties are concerned. It is also made clear that the principles enunciated in *Swaran Singh's case* are not applicable to cases otherwise than those of third parties.

68. However, we make it further clear that, the Insurance Company can take a particular defence and

WWW.LIVELAW.IN

successfully defend and prove the breach of condition which is enumerated under Section 149 (2) of the Act, even if that breach is referable to the cause of accident. But it should be borne in mind that in respect of a third party, under what circumstances the Court can absolve the liability of the insurer. This is an important aspect that should be considered by this Court. For example, if the Tribunal comes to the conclusion that the victim (injured or the deceased person) himself was responsible for the breach of fundamental condition by the insured or there was any fraud or collusion between by the victim and the insured, for a wrongful gain and to cause wrongful loss to the insurer, in such an eventuality, the Court should very carefully examine the situation prior to exercising its discretion to fasten the liability on the insurance company. If fraud or collusion between the insured and the victim is established, in such an eventuality, the insurer is absolutely not liable to pay compensation though the case is covered under the policy, in view of such fraud or collusion. The Court, on analyzing the peculiar circumstances of a case, can completely absolve the liability of the insurer in a given case. In order to arrive

WWW.LIVELAW.IN

at such a conclusion, the Court also has to give a finding that the fundamental breach alleged occurred due to the collusion and the contribution by the victim/third party himself independently or in collusion with the insured. For example, if the insured in collusion with the victim voluntarily involves his vehicle though the said vehicle was actually not involved in the accident at all, and the victim claims compensation against such an owner, and it is proved during the course of trial that the said vehicle was not involved at all in the accident but inspite of that, the Court comes to the conclusion that owner of said vehicle is liable because of the collusion between himself and the claimant, the owner only is exclusively liable for payment of compensation because of fraud played by the victim/ third party in collusion with the owner. The insurance company is not at all liable under such circumstances.

69. We cannot exhaustively narrate the circumstances under which the insurance company can be completely absolved, but we can definitely say that, on the basis of the facts and circumstances of each case, the Court, upon consideration of such facts and circumstances, can

WWW.LIVELAW.IN

also come to the conclusion that the victim himself had contributed to the breach of a fundamental condition individually or in collusion with the owner and in such an eventuality, the Tribunal can pass appropriate orders, absolving the liability of the insurer. Otherwise, if the third party has no role to play with reference to any breach of condition by the insurer and he is a third party, in such an eventuality even by proving the breach of fundamental condition in the policy as contemplated under Section 149 (2) of the Act, the Court can fasten liability jointly on the Insurance Company and the owner depending upon the facts and circumstances of each case. It is further made clear that the Tribunals and High Courts can also pass such an order of pay and recovery but there must be valid reasons to be recorded in absolving liability of the Insurance Company or fastening the liability on the Insurance Company, again by considering the facts and circumstances of each case.

70. In the aforesaid background, the main purpose rule is also to be examined by the Court. The object of the enactment of the Motor Vehicles Act and the purpose of

WWW.LIVELAW.IN

specifically having provisions, namely Sections 146, 147 and 149 (1) and 149(2) in the Act have to be understood by the Court with reference to what exactly the intention of the Parliament is and what was the purpose of introducing the said provisions. The main purpose rule is considered by the apex Court in ***Skandia Insurance Co. Ltd. V. Kokilaben chandravadan***, reported in ***(1987) 2 SCC 654*** wherein the apex Court considering the breach of a condition of policy at the time of the accident. In the said case, The person who had been driving the vehicle was not duly licenced person to drive the vehicle, though the insured had engaged a licenced driver and had entrusted the vehicle for being driven to the licenced driver. It was contended that when the accident occurred, when an unlicenced person was driving the vehicle, whether it would exonerate the liability of the insurance company. Applying the main purpose rule, the apex Court held that, it would not exonerate the insurance company. The apex Court held as under:

> "13. In order to divine the intention of the Legislature in the course of interpretation of the relevant provisions there can

WWW.LIVELAW.IN

scarcely be a better test than that of probing into the motive and philosophy of the relevant provisions keeping in mind the goals to be achieved by enacting the same. Ordinarily it is not the concern of the Legislature whether the owner of the vehicle insures his vehicle or not. If the vehicle is not insured any legal liability arising on account of third party risk will have to be borne by the owner of the vehicle. Why then as the Legislature insisted on a person using a motor vehicle in a public place to insure against third party risks by enacting sec. 147. Surely the obligation has not been imposed in order to promote the business of insurers engaged in the business of automobile insurance. The provision has been inserted in order to protect the members of the community traveling in vehicles or using the roads from the risk attendant upon the user of motor vehicles on the roads."

71. The decision can be meaningfully understood in that, the protection to innocent third parties would remain a protection merely on paper unless there is a guarantee

WWW.LIVELAW.IN

under the statute. It is trite that compensation awarded by the Courts would be recoverable from the persons held liable for the occurrence of the accident. A Court can only pass an award or decree; it cannot ensure that such award or decree results in the amount being actually recovered from the persons liable who may not have the resources. Therefore, the exercise undertaken by the law and the Courts would then be an exercise in futility and the outcome of the legal proceedings, which by the very nature of things involve time and money invested from the scarce resources of the community would make a mockery of the injured victims, or the dependents of the deceased victim in the accident, who are themselves obliged to incur considerable expenditure of time, money and energy in litigation. To overcome this despicable situation, the Parliament has made it obligatory that no motor vehicle shall be used unless a third party insurance is in force (Section 145 of the Act).

72. Therefore, the main purpose recognized under the statute is that no third party should suffer despite breach of any condition in the insurance policy between insurer and insured. Though such breach of condition is

WWW.LIVELAW.IN

proved by the insurer against the insured, it should be treated as an *inter se* dispute between the insurer and the insured and the same should not affect the right of a third party, unless, there is a contribution by the third party himself in causing the breach of any condition of the policy. This is the main object and purpose of the Act and the provisions of the Act under consideration. Therefore, the purpose for which the conditions have been imposed in the policy as recognized under Section 149 (2) of the Act and the breach of those conditions are to be tested, as to, whether, the breach is referable to the cause of the accident so as to exonerate the insurer. If not, any condition imposed in the policy and breach of such a condition will not exonerate the Insurance Company so far as a third party risk is concerned. Thus, the first main test, if on ascertaining breach of a condition in the policy by the Court as to, whether the said breach is referable to the cause of accident in which case it would become a fundamental breach, then, the second test would be, whether, the victim or third party, in any manner contributed or was responsible for such breach of the condition by the insured and only

WWW.LIVELAW.IN

thereafter, the Courts have to examine whether the Insurance Company could be directed to pay the compensation and recover from the insured or be completely absolved of its liability. This is how we understand the expressions regarding "fundamental breach" and main purpose rule.

73. It is worth recalling the tool of interpretation of statute with reference to the intention of the Legislature. The apex Court in various decisions including in the case of ***Commissioner of Customs (Preventive), Gujarat v. Reliance Petroleum Ltd.,*** reported in ***(2008) 7 SCC 220,*** has observed as under:

> "Legislation in modern State is actuated with some policy to curb some public evil or to effectuate some public benefit. The legislation is primarily directed to the problems before the Legislature based on information derived from past and present experience. It may also be designed by use of general words to cover similar problems arising in future. But, from the very nature of things, it is impossible to anticipate fully the varied situations arising in future in which the application of the legislation

WWW.LIVELAW.IN

> in hand may be called for, and, words chosen to communicate such indefinite 'referents' are bound to be, in many cases lacking in clarity and precision and thus giving rise to controversial questions of construction."

74. In light of the above decision, in our opinion, the concept of 'main purpose' with reference to the provisions of the Act noted supra is definitely intended to curb public evil and to effectuate public benefit, particularly in the context of third parties, who sustain injury and may die in a road traffic accident. Therefore, any Act of Parliament or Legislature, sometimes may not foresee all kinds of situations and all types of consequences. It is for the Court to see whether a particular case falls within the broad principles of law enacted by the Parliament or the Legislature. Therefore, the interpretation of a statute should not be in a narrow pedantic manner but in a broad manner applicable to all types of situations. Inspite of the fact that experts in the field assist in drafting the Acts and Rules, they would on many occasions fall short of the language to be used and phrases employed, a statute may not be perfect nor happily worded. Therefore, Courts need

WWW.LIVELAW.IN

to interpret the statute by mainly applying the principle of intention of the legislature. Sometimes Courts may read down the words of a provision or read up a provision of a statute for the purpose of curbing public evil and effectuating public benefit as noted above. Therefore, in our opinion, the process of construction of a statute should combine both a liberal and purposive approach which would meet the ends of justice in light of the purpose and object of the enactment and the particular provisions.

75. As we have stated above, the interpretation of a provision of a statute in the present context must be to protect the interest of the innocent third parties who are not responsible for the cause of the accident or who have not contributed in any way to the accident or towards breach of conditions of the policy by the insured in any manner; those persons should not suffer for any reason. Therefore, in all such circumstances, the insurer has to indemnify the third party with reference to the payment of compensation. Hence, the breach of conditions in such cases should be treated as a fundamental breach only insofar as the insured is concerned. It would not affect the right of a third party

WWW.LIVELAW.IN

from recovering compensation awarded by the Courts, jointly or severally from the insurer or the insured.

76. Before parting with this judgment, we may also refer to waiver of breach of conditions by the insurer. Apart from specifically incorporating the conditions as enumerated in Section 149(2) of the Act, the insurer and the insured may also incorporate any other condition which is convenient and beneficial for the insurer or the insured making them *inter se* liable to each other. It is not that in law the insurer need not accept its liability despite there being a fundamental breach of any of the conditions of the policy by collecting additional premium or depending upon the business relationship and or good will between the insurer and the insured. Therefore, all would depend upon the relationship between the insurer and the insured. Even a fundamental breach of a condition in the policy can be waived by the insurer to accept the liability in order to enhance the business between the insurer and the insured; the insurer can undertake to discharge liability of the insured considering the large and huge business given by the insured to the insurer. Any other condition which is

WWW.LIVELAW.IN

incorporated in the policy and breach of the said condition can also be waived by the insurer and accept its liability to satisfy an award. In such a circumstance, there should be a specific contract of waiver between the insured and the insurer and same would not, in any manner, make the insurer generally liable in all cases of breach of a condition of the policy. At the same time, there cannot be an universal waiver by the insurer in order to make it liable in all such cases. Therefore, the waiver of a breach of a condition in a policy is a special contract entered into between the insurer and the insured in order to make the insurer liable to indemnify the insured. The breach of a condition definitely gives the insurer the right to repudiate its liability or it can also elect to waive the same. If it is waived, the liability can be accepted and in such an eventuality, the courts would have no difficulty in fastening the entire liability on the insurer.

77. Therefore, looking to the aforesaid well settled principles in the rulings referred above, the law is abundantly clear as laid down by the Apex Court in *Swaran Singh's case*, which has been consistently adopted and

WWW.LIVELAW.IN

followed in various subsequent judgments. The same clarifies the position that the Tribunal or the High court, under the peculiar and special facts and circumstances of each case, could ascertain whether there was any fundamental breach of condition, referable to the cause of accident and depending upon the circumstances, may order for 'pay and recover'. However, the guiding principle that has to be adopted is either absolving the liability of the insurer *in toto* or fastening the liability on the insured and ordering to insurer to pay and recover the award amount accordingly.

78. Before answering the referred questions, we need to revisit the facts of this case with reference to the appeal filed. As we have observed, by collecting extra premium, the insurance company can undertake extra responsibility and hence liability. The Tribunal Court in its judgment has granted compensation of Rs.1,000/- to respondent No.1 herein even after holding that the respondent Insurance Company cannot be fastened with the liability but relying upon the ***National Insurance Company V. Baljit Kaur case***, reported in ***(2004)2 SCC 1***

WWW.LIVELAW.IN

directed the insurance company to pay and recover the compensation from the owner.

79. Learned Counsel, Sri. Suryanarayana Rao, appearing for the New India Assurance Company has submitted that the said amount has already been deposited by the Insurance Company. However, he contented that the learned Single Judge has erroneously observed in the instant case that, the insurer had collected extra premium from the insured-owner of the vehicle to undertake its liability for a larger coverage to include the risk of gratuitous passenger.

80. Learned counsel, Sri.Suryanarayana Rao, has also taken us through the policy but we find that absolutely no extra premium was collected to cover the risk of any gratuitous passenger. To that extent, the order passed by the learned Single Judge is not proper and appropriate.

81. Be that as it may, as we have found that even in *Baljit Kaur's case,* under similar set of facts and circumstances, the Supreme court ordered for 'pay and recover' and subsequently in *Shammanna's case* as referred

WWW.LIVELAW.IN

to above, it was held that even the Tribunals and the High Courts have the power to order for 'pay and recover'. The amount in the present case has already been paid, therefore though we are of the opinion the insurance company is not liable to pay any compensation as there was a fundamental breach, but on the basis of the principles laid down in *Swaran Singh's* case, the insurance company can still be directed to pay the awarded amount to the third party and recover the amount from the insured, we do not find any strong reason to interfere with the order passed by the Tribunal or the learned Single Judge. Hence, the appeal is devoid of merit and the same is liable to be dismissed and it is accordingly dismissed.

82. Before parting with this judgment, we feel it just and necessary to apprise the Insurance Companies that, where liability is fastened on the Insurance Company and pay and recovery order has been passed. In such an eventuality, in order to protect their interests, the Insurance Companies could invoke the provisions under Order XXXVIII Rule 5 of Code of Civil Procedure, soon after their appearance before the Court in order to seek attachment

WWW.LIVELAW.IN

before judgment the movable and immovable properties of the insured so as to protect their recovery rights if there would be any decree in their favour in the same judgment by the Tribunal. This would definitely help the Insurance Companies to recover the amount of compensation paid by them under the contract of indemnity from the insured after the award being passed.

83. With the above said observations, we answer the questions 1 and 2 which are referred for our consideration, in the following manner:

Questions referred:-

I) If it is shown the insurance policy is not 'Act' policy in terms of Sections 145 and 147 of the Motor Vehicles Act, but a contractual policy issued collecting extra premium indicating insurance company has enlarged its liability, will not the insurance company be liable to pay and recover even if there is any breach by the insurer?

II) In such cases, is not the rule to 'pay and recover' applicable in view of the mandate in Section 149, M.V.Act that upon issuance of

Not An Official Copy

WWW.LIVELAW.IN

policy, the insurer is bound to discharge the award as if it were a judgment debtor?

Answers:

i) The Insurer is liable to pay the third party and recover from the insured even if there is breach of any condition recognized under Section 149(2), even if it is a fundamental breach (that is breach of condition which is the cause for the accident) and the insurer proves the said breach, in view of the mandate under Section 149(1) of the Act. But no such order can be passed against the insurer, if, on the facts and circumstances of a case, a finding is given by the court that the third party (injured or deceased) had played any fraud or was in collusion with the insured, individually or collectively, for a wrongful gain to themselves or cause wrongful loss to the insurer.

ii) The Court can also fasten the absolute liability on the insurer, if there is any breach of condition which is enumerated under Section 149(2) of the Act or any other condition of the policy if the Insurance Company has waived breach of any such condition or has taken the special responsibility to pay by collecting extra premium by covering any type of risk depending upon facts of each case.

WWW.LIVELAW.IN

iii) Before passing any order on the Insurance Company to pay and recover, the Court has to examine the facts and circumstances of each case and if it finds that the victim, injured or the deceased, in a particular case, was solely or jointly responsible for breach of such fundamental condition by playing fraud or in collusion with the insured, the Court may exercise its discretion not to fasten the liability on the insurer.

iv) However, the court should not adopt the above guideline as a general rule in all cases, but only under peculiar facts and circumstances of each case and on giving appropriate reasons.

In the result, the appeal is ***dismissed.*** Parties to bear their respective costs.

Sd/-
JUDGE

Sd/-
JUDGE

PL

WWW.LIVELAW.IN

Per Nagarathna J.:

I have had the benefit of reading the erudite opinion of Hon'ble Phaneendra J. While I broadly concur with the detailed opinion formulated by him, I wish to add to the interpretation of the provisions of law under consideration.

Birds eye view of the controversy:

2. The two points referred for opinion of the Full Bench by Hon'ble Jawad Rahim J., are as under:

> "I) If it is shown the insurance policy is not an 'Act' policy in terms of Sections 145 and 147 of the Motor Vehicles Act, but a contractual policy issued collecting extra premium indicating insurance company has enlarged its liability, will not the insurance company be liable to pay and recover even if there is any breach by the insurer?
>
> II) In such cases, is not the rule to 'pay and recover' applicable in view of the mandate in Section 149, M.V.Act that upon issuance of policy, the insurer is bound to discharge the award as if it were a judgment debtor?"

3. At the outset, it must be noted that this is a case where the insurer sought avoidance of its liability on account of the fact that the injured claimant was travelling

WWW.LIVELAW.IN

in a tempo, bearing Regn.No.KA-28/B-5434, which is a goods vehicle and therefore, being a passenger in a goods vehicle, whose risk was not compulsorily covered under Section 147 of the Motor Vehicles Act, 1988 [hereinafter, referred to as "the Act"] though there was additional premium collected by the insured. Thus, the risk of the injured claimant not being covered compulsorily/statutorily, as additional premium was collected, whether the insurer was liable to pay the compensation was the question that arose in the case. The Tribunal assessed the compensation at Rs.1,000/- along with interest at 6% p.a. from the date of petition till deposit and directed the second respondent - Insurer to pay the compensation and to recover the same from first respondent – owner, by filing an execution petition. The said order has been challenged in this appeal and in the appeal the aforesaid points have been raised for consideration of the Full Bench.

4. The learned Judge also felt that a Division Bench of this Court in the case of ***The Oriental Insurance Co., Ltd., vs. Subramanyam [ILR 2012 KAR 5241]*** *[Subramanyam]*, has taken a view that the breach of

WWW.LIVELAW.IN

condition in the insurance policy empowers the insurer to avoid its liability. In such a case, the insurer cannot be directed to satisfy the award, but in appropriate cases the Hon'ble Supreme Court in exercise of its jurisdiction under Article 142 of the Constitution, has directed the insurer to pay compensation and recover the amount from the insured. In *Subramanyam*, the policy was not an 'Act policy' limited to only Section 147 of the Act, that is, compulsory coverage, but it was a contractual policy. Therefore, a doubt was expressed that, if a policy is shown to be contractual policy and not merely an 'Act policy' and additional premium has been collected, whether the insurer could avoid its liability. The said aspect, not being adverted to by the Division Bench in *Subramanyam*, lead to the framing of the aforesaid questions for reference to the Full Bench.

5. At this stage, itself it may be sated that in *Subramanyam,* a Division Bench of this Court held that a pay and recovery order is not permissible under Section 149 of the Act and when an Insurance Company proves any of the defences under section 149(2) of the Act, it would be absolved of its liability. The judgment of the Division Bench

WWW.LIVELAW.IN

of this Court in *Subramanyam* came up for consideration before the Hon'ble Supreme Court in ***Shamanna vs. Divisional Manager, Oriental Insurance Company Limited [(2018) 9 SCC 650]*** *(Shamanna)*. While considering the correctness of the judgment passed by this court in *Shamanna's* case, the Hon'ble Supreme Court, on referring to ***National Insurance Company Limited vs. Swaran Singh and others [(2004) 3 SCC 297]*** *(Swaran Singh)* and the subsequent decisions in the case of ***National Insurance Company Limited vs. Laxmi Narain Dhut [(2007) 3 SCC 700]*** *(Laxmi Narain Dhut)* and ***National Insurance Co. Ltd. vs. Parvathneni [(2009) 8 SCC 785]*** *(Parvathneni)***,** held that in *Parvathneni*, the correctness of the decisions regarding exercise of jurisdiction under Article 142 of the Constitution of India, directing the Insurance Company to pay the compensation amount even though the Insurance Company had no liability to pay was doubted and the matter was referred to a Larger Bench of three Judges. But the Larger Bench of the Hon'ble Supreme Court disposed of the matter keeping open the question of law to be decided in an appropriate case. Thus,

WWW.LIVELAW.IN

in *Shamanna's* case, the Hon'ble Supreme Court, on referring to the above development, has observed that the question of law is left open to be decided in an appropriate case, but the decisions in *Swaran Singh* followed in *Laxman Dhut* hold the field.

6. Further, though *Shamanna's* case was decided in the year 2018, the present reference being of the year 2013 also concerning, the correctness or otherwise of the decision in *Subramanyam* has to be decided in the above background.

7. Thus, in a nutshell, the question to be considered is, whether, the Insurance Company is liable to pay compensation and be permitted to recover the same from the insured even when there is a violation or breach of the condition of the policy under Section 149 of the Act. In other words, under what circumstances pay and recovery order could be made by the Motor Accident Claims Tribunal (hereinafter, referred to as "the Tribunal") or Court when there is breach of condition of the policy? In this regard, contention of the learned counsel for Insurance Company

WWW.LIVELAW.IN

was that the circumstances under which a pay and recovery order could be issued must be clearly established as according to them, when a defence enumerated under Section 149 (2) of the Act is proved whether the Insurance Company would be completely absolved of its liability is not clear despite the catena of decisions. That, pay and recovery order cannot be passed by the Tribunal or the Court when there is a breach of the policy condition. It was the further contention that Hon'ble Supreme Court by exercising its power under Article 142 of the Constitution in certain cases has issued pay and recovery order to do complete justice in the matter, but such an order cannot be made by the High Court or the Tribunal. Learned counsel for the claimant has responded to the said contentions.

Scheme of the Act:

8. In order to answer the above points, it would be necessary to consider the scheme of Chapter XI of the Act in the first instance. Chapter XI of the Act deals with insurance of Motor Vehicles against third party risks.

WWW.LIVELAW.IN

9. Section 145 is the definition clause which defines 'authorised insurer'; 'certificate of insurance'; 'liability'; 'policy of insurance'; 'property'; 'reciprocating country' and 'third party'. The expression "certificate of insurance" is defined as a certificate issued by an authorised insurer in pursuance of sub-section (3) of Section 147 and includes a cover note complying with such requirements as may be prescribed, and where more than one certificate has been issued in connection with a policy, or where a copy of a certificate has been issued, all those certificates or that copy, as the case may be. "Policy of insurance" includes "certificate of insurance". Thus, policy of insurance is an inclusive definition and similarly, the expression; 'certificate of insurance' also is an inclusive definition to include a cover note. The expression "liability" wherever used in relation to the death of or bodily injury to any person, includes liability in respect thereof under section 140; while, the expression "third party" includes the Government. Thus, both the expression 'liability' as well as 'third party' are inclusive definitions.

WWW.LIVELAW.IN

10. Section 146 speaks about necessity for insurance against third party risk. Sub-section (1) states that no person shall use, except as a passenger, or cause or allow any other person to use, a motor vehicle in a public place, unless there is in force in relation to the use of the vehicle by that person or that other person, as the case may be, a policy of insurance complying with the requirements of Chapter XI. Further, in the case of a vehicle carrying, or meant to carry, dangerous or hazardous goods, a policy of insurance under the Public Liability Insurance Act, 1991 (6 of 1991) is also to be taken. Any such insurance against third party risk does not however exempt Central Government or State Government owned vehicles; the vehicles owned by any local authority or State transport undertaking, provided the said authority or undertaking has a fund established and maintained in accordance with the rules made in that behalf for meeting any liability arising out of the use of any vehicle of that authority or undertaking which that authority or undertaking or any person in its employment may incur to third parties. Hence, Section 146(1) mandates that no person can use or allow any other

WWW.LIVELAW.IN

person to use, a motor vehicle in a public place unless the said vehicle is covered by a policy of insurance in accordance with the requirements of Chapter XI.

11. The requirements of policy and limits of liability are delineated in Section 147 of the Act. The said requirements are in order to comply with what is stated in Chapter XI. Sub-section (1) of Section 147 states that a policy of insurance must be a policy which, (a) is issued by a person who is an authorised insurer; and (b) insures the person or classes of persons specified in the policy to the extent provided in sub-section (2) to Section 147. The said insurance cover must be, (a) against any liability which may be incurred by him in respect of the death of or other bodily injury to any person, including owner of the goods or his authorized representatives carried in the vehicle or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place; (b) against the death of or bodily injury to any passenger of a public service vehicle caused by or arising out of the use of the vehicle in a public place. The proviso states that a policy shall not be required, **(i)** to cover liability in respect of the death, arising

WWW.LIVELAW.IN

out of and in the course of his employment, of the employee of a person insured by the policy or in respect of bodily injury sustained by such an employee arising out of and in the course of his employment other than a liability arising under the Workmen's Compensation Act, 1923 (W.C Act) in respect of the death of, or bodily injury to, any such employee — (a) engaged in driving the vehicle, or (b) if it is a public service vehicle engaged as a conductor of the vehicle or in examining tickets on the vehicle, or (c) if it is a goods carriage, being carried in the vehicle. **(ii)** A policy of insurance shall not be required to cover any contractual liability. The explanation is intended to clarify the expression, public place, by stating, if the accident has occurred resulting in death of or bodily injury to any person or damage to any property not in a public place at the time of accident, nevertheless it is deemed to have been caused by or to have arisen out of, the use of a vehicle in a public place, if the act or omission which led to the accident occurred in a public place.

12. On a conspectus reading of the above, it becomes clear that, there is compulsory coverage of a risk

WWW.LIVELAW.IN

of a third party as well as owner of the goods or authorized representative carried in a goods vehicle as well as damage to any property of a third party caused by or arising out of the use of the vehicle in a public place. Further, any passenger of a public service vehicle is also covered under the policy against death or bodily injury. The risk of the specific categories of persons as per the W.C Act is also to be compulsorily covered i.e., liability, of a driver of a vehicle engaged in driving of the vehicle of a conductor of a public service vehicle or examiner of tickets as well as the employee in the case of a goods carriage, being carried in the vehicle. The aforesaid classes of person are, therefore, compulsorily covered and the same would be the minimum coverage of risk under a motor vehicle insurance policy. When a policy is issued by complying with the mandatory risks, the same is called an 'Act Policy' or a statutory policy.

13. There is no compulsion to cover any other liability under the Act. The same would depend on the specific terms of contract between the parties. But if an insurer undertakes to cover any other risk, such as, risk of passengers of a private motor vehicle such as a car or

WWW.LIVELAW.IN

property of passengers of such vehicle, by accepting additional premium, then the insurer is liable to make good such a liability, subject to the terms of the policy as well as the Act.

14. Sub-section (2) of Section 147 is subject to the proviso contained in sub-section (1) thereof. It speaks about the limits of liability, namely, (a) save as provided in clause (b) of Section 147(2), the amount of liability incurred i.e., the actual liability; and (b) in respect of damage to any property of a third party, the limit is of rupees six thousand only. The proviso which is of no relevance now states that if any policy of insurance issued with any limited liability was in force, immediately before the commencement of the Act, the same shall continue to be effective for a period of four months after such commencement or till the date of expiry of such policy whichever was earlier. In other words, sub-section (2) of Section 147 states that a policy, subject to proviso to sub-section (1) (which covers compulsory coverage or statutory cover) would cover the amount of liability incurred in respect of any death or bodily injury to any person or victim of an accident who is a third party. But,

WWW.LIVELAW.IN

insofar as the damage to third party is concerned, the upper limit provided is Rs.6,000/- only. But it is permissible for an insurer to provide coverage of a wider liability i.e., apart from the actual liability incurred in respect of the death or bodily injury of a third party victim of an accident as stipulated in section 147(1) such as covering the risk of the passengers of a private car who are not considered as third parties or the driver of a private car who is not an employee or even the risk of the owner of a vehicle under a personal accident cover. Similarly, there could be a liability beyond Rs.6,000/- also incurred by an insurer so as to indemnify the entire damage to the property of a third party. Thus, if the policy assumes a wider liability by a specific contract, then the same would not be limited by the cap of Rs.6000/- stated in Section 147(2)(b) of the Act. It would fall under a contractual liability and not a statutory one.

15. Sub-section (3) of Section 147 states that unless the insurer issues in favour of the insured a certificate of insurance in the prescribed form and containing the prescribed particulars of any condition subject to which the policy is issued, the policy would have no effect. If a

WWW.LIVELAW.IN

cover note is not issued by the insurer in terms of the provisions of Chapter XI or the Rules made thereunder within the prescribed time, the insurer shall, within seven days of the expiry of the period of the validity of the cover note, notify the fact to the registering authority in whose records the vehicle to which the cover note relates has been registered or to such other authority as the State Government may prescribe. This is an obligation cast on the insurer vide Section 147(4) of the Act.

16. Sub-section (5) of Section 147 begins with a *non-obstante* clause and it states that notwithstanding anything contained in any law for the time being in force, an insurer issuing a policy of insurance under Section 147 shall be liable to indemnify the person or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of that person or those classes of persons.

17. The next Section which is of relevance in the present context is Section 149 of the Act which speaks about the duty of the insurer to satisfy judgments and

WWW.LIVELAW.IN

awards against persons insured in respect of third party risks. Sub-section (1) of Section 149 states, if, after a certificate of insurance has been issued under sub-section (3) of Section 147 in favour of the person by whom a policy has been effected, judgment or award in respect of any such liability as is required to be covered by a policy under clause (b) of sub-section (1) of Section 147 (being a liability covered by the terms of the policy or under the provisions of Section 163A), is obtained against any person insured by the policy, then, notwithstanding that the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy, the insurer shall, subject to the other provisions of Section 149, pay to the person entitled to the benefit of the decree any sum not exceeding the sum assured payable thereunder, as if he were the judgment debtor, in respect of the liability, together with any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.

18. Therefore, sub-section (1) of Section 149 categorically speaks about an insured being indemnified by

WWW.LIVELAW.IN

an insurer having regard to the stipulations prescribed in Section 147 but subject to Section 149 of the Act. Further, the expression, "liability covered by the terms of the policy" has been explained to mean a liability which is covered by the policy or which would be so covered but for the fact that the insurer is entitled to avoid or cancel or has avoided or cancelled the policy, vide section 149 (6).

19. Sub-section (2) of Section 149 speaks about the defences that an insurer could raise as against the insured in the matter of indemnifying the insured under the policy of insurance. The defences that could be raised by an insurer could also be the breaches of specified conditions in a policy of insurance. They are stated in sub-section (2*)(a)* of Section 149 of the Act which could be noted as follows: the first is a condition excluding the use of the vehicle (i) for hire or reward, where the vehicle is, on the date of the contract of insurance a vehicle not covered by a permit to ply for hire or reward, or (ii) for organised racing and speed testing, or (iii) for a purpose not allowed by the permit under which the vehicle is used, where the vehicle is a transport vehicle, or (iv) without side-car being attached

WWW.LIVELAW.IN

where the vehicle is a motor cycle; or *(b)* a condition excluding driving by a named person or persons or by any person who is not duly licensed, or by any person who has been disqualified for holding or obtaining a driving licence during the period of disqualification; or *(c)* a condition excluding liability for injury caused or contributed to by conditions of war, civil war, riot or civil commotion; or *(d)* that the policy is void on the ground that it was obtained by the non-disclosure of a material fact or by a representation of fact which was false in some material particular. The expressions "material fact" and "material particular" have been explained in sub-section (6) of Section 149 of the Act.

20. The defences at (a) to (c) above are exclusion of liability on the prevailing of certain circumstances at the time of the accident, while (d) above is a circumstance giving rise to a policy being avoided by an insurer on account of misrepresentation, non-disclosure, etc. by an insured at the time of entering into a contract of insurance. Thus, there are two genus of breaches having species within them.

WWW.LIVELAW.IN

21. Sub-section (3) of Section 149 of the Act states that when any judgment is passed from the Court in a reciprocating country, the insurance company shall be liable to the person entitled to the benefit of the decree in the manner and to the extent specified in sub-section (1) of Section 149, as if the judgment was given by a Court in India, provided that the insurer had notice through the Court concerned of the bringing of the proceedings and the insurer to whom notice was so given was entitled to defend the action on grounds similar to those specified in sub-section (2) of Section 149.

22. Sub-section (4) of Section 149 of the Act which is most relevant for the present controversy states, when a Certificate of insurance has been issued under sub-section (3) of section 147 of the Act to any person by whom a policy has been effected any restriction with reference to clause (b) of sub-section (1) of section 147, would be of no effect. In other words, the requirements of compulsory coverage under Section 147 of the Act would have to be complied with under every policy irrespective of any other term or condition that may be agreed to between the insurer and

WWW.LIVELAW.IN

insured. The proviso however states that any sum paid by the insurer in or towards the discharge of any liability of any person which is covered by the policy by virtue of sub-section (4) of Section 149 shall be recoverable by the insurer from that person. Thus, the proviso speaks of the concept of 'pay and recovery'.

23. Sub-section (5) of the Section 149 states that if the amount which an insurer becomes liable under section 149 to pay in respect of a liability incurred by a person insured by a policy exceeds the amount for which the insurer would apart from the provisions of the said section be liable under the policy in respect of that liability, the insurer shall be entitled to recover the excess from that person. This is also another instance where a pay and recovery order could be made under the statute.

24. Under sub-section (7) of Section 149, it is stated that no insurer to whom the notice has been given shall be entitled to avoid his liability to any person entitled to the benefit of any such judgment or award otherwise than in the manner provided for in sub-section (2) of Section 149 or in

WWW.LIVELAW.IN

the corresponding law of the reciprocating country, as the case may be. This sub-section speaks of complete avoidance of liability which is as per sub-section (2) of Section 149 of the Act.

25. Next, Section 156 speaks about the effect of certificate of insurance being issued in respect of contract of insurance. When such a certificate of insurance in respect of a contract of insurance between the insurer and the insured person, is issued, then (a) if and so long as the policy described in the certificate has not been issued by the insurer to the insured, the insurer shall, as between himself and any other person except the insured, be deemed to have issued to the insured person a policy of insurance conforming in all respects with the description and particulars stated in such certificate; and (b) if the insurer has issued to the insured the policy described in the certificate, but the actual terms of the policy are less favourable to persons claiming under or by virtue of the policy against the insurer either directly or through the insured than the particulars of the policy as stated in the certificate, the policy shall, as between the insurer and any

WWW.LIVELAW.IN

other person except the insured, be deemed to be in terms conforming in all respects with the particulars stated in the said certificate. This section has incorporated the *contra proferentem* rule.

Nature and Character of Insurance Policies under the Act:

26. Having adverted to the statutory requirements of a policy of insurance, it would be necessary to discuss the nature and characteristics of a contract of insurance. It is well known that the contract of insurance is a contract of indemnity. It is a promise made by an insurer to indemnify the insured subject to certain terms and conditions which may be in the nature of exemptions or exceptions under the policy. Mandatory terms of insurance policy have been delineated under Section 147. They are statutory terms. Section 149(2) of the Act are termed as defences by an insurer, or the exemptions to liability of the insurer to satisfy an award which otherwise an insurer would be liable to satisfy. Thus, the conditions of the policy assume importance in the context of breach of the terms of policy. The conditions of policy could be either express or implied.

WWW.LIVELAW.IN

Implied terms are, *inter alia,* the statutory terms which have to be complied with by the insured under every policy irrespective of whether there is an express inclusion or reference to them in the contract. But, express conditions are those which are expressly set out in the policy on a *consensus ad idem* between the insured and the insurer. The conditions of a policy can again be categorized into two classes: general terms and special terms. General Terms are those which are common to all policies of a particular nature or class. Special Terms are those, which are applicable to a particular policy and by a specific contract between the insurer and the insured. An insurance policy would consist of conditions which can again be categorised into two types: statutory and contractual. Further, the coverage of risks could also be statutory and contractual in nature or an amalgamation of both types. Under Section 147(1) of the Act, the coverage of risks under an insurance policy are statutory and compulsory in nature. It is always open to an insurer to cover other risks, which are optional or contractual, but under Section 147(1) it is compulsory

WWW.LIVELAW.IN

coverage of the risks of classes of persons enumerated therein.

27. Just as an insurance policy could cover risks which are statutory or contractual in nature, in the same manner, the exemptions or restrictions under a policy could also be statutory or contractual in nature, however, subject to any supervening statutory conditions under the Act. For instance, the grounds of defence which are enumerated in Section 149 (2) of the Act are meant for avoidance of liability. However, the said provision is subject to sub-sections (3), (4) and (7) of Section 149. They are reiterated as under for immediate reference:

> **(a)** there has been a breach of a specified condition of policy, being one of the following, namely-
>
> (i) A condition excluding the use of the vehicle-
>
> (A) for hire or reward, where the vehicle is not covered by a permit to ply for hire or reward on the date of the contract of insurance, or

WWW.LIVELAW.IN

(B) for organised racing and speed testing, or

(C) for a purpose not allowed by the permit under which the vehicle is used where the vehicle is a transport vehicle, or

(D) without side car being attached where the vehicle is Motor Cycle; or

(ii) a condition excluding driving by a named person or persons or/by any person who is not duly licensed or by any person who has been disqualified for holding or obtaining a driving licence during the period of disqualification; or

(iii) a condition excluding liability for injury caused or contributed to by conditions of war, civil war, riot or civil commotion; or

(b) that the policy is void on the ground that it was obtained by the non-disclosure of a material fact or by a representation of fact which was false in some material particular.

28. The defences available under the statute alone can be taken by the insurer and none other as against third parties. Thus under Section 149(2) (a) and (b) specified

WWW.LIVELAW.IN

defences of an insurer who is issued notice of a claim to defend an action are enumerated. If the insurer succeeds in his defence whether the third party victim has to execute the decree against the insured only or the third party victim is protected by the statute is the conundrum in this case.

29. In ***British India General Insurance Company Limited vs. Capt. Ithar Singh (AIR 1959 SC 1331)],*** there are categorical observations in that regard made under the erstwhile Act of 1939, but applicable to the present Act also and the same are extracted as under:

> "5.To start with it is necessary to remember that apart from the statute an insurer has no right to be made a party to the action by the injured person against the insured causing the injury. Sub-section (2) of Section 96 however gives him the right to be made a party to the suit and to defend it. The right therefore is created by statute and its content necessarily depends on the provisions of the statute. The question then really is, what are the defences that sub-section (2) makes available to an insurer? That clearly is a

WWW.LIVELAW.IN

question of interpretation of the sub-section.

6. Now the language of sub-section (2) seems to us to be perfectly plain and to admit of no doubt or confusion. It is that an insurer to whom the requisite notice of the action has been given " shall be entitled to be made a party thereto and to defend the action on any of the following grounds, namely," after which comes an enumeration of the grounds. It would follow that an insurer is entitled to defend on any of the grounds enumerated and no others. If it were not so, then of course no grounds need have been enumerated. When the grounds of defence have been specified, they cannot be added to. To do that would be adding words to the statute.

7. Sub-section(6) also indicates clearly how sub-section (2) should be read. It says that no insurer to whom the notice of the action has been given shall be entitled to avoid his liability under sub-section (1) "otherwise than in the manner provided for in sub-section. (2)". Now the only manner of avoiding liability provided for in sub-section (2) is by successfully raising

Not A Certified Copy

WWW.LIVELAW.IN

any of the defences therein mentioned. It comes then to this that the insurer cannot avoid his liability except by establishing ,such defences. Therefore sub-section (6) clearly contemplates that he cannot take any defence not mentioned in sub-section (2). If he could, then he would have been in a position to avoid his liability in a manner other than that provided for in sub-section (2). That is prohibited by sub-section (6).

8. We therefore think that sub-section (2) clearly provides that an insurer made a defendant to the action is not entitled to take any defence which is not specified in it.

X X X

11. We proceed now to consider the arguments advanced by the learned Solicitor-General who appeared for the appellants. He contended that there was nothing in sub-section (2) to restrict the defence of an insurer to the grounds therein enumerated. To support his contention, he first referred to sub-section (3) of section 96 and said that it indicated that the defences that were being dealt

WWW.LIVELAW.IN

with in sub-section (2) were only those based on the conditions of the policy. His point was that sub-section (2) permitted defences on some of those conditions and sub-section (3) made the rest of the conditions of no effect, thereby preventing a defence being based on any of them. He said that these two sub-sections read together show that sub-section (2) was not intended to deal with any defences other than those arising out of the conditions of the policy, and as to other defences therefore sub-section (2) contained no prohibition. He further said that as under sub-section (2) an insurer was entitled to be made a defendant to the action it followed that he had the right to take all legal defences excepting those expressly prohibited.

12. We think that this contention is without foundation. Sub- section (2) in fact deals with defences other than those based on the conditions of a policy. Thus clause (a) of that sub-section permits an insurer to defend an action on the ground that the policy has been duly cancelled provided the conditions set out in that

WWW.LIVELAW.IN

clause have been satisfied. Clause (c) gives him the right to defend the action on the ground that the policy is void as having been obtained by non-disclosure of a material fact or a material false representation of fact. Therefore it cannot be said that in enacting sub-section (2) the legislature was contemplating only those defences which were based on the conditions of the policy.

13. It also seems to us that even if sub-section (2) and sub-section (3) were confined only to defences based on the conditions of the policy that would not have led to the conclusion that the legislature thought that other defences not based on such conditions, would be open to an insurer. If that was what the legislature intended, then there was nothing to prevent it from expressing its intention. What the legislature has done is to enumerate in sub-section (2) the defences available to an insurer and to provide by sub-section (6) that he cannot avoid his liability excepting by means of such defences. In order that sub-section (2) may be interpreted in the way the

WWW.LIVELAW.IN

learned Solicitor-General suggests we have to add words to it. The learned Solicitor-General concedes this and says that the only word that has to be added is the word "also" after the word "grounds". But even the rules of interpretation do not permit us to do unless the section as it stands is meaningless or of doubtful meaning, neither of which we think it is. The addition suggested will, in our view, make the language used unhappy and further effect a complete change in the meaning of the words used in the sub-section.

14. As to sub-section (6) the learned Solicitor-General contended that the proper reading of it was that an insurer could not avoid his liability except by way of a defence upon being made a party to the action under sub-section (2). He contended that the word "manner " in sub-section (6) did not refer to the defences specified in sub-section (2) but only meant, by way of defending the suit the right to do which is given by sub-section (2). We think that this is a very forced construction of sub-section (6) and

WWW.LIVELAW.IN

we are unable to adopt it. The only manner of avoiding liability provided for in sub-section (2) is through the defences therein mentioned. Therefore when sub-section (6) talks of avoiding liability in the manner provided in sub-section (2), it necessarily refers to these defences. If the contention of the learned Solicitor-General was right, sub-section (6) would have provided that the insurer would not be entitled to avoid his liability except by defending the action on being made a party thereto.

15. There is another ground on which the learned Solicitor- General supported the contention that all defences are open to an insurer excepting those taken away by sub-section (3). He said that before the Act came into force, an injured person had no right of recourse to the insurer and that it was Section 96(1) that made the judgment obtained by the injured person against the assured binding on the insurer and gave him a right against the insurer. He then said that being so, it is only fair that a person sought to be made bound by a judgment should be entitled to resist his

WWW.LIVELAW.IN

liability under it by all defences which he can in law advance against the passing of it.

16. Again, we find the contention wholly unacceptable. The Statute has no doubt 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. It is not for us to add to those grounds and therefore to the statute for reasons of hardship. We are furthermore not convinced that the statute causes any hardship. First, the insurer has the right, provided he has reserved it by the policy, to defend the action in the name of the assured and if he does so, all defences open to the assured can then be urged by him and there is no other defence that he claims to be entitled to urge. He can thus avoid all hardship if any, by providing for a right to defend the action in the name of the assured and this he has full liberty to do. Secondly, if he has been made to pay something which on the contract of the policy he was not, bound to pay, he can under the proviso to sub-section (3) and

WWW.LIVELAW.IN

under sub-section (4) recover it from the assured. It was said that the assured might be a man of straw and the insurer might not be able to recover anything from him. But the answer to that is that it is the insurer's bad luck. In such circumstances the injured person also would not have been able to recover the damages suffered by him from the assured, the person causing the injuries. The loss had to fall on someone and the statute has thought fit that it shall be borne by the insurer. That also seems to us to be equitable for the loss falls on the insurer in the course of his carrying on his business, a business out of which he makes profit, and he could so arrange his business that in the net result he would never suffer a loss. On the other hand, if the loss fell on the injured person, it would be due to no fault of his; it would have been a loss suffered by him arising out of an incident in the happening of which he had no hand at all."

(Underlining by me)

30. Thus, between the insured and the insurer, all restrictions by virtue of the terms, exceptions and conditions

WWW.LIVELAW.IN

in the policy are valid and enforceable because they are parties to the contract. But as against a third party, only those defences incorporated in the Act which comes within Section 149 (2) (a) could be raised as regards coverage of compulsory risks. This is as per Section 149 (4). That means a third party's rights against the insurer cannot be defeated by any defence other than those coming within Section 149(2)(a). The insurer must in such a case satisfy the decree in favour of the third party, but can recover it from the insured by virtue of the proviso to Section 149(4). Further, Section 149(5) also empowers the insurer to recover from the insured any amount paid to the third party, in respect of a compulsory risk, which is in excess of the amount insured was liable to pay under the policy. Thus, Section 149(4) clearly enunciates the rule of pay and recover under two circumstances. Proviso to sub-section (4) of Section 149 categorically states that any sum paid by the insurer towards the discharge of any liability of any person which is covered by the policy shall be recoverable by that person. Thus, reference is to Section 149(2)(a) of the Act. But, as regards clause (b) of sub-section (2) of Section 149,

WWW.LIVELAW.IN

would the principle of pay and recover apply on a plain reading of the sub-section? Thus, whether liability covered by the terms of the policy could be avoided by the specific defence which is enumerated under Section 149(2)(b) of the Act?

31. It is necessary to note the distinction between Section 149(2)(a) and Section 149(2) (b) of the Act. Both of them pertain to defences of an insurer. But Section 149(2)(a) pertain to defences of the insurer on the happening of an event namely, a road traffic accident, leading to injury or death or on account of war, civil war, riot or civil commotion. But Section 149(2)(b), deals with a case where the policy is void on the ground that it was obtained by a non-disclosure of a material fact or by a representation of the fact which was false in some material particular. The expressions 'material fact' and 'material particular' are explained in sub-section (6) of Section 149 of the Act. In other words, the defence of the insurer under Section 149(2)(b) goes to the root of the contract. When the policy of the insurance itself is void, no rights and obligations would flow from such a policy. In such a

WWW.LIVELAW.IN

situation, is the insurer still liable at all to satisfy the award in the event of there being a road traffic accident resulting in injury or death or damage to property of a third party? In such a case, should the award be executed solely against the owner of the vehicle and the driver or any other person responsible for causing the accident or even in such a case, whether the principle of pay and recovery apply?

Pay and recovery Order: Swaran Singh- Section 149(2) (a) of the Act:

32. Section 149(2)(a) of the Act was a subject of interpretation by the Hon'ble Supreme Court in *Swaran Singh.* In the said case, the question, as to, whether, an insurer can avoid its liability in the event it raises a defence as envisaged under sub-section (2) of Section 149 of the Act was considered. Specifically, in the said case, the defences in clause (a) of sub-section (2) of Section 149 were considered and regard having to the words "that there has been a breach of specific condition of a policy", in clause (a), would imply that the defence of the action for compensation would depend upon the terms of the policy. The said case

WWW.LIVELAW.IN

focused on the defence of a person driving a motor vehicle not being duly licensed or who has been disqualified from holding or obtaining a driving licence during the period of disqualification. It was observed that a breach on the part of the insured must be established by the insurer to show that not only the insured used or caused or permitted to use the vehicle in breach of the Act, but also that the damage suffered by the victim flowed from the breach. The question, whether, a third party victim of an accident would be entitled to recover the amount of compensation granted by the Tribunal although the driver of the vehicle at the relevant point of time did not have a valid driving licence from the owner or the driver or insurer thereof was considered. In that regard, it was observed that a contract of insurance and its terms must be gathered from the expressions used therein. It was observed that on a holistic consideration of Section 149 of the Act, the conclusion that could be arrived at was, once the insured proved that the accident was covered by compulsory insurance clause, it was for the insurer to prove that it came within an exception clause. In other words, the person who alleges breach must

WWW.LIVELAW.IN

prove the same. The Insurance Company was therefore, required to establish the said breach by cogent evidence and in the event the Insurance Company failed to prove that there had been breach of conditions of policy on the part of the insured, the Insurance Company could not be absolved of its liability. Noting that the Act is a beneficial statute, it was observed that the liability of the insurer *vis-à-vis* a third party is a statutory one and hence, the liability to satisfy the decree passed in favour of a third party is also statutory in nature.

33. After considering several earlier judgments at paragraph No.110, the summary of findings were enumerated by holding that an insurer is entitled to raise a defence under Section 163 A or Section 166 of the Act, in terms of Section 149(2)(a) of the Act. Paragraph No.110 clauses (i) to (xi) are relevant and they read as under:

> **"SUMMARY OF FINDINGS :**
>
> 110. The summary of our findings to the various issues as raised in these petitions is as follows:
>
> (i) Chapter XI of the Motor Vehicles Act, 1988 providing compulsory insurance of vehicles

WWW.LIVELAW.IN

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) An insurer is entitled to raise a defense 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 licence of the driver, as contained in sub-section (2)(a)(ii) of section 149, has 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 defenses available to the insurer against either the insured or the third parties. To avoid its liability towards

Not Amended Copy

WWW.LIVELAW.IN

the 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) Insurance companies, however, with a view to avoid their liability must not only establish the available defense(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 the 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 insured 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

WWW.LIVELAW.IN

allowed to avoid its liability towards the 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 defenses available to the insurer 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 fulfill 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.

WWW.LIVELAW.IN

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 defense or defenses to the insurer, the Tribunal has necessarily the power and jurisdiction to decide disputes inter se between the 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 defense 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

WWW.LIVELAW.IN

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 the amount paid under the contract of insurance on behalf of the insured can be taken recourse to by the Tribunal and be extended to claims and defenses of the insurer against the insured by relegating them to the remedy

WWW.LIVELAW.IN

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."

(Emphasis supplied by me)

34. On a reading of the same, it becomes clear that the Hon'ble Supreme Court has laid down two tests. The breach of a policy condition, for example, by disqualification of the driver to hold a driving licence or invalid driving licence has to be proved to have been committed by the insured for avoiding liability by the insurer. In other words, in order to avoid the liability towards the 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 policy regarding use of the vehicle by a duly licensed driver or one who was not disqualified to drive at the relevant time. Thus, burden of proof of establishing breach on the part of the owner of the vehicle is on the Insurance Company. The above is the first test laid down by the Hon'ble Supreme Court. Then, there is another test enunciated. Even after proving breach of a policy condition regarding a valid licence by the driver or his

WWW.LIVELAW.IN

qualification to drive during the relevant period on the part of the insured, the insurer would not be allowed to avoid his liability towards the insured unless the said breach or breaches is/are so "fundamental" as found to have contributed to the cause of the accident. This is having regard to the "rule of main purpose" or "main purpose rule" i.e., even if there is a proof of the driver of a motor vehicle not being duly licenced at the time of the accident, the said fact must be a cause for the accident. In other words, the breach was so fundamental as to have contributed to the cause of the accident. The doctrine of fundamental breach has been incorporated in Section 149 of the Act by the Hon'ble Supreme Court in order to give effect to the main purpose rule. Thus, the exclusion clause or the defence of an insurer so as to avoid liability has been read down to the extent to which it is inconsistent to the main purpose of the contract. The above is the second test to be applied. Thus, there has to be a finding of fact, as to, whether, the owner or the insured had taken reasonable care. Hence, the Tribunal will have to decide the dispute, as to, whether, the insurer has proved its defence. While adjudicating the said

WWW.LIVELAW.IN

claim if the Tribunal concludes that the insurer has satisfactorily proved its defence in accordance with Section 149(2)(a) of the Act, 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 as per the award of the Tribunal having regard to the mandate of section 149(1) of the Act.

35. The exception or exemption clauses, in an insurance contract are in the nature of defences of an insurer under Section 149(2) of the contract. While construing the exception or exemption clause in an insurance contract, "the main purpose rule" is applied. When such a rule is applied, the Courts may reject an exception clause by looking into a contract as a whole by holding that such a clause is repugnant to the main purpose and intent of the contract. In the final analysis the problem is one of construction of the contract bearing in mind the important role of *contra proferentum* rule, which has its play in the area as per section 156 of the Act. In other words, exception or exclusion clause has no application to a

WWW.LIVELAW.IN

situation created by a fundamental breach of contract. On the other hand, the main purpose rule is applied to read down the exception clause having regard to the object of the contract. This is particularly, so in the case of a motor insurance contract where the risk of the third parties are compulsorily covered under the Act. Any other interpretation in favour of the insurer would be contrary to the object and purpose of Chapter XI of the Act in particular and the Act in general and hence self defeating. Thus, while interpreting the contract, the main object of the contract has to be discerned by the Court in light of the purpose of the Act. In the case of an insurance contract for motor vehicles, the exemption clause or the defence would not be construed so as to defeat the main object of the contract. In an insurance contract, the exemption clause would become ineffective. In the case of a fundamental breach, the question that would be relevant is on the manner in which it was committed. "A deliberate breach is fundamental, so also a reckless breach, but an innocent breach cannot be regarded as fundamental." *[Source – ODGER's Construction of Deeds And Statutes by Gerald Dworkin, Fifth Edition].*

WWW.LIVELAW.IN

36. Thus, on a reading of Section 149, it becomes clear that when third party risks are involved or when the victim of the accident is a third party, such risk being compulsorily covered under sub-section (1) of Section 147, any exclusion in the policy must be suitably interpreted having regard to the main purpose for which an insurance contract is entered into. In *Swaran Singh* the Hon'ble Supreme Court has enumerated the aforementioned twin tests in the above context. It is only when both the tests are satisfied that the insurer could be permitted to pay and recover from the insured as per the proviso to sub-section (4) of Section 147 otherwise, no pay and recovery order could be made and the insurer has to satisfy the award.

37. Thus, what follows is that, in regard to third party rights, the insurer can defeat such rights under Section 149(2)(a) by proving a breach of the condition of the policy and further, proving that the same is a fundamental breach. In such an event, the insurer can only mitigate its liability and the insured would be liable to satisfy the judgment vis-à-vis the insurer who would have satisfied

WWW.LIVELAW.IN

the claim of the third party in the first instance. Therefore, the insurer cannot defeat a third party claim by any exclusion in the policy having regard to the four corners of Section 149(2)(a). It can only mitigate its liability by seeking recovery from the insured on proof of the exclusion clause as per the twin tests enumerated by the Hon'ble Supreme Court. This is the object of Section 149 (4) and the proviso thereto which contemplates pay and recovery order to be made against the insurer who has been notified in a claim proceeding instituted by a third party under Section 149(1) of the Act.

38. To this, another nuance may be added. What would be the position when the insurer is able to prove a breach of the policy, but the said breach is not a fundamental breach or the breach did not contribute to the cause of the accident but what could be termed as an innocent breach and not an intentional one. In such a case also, the Insurance Company must pay to the third party and recover from the insured. This could be illustrated with reference to the vehicle not being covered by a permit to ply for hire or reward. The Hon'ble Supreme Court in the case

WWW.LIVELAW.IN

of ***Amrit Paul Singh vs. TATA AIG General Insurance Co. Ltd [AIR 2018 SC 2662],*** held that the vehicle not having a permit at all and being used for hire or reward is a case of fundamental breach and hence, the insurer though absolved of its liability had to pay the compensation and recovery order was made in the said case permitting recovery from the insured. Also, when a vehicle had a permit to ply within a particular area or on a route deviated from the said area or route and was plying in another area or route and an accident occurred, then it is not a case of fundamental breach, although, there is a violation of the terms of the policy. In such an event also, the pay and recovery order has been made in the case of ***Rani & Others vs. National Insurance Company Ltd. [(2018) 8 SCC 492],*** by the Hon'ble Supreme Court.

39. In this context, it would be relevant to refer to sub-section (7) of Section 149, which states that no insurer to whom notice referred to sub-section (2) or sub-section (3) of Section 149 has been given, shall be entitled to avoid its liability to any person entitled to the benefit of any judgment or award referred to under sub-section (1) of

WWW.LIVELAW.IN

Section 149 or sub-section (3) thereof, than in the manner provided under sub-section (2) of Section 149 or in the corresponding law in the reciprocating Country as in the case may be. Sub-section (2) of Section 149 has now been interpreted in *Swaran Singh* by the Hon'ble Supreme Court having regard to the object and purpose of the Act and Chapter XII thereof in particular by applying the principles of pay and recovery.

40. In light of the above discussion, it is necessary to observe that the Division Bench of this Court in the case of *Subramanyam,* has failed to appreciate the import of the judgment of the Hon'ble Supreme Court in *Swaran Singh. In* the said judgment, the Hon'ble Supreme Court laid down the law as discussed above, but invoked Article 142 of the Constitution only to the cases pending at that time before the Hon'ble Supreme Court and in respect of those cases, the Insurance Company was directed to satisfy the awards subject to their right to recover the same from the owners of the vehicle and the said direction was not to be treated as precedent in other cases. Thus, under Article 142 of the Constitution, pay and recovery order was issued only to a

WWW.LIVELAW.IN

limited number of cases pending at that time and the same was not to be treated as a precedent. The said direction has been misconstrued by the Division Bench in *Subramanyam's* case, by holding that when the insurer is not liable to pay under Section 149(2)(a) it cannot be directed to pay and recover. While observing thus, the Division Bench also observed that when grounds are established under Section 149(2)(a) of the Act, there is no liability on the part of the insurer to pay the amount decreed or awarded under Section 149(1), it would be absolved of its liability. But, the question of directing the insurer in a case falling under Section 142(2)(a) to pay and recover is *stricto senso* not under Article 142 of the Constitution. The direction issued to pay and recover against the insurance companies was not to be treated as a precedent in *Swaran Singh's* case having regard to the law laid down in the said case. But, the Division Bench has also failed to note the distinction between the defence under Section 149(2)(a) of the Act as opposed to Section 149(2)(b) of the Act which is evident in section 149 (4) of the Act. If the circumstances under Section 149(2)(a) apply, then in such a case, the doctrine of

WWW.LIVELAW.IN

fundamental breach and the main purpose rule would apply and if the Insurance Company is able to prove the breach and the said breach is a fundamental breach then, in such an event also, the Insurance Company would have to satisfy the award and a direction to recover the same from the insured would have to ensue. This is bearing in mind Section 149(1) r/w Section 149(7) of the Act. On the other hand, if the Insurance Company is unable to prove its case, as per twin tests laid down in *Swaran Singh,* then pay and recovery order also cannot be made and the Insurance Company would simply be liable to satisfy the award and thereby indemnify the insured.

Article 142 of the Constitution:

41. In many judgments, the Hon'ble Supreme Court has issued pay and recover orders against the insurance companies and the controversy is, as to, whether, such orders have been made exercising jurisdiction under Article 142 of the Constitution of India. In some decisions it has been explicably stated that the order or direction of pay and recovery is as per Article 142 of the constitution. The said Article empowers the Supreme Court in exercise of its

WWW.LIVELAW.IN

jurisdiction to pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or order so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, in such manner as the President may by order prescribe. The expression '*such order as is necessary for doing complete justice'* has wide amplitude and scope and empowers the Supreme Court to make any order as may be necessary for doing complete justice in a case before it. The object of exercising such power is ultimately to do complete justice between the parties. Usually, when the Supreme Court moulds the relief while ensuring that no injustice is caused, power is exercised under Article 142 for doing complete justice in the matter. Sometimes, while laying down the law in a matter, a direction could be issued by granting relief in a particular way in that particular case so as to safeguard the interest of the parties as noticed in the case of *Swaran Singh*. The Supreme Court would also look into the equitable consideration while passing such orders

WWW.LIVELAW.IN

given the facts and circumstances of a case, so as to further the cause of justice.

42. As already noted, in *Parvathneni*, the Hon'ble Supreme Court disposed of the matter keeping the question of law open, as to, whether, in exercise of jurisdiction under Article 142 of the Constitution, the Insurance Company could pay the compensation amount even though it has no liability to pay. It is not proper for this Court to venture into the said debate in view of the conclusions that are arrived at on the interpretation placed on Section 149 of the Act in this case.

Section 149(2)(b):

43. The next point to be discussed is with regard to the interpretation to be given to Section 149 (2) (b) of the Act. Sub-section (1) of Section 149, *inter alia,* states that after the certificate of insurance has been issued under Section 147(3) of the Act in favour of a person by whom a policy has been effected i.e., insured, any judgment or award of such a liability in respect of which a policy issued under Section 147 (1)(b) of the Act or Section 163A is

WWW.LIVELAW.IN

obtained against the insured then, notwithstanding that the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy, the insurer shall subject to the provisions of Section 149 pay to the person entitled to the benefit of the decree any sum not exceeding the sum assured as if it were a judgment debtor in respect of the liability together with any amount payable in respect of cost and interest. The said sub-section is subject to the other provisions of Section 149. As already noted, sub-section (2) of Section 149 deals with the defences to an action that could be taken by an insurer. Clause (a) deals with the defences that would arise on account of a beach of condition of the policy which happens on the occurrence of a road traffic accident or when the exclusion clause operates or, when an injury or death is caused or contributed to by conditions of war, civil war, civil riot or commotion. But, clause (b) of Section 149 states that a policy is void on the ground that it was obtained by the non-disclosure of a material fact or by representation of a fact which was false in some material particular. The expressions "material fact" and "material particular" are defined in sub-section (6) of

WWW.LIVELAW.IN

Section 149. It states that a fact or particular being of such a nature as to influence the judgment of a prudent insurer in determining whether he will take the risk and if so, on what premium and on what conditions is a material fact or material particular. Thus, while entering into the contract of insurance, if there is suppression or a non-disclosure of a material fact or a misrepresentation of a true fact in some material particular, in such circumstance the policy is void.

44. The question is, as to, whether, the insurer is still liable to satisfy the award when the policy itself is void? The answer to the same is found in sub-section (1) of Section 149 as well as sub-section (4) of Section 149. It is already noted that sub-section (1) of Section 149 makes the insurer liable as if it were a judgment debtor, is subject to the provisions of Section 149. Sub-section (4) of Section 149 states that where a certificate of insurance has been issued under Section 147 (3) of the Act to any person by whom a policy has been effected so much of the policy as purports to restrict insurance of a person thereby by reference to any condition <u>other than those in clause (b) of sub-section (2) of Section 149 shall</u>, as respects such

WWW.LIVELAW.IN

liability as are required to be covered by a policy under Section 147 (1) (b) is of no effect. That means the liability to satisfy an award or judgment under Section 149 (1) of the Act by an insurer would apply even when any of the defences under Section 149(2) of the Act would arise. Section 149 (2)(b) of the Act, deals with a situation where the policy itself is void. In such a case, an exception has been made under sub-section (4) of Section 149 of the Act. But, under Section 149(1), any restriction or defence raised with regard to Section 149(2) of the Act would have no effect and the insurer would have to satisfy the award or judgment having regard to sub-section (1) of Section 149 of the Act. Thus, sub-section (1) of Section 149 of the Act being subject to the other provisions of Section 149, sub-section (4) of Section 149 would have to be read harmoniously having regard to the non-obstante clause in Section 149(1) of the Act. In other words, if the policy itself is void, whether the insurer is still liable to satisfy the judgment or award? Proviso to sub-section (4) of Section 149 states that if any sum is paid by the insurer in or towards the discharge of any liability of any person, which is

WWW.LIVELAW.IN

covered by the policy by virtue of the said sub-section i.e., sub-section (4) of Section 149, the same shall be recoverable by the insurer from that person. Thus, the moot question, as to, whether, the insurer would be still liable to satisfy an award even when the policy itself is void assumes significance. In this regard it is necessary to refer to sub-section (6) of Section 149 which categorically states that the expression "liability covered by the terms of the policy" means a liability, which is covered by the policy or which would be so covered but for the fact that the insurer is entitled to avoid or cancel or has avoided to cancel the policy. The expression "but for the fact", in sub-section (6) of Section 149 is significant. In other words, if an insurer is entitled to avoid or tried to cancel or avoided the policy, in such a case, whether the insurer is still liable to place his defence under Section 149(2)(b) of the Act and whether the liability covered by the terms of the policy cannot be enforced in such a situation? The question further arises, even in a case falling under Section 149(2)(b), whether, the insurer is liable to satisfy judgment or award under Section 149 (1) of the Act.

WWW.LIVELAW.IN

45. I am of the view that in such a situation also, the insurer is liable to satisfy the judgment and award. This is because, sub-section (1) of Section 149 uses the expression *"notwithstanding that the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy, the insurer shall pay to the person entitled to the benefit of the decree"*. The said expression is couched alongside another expression namely, *"subject to the provisions of this section"* i.e., Section 149. Also, in sub-section (6) of Section 149, the expression *"liability covered by the terms of the policy"* is defined to mean *"a liability which is covered by the policy or which would be so covered but for the fact that the insurer is entitled to avoid or cancel or has avoided or cancelled the policy".* On a conjoint reading of the aforesaid provisions with particular emphasis on the aforesaid expressions, it would emerge that even when a defence under Section 149(2)(b) is raised by an insurer to the effect that the policy is void on account of non-disclosure of a material fact or a misrepresentation of a fact which was false in material particular at the time of obtaining policy by the insured is proved in such an event

WWW.LIVELAW.IN

also, the insurer cannot avoid or cancel the policy and will be liable to satisfy the judgment or award under sub-section (1) of Section 149.

46. It is noted that sub-section (1) of Section 149 contains a *non-obstante* clause, and, the same has to be read along with other sub-sections of Section 149. When the same are read holistically, it would reveal that when a policy is found to be void and the defence under Section 149(2)(b) is established by the insurer or the insurer has avoided or cancelled the policy i.e., repudiated the contract in such a case also, the insurer can be directed to satisfy the judgment of award. Though the Parliament has used the expression *"subject to the provisions of this section in Section 149(1)"* and also, the expression *"but for the fact that the insurer is entitled to avoid or cancel or has avoided or cancelled the policy"* in sub-section (6) of Section 149 nevertheless the same has to be read in light of the non-obstante clause in Section 149 (1) of the Act particularly in the context of compulsory coverage of risks as per Section 147 (1) (b) of the Act which includes third party risk. Therefore, the Parliament, being conscious of the fact that a

WWW.LIVELAW.IN

void policy cannot be enforced and the insured cannot be indemnified on the basis of a void policy in general law of contract and the judgment or award obtained by a third party against such an insured cannot be given effect to, has incorporated the non-obstante clause in Section 149 (1) of the Act, which is by way of an exception to the general contract law. This is to protect the interest of innocent third parties whose risk is considered under Section 147 (1)(b) of the Act.

47. In *Swaran Singh*, Hon'ble Supreme Court considered a case under Section 149(2)(a). The said case did not relate to Section 149(2)(b). The defence under Section 149(2)(b) relates to the conduct of the insured at the time of entering into a contract of insurance and issuance of a policy and it is disjunctive of Section 147(1)(a) of the Act. But, the proviso to sub-section (4) of Section 149 is referable to Section 149(2) of the Act in its entirety. That is how the Hon'ble Supreme Court has also interpreted Section 149 (2) in *Swaran Singh*. If a defence under Section 149(2)(b) is established by the insurer, it would imply that the policy is void. Then, the pertinent question that would

WWW.LIVELAW.IN

arise is as to how the rights of innocent third parties are to be protected in such a situation wherein the insurance policy, on the basis of which the insured is to be indemnified, is void.

48. Before answering the said question, it is necessary to understand the nature of a contract of insurance. A contract of insurance is a contract of indemnity which is triggered by loss. In other words, an indemnity is a contract by one party to keep the other harmless against loss. According to Joanna Benjamin in *Financial Law (Oxford University Press),* there are three elements in a contract of insurance; (i) it must provide for the payment of a sum of money or other corresponding benefit; (ii) upon the occurrence of a future uncertain event; (iii) in which the policy holder has a insurable interest.

49. Further, a contract of insurance is a contract of utmost good faith *(uberrimae fidei).* The same would mean that each party owes the other duties of utmost good faith. The policy holder is under a duty to disclose to the insurer of facts which are material to the insurer's decision whether to

WWW.LIVELAW.IN

insure and if so, on what terms. Further, the policy holder is under a duty not to make any misrepresentation. Breach of these duties enables the insurer to repudiate the contract as being void *ab initio.* In such a case, it results in an automatic discharge of contract of insurance from the moment of his breach. In this regard, it would be useful to refer to section 18 of the Indian Contract Act, 1872, which reads as under:

> 18. "*Misrepresentation*" means and includes-
>
> (1) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;
>
> (2) any breach of duty which, without an intent to deceive, gains an advantage to the person committing it, or any one claiming under him, by misleading another to his prejudice or to the prejudice of anyone claiming under him;
>
> (3) causing, however innocently, a party to an agreement to make a mistake

WWW.LIVELAW.IN

> as to the substance of the thing which is the subject of the agreement."

50. A misrepresentation is a positive statement of fact, which is made or adopted by a party to a contract which is untrue, it may be made fraudulently, carelessly or innocently, which is a false representation. If one party has induced the other party to enter into a contract by misrepresentation, though innocently, any material fact especially within his own knowledge, the party mislead can avoid the contract. The same is crystallized in Section 18 of the Indian Contract Act. The effect of representations made before making the contract might continue until the contract is actually concluded. Where a representation is false or if there is misrepresentation, it renders the contract voidable.

51. Further, the parties can decide at the time of making the contract which facts shall be deemed material, and to what extent. They can change the existence of any specified state of facts, or the truth of any affirmation, an essential term or condition of the contract, so that without it there is no contract at all; on the other hand, they can make

Not Approved

WWW.LIVELAW.IN

any fact or affirmation the subject matter of a warranty or collateral agreement, so that failure to make it good shall not avoid the principal contract, but only give a right to damages. In every case the question is what the parties really intended.

52. As already noted, insurance contracts are contracts of utmost good faith, either party to a contract has a right to avoid the contract: (i) if there has been a failure by the other party to have disclosed a material fact; or (ii) that there has been on the part of the other party a misrepresentation of a material fact. The same are incorporated under Section 149(2)(b) of the Act. In other words, in a contract of insurance, the insured is to make a full disclosure to the insurer without being asked of material circumstances. The insured is expected to answer various questions and give true and faithful information. If the insured has knowledge of a fact which others cannot ordinarily have, then he cannot indulge himself in *suppressio veri suggestio falsi* by making a suggestion which is false. Thus, the insurer can avoid the policy if three conditions are satisfied: first, there is a misstatement on a material matter,

WWW.LIVELAW.IN

or suppression of facts which it was material to disclose; secondly, the suppression was fraudulently made by the policy-holder; and the policy-holder must have known at the time of making the statement that it was false or that it suppressed facts which it was material to disclose. This duty may be enlarged by contract, by an insertion of a clause called "basis of the contract" clause in the proposal form, under which the insured warrants the accuracy of the information given by him in the proposal (of material or non-material facts), and entitling the insurer to avoid the policy and forfeit amounts paid if the information is untrue. The effect of such a stipulation is that the parties, by a covenant between themselves, agree that certain matters shall be considered as the truth of the answers given with regard to them by the assured shall be considered as the condition essential to the validity of the contract. The insured may also be required to take a responsibility for facts which he did not know, or did not realize, to be false. But, such clauses are construed strictly against the insurer. The incidents of such insurance contracts in India are on the same footing as in England and the agreement is not

WWW.LIVELAW.IN

enforceable if the basis of the agreement is broken. The duty may also be restricted by a contract. Where such a provision is contained in the contract, the duty of disclosure is contractual, and as the provision becomes a part of the contract between the parties, it becomes a term of the contract that disclosure is to be made in accordance with the provision; a failure to make such disclosure is therefore, a breach of contract, making available to the insurers the remedy as stipulated in it. The insurer can then claim benefit of one of the terms of the contract to avoid its liability. There is also a corresponding duty to disclose material facts by the insurer to the insured for example, the insurer cannot deny the claim on the basis of a recommendation of the statutory Tariff Advisory Committee (deemed to be part of the policy), when the same was not incorporated as part of the policy.

53. Thus, under the Indian Contract Act, suppression of the material facts when making a proposal for insurance by one having knowledge or belief of the fact would fall under Section 17 of the said Act. Non-disclosure by the insured entitling the insurer to repudiate the liability

WWW.LIVELAW.IN

must relate to a material fact. A representation is material when a responsible man would have been influenced by it in deciding whether or not to enter into the contract. The test to determine materiality is whether the fact has any bearing on the risk undertaken by the insurer; such as "would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk". The aforesaid are also statutorily incorporated under Section 149(6) of the Act.

54. Thus, any fact which materially influences the making of a contract of determining, whether to accept or not to accept the risk at ordinary rates of premia is a material fact which has to be materially stated. For instance, a motor vehicle insurance could be avoided on the ground that insured had not disclosed the fact that an accident had occurred on the very same day for insurance that has to be made. The insurer was entitled to repudiate the policy when this fact was not disclosed. Thus, the question whether a particular circumstance is material or not is a question of fact. The insurer cannot avoid the policy if the misrepresentation cannot relate to material fact. Any

WWW.LIVELAW.IN

pleading for misrepresentation cannot be general, specific circumstances showing that misrepresentation was practiced, must be pleaded. The onus is on the person alleging misrepresentation to establish it. Thus, a burden of proof to show non-disclosure or misrepresentation, or that the statements in the proposal are untrue, lies on the insurer, and the onus is a heavy one. The insurer must justify that the insured was, at every given time when insurance policy was signed, conscious of the fact. Where there is no evidence to be concluded that there was suppression of facts or there was a misrepresentation, the insurer cannot avoid the policy. Thus, when the defence of Section 149(2)(b) is proved by the insurer, the contract becomes void. In such a case, the insurer can avoid the performance of the contract and the parties are to be restored to *status quo ante*. Thus, under Section 149(2)(b) of the Act, the aspect regarding non-disclosure of a material fact or false representation on a material particular resulting in the policy becoming void is statutorily recognized and incorporated. *(Source: Pollock and Mulla, 'The Indian Contract Act and Specific Relief Acts, 14th Edition).*

WWW.LIVELAW.IN

55. In *Swaran Singh,* the Hon'ble Supreme Court referred to ***United India Insurance Co. Ltd. Vs. Jaimy [1998 ACJ 1318 (Ker)]*** and has emphasized that under Section 149(4) of the Act, an Insurance Company could be directed to pay and recover in the context of a situation contemplated under Section 149(2)(a). Does it mean that except under a situation arising under Section 149(2)(b), the insurer would not be in a position to avoid the liability because he has got rights against the owner under the above provision. Thus, in a situation falling under Section 149(2)(b), the policy itself would be rendered void and the insurer would have rights against the owner or insured. But, it was further emphasized that under the Act, burden of the Insurance Company has been made heavier in the context of controlling the need of taking up the contentions to legally avoid the liabilities of the Insurance Company. Hence, if a case under Section 149(2)(b) is established by an insurer, it would permit avoidance or cancellation of a policy but even in such a situation, it is the insurer who would be liable to pay the compensation to the third parties. It is reiterated that the *non obstante* clause in Section

WWW.LIVELAW.IN

149(1) has to be read conjointly with the other provisions of the said section and Section 149(2)(b) is an exception wherein the insurer though absolved of its liability under the policy has nevertheless to satisfy the judgment or awards to third parties. This is in respect of risks under Section 147(1)(b) of the Act which are compulsory risks covered under the Act having regard to the 'main purpose rule' which is incorporated in Section 149(1) of the Act by use of the non-obstante clause. The said interpretation is also supported by the wordings of Section 149(4) and 149(6) as well as Section 149(7) of the Act discussed above.

56. In this context, it would be useful to emphasise on the non-obstante clause in Section 149(1) of the Act. The expression *"notwithstanding that the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy, the insurer shall subject to the provisions of this section 149, pay to the person entitled to the benefit of the decree, any sum not exceeding the sum assured payable thereunder, as if he were the judgment debtor in respect of the liability....."* are significant. The use of the non-obstante clause in Section 149(1) is in order to override the principles

WWW.LIVELAW.IN

of the general law of contract in as much as even if the insurer could avoid or cancelled the policy, nevertheless has to satisfy the judgment or decree as if it were the judgment debtor of the liability. Thus, the use of non-obstante clause as a legislative device by the Parliament under Section 149(1) of the Act must be given its full and complete intended meaning which is an overriding effect. When such a meaning is given, it becomes clear that, even in a case where an insurance policy is rendered void or cancelled by the insurer, then also, the insurer has to pay the third party victim who is the beneficiary of an decree or award, the sum not exceeding the sum assured payable thereunder as if it were the judgment debtor in respect of the liability. On such payment been made, the insurer can recover from the insured as the liability of the insured covered under the policy would have been discharged by the insurer. In case the payment exceeds the amount for which the insurer was liable, it shall be entitled to recover the excess from the insured. Thus, sub-section (4) and (5) of Section 149 have to be read in conjunction with the non-obstante clause in Section 149(1) of the Act. Thus, even in a case where the

WWW.LIVELAW.IN

policy is void or cancelled by the insurer nevertheless its liability under the policy would have to be make good under Section 149(1) of the Act subject to recovery from the insured. In other words, the avoidance of liability under the policy or cancellation of the policy by the insurer under general law of contract and in terms of the policy cannot absolve the insurer to satisfy judgment and award by the tribunal or court. Having regard to non-obstante clause under Section 149(1) of the Act, the insurer would have to pay to the innocent third party victim or family members of the deceased or the injured person and seek recovery from the insured.

57. In the result, the questions referred to in this appeal are answered as under:

i) Having regard to Section 149(1) read with Section 149(7) whenever a case falls under Section 149(2)(a) and the same is successfully established or proved by the Insurance Company, as per the twin tests laid by the Hon'ble Supreme Court in *Swaran Singh*, nevertheless, the insurer or Insurance Company is liable to satisfy the award vis-à-vis a third party and is entitled

WWW.LIVELAW.IN

to recover from the insured. This is irrespective of, the policy being an Act policy in terms of Section 147 pertaining to compulsory coverage of risks of third parties and other classes of persons stated therein or a policy covering other risks by specific contract being entered into in that regard and where additional premium is paid by the insured i.e., a contractual policy.

ii) Thus, the rule of pay and recover is applicable in view of the mandate in Section 149(4) of the Act and even if there is a breach of the terms of the insurance policy, the insurer is bound to satisfy the judgment and award as if it were a judgment debtor, even if it satisfies the twin tests enunciated by the Hon'ble Supreme Court under Section 149(4)(a) of the Act.

iii) If the Insurance Company makes out a case under Section 149(2)(b) of the Act, then also the Insurance Company has to satisfy the award, as it is the duty of the Insurance Company to indemnify the insured on the basis of the policy of the insurance and even when the contract of insurance itself is

WWW.LIVELAW.IN

void, nevertheless the liability to indemnify the insured would arise and insurer is entitled to recover from the insured.

iv) Thus, in a case where Section 149(2)(b) applies and the Insurance Company successfully establishes that the policy is void, in such a case also, the insurer is not absolved of its liability to satisfy the judgment or award as rights or obligations would flow even from a policy which is void *vis-à-vis* third party. In such a case, the insurer is not completely absolved of its liability, the insured would have to satisfy the award vis-à-vis the third party and recover from the insured the amount paid to the third party and may also have a right to seek damages from the insured.

v) The judgment of the Division Bench of this Court in *Subramanyam*, holding that a pay and recovery order cannot be made as there is no liability to pay or satisfy the award or decree in respect of a case falling under Section 149(2) is not correct. Hence, that portion of the judgment in *Subramanyam*, which states that if the case

WWW.LIVELAW.IN

falls within the scope of Section 149(2) of the Act and the insurer is successful in establishing any of the defences as stated therein, it would be completely absolved of its liability to satisfy the award is also not correct and to that extent, it is held to be bad in law.

vi) Article 142 of the Constitution of India being a power granted under the Constitution only to the Supreme Court can be exercised in appropriate cases only by the Apex Court. Exercise of power under Article 142 by the Hon'ble Supreme Court in a particular case cannot be a precedent for other Courts and Tribunals to exercise such a power unless the same is indicated to be a precedent by the Apex Court.

In the instant case, the appellant – Insurance Company was directed to discharge its liability, subject to the result of this reference. The vehicle involved in the instant case is a goods vehicle and the injured claimant was travelling in a goods carriage. The Tribunal awarded compensation of Rs.1,000/- with interest at 6% p.a. from the date of petition till deposit and to recover the same from the insured –

WWW.LIVELAW.IN

respondent No.2 herein. If the appellant – insurer has deposited the amount, it is entitled to recover the said amount from the first respondent – insured, as this is a case which falls under Section 149(2)(a) of the Act as the insured claimant was permitted to travel as a passenger in a goods vehicle namely, tempo.

In the circumstances, the appeal is liable to be dismissed and is ***dismissed.***

Parties to bear their respective costs.

Sd/-
JUDGE

*RK/-*mvs*

Not An Official Copy

WWW.LIVELAW.IN

ORDER OF THE COURT

Questions referred:-

I) If it is shown the insurance policy is not 'Act' policy in terms of Sections 145 and 147 of the Motor Vehicles Act, but a contractual policy issued collecting extra premium indicating insurance company has enlarged its liability, will not the insurance company be liable to pay and recover even if there is any breach by the insurer?

II) In such cases, is not the rule to 'pay and recover' applicable in view of the mandate in Section 149, M.V.Act that upon issuance of policy, the insurer is bound to discharge the award as if it were a judgment debtor?

Answers:

i) Having regard to Section 149(1) r/w Section 149(7) whenever a case falls under Section 149(2)(a) and the same is successfully established or proved by the Insurance Company, as per the twin tests laid by the Hon'ble Supreme Court in *Swaran Singh*, nevertheless, the insurer

WWW.LIVELAW.IN

or Insurance Company is liable to satisfy the award vis-à-vis a third party and is entitled to recover from the insured. This is irrespective of, the policy being an Act policy in terms of Section 147 pertaining to compulsory coverage of risks of third parties and other classes of persons stated therein or a policy covering other risks by specific contract being entered into in that regard and where additional premium is paid by the insured i.e., a contractual policy.

ii) The Insurer is liable to pay the third party and recover from the insured even if there is breach of any condition recognized under Section 149 (2), even if it is a fundamental breach (that is breach of condition which is the cause for the accident) and the insurer proves the said breach in view of the mandate under Section 149(1) of the Act. But, no such order can be passed against the insurer, if, on the facts and circumstances of a case, a finding is given by the court that the third party (injured or deceased) had

WWW.LIVELAW.IN

played any fraud or was in collusion with the insured, individually or collectively, for a wrongful gain to themselves or cause wrongful loss to the insurer.

iii) The Court can also fasten the absolute liability on the insurer, if there is any breach of condition which is enumerated under Section 149(2) of the Act or any other condition of the policy if the Insurance Company has waived breach of any such condition or has taken the special responsibility to pay by collecting extra premium by covering any type of risk depending upon facts of each case.

iv) Thus, the rule of pay and recover is applicable in view of the mandate in Section 149(4) of the Act and even if there is a breach of the terms of the insurance policy, the insurer is bound to satisfy the judgment and award as if it were a judgment debtor, even if it satisfies the twin tests enunciated by the Hon'ble Supreme Court under Section 149(4)(a) of the Act.

WWW.LIVELAW.IN

v) Before passing any order on the Insurance Company to pay and recover, the Court has to examine the facts and circumstances of each case and if it finds that the victim, injured or the deceased, in a particular case, was solely or jointly responsible for breach of such fundamental condition by playing fraud or in collusion with the insured, the Court may exercise its discretion not to fasten the liability on the insurer.

vi) However, the court should not adopt the above guideline as a general rule in all cases, but only under peculiar facts and circumstances of each case and on giving appropriate reasons.

vii) If the Insurance Company makes out a case under Section 149(2)(b) of the Act, then also the Insurance Company has to satisfy the award so far as third party is concerned, as it is the duty of the Insurance Company to indemnify the insured on the basis of the policy of the insurance and even when the contract of insurance itself is void, nevertheless the

WWW.LIVELAW.IN

liability to indemnify the insured would arise and insurer is entitled to recover from the insured.

viii) Thus, in a case where Section 149(2)(b) applies and the Insurance Company successfully establishes that the policy is void, in such a case also, the insurer is not absolved of its liability to satisfy the judgment or award as rights or obligations would flow even from a policy which is void *vis-à-vis* third party. In such a case, the insurer is not completely absolved of its liability, the insured would have to satisfy the award vis-à-vis the third party and recover from the insured the amount paid to the third party and may also have a right to seek damages from the insured.

ix) The judgment of the Division Bench of this Court in *Subramanyam*, holding that a pay and recovery order cannot be made as there is no liability to pay or satisfy the award or decree in respect of a case falling under Section 149(2) is not

WWW.LIVELAW.IN

correct. Hence, that portion of the judgment in *Subramanyam*, which states that if the case falls within the scope of Section 149(2) of the Act and the insurer is successful in establishing any of the defences as stated therein, it would be completely absolved of its liability to satisfy the award is also not correct and to that extent, it is held to be bad in law.

x) Article 142 of the Constitution of India being a power granted under the Constitution only to the Supreme Court can be exercised in appropriate cases only by the Apex Court. Exercise of power under Article 142 by the Hon'ble Supreme Court in a particular case cannot be a precedent for other Courts and Tribunals to exercise such a power unless the same is indicated to be a precedent by the Apex Court.

In the instant case, the appellant – Insurance Company was directed to discharge its liability, subject to the result of this reference. The vehicle involved in the instant case is a goods vehicle and the injured claimant was travelling in a goods carriage. The

Not Approved for Reporting

WWW.LIVELAW.IN

Tribunal awarded compensation of Rs.1,000/- with interest at 6% p.a. from the date of petition till deposit and to recover the same from the insured – respondent No.2 herein. If the appellant – insurer has deposited the amount, it is entitled to recover the said amount from the first respondent – insured, as this is a case which falls under Section 149(2)(a) of the Act as the insured claimant was permitted to travel as a passenger in a goods vehicle namely, tempo.

In the circumstances, the appeal is liable to be dismissed and is ***dismissed.***

Parties to bear their respective costs.

Sd/-
JUDGE

Sd/-
JUDGE

Sd/-
JUDGE

PL* bvv;
**mvs/RK/-*

Not An Official Copy