

(2012) 08 MAD CK 0095

In the Madras High Court

Case No : C.M.A. (MD) No's. 878 of 2010, 1609 of 2007, 501 of 2008, 523 of 2009, 1165 of 2011, 325 of 2011, 245 of 2006, 1184 and 1185 of 2010, 260 of 2011, 296 of 2011, 818 of 2010, 1412 of 2010, 902 of 2006, 323 of 2011, 1195 and 1196 of 2011, 1530 of 2011, 483

Branch Manager, Oriental Insurance Company Ltd.

APPELLANT

Vs

Mansoor Hussain and Another

RESPONDENT

Date of Decision : 03-08-2012

Acts Referred:

Constitution of India, 1950 — Article 142

Motor Vehicles Act, 1988 — Section 147, 149, 149(2), 149(2)(a), 149(2)(a)(ii)

Citation : (2013) 2 CTC 57

Hon'ble Judges : G.M. Akbar Ali, J

Bench : Single Bench

Advocate : C. Ramachandran, for the Appellant; T. Selvakumaran, for the Respondent

Judgement

G.M. Akbar Ali, J.—These Civil Miscellaneous Appeals are filed by the Appellant, against the judgment and decree of the Tribunals by questioning the liability to pay the compensation to the Claimants in cases of no valid driving licenses. In all these Civil Miscellaneous Appeals, the common question arises for consideration is:

Whether the Insurer has to be exonerated totally in a case where they have established that the driver of the insured vehicle did not possess any type of licence on the date of accident or whether the liability can be fastened on the Insurer by directing them to pay the compensation to the Claimants with a liberty to recover the same from the insured.

2. In a catena of judgments, the Hon'ble Apex Court has dealt with the liability of the Insurance Company while interpreting Section 149(2)(a)(ii) and the Proviso appended to sub-sections (4) & (5) of the Motor Vehicles Act, 1988. In the celebrated case of National Insurance Co. Ltd. Vs. Swaran Singh and Others,

the Three Judges of the Hon''ble Supreme Court has dealt in detail with the licence and had settled the principles in cases where--

(a) when the person has been granted licence for one type of vehicle, but, at the relevant time he was driving another type of vehicle;

(b) where the driver''s licence is found to be fake;

(c) where the person is in possession of a learner''s licence.

and has concluded with the following summary of findings--

102. The summary of our findings to the various issues as raised in these Petitions are as follows:

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

(ii) Insurer is entitled to raise a defence in a Claim Petition filed u/s 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 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 where for 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 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 u/s 149(2) of the Act.

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

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

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

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

(xi) The provisions contained in sub-section (4) with Proviso thereunder and sub-section (5) which are intended to cover specified contingencies mentioned therein to enable the Insurer to recover amount paid under the contract of insurance on behalf of the insured can be taken recourse of by the Tribunal and be extended to claims and defences of Insurer against insured by relegating

them to the remedy before regular Court in cases where on given facts and circumstances adjudication of their claims inter se might delay the adjudication of the claims of the victims.

3. A Full Bench of this Court in Branch Manager, Branch Manager, United India Insurance Co. Ltd. Vs. Nagammal, Unnamalai and V.B. Krishnan, was considering a question of pay and recovery and the Full Bench has held as follows:

31. Thus from an analysis of the statutory provisions as explained by the Supreme Court in various decisions rendered from time to time, the following picture emerges:

(i) The Insurance Policy is required to cover the liability envisaged u/s 147, but wider risk can always be undertaken.

(ii) Section 149 envisages the defences which are open to the Insurance Company. Where the Insurance Company is not successful in its defence, obviously it is required to satisfy the decree and the award. Where it is successful in its defence, it may yet be required to pay the amount to the Claimant and thereafter recover the same from the owner under such circumstance envisaged and enumerated in Section 149(4) and Section 149(5).

4. The First Bench decision of this Court at Principal seat reported in Bajaj Allianz General Insurance Co. Ltd. Vs. P. Manimozhi and Others, had considered the question of non-possession of a valid licence of the driver and after considering the decision of another Division Bench reported in The United India Insurance Co. Ltd. Vs. S. Saravanan (Infirmary) rep. by his wife, NF.S. Lalitha and Ravi, held that when there is a breach of condition under an Insurance Policy, then the Insurance Company must pay and recover. It is necessary to extract the relevant portion from the above decision, which is as follows:

14. The next contention raised by the learned Counsel appearing for the Appellant is that the Third Respondent, the rider of the Two-Wheeler did not have a valid driving licence on the date of the accident and therefore, the Insurer is not liable to pay. The Hon"ble Supreme Court as regards this point namely, possession of valid driving licence broadly classified the same under four different categories:--

(i) Where, there was no licence

(ii) Where, the licence is forged/fake

(iii) Where, the licence is for a different class of vehicle from the offending vehicle, and

(iv) Where, the licence is for a learner and held that when there is a breach of condition under an Insurance Policy is proved then the Insurance Company must pay and may recover. A Division Bench of this very Court in which one of us (T.S. Sivagnanam, J.) was a party considered this very issue and after taking note of the decisions of the Hon"ble Supreme Court in the case of New India Assurance

Co., Shimla Vs. Kamla and Others etc. etc., United India Insurance Co. Ltd. v. Lehu, 2004 (1) TN MAC 340 (SC); Skandia Insurance Co. Ltd. Vs. Kokilaben Chandravadan and Others, ; Sohan Lal Passi Vs. P. Sesh Reddy and others, ; National Insurance Co. Ltd. Vs. Swaran Singh and Others, ; and National Insurance Co. Ltd. v. Laxmi Narain Dhut, 2001 (1) TN MAC 310 (SC), held that the Insurer must pay the amount and then may recover.

5. Another Division Bench judgment of this Court reported in United India Insurance Co. Ltd. Vs. V. Vijayakumar and others, (where I am one of the party) had also dealt with the similar question as to--

whether the Insurer has proved the defence as to breach of Policy condition and whether pay and recover can be ordered.

6. My Esteemed Sister R. Banumathi, J. dealt in detail with Section 3 of the Motor Vehicles Act, which emphasis upon the necessity for driving licence and other provisions relating to licences. After referring to the dictum laid down in National Insurance Co. Ltd. v. Swaran Singh and others, 2004 (1) TN MAC 104 (SC) (cited supra) and various other judgments had ultimately held as follows:

38. The 3rd Respondent had a licence, but not a valid one. As there was violation of conditions of Policy, Tribunal was not right in fastening the statutory liability upon the Insurance Company. Since there was violation of Policy conditions the Tribunal ought not to have fastened the statutory liability upon the Insurance Company. Keeping in view the nature of injuries sustained by the Claimant and that the Claimant is now reduced to vegetable existence, the only just and reasonable course would be to direct the Insurance Company to pay compensation to the 1st Respondent-Claimant and recover it from the owner for his breach of the Policy conditions.

7. A latest decision of the Hon''ble Supreme Court reported in Jawahar Singh Vs. Bala Jain and Others, wherein the Hon''ble Supreme Court dealt with a case where a Motorcycle belonging to the insured was driven by a minor without driving licence amounts to breach of Policy condition and held as follows:

11. We cannot shut our eyes to the fact that it was Jatin, who came from behind on the Motorcycle and hit the Scooter of the deceased from behind. The responsibility in causing the accident was, therefore, found to be solely that of Jatin. However, since Jatin was a minor and it was the responsibility of the Petitioner to ensure that his Motorcycle was not misused and that too by a minor, who had no licence to drive the same, the Motor Accident Claims Tribunal quite rightly saddled the liability for payment of compensation on the Petitioner and, accordingly, directed the Insurance Company to pay the awarded amount to the awardees and, thereafter, to recover the same from the Petitioner. The said question has been duly considered by the Tribunal and was correctly decided. The High Court rightly chose not to interfere with the same.

8. In a Division Bench decision reported in Dr. Balaji v. K. Sunil Kumar and

others, 2012 (1) TN MAC 117 (DB), where I am one of the party had also dealt with the point whether the Tribunal is right in directing the respondent to pay and recover when the rider (driver) of the insured vehicle did not possess any valid licence. I was the author of the judgment and after considering various judgments and following the dictum laid in Bajaj Allianz General Insurance Co. Ltd. Vs. P. Manimozhi and Others, , held as follows:

23. Therefore, driving the Motorcycle without valid licence is a breach of Policy conditions. If there is breach of Policy condition, as per the decision of the Full Bench, this Court can order pay and recovery. Therefore, we do not want to interfere on this aspect.

9. In a decision reported in K. Kanagammal, K. Ramakrishna and K. Jayakumar Vs. Chandran @ G. Mani, R. Ramesh, The New India Assurance Limited and The Oriental Insurance Company Limited, my Esteemed Sister Aruna Jagadesan, J. had dealt with the point:

if it was established that due to a fundamental breach of the essential condition of the Policy i.e., the offending vehicle having been driven by a person not possessing a valid and effective driving licence the Insurers could avoid liability u/s 149(2)(a)(ii) of the Act.

After analyzing various judgments of the Supreme Court and this Court, the learned Judge followed the dictum laid down in the judgment reported in Jawahar Singh Vs. Bala Jain and Others, and ordered the Insurance Company to pay the compensation and recover the same from the owner of the vehicle.

10. In a judgment reported in Divisional Manager, National Insurance Co. v. A. Usha and another, 2011 (1) TLNJ 258 (civil), my Esteemed Brother Justice S. Manikumar, J. had also dealt with a case of Insurance Company disputing the liability on the ground that the driver of the vehicle insured with them did not possess a valid and effective licence. After analyzing the provisions of the Act and various decisions held as follows:

18. It is well known that till a reference is decided by a Larger Bench of Supreme Court, the law which is applicable to the case falling u/s 149(4), has to be decided following the Division Bench of this Court in The United India Insurance Co. Ltd. Vs. S. Saravanan (Infirmary) rep. by his wife, NF.S. Lalitha and Ravi, to maintain uniformity in claim cases, where there is no licence for the driver to drive the vehicle at the time of accident and the compensation has to be paid by the Insurance Company to the third party victim, who is not aware as to whether the driver of the offending vehicle had the requisite and valid driving licence to drive that particular kind of vehicle. Though the issue is now pending before the Supreme Court, yet it should be noted that this Court in The United India Insurance Co. Ltd. Vs. S. Saravanan (Infirmary) rep. by his wife, NF.S. Lalitha and Ravi, after considering a catena of decisions, held that the Insurer must pay so far as third party's risk and recover the same from the insurer, if so advised.

11. In a judgment reported in *United India Insurance Co. Ltd. Vs. Subramanian and Thangavel* my Esteemed Brother Justice R. Subbaiah had dealt with a case of the Claimant which was resisted by the Insurance Company on the ground of the victim was an unauthorized passenger in the goods vehicle and the driver of the Lorry did not have a valid licence. The learned Judge has also considered many decisions on that point and exonerated the Insurance Company fully only on the point of the victims as unauthorized passenger in the goods vehicle.

12. However in a decision reported in *The Divisional Manager, The New India Assurance Co. Ltd. Vs. V. Chandran and M. Murugan*, my Esteemed Learned Brother Justice A. Selvam, had dealt with a case of driving licence not produced by the owner even after notice and the Insurer had discharged his burden by examining the Regional Transport Official and held that the Insurance Company cannot be fastened with liability and exonerated the Insurance Company. The learned Judge has followed *Sardari and Others Vs. Sushil Kumar and Others*, and negatived the plea of pay and recover and held that *National Insurance Co. Ltd. v. Swaran Singh and others*, 2004 (1) TN MAC 104 (SC) is not a binding precedent as noted therein.

13. Therefore, in a case of expired licence or a forged/fake licence or learner's licence, the dictum is, it is a breach of Policy condition where the owner of the vehicle was not prudent in verifying the licence produced by the driver and therefore, the Insurance Company is not liable; however, they can be directed to pay the compensation to the victim with a liberty to recover the same from the insured. But what is the position in a case of "No licence at all" where the insured has knowingly or unknowingly allowed the driver to drive the vehicle? The main contention of the learned Counsel for the Insurance Companies are that when a person is not duly licensed to drive a vehicle or if he has not possessed any type of licence, the Insurance Company has to be totally exonerated from the liability. The learned Counsels would concede that in a case of fake or expired licence or invalid licence to drive a vehicle or a licence without Badge, though the Insurance Company has established the breach of Policy condition, they may be ordered to pay and later recover from the owner of the vehicle, but, not in the case of no licence at all.

14. According to the learned Counsels, the dictum laid down in *National Insurance Co. Ltd. v. Swaran Singh and others*, 2004 (1) TN MAC 104 (SC) is only to the effect to avoid its liability towards insured, the Insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the Policy regarding use of vehicle by duly licensed driver or one who was not disqualified to drive at the relevant time. According to the learned Counsel, in a case of fake licence or expired licences, etc., the insured would have satisfied himself or under the impression that he is handing over the vehicle to a person duly licenced and therefore, he was not guilty of negligence. But, in the case of no licence at all, the insured was guilty of negligence and failed to exercise reasonable care in the matter fulfilling the

Policy condition. Therefore, the Insurance Company cannot be fastened with liability and even pay and recover cannot be ordered.

15. However, according to the learned Counsel for the Claimants, as per the dictum laid down by the Apex Court in National Insurance Co. Ltd. Vs. Swaran Singh and Others, 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, the Insurer would not be allowed to avoid its liability unless the said breach of condition is so fundamental. According to the learned Counsel it does not make a difference between a fake licence or a expired licence and no licence.

16. I have heard the learned Counsel for the Appellants/Insurance Company and the learned Counsel for the Respondents and perused the entire materials on record and also gone through the various "judgments in this regard.

17. The learned Counsel for the" Claimant Mr. Minnavadi had relied on an earliest judgment reported British India General Insurance Co. Ltd. Vs. Captain Itbar Singh and Others where Three-Judges Bench of the Supreme Court had an occasion to deal with Section 96(2) of the old Act, which is equivalent to Section 149(2) of the new Act. The learned Judges were deciding about the defences available for the Insurance Company under those provisions and had ultimately held that the statutes have no doubt created a liability in the Insurer to the injured person but the statutes have also expressly confined the right to avoid that liability to certain grounds specified in it in their wisdom. They have stated as follows:

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 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 some one 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.

18. It has to be borne out in mind that only u/s 149 of the Act the Insurer has become a party in a tortious claim otherwise, it is only a Suit between the victim and the tortfeasor. Only under an Insurance Policy between the tortfeasor and the Insurance Company the Insurer has undertaken to indemnify the insured. Therefore, the defenses available to the Insurance Company is very limited.

19. Section 149(2)(a)(ii) reads as follows:

Duty of insurers to satisfy judgments and awards against persons insured in respect of third party risks.--

(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

(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 a Motorcycle; 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 nondisclosure of a material fact or by a representation of fact which was false in some material particular.

20. This Section is corresponding to Section 96 of the old Act. In *Iffco Tokyo General Insurance Company v. Jafer Sadiq*, 2012 (1) TN MAC 394 (DB), a Division Bench of this Court (where I was a party) had an occasion to deal with the provisions u/s 96 of the old Act and the provision u/s 149(2)(a) of the New Act.

21. On a comparative reading of the relevant provisions, we found that upon careful reading of the provisions there is a draftsman's mistake which went unnoticed for all these years u/s 149(2). This Court found as follows:

36. In the comparative table shown above, Section 96, Clause (ii) (Old Act) deals with the grounds of defence available to the Insurance Company. Sub-clause (a) relates to a Policy which was cancelled by mutual consent, etc., sub-clause (b), which is very important which deals with three conditions--

(i)(a) use of the vehicle for hire or reward not covered by a Permit (b) for organized racing and speed testing (c) use of vehicle for a purpose not allowed by the Permit (d) without side-car being attached, where the vehicle is a Motorcycle.

(ii) deals with vehicle being driven by a person not duly licensed with.

(iii) deals with when the policy is void.--

Section 96(2-A) was inserted w.e.f. 16.2.1957.

37. Now if we look at Section 149 of the Act 1988, in sub-section (2) to Section 149; what was in Section 96(2)(a) viz., the defence on cancellation of Policy is not incorporated rather it is deleted. Therefore necessarily, sub-clause (b) of Section 96(2) has become now 149(2)(a). Consequently, 96(2)(c) has become 149(2)(b). Further, consequently, sub-clause (2-A) has been re-numbered as 3. Therefore, 96(3) of the Old Act is now 149(4).

38. Now 96(3) & 149(4) are in pari materia which it should not be.

39. The reason being after the sentence "by reference to any condition other than those in clause (b) of sub-section (2) shall be of no effect", relates to old "b" which includes a condition excluding driving by a person who is not duly licenced. When it comes to Section 149(4), rightly or wrongly the sentence "by reference to any condition other than those in clause (b) of sub-section (2) shall be of no effect" which relates to the present Clause (b) which reads as that the Policy is void on the ground, etc., whereas it should have been "(a)" which relates to condition excluding driving by a person who is not duly licenced.

40. The difference is very revealing and we do not think it is a mistake or error. But the Parliament appears to have introduced a very significant change under the replacing statute to mean that the defences of Insurer, while being confined to those available u/s 149(2), in respect of defences other than those u/s 149(2) (b), as a rule the Insurer may have to pay and recover. Only u/s 149(2)(b) which relates to void Policy the Insurer can seek complete exoneration from liability. That is the understanding we get from comparative reading of Section 96(3) and Section 149(4) of the Act.

41. Since the language in Section 149(4) is in pari materia with Section 96(3) of the Old Act, it gives an impression that while the Parliament or the draftsman have chosen to use the same expression clause (b) of sub-section (2) as used in

Section 96(3), the content and substance of the said provision is different as illustrated above. Whether it is the act of Parliament or the error of draftsman, the impact and the effect is very significant affording enormous protection to the innocent motor accident victims providing them improved and better protection in the new Act.

42. A comparative reading as above would show that the Parliament in its wisdom, apart from restricting permissible defences of Insurer to those enumerated u/s 149(2), has gone beyond and ensured that all other defences other than those provided u/s 149(2)(b) would be of no effect in so far as third party victims are concerned.

43. At the risk of repetition we point out that the defence u/s 149(2)(b) relates to the Policy of the Insurance held to be void under certain circumstances. Only in a case where the Policy of the Insurance is found to be void as per Section 49(2)(b) the Insurer may be justified in refusing indemnity.

22. This anomaly was pointed out by Mr. S. Srinivasa Ragavan, an Advocate for Insurance Companies, in his article "LIFTING THE LEGISLATIVE VEIL" published in 2010 (4) CTC 68 J.S. It is pointed out that "While drafting sub-section (4) of Section 149 of the M.V. Act in 1988, the parliament ought to have amended the provision of law by making clause (b) as clause (a)". In my view, as expressed in the judgment in *Iffco Tokyo General Insurance Company v. Jafer Sadiq*, 2012 (1) TN MAC 394 (DB), whether it is the draftsman's mistake or the wisdom of the parliament, in fact the New Act had denied the right of the Insurance Company to avoid its liability in cases of driving licences. In that case, even the defence of questioning the licence of the driver is not available to the Insurer. Though there was a suggestion on the side of the Insurance Company, that it is only a draftsman's mistake, we held that it is the wisdom of the Parliament restricting the defences of the Insurer.

23. Therefore, as per the dictum laid down in *National Insurance Co. Ltd. Vs. Swaran Singh and Others*, ; in *The United India Insurance Co. Ltd. Vs. S. Saravanan (Infirmity) rep. by his wife, NF.S. Lalitha and Ravi*, ; in *Bajaj Allianz General Insurance Co. Ltd. Vs. P. Manimozhi and Others*, in *Branch Manager, United India Insurance Co. Ltd. Vs. Nagammal, Unnamalai and V.B. Krishnan*, and in *Jawahar Singh Vs. Bala Jain and Others*, and in *Iffco Tokyo General Insurance Company v. Jafer Sadiq*, 2012 (1) TN MAC 394 (DB), it is settled that if the Insurer establishes that there is a breach of Policy condition u/s 149(2)(a) (ii), the Insurance Company though not liable, as it has successfully established its defence, can be directed to pay and recover from the insured.

24. However, in *The Divisional Manager, The New India Assurance Co. Ltd. Vs. V. Chandran and M. Murugan*, a learned Single Judge of this Court has held that Where the Insurance Company has positively proved that on the date of accident, the driver of the offending vehicle has not possessed of any licence at all, the owner of the vehicle alone liable to pay compensation. The order of the

Larger Bench in National Insurance Co. Ltd. Vs. Swaran Singh and Others, directing the Insurance Companies to pay and later recover even in cases of "did not hold any licence at all" was negatived holding, it is not a precedent binding on the Courts.

25. In my humble opinion in Sardari and Others Vs. Sushil Kumar and Others, the question of pay and recover was not considered at all. In Branch Manager, New India Assurance Co. Ltd. v. Muralikrishnan and another, 2010 (3) MLJ 271, P.K. Mishra, J. laid down a ratio decidendi which is as follows: "The judgment of the Supreme Court in National Insurance Co. Ltd. Vs. Vidhyadhar Mahariwala and Others, does not, as a rule, exclude the "pay and recover" policy in all cases." It applies to Sardari's case also. Similarly, the learned Single Judge has dealt with only Article 142 of the Constitution of India and the self-contained relief u/s 149(4) of the M.V. Act was not urged before the Court for pay and recover."

26. I am of the considered view that the defence available u/s 149(2)(a)(ii) which relates to duly licenced includes no licence also. The contention that in the case of no licence at all, the insured was guilty of negligence and failed to exercise reasonable care in the matter fulfilling the Policy condition can not be acceptable as the victim can not suffer for the failure of the insured. The wisdom of the Three-Judges Bench of the Supreme Court in British India General Insurance Co. Ltd. Vs. Captain Itbar Singh and Others is very relevant. This Court is also bound by the decision of the Full Bench in Branch Manager, United India Insurance Co. Ltd. Vs. Nagammal, Unnamalai and V.B. Krishnan, wherein it is held that--

Where it (Insurance Company) is successful in its defence, it may yet be required to pay the amount to the Claimant and thereafter recover the same from the owner.....

It is also relevant to refer to Jawahar Singh Vs. Bala Jain and Others, where the Supreme Court upheld the order of the Tribunal directing the Insurer to pay and recover from the insured in case of a Minor who did not posses and could not have possessed any licence at all, caused the accident. Therefore, even in case of no licence if the Insurance Company establishes that the driver of the insured vehicle was not in possession of any type of licence, the Insurance Company is to be exonerated but as per sub-section (4) & (5) of Section 149 of the Act, they can be directed to pay and recover. Therefore, the questions are answered accordingly in all the Civil Miscellaneous Appeals. Since in all the above Appeals the Insurance Company has established no license to the drivers, the Appellants are exonerated but directed to pay the compensation and recover the same from the owner of the vehicle in the same proceedings.

27. In Oriental Insurance Co. Ltd. Vs. Shri Nanjappan and Others, the mode of recovery is being mentioned and therefore the Counsel of the Insurance Company requested this Court to incorporate such mode to enable the Insurance Company to recover the compensation paid from the owner. Since the mode of

recovery is not mentioned in the orders of the Tribunal, I see there is a force in the argument of the learned Counsels for the Insurance Companies. In the result, all the Appeals are disposed of holding that in all the cases of no licence, the Insurance Company, though exonerated but directed to pay and recover the same from the owner of the vehicle. The Insurance Company is entitled to recover the compensation as per the mode incorporated in Oriental Insurance Co. Ltd. Vs. Shri Nanjappan and Others, which is incorporated as follows:

For the purpose of recovering the compensation amount from the insured, the Insurer shall not be required to file a Suit. It may initiate a proceeding before the concerned Executing Court as if the dispute between the Insurer and the insured was the subject matter of determination before the Tribunal and as if the issue is decided against the owner and in favour of the Insurer. A notice shall be issued to the insured to furnish security for the entire amount. The offending vehicle shall be attached as a part of the security. If necessity arises, the Executing Court shall take assistance of the concerned Regional Transport Authority. The Executing Court shall pass appropriate orders in accordance with law as to the manner in which the insured/owner of the vehicle shall make payment to the Insurer. In case there is any default it shall be open to the Executing Court to direct realisation by disposal of the securities to be furnished or from any other property of the insured.

No costs. Consequently, connected M.Ps. are closed.