

(2012) 07 KAR CK 0047

In the Karnataka High Court

Case No : M.F.A. No. 2596 of 2007 (MV)

The Oriental Insurance Co., Ltd.,

APPELLANT

Vs

Sri K.C. Subramanyam and Sri J.M. Nagaraj

RESPONDENT

Date of Decision : 12-07-2012

Acts Referred:

Constitution of India, 1950 — Article 141, 142

Motor Vehicles Act, 1988 — Section 147 (50, 149, 149 (1), 149 (2)

Citation : (2012) 07 KAR CK 0047

Hon'ble Judges : N. Kumar, J;H.S. Kempanna, J

Bench : Division Bench

Advocate : B.C. Seetharama Rao and Sri A.N. Krishnaswamy, as Amicus curiae, for the Appellant; Suresh D. Deshpande, for R2, Sri Sripad V. Shastry, for R1 and Sri S.P. Shankar Advocate, as amicus curiae, for the Respondent

Final Decision : Allowed

Judgement

1. The Insurance Company has preferred this appeal challenging the liability to pay the compensation to the claimant in MVC No. 5667/2005, which is fastened on them by the Claims Tribunal. For the purpose of convenience, the parties are referred to as they are referred to their rank in the claim petition.

FACTS IN BRIEF

2. The claimant - K.C. Subramanya was travelling in Tata Victra bearing No. KA-03-B-8180 driven by its driver Prasanna Babu on 25.4.2005. At about 03.30 hours when the said vehicle came near Sundepalli on NH-7 in Kurnool Donu road, the vehicle met with an accident on account of rash and negligent driving of the driver. The claimant sustained injuries. The police registered a case against the driver of the vehicle in Crime No. 49/2005. In fact, the wife of the claimant, who was travelling with him died. He preferred a claim petition in MVC No. 5667/2005 claiming compensation for the injuries sustained by him. In fact, another injured person in the said accident had also filed separate petition. Respondents filed common defence denying all the allegations made in the claim petition. The

insurance company did not dispute the insurance coverage to the vehicle involved in the accident. They specifically pleaded that their liability is subject to the terms and conditions of the policy. The claimants have to prove that the documents of the vehicle like RC, FC, permit and payment of premium in respect to the said passenger carrying on commercial vehicle is valid and current as on the date of the accident. Further they have to establish that the person who was driving the vehicle had valid and effective driving license to drive the same as on the date of the accident. The owner of the vehicle willfully entrusted the vehicle to a person who was without valid license and violated the terms and conditions of the policy. Therefore, the insurance company is not liable to indemnify the owner of the vehicle. Hence, they sought for dismissal of the petition.

3. On the aforesaid pleadings, the Tribunal framed the following issues:-

1. Whether the petitioner proves that on 25.4.2006 at about 3.30 hours when he/she was travelling along with his/her family members in a Tata victra bearing registration No. KA-03-B-8180 near Sundepalli Bus stage, NH-7 Road, Kurnool to Donu, Velladurthi Mandal, he met with an accident and sustained grievous injuries was due to rash and negligent driving by the above said vehicle by its driver as alleged?

2. Whether the petitioner is entitled for compensation? If so, how much and from whom?

3. What order?

4. Claimant in order to establish his case examined himself as PW.1 and produced 13 documents which are marked as Exs.P.1 to P. 13. On behalf of the respondents, one of the Insurance Company official has been examined as RW.1 and they also produced four documents, which are marked as Exs.R.1 to R.4.

5. The Tribunal on consideration of the aforesaid oral and documentary evidence on record held that the accident was on account of rash-"and negligent driving of the driver of the vehicle and therefore, the claimant has established actionable negligence. After looking into the medical evidence on record, the Tribunal held that the claimant sustained the following injuries:-

(a) (R) Black Eye

(b) Abrasion on the (R) face anterior to (R) Ear

(c) Sutured lacerated wound oblique over center of forehead.

The Medical Officer was of the opinion that the injuries are simple in nature. He was an inpatient in the hospital from 25.4.2005 to 27.4.2005. Therefore, it awarded a sum of Rs. 3000/- each for the simple injuries sustained, Rs. 13,310/- towards medical expenses, a sum of Rs. 5,000/-towards mental shock and agony and a sum of Rs. 2,000/-towards conveyance, and nourishment charges. Thus in all, a sum of Rs. 29,310/- is awarded as compensation.

6. After referring to the documents produced by the Insurance Company and also taking note of the evidence of the witness on behalf of the insurance company, the Tribunal held that, a perusal of the documentary evidence coupled with the oral evidence of RW.1 makes it clear that as the date of the accident the driver of the offending vehicle did not have valid and effective driving licence to drive the said vehicle. Therefore, there is violation of the terms and conditions of the policy on the part of the owner of the offending vehicle. In this regard reliance is placed on the judgment of the Apex Court in the case of National Insurance Company Limited vs. Savitri Devi and Others reported in ILR 2004 KAR 977 wherein it is held that the insurance company at the first instance has to pay compensation amount awarded to the claimant and is at liberty to recover the same from the owner of the offending vehicle. Accordingly, the claim petition was allowed.

7. Aggrieved by the said award fastening the liability on the insurance company, the insurance company has preferred this appeal. We have heard the learned counsel for the parties as well as the learned counsel who are not representing the parties to this litigation.

8. We are very much concerned with the position of the Judges, who are dealing with this matter in the Motor Accident Claim Tribunals. They are not able to make up their mind on this question of liability, which is one of the causes for delay in disposal of the claim petitions. In spite of several judgments of the Supreme Court on the point an element of doubt and confusion prevails. Therefore, we thought it proper to hear all the concerned and try to reconcile and pass an order giving guidance to them so that the claim petitions could be decided expeditiously. We are conscious that even in the Supreme Court itself, now the questions are referred to the larger bench. As could be seen from the points of reference, the question that is referred to the larger Bench is, whether the apex Court by virtue of the power conferred on it under Article 142 of the Constitution can pass an order directing the insurance company to pay the money to the third party and recover from the owner? It cannot be disputed that the power to be exercised under Article 142 is only by the Apex Court and not by other Courts. Therefore, neither this Court nor Tribunals exercising the power under Article 142 and directing the insurance company to pay the third party and then recover from the insured would arise. We have to decide the rights of the parties strictly in terms of the statutory provisions. If a particular provision is not interpreted by the Supreme Court, we are at liberty to make our interpretation. It is in this context, this appeal was taken up for consideration. We heard the learned counsel appearing for the parties. We also requested the learned counsel who are experts in the field to assist us as "*amicus curiae*".

9. The point that arise for our consideration is as under:

POINT FOR CONSIDERATION

When the insurance company establishes its case u/s 149 (2) by proving one of

the grounds mentioned in sub-section (i)(a)(b) of Section 149 (2) and is entitled to avoid its liability to the insured,

(a) is it entitled to avoid its liability to the third party also? Or

(b) whether the insurance company has to pay the amount awarded to the third party and recover it from the insured?

RIVAL CONTENTIONS

10. Learned counsel Sri B.C. Seetharama Rao appearing for the insurance company assailing the impugned order contended that the liability is not coextensive with the insured. The liability of the insurance companies is circumscribed by the statutory provision under Chapter XI and XII of the Motor Vehicles Act, 1988, (for short hereinafter referred to as "the Act"). It cannot be read in isolation. Insurance companies are owned by the Government. They are commercial ventures. Therefore, no liability can be fastened on them de hors the liability fastened under the statutory provision. On the basis of the social philosophy liability cannot be fastened. When once the insurance company establishes the ground mentioned in "-."Section 149 of the MV Act, not only the liability of the insurance company to the insured ceases and they are also under no obligation to pay the third parties in respect of the risk covered under the policy" This concept of "pay and recover" cannot be made applicable to the cases where there is no liability of the insurance company by virtue of Section 149 (2) of the Act. He submitted that this concept of "pay and recover" is conferred u/s 149 (4) and (5) of the MV Act. But the Parliament consciously did not apply the said principle to cases u/s 149 (1) r/w.149 (2) of the Act. Therefore, intention is manifest. The Courts cannot, under the guise of harmonious interpretation, read into the provision which is specifically excluded by the Parliament. If done it amounts to re-writing the law. It is not permissible. In several judgments of the Apex Court, it has been held that if there is no liability of the insurer to the insured, by virtue of their establishing the ground u/s 149 (2) of the MV Act, the insurance company cannot be made to pay to the third party and recover it from the insured. He submitted that those directions issued by the Apex Court do not lay down any principle of law. Those are the cases where by virtue of the power conferred u/s 142 of the Constitution, in order to do complete justice between the parties, the Apex Court has issued such direction, which power conspicuously is not vested in the High Court and the Tribunal under the statute. Therefore, when the statute expressly states that once the liability could be avoided, u/s 149 (2)(b) of MV Act, the Courts have no power to direct the insurance company to pay and recover.

11. Sri. A.N. Krishnaswamy, learned counsel appearing for the several other insurance companies as Amicus Curiae submitted that Sections 149 (1) and 149(2) have to be read along with Section 149(7) of the MV Act. If so read, the intention of the legislature would be amply clear. u/s 149(2) of the Act, the insurance company will get the right to defend on the grounds mentioned u/s

149(2) of the Act and there is no indication in the said provision that the right to defend and avoid the liability is only against the insured and not against the third party. The Parliament by introducing Section 149 (7) in the MV Act has made its intention clear. Therefore, in the light of the express provision contained in Section 149(7) of the Act, once the insurance company establishes the grounds enumerated u/s 149(2), their liability to indemnify the insured and pay the third party does not exist. Therefore, this concept of directing payment to the third party and permuting the insurance company to recover the said amount from the insured is not applicable to the cases falling under Sections 149 (1), 149 (2) of the Act.

12. Per contra, learned counsel appearing for the claimant Sri Sripad Shastry contended that the liability to pay the third party is a statutory liability. It is a social obligation. Recognizing these two aspects Section 146 is introduced under the Motor Vehicles Act. The same cannot ply without policy coverage. That provision is not made to the benefit of the insurance company. It is made for the benefit of the innocent third parties who are the victims in the accident. Even if there is a violation of terms of the contract as set out in Section 149(2) of the Act and there is no liability on the part of the insurance company to indemnify the insured but their liability to pay the third party is not extinguished. In view of Section 149(2) of the Act as "any person" refers to Section 149(7) and Section 149(1) refers to the "insured", the insured is beneficiary under the decree and he is not personally liable to pay. The insurance company pays the said amount. It is in that context, if Section 149 (1) is read with other benevolent provision of Section 149(5) and other provisions, the conclusion is inescapable that once there is a valid insurance policy and the vehicle involved in the accident is covered under the Motor Vehicles Act, and even if the owner commits breach of terms and conditions of the policy, the liability of the insurance company to pay the third party, cannot be avoided.

13. Sri. S.P. Shankar, learned senior counsel assisting the Court as "Amicus Curiae" has brought to our notice the various judgments of the Apex Court where there is violation of the terms of the policy, the directions are issued to the insurance company to pay the third party and recover it from the insured and the said directions are issued while interpreting Section 149(1) and 149 (2) of the Act. In the course of time, the legal position has attained an extent of certainty, so that, through out the country the said law is being applied and benefit is conferred on the third party. Therefore, on the doctrine of stare decisis, the law which is enforced for the benefit of the victim in the motor accident, should not be varied or altered on the ground that particular statutory provision is not noticed or interpreted extensively in the judgment of the Apex Court. He further submitted that when once the Apex Court has laid down the law under Article 141 of the Constitution of India, that law is binding on all Courts in the country. Even if while laying down the law, if provisions of statute are not noticed and not interpreted by the Apex Court, it is not open to the High Court to ignore or refuse to follow the said decisions, on the ground the provision of law is not noticed. He

further submitted that in the Apex Court some of the judges did not agree with the said view. Therefore, now the matter is referred to Full Bench and proper course would be to await the decision of the Apex Court on the said point.

14. He also pointed out the term "any person" used in Section 149 (7) of the Act does not mean every person including the claimant. Since Section 149 (7) refers to Section 149 (1) it is easy to understand words "every person" as insured by the policy occurring in Section 149:(1). It is necessary to harmonize Section 149 (1) and 149 (7) more so, in view of non-obstante clause appearing in later Section of 149(1). The insurer is relegated to the position of the judgment debtor even though there is no privity of contract between the claimants and insurer. It is by reason of statutory coverage the insurer is liable. The liability is carved out of a statute and hence exclusive as well as absolute. It is apparent from Section 168 which obligates the insurer-the first person, to pay and in the event of non-insurance to direct the owner and driver to pay. The liability is strict and absolute. The terms of liability to any person appearing in Section 149 (7) is not referable to the claimants, but to the insured alone. In the scheme of Chapters XI and XII, the third party is the sole beneficiary, just as the insurer is the sole beneficiary of the compulsory insurance. Insured is basically liable as a tortfeasor. When the insurer is statutorily liable to pay compensation by reason of Sections 149 (1) and 147 (5), it must be construed as an embargo on insurer to avoid payment of compensation except on the grounds enumerated in Section 149 (2) and by reason of Section 149 (5), the insurer is mandated to pay the compensation even in excess of its liability, with liberty to recover the same from the insured. Hence Sections 149 (1), 149 (4), 147(5) and Section 168 must be read harmoniously to conclude that the insurer shall pay this sum awarded and in the event of the award being in excess of liability to recover the same from the insured. The distinguishing feature of 1988 Act is that the liability of the insurer and insured is co-extensive and co-terminus vide Section 149 (2)(a). Even Section 147(1)(b) mandates that the authorised insurer shall insure the persons or class of persons specified in the policy to the extent specified in Sub Section (2). Section 147 (2) mandates that the insurer shall pay the amount of liability incurred under the award. Thus it is clear that compulsory insurance is not to be treated as a private benevolence of the parliament, but a duty is cast on the insurer by the parliament to pay the compensation awarded to the third party notwithstanding that it can avoid or has avoided or that it can cancel or has cancelled the policy.

15. In the light of the aforesaid argument, it is necessary for us to look into the interpretation placed by the Apex Court on the relevant provisions of law both under 1939 Act as well as under 1988 Act.

JUDGMENTS OF THE APEX COURT

16. First of the judgments in this regard is in the case of British India General Insurance Co. Ltd. Vs. Captain Itbar Singh and Others, . In this case the question raised for consideration is whether in an action for compensation when once the

insurer is made a party to the proceedings can they raise in defence other than what is prescribed under sub-section (2) of Section 96 of the Motor Vehicles Act, 1939. in that context, it was held 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 insured person against the insured causing the injury. Sub-section (2) of S. 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-S. (2) makes available to an insurer ? That clearly is a question of interpretation of the sub-section.

6. Now the language of sub-s. (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-s. (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-s. (1) "Otherwise than in the manner provided for in sub-section. (2)". Now the only manner of avoiding liability provided for in sub-s. (2) is by successfully raising 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-s. (6) clearly contemplates that he cannot take any defence not mentioned in subs. (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-s. (2). That is prohibited by sub-s. (6).

8. We therefore think that sub-s. (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.

Again at paragraph 16, it is observed as under:

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-s. (3) and under sub-s. (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.

17. The Apex Court in the case of *Skandia Insurance Co. Ltd. Vs. Kokilaben Chandravadan and Others*, was dealing with the case wherein when the accident occurred, 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. In that context, it was contended that when the accident occurred, when an unlicenced person was driving the vehicle the insurance company would be exonerated from the liability. The validity of the said argument was decided in the light of the provisions contained in Section 96(1) and 96(2)(b)(ii) of the Motor Vehicles Act. It was contended on behalf of the Insurance Company that since admittedly there was an exoneration clause, the insurance company would not be liable, when the accident occurred, a person who had been driving the vehicle was not duly licenced person to drive the vehicle. In answering the said question, the Supreme Court went into the question of intention of legislature in enacting the Act and held as under:

13. In order to divine the intention of the legislature in the course of interpretation of the relevant provisions there can 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 risk by enacting Section 94. Surely the obligation has not been imposed in order to promote the business of the insurers engaged in the business of automobile insurance. The provision has been inserted in order to protect the members of the community travelling in vehicles or using the roads

from the risk attendant upon the user of motor vehicles on the roads. The law may provide for compensation to victims of the accidents who sustain injuries in the course of an automobile accident or compensation to the dependents of the victims in the case of a fatal accident. However, such protection would remain a protection on paper unless there is a guarantee that the compensation awarded by the Courts would be recoverable from the persons held liable for the consequences of the accident. A Court can only pass an award or a decree. It cannot ensure that such an award or decree results in the amount awarded being actually recovered, from the person held liable who may not have the resources. The exercise undertaken by the law Courts would then be an exercise in futility. And the outcome of the legal proceedings which by the very nature of things involve the time cost and money cost invested from the scarce re-sources of the community would make a mockery of the injured victims, or the dependents of the deceased victim, of the accident, who themselves are obliged to incur not inconsiderable expenditure of time, money and energy in litigation. To overcome this ugly situation the legislature has made it obligatory that no motor vehicle shall be used unless a third party insurance is in force. To use the vehicle without the requisite third party insurance being in force is a penal offence. The legislature was also faced with another problem. The insurance policy might provide for liability walled in by conditions which may be specified in the contract of policy. In order to make the protection real, the legislature has also provided that the judgment obtained shall not be defeated by the incorporation of exclusion clauses other than those authorised by Section 96 and by providing that except and save to the extent permitted by Section 96 it will be the obligation of the Insurance Company to satisfy the judgment obtained against the persons insured against third party risks. (vide Section 96). In other words, the legislature has insisted and made it incumbent on the user of a motor vehicle to be armed with an insurance policy covering third party risks which is in conformity with the provisions enacted by the legislature. It is so provided in order to ensure that the injured victims of automobile accidents or the dependents of the victims of fatal accidents are really compensated in terms of money and not in terms of promise. Such a benign provision enacted by the legislature having regard to the fact that in the modern age the use of motor vehicles notwithstanding the attendant hazards, has become an inescapable fact of life, has to be interpreted in a meaningful manner which serves rather than defeats the purpose of the legislation. The provision has therefore to be interpreted in the twilight of the aforesaid perspective.

14. Section 96(2)(b)(ii) extends immunity to the Insurance Company if a breach is committed of the condition excluding driving by a named person or persons or by any person who is not fully licensed, or by any person who has been disqualified for holding or obtaining a driving licence during the period of disqualification. The expression "breach" is of great significance. The dictionary meaning of "breach" is "infringement or violation of a promise or obligation". It is therefore abundantly clear that the insurer will have to establish that the

insured is guilty of an infringement or violation of a promise that a person who is duly licensed will have to be in charge of the vehicle. The very concept of infringement or violation of the promise that the expression "breach" carries within itself induces an inference that the violation or infringement on the part of the promisor must be a wilful infringement or violation. If the insured is not at all at fault and has not done anything he should not have done or is not amiss in any respect how can it be conscientiously posited that he has committed a breach? It is only when the insured himself places the vehicle in charge of a person who does not hold a driving licence, that it can be said that he is "guilty" of the breach of the promise that the vehicle will be driven by a licensed driver. It must be established by the Insurance Company that the breach was on the part of the insured and that it was the insured who was guilty of violating the promise or infringement of the contract. Unless the insured is at fault and is guilty of a breach the insurer cannot escape from the obligation to indemnify the insured and successfully contend that he is exonerated having regard to the fact that the promisor (the insured.) committed a breach of his promise. Not when some mishap occurs by some mis-chance. When the insured has done everything within his power inasmuch as he has engaged a licensed driver and has placed the vehicle in charge of a licensed driver with the express or implied mandate to drive himself it cannot be said that the insured is guilty of any breach. And it is only in case of a breach or a violation of the promise on the part of the insured that the insurer can hide under the umbrella of the exclusion clause. In a way the question is as to whether the promise made by the insured is an absolute promise or whether he is exculpated on the basis of some legal doctrine. The discussion made in paragraph 239 of Breach of Contract by Carter (1984 Edition) under the head Proof of Breach, gives an inkling of this dimension of the matter. In the present case even if the promise were to be treated as an absolute promise the grounds for exculpation can be found from Section 84 of the Act which reads thus:

84. Stationary vehicles-No person driving or in charge of a motor) vehicle shall cause or allow the vehicle to remain stationary in any public place, unless there is in the driver's seat a person duly licensed to drive the vehicle or unless the mechanism has been stopped and a brake or brakes applied or such other measures taken as to ensure that the vehicle cannot accidentally be put in motion in the absence of the driver.

In view of this provision apart from the implied mandate to the licensed driver not to place an unlicensed person in charge of the vehicle, there is also a statutory obligation on the said person not to leave the vehicle unattended and not to place it in charge of an unlicensed driver. What is prohibited by law must be treated as a mandate to the employee and should be considered sufficient in the eye of law for excusing non-compliance with the conditions. It cannot therefore in any case be considered as a breach on the part of the insured. To construe the provision differently would be to re-write the provision by engrafting a rider to the effect that in the event of the motor vehicle happening to be driven

by an unlicensed person regardless of the circumstances in which such a contingency occurs, the insured will not be liable under the contract of insurance. It needs to be emphasised that it is not the contract of insurance which is being interpreted. It is the statutory provision defining the conditions of exemption which is being interpreted. These must therefore be interpreted in the spirit in which the same have been enacted accompanied by an anxiety to ensure that the protection is not nullified by the backward looking interpretation which serves to defeat the provision rather than to fulfil its life-aim. To do otherwise would amount to nullifying the benevolent provision by reading it with a non-benevolent eye and with a mind not tuned to the purpose and philosophy of the legislation without being informed of the true goals sought to be achieved. What the legislature has given, the Court cannot deprive of by way of an exercise in interpretation when the view which renders the provision potent is equally plausible as the one which renders the provision impotent. In fact it appears that the former view is more plausible apart from the fact that it is more desirable. When the option is between opting for a view which will relieve the distress and misery of the victims of accidents or their dependents on the one hand and the equally plausible view which will reduce the profitability of the insurer in regard to the occupational hazard undertaken by him by way of business activity, there is hardly any choice. The Court cannot but opt for the former view. Even if one were to make a strictly doctrinaire approach, the very same conclusion would emerge in obedience to, the doctrine of "reading down the exclusion clause in the light of the "main purpose" of the provision so that the "exclusion clause" does not cross swords with the main purpose" high-lighted earlier. The effort must be to harmonize the two instead of allowing the exclusion clause to snipe successfully at the main purpose. This theory which needs no support is supported by Carter's "Breach of Contract" Vide paragraph 251. To quote:

Notwithstanding the general ability of contracting parties to agree to exclusion clause which operate to define obligations there exists a rule, usually referred to as the "main purpose rule", which may limit the application of wide exclusion clauses defining a promisor's contractual obligations. For example, in *Glynn v. Margetson & Co.*, [1893] A.C. 351 at 357 Lord Halsbury L.C. stated:

It seems to me that in construing this document, which is a contract of carriage between the parties, one must be in the first instance look at the whole instrument and not at one part of it only. Looking at the whole instrument, and seeing what one must regard... as its main purpose, one must reject words, indeed whole provisions, if they are inconsistent with what one assumes to be the main purpose of the contract.

Although this rule played a role in the development of the doctrine of fundamental breach, the continued validity of the rule was acknowledged when the doctrine was rejected by the House. of Lords in *Suisse Atlantique Societe d'Armement Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale*, [1967] 1 A.C. 361 at 393, 412-413, 427-428, 30. Accordingly, wide exclusion clauses will be

read down to the extent to which they are inconsistent with the main purpose, or object of the contract.

18. The Apex Court in the case of Kashiram Yadav and Another Vs. Oriental Fire and General Insurance Co. and Others, was considering the question whether when the breach of condition is established, whether the insurer will not be liable to indemnify the owner. Answering the said question, it was held as under:

4. Section 96 of the Motor Vehicles Act, 1939 imposes duty on the insurer to satisfy judgments against persons insured in respect of third party risks. Sub-section 2 thereof provides exception to the liability of the insurer. Sub-sec. 2(b) of sec. 96 provides that the insurer is not liable to satisfy the judgments against the persons insured if there has been a breach of a specified condition of the policy. One of the conditions of the policy specified under clause (v) is that the vehicle should not be driven by any person who is not duly licensed, or by any person who has been disqualified from holding or obtaining driving licence during the period of disqualification. It is not in dispute that the certificate of insurance concerned in this case contains this condition. If, therefore, there is a breach of this condition, the insurer will not be liable to indemnify the owner.

5. Counsel for the appellants however, submitted that insurer alone would be liable to pay the award amount even though the tractor was not driven by a licensed driver. In support of the contention, he placed reliance on the decision of this Court in Skandia Insurance Co. Ltd. Vs. Kokilaben Chandravadan and Others, We do not think that that decision has any relevance to the present case. There the facts found were quite different. The vehicle concerned in that case was undisputedly entrusted to the driver who had a valid licence. In transit the driver stopped the vehicle and went to fetch some snacks from the opposite shop leaving the engine on. The ignition key was at the ignition lock and not in the cabin of the truck. The driver has asked the cleaner to take care of the truck. In fact the driver had left the truck in the care of the cleaner. The cleaner meddled with the vehicle and caused the accident. The question arose whether the insured (owner) had committed a breach of the condition incorporated in the certificate of insurance since the cleaner operated the vehicle on the fatal occasion without driving licence. This Court expressed the view that it is only when the insured himself entrusted the vehicle to a person who does not hold a driving licence, he could be said to have committed breach of the condition of the policy. It must be established by the Insurance Company that the breach is on the part of the insured. Unless the insured is at fault and is guilty of a breach of the condition, the insurer cannot escape from the obligation to indemnify the insured. It was also observed that when the insured has done everything within his power in as much as he has engaged the licensed driver and has placed the vehicle in his charge with the express or implied mandate to drive himself it cannot be said that the insured is guilty of any breach.

6. We affirm and reiterate the statement of law laid down in the above case. We may also state that without the knowledge of the insured, if by driver's acts or

omission others meddle with the vehicle and cause an accident, the insurer would be liable to indemnify the insured. The insurer in such a case cannot take the defence of a breach of the condition in the certificate of insurance.

7. But in the present case, the onus of the insurer has been discharged from the evidence of the insured himself. The insured took a positive defence stating that he was not the owner of the vehicle since he had already sold the same to a third party. This has not been proved. Secondly, he took a defence stating that the vehicle at the relevant time was driven by a licensed driver, Gaya Prasad, (PW-2). This was proved to be false. There is no other material even to indicate that the vehicle was entrusted to the licensed driver on the date of the fatal accident. With these distinguishing features in the present case, we do not think that the ratio of the decision in Skandia Insurance Co. Ltd. 's case could be called to aid the appellants.

19. The Apex Court in the case of New Indian Assurance Co. Ltd. Vs. Mandar Madhav Tambe and others, was considering the question whether the insurance company is entitled to invoke the provision of Section 92 (a) (b) (ii) of the Act and secondly, the exclusion clause in the insurance policy absolves insurance company of any liability. In the said case after referring to the statutory provisions it was held as under:

14. Apart from the fact that a learner having such a licence would not be regarded as duly licensed, the aforesaid clause in the insurance policy makes it abundantly clear that the insurance company, in the event of an accident, would be liable only if the vehicle was being driven by a person holding a valid driving licence or a permanent driving licence "other than a learner's licence". This clause specifically provides that even if respondent No. 3 had held a current learner's licence at the time of the accident, the appellant would not be liable. In the present case it is clear that the respondent No. 3 did not have a permanent driving licence before the date of the accident and he had held only a learner's licence and it lapsed nearly two years before the accident. The High Court observed that the Act did not contemplate a "permanent driving licence" because a driving licence is valid only for a certain period after which it has to be renewed. This may be so, but the use of the words "permanent driving licence" in the insurance policy was to emphasise that a temporary or a learner's licence holder would not be covered by the insurance policy. The intention and meaning of the policy clearly is that the person driving the vehicle at the time of the accident must be one who hold a "driving licence" within the meaning of Section 2 (5-A) of the Act. This being so, we are unable to agree with the conclusion of the High Court that the appellant is liable to pay the amount which had been awarded in favour of respondent No. 1.

20. The three Judges Bench of the Apex Court in the case of Sohan Lal Passi Vs. P. Sesh Reddy and others, on reference to a Larger Bench, the Court was considering the question whether once there has been a contravention of the condition prescribed in sub-section (2) (b) (ii) of Section 96, whether the person

insured shall not be entitled to the benefit of sub-section (1) of Section 96. Answering the said question, the Apex Court held as under:

...According to us, Section 96(2)(b)(ii) "should not be interpreted in a technical manner. Sub-section (2) of Section 96 only enables the insurance company to defend itself in respect of the liability to pay compensation on any of the grounds mentioned in sub-section (2) including that there has been a contravention of the condition excluding the vehicle being driven by any person who is not duly licensed. This bar on the face of it operates on the person insured. If the person who has got the vehicle insured has allowed the vehicle to be driven by a person who is not duly licensed then only that clause shall be attracted. In a case where the person who has got insured the vehicle with the insurance company, has appointed a duly licensed driver and if the accident takes place when the vehicle is being driven by a person not duly licensed on the basis of the authority of the driver duly authorised to drive the vehicle whether the insurance company in that event shall be absolved from its liability? The expression "breach" occurring in Section 96(2)(b) means infringement or violation of a promise or obligation. As such the insurance company will have to establish that the insured was guilty of an infringement or violation of a promise. The insurer has also to satisfy the Tribunal or the Court that such violation or infringement on the part of the insured was willful, If the insured has taken all precautions by appointing a duly licensed driver to drive the vehicle in question and it has not been established that it was the insured who allowed the vehicle to be driven by a person not duly licensed, then the insurance company cannot repudiate its statutory liability under sub-section (1) of Section 96....

...While interpreting the contract of insurance, the Tribunals and Courts have to be conscious of the fact that right to claim compensation by heirs and legal representatives of the victims of the accident is not defeated on technical grounds. Unless it is established on the materials on record that it was the insured who had willfully violated the condition of the policy by allowing a person not duly licensed to drive the vehicle when the accident took place, the insurer shall be deemed to be a judgment-debtor in respect of the liability in view of sub-section (1) of Section 96 of the Act. It need not be pointed out that the whole concept of getting the vehicle insured by an insurance company is to provide an easy mode of getting compensation by the claimants, otherwise in normal course they had to pursue their claim against the owner from one forum to the other and ultimately to execute the order of the Accident Claims Tribunal for realization of such amount by sale of properties of the owner of the vehicle. The procedure and result of the execution of the decree is well known.

21. The Apex Court in the case of United India Insurance Co. Ltd. Vs. Gian Chand and others, was dealing with the case where the insurance company got exonerated from its liability on account of the fact that the insured has permitted the vehicle to be driven by an unlicensed driver and therefore, he committed breach of relevant terms of the policy and that entitled the insurance company to

get the benefit of exclusion clause available as a defence to the company u/s 96(2)(b) of the Act. Relying on the judgment of the Apex Court in Skandia Insurance Company it was contended that the insurance company cannot be absolved of the liability. In that context the Apex Court in the said judgment held as under:-

8. In order to resolve this controversy between the parties, it must be observed at the outset that the aforementioned decisions clearly indicate two distinct lines of cases. The first line of cases consists of fact situations wherein the insured are alleged to have committed breach of the condition of insurance policy, which required them not to permit the vehicle to be driven by an unlicensed driver. Such a breach is held to be a valid defence for the insurance company to get exonerated from meeting the claims of third parties who suffer on account of vehicular accidents which may injure them personally or which may deprive them of their bread-winner on account of such accidents caused by the insured vehicles. The other line of cases deals with the insured owners of offending motor vehicles that cause such accidents wherein the insured owners of the vehicles do not themselves commit breach of any such condition and hand over the vehicles for driving to licensed drivers who on their own and without permission, express or implied, of the insured, hand over vehicles or act in such a way that the vehicles get available to unlicensed drivers for being driven by the latter and which get involved in vehicular accidents by the driving of such unlicensed drivers. In such cases the insurance company cannot get benefit of the exclusionary clause and will remain liable to meet the claims of third parties for accidental injuries, whether fatal or otherwise. The decisions of this Court in Skandia Insurance Co. Ltd. Vs. Kokilaben Chandravadan and Others, and in Sohan Lal Passi Vs. P. Sesh Reddy and others, represent this second line of cases while the decisions of this Court in New India Assurance Co. Ltd., V. Mandar Madhav Tambe, 1996 ACJ 1078 (SC) and in Kashiram Yadav and Another Vs. Oriental Fire and General Insurance Co. and Others, represent the first line of cases.

10. We fail to appreciate how the aforesaid decision can be of any avail to the learned counsel for the respondents-claimants on the peculiar facts of the present case. It has been clearly held by the Tribunal as well as by the High Court that respondent No. 1 who was permitted to drive the vehicle by respondent No. 9, the insured, was admittedly not having any driving license. It was not the case of respondent NO. 9, the insured, that he did not know that respondent No. 1, whom the vehicle was being handed over, was not having a valid licence. In fact, once he did not step in the witness-box to prove his case, an adverse inference had necessarily to be drawn against him to the effect that the vehicle had been handed over by him for being driven by an unlicensed driver, respondent No. 1. That finding reached by the Tribunal as well as by the High Court must result in exonerating the Insurance company of its obligation as the statutory defence became available to it. The High Court, even though agreeing with the finding of fact reached by the Tribunal, has in our view, by

misconstruing the ratio of the decision of this Court in *Skandia Insurance Co. Ltd. Vs. Kokilaben Chandravadan and Others*, erroneously held that the said defence was not available to the insurance company on the facts of the present case. Even that apart, a Bench of three learned Judges of this Court in *Sohan Lal Passi Vs. P. Sesh Reddy and others*, while upholding the ratio of the decision of this Court in *Skandia Insurance Co. Ltd. Vs. Kokilaben Chandravadan and Others*, has also taken the same view.

11. Even apart from these judgments which do not improve the case of the respondents, strong reliance was placed on two other judgments of this Court by the learned counsel for the appellant. As noted earlier they represent the first line of cases. In *Kashiram Yadav and Another Vs. Oriental Fire and General Insurance Co. and Others*, a Bench of two learned Judges of this Court, speaking through K. Jagannatha Shetty, J., distinguished the decision in *Skandia Insurance Co. Ltd. Vs. Kokilaben Chandravadan and Others*, and took the view that when the insured had handed over the vehicle to an unlicensed driver, the insurance company would get exonerated and the ratio of the decision in *Skandia Insurance Co. Ltd. V. " Kokilaben Chandravadan (supra)*, would be of no assistance to the claimants in such a case. The fact situation in the present case is almost parallel to the fact situation which was examined by this Court in *Kashmiram Yadav V. Oriental Fire and Genl. Ins. Co. Ltd. (supra)*. There is also a latter decision of this Court in *New Indian Assurance Co. Ltd. Vs. Mandar Madhav Tambe and others*, wherein a Bench of two learned Judges of this Court to which one of us, B.N. Kripal, J. was apart, examined a similar fact situation and came to the conclusion that the exclusion clause in the insurance policy makes it clear that the insurance company, in the event of an accident, would be liable only if the vehicle was being driven by a person holding a valid licence "other than a learner's licence". The use of the words "permanent driving licence in the insurance policy was to emphasise that a temporary or a learner's licence holder would not be covered by the insurance policy.

12. Under the circumstances, when the insured had handed over the vehicle for being driven by an unlicensed driver, the insurance company would get exonerated from, its liability to meet the claims of third party who might have suffered on account of vehicular accident caused by such unlicensed driver. In view of the aforesaid two sets of decisions of this court, which deal with different fact situations, it cannot be said that the decisions rendered by this Court in *Skandia Insurance Co. Ltd. Vs. Kokilaben Chandravadan and Others*, and the decision of the Bench of three learned Judges in *Sohan Lal Passi Vs. P. Sesh Reddy and others*, in any way conflict with the decisions rendered by this Court in the cases of *New Indian Assurance Co. Ltd. Vs. Mandar Madhav Tambe and others*, and *Kashiram Yadav and Another Vs. Oriental Fire and General Insurance Co. and Others*,

13. In the result, therefore, this appeal is allowed. The decision of the High Court under appeal to the extent it refuse to exonerate the insurance company will

stand set aside and it is held that the appellant insurance company is not liable to meet the claim of the respondents-claimants. The claim petition will stand rejected against the appellant insurance company. The respondents-claimants will, however, be entitled to recover the awarded amount of compensation from respondent Nos. 1 and 9.

22. The Apex Court in the case of New India Assurance Co., Shimla Vs. Kamla and Others etc. etc., interpreting Section 149(2) (4) and (5), held as under:

18. Section 149(2) of the Act says that notice regarding the suit or other legal proceedings shall be given to the insurer if such insurer is to be fastened with such liability. The purpose of giving such notice is to afford the insurer to be made a party in the proceedings for defending the action on any one of the grounds mentioned in the sub-section. Among the multiplicity of such grounds the one which is relevant in this case is extracted below:

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

(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.

19. Sub-section (4) of Section 149 of the Act says that so much of the policy as purports to restrict the insurance of the person insured by reference to any condition shall as respects such liabilities as are required to be covered by a policy, be of no effect. The proviso to the said sub- section is important for the purpose of considering the question involved in this case and hence that proviso is extracted below:

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.

20. Similarly, in this context sub-section (5) is equally important and hence that is also extracted below:

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.

21. A reading of the proviso to sub-section (4) as well as the language employed in sub-section (5) would indicate that they are intended to safeguard the interest of an insurer who otherwise has no liability to pay any amount to the insured but for the provisions contained in Chapter XI of the Act. This means, the insurer has to pay to the third parties only on account of the fact that a policy of insurance has been issued in respect of the vehicle, but the insurer is entitled to recover

any such sum from the insured if the insurer were not otherwise liable to pay such sum to the insured by virtue of the conditions of the contract of insurance indicated by the policy.

22. To repeat, the effect of the above provisions is this: When a valid insurance policy has been issued in respect of vehicle as evidenced by a certificate of insurance the burden is on the insurer to pay to third parties, whether or not there has been any breach or violation of the policy conditions. But the amount so paid by the insurer to third parties can be allowed to be recovered from the insured if as per the policy conditions the insurer had no liability to pay such sum to the insured.

23. In the case of National Insurance Co. Ltd., Chandigarh Vs. Nicolletta Rohtagi and Others, a three member Bench of the Apex Court was called upon to decide the question whether non filing of the appeal by the insured amounts to failure to decide the claim and that the right to decide include right to file appeal against the award of the Tribunal and whether the insured has a right of appeal to contest the award on merits when he was not included as a party or when the award was obtained by playing fraud. While deciding the said question, incidentally, the Apex Court was interpreting" Section 149. In that context, it held as under in Para 9.

9. ...Section 96(2) of 1939 Act which corresponds to Section 149(2) of 1988 Act lays down that an insurance company can defend the action only on the ground of breach of conditions of the policy referred to in sub-section or on the ground that the policy is void for the reason referred to in the said sub-section. Section 96(6) of the 1939 Act corresponds to Section 149(7) of the 1988 Act and the same provides that the insurance company cannot avoid the liability to any person entitled to benefit of any judgment or award referred to in sub-section (1) except in the manner provided in sub-section (2) of the Act.

The Apex Court further held as under:

13. To answer the question, it is necessary to find out on what grounds the insurer is entitled to defend/contest against a claim by an injured or dependants of the victims of motor vehicle accident. u/s 96(2) of 1939 Act which corresponds to Section 149(2) of 1988 Act, an insurance company has no right to be a party to an action by the injured person or dependants of deceased against the insured. However, the said provision gives the insurer the right to be made a party to the case and to defend it. It is, therefore, obvious that the said right is a creature of the statute and its content depends on the provisions of the statute. After the insurer has been made a party to a case or claim, the question arises what are the defences available to it under the statute. The language employed in enacting sub- section (2) of Section 149 appears to be plain and simple and there is no ambiguity in it. It shows that when an insurer is impleaded and has been given notice of the case, he is entitled to defend the action on grounds enumerated in the sub-section, namely, sub-section (2) of Section 149 of 1988

Act, and no other ground is available to him. The insurer is not allowed to contest the claim of the injured or heirs of the deceased on other ground which is available to an insured or breach of any other conditions of the policy which do not find place in sub-section (2) of Section 149 of 1988 Act. If an insurer is permitted to contest the claim on other grounds it would mean adding more grounds of contest to the insurer than what the statute has specifically provided for.

14. Sub-section (7) of Section 149 of 1988 Act clearly indicates in what manner sub-section (2) of Section 149 has to be interpreted. Sub-section (7) of Section 149 provides that 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. The expression "manner" employed in sub-section (7) of Section 149 is very relevant which means an insurer can avoid its liability only in accordance with what has been provided for in sub-section (2) of Section 149. It, therefore, shows that the insurer can avoid its liability only on the statutory defences expressly provided in sub-section (2) of Section 149 of 1988 Act. We are, therefore, of the view that an insurer cannot avoid its liability on any other grounds except those mentioned in sub-section (2) of Section 149 of 1988 Act.

15. It is relevant to note that the Parliament, while enacting sub-section (2) of Section 149 only specified some of the defences which are based on conditions of the policy and, therefore, any other breach of conditions of the policy by the insured which does not find place in sub-section (2) of Section 149 cannot be taken as a defence by the insurer. If the Parliament had intended to include the breach of other conditions of the policy as a defence, it could have easily provided any breach of conditions of insurance policy in sub-section (2) of Section 149. If we permit the insurer to take any other defence other than those specified in sub-section (2) of Section 149, it would mean we are adding more defences to insurer in the statute which is neither found in the Act nor was intended to be included.

16. For the aforesaid reasons, we are of the view that the statutory defences which are available to the insurer to contest a claim are confined to what are provided in sub-section (2) of Section. 149 of 1988 Act and not more and for that reason if an insurer is to file an appeal, the challenge in the appeal would confine to only those grounds.

24. The Constitution Bench of the Apex Court in the case of New India Assurance Co. Ltd. Vs. C.M. Jaya and Others, has held as under:

The liability could be statutory or contractual. A statutory liability cannot be more than what is required under the statute itself. However, there is nothing in

Section 95 of the Act prohibiting the parties from contracting to create unlimited or higher liability to cover wider risk. In such an event, the insurer is bound by the terms of the contract as specified in the policy in regard to unlimited or higher liability as the case may be. In the absence of such a term or clause in the policy, pursuant to the contract of insurance, a limited statutory liability cannot be expanded to make it unlimited or higher. If it is so done, it amounts to re-writing the statute or the contract of insurance which is not permissible.

25. The Apex Court in the case of United India Insurance Company Ltd. Vs. Lehu and Others, held as under:

17. When an owner is hiring a driver he will therefore have to check whether the driver has a driving licence. If the driver produces a driving licence which on the face of it looks genuine, the owner is not expected to find out whether the licence has in fact been issued by a competent authority or not. The owner would then take the test of the driver. If he finds that the driver is competent to drive the vehicle, he will hire the driver. We find it rather strange that Insurance Companies expect owners to make enquiries with RTO's, which are spread all over the country, whether the driving licence shown to them is valid or not. Thus where the owner has satisfied himself that the driver has a licence and is driving competently there would be no breach of Section 149(2)(a)(ii). The Insurance Company would not then be absolved of its liability. If it ultimately turns out that the licence was fake the Insurance Company would continue to remain liable unless they prove that the owner/insured was aware or had noticed that the licence was fake and still permitted that person to drive. More importantly even in such a case the Insurance Company would remain liable to the innocent third party, but it may be able to recover from the insured. This is the law which has been laid down in *Skiandia's Sohan Lal Passi's* and *Kamla's* case. We are in full agreement with the views expressed therein and see no reason to take a different view.

18. In this view of the matter we see no substance in this appeal. The appeal stands dismissed with costs of Rs. 20,000/-. This amount of costs to be shared equally between the claimants on one hand and the insured on the other. Clarified that the costs awarded herein is in addition to the costs directed to be paid by the Motor Accidents Claim Tribunal.

26. Again interpretation of Section 149 (2)(a)(ii) vis-?-vis provision appended to sub-section (4) and (5) of the Motor Vehicles Act, 1988, fell for consideration before the Apex Court in the case of *National Insurance Co. Ltd. Vs. Swaran Singh and Others*, After referring to all the relevant provisions of the Act and the arguments canvassed on both sides, after referring to the aforesaid judgments, the Supreme Court held as under:

30. Sub-section (1) of Section 149, casts a liability upon the insurer to pay to the person entitled to the benefit of the decree as if he were the judgment debtor. Although the said liability is subject to the provision of this section, it prefaces

with a non obstante clause that the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy. Furthermore, the statute raises a legal fiction to the effect that for the said purpose the insurer would be deemed to be judgment debtor in respect of the liability of the insurer.

33. The question as to whether an insurer can avoid its liability in the event it raises a defence as envisaged in Sub-section (2) of Section 149 of the Act corresponding to sub-section (2) of Section 96 of the Motor Vehicles Act, 1939 had been the subject matter of decisions in a large number of cases.

34. It is beyond any doubt or dispute that u/s 149(2) of the Act an insurer, to whom notice of the bringing of any proceeding for compensation has been given, can defend the action on any of the grounds mentioned therein. 35. However, Clause (a) opens with the words "that there has been a breach of a specified condition of the policy", implying that the insurer's defence of the action would depend upon the terms of the policy. The said sub-clause contains three conditions of disjunctive character, namely, the insurer can get away from the liability when (a) a named person drives the vehicle; (b) it was being driven by a person who did not have a duly granted licence; and (c) driver is a person disqualified for holding or obtaining a driving licence.

42. Furthermore, the insurance company with a view to avoid its liabilities is not only required to show that the conditions laid down u/s 149(2)(a) or (b) are satisfied but is further required to establish that there has been a breach on the part of the insured. By reason of the provisions contained in the 1988 Act, a more, extensive remedy has been conferred upon those who have obtained judgment against the user of a vehicle and after a certificate of insurance is delivered in terms of Section 147(3) a third party has obtained a judgment against any person insured by the policy in respect of a liability required to be covered by Section 145, the same must be satisfied by the insurer, notwithstanding that the insurer may be entitled to avoid or to cancel the policy or may in fact have done so. The same obligation applies in respect of a judgment against a person not insured by the policy in respect of such a liability, but who would have been covered if the policy had covered the liability of all persons, except that in respect of liability for death or bodily injury.

43. Such a breach on the part of the insurer must be established by the insurer to show that not only the insured used or caused or permitted the vehicle to be used in breach of the Act but also that the damage he suffered flowed from the breach.

44. Under the Motor Vehicles Act, holding of a valid driving licence is one of the conditions of contract of insurance. Driving of a vehicle without a valid licence is an offence. However the question herein is whether a third party involved in an accident is entitled to the amount of compensation granted by the Motor Accidents Claims Tribunal although the driver of the vehicle at the relevant time might not have a valid driving licence but would be entitled to recover the same

from the owner or driver thereof.

45. It is trite that where the insurers relying upon the violation of provisions of law by the assured takes an exception to pay the assured or a third party, they must prove a wilful violation of the law by the assured. In some cases violation of criminal law, particularly, violation of the provisions of the Motor Vehicles Act may result in absolving the insurers but, the same may not necessarily hold good in the case of a third party. In any event, the exception applies only to acts done intentionally or "so recklessly as to denote that the assured did not care what the consequences of his act might be".

59. A bare perusal of the provisions of Section 149 of the Act leads to only one conclusion that usual rule is that once the assured proved that the accident is covered by the compulsory insurance clause, it is for the insurer to prove that it comes within an exception.

62. The proposition of law is no longer *res integra* that the person who alleges breach must prove the same. The insurance company is, thus, required to establish the said breach by cogent evidence. In the event, the insurance company fails to prove that there has been breach of conditions of policy on the part of the insured, the insurance company cannot be absolved of its liability.

63. Apart from the above, we do not intend to lay down anything further i.e. degree of proof which would satisfy the aforementioned requirement inasmuch as the same would indisputably depend upon the facts and circumstances of each case. It will also depend upon the terms of contract of insurance. Each case may pose different problem which must be resolved having to a large number of factors governing the case including conduct of parties as regard duty to inform, correct disclosure, suppression, fraud on the insurer etc. It will also depend upon the fact as to who is the owner of the vehicle and the circumstances in which the vehicle was being driven by a person having no valid and effective licence. No hard and fast rule can therefore be laid down. If in a given case there exists sufficient material to draw an adverse inference against either the insurer or the insured, the Tribunal may do so. The parties alleging breach must be held to have succeeded in establishing the breach of conditions of contract of insurance on the part of the insured by discharging its burden of proof. The Tribunal, there cannot be any doubt, must arrive at a finding on the basis of the materials available on records.

64. In the aforementioned backdrop, the provisions of sub-sections (4) and (5) of Section 149 of the Motor Vehicles Act, 1988 may be considered as the liability of the Insurer to satisfy the decree at the first instance.

66. The liability of the insurer is a statutory one. The liability of the insurer to satisfy the decree passed in favour of a third party is also statutory.

74. The submissions made on behalf of the petitioner may now be noticed. According to the learned counsel, sub-section (4) of Section 149 deals with the

situation where the insurer in the policy 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) of Section 149 and in that view of the matter no liability is covered for driving of a vehicle without licence or fake licence. The submission ignores the plain and unequivocal expression used in sub-section (2) of Section 149 as well as the proviso appended thereto. With a view to construe a statute the scheme of the Act has to be taken into consideration. For the said purpose the entire Act has to be read as a whole and then chapter by chapter, section by section and word by word.

75. Proviso appended to sub-section (4) of Section 149 is referable only to sub-section (2) of Section 149 of the Act. It is an independent provision and must be read in the context of Section 96(4) of the Motor Vehicles Act, 1939. Furthermore, it is one thing to say that the insurer will be entitled to avoid its liability owing to breach of terms of a contract of insurance but it is another thing to say that the vehicle is not insured at all. If the submission of the learned counsel for the petitioner is accepted, the same would render the proviso to sub-section (4) as well as sub-section (5) of Section 149 of the Act otiose, nor any effective meaning can be attributed to the liability clause of the insurance company contained in sub-section (1). The decision in *New India Assurance Co., Shimla Vs. Kamla and Others etc. etc.*, has to be read in the aforementioned context.

76. Sub-section (5) of Section 149 which imposes a liability on the insurer must also be given its full effect. The insurance company may not be liable to satisfy the decree and, therefore, its liability may be zero but it does mean that it did not have initial liability at all. Thus, if the insurance company is made liable to pay any amount, it can recover the entire amount paid to the third party on behalf of the assured. If this interpretation is not given to the beneficent provisions of the Act having regard to its purport and object, we fail to see a situation where beneficent provisions can be given effect to Sub-section (7) of Section 149 of the Act, to which pointed attention of the Court has been drawn by the learned counsel for the petitioner, which is in negative language may now be noticed. The said provision must be read with sub-section (1) thereof. The right to avoid liability in terms of sub-section (2) of Section 149 is restricted as has been discussed hereinbefore. It is one thing to say that the insurance companies are entitled to raise a defence but it is another thing to say that despite the fact that its defence has been accepted having regard to the facts and circumstances of the case, the Tribunal has power to direct them to satisfy the decree at the first instance and then direct recovery of the same from the owner. These two matters stand apart and require contextual reading.

Then they recorded the following conclusions:

96. It is, therefore, evident from the discussions made hereinbefore that the liability of the insurance company to satisfy the decree at the first instance and to recovery the awarded amount from the owner or driver thereof has been

holding the field for a long time.

97. Apart from the reasons stated hereinbefore the doctrine of stare decisis persuades us not to deviate from the said principle.

98. It is well-settled rule of law and should not ordinarily be deviated from....

99. We may, however, hasten to add that the Tribunal and the court must, however, exercise their jurisdiction to issue such a direction upon consideration of the facts and circumstances of each case and in the event such a direction has been issued despite arriving at a finding of fact to the effect that the insurer has been able to establish that the insured has committed a breach of 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 realise the awarded amount from the owner or driver of the vehicle, as the case may be, in execution of the same award having regard to the provisions of Sections 165 and 168 of the Act. However, in the event, having regard to the limited scope of inquiry in the proceedings before the Claims Tribunal it had not been able to do so, the insurance company may initiate a separate action therefore against the owner or the driver of the vehicle or both, as the case may be. Those exceptional cases may arise when the evidence becomes available to or comes to the notice of the insurer at a subsequent stage or for one reason or the other, the insurer was not given opportunity to defend at all. Such a course of action may also be resorted to when a fraud or collusion between the victim and the owner of the vehicle is detected or comes to the knowledge of the insurer at a later stage.

100. Although, as noticed hereinbefore, there are certain special leave petitions wherein the persons having (sic. driving) the vehicles at the time when the accidents took place did not hold any licence at all, in the facts and circumstances of the case, we do not intend to set aside the said awards. Such awards may also be satisfied by the petitioners herein subject to their right to recover the same from the owners of the vehicles in the manner laid down therein. But this order may not be considered as a precedent.

101. Although in most of the cases, we have not issued notices in view of the fact that the question of law has to be determined; we have heard counsel for the parties at length at this stage.

Then they recorded summary findings at Para 102. The relevant clauses being:

(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.

(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 of 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 insurer u/s 149(2) of the Act.

(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 from 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 there under 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.

27. The Apex Court in the case of National Insurance Co. Ltd. Vs. Baljit Kaur and Others, while dealing with the question whether the gratuitous passenger is included in the word "any person" as used in Section 147 of the Act held as under:-

20. It is thereafter, manifest that in spite of the amendment of 1994, the effect of the provision contained in Section 147 with respect to persons other than the owner of the goods or his authorised representative remains the same. Although the owner of the goods or his authorised representative would now be covered by the policy of insurance in respect of a goods vehicle, it was not the intention of the legislature to provide for the liability of the insurer with respect to passengers, who were neither contemplated at the time the contract of insurance was entered into, nor any premium was paid to the extent of the benefit of insurance to such category of people.

21. The upshot of the aforementioned discussion is that instead and in place of the insurer the owner of the vehicle shall be liable to satisfy the decree. The question, however, would be as to whether keeping the view the fact that the law was not clear so long such a direction would be fair and equitable. We do not think so. We, therefore, clarify the legal position which shall have prospective effect. The Tribunal as also the High Court had proceeded in terms of the decisions of this Court in Satpal Singh, 2000 ACJ(SC). The said decision has been overruled only in Asha Rani, 2003 ACJ 1 (SC). We, therefore, are of the opinion that the interest of justice will be sub served if the appellant herein is directed to satisfy the awarded amount in favour of the claimant if not already satisfied and recover the same from the owner of the vehicle. For the purpose of such recover, it would not be necessary for the insurer to file a separate suit but it may initiate a proceedings before the executing court as if the dispute between the insurer and the owner was the subject matter of determination before the Tribunal and

the issue is decided against the owner and in favour of the insurer. We have issued the aforementioned directions having regard to the scope and purport of Section 168 of the Motor Vehicles Act, 1988 in terms whereof it is not only entitled to determine the amount of claim as put forth by the claimant for recovery thereof from the insurer, owner or driver of the vehicle jointly or severally but also the dispute between the insurer on the one hand and the owner or driver of the vehicle involved in the accident inasmuch as can be resolved by the Tribunal in such a proceedings.

28. The Apex Court in the case of Deddappa and Others Vs. The Branch Manager, National Insurance Co. Ltd., was dealing the question regarding the liability of the insurance company, when they had canceled the insurance policy on the ground of non-payment of premium on account of dishonour of the cheque. Whether they are still liable to pay to the third party. It is held as under:-

24. We are not oblivious of the distinction between the statutory liability of the insurance company vis-à-vis a third party in the context of Sections 147 and 149 of the Act and as liabilities in other cases. But the same liabilities arising under a contract of insurance would have to be met if the contract is valid. If the contract of insurance has been cancelled and all concerned have been intimated thereabout, we are of the opinion, the insurance company would not be liable to satisfy the claim.

25. A beneficial legislation as is well known should not be construed in such manner so as to bring within its ambit a benefit which was not contemplated by the legislature to be given to the party. In Regional Director ESI Corpn. V. Ramanuja Match Industries this Court held

10. We do not doubt that beneficial legislations should have liberal construction with a view to implementing the legislative intent but where such beneficial has a scheme of its own there is no warrant for the Court to travel beyond the scheme and extend the scope of the statute on the pretext of extending the statutory benefit to those who are not covered by the scheme.

We, therefore, agree with the opinion of the High Court.

26. However, as the appellant hails from the lowest strata of society, we are of the opinion that in a case of this nature, we should, in exercise of our extraordinary jurisdiction under Article 142 of the Constitution of India, direct Respondent 1 to pay the amount of claim to the appellants herein and recover the same from the owner of the vehicle viz. Respondent 2, particularly in view of the fact that no appeal was preferred by him We direct accordingly.

29. The Apex Court in the case of Oriental Insurance Co. vs. Zaharulnisha & Ors reported in AIR 2008 SCW 3251, was dealing with the case where the driver of the vehicle had no valid license at the time of accident and thus breach of terms of the policy u/s 149 (2) was clearly established. However, the insurance company was directed to pay the amount to the third party and recover it from

the Insurance Company. In that context, it held as under:-

16. ...However, the question herein is whether a third party involved in an accident is entitled to the amount of compensation granted by the Motor Accidents Claims Tribunal although the driver of the vehicle at the relevant time might not have a valid driving licence but would be entitled to recover the same from the owner or driver thereof. It is trite that where the insurer, relying upon the provisions of violation of law by the assured, take an exception to pay the assured or a third party, they must prove a wilful violation of the law by the assured. In some cases, violation of criminal law, particularly violation of the provisions of the MV ACT, may result in absolving the insurer but, the same may not necessarily hold good in the case of a third party. In any event, the exception applies only to acts done intentionally or "so recklessly as to denote that the assured did not care what the consequences of his act might be". The provisions of sub-section (4) and (5) of Section 149 of the MV Act may be considered as to the liability of the insurer to satisfy the decree at the first instance. The liability of the insurer is a statutory one. The liability of the insurer to satisfy the decree passed in favour of a third party is also statutory.

18. In the light of the above-settled proposition of law, the appellant-insurance company cannot be held liable to pay the amount of compensation to the claimants for the cause of death Shukurullah in road accident which had occurred due to rash and negligent driving of scooter by Ram Surat who admittedly had no valid and effective licence to drive the vehicle on the day of accident. The scooterist was possessing driving licence of driving HMV and he was driving totally different class of vehicle which act of his is in violation of Section 10(2) of the MV Act.

19. In the result, the appeal is allowed to the limited extent and it is directed that the appellant-insurance company though not liable to pay the amount of compensation, but in the nature of this case it shall satisfy the award and shall have the right to recover the amount deposited by it along with interest from the owner of the vehicle, viz. respondent No. 8, particularly in view of the fact that no appeal was preferred by him nor has he chosen to appear before this Court to contest this appeal. This direction is given in the light of the judgments of this Court in National Insurance Co. Ltd. Vs. Baljit Kaur and Others, and Deddappa and Others Vs. The Branch Manager, National Insurance Co. Ltd.,

30. Sri. S. P. Shankar, learned senior counsel submitted that there are 19 decisions of the Apex Court, where under the insurer has been directed to pay and recover the amount awarded from the insured. Even if the insurer has proved the permitted defence u/s 149 (2) of the Act, since from the last 53 years, the Supreme Court has been consistently directing the insurer to pay and recover. The doctrine of stare-decisis is attracted. The law declared by the Apex Court in Swaran Singh's Case construing the scope and purport of Sections 149. (2) and 149(7) is binding on all Courts and cannot be ignored in view of several authorities which has followed the said judgment. An interpretation placed by the

Apex Court on Sections 149(2) and 149(7) is at peace with the scheme of compulsory insurance and main purpose of such compulsory insurance. There is no need to deviate from the theory of pay and order. Wording of Section 149(7) has led to certain doubts since the purpose of Section 149(2) is served by Section 149(1) effectively and parliament be better advised to delete Section 149(7).

31. In support of his contention he relied on the judgment of the Apex Court in Lt. Col. P.R. Chaudhary (Retd.) Vs. Municipal Corporation of Delhi, where it was held as under:

6. We find ourselves unable to subscribe to the reasoning of the high Court and the views expressed by it. Law as interpreted by this Court cannot be brushed aside by saying to the effect that it is not in conformity with the statutory provisions. The Law laid down by this Court is explicit and admits of no doubt. For the purpose of arriving at the rateable value the basic principle is the annual rent which the owner of the premises may reasonably expect to get if the premises were let out to a hypothetical tenant. It would depend on the size, situation, locality and condition of the premises and the amenities provided therein. All these and other relevant factor would have to be followed in determining the rateable value. That, However, cannot be in excess of the standard rent which would be the upper limit. But then considering the runaway prices of land and building materials if the standard rent were to be the measure of rateable value there would be a huge disparity between rateable value of old premise and those recently constructed though they may be similar and situated in the same or even adjoining locality. Considering the same and similar services which are provided by the local authority if there is vast disparity between the rateable value of the old premises and the new premises that would be wholly illogical and irrational. To avoid such a situation Dr. Balbir Singh Case laid the principles which have to be followed in arriving at the rateable value of the newly constructed premises. Of course, rateable value cannot be the same but then at the same time a wide disparity would certainly be irrational, unreasonable and unfair which situation could be avoided by following the principles laid down by this Court otherwise the rateable value recording wide disparity would be struck down. There cannot be any ambiguity as to the principles laid down by this Court in arriving at the rateable value.

32. He also relied on the judgment of the Apex Court in Suganthi Suresh Kumar Vs. Jagdeeshan, wherein at Paragraph 9 it has been held as under:-

It is impermissible for the High Court to overrule the decision of the Apex Court on the ground that Supreme Court laid down the legal position without considering any other point. It is not only a matter of discipline for the High Courts in India. It is the mandate of the Constitution as provided in Article 141 that the law declared by the Supreme Court shall be binding on all courts within the territory of India. It was pointed out by this Court in Anil Kumar Neotia and Others Vs. Union of India (UOI) and Others, that the High Court cannot question

the correctness of the decision of the Supreme Court even though the point sought before the High Court was not considered by the Supreme Court.

33. Again the Apex Court in the case of Industrial Finance Corporation of India Ltd. Vs. The Cannanore Spinning and Weaving Mills Ltd. and Others, at paragraph 38 has held as under:-

38. A fatal attempt has been made during the course of hearing that the decision of the Punjab National Bank(supra) may not have a binding effect by reason of this being an order only and not a detailed judgment. We are, however, unable to record our concurrence therewith.

34. The Apex Court in the case of Official Liquidator Vs. Dayanand and Others, at paragraph 90 has held as under:-

We are distressed to note that despite several pronouncements on the subject, there is substantial increase in the number of cases involving violation of the basics of judicial discipline. The learned Single Judges and Benches of the High Courts refuse to follow and accept the verdict and law laid down by coordinate and even larger Benches by citing minor difference in the facts as the ground for doing so. Therefore, it has become necessary to reiterate that disrespect to the constitutional ethos and breach of discipline have grave impact on the credibility of judicial institution and encourages chance litigation. It must be remembered that predictability and certainty is an important hallmark of judicial jurisprudence developed in this country in the last six decades and increase in the frequency of conflicting judgments of the superior judiciary will do incalculable harm to the system inasmuch as the Courts at the grass roots will not be able to decide as to which of the judgments lay down the correct law and which one should be followed.

35. From the judgment in Chaudhary's case it is clear that the High Court cannot brush aside the judgment of the Supreme Court when law is interpreted saying that it is not in conformity with the statutory provisions. Once the Apex Court lays down law in explicit terms and admits of no doubt, the High Court is bound to follow the said law. In Suganthi Suresh Kumar's case, the Apex Court has held that the High Court cannot over-rule the decision of the Apex Court on the ground that the Supreme Court laid down the legal position without considering any other point. The law laid down by the Apex Court is binding on all Courts within the territory of India by virtue of Article 141 and the High Courts cannot question the correctness of the decision of the Supreme Court. In Industrial Finance Corporation of India Ltd. Vs. The Cannanore Spinning and Weaving Mills Ltd. and Others, the Apex Court held that a judgment of the Supreme Court do not cease to be a binding precedent as it is a short order and not a detailed judgment. In Official Liquidator Vs. Dayanand and Others, the Apex Court has held that "there should be predictability and certainty in the judicial functioning and therefore, the law laid down by the Apex Court cannot be ignored.

36. There cannot be any quarrel about these propositions of law. If the Apex

Court declares the law, it is binding on all Courts in India by virtue of Article 141. Therefore, the question is what is that the Supreme Court has laid down in the aforesaid judgments?

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37. Article 141 of the Constitution unequivocally indicates that the law declared by the Supreme Court shall be binding on all Courts within the territory of India. The aforesaid Article empowers the Supreme Court to declare the law. But what is binding is the ratio of the decision and not any finding of facts. It is now well settled that a decision is an authority for what it decides and not what can logically be deduced there from. The ratio decedendi of the judgment is its reasoning which can be deciphered only upon reading the same in its entirety. The ratio decedendi of a case or the principles and reasons on which it is based is distinct from the relief finally granted or the manner adopted for its disposal. The only thing in a judge's decision binding as an authority upon a subsequent judge is the principle upon which the case was decided. The task of finding the principle is fraught with difficulty as without an investigation into the facts, it cannot be assumed whether a similar direction must or ought to be made. It is the principle found out upon a reading of a judgment as a whole, in the light of the questions before the Court that forms the ratio and not any particular word or sentence. A judgment of the Court has to be read in the context of questions which arose for consideration in the case in which the judgment was delivered. Observations must be read in the context in which they appear. A judgment is not to be read as a statute. To interpret words, phrases and provisions of a statute, it may become necessary for judges to embark into lengthy discussions but the discussion is meant to explain and not to define. The ratio decidendi of a judgment has to be found out only on reading the entire judgment. In fact, the ratio of the judgment is what is set out in the judgment itself. The answer to the question would necessarily have to be read in the context of what is set out in the judgment and not in isolation. In case of any doubt as regards any observations, reasons and principles, the other part of the judgment has to be looked into. By reading a line here and there from the judgment, one cannot find out the entire ratio decidendi of the judgment. Keeping the aforesaid principle in mind, we shall look at the judgments of the Apex Court.

38. Relying on Para 16 of the judgment in *British India General Insurance Co. Ltd. Vs. Captain Itbar Singh and Others*, it was contended that the Supreme Court has laid down the law that the insurer has to pay and recover the compensation from the insured. The judgment of the Supreme Court cannot be read in isolation. It has to be read in its entirety. Therefore let us see what the Supreme Court has laid down in the said judgment. That was a case arising under the Old Act where Section 96(2) which is in paramateria with Section 149(2) fell for consideration. Further, it also considered the effect of Sub-Section (6) of Section 96 which is paramateria with Sub-Section (7) of Section 149. In Paragraph 5 it has held that apart from the statutes, an insurer has no right to

be made a party to an action for compensation by the injured person against the insured causing the injury. Sub-Section (2) of Section 96 however gives him a 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 raised is, what are the defence that Sub-Section (2) makes available to an insurer. That clearly is a question of interpretation of Sub-Section. The language of sub-section (2) is perfectly plain and admits of no doubt or confusion. The Insurer to whom the requisite notice of the action has been given (shall be entitled to be made a party thereof) and to defend the action on any of the grounds mentioned in the aforesaid provision. The ground on which the action could be defended are enumerated. 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.

39. Sub-section (6) also indicates clearly how sub-sec.(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-s(1) otherwise than in the manner of avoiding liability provided for in sub-s. (2) is by successfully raising 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-s. (6) clearly contemplates that he cannot take any defence not mentioned in sub-s. (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-s. (2). That is prohibited by sub-s. (6). Therefore, the insurer cannot avoid his liability except by establishing such defences. Elaborating the same, it was held that 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 be urged by him and there is no 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 opportunity 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 provisions to Sub-Section (3) and under Sub-Section (4) recover it from the assured. Therefore, they held that sub-s. (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.

40. In Paragraph 16, on which reliance is placed, what the Apex Court has held is 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 the Courts to add to those grounds and therefore to the statute for reasons of hardship. They were 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-s. (3) and under sub-s. (4) recover it from the assured.

41. Therefore, it is clear that the Supreme Court has categorically held that the insurer has a right to defend an action under the grounds mentioned u/s 149(2) of the Act. Except those grounds, he cannot defend the action on any other grounds. If he wants to defend on any other grounds then he should reserve that right in the Insurance Policy. Only then he gets a right to defend the action in the name of the assured on such grounds. However, if he has been made to pay more than what he is contracted to pay under the contract by virtue of Sub-Sections(3) and (4) under the Old Act he is bound to pay the injured the amount awarded and claim the excess amount so awarded. Therefore, only in cases where he has contracted to pay less and he is made to pay more than what he has contracted to pay, he has to pay and he has right to recover the excess paid by virtue of express statutory provisions contained in the statute at Sub-Sections(3) and (4). If he is not liable to pay, under the contract any amount at all, because of breach committed by the insurer not only he is not liable to indemnify the insured, he is also not liable to pay the injured-3rd party. Therefore, the contention that in Para 16 of the aforesaid judgment, the Supreme Court has declared the law that even in cases where the Insurance Company establishes the breach u/s 149(2), the Insurance Company has to pay to the third party and recover it from the insured is not forthcoming. It is a case of misreading of the said judgment.

42. The next judgment on which reliance is placed is Skandia Insurance Co. Ltd. Vs. Kokilaben Chandravadan and Others, Reliance is placed on the observations of the Supreme Court in Para 13 wherein it is observed as follows:-

Why then as the legislature insisted on a person using a motor vehicle in a public place to insure against third party risk by enacting Section 94. Surely the obligation has not been imposed in order to promote the business of the insurers engaged in the business of automobile insurance. The provision has been inserted in order to protect the members of the community travelling in vehicles or using the roads from the risk attendant upon the user of motor vehicles on the roads. The law may provide for compensation to victims of the accidents who sustain injuries in the course of an automobile accident or compensation to the dependents of the victims in the case of a fatal accident. However, such protection would remain a protection on paper unless there is a guarantee that the compensation awarded by the Courts would be recoverable from the persons held liable for the consequences of the accident. A Court can only pass an award or a decree. It cannot ensure that such an award or decree results in the amount awarded being actually recovered, from the person held liable who may not have

the resources. The exercise undertaken by the law Courts would then be an exercise in futility. And the outcome of the legal proceedings which by the very nature of things involve the time cost and money cost invested from the scarce re-sources of the community would make a mockery of the injured victims, or the dependents of the deceased victim of the accident, who themselves are obliged to incur not inconsiderable expenditure of time, money and energy in litigation. To overcome this ugly situation the legislature has made it obligatory that no motor vehicle shall be used unless a Hard party insurance is in force. To use the vehicle without the requisite third party insurance being in force is a penal offence. The legislature was also faced with another problem The insurance policy might provide for liability walled in by conditions which may be specified in the contract of policy. In order to make the protection real, the legislature has also provided that the judgment obtained shall not be defeated by the incorporation of exclusion clauses other than those authorised by Section 96 and by providing that except and save to the extent permitted by Section 96 it will be the obligation of the Insurance Company to satisfy the judgment obtained against the persons insured against third party risks. (vide Section 96). In other words, the legislature has insisted and made it incumbent on the user of a motor vehicle to be armed with an insurance policy covering third party risks which is in conformity with the provisions enacted by the legislature. It is so provided in order to ensure that the injured victims of automobile accidents or the dependents of the victims of fatal accidents are really compensated in terms of money and not in terms of promise. Such a benign provision enacted by the legislature having regard to the fact that in the modern age the use of motor vehicles notwithstanding the attendant hazards, has become an inescapable fact of life, has to be interpreted in a meaningful manner which serves rather than defeats the purpose of the legislation. The provision has therefore to be interpreted in the twilight of the aforesaid perspective.

43. It was held that Section 96(2)(b)(ii) extends immunity to the Insurance Company if a breach is committed of the condition excluding driving by a named person or persons or by any person who is not fully licensed, or by any person who has been disqualified for holding or obtaining a driving licence during the period of disqualification. The expression "breach" is of great significance. The dictionary meaning of "breach" is "infringement or violation of a promise or obligation". It is therefore abundantly clear that the insurer will have to establish that the insured is guilty of an infringement or violation of a promise that a person who is duly licensed will have to be in charge of the vehicle. It is only when the insured himself places the vehicle in charge of a person who does not hold a driving licence, that it can be said that he is "guilty" of the breach of the promise that the vehicle will be driven by a licensed driver. It must be established by the Insurance Company that the breach was on the part of the insured and that it was the insured who was guilty of violating the promise or infringement of the contract. Unless the insured is at fault and is guilty of a breach the insurer cannot escape from the obligation to indemnify the insured

and successfully contend that he is exonerated having regard to the fact that the insured committed a breach of his promise. Not when some mishap occurs by some mis-chance. When the insured has done everything within his power inasmuch as he has engaged a licensed driver and has placed the vehicle in charge of a licensed driver with the express or implied mandate to drive himself it cannot be said that the insured is guilty of any breach. And it is only in case of a breach or a violation of the promise on the part of the insured that the insurer can hide under the umbrella of the exclusion clause. It is not the contract of insurance which is being interpreted. It is the statutory provision of defining the conditions of exemption, which is being interpreted. They must be interpreted in the spirit in which the same have been enacted accompanied by an anxiety to ensure that the protection is not nullified by the backward looking interpretation which serves to defeat the provision rather than to fulfil its life-aim. What the legislature has given, the Court cannot deprive it by way of an exercise in interpretation when the view which renders the provision potent is equally plausible as the one which renders the provision impotent.

44. Therefore, they proceeded to hold that if the insurer is unable to prove the breach and even if the vehicle is driven at a relevant point of time by the driver without a valid licence, if that breach is not attributable to the insured, the liability of the insurer cannot be avoided. It is clear from the aforesaid statement of law what the Supreme Court has laid down is, notwithstanding any term in the contract between the insurer and the insured, the insurer can avoid the liability only on making out the breach of the conditions stipulated in Section 149(2). Even if there is a breach of the conditions of the policy, which is not statutorily recognised u/s 149(2) still the insurer has to pay to the third party and he cannot avoid the liability. Similarly, the breach of the terms of the policy has to be directly attributable to the insured. It is only then the insurer can avoid the liability. Therefore, it follows that the insurer can avoid the liability only if he establishes the breach as contemplated u/s 149(2) of the Act. Therefore, in this case also the Apex Court has not held that even if the breach as contemplated u/s 149(2) is established by the insurer still he has to pay the money to the third party and recover from the insured.

45. In *Kashiram Yadav and Another Vs. Oriental Fire and General Insurance Co. and Others*, the Supreme Court held that Sub-Section (2) of Section 96 provides exception to the liability of the insurer. Sub-sec. 2(b) of sec. 96 provides that the insurer is not liable to satisfy the judgments against the persons insured if there has been a breach of a specified condition of the policy. Unless the insured is at fault and is guilty of a breach of the condition, the insurer cannot escape from the obligation to indemnify the insured.

46. In *New Indian Assurance Co. Ltd. Vs. Mandar Madhav Tambe and others*, the Apex Court held that apart from the fact that a learner having such a licence would not be regarded as duly licensed, the aforesaid clause in the insurance policy makes it abundantly clear that the insurance company, in the event of an

accident, would be liable only if the vehicle was being driven by a person holding a valid driving licence or a permanent driving licence "other than a learner's licence". This clause specifically provides that even if respondent No. 3 had held a current learner's licence at the time of the accident, the appellant would not be liable.

47. In the case of *Sohan Lal Passi Vs. P. Sesh Reddy and others*, it was held that, the expression "breach" occurring in Section 96(2)(b) means infringement or violation of a promise or obligation. As such the insurance company will have to establish that the insured was guilty of an infringement or violation of a promise. The insurer has also to satisfy the Tribunal or the Court that such violation or infringement on the part of the insured was willful. Unless it is established on the materials on record that it was the insured who had willfully violated the condition of the policy by allowing a person not duly licensed to drive the vehicle when the accident took place, the insurer shall be deemed to be a judgment-debtor in respect of the liability in view of sub-section (1) of Section 96 of the Act.

48. In the case of *United India Insurance Co. Ltd. Vs. Gian Chand and others*, , the Apex Court held that, the first line of cases consists of fact situations wherein the insured are alleged to have committed breach of the condition of insurance policy, which required them not to permit the vehicle to be driven by an unlicensed driver. Such a breach is held to be a valid defence for the insurance company to get exonerated from meeting the claims of third parties who suffer on account of vehicular accidents which may injure them personally or which may deprive them of their bread-winner on account of such accidents caused by the insured vehicles. The other line of cases deals with the insured owners of offending motor vehicles that cause such accidents wherein the insured owners of the vehicles do not themselves commit breach of any such condition and hand over the vehicles for driving to licensed drivers who on their own and without permission, express or implied, of the insured, hand over vehicles or act in such a way that the vehicles get available to unlicensed drivers for being driven by the latter and which get involved in vehicular accidents by the driving of such unlicensed drivers. In such cases the insurance company cannot get benefit of the exclusionary clause and will remain liable to meet the claims of third parties for accidental injuries, whether fatal or otherwise.

49. In the case of *New India Assurance Co., Shimla Vs. Kamla and Others etc.* etc., it was held that, Section 149(2) of the Act says that notice regarding the suit or other legal proceedings shall be given to the insurer if such insurer is to be fastened with such liability. The purpose of giving such notice is to afford the insurer to be made a party in the proceedings for defending the action on any one of the grounds mentioned in the sub-section. A reading of the proviso to sub-section (4) as well as the language employed in sub-section (5) would indicate that they are intended to safeguard the interest of an insurer who otherwise has no liability to pay any amount to the insured but for the provisions contained in

Chapter XI of the Act. This means, the insurer has to pay to the third parties only on account of the fact that a policy of insurance has been issued in respect of the vehicle, but the insurer is entitled to recover any such sum from the insured if the insurer were not otherwise liable to pay such sum to the insured by virtue of the conditions of the contract of insurance indicated by the policy. When a valid insurance policy has been issued in respect of a vehicle as evidenced by a certificate of insurance the burden is on the insurer to pay to third parties, whether or not there has been any breach or violation of the policy conditions. But the amount so paid by the insurer to third parties can be allowed to be recovered from the insured if as per the policy conditions the insurer had no liability to pay such sum to the insured.

50. In the case of National Insurance Co. Ltd., Chandigarh Vs. Nicolletta Rohtagi and Others, , the Apex Court held that, after the insurer has been made a party to a case or claim, the question arises what are the defences available to it under the statute. The language employed in enacting sub-section (2) of Section 149 appears to be plain and simple and there is no ambiguity in it. It shows that when an insurer is impleaded and has been given notice of the case, he is entitled to defend the action on grounds enumerated in the sub-section, namely, sub-section (2) of Section 149 of 1988 Act, and no other ground is available to him. Sub-section (7) of Section 149 of 1988 Act clearly indicates in what manner sub-section (2) of Section 149 has to be interpreted. Sub-section (7) of Section 149 provides that 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. The expression "mariner" employed in sub-section (7) of Section 149 is very relevant which means an insurer can avoid its liability only in accordance with what has been provided for in sub-section (2) of Section 149. It, therefore, shows that the insurer can avoid its liability only on the statutory defences expressly provided in sub-section (2) of Section 149 of 1988 Act.

51. The next judgment on which greater emphasis is laid is in the case of National Insurance Co. Ltd. Vs. Swaran Singh and Others, the judgment rendered by a Bench consisting of three Judges. As is clear from the said judgment, the Court was interpreting Section 149 (2)(a)(ii) vis-?-vis provision appended to sub-section (4) and (5) of the Motor Vehicles Act, 1988. In fact in para (2) the Apex Court has made it very clear that in view of the fact that in the petitions before them the pure question of law is involved, it is not necessary to advert to the individual facts pertaining to each matter. Thereafter, they dealt with the defence raised by the Insurance Company in the claim petitions purporting to be in terms of Section 149(2)(a)(ii) of the Act. Then, they have referred to the relevant statutory provisions of the Act. Then they have referred to the various judgments of the Apex Court till date. Then at paragraph 33 they

formulated the question as to whether an insurer can avoid its liability in the event it raises a defence as envisaged in sub-section (2) of Section 149 of the Act corresponding to Sub-Section (2) of Section 96 of the Old Act. After noticing the various judgments and interpreting such provisions, they held that it is beyond any doubt or dispute that u/s 149(2) of the Act an insurer, to whom notice of the bringing of any proceeding for compensation has been given, can defend the action on any of the grounds mentioned therein. However, clause (a) opens with the words "that there has been a breach of a specified condition of the policy", implying that the insurer's defence of the action would depend upon the terms of the policy. The said sub-clause contains three conditions of disjunctive character. After referring to them and also to Sections 3 and 15 of the Act, it was held at Paragraph 42 that when the insurance company with a view to avoid its liabilities is not only required to show that the conditions laid down u/s 149(2)(a) or (b) are satisfied but is further required to establish that there has been a breach on the part of the insured. By reason of the provisions contained in the 1988 Act, a more extensive remedy has been conferred upon those who have obtained judgment against the user of a vehicle and after a certificate of insurance is delivered in terms of Section 147(3) a third party has obtained a judgment against any person insured by the policy in respect of a liability required to be covered by Section 145, the same must be satisfied by the insurer, notwithstanding that the insurer may be entitled to avoid or to cancel the policy or may in fact have done so. The same obligation applies in respect of a judgment against a person not insured by the policy in respect of such a liability, but who would have been covered if the policy had covered the liability of all persons, except that in respect of liability for death or bodily injury. Such a breach on the part of the insurer must be established by the insurer to show that not only the insured used or caused or permitted the vehicle to be used in breach of the Act but also that the damage he suffered flowed from the breach. Where the insurers relying upon the violation of provisions of law by the assured takes "an exception to pay the assured or a third party, they must prove a wilful violation of the law by the assured. In some cases violation of criminal law, particularly, violation of the provisions of the Motor Vehicles Act may result in absolving the insurers but, the same may not necessarily hold good in the case of a third party. In any event, the exception applies only to acts done intentionally or "so recklessly as to denote that the assured did not care what the consequences of his act might be".

52. Then they have referred to the judgment in Sohan Lal Passi Vs. P. Sesh Reddy and others, where the correctness of the judgment in Skandia Insurance Company Limited vs. Kokilaben Chandravadan [1987 ACJ 411(SC)] fell for consideration where it was held the expression "breach" occurring in Section 96(2)(b) means -.infringement or violation of a promise or obligation. As such the insurance company will have to establish that the insured was guilty of an infringement or violation of a promise. The insurer has also to satisfy the Tribunal or the Court that such violation or infringement on the part of the insured was

willful. After referring to the same, it was held that a bare perusal of the provisions of Section 149 of the Act leads to only one conclusion that usual rule is that once the assured proved that the accident is covered by the compulsory insurance clause, it is for the insurer to prove that it comes within an exception. They proceeded to consider the provisions of Sub-Sections (4) and 5 of Section 149 of the Act regarding the liability of the insurer to satisfy the decree at the first instance. It was held that the liability of the insurer is a statutory one. The liability of the insurer to satisfy the decree passed in favour of a third party is also statutory. After referring to the arguments it was held at Paragraph 75 that "Proviso appended to sub-section (4) of Section 149 is referable only to sub-section (2) of Section 149 of the Act. It is an independent provision and must be read in the context of Section 96(4) of the Motor Vehicles Act, 1939. Furthermore, it is one thing to say that the insurer will be entitled to avoid its liability owing to breach of terms of a contract of insurance, but it is another thing to say that the vehicle is not insured at all,; If the submission of the learned counsel for the petitioner is accepted, the same would render the proviso to sub-section (4) as well as sub-section (5) of Section 149 of the Act otiose, nor any effective meaning can be attributed to the liability clause of the insurance company contained in sub-section (1). Sub-section (5) of Section 149 which imposes a liability on the insurer must also be given its full effect. The insurance company may not be liable to satisfy the decree and, therefore, its liability may be zero, but it does mean that it did not have initial liability at all. Thus, if the insurance company is made liable to pay any amount, it can recover the entire amount paid to the third party on behalf of the assured. If this interpretation is not given to the beneficent provisions of the Act having regard to its purport and object, we fail to see a situation where beneficent provisions can be given effect to.

53. Then they referred to Sub-section (7) of Section 149 of the Act which is in negative language. They held that, the said provision must be read with sub-section (1) thereof. The right to avoid liability in terms of sub-section (2) of Section 149 is restricted as has been discussed hereinbefore. It is one thing to say that the insurance companies are entitled to raise a defence, but it is another thing to say that despite the fact that its defence has been accepted having regard to the facts and circumstances of the case, the Tribunal has power to direct them to satisfy the decree at the first instance and then direct recovery of the same from the owner. These two matters stand apart and require contextual reading."

54. Then they went on to decide the various circumstances under which the insurer can avoid the liability. Then they also noticed the various judgments on the point. Then they concluded at Paragraph 96 that "the liability of the Insurance Company to satisfy the decree at the first instance and to recover the awarded amount from the owner or driver thereof has been holding the field for a long time. Apart from the reasons stated hereinbefore the doctrine of stare decisis persuades us not to deviate from the said principle." Then they took note

of certain special leave petitions wherein the persons having (sic driving) the vehicles at the time when the accidents took place did not hold any licence at all. In the facts and circumstances of the case, they did not intend to set aside the said awards. They directed that such awards may also be satisfied by the insurer subject to the right to recover the same from the owners of the vehicles in the manner laid down in the judgment. But explicitly they made it clear that the said order may not be considered as a precedent.

55. It is by relying on the earlier portions at Paragraphs 96 and 97, it was contended that this concept of principle of pay and recover has been holding the field for a long time and the doctrine of stare decisis prevents the Courts from taking a deviation from the said principle. The observations made at Paragraph 100 of the judgment makes it clear if the vehicle is driven by the driver who did not possess the valid driving licence at the time of accident and if the insured had entrusted the vehicle to such person then, there is no liability on the part of the insurer to pay the third party. In such cases no order to pay and recover can be passed because though the Supreme Court in the case before them passed such orders, they made it explicitly clear that the said judgment would not be a precedent in future. Therefore, what is observed in Paragraphs 96 and 97 is to be understood in the context of what is stated in Paragraph 76 where they were considering the concept of pay and recover being confined to Sub-Sections (4) and (5) of Section 149 and therefore, shall not attract to a case of Sub-Section (1) of Section 149 because of Sub-Section (7) of Section 149. In unequivocal terms the Supreme Court in Paragraph 76 has held that the said provision must be read with Sub-Section (1) thereof. And the right to avoid liability in terms of Sub-Section (2) of Section 149 is restricted as has been discussed hereinabove. Therefore the insurer has the right to avoid the liability on any of the grounds mentioned in Sec. 149(2). Once those grounds are established, the liability u/s 149(1) does not exist and Section 149(7) makes that position explicitly clear. If the case does not fall u/s 149(1) (2) or Section 149(7) and falls u/s 149(4) read with Section 149(5) then the settled legal position is even though the insurer is not liable to indemnify the insured to the extent awarded by the Tribunal, and the liability only to the extent covered under the policy, he has to satisfy the award and recover the excess amount from the insured. So this principle of pay and recover is holding the field to cases which fall u/s 149(4) and (5) and not to cases which fall u/s 149(1) read with Section 149(7). In fact reliance is also placed in the very same judgment on the findings in Paragraph 102(x) wherein it is stated that "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." The provision of Section 149(2) read with Sub-Section (7) is interpreted in paragraph 76. Therefore a reading of Paragraph 76 makes it clear that they have

made a distinction between Sub-Sections (5) and Sub-Section (7). Any cases falling under Sub-Section (7) it has to be read along with Section 149(1). Then, as is clear from Paragraph 100, there is no liability. The liability to pay and recover arises when the case falls under Sections 149(4) and (5) read with Section 149(2). It is clear from the next paragraph where they have said that 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."

56. It is also clear from Clause(3) of Paragraph 102 where it is held that "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." Again at Clause(iv) it is made clear that "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." Then in clause(vi) it is made clear that "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 of the condition of driving licence is/ are so fundamental as are found to have contributed to the cause of the accident." Therefore, a reading of the entire judgment keeping in mind the question which arose for consideration before the Apex Court in the said judgment, it is clear that in order to avoid the liability the insurer has to first establish the grounds mentioned in Section 149(2) and further must establish breach of such conditions by the insured. If these two conditions are established, there is no liability on the part of the insured to pay the third party. However, when the case falls u/s 149(4) and (5) though under the contract he is not liable to pay the amount awarded to the third party by virtue of the statutory liability imposed on him u/s 149(1) he has to pay and because of the provisions u/s 149(4) and (5), he can recover excess amount from the insured.

57. The Apex Court held that "A bare perusal of the provisions of Section 149 of the Act leads to only one conclusion that usual rule is that once the assured proved that the accident is covered by the compulsory insurance clause, it is for the insurer to prove that it comes within an exception. The proposition of law is no longer res integra that the person who alleges breach must prove the same. The insurance company is, thus, required to establish the said breach by cogent evidence. In the event, the insurance company fails to prove that there has been

breach of conditions of policy on the part of the insured, the insurance company cannot be absolved of its liability. The liability of the insurer is a statutory one. The liability of the insurer to satisfy the decree passed in favour of a third party is also statutory.

58. In fact, how this case has been understood by the Supreme Court subsequently is clear from the judgment of the Apex Court in *Oriental Insurance Company vs. Zaharulnisha and others* [AIR 2008 SCW 3251] wherein after referring to the aforesaid law laid down in *Swaran Singh's* case, in answering the question whether the third party involved in an accident is entitled to the amount of compensation granted by the Motor Accident Claims Tribunal although the driver of the vehicle at the relevant time might not have a valid driving licence but would be entitled to recover the same from the owner or the driver thereof, it has held that it is trite that where the insurer relying upon the provisions of violation of law by the assured, take an exception to pay to the assured or a third party, they must prove a wilful violation of the law by the assured. The exception applies only to acts done intentionally or "so recklessly as to denote that the assured did not care what the consequences of his act might be". The provisions of sub-section (4) and (5) of Section 149 of the MV Act may be considered as to the liability of the insurer to satisfy the decree at the first instance. The liability of the insurer is a statutory one. The liability of the insurer to satisfy the decree passed in favour of a third party is also statutory. Then they have set out the findings recorded in *Swaran Singh's* case verbatim. Thereafter they concluded by holding that in the light of the above-settled proposition of law, the appellant-insurance company cannot be held liable to pay the amount of compensation to the claimants for the cause of death of Shukurullah in road accident which had occurred due to rash and negligent riding of scooter by its rider, who admittedly had no valid and effective licence to drive the vehicle on the day of accident. They allowed the appeal preferred by the Insurance Company, but they directed that the Insurance Company though was not liable to pay the amount of compensation, but in the nature of that case, it shall satisfy the award and shall have the right to recover the amount deposited by it along with interest from the owner of the vehicle relying on the directions issued by the Apex Court in *Balajit Kaur and Deddappa's* case. Therefore, it is clear that the Supreme Court in the aforesaid judgment after setting out the summary of the findings rendered by the Apex Court in *Swaran Singh's* case has categorically held that the Insurance Company is not liable to pay the third party and recover it from the insured, in view of Section 149(1) and (2) read with Section 149(7) as the said case did not fall u/s 149(2) read with sub-Sections 4 and 5

59. In *Balajit Kaur and Deddappa's* case after holding that the Insurance Company is not liable by virtue of they making out a case u/s 149(2) of the Act, still in exercise of their power under Article 142 of the Constitution they directed the Insurance Company to pay the third party and recover the same from the insured. Following the aforesaid two judgments again in *Zaharulnisha's* case similar directions were issued. From the aforesaid discussions, it is clear that

once the insurer has been made a party to the proceedings, he gets a right to defend such an action on the grounds mentioned u/s 149(2) of the Act. Once, he establishes the aforesaid enumerated grounds that he can avoid the liability under the Insurance Policy, then he would be under no obligation to pay the claim of the third party as awarded. In such circumstances, the Tribunal has no power to direct the Insurance Company to pay the third party and recover it from the insured. Such a direction has been issued by the Apex Court by virtue of the power conferred on them under Article 142 of the Constitution of India which power neither this Court nor the Tribunal constituted under the Act is entitled to exercise.

60. Therefore, as we understand, the Apex Court has held that if the insurer establishes the defence available to him u/s 149(2) of the Act, he has a right to avoid the liability and he is under no obligation to pay the third party and then recover from the insured. Therefore, the contention that even if the insurer has proved the defence available to him u/s 149(2) of the Act, for the last 53 years, the Supreme Court has been consistently directing the insurer to pay and recover and the doctrine of stare decisis is attracted is without any substance. The Supreme Court has not laid down any law to that effect.

61. Unfortunately, in spite of the aforesaid judgments, still confusion prevails about the liability of the insurance company, the power of the Court and Tribunal to issue directions regarding "pay and recover". Therefore, it is our endeavour to notice the relevant provisions of the Act interpret them and state what is the law as is clear from the aforesaid statutory provisions and in the light of the aforesaid judgments, so that, the Tribunals would be in a better position to appreciate these aspects. In fact in this context, we are reminded of the observations of the Apex Court in Swaran Singh's case where it has been held that with a view to construe a statute the scheme of the Act has to be taken into consideration. For the said purpose the entire Act has to be read as a whole and then chapter by chapter, section by section and word by word. Keeping the aforesaid principle dealing with interpretation of statutes we have attempted to construe the statutory provisions.

SCHEME UNDER THE ACT

62. The claims arising under the Motor Vehicle's Act for compensation and damages are to be found in Chapter XII of the Act. Chapter XI of the Act deals with insurance of motor vehicles against third party risks. For our purpose, if we look into these two chapters closely that would serve the purpose. Chapter XII of the Act deals with claims tribunals. Section 165 provides for constitution of a claims tribunal. The State Government may constitute a claims tribunal for adjudicating upon claims for compensation in respect of accidents involving the death of, or bodily injury to, persons arising out of the use of motor vehicles, or damages to any property of a third party, so arising, or both. The said claim for compensation includes the claim for compensation u/s 166 and also u/s 163(A) of the Act. Section 166 provides for filing of an application for compensation. An

application for compensation arising out of an accident of the nature specified in sub-Section (1) of Section 165 may be made by a person who is injured or the owner of the property or the legal representatives of the deceased in an accident. Section 168 provides for issue of notice to the insurer of such a claim and holding an enquiry into the claim and making of an award determining the amount of compensation which appears to the Tribunal to be just. After determining the amount of compensation, the Tribunal has been vested with the power to specify the person or persons to whom compensation should be paid. Further, the Tribunal shall specify the amount which shall be paid by the insurer or owner or driver of the vehicle involved in the accident or by all or any of them, as the case may be. Section 170 of the Act specifically provides for impleading the insurer in certain cases. Where the claimant has not impleaded the insurer as a party at the time of filing of the claim petition and in the course of any inquiry u/s 168 of the Act, the Claims Tribunal is satisfied that there is collusion between the person making the claim and the person against whom the claim is made, or the person against whom the claim is made has failed to contest the claim, then the Tribunal has been vested with the power to direct that the insurer who may be liable in respect of any such claim shall be impleaded as a party to the proceedings. If the insurer is so impleaded, then, without prejudice to the provisions contained in Sub-Section (2) of Section 149, he would have the right to contest the claim on all or any of the grounds that are available to the person against whom the claims has been made. In other words, Section 149(2) of the Act provides what are the grounds on which the insurer can defend an action for compensation irrespective of the grounds which are mentioned in the Insurance policy, on which the insurer can avoid the liability under the policy. Thus, Section 149(2) provides the grounds which are available to the insurer to defend. Except those grounds, he cannot defend an action on any other grounds. But Section 170 makes an exception. If the conditions stipulated in Section 170 are satisfied and he is made a party at the instance of the Tribunal, then in addition to the grounds mentioned in Section 149(2) he can contest the claim on all or any of the grounds that are available to the person against whom the claim has been made. Broadly this is the scheme under the Act provided for adjudication of the claims for compensation and damages.

63. Chapter XI deals with insurance of motor vehicles against third party risks. From the heading of the Chapter, it can be noticed that there is no obligation on the part of the owner of the vehicle to insure the vehicle in respect of other risks. Insofar as third party risk is concerned, it is mandatory. This is reflected in Section 146 of the Act, which reads as under:-

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:

1[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 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 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.

64. Section 146 of the Act gives protection to the third party in respect of death or bodily injury or damage to the property while using the vehicle in a public place and, therefore, the insurance of vehicle had been made compulsory u/s 146 read with Section 147 of the Act. When a certificate of insurance is issued, in law., the insurance company is bound to reimburse the owner. Section 146 provides for statutory insurance. An insurance is mandatorily required to be obtained by the person in charge of or in possession of the vehicle. Once the Insurance Company had undertaken liability to third parties 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 condition in the policy. The object behind the aforesaid legislations is that third-party right should not suffer on account of failure to comply with those terms of the insurance policy. It is manifest that compulsory insurance is for the benefit of third parties. The third party can enforce liability undertaken by the insurer.

65. The only person who is exempted is the passenger of such motor vehicle. However, the aforesaid compulsion do not apply to any vehicle owned by the Central Government or State Government used for Government purpose and connected with any commercial enterprise. However, if such authorities wants to use it for commercial purposes, 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. Therefore the whole object is to cover the third party risk.

66. Section 147 of the Act specifies the requirement of policy and factors of liability. It reads as under:-

147. Requirements of policies and limits of liability.

(1) 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 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 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, or
- (ii) to cover any contractual liability.

Explanation.-- For the removal of doubts, it is hereby declared that the death of 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 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 there under 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.

67. Section 147 deals with the requirements of policies and limits of liability. Sub-clause (i) of Clause (b) of sub-section (1) of Section 147 speaks of liability which may be incurred by the owner of a vehicle in respect of death of or bodily injury to any person or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place. Whereas sub-clause (ii) thereof deals with liability which may be incurred by the owner of a vehicle 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. Once the policy is issued under the Act, it insures the person or class of persons specified in the policy to the extent specified in sub-section (2) against any liability as mentioned in sub-clause (1) of clause (b) of sub-section (1) of Section 147. However, sub-clause (2) of Clause (b) of sub-section (1) of Section 147 specifically deals with death or bodily injury to any passenger of a public service vehicle caused by or arising out of use of the vehicle in a public place. Section 2(35) of the Act defines what a public service vehicle means, i.e., any motor vehicle used or adopted to be used for the carriage of passengers for hire or reward and includes a maxi cab, a motor cab, contract carriage and stage carriage. It does not speak of any passenger in a "goods carriage". Therefore, it is clear the statutory insurance is confined to the death 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 to sub-section (1) provides for statutory liability to cover liability in respect of the death arising out of and in the course of his employment of the employee, or in respect of bodily injury sustained by such an employee, arising out of and in the course of his employment. The said liability is limited to the extent as provided under the Workmen's Compensation Act, 1923. It is not in respect of all employees the said statutory cover of insurance is provided. The said statutory cover is provided only to an employee engaged in driving the vehicle, an employee who is employed as a conductor of public service vehicle or in examining tickets of public service vehicle and an employee who is carried in the goods carriage vehicle. However the liability in so far as they are concerned is limited to the liability under the Workmen's Compensation Act. Clause (ii) of the proviso to Sub-section (1) of Section 147 makes it clear that the policy of insurance issued under this chapter shall not be required to cover any contractual liability. In other words the risks that is covered is what is statutorily provided u/s 147(1) of the Act only. However, it is open to the insured to cover the risks that is not enumerated in Section 147(1) of the Act. Therefore, this proviso comes into operation once there is a valid policy though the policy does not cover the risk of such employees. When once the owner of the vehicle insures the motor vehicle and obtains the policy of insurance complying with the requirements of Chapter XI and an insurer issues a certificate of insurance in the prescribed form, containing the prescribed particulars of any condition subject to which the policy is issued as contemplated under Sub-Section (3) of Section 147 of the Act, the duty is cast on the insurer to satisfy the judgments and awards against the persons insured, in respect of third party risk.

68. Sub-Section (2) of Section 147 deals with the extent of the liability covered in respect of the policies issued under this chapter. It makes three classifications. They are:

a) In respect of claim arising under clause (b) of sub-section (1) of Section 147, i.e., third party the amount of liability incurred. In other words there is no limit. The entire amount of compensation awarded by the Court u/s 149(1) read with

Section 168 is to be paid by the insurer.

b) In respect of claims arising under the proviso to Sub-section (1) of Section 147 i.e. claims by the employees of the insured such as (a) driver of the vehicle (b) conductor or person examining tickets of the public service vehicle (c) an employee carried in the Goods vehicle, the amount payable to such employees would be as provided under the Workmen's Compensation Act, 1923, only.

c) In respect of claims for damage to any property of a third party, a sum of Rs. 6,000/- only.

In order to cover all these risks, the condition precedent is, the issue of a policy of insurance as defined under clause (b) of Section 145 read with Sub-section (3) of 147 of the Act, which should satisfy the following requirements:

a) Policy is issued by a person who is an authorised insurer.

b) Such an authorised insurer issues a policy in favour of the person by whom the policy is effected.

c) Certificate of insurance should be in the prescribed form and containing the prescribed particulars.

69. Once these conditions are satisfied the policy of insurance comes into effect, the insurer 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. In addition the insurer is also liable to indemnify the insurer, regarding the liability statutorily provided under proviso to sub-section (1) of Section 147.

70. Sub-section (5) of Section 147 makes it clear that 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. Therefore, the legislature learning from the past experience and in its wisdom has taken all possible care to protect the interest of third parties as well as employees of the insured.

71. Section 149 of the Act deals with the duty of the insurer. It is as under:

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 (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 provisions of this

section, pay to the person entitled to the benefit of the decree any sum not exceeding the sum assured payable there under, 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.

(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 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.

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 to the 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).

(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.

(6) In 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 u/s 165 and "Award" means an award made by that Tribunal u/s 168.

72. Sub-Section (1) of Section 149 of the Act makes it clear that the said provision is attracted or comes into force only after a certificate of insurance has been issued under Sub-Section (3) of Section 147 in favour of the person by whom the policy has been effected. In other words, the condition precedent for

application of Section 149 of the Act is the existence of a certificate of insurance in terms of Sub-Section (3) of Section 147. Otherwise the said section has no application at all. The said certificate should cover clause (b) of Sub-Section (1) of Section 147, being the liability covered by the terms of the policy or under the provisions of section 163A. The insurance being based on a contract, insurer may be entitled to avoid or cancel the insurance policy if the insured commits breach of terms of the contract, in which event, under the contract there would be no liability on the part of the insurer to indemnify the insured. Therefore, when once the insurer has issued a certificate of insurance covering the liability under Clause (b) Sub-Section (1) of Section 147 on the ground of breach of terms of the contract, it is open to him to avoid or cancel the policy. The intention of the Legislature is that the insurer should not be allowed to avoid or cancel the policy on such grounds. Then the Legislature has used the non-obstante clause, i.e., notwithstanding that the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy, shall pay to the person entitled to the benefit of the decree the amount of compensation awarded. It is in harmony with Sub-Section (5) of Section 147 of the Act, which also contains a non-obstante clause in so far as indemnifying the insured. The said clause states "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."

73. Therefore, the intention of the legislature is very clear. They have used the non-obstante clause in Sub-Section (5) of Section 147 and also in Section 149 of the Act preventing the insurer from avoiding or canceling the liability on the ground of breach of contract. However, after expressing in such a manner, consciously, they have made the liability of the insurer "subject to the provisions of sub-section (2) of Section 149". That is Section 149(2) statutorily provides the grounds on which the insurer can defend the action and in other words, the insurer can avoid the liability under the Act. Therefore the intention is clear. Whatever may be the contract between the insured and the insurer and even in the event of the insured committing breach of terms of the contract, the insurer's liability under the contract does not cease insofar as third party risk is concerned. The liability of the insurer ceases in respect of third party risk only if the insurer can come within the exclusion Clause contained in Section 149(2) of the Act. Then they have proceeded to state what is the legal position when the insurer is not entitled to this exclusion Clause. The legal position is if the Claims Tribunal passes an award against the insured, the insurer steps into the shoes of the insured as a judgment debtor and he has to pay to the person entitled to the benefit of the decree in a sum not exceeding the sum assured payable there under. In other words, though there is no privity of contract between the third party and the insurer and the contract is only between the insured and the insurer, by virtue of the statutory provision, a statutory liability is foisted on the insurer to satisfy the decree obtained by the third party against the insured. The

insurer shall be deemed to be a judgment debtor in respect of liability in view of Sub-Section (1) of Section 149 of the Act. Therefore, the liability of the insurer is a statutory one. The liability of the insurer to satisfy the decree passed in favour of a third party is also statutory. However, such a legal consequence would follow only if the conditions stipulated under Sub-Section (2) of Section 149 is satisfied by the claimant. The said condition is before the commencement of the proceedings in which the judgment and award are given, notice is given to the insurer through the Court about the commencement of the proceedings before the Claims Tribunal or in respect of the judgment and award passed by the Claims Tribunal is stayed in appeal, notice is given to the insurer about such proceedings. The effect of giving such notice would be that the insurer shall be entitled to be made a party thereof. Once he is made a party thereof, then Sub-Section (2) of Section 149 of the Act confers a right on the insurer to defend the action on any of the grounds mentioned therein. Therefore, what follows is, if a third party wants an award or decree of compensation executable against the insured by virtue of the statutory liability as contained in Sub-Section (1) Section 149, he shall make the insurer a party to the claim petition. If the insurer is not made a party to the claim petition, as is clear from the opening words of Sub-Section (2) of Section 149, no sum shall be payable by the insurer under Sub-Section (1) of Section 149 in respect of any judgment or award. In other words, if the insurer is not made a party to the proceedings by the third party, there is no statutory liability on the part of the insurer to satisfy the decree or award to be passed by the Claims Tribunal. In fact, when an application for compensation is made u/s 166 of the Act, the Claims Tribunal is under obligation to give notice of the application to the insurer, even if the claimant has not made the insurer a party. Further by virtue of Section 170, even if the third party has not made the insurer a party in the application, and the Tribunal did not issue notice to the insurer on receipt of application u/s 166 and if in the course of any enquiry the Tribunal is satisfied that there is a collusion between the person making the claim and the person against whom the claim is made or the person against whom the claim is made has failed to contest the claim petition, it is vested with the power to direct that the insurer shall be impleaded as a party to the proceedings. If the insurer is made a party in terms of Section 149(2) or in terms of Section 168, the only defences which are available to him in respect of the claim are as provided u/s 149(2). But if he is made a party in terms of Section 170 of the Act, in addition to the grounds mentioned u/s 149(2), he shall have a right to contest the claim petition on all or any other grounds that are available to the persons against whom the claim has been made. Insofar as Section 149(2) of the Act is concerned, notice regarding the suit or other legal proceedings shall be given to the insurer if such insurer has to be fastened with such liability. The purpose of giving such notice is to afford the insurer to be made a party in the proceedings for defending the action on any one of the grounds mentioned in the Sub-Section (2) of Section 149.

74. It is by now settled law that the insurer cannot avoid his liability except by

establishing the defenses, which are set out in Sub-Section (2) of Section 149. The insurer is not entitled to take any defence, which is not specified in Sub-Section (2) of Section 149. Therefore, Sub-Section (2) provides exceptions to the liability of the insurer. Sub-Section (1) of Section 149 provides that the insurer is liable to satisfy the judgments against the person insured, unless the insured is at fault and is guilty of breach of a condition of the policy. The insurer cannot escape from the obligation to indemnify the insured, unless it is established that it was the insured who had willfully violated the conditions of the policy. A bare perusal of the provisions of Section 149 of the Act leads to only one conclusion that the usual rule is that once the insured prove that the accident is covered by the compulsory insurance clause, it is for the insurer to prove that it comes within the exception. The proposition of law is no longer res-integra that the person who alleges breach must prove the same. The Insurance Company is thus required to establish the said breach by cogent evidence. In the event the Insurance, Company fails to prove that there is breach of the conditions of the policy on the part of the insured, the Insurance Company cannot be absolved of its liability.

75. Sub-Section (3) of Section 149 deals with the judgments obtained from a Court in a reciprocating country. Then we have Sub-Sections (4) and (5) of Section 149 where the principle of pay and recover has been statutorily provided by the Legislature. Sub-Section (4) of Section 149 makes it clear if the policy restricts the insurance of the persons insured thereby by reference to any condition other than those in clause (b) of sub-section (2), it declares that as respects such liabilities as are required to be covered by a policy under clause (b) of sub-section (1) of Section 147, the said restrictive clause in the contract of insurance has no effect. If the insurer is made to pay notwithstanding the restrictive clause, he shall pay the same to the person entitled to the said amount and the insurer shall have a right to recover the amount paid from the insured. In other words, the insurer is made to pay for the risk which is not covered under the policy by virtue of sub-section (4) of Section 149 of the Act, then the proviso protects the interests of the insurer by conferring on him the right to recover the amount from the insured, which risk is not covered by the insured under the policy. By introduction of this sub-section what is sought to be conveyed by the Parliament is Section 147(1)(b), which is the provision which covers the third party risk cannot be rendered nugatory by a contract between the parties, when Section 146 is introduced making compulsory insurance to cover third party risks. Section 147 (1)(b) sets out the persons whose risk is to be covered statutorily, the said statutory provisions would have over-riding effect vis-?-vis the provisions contained in the contract of insurance. If the statute covers the risk and the contract does not cover the risk but if an insurance policy is issued as contemplated under sub-section (3) of Section 147 of the Act, then the insurer is bound to satisfy the award notwithstanding the fact that the said risk is not covered under the policy. Then he can recover the same from the insured as under the contract he has not agreed to indemnify the insured. It is

because the contract of insurance is in force and there is no breach of the terms and conditions of policy, which can be attributed to the insured. Therefore, when the issuance of a certificate of insurance is not in dispute and the liability arises under the statute and that the amount payable by the insurer towards discharge of any liability to any persons is not covered by the policy statutorily, insurer is liable to satisfy the decree or award and he cannot avoid satisfying the decree or award relying on the terms of the insurance policy. But once he satisfies the award, he has a right to cover from the insured the amount so paid. Therefore, the Legislature has specifically and expressly incorporated this right of the insurer to pay and recover to cases to which Sub-Section (4) of Section 149 is attracted. The aforesaid provision applies to the cases other than those in Clause (b) of Sub-Section (2) of Section 149 of the Act, but applies to case to which Clause (b) of Sub-Section (1) of Section 147 of the Act is attracted.

76. Sub-Section (5) of Section 149 applies to other cases to which the aforesaid provision is not attracted. The principle is the same. Sub-Section (5) of Section 147 provides an insurer issuing a policy of insurance u/s 147 shall be liable to indemnify the person or classes of the 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, irrespective of anything contained in any law for the time being in force which is contrary to the terms of the policy. If the insurer is made liable u/s 149(1) of the Act exceeding the amount the insurer is liable to pay under the policy, then the insurer is statutorily obliged to pay the amount payable u/s 149(1) of the Act. On such payment, he acquires a right to recover the excess amount paid in excess of the agreed amount under the policy. Again, this principle of pay and recover has been expressly provided by the Statute-in this provision. Therefore, by the aforesaid provision an attempt is made to give an over-riding effect over the terms of contract by the statutory provisions. Once there is a policy of insurance and a certificate of insurance has been issued in terms of Sub-Section (3) of Section 147, there is a liability on the part of the insurer to indemnify the persons or classes of persons specified in the policy, in respect of any liability that the policy purports to cover to the entire extent of award and recover the excess amount paid from the insured.

77. Therefore, a reading of the provisions of Sub-section (4) of Section 149 of the Act as well as the language employed in Sub-Section (5) of Section 149 would indicate that they are intended to safeguard the interest of the insurer who makes payment to the third party in discharge of his statutory liability who otherwise is not liable to pay any amount to the insured under the policy of insurance but for the provisions contained in Chapter-XI of the Act. In other words, when a valid insurance policy has been issued in respect of a vehicle as evidenced by certificate of insurance and notwithstanding the fact that in the said certificate of insurance, the liability of the insurer is restricted or made to pay in excess of the amount agreed to be paid and if there is a decree or award by the Court to pay the amount which under the terms of the insurance policy the insurer is not liable to pay, the insurer has to pay the amount awarded or

decreed u/s 149(1) of the Act. The amount so paid which is not covered under the contract or in excess, the insurer can recover from the insured the said amount paid. These two provisions apply to the cases where there is no breach of the terms and conditions of policy of insurance. There is no question of avoiding the liability. What is sought to be avoided is the liability to pay relying on a restrictive clause in the policy or the excess amount payable which is not permitted by law. It has no application to the cases of breach of the terms of the insurance policy or it has no application to the cases where the insurer makes out a ground for avoiding the liability as statutorily provided u/s 149(2) of the Act. In the case of breach of the terms of the policy or in the case of the insurer establishing a ground statutorily provided u/s 149(2) of the Act, what happens is dealt with in Sub-Section (7) of Section 149 of the Act.

78. Sub-Section (7) of Section 149 provides when once the notice referred to in Sub-Section (2) has been given to him by the claimant, he shall not 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). However, one exception culled out for avoiding the liability is in the manner provided for in Sub-Section (2) of Section 149. Sub-Section (2) of Section 149 deals with the breach committed by the insured. In other words, if the insurer when he is entitled to defend the action on any of the grounds mentioned in Sub-Section (2) (a) and (b) of Section 149, succeeds in establishing the said ground, he can avoid his liability to any person entitled to the benefit of any such judgment or award as is referred to in Sub-Section (1). The beneficiary under Sub-Section (1) of Section 149 is the person who filed an application for compensation u/s 166 and after enquiry, an award determining the amount of compensation is made by the Claims Tribunal. Therefore, it is the claimant who is entitled to the benefit of Section 149(1) though the award or decree of compensation is made against the insured. By virtue of the statutory provision, if the notice of such claim is given to the insurer, the insurer steps into the shoes of judgment debtor who has to satisfy the decree or award. Once the insurer is made a party u/s 149(2) to have the benefit of Section 149(1), correspondingly the insurer is given a right to defend the action. While defending the action, if he establishes any one of the grounds mentioned in Sub-Section (2) of Section 149, he can avoid the liability u/s 149(1) of the Act. This is the purport of Sub-Section (7) of Section 149.

79. We are fortified in this regard by the judgment of the Apex Court in the case of British India General Insurance Co., Ltd., vs. Captain Itbar Singh and Others reported in AIR 1959 SC 1331 in taking this view. The only manner of avoiding the liability as is provided for in Sub-Section (2) of Section 149 is by successfully rising any of the defences therein mentioned. The insurer cannot avoid his liability except by establishing such defences. The Supreme Court in the case of National Insurance Co. Ltd., Chandigarh Vs. Nicolletta Rohtagi and Others, at para-14 has categorically held that Sub-Section (7) of Section 149 of 1988 Act clearly indicates that in what manner Sub-Section (2) of Section 149 has to be interpreted. Sub-Section (7) of Section 149 provides that 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 judgment or award as is referred to in Sub-Section (1) or any such judgment as is referred to in Sub-Section (3) otherwise than in the manner provided for in Sub-Section (2) or (4) correspondingly of the reciprocating country, as the case may be. The expression "manner" employed in Sub-Section (7) of Section 149 is very relevant, which means the insurer can avoid his liability only on the grounds that has been provided for in Sub-Section (2) of Section 149. It therefore shows that the insurer can avoid its liability only on the statutory defences expressly provided in Sub-Section (2) of Section 149 of the 1988 Act. In the case of National Insurance Co. Ltd. Vs. Swaran Singh and Others, it was held that Sub-Section (7) of Section 149 of the Act has to be read with Sub-Section (1) thereto. The right to avoid the liability in terms of Sub-Section (2) of Section 149 is restricted as has been discussed herein before. After recording their conclusion that the liability of the insurance company to satisfy the decree at the first instance and to recover the awarded amount from the owner or driver thereto has been holding the field for a long time and the Doctrine of Stare Decisis persuades not to deviate from the said principle. In respect of cases falling under Sub-Section (7) of Section 149, it was held in the facts and circumstances of the case, though did not intend to set aside the said awards, such awards may also be satisfied by the petitioners therein subject to the right to recover the same from the owners of the vehicles in the manner laid down therein, but this order may not be considered as a precedent.

80. Therefore, what follows is that if the case falls under Sub-Section (4) and (5) of Section 149, there is liability on the part of the Insurance Company to satisfy the decree at the first instance and then recover the amount paid in excess from the owner. This is the law which is holding the field for a long time. There cannot be any deviation. But if the case falls under Sub-Section (2) read with sub-section (7) of Section 149, if the insurer establishes his defences u/s 149(2), then there is no binding precedent holding the field which enables the Tribunal or this Court to direct the Insurance Company to satisfy the decree at the first instance and to recover the awarded amount from the owner or driver thereto. On the contrary in Swaran Singh's case the Apex Court has explicitly stated that the directions issued by them in the said case to pay and recover may not be considered as a precedent.

81. From the above discussion, what follows is :-

(a) If the vehicle involved in the accident is duly insured and the insurer has issued the certificate of insurance as provided under Sub-Section (3) of Section 147, the liability of the insurer to satisfy the claim awarded u/s 147(1)(b) is absolute. Once the claimant issues the notice to the insurer in his claim petition and thereafter the Claims Tribunal passes an award, the insurer by virtue of Section 149(1) steps into the shoes of judgment debtor, that is steps into the shoes of the insured and is bound to pay the amount awarded to the third party.

The liability is created under the statute.

(b) When the notice is issued u/s 149(2), the insurer gets a right to defend the action, that is the action brought, by the claimants. He can defend the action only on the grounds mentioned in Sub-Section (2) of Section 149. No other grounds are available to the insurer.

(c) If the defence of the insurer is that under the terms of the policy he has restricted his liability to indemnify a particular amount and is not liable to pay the amount as statutorily provided u/s 147 (1) (b), though he is entitled to such a defence, the tribunal or Court shall ignore the said restrictive clause in the policy and pass a decree or award directing payment of compensation in terms of Section 147(1)(b) of the Act. The insurer shall satisfy the decree or award. On such satisfaction, the insurer gets the right to recover the amount which was not liable to be paid under the policy from the insured.

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

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

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

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

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

(i) In fact, one of the Benches of the Supreme Court, doubting the correctness of this practice in the Supreme Court of directing pay and recover by exercising the power conferred under Article 142 of the Constitution, has referred the matter to a larger Bench. We have not interpreted in this case the scope and ambit of Article 142 of the Constitution. We are strictly confining our jurisdiction to interpret the statutory provisions in the light of the judgments of the Supreme Court.

DOES THE SCHEME FULFILL SOCIAL OBLIGATION ABSOLUTELY?

82. A tort is a species of civil injury or wrong. A civil wrong is one which gives rise to civil proceedings. A tort is a civil wrong for which the remedy is a common law action for unliquidated damages. The law of torts exist for the purpose of preventing men from hurting one another, whether in respect of their property, their persons, their reputations or anything else which is theirs. The action of tort, therefore, is usually a claim for pecuniary compensation in respect of damage suffered as the result of the invasion of a legally protected interest.

83. In common law, originally it is the person who committed the accident i.e. the driver who has to compensate the injured. It is a personal liability. Experience showed that even if the courts were to pass a decree against a driver, the successful party was unable to recover the amount awarded as damages as compensation because of the financial position (of such drivers. Therefore, in common law the concept of vicarious liability was developed making the owner of the vehicle liable for the tortuous act of his servant, the driver. Before the master could be made liable it is necessary to prove that the servant was acting during the course of his employment and that he was negligent. The liability of the owner of the motor vehicle to compensate the victim in a motor accident due to the negligent driving of his servant is based on the law of Tort. The owner's liability arises out of his failure to discharge the duty cast on him by law. The right to receive compensation can only be against a person who is bound to compensate due to his failure to perform a legal obligation. If a person is not liable legally, he is under no duty to compensate anyone else. The general law applicable is only common law and the law of torts. If under the law a person becomes legally liable then the person suffering the injuries is entitled to be compensated. The concept of owners liability without any negligence is opposed to the basic principles of law. The mere fact that a party received an injury

arising out of the use of a vehicle in a public place cannot justify fastening liability on the owner. The proof of negligence remains the lynch pin to recover compensation.

84. The experience showed though the negligence is proved and the owner of the vehicle was held responsible, in majority of the cases, the owner was in no way better positioned than that of the driver. The recovery of damages/compensation awarded, by the courts still remained a problem. The number of vehicles on the road increased phenomenally leading to increase in road accidents. In the 20th Century, an idea came, in that liability should be imposed upon those able to pass the losses on to the public, the so called "insurance idea". The public has to bear the losses falling upon any of them. As means of achieving that just distribution of the burden of loss, the law should impose the loss in the first instance upon those able to pass it on to the public at large through charges for services rendered. It looks like an idea of greater ability to bear the loss as a ground of liability. The criterion of liability in tort is not so much on culpability but on whom should the risk fall. A system of insurance was developed. It has many advantages. Society as a whole knows that those who are insured will not be left destitute. The victim is protected from financial ruin. Insurance remedies burden of paying damages from individual defendants and spreads it over the general body of premium paying policy holders. The various enactments have attempted to mitigate a possible injury to the claimant by providing for payment of the claims by insurance. With the increase of traffic and accidents it was found that in a number of cases hardship was caused where the person inflicting the injury was devoid of sufficient means to compensate the person afflicted.

85. In England the owner of the vehicle voluntarily insured against the risk of injury to other road users. However, in order to meet this contingency the Road Traffic Act, 1930, the Third Parties (Rights against Insurers) Act, 1930 and the Road Traffic Act, 1934 were enacted in England. A system of compulsory insurance was enacted by the Road Traffic Act, 1930. Its object was to reduce the number of cases where judgment for personal injuries obtained against a motorist was not met owing to the lack of means of the defendant in the running-down action and his failure to insure against such a liability. It is sufficient to state that compulsory insurance was introduced to cover the liability which the owner of the vehicle may incur.

86. The Indian Law introduced provisions relating to compulsory insurance in respect of third party insurance by introducing Chapter VIII of the old Act. These provisions almost wholly adopted the provisions of the English law. The relevant sections found in the three English Acts referred to above were incorporated in Chapter VIII. Before a person can be made liable to pay compensation for any injuries and damage which have been caused by his action, it is necessary that the person damaged or injured should be able to establish that he has some cause of action against the party responsible. Causes of action may arise out of actions for wrongs under the common law or for breaches of duties laid down by

statutes. In order to succeed in an action for negligence the plaintiff must prove (1) that the defendant had in the circumstances a duty to take care and that duty was owed by him to the plaintiff and that (2) there was a breach of that duty and that as a result of the breach damage was suffered by the plaintiff. The master also becomes liable for the conduct of the servant when the servant is proved to have acted negligently in the course of his employment. The purpose of enactment of Road Traffic Acts and making insurance compulsory is to protect the interests of the successful claimant from being defeated by the owner of the vehicle who has not enough means to meet his liability. The safeguard is provided by imposing certain statutory duties namely the duty not to drive or permit a car to be driven unless the car is covered by the requisite form of third party insurance.

87. Now the liability to pay compensation is based on a statutory provision and not on the common law or principles of law of torts. It is manifest that compulsory insurance is for the benefit of third parties. The liability of the owner to have compulsory insurance is only in regard to the third party. Once the vehicle is insured, the owner as well as any other person can use the vehicle with the consent of the owner. Section 146 does not provide that any person who will use the vehicle shall insure the vehicle in respect of his separate use. Section 146 provides for statutory insurance. Insurance is mandatory. The provision of compulsory insurance have been framed to advance social object. It is a way of part of social justice doctrine. After the introduction of the provisions for compulsory insurance, no motor vehicle can go on road without a valid insurance policy. This obligation was not imposed in order to promote the business of the insurers engaged in the business of automobile insurance company. The provision has been inserted in order to protect the members of the community travelling in vehicles or using the roads from the risk attendant upon from the user of the vehicles on roads. The law may provide for compensation to victims of accidents who sustain injuries in the course of an automobile accident or compensation to the dependents of the victims in the case of fatal accident. Such protection would remain a protection on paper unless there is a guarantee that the compensation awarded by the courts would be recoverable from the persons held liable for the consequences of the accident. The court can only pass an award or a decree. It can ensure that such an award or decree results in the amount awarded being actually recovered from the person held liable who may not have the resources. The exercise undertaken by law courts would then be an exercise in the futility. The outcome of the legal proceedings which by the very nature of things involve time, cost and money invested from the scarce resources of the community would make a mockery of the injured victims or the dependents of the injured in the accident who themselves are obliged to incur not inconsiderable expenditure of time, money and energy in litigation. It is to overcome this ugly situation the legislature has made it obligatory that no motor vehicle shall be used unless a third party insurance is in force. To use the vehicle without the requisite third party insurance being in force is a penal offence. The

insurance policy might provide for liability walled in by conditions which may be specified in the contract of policy. In order to make the protection real, the legislature has also provided that the judgment obtained shall not be defeated by the incorporation of exclusion clauses other than those authorised by Section 149 of the Act and by providing that except and save to the extent permitted by Section 149 it will be the obligation of the Insurance Company to satisfy the judgment obtained against the persons insured against the third party risks. In other words, the legislature has insisted and made it incumbent on the user of the motor vehicle to be armed with an insurance policy covering the third party risks which is in conformity with the provisions enacted by the legislature. It is so provided in order to ensure that the injured victims of automobile accidents or the dependants of the victims of fatal accidents are really compensated in terms of money and not in terms of promise. Such a provision as enacted by the legislature having regard to the fact that in modern age, the use of motor vehicle notwithstanding the attendant hazards has become an inescapable fact of life, has to be interpreted in a meaningful manner which serves rather than defeats the purpose the legislation. The provision contained in the Act have to be interpreted in the twilight of the aforesaid perspective.

88. Further, the Legislature took note of the fact the insurer may restrict his liability to indemnify the insured to a particular amount which is less than the actual amount liable to be paid to a third party under the statute. Therefore, Sub Section (4) and (5) were introduced nullifying those contractual terms and making it obligatory on the part of the insurer to pay the amount awarded or decreed. However, the insurer was given the right to proceed against the insured to recover the excess amount paid.

89. With the nationalisation of the Insurance Company in India, the social responsibility is now taken over by the instrumentalities of the State. With the passage of time, the concept of "absolute liability", concept of "liability without fault" in certain cases was introduced by way of Section 140 of the Act. The amendments were carried out to the law introducing no fault liability. It is a clear departure from the usual common law principle that claimants should establish negligence on the part of the owner or driver of the motor vehicle before claiming any compensation for the death or permanent disablement caused due to the motor accident. To that extent, the substantive law of the country stands modified. Similarly the concept of no fault liability and payment of compensation on structured formula basis was introduced by introducing Section 163A of the Act.

90. This piece of legislation is enacted by the parliament with a social obligation of providing solace to the victims of the accident or to the legal representatives of persons who died in the accident. Therefore, the Courts have been placing such interpretation which would advance the cause of justice and liberal construction has been placed with a view to implementing the legislative intent. In this background under the scheme, as contained in Chapter XI and XII, the

legislature has expressly provided for the principle of "pay and recover" in Sub Sections (4) and (5) of Section 149. However, the same is not provided in Section 149(2). At the same time, the express provision like sub section (7) of Section 149 is enacted by the Legislature making it very clear that the insurer has a right to avoid the liability on the grounds specified u/s 149(2) of the Act. The question is whether the Courts by an interpretive process read into sub-section (7) of Section 149 of the Act, the principle of "pay and recover", to come to the rescue of third parties for whose benefit the aforesaid scheme is introduced by the Parliament. The law on the point is fairly well settled.

SCOPE OF INTERPRETATION

91. Legislation in a 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 in hand may be called for, and, words chosen to communicate such indefinite references are bound to be, in many cases lacking in clarity and precision and thus giving rise to controversial questions of construction. The duty of the Judges is to expound and not to legislate is a fundamental rule. There is a marginal area in which the Courts mould or creatively interpret legislation and they are thus finishers refiners and polishers of legislation which comes to them in a state requiring varying degrees of further processing.

92. A statute is an edict of the Legislature and the conventional way of interpreting or construing a statute is to seek the intention of its maker. A statute is to be construed according to the intent of them that make it and the duty of judicature is to act upon the true intention of the Legislature. If a statutory provision is open to more than one interpretation, the Court has to choose that interpretation which represents the true intention of the Legislature. The function of the Courts is only to expound and not to legislate. A statute as enacted cannot be explained by the individual opinions of the legislators. The Legislature becomes functus officio in so far as that particular statute is concerned, so that it cannot itself interpret it. The Legislature can no doubt amend or repeal any provisions of the statute or can declare its meaning, but all this can be done only by a fresh statute after going through the normal process of law making. The Courts have therefore to look essentially to the words of the statute to discern the meaning as much as possible by the context.

93. The first and primary rule of construction is that the intention of the Legislature must be found in the words used by the Legislature itself. The question is not what may be supposed to have been intended, but what has been said. If the Legislature did intend that which it has not expressed clearly; much more, if the Legislature intended something very different; if the Legislature

intended pretty nearly the opposite of what is said, it is not for Judges to invent something which they do not meet within the words of the text. In case of doubt, therefore, it is always safe to have an eye on the object and purpose of the statute, or reason and spirit behind it. Each word, phrase or sentence observed is to be construed in the light of general purpose of the Act itself. Interpretative efforts must be illumined by the goal though guided by the word. The intention of the Legislature thus assimilates two aspects: in one aspect it carries the concept of meaning, i.e., what the words mean and in another aspect, it conveys the concept of purpose and object or the reason and spirit, prevailing through the statute. The process of construction, therefore combines both literal and purposive approaches. In other words, the legislative intention i.e., the true or legal meaning of an enactment is derived by considering the meaning of the words used in the enactment in the light of any discernible purpose or object which comprehends the mischief and its remedy to which the enactment is directed. In all ordinary cases primarily the language employed is the determinative factor of legislative intention. The mischief against which the statute is directed and, perhaps though to an undefined extent the surrounding circumstances can be considered. Other statutes in *pari materia* and the state of the law at the time are admissible. Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted. In a Court of law or equity, what the Legislature intended to be done or not to be done can only be legitimately ascertained from what which it has chosen to enact, either in express words or by reasonable and necessary implication. A bare mechanical interpretation of the words and application of a legislative intent devoid of concept of purpose will reduce most of the remedial and beneficent legislation to futility. To be literal in meaning is to see the skin and miss the soul.

94. The Courts are warned that they are not entitled to usurp legislative function under the disguise of interpretation and that they must avoid the danger of an *a priori* determination of the meaning of a provision based on their own preconceived notions of ideological structure or scheme into which the provisions to be interpreted is somehow fitted Caution is all the more necessary in dealing with the legislation enacted to give effect to policies that are subject of bitter public and parliamentary controversy for in controversial matters there is room for differences of opinion as to what is expedient, what is just and what is morally justifiable. It is the Parliament's opinion in these matters that is paramount. This only means that Judges cannot interpret statutes in the light of their views as to policy, but they can adopt a purposive interpretation, if they can find in the statute read as a whole or in the material to which they are permitted by law to refer as aids to interpretation as expression of Parliament's purpose of policy. So there is no usurpation of function or danger when the purpose or

object of a statute is derived from legitimate sources and the words are given an interpretation which they can reasonably bear to effectuate that purpose or object. The correct interpretation is one that best harmonises the words with the object of the statute.

95. Judges will serve the public interest, better if they keep quiet about their legislative function. No doubt they will discreetly contribute to changes in the law, because they cannot do otherwise even if they could. Constitution's separation of powers or more accurately functions, must be observed if judicial independence is not to be put at risk. The Courts cannot interpret a statute the way they have developed the common law which in a constitutional sense means judicially developed equity. The Courts can exercise no such power in respect of statutes. Judges have to be conscious that in the end, the statute is the master and not the servant of the judgment and that no judge has a choice between implementing the law and disobeying it. Judges have more freedom in interpreting a Constitution but while interpreting statutes that freedom is substantially curtailed. The rules of interpretation are not rules of law and are not to be applied like the rules enacted by the Legislature in an Interpretation Act. They serve as guides. They are aids to construction, presumptions or pointers. Not infrequently one rule points in one direction, another in a different direction. In each case, we must look at all relevant circumstances and decide as a matter of judgment what weight to attach to any particular rule.

96. The intention of the Legislature is primarily to be gathered from the language used, which means that attention should be paid to what has been said as also to what has not been said. As a consequence of construction which requires for its support addition or substitution of words or which results in rejection of words as meaningless has to be avoided. Courts cannot aid the Legislature's defective phrasing of an Act. They cannot add or mend and by construction make up deficiencies, which are found there. It is contrary to all rules of construction to read words into an Act unless it is absolutely necessary to do so. Similarly it is wrong and dangerous to proceed by substituting some other words for words of the statute. The Courts cannot reframe the legislation for the very good reason that it has no power to legislate. The principle that the statute must be read as a whole is equally applicable to different parts of the same Section. The Section must be construed as a whole whether or not one of the parts is a saving clause or a proviso. It is an elementary rule that construction of a Section is to be made of all the parts together. It is not permissible to omit any part of it. The whole Section should be read together. Sub-sections in a Section must be read as parts of an integral whole and as being independent, each portion throwing light, if need be, on the rest. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves do alone in such cases best declare the intent of the lawgiver. When a language is plain and unambiguous and admits of only one meaning no question of construction of a statute arises, for the Act speaks for itself. The results of the construction are

then not a matter for the Court even though they may be strange or surprising, unreasonable or unjust or oppressive. If the words used are capable of one construction only then it would not be open to the Courts to adopt any other hypothetical construction on the ground that such construction is more consistent with the alleged object and policy of the Act.

97. Casus omissus is an application of the same principle that a matter which should have been but has not been provided for in a statute cannot be supplied by Courts, as to do so will be legislation and not construction. There is no presumption that a casus omissus exists and language permitting the Court should avoid creating a casus omissus where there is none. Omission by the Legislature to amend a related provision presents great difficulties of construction. The Court cannot supply a real casus omissus. It is equally clear that it should not so interpret a statute as to create a casus omissus when there is really none. If a matter, provision for which may have been desirable, has not been really provided for by the Legislature, the omission cannot be called a defect of the nature which can be cured or supplied by recourse to the mode of construction to give force and life to the intention of the Legislature. Casus omissus cannot be supplied by the Court except in the case of clear necessity and when reason for it is found in the four corners of the statute itself but at the same time a casus omissus should not be readily inferred. It is incumbent on the Court to avoid a construction, if reasonably permissible on the language, which would render a part of the statute devoid of any meaning or application. The Courts always presume that the Legislature inserted every part thereof for a purpose and the legislative intention is that every part of the statute should have effect. The Legislature is deemed not to waste its words or to say anything in vain and a construction which attributes redundancy to the Legislature will not be accepted except for compelling reasons.

98. In discharging its interpretative function, the Court can correct obvious drafting errors and so in suitable cases the Court will add words, or omit words or substitute words. But before interpreting a statute in this way the Court must be abundantly sure of three matters: (1) the intended purpose of the statute or provision in question, (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed. Before any words are read to repair as omission in the Act, it should be possible to state with certainty that these or similar words would have been inserted by the draftsman and approved by Parliament had their attention been drawn to the omission before the Bill passed into law. But it is equally well settled as held by the Apex Court in the case of Regional Director ESI Corporation Vs. V. Ramanuja Match Industries that, we do not doubt that the beneficial legislations should have liberal construction with a view to implementing the legislative intent, but where such beneficial has a scheme of its own there is no warrant for the court to travel beyond the scheme and extend

the scope of statute on the pretext of extending the statutory benefit to those who are not covered by the scheme. Courts cannot introduce words into the statute nor they could rewrite the statute.

99. In the background of this well settled legal principles we have to approach this human problem, a victim of an accident, who had no control over the vehicle which is involved in the accident and who is not a party to the insurance is looking at the society, State, Government and Courts for relief for survival in a country governed by rule of law, which has accepted Democracy as the way of life. Chapter XI of the Act was introduced for the benefit of the third party. The Parliament has passed this beneficial legislation providing for compulsory insurance to all vehicles before they are brought on roads. They also introduced the concept of "liability without fault" as contained in Section 140 of the Act. They also provided for "no fault liability" and payment of compensation on structured formula basis u/s.163-A of the Act. Further they have introduced the principle of "pay and recover" in Sub Section (4) and (5) of Section 149 of the Act. It provides for payment of the amount awarded as compensation notwithstanding the restrictive clause in the policy of insurance. But the benefit extended under that Chapter is taken away by introduction of Section 149(2) read with sub-section (7) of Section 149, without expressly providing the principle of pay and recover as was done in the case falling under sub-sections (4) and (5) of Section 149 of the Act. When the Parliament expresses its intention by express words, in particular sub-Section (4), (5) and (7) of Section 149 of the Act, the Court has to presume that the legislature inserted every part thereof for a purpose and the legislative intention is that every part of the statute should have effect. The legislature is deemed not to waste its words or to say anything in vain and a construction which attributes redundancy to the legislature is to be avoided. The legislative intention is to be gathered from the language used, which means that attention should be paid to what has been said as also to what has not been said. The Courts cannot reframe the legislation to make up deficiencies, as it has no power to legislate. Therefore, when the Parliament has expressly provided for the principle of pay and recover in cases falling under sub-Section (4) and (5) and has omitted to extend the said benefit to cases falling under sub-Section (7) or sub-Section (2) of Section 149 of the Act, the Court cannot read the said principle into the said provisions and extend the benefit. It amounts to the Court supplying "casus omissus", which is not permissible. It amounts to the Court reframing the section, and legislating, for which it has no power. That is why the Supreme Court in order to do complete justice between the parties, even after holding that there is no liability on the part of the insurance company to indemnify or pay in terms of the decree or the award passed by the Tribunal, has been issuing directions to the insurance company to pay the claim and recover the said amount from the insured, by virtue of its power under Article 142 of the Constitution and extending the said benefit while making it clear that it would not be a precedent. Thus it has demonstrated the judicial restraint and respected the concept of separation of

power as enunciated in the Constitution.

100. It is brought to our notice that the Motor Vehicles (Amendment) Bill 2012 is passed by the Rajyasabha on 8.5.2012. Substantial amendments are brought about to the Motor Vehicles Act, 1988 in the said bill. Section 147 also is amended. Section 149(1) of the Act is also amended. After Clause (b) of Sub section (2) of Section 149, clause (c) is introduced to the effect that the insurer on acceptance of the policy shall have the right to contest the claim on any relevant ground including the quantum. Therefore, restriction imposed on the insurance company to defend earlier is removed by providing for the right to contest the claim on any relevant ground including the quantum. However, there is no amendment to Sub Section (7). An express provision as contained in sub-section (4) and (5) of Section 149 of the Act is the need of the hour. Therefore, in fitness of things, an express provision extending the benefit of the principle of "pay and recover" should be enacted even in the cases where the insurer establishes his defence as provided in the statute: u/s. 149(2) and avoids the liability to indemnify the insurer under the policy. The avoiding of the liability by the insurance company should be confined only to the insured. The Insurance Company should be made liable to satisfy the award or decree passed by the Tribunal with liberty to recover the said amount from the insured. Therefore, once the insured insures his motor vehicle, obtains a policy and certificate of insurance is issued, the third party interest in respect of such vehicles covered under the insurance and the liability flowing from the certificate of insurance should be made absolute insofar as the third party is concerned. That would serve the social purpose. It would be in conformity with the judicial thinking in the country. It provides solace to the victims of the road accidents, most of whom come from lower strata of the society, who are economically, socially and educationally backward. The loss of the bread earner of the family renders the entire family destitute. It would be a welfare measure and in public interest. It discharges the social responsibility of the State and serve social purpose. When the law is certain, it enables the insurance industry to restructure their insurance plans so as to absorb this liability, by fixing appropriate premiums so that this liability is shared by the body of insured and the liability would not fall on any one insured, who has committed the breach of the terms of the policy, which is the golden rule underlying this concept of insurance.

101. It is in these circumstances, we have set out the law as declared by the Apex Court from the year 1959 till today in detail. Based on the understanding of the said law, the Courts and the Tribunals are passing awards fastening liability in some cases on the insurance company and exonerating the insurance company in some cases. It has led to enormous growth of law which could have been avoided. Therefore, in our view as the amendment bill is yet to be passed in the parliament, as it is likely to be moved in the Loka Sabha during winter session, it would be appropriate for the Law Commission as well as the Department of Law and Parliamentary Affairs to apply their mind, give a thought to the judicial thinking in the country on this aspect and find a solution to this

human problem with sympathy and come to the rescue of those unfortunate victims of road accidents or their dependants. An express provision of "pay and recover" would put an end to this terrible misery. We hope this suggestion would get proper consideration and yield favourable results. For the aforesaid reasons, we pass the following order:-

- i) The appeal is allowed;
- ii) The impugned order passed by the Tribunal fastening the liability on the Insurance Company with a direction to pay and recover is hereby set aside;
- iii) The award insofar as the owner of the vehicle is concerned stands affirmed.
- iv) Parties to bear their own costs.

The High Court Registry is directed to send a copy of the judgment forthwith to the following :-

- 1) Law Commission of India;
- 2) Ministry of Law and Parliamentary Affairs;
- 3) Ministry of Surface Transport.