

(2008) 08 BOM CK 0045

In the Bombay High Court

Case No : Letters Patent Appeal No. 121 of 2000

Traders Pvt. Ltd. and The Oriental Insurance Co. Ltd.

APPELLANT

Vs

Smt. Sunanda Machivale and Others

RESPONDENT

Date of Decision : 27-08-2008

Acts Referred:

Constitution of India, 1950 — Article 136, 142

Motor Vehicles Act, 1939 — Section 11(1), 110, 110A, 2, 2(1)

Motor Vehicles Act, 1988 — Section 147(2), 149, 149(2), 149(4), 149(5)

Citation : (2008) 5 ALLMR 757 : (2008) 110 BOMLR 2919

Hon'ble Judges : Ranjana Desai, J;R.P. Sondurbaldota, J

Bench : Division Bench

Advocate : M.G. Barve, for the Appellant; P.M. Patel, for Respondents 1 to 3 and R. Mahadik, instructed by S.R. Singh, for Respondent 7, for the Respondent

Judgement

Ranjana Desai, J.—Rule. Respondents waive service. By consent of the parties, taken up for hearing forthwith.

2. In this letters patent appeal, order dated 8/3/2000 passed by learned Single Judge of this Court in First Appeal No. 807 of 1994 is under challenge. Respondents 1 to 4A are the heirs of one Krishna Babu Machivala. They filed Application No. 827 of 1988 under the Motor Vehicles Act, 1939 (for short, "the said Act") in the Motor Accident Claims Tribunal at Bombay, (for short, "the Tribunal") for compensation on account of the death of the said Krishna (for convenience, "the deceased") in a car accident on 16/12/1987.

3. We shall now state how the parties are arraigned in the application before the Tribunal. Respondents 1 to 4A are the original applicants-claimants (for convenience, "the applicants"). Appellant 1 firm is opposite party No. 3. It is the owner of Maruti Car No. GBL 8335. Maruti Car No. GBL 8335 shall be referred to as the said car and appellant 1 shall be referred to as the owner of the said car. Appellant 2 is the 2nd insurer. It is the insurer of the said car and shall be referred to as such. Respondent 5 is the owner of Motor Truck No. MHT 1835. He

is opposite party No.1. Motor Truck No.1835 shall be referred to as the offending truck and respondent 5 shall be referred to as the owner of the offending truck. Respondent 5A is the widow of respondent 5. Respondent 6 is the driver of the offending truck. He is opposite party No.2 and shall be referred to as the driver of the offending truck. Respondent 7 is the 1st insurer. It is the insurer of the offending truck and shall be so referred to.

4. On 16/12/1987, at about 11.40 p.m., the deceased was driving the said car. One Anil Dwarkanath Chudji, an employee of the Indian Express Newspaper Ltd. (for short, "the Indian Express") and another colleague from the Indian Express Office, were with him. They were proceeding from Nariman Point to Pune. When the said car approached Sion-Trombay Road near R.K. Studio, suddenly the offending truck coming from the opposite direction driven by opposite party No.2 in fast and uncontrollable speed dashed against Maruti Motor No.CGZ-6272 which was ahead of it, then went over the driver and dashed against the said car driven by the deceased with such a great force that it turned round on the spot killing the deceased instantaneously. Other inmates of the said car were injured. Soon, the wireless van of the police came to the spot of incident and removed the injured to the Rajawadi Hospital, Bombay.

5. The case of the applicants is that the sudden death of the only earning member of the family has caused irreparable loss, pain and suffering to them. The deceased was young and of robust health. He could have lived up to 75 years but for this accident. Besides driving in Bombay for the Indian Express who was his employer, he was required to go to Pune, almost daily on overtime wages.

6. The applicants' further case is that the accident took place because of the rash and negligent driving of the driver of the offending truck. The owner of the truck is liable to pay compensation to the applicants because its driver was driving the truck as its servant in the course of employment with him and/or as the agent of and/or on behalf of and/or with his knowledge and/or permission. The insurer of the offending truck is also liable to indemnify any driver holding license after issuing the certificate of insurance under the said Act. It is also the case of the applicants that the deceased was driving the said car as a servant of the owner of the said car in the course of employment with it and/or as the agent of and/or on behalf of and/or with the knowledge of and/or with its permission and, therefore, the owner of the said car was liable to pay compensation to the applicants. According to the applicants, the insurer of the said car driven by the deceased was also liable to indemnify the deceased holding license after issuing the certificate of insurance under the provisions of the said Act. The applicants, therefore, prayed that the Opposite Parties may be ordered to pay to the applicants a sum of Rs.4,00,000/- or such other sum as may be deemed fit by way of general and special damages with interest thereon from the date of the application till payment.

7. Before the Tribunal, Opposite Party Nos.1 to 3 i.e. the owner of the offending truck, driver of the offending truck and owner of the said car respectively,

remained absent. The insurer of the offending truck filed written statement admitting their liability to the extent of Rs.1,50,000/- and deposited Rs.1,50,000/- with the Tribunal. The applicants then made an application and requested the Tribunal that the insurer of the offending truck be discharged. The Tribunal granted this prayer. Notice as against the said insurer was discharged.

8. Insurer of the said car who is appellant 2 herein denied the claim. It contended that the deceased was employed by the Indian Express. He was not the employee of the owner of the said car i.e. M/s. Traders Private Limited (appellant 1 herein). Therefore, even though he was driving the said car belonging to the owner of the said car, the insurer of the said car was not liable to pay compensation to the applicants either in the claim made under the said Act or under the Workmen's Compensation Act. According to the insurer of the said car, assuming the applicants are entitled to compensation they would be entitled to it only under the Workmen's Compensation Act and, therefore, the Tribunal has no jurisdiction to entertain the application. According to the insurer of the said car, as there was no negligence on the part of the deceased, there was no question of the insurer of the said car or the owner of the said car paying any compensation to the applicants.

9. Upon consideration of the evidence, the Tribunal concluded that the driver of the offending truck drove it in a rash and negligent manner which resulted in the offending truck colliding against the said car driven by the deceased causing him fatal injuries. The Tribunal held that the insurer of the said car was not liable even under the Workmen's Compensation Act to pay compensation to the applicants as the deceased was not an employee of the owner of the said car. The Tribunal held that the owner of the offending truck and the insurer of the offending truck are liable to pay Rs.2,98,000/- minus Rs.15,000/- already paid u/s 92A of the said Act i.e. Rs.2,83,000/- as compensation to the applicants with interest at the rate of 12% per annum from the date of application till payment, jointly and severally.

10. The Tribunal further held that the liability of the insurer of the offending truck is however limited to Rs.1,50,000/- minus Rs.7,500/- already paid u/s 92A of the said Act. The Tribunal ordered that balance amount of award (Rs.2,83,000/- - Rs.1,42,500/-) i.e. Rs.1,40,500/- with interest and proportionate costs be recovered from the owner of the offending truck. The application was dismissed as against the driver of the offending truck and the owner of the said car and notice against the insurer of the said car was discharged.

11. Being aggrieved by this judgment and order, the applicants preferred First Appeal No.807 of 1994. Main contention of the applicants before learned Single Judge was that the deceased was an employee of the owner of the said car and was driving his car and, hence, the insurer of the said car was liable to pay compensation to the applicants as the insurance policy included liability to third parties. It was contended that therefore, the insurer of the said car had paid compensation u/s 92A of the said Act. It was urged that the Tribunal ought to

have called upon the insurer of the said car to produce the insurance policy. It was also urged that the compensation awarded was inadequate and the entire amount claimed ought to have been granted.

12. Learned Single Judge directed the insurer of the said car to produce the policy of insurance. On a consideration of certain clauses of the policy, learned Single Judge came to a conclusion that the insurer of the said car cannot avoid its liability to pay compensation to the applicants. He observed that the employer of the deceased had ordered him to drive the car of its subsidiary company i.e. the owner of the said car. Learned Single Judge held that the insurer of the said car was liable to indemnify the applicants under its "Comprehensive Policy" insuring the said car. Learned Single Judge was of the view that the compensation awarded was inadequate and the applicants would be entitled to the amount claimed by them that is Rs.4,00,000/-. Learned Single Judge observed that the insurer of the offending truck had accepted its liability and deposited Rs.1,50,000/- and that amount has been received by the applicants. Hence, the balance amount i.e. Rs.2,50,000/- should be recovered from the insurer of the said car. Insurer of the said car was, therefore, directed to pay Rs.2,50,000/- to the applicants with interest thereon at the rate of 12% per annum from the date of the order of the Tribunal.

13. The said judgment and order is challenged in the instant letters patent appeal by M/s. Traders Private Limited i.e. owner of the said car (appellant 1 herein) and the Oriental Insurance Company Limited - the insurer of the said car (appellant 2 herein).

14. We have heard, at some length, Mr. Barve, learned Counsel for the appellants and Mr. Singh, learned Counsel for the New India Assurance Company Limited i.e. the insurer of the offending truck, who is respondent 7 herein. We have also heard Mr. Patel, learned Counsel for the claimants.

15. Mr. Barve, learned Counsel for the appellants took us through the written submissions tendered in the court by the appellants. He submitted that learned Single Judge erred in taking the insurance policy issued by the insurer of the said car to the owner of the said car, on record. He submitted that application to bring on record the said document was rejected by the Tribunal. That order was not challenged. The said policy, therefore, could not have been read in evidence at the appellate stage. Mr. Barve submitted that taking of the said policy on record has occasioned serious miscarriage of justice because the appellants had no opportunity to lead evidence to prove the extent to which IMT 5 purported to extend Personal Accident Insurance Cover.

16. Mr. Barve submitted that Section 110 of the said Act conferred upon the Tribunal jurisdiction to adjudicate upon claims for compensation in respect of accidents involving the death of or bodily injury to and/or damage to any property of Third Party. The deceased was neither a Third Party within the meaning of Section 95(1)(b)(i) nor was he in the employment of the owner of

the said car so that liability under the Workmen's Compensation Act, 1923 can be fastened on it. The deceased was in fact a First Party and the liability, if any, of the appellants would have been in respect of acts of his negligence resulting into death of or bodily injury to and/or damage to any property of Third Party.

17. Mr. Barve submitted that learned Single Judge has wrongly interpreted Clause 3 of Section II of the said policy. He pointed out that Section II is titled as Liability to Third Parties. Clause 3 thereof only states that the insurer of the said car was liable in respect of liability of the driver for his tortuous acts towards Third Party personal injury or property damage. Learned Single Judge has wrongly held that the insurer of the said car is liable to compensate the deceased who was driving the car of the owner of the said car.

18. Mr. Barve submitted that endorsement IMT 5 on which reliance is placed by learned Single Judge pertains to "Accidents to unnamed passengers other than the insured and his paid Driver or Cleaner". Thus the deceased not being a passenger was not entitled to the benefit of Personal Accidents Insurance Cover. Mr. Barve submitted that learned Single Judge erred in treating Personal Accidents Insurance Cover under Endorsement IMT 5 as a contract of indemnity. He submitted that neither Personal Accidents Insurance Cover nor Life Insurance Policy is a contract of indemnity. Mr. Barve contended that endorsement IMT 5 is a Personal Accidents Insurance Cover in respect of death limited to Rs.15,000/- to unnamed passengers and specifically excludes such compensation to person driving the vehicle.

19. Mr. Barve submitted that enhancement of compensation has no basis. In any event, it is the insurer of the Third Party vehicle which has to satisfy the award and excess compensation must be recovered from the said Insurer. He submitted that liability cannot be fastened on the insurer of the said car in the absence of any liability being fastened on the owner of the said car.

20. In support of his submissions, Mr. Barve has relied on judgments of the Supreme Court in Padma Srinivasan Vs. Premier Insurance Company Limited, ; National Insurance Co. Ltd. Vs. Swaran Singh and Others, ; Punam Devi and Another Vs. Divisional Manager, New India Assurance Co. Ltd. and Others, ; National Insurance Co. Ltd. Vs. Baljit Kaur and Others, ; Sohan Lal Passi Vs. P. Sesh Reddy and others, ; Skandia Insurance Co. Ltd. Vs. Kokilaben Chandravadan and Others, ; National Insurance Co. Ltd. Vs. Deepa Devi and Others, ; Oriental Insurance Co. Ltd. v. Syed Ibrahim and Ors. 2007 ACJ 2816; National Insurance Co. Ltd. Vs. Anjana Shyam and Others, ; British India General Insurance Co. Ltd. Vs. Captain Itbar Singh and Others, and Subramania Naicker and Another Vs. Kuppuswamy and Another, . Mr. Barve submitted that in the circumstances, the impugned judgment and order be set aside and necessary direction be given to recover the excess compensation from the insurer of the offending truck.

21. Mr. Singh learned Counsel for the New India Assurance Company Limited i.e.

the Insurer of the offending truck, respondent 7 herein, submitted that the insurer of the offending truck had filed written statement in the Tribunal stating that its liability was limited to Rs.1,50,000/-. It accepted the limited liability and paid Rs.1,50,000/- to the Claimants and the Claimants filed application praying for deletion of its name from the proceedings. That application was allowed and notice issued against the insurer of the offending truck was discharged. This order was not challenged by the appellants. In fact, the appellants have now prayed that the judgment of the Tribunal be upheld. Therefore, the appellants cannot now urge that the insurer of the offending truck is liable to pay any additional compensation to the Claimants.

22. Mr. Singh submitted that in any case, at the relevant time, the liability of the insurer of the offending truck in respect of Third Party risks, in case of goods vehicle was limited to Rs.1,50,000/- u/s 95(2)(a) of the said Act. Mr. Singh further submitted that on perusal of schedule of the policy of the insurer of the offending truck, it is clear that premium of Rs.240/- has been paid towards "Public Risk" u/s II-1(i) of the Policy and Rs.16 has been paid for covering risk of driver/cleaner. No extra premium has been paid for coverage of any passenger to be carried in the vehicle or for unlimited liability for Third Party risks. Limits of liability has been described as "such amount as is necessary to meet the requirements of M.V. Act, 1939". Mr. Singh submitted that it is well settled that liability of the insurer would be limited as provided under the statute/law except where it can be shown that there was a special contract to enhance the liability and extra premium was paid there for. Mr. Singh submitted that so far as insurer of the offending truck is concerned, there was no special contract to enhance the liability and no extra premium was paid. Therefore, there is no question of the insurer of the offending truck paying any compensation to the Claimants beyond the admitted liability of Rs.1,50,000/- as per Section 95(2)(a).

23. Mr. Singh pointed out that the policy of the insurer of the offending truck is styled as "Third Party Policy". Third Party Property Damage as provided under "Limits of Liability" is Rs.50,000/- (Section II(i)(ii) of the policy). Thus Third Party Property Damage though limited to Rs.2,000/- u/s 92(2) (d) was extended up to Rs.50,000/- however as far as "Third Party injury and/or death" is concerned, the liability is restricted to Rs.15,000/- as per the said Act (Section II-1(i) of the policy). Mr. Singh submitted that in case of a Comprehensive Policy damage caused to the vehicle and certain other risks are covered on payment of requisite extra premium. But that does not mean that the limit of the liability with regard to Third Party risks becomes unlimited or higher than that which is statutorily fixed. In this connection, Mr. Singh relied on National Insurance Co. Ltd., New Delhi Vs. Jugal Kishore and Others, ; New India Assurance Co. Ltd. Vs. C.M. Jaya and Others, ; Oriental Insurance Co. Ltd. Vs. Smt. Raj Kumari and Others, and National Insurance Co. Ltd. Vs. Anjana Shyam and Others, .

24. Mr. Singh further submitted that the appellant's argument that the insurer of the offending truck should be directed to pay the entire award amount to the

Claimants and then recover that from the owner of the truck is misconceived. Mr. Singh submitted that the liability of the insurer of the offending truck is limited to only Rs.1,50,000/- and there is no provision in law under which any insurer can be asked first to pay the Claimants and then recover from the insured even if there is no liability and/or restricted liability. Mr. Singh submitted that the extraordinary jurisdiction to make such a direction is only enjoyed by the Supreme Court under Article 136 read with Article 142 of the Constitution of India if the finding under the law is that there is no liability upon the insurer to pay the compensation to the Claimants and then recover it from the owner. In this connection, Mr. Singh relied upon the judgments of the Supreme Court in National Insurance Co. Ltd. Vs. Kusum Rai and Others, ; Oriental Insurance Co. Ltd. Vs. Brij Mohan and Others, . He also relied on judgments of this Court in United India Insurance Co. Ltd. v. Anubai G. Thakore and Ors. F.A. No.827 of 2006 decided on 26/8/2007 and New India Assurance Company Ltd. Vs. Diwakar Rohankar and Others, . Mr. Singh also relied on the judgment of the Rajasthan High Court in United India Insurance Co. Ltd. v. Madho Singh and Ors. 2005 ACJ 1953. Mr. Singh submitted that in the circumstances, the insurer of the offending truck cannot be saddled with the liability of paying any additional compensation to the Claimants nor can it be asked to pay the amount to the Claimants and recover it from the owners of the offending truck.

25. Mr. Patel, learned Counsel for the claimants submitted that learned Single Judge has rightly granted the claim of the claimants in its entirety. He submitted that no case is made out for interference with the quantum of maintenance. He submitted that learned Single Judge has rightly held the appellants also liable to pay compensation to the claimants but assuming this Court comes to the conclusion that they are not liable to pay the compensation, that would entirely be a matter between the two insurance companies and the owners with which the claimants are not concerned.

26. We have already noted that the Tribunal has returned a finding that the driver of the offending truck drove it in a rash and negligent manner which resulted in the offending truck colliding against the said car causing fatal injuries to the deceased. The Tribunal has not found the deceased to be negligent. These findings of the Tribunal have not been disturbed by learned Single Judge. We concur with the above findings recorded by the Tribunal which are endorsed by learned Single Judge. We must also note that there is no conclusive evidence on record to establish that the deceased was driving the said car at the instance of or on the order of the owners of the said car.

27. So far as quantum of compensation is concerned, learned Single Judge has come to a conclusion that the claimants are entitled to Rs.4,20,120/-. However, since the applicants have claimed only Rs.4 lakhs, learned Single Judge has allowed the applicants' claim in its entirety. Thus, learned Single Judge has enhanced the compensation. In our opinion, the enhancement of compensation is justified and legal. Moreover, having regard to the fact that the deceased is

survived by two daughters, one son, a widow and a mother, we are not inclined to disturb the quantum. The amount awarded appears to us to be reasonable.

28. We must first deal with Mr. Barve's objection to the taking on record of the insurance policy of the insurer of the said car by learned Single Judge. The impugned order indicates that the Tribunal refused to take the xerox copy of the said policy on record. Learned Single Judge has observed that it was a basic and crucial document which could not have been ignored by the Tribunal. Learned Single Judge, therefore, took it on record and considered its terms. From the impugned judgment, it does not appear that the insurer of the said car raised any objection to taking of the said policy on record before learned Single Judge. If such an objection was raised, learned Single Judge would have dealt with it. It is, therefore, not open to the insurer of the said car to raise this objection at this stage. In any event, we do not see what prejudice is caused to the insurer and owner of the said car. Interpretation of the terms of policy can easily be done even at the appellate stage. In any case, we feel that it is better to have the said policy on record, consider its clauses, rather than keep scope for doubts and make the determination of the issues vulnerable. In this connection, we may refer to the judgment of the Supreme Court in *National Insurance Co. Ltd., New Delhi Vs. Jugal Kishore and Others*, where the Supreme Court commented on the attitude of the insurance companies, of not filing a copy of the policy in the court and held that it is the duty of the party which is in possession of a document which would be helpful in doing justice in the cause to produce the said document and such party should not be permitted to take shelter behind the abstract doctrine of burden of proof. In view of the above, this submission of Mr. Barve is rejected.

29. Before we go to the rival legal submissions, we must refer to the observations made by learned Single Judge that the owner of the said car is a subsidiary company of Indian Express Newspaper Limited. It must be stated here that in the application, the applicants have said that the deceased was working as a driver in the Indian Express. The wife of the deceased has also said so in the evidence. In this connection, the applicants have examined Prem Mannalal Ramne, Chief Time Keeper of the Indian Express. He has said in the examination-in-chief that the deceased was serving in the Indian Express. But, he has not said that the deceased was serving as a driver with the owner of the said car. In cross-examination, he has stated that the deceased was not an employee of owner of the said car. He has stated that the Indian Express and owner of the said car are different companies. He has admitted that the deceased was paid salary by the Indian Express and he was not receiving any salary from the owner of the said car. Therefore, it is clear that the deceased was an employee of the Indian Express and not of the owner of the said car. There is no evidence on record to establish that the Indian Express is a sister concern of owner of the said car. This finding reached by the Tribunal is in our opinion correct. Contrary finding recorded by learned Single Judge is, therefore, set aside.

30. It must also be noted that learned judge has observed that there is hardly any dispute that the owner of the said car is a subsidiary company of the Indian Express and that the Indian Express had asked the deceased to drive the said car. This observation of learned Judge is factually wrong. There is no such admission on record. In its written statement, the owner of the said car has denied that the deceased was its employee. As we have already noted, there is no clear evidence on record to establish that the owner of the said car is a subsidiary company of the Indian Express.

31. Before we go to the relevant provisions of the said Act, it is necessary to refer to the judgment of the Supreme Court in *Minu Mehta's* case (*supra*) to which our attention is drawn by Mr. Barve. In *Minu Mehta's* case (*supra*), the Supreme Court was faced with a situation where this Court and the Andhra Pradesh High Court had held that the liability of the insured and consequently of the insurer to compensate a Third Party dying or being injured on account of the use of the insured vehicle, is irrespective of whether the death, injury, etc. has been caused by rash and negligent driving. The Supreme Court was of the opinion that this view expressed by the High Courts was without any basis in law. The Supreme Court, therefore, analyzed the law. We may sum up what the Supreme Court has held as that would be relevant for the present case also.

32. The Supreme Court observed that the liability of the owner of the car to compensate the victim in a car accident due to the negligent driving of his servant is based on the law of tort. The owner is made liable on the basis of vicarious liability. Before the master could be made liable, it is necessary to prove that the servant was acting during the course of his employment and was negligent. With the increase of traffic and accidents it was found that in number of cases hardship was caused where the person inflicting the injury was devoid of sufficient means to compensate the person affected. Therefore, in England, certain statutes were enacted. In India, provisions relating to compulsory insurance in respect of Third Party insurance were made by introducing Chapter VIII in the said Act. After considering the provisions of the said Act, particularly Sections 95(1)(a) and (b), 95(1)(b)(i) and Section 96, the Supreme Court observed that the owner's liability arises out of his failure to discharge a duty cast on him by law. The right to receive compensation can only be against person who is bound to compensate due to the failure to perform a legal obligation. If a person is not liable legally, he is under no duty to compensate any one else. The Tribunal is constituted for expeditious disposal of the motor claims. 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 and the Tribunal is authorized to determine the amount of compensation which appears to be just. The Supreme Court observed that the concept of owner's liability without any negligence is opposed to the basic principle of law and the mere fact that a party received an injury arising out of the use of a vehicle in public place cannot justify fastening liability on the owner. The Supreme Court concluded that the proof of negligence remains the lynch pin

to recover compensation.

33. We must approach the present case keeping the above basic principles in mind. The question which we have to answer is once it is held that the death of the deceased is caused because of the negligent driving of the driver of the offending truck who should pay compensation to the claimants and to what extent. We shall first examine whether the insurer of the said car and the owner of the said car are liable to pay the compensation and if they are to what extent.

34. The policy of the insurer of the said car is as it's title states Private Car Comprehensive Policy. In Jugal Kishore's case (supra), the Supreme Court discussed the nature of a comprehensive policy. We shall advert in detail to this judgment a little later. But at this stage, we must mention that in this judgment, the Supreme Court has in the context of Comprehensive Policy stated that if the insured wants to cover risk with regard to driver or passenger, etc. in excess of statutory liability, it has to be clearly specified in the policy and separate premium has to be paid there for. Therefore, the terms of the policy of the insurer of the said car will have to be carefully perused.

35. Before going to the terms of the policy, we must note that after examining the present case in the light of the judgment of the Supreme Court in Minu Mehta's case (supra), we are of the opinion that the insurer of the said car would have been liable in respect of acts of negligence of the deceased resulting into death of / or bodily injury to and/or damage to any property of Third Party. The deceased was not a Third Party within the meaning of Section 95(1)(b)(i) of the said Act. The deceased was a victim in this case. There is no evidence to establish that he was negligent. There is nothing to establish that he was the employee of the owner of the said car or he was driving the said car at the instance of the owner of the said car. On first principles, we do not see how the insurer of the said car could be held liable to pay compensation to the heirs of the deceased. It is also difficult to understand how the owner of the said car can be held liable to pay compensation to the heirs of the deceased under the said Act under the policy which is issued in its favour and which is on record.

36. In this context, before going to the terms of the policy, it is necessary to refer to certain relevant provisions of the said Act. Chapter VIII of the said Act is titled as Insurance of Motor Vehicles against Third Party Risks. Section 94(1) thereof states that no person shall use except as a passenger or cause or allow any other person to use a motor vehicle in a public place, unless there is in force in relation to the use of the vehicle by that person or that other person as the case may be, a policy of insurance complying with the requirements of Chapter VIII. u/s 95(4) a policy shall be of no effect for the purposes of Chapter VIII unless and until there is issued by the insurer in favour of the person by whom the policy is effected a certificate of insurance containing, inter alia, the conditions subject to which the policy is insured.

37. Section 95(1)(b)(i) states that a policy of insurance must be a policy which

insures the person or class of persons specified in the policy against any liability which may be incurred by him in respect of the death 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.

38. Section 95(1)(b)(ii) states that a policy of insurance must be a policy which insures the person or classes of persons specified in the policy against the death of or bodily injury to any passenger of a public service vehicle caused by or arising out of the vehicle in a public place. Obviously 95(1)(b)(i) and (ii) concern themselves with Third Parties. Proviso to Section 95(1)(b) states which liability the policy is not expected to cover. It says that a policy shall not be required to cover liability in respect of 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 disability arising under the Workmen's Compensation Act, 1923, in respect of the death 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 examining tickets in the vehicle, or (c) if it is a goods vehicle, being carried in the vehicle. The proviso limits the liability of the insured to the extent that would arise under the Workmen's Compensation Act in respect of driver, conductor or ticket examiner and those who are carried in a goods carriage.

39. Sub-clause (ii) and (iii) of the proviso however carve out exception. Under these provisions, the insurer is required to cover liability in respect of the death of or bodily injury to persons being carried in or upon or entering or mounting or alighting from the vehicle at the time of the occurrence of the event out of which a claim arises, where the vehicle is a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment. The exemption is with reference to the nature of the vehicle and not with reference to the persons carried in the vehicle. Section 95(2) pertains to limits of liability to which we shall soon advert. In the scheme of the provisions to which we have made reference hereinabove, the driver of the said car i.e. the deceased does not figure at all. The deceased was not a Third Party within the meaning of Section 95(1)(b)(i) of the said Act. He was not even an employee of the owner of the said car. Assuming he was an employee of the owner of the said car, insurer of the said car would have been liable in respect of acts of negligence of the deceased resulting into death of / or bodily injury to and / or damage to any property of Third Party. Such is not the case here. The deceased being not a Third Party, in our opinion, his heirs are not entitled to compensation from the owner of the said car or insurer of the said car under the said Act.

40. To fasten the liability on the insurer of the said car, learned Single Judge has relied upon certain terms of its policy. He has quoted Clause 3 of Section II i.e. Liability to Third Parties. It reads thus:

3. In terms of and subject to the limitations of the indemnity which is granted by

this Section to the Insured the Company will indemnify any Driver who is driving the Motor Car on the Insured's order or with his permission provided that such Driver

(a) is not entitled to indemnity under any other Policy

(b) shall as though he were the Insured observe fulfill and be subject to the terms, exceptions and conditions of this Policy in so far as they can apply.

Learned Single Judge has observed that from this clause, it is clear that the deceased being driver of the said car was covered and was entitled to be indemnified by the insurer of the said car. In our opinion, learned Single Judge has not interpreted the said clause correctly.

41. Clause 3, it must not be forgotten is under the caption "Liability to Third Parties". Clause 3 implies that the insurer takes upon itself the vicarious obligation resting on the owner of the car to make good any loss or damage caused to Third Parties by his employee i.e. the driver due to his negligence. The words "indemnify the driver" mean to make good the loss or damage caused to Third Parties because of the negligent driving of the driver of the car of the insured by the insurer of the car. It does not mean that the victim has to be compensated by the insurer of the car.

42. Moreover, Sub-clause (a) indicates that the insurer will indemnify any driver who is driving the motor car on the insured's order or with his permission provided that such driver is not entitled to indemnity under any other policy. Thus, the driver who can get indemnity from any other company under any other policy, is under this contractual term not to get indemnity from the company who has issued the policy insuring the car he was driving New Asiatic Insurance Co. Ltd. Vs. Pessumal Dhanamal Aswani and Others, . This case should have been examined from this angle also. Unfortunately, this has not been done.

43. Learned Single Judge has also wrongly interpreted Clause 5. Clause 5 reads thus:

5. In the event of the death of any person entitled to indemnity under this Policy the Company will in respect of the liability incurred by such person indemnify his personal representatives in the terms of and subject to the limitations of this Policy provided that such personal representatives shall as though they were the Insured observe fulfil and be subject to the terms, exceptions and conditions of this Policy in so far as they can apply.

Clause 5, in our opinion must also be interpreted in the manner in which Clause 3 has been interpreted by us hereinabove. It means that if under the policy, a driver who is negligent and causes death of a Third Party or causes damage to the property of the Third Party and who has to be indemnified by making good the loss caused by his action to the Third Party, dies his personal representatives will have to be similarly indemnified in respect of liability incurred by him against Third Parties. The said amount cannot be recovered from the legal

representatives of the deceased driver.

44. Learned Single Judge has also relied on I.M.T. 5 which reads as under:

I.M.T. 5. Accidents to unnamed Passengers other than the insured and his paid Driver or Cleaner. In considerations of the payment of an additional premium it is hereby understood and agreed that the company undertakes to pay compensation on the scale provided below for bodily injury as hereinafter defined sustained by any passenger other than the insured and/or his paid driver attendant or cleaner and/or a person in the employ of the insured coming within the scope of workmen's compensation Act, 1923 and subsequent amendments of the said Act and engaged in and open the service of the insured at the time such injury is sustained whilst mounting into dismounting from or traveling in but not driving the Motor Car and caused by violent accident external and visible means which independently of any other cause shall within six calendar months of the occurrence of such injury result in Death only...100% compensation. Learned Single Judge has observed that from this clause, it is clear that the paid driver who comes within the scope of the Workmen's Compensation Act, 1923 is excluded for the reason that he is already covered under Clause 3 of Section II and, therefore, the Tribunal was not right in holding that the deceased was not covered under the policy. This reasoning again proceeds on the basis that under Clause 3 of Section II driver of the insured is entitled to compensation. Learned Single Judge has accepted that IMT 5 excludes the driver of the insured, but according to him this is because he is covered by Clause 3 of Section II. As stated by us hereinabove under Clause 3 of Section II driver of the insured is not entitled to compensation he being not a Third Party and, therefore, in our opinion this reasoning of learned Single Judge must be set aside as it is based on a wrong premise.

45. In any case, IMT 5 is a personal accident insurance cover and liability in respect of death is limited to Rs.15,000/- to unnamed passenger. Assuming that in terms of observations of the Supreme Court in Jugal Kishore's case (supra), the owner of the said car has covered risk with regard to unpaid driver on payment of separate premium and the deceased was an unpaid driver and was covered by IMT 5, the insurers of the said car would be required to pay compensation on the scale provided i.e. in respect of death, the compensation is 100%. The schedule of premium shows that a premium of Rs.94 was paid towards IMT 5 for death benefits in respect of 4 passengers. This covered an amount of Rs.15,000/- per passenger and nothing more.

46. In view of the above, we are clearly of the view that learned Single Judge is not right in fastening the liability to pay the compensation on the owner of the said car or the insurer of the said car. We must now turn to the liability of the insurer of the offending truck.

47. We have already noted that the insurer of the offending truck has filed its written statement before the Tribunal stating that its liability is limited to

Rs.1,50,000/-. It had paid the amount before adjudication of the claim. The claimants had filed a written application praying for the deletion of the insurer of the offending truck. That application was allowed and notice issued against the insurer of the offending truck was discharged. The claimants did not make any grievance about this in the first appeal filed by them. It is pertinent to note that the order discharging the insurer of the offending truck was not challenged by the present appellants i.e. the owner of the said car and the insurer of the said car and, therefore, that order has become final. In any case, since learned Counsel for the appellants has raised a serious objection to the discharge of the insurer of the offending truck in this Court by raising legal issues, it is necessary to see whether insurer of the offending truck has rightly been discharged, or whether the responsibility of paying the entire compensation rests on it. It is also urged by Mr. Barve, learned Counsel for the appellants that learned Single Judge should have directed the insurer of the offending truck to make up the amount granted by the Tribunal by paying to the Claimants the amount in excess of Rs.1,50,000/-. According to Mr. Barve, since the said amount has wrongly been directed to to be paid to the claimants by the insurer of the said car, the insurer of the offending truck may be directed to pay it to the insurer of the said car and recover it from the owner of the offending truck.

48. We have already referred to certain relevant provisions of the said Act. Policy of the insurer of the offending truck is a Third Party Policy. So far as the liability of the insurer of the offending truck is concerned, it is necessary to refer to Section 95(2) which covers limits of liability. It reads thus:

95(2) Subject to the proviso to subsection (1), a policy of insurance shall cover any liability incurred in respect of any one accident up to the following limits, namely:

[(a) where the vehicle is a goods vehicle, a limit of one lakh and fifty thousand rupees in all, including the liabilities, if any, arising under the Workmen's Compensation Act, 1923, in respect of the death of, or bodily injury to, employees (other than the driver), not exceeding six in number, being carried in the vehicle;]

[(b) where the vehicle is a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment,

(i) in respect of persons other than passengers carried for hire or reward, a limit of fifty thousand rupees in all;

(ii) in respect of passengers, a limit of fifteen thousand rupees for each individual passenger;

(c) save as provided in Clause (d), where the vehicle is a vehicle of any other class, the amount of liability incurred;

(d) irrespective of the class of the vehicle, a limit of rupees six thousand in all in respect of damage to any property of a third party.]

49. The offending truck was a goods vehicle. It is necessary to see what are the limits of liability provided under the policy issued by the insurer of the offending truck. The relevant portion reads as under:

50. Thus, as per Section II-I(i) of the policy as far as Third Party injury and/or death is concerned, the limits of liability set out in the policy, the liability of the insurer of the said truck, it being a "goods vehicle" was limited to Rs.1,50,000/- u/s 95(2)(a) of the said Act. Schedule of the premium reads as under:

B: LIABILITY TO PUBLIC RISK Add: for L.L. To authorized non fare paying passengers as per END IMT 14 (b) Limit any one passenger Rs. _____ Limit any one Accident Rs. _____

Rs. Rs.

240.00

Add for L.L. To paid driver and/or Cleaner as per END IMT. is Add for increased T.P. Limits Section II 1(i) Unlimited Section II 1(ii) Rs.

Rs.

16.00

Add : for.....

Rs.

Rs.

COMPREHENSIVE PREMIUMM (A+B) Less : 10% Sp. Discount (If due)

Rs. Rs.

256.00

NET PREMIUM DUE (ROUNDED OFF)

Rs.

256.00

This premium of Rs.240/- has been paid towards "Public Risk" u/s 11-1(i) of the Policy and Rs.16 has been paid for covering risk of driver / cleaner. However, no extra premium has been paid for coverage of any passenger to be carried in the vehicle or for unlimited liability for Third Party Risks.

51. Under the caption Limits of liability, Rs.50,000/- is covered u/s 11-1(ii) of the policy i.e. Third Party Property Damage". u/s 95(2)(d), Third Party Damage is limited to Rs.6,000/-. But it appears that risk towards "Third Party Damage" is extended and covered upto Rs.50,000/-.

52. In this connection, we shall again refer to the judgment of the Supreme Court in Jugal Kishore's case (supra). In that case, the Supreme Court was

concerned with comprehensive policy which covers more risks than Third Party Policy with which we are concerned here. The Tribunal had awarded compensation in the sum of Rs.10,000/- recoverable jointly and severally from the appellant insurance company and the owner of the offending bus. The claimant preferred an appeal to the Delhi High Court contending that the compensation was inadequate. The Delhi High Court awarded a sum of Rs.1,00,000/- as compensation to the claimant recoverable jointly and severally from the appellant insurance company and the owner of the offending truck. Aggrieved by the said judgment, the appellant insurance company approached the Supreme Court. The policy of the appellant insurance company indicated that the liability undertaken with regard to the death or bodily injury to any person caused by or arising out of the use (including the loading and/or unloading) of the motor vehicle falling u/s II(1)(i) had been confined to "such amount as is necessary to meet the requirements of the Motor Vehicles Act, 1939. This liability as noted by the Supreme Court, at the relevant time as per Clause (b) of Sub-section (2) of Section 95 of the said Act was Rs.20,000/- only. The details of premium indicated that no extra premium with regard to a case falling u/s II (1) (i) was paid by the owner of the offending bus. The Supreme Court noted that only the offending bus was comprehensively insured the insured's estimate of value including accessories (I.E.V.) thereof having been shown as Rs.40,000/-. It was urged that the policy was a "Commercial Vehicle Comprehensive" policy and the premium paid was higher than the premium of an 'Act only' policy and therefore, liability of the appellant's insurance company was unlimited and not confined to Rs.20,000/- only. The Supreme Court rejected this submission. "Even though it is not permissible to use a vehicle unless it is covered at least under an 'Act only' policy it is not obligatory for the owner of a vehicle to get it comprehensively insured. In case, however, it is got comprehensively insured a higher premium than for an 'Act only' policy is payable depending on the estimated value of the vehicle. Such insurance entitles the owner to claim reimbursement of the entire amount of loss or damage suffered up to the estimated value of the vehicle calculated according to the rules and regulations framed in this behalf. Comprehensive insurance of the vehicle and payment of higher premium on this score, however, do not mean that the limit of the liability with regard to third party risk becomes unlimited or higher than the statutory liability fixed under subsection (2) of Section 95 of the Act. For this purpose, a specific agreement has to be arrived at between the owner and the insurance company and separate premium has to be paid on the amount of liability undertaken by the insurance company in this behalf. Likewise, if risk of any other nature, for instance, with regard to the driver or passengers etc. in excess of statutory liability, if any, is sought to be covered it has to be clearly specified in the policy and separate premium paid therefore."

53. In our opinion, ratio of this judgment is clearly attracted to the present case.

54. In C.M. Jaya's case (supra), the deceased was riding the pillion seat of a two wheeler when it met with accident with a truck insured by the appellant

insurance company. The Tribunal awarded a sum of Rs.1,03,360/- as compensation and held that the liability of the appellant-insurer was limited to Rs.50,000/- and the balance amount was recoverable from the driver and owner of the truck. In appeal, the High Court held that the liability of the appellant insurer was unlimited as the truck was comprehensively insured. The High Court allowed the cross-objections preferred by the claimants and placed the full pecuniary liability on the insurer while enhancing the compensation. Submissions were advanced on the extent of liability of the insurer. The question which was posed for consideration before the Constitution Bench of the Supreme Court was whether in a case of insurance policy not taking any higher liability by accepting a higher premium, in case of payment of compensation to a third party, the insurer would be liable to the extent limited u/s 95(2) or the insurer would be liable to pay the entire amount and he may ultimately recover it from the insured. Since there was conflict of opinion in the decisions of the Supreme Court, the Constitution Bench took a resume of its earlier decisions. On facts, the Constitution Bench noted that the policy disclosed that the limit of the amount of the insurer's liability u/s 11(1)(ii) in respect of one accident was Rs.50,000/-. The limit of the amount of the insurer's liability u/s 11(1)(ii) in respect of series of claims arising out of one event was Rs.50,000/-. No higher premium was paid to cover higher liability than the statutory liability fixed in the policy. The Constitution Bench referred to Jugal Kishore's case (supra) and to New India Assurance Co. Ltd. Vs. Smt. Shanti Bai and others, and observed that the liability of the insurer is limited, as indicated in Section 95 of the said Act, but it is open to the insured to make payment of additional higher premium and get higher risk covered in respect of third party also. But in the absence of any such clause in the insurance policy, the liability of the insurer cannot be unlimited in respect of third party and it is limited only to the statutory liability. The Constitution Bench added that this view has been consistently taken in its other decisions. Though the Constitution Bench did not in so many words state that if the insurance company's liability is limited, it cannot be made to pay the entire compensation amount and recover it from the insurer while holding that the appellant insurance company's liability was limited, it was made clear that the liability of the driver of the offending vehicle and owner of the offending vehicle was not affected. The Constitution Bench did not direct the appellant insurance company to pay the compensation amount and recover it from the owner and driver of the vehicle. The judgments of the Supreme Court in Jugal Kishore's case (supra) and C.M. Jaya's case (supra), in our opinion, apply to the present case. There is no extra premium paid for coverage of any passenger to be carried in the vehicle for 'unlimited liability' for third party risks. Liability of the insurer of the offending truck as per the schedule is limited to such amount as is necessary to meet the requirements of the said Act. There is no special contract to enhance the liability and hence, no extra premium was paid therefore. We therefore hold the liability of the insurer of the offending truck being limited, it cannot be saddled with liability to pay additional compensation.

55. We now come to a very crucial aspect of the matter. The claimants have already received the total amount of compensation i.e. Rs.4,00,000/- as awarded by learned Single Judge. Out of that amount, Rs.1,50,000/- has been paid by the insurer of the offending truck. Remaining amount has been paid by the insurer of the said car. We have already held that the liability of the insurer of the offending truck is rightly limited to Rs.1,50,000/- and that the owner of the said car and the insurer of the said car cannot be held liable to pay any compensation to the claimants. The insurer of the said car is therefore entitled to get back the said amount. The said amount obviously cannot be recovered from the claimants because apart from the fact that they are entitled to this amount in law, such a direction would cause great hardship to the claimants. Since, the liability of the insurer of the offending truck is limited to Rs.1,50,000/- the remaining amount may have to be paid by the owner of the offending truck, who would be vicariously liable to pay for the tortious acts of his employee, the negligent driver of the offending truck. Mr. Barve learned Counsel for the insurer of the said car urged that the insurer of the offending truck may be directed to pay the said amount so that it can recover it from the owner of the offending truck.

56. In our opinion, we cannot in all cases issue a direction to any insurance company if it is not bound in law to pay compensation, to pay it and recover it from the owner of the offending vehicle. We have already referred to the Constitution Bench judgment in C.M. Jaya's case (supra), where this question fell for consideration and the Constitution Bench did not direct the insurance company to pay the entire amount, that is including the amount in excess of its limited liability and recover it from the insured. The Constitution Bench had before it the judgment of the Supreme Court in Jugal Kishore's case (supra), where the Supreme Court held that the liability of the appellant insurance company was limited to Rs.50,000/- and observed that this finding did not affect in any manner the liability of the truck owner and the driver to pay the full amount of the award. Similarly, in National Insurance Co. Ltd. Vs. Bommithi Subbhayamma and Others, the Supreme Court held that the insurance company was not liable to pay compensation on the death of gratuitous passenger in the truck when it met with accident but the claimants are entitled to recover the amount of compensation granted by the Tribunal from the owner of the vehicle.

57. It is also necessary to refer to Smt. Raj Kumari's case (supra) , on which Mr. Singh has placed reliance. In that case, the High Court had held that though the liability of the insurer was limited to Rs.50,000/-, yet it was to first pay the amount awarded to the claimants and recover the amount in excess of Rs.50,000/- from the owner and the driver of the offending vehicle. The insurer carried an appeal to the Supreme Court. The Supreme Court observed that the liability of the insurer was limited to quantum which was to be indemnified in terms of the policy. The Supreme Court observed that in certain cases, it has, after looking into the fact situation, directed the insurance company to make payment with liberty to recover the amount in excess of the liability from the insured. The Supreme Court clarified that those decisions were given on the fact

situation of the cases concerned. The Supreme Court directed that the insurer shall pay an amount of Rs.50,000/- with interest awarded to the claimants and the balance has to be paid by the insured.

58. We may also refer to Anjana Shyam's case (supra) which lends support to our above conclusion. In that case, the question before the Supreme Court was whether the Insurance Company's liability was confined only to the extent of the number of passengers insured by it and could not be extended to cover persons not covered by the insurance policy. The Supreme Court held that the insurance company can be made liable only in respect of the number of passengers for whom insurance can be taken under the Motor Vehicles Act and for whom insurance has been taken as a fact and not in respect of other passengers involved in the accident in case of overloading. The Supreme Court observed that since there was no means of ascertaining who, out of the overloaded passengers, constituted the passengers covered by the insurance policy, insurance company in such a case, would be bound to cover the higher of the various awards and would be compelled to deposit the higher of the amounts of compensation awarded to the extent of number of passengers covered by the insurance policy. The Supreme Court observed that it would be for the Tribunal thereafter to direct distribution of the money so deposited by the Insurance Company proportionately to all the claimants and leave all the claimants to recover the balance from the owner of the vehicle.

59. In our opinion, directions facilitating recovery of the amount from the owner of the offending vehicle issued by the Supreme Court in Baljit Kaur's case (supra), in Oriental Insurance Co. Ltd. Vs. Shri Nanjappan and Others, in Kusum Rai's case (supra), in Oriental Insurance Co. Ltd. Vs. Brij Mohan and Others, and in Syed Ibrahim's case (supra) are in exercise of its jurisdiction under Article 142 of the Constitution of India read with Article 136 thereof for doing complete justice to the parties. Such powers do not vest in us. It is therefore not possible for us to pass similar orders. We may note that learned Single Judge of Aurangabad Bench of this Court (Kingaonkar, J.) has taken a similar view in First Appeal No.827 of 2006 and First Appeal No.826 of 2006 decided on 4/8/2007. However, learned Single Judge of Nagpur Bench of this Court (Kharche, J.) has taken a contrary view in National Insurance Co. Ltd. v. Prakash Sakhambar Dudhankar and Ors. 2006(1) BCR 412. The view taken by Kingaonkar, J. commends itself to us.

60. We will now turn to Padma Srinivasan's case (supra) on which reliance is placed by Mr. Barve. In that case, the accident had taken place on 5/4/1970. The claimant filed appeal u/s 110-A of the Motor Vehicles Act, 1939. The respondent insurance company denied its liability. The Tribunal held that the claimant is entitled to recover compensation in the sum of Rs.60,000/-. The Tribunal limited the liability to Rs.50,000/-. The insurance company filed an appeal in the High Court. It contended that on the date on which the insurance policy was issued, its statutory liability was limited to a sum of Rs.23,000/- only and, therefore, the

Tribunal was in error in passing an award in the sum of Rs.50,000/-. The Supreme Court considered the relevant provisions of the Motor Vehicles Act, 1939 and held that the material date for ascertaining the extent of liability of the insurer is the date of the accrual of the cause of action for a claim arising out of an accident, which in general would be the date of the accident. The Supreme Court noted that the accident had taken place after 2/3/1970. u/s 95(2)(a) of the Motor Vehicles Act, 1939, the limit of the liability was increased from Rs.20,000/- to Rs.50,000/- vide Act, 56 of 1969. This amendment came into force on 2/3/1970. Thus, in Section 95(2)(a), the liability of Rs.20,000/- was increased to Rs.50,000/-. The Supreme Court held that since the accident had taken place after the amendment came into effect and the liability amount was increased, the claimant would be entitled to Rs.50,000/- and not Rs.20,000/-. Material date means the date of the accident.

61. In this case, the accident took place on 16/12/1987. u/s 147(2)(a) of the Motor Vehicles Act, 1988, the liability in case of death is "liability incurred" that is unlimited. The new Act came into force from 1/7/1989. Since the accident occurred prior to this date, in the light of Padma Srinivasan's case (supra), the liability of the insurer of the truck cannot be enhanced to that which is granted by the Tribunal, because it is not unlimited.

62. In Swaran Singh's case (supra) on which Mr. Barve has relied upon, the Supreme Court was concerned with interpretation of Section 149 of the Motor Vehicles Act, 1988, which pertains to duty of insurers to satisfy judgments and award against persons insured in respect of third party risks. The Supreme Court concluded that if the insurer has satisfactorily proved its defence in accordance with the provisions of Section 149(2) read with subsection (7), 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 Supreme Court further observed that 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 Motor Vehicles Act, 1988 as arrears of land revenue. The Supreme Court observed that where the adjudication of the claims of the insured and the insurer might delay the adjudication of the claims of the victims, the Tribunal may relegate them to the remedy before the regular court.

63. In Captain Itbar Singh's case (supra) on which Mr. Barve has placed reliance, the Supreme Court observed that if the insurer 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 subsection (3) and under Sub-section (4) of Section 96 of the Motor Vehicles Act, 1939 recover it from the assured.

64. Mr. Barve sought to rely on the above provisions of law and the above judgments and contended that the insurer of the offending truck must be made to pay the entire amount and recover it from the owner.

65. The question which arises is what is the effect of Section 96 (3) and (4) of the said Act and Section 149(4) and (5) of the Motor Vehicles Act, 1988. Can it be said that because of these provisions, the insurance company can be compelled to make payment of the awarded amount and recover it from the insured in all cases? We have carefully considered these provisions. On the basis of these provisions, we are unable to lay down a broad proposition that in all cases, the insurer must be made to pay the entire compensation amount and then recover it from the owner of the offending vehicle.

66. Section 96 of the said Act corresponds to Section 149 of the Motor Vehicles Act, 1988. These provisions state the duty of the insurers to satisfy judgments against persons insured in respect of Third Party risks. These provisions make the insurer deemed judgment debtor if award against the insured is passed subject to notice and defences/grounds. Section 96(2) and Section 149(2) state the conditions under which the insurer can deny Third Party risks. They contain the defences available with the insurer. The effect of proviso to Section 96(3) and Section 149(2) is that the insurer can recover amount from the insured if it is made liable to pay because of this section. u/s 96(3) and (4) of the said Act and u/s 149(4) and (5) of the Motor Vehicles Act, 1988, if the amount which the insurer becomes liable to pay under the policy exceeds the amount which the insurer would, apart from the provisions of Section 96 or Section 149 as the case may be liable under the policy in respect of that liability, the insurer shall be entitled to recover the excess from that person. In our opinion the legislature has given statutory right to the insurer under Sub-section (2) of Section 96 of the said Act and u/s 149 of the Motor Vehicles Act, 1988 to defend a claim on limited grounds. That right cannot be defeated by interpreting Sub-section (3) and (4) of Section 96 of the said Act or Sub-section (4) and (5) of Section 149 of the Motor Vehicles Act, 1988 in a manner which will result in giving benefit by one hand and withdrawing it by other hand.

67. In Swaran Singh's case (supra), and in Captain Itbar Singh's case (supra), the Supreme Court was concerned with situations where the insurance company was compelled to pay compensation. The Supreme Court observed that if the insurer proves the available satisfactory defences, or if he has been made to pay something which on the contract of policy he was not bound to pay, he can recover the same from the assured under the above mentioned provisions. These judgments, in our opinion, do not lay down a proposition that in all cases the insurance company has to pay the awarded amount and then recover it from the assured, whether it is liable to pay the amount or not. Such a course may be available under certain fact situations only. For instance, under the Motor Vehicles Act, 1988, for Third Party property damage, the liability is limited to Rs.6,000/- and if there is any policy which covers lesser amount viz. Rs.2,000/-, as under the said Act, the amount of Rs.4,000/- would be recoverable from the insured by the insurer after paying it.

68. We have already referred to Padma Srinivasan's case (supra), and stated

that the accident took place on 16/12/1987 i.e. prior to amendment whereby limit of liability was increased, the insurer of the offending truck cannot be made to pay the enhanced liability. However, had the accident taken place after the amendment which enhanced the liability to unlimited liability, the insurer would be liable to pay the difference between the limited liability and the amount awarded and recover it from the insured. In this connection, we may usefully refer to Madho Sen's case (supra) where the Rajasthan High Court has considered this aspect and laid down the law. We find substance in Mr. Singh's submission that the legislature has given statutory right under Sub-section (2) of Section 96 of the said Act and Sub-section (2) of Section 149 of the Motor Vehicles Act, 1988. Sub-sections (3) and (4) of Section 96 or (4) and (5) of Section 149 confer rights on the insurer to recover from the insured under certain contingencies as explained above and, therefore, the said "rights" granted by the legislature cannot be converted into "obligation or liability of the insurer to pay to the claimants first in all cases whether they are liable or not and then recover it from the insured. Section 96(2) / Section 149(2) would become superfluous if any other interpretation is put on the above provisions.

69. In our opinion, judgments of the Supreme Court in Punam Devi's case (supra), Sohan Lal's case (supra), Skandia Insurance Company's case (supra), Deepa Devi's case (supra) and Subramania Naicker's case (supra), have no application to the issues involved in this case and, hence, need not be elaborately discussed.

70. In the view that we have taken, the letters patent appeal is disposed of in the following manner:

- (a) The compensation amount awarded by learned Single Judge to the claimants is confirmed.
- (b) The appellants are held not liable to pay any compensation to the claimants
- (c) Liability of the insurer of the offending truck is limited to Rs.1,50,000/- and nothing more can be recovered from it.
- (d) The appellants would be at liberty to recover the amount paid by them from the owner of the offending vehicle if they so desire.
- (e) The impugned judgment and order is set aside to the above extent and is substituted by the present judgment and order.

71. Letters patent appeal is disposed of in the aforesaid terms with no order as to costs. Needless to say that all connected civil applications stand disposed of.