SUSHILA AGGARWAL & ORS. A

v.

STATE (NCT OF DELHI) & ANR.

(Special Leave Petition (Criminal) Nos. 7281-7282 of 2017)

MAY 15, 2018 B

[KURIAN JOSEPH, MOHAN M. SHANTANAGOUDAR AND NAVIN SINHA, JJ.]

Bail – Whether an anticipatory bail should be for a limited period of time – There are two divergent views: One are the line of Judgments in support that anticipatory bail should not be for a limited period and the others are that orders of anticipatory bail should be of a limited duration – In the light of the conflicting views of the different Benches of varying strength, following questions referred to the larger Bench: (i) Whether the protection granted to a person u/s.438 Cr.P.C. should be limited to a fixed period so as to enable the person to surrender before the trial Court and seek regular bail; (ii) Whether the life of an anticipatory bail should end at the time and stage when the accused is summoned by the Court – Code of Criminal Procedure, 1973 – s.438. C D

Shri Gurbaksh Singh Sibbia and Others v. State of Punjab **(1980) 2 SCC 565 : [1980] 3 SCR 383 ;** *Siddharam Satlingappa Mhetre v. State of Maharashtra and Others* **(2011) 1 SCC 694 : [2010] 15 SCR 201 ;** *Bhadresh Bipinbhai Sheth v. State of Gujarat and Another* **(2016) 1 SCC 152 : [2015] 10 SCR 398 ;** *Salauddin Abdulsamad Shaikh v. State of Maharashtra* **(1996) 1 SCC 667 : [1995] 6 Suppl. SCR 556 ;** *K.L. Verma v. State and Another* **(1998) 9 SCC 348 ;** *Sunita Devi v. State of Bihar and Another* **(2005) 1 SCC 608 : [2004] 6 Suppl. SCR 707 ;** *Adri Dharan Das v. State of W.B.* **(2005) 4 SCC 303 : [2005] 2 SCR 188 ;** *Nirmal Jeet Kaur v. State of M.P. and Another* **(2004) 7 SCC 558 : [2004] 3 Suppl. SCR 1006 ;** *HDFC Bank Limited v. J.J. Mannan* **(2010) 1 SCC 679 : [2009] 16 SCR 590 ;** *Satpal Singh v. The State of Punjab* **(2018) SCC Online SC 415 – referred to.** E F G H

Case Law Reference

[1980] 3 SCR 383	**referred to**	**Para 2**
[2010] 15 SCR 201	**referred to**	**Para 3**
[2015] 10 SCR 398	**referred to**	**Para 3**
[1995] 6 Suppl. SCR 556	**referred to**	**Para 4**
(1998) 9 SCC 348	**referred to**	**Para 4**
[2004] 6 Suppl. SCR 707	**referred to**	**Para 4**
[2005] 2 SCR 188	**referred to**	**Para 4**
[2004] 3 Suppl. SCR 1006	**referred to**	**Para 4**
[2009] 16 SCR 590	**referred to**	**Para 5**

CRIMINAL APPELLATE JURISDICTION : Special Leave Petition (Criminal) No. 7281-7282 of 2017.

From the Order dated 02.08.2017 of the High Court of Delhi at New Delhi in BA No. 1415 of 2017.

Vikramjit Banerjee, ASG, H. P. Raval, Sr. Adv., Ms. Geetha Luthra, Nipun Saxena, Aditya P. Arora, Ms. Divya Anand, Abhay Kumar, Vineet Kumar Singh, Saurabh Mishra, Pranay Ranjan, C. K. Sucharita, Sanjay Kr. Tyagi, Ayush Anand, Shubhendu Anand, Ms. Shruti Agarwal, Ujjwal Jain, Prateek Yadav, B. V. Balaram Das, C. S. N. Mohan Rao, Lokesh Kumar Sharma and B. Kranthi Kumar, Advs. for the appearing parties.

The Order of the Court was passed by

KURIAN, J. 1. Whether an anticipatory bail should be for a limited period of time is the issue before us on which there are two divergent views.

2. The line of judgments that anticipatory bail should not be for a limited period places its reliance on the Constitution Bench decision of this Court in **Shri Gurbaksh Singh Sibbia and others** v. **State of Punjab**[1].

[1](1980) 2 SCC 565

3. **Siddharam Satlingappa Mhetre** v. **State of Maharashtra and others**[2] is a very detailed judgment by a Bench of two Judges on the scope and object of an anticipatory bail. In **Mhetre** (supra), this Court took the view that the Constitution Bench has held that anticipatory bail granted by the court should ordinarily continue till the trial of the case. To quote:

> **"94.** The proper course of action ought to be that after evaluating the averments and accusation available on the record if the court is inclined to grant anticipatory bail then an interim bail be granted and notice be issued to the Public Prosecutor. After hearing the Public Prosecutor the court may either reject the bail application or confirm the initial order of granting bail. The court would certainly be entitled to impose conditions for the grant of bail. The Public Prosecutor or the complainant would be at liberty to move the same court for cancellation or modifying the conditions of bail any time if liberty granted by the court is misused. The bail granted by the court should ordinarily be continued till the trial of the case.
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> **95.** The order granting anticipatory bail for a limited duration and thereafter directing the accused to surrender and apply for a regular bail is contrary to the legislative intention and the judgment of the Constitution Bench in *Sibbia case*."
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> (Emphasis supplied)

The decision in **Mhetre** was recently followed in **Bhadresh Bipinbhai Sheth** v. **State of Gujarat and another**[3].

4. The other line of judgments is that orders of anticipatory bail should be of a limited duration. **Salauddin Abdulsamad Shaikh** v. **State of Maharashtra**[4] is one of the earlier decisions of a three Judge Bench. True, there is no reference to the Constitution Bench in **Sibbia's** case (supra). However, discussing the concept of anticipatory bail, this Court took the view that :-

> "**2.** Under Section 438 of the Code of Criminal Procedure when any person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence, the High

[2] (2011) 1 SCC 694
[3] (2016) 1 SCC 152
[4] (1996) 1 SCC 667

A Court or the Court of Session may, if it thinks fit, direct that in the event of such arrest, he shall be released on bail and in passing that order, it may include such conditions having regard to the facts of the particular case, as it may deem appropriate. Anticipatory bail is granted in anticipation of arrest in non-bailable cases, but that does not mean that the regular court, which is to try the offender, is sought to be bypassed and that is the reason why the High Court very rightly fixed the outer date for the continuance of the bail and on the date of its expiry directed the petitioner to move the regular court for bail. That is the correct procedure to follow because it must be realised that when the Court of Session or the High Court is granting anticipatory bail, it is granted at a stage when the investigation is incomplete and, therefore, it is not informed about the nature of evidence against the alleged offender. It is, therefore, necessary that such anticipatory bail orders should be of a limited duration only and ordinarily on the expiry of that duration or extended duration the court granting anticipatory bail should leave it to the regular court to deal with the matter on an appreciation of evidence placed before it after the investigation has made progress or the charge-sheet is submitted.

3. It should be realised that an order of anticipatory bail could even be obtained in cases of a serious nature as for example murder and, therefore, it is essential that the duration of that order should be limited and ordinarily the court granting anticipatory bail should not substitute itself for the original court which is expected to deal with the offence. It is that court which has then to consider whether, having regard to the material placed before it, the accused person is entitled to bail."

This view has also been followed in **K.L. Verma** v. **State and another**[5], **Sunita Devi** v. **State of Bihar and another**[6], **Adri Dharan Das**v. **State of W.B.**[7]**.** In **K.L. Verma** (supra), after referring to **Salauddin** (supra), this Court held as follows:

"**3.** We have carefully examined both the orders of 9-10-1996 and 11-10-1996 and have also heard counsel for the accused as

[5] (1998) 9 SCC 348
[6] (2005) 1 SCC 608
[7] (2005) 4 SCC 303

well as counsel for the CBI and we are of the opinion that the proper course for the High Court was to decide on the question of the requirement of sanction and if the High Court could not do so, to have stayed further proceedings till that vital question was answered. On the other question emanating from the order dated 9-10-1996, we find that the High Court placed reliance on this Court's decision in *Salauddin Abdulsamad Shaikh* v. *State of Maharashtra* which was a case in which the High Court, while granting interim anticipatory bail, imposed certain conditions, one of which was that the accused should move for regular bail before the Court which was in seisin of the case pending against him. The High Court also observed that the application should be disposed of uninfluenced by the observations made in the earlier order. The special leave petition was directed against that order of the High Court. While dealing with that order, this Court observed that under Section 438 of the Code, when any person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence, the High Court or the Court of Session may, if it thinks fit, direct that in the event of such arrest, he shall be released on bail and in passing that order, it may include such conditions as it may deem appropriate. This Court further observed that anticipatory bail is granted in anticipation of arrest in non-bailable cases, but that does not mean that the regular court, which is to try the offender, is sought to be bypassed. It was, therefore, pointed out that it was necessary that such anticipatory bail orders should be of a limited duration only and ordinarily on the expiry of that duration or extended duration the court granting anticipatory bail should leave it to the regular court to deal with the matter on an appreciation of evidence placed before it after the investigation has made progress or the charge-sheet is submitted. By this, what the Court desired to convey was that an order of anticipatory bail does not enure till the end of trial but it must be of limited duration as the regular court cannot be bypassed. The limited duration must be determined having regard to the facts of the case and the need to give the accused sufficient time to move the regular court for bail and to give the regular court sufficient time to determine the bail application. In other words, till the bail application is disposed of one way or the other the court may allow the accused to remain

A on anticipatory bail. To put it differently, anticipatory bail may be granted for a duration which may extend to the date on which the bail application is disposed of or even a few days thereafter to enable the accused persons to move the higher court, if they so desire. This decision was not intended to convey that as soon as the accused persons are produced before the regular court the B anticipatory bail ends even if the court is yet to decide the question of bail on merits. The decision in *Salauddin case* has to be so understood."

In **Nirmal Jeet Kaur** v. **State of M.P. and another**[8], **K.L. Verma** (supra) in so far as it stated that "*...or even a few days thereafter* C *to enable the accused persons to move the higher court, if they so desire* ..." was held to be in conflict with the statutory requirement under Section 439. To quote:

"**13.** The grey area according to us is the following part of the judgment in *K.L. Verma case* "or even a few days thereafter to D enable the accused persons to move the higher court, if they so desire".

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20. In *Salauddin case* also this Court observed that the regular court has to be moved for bail. Obviously, an application under E Section 439 of the Code must be in a manner in accordance with law and the accused seeking remedy under Section 439 must ensure that it would be lawful for the court to deal with the application. Unless the applicant is in custody his making application only under Section 439 of the Code will not confer jurisdiction on F the court to which the application is made. The view regarding extension of time to "move" the higher court as culled out from the decision in *K.L. Verma case* shall have to be treated as having been rendered per incuriam, as no reference was made to the prescription in Section 439 requiring the accused to be in custody. In *State* v. *Ratan Lal Arora* it was held that where in a case the G decision has been rendered without reference to statutory bars, the same cannot have any precedential value and shall have to be treated as having been rendered per incuriam. The present case stands at par, if not, on a better footing. The provisions of Section 439 do not appear to have been taken note of.

H [8] (2004) 7 SCC 558

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23. If the protective umbrella of Section 438 is extended beyond what was laid down in *Salauddin case* the result would be clear bypassing of what is mandated in Section 439 regarding custody. In other words, till the applicant avails remedies up to higher courts, the requirements of Section 439 become dead letter. No part of a statute can be rendered redundant in that manner."

5. This Court in **HDFC Bank Limited** v. **J.J. Mannan**[9] has referred to a contention based on the Constitution Bench decision in **Sibbia** (supra) and yet it has taken the view that the protection under Section 438 is only till the investigation is completed and chargesheet is filed. To quote paragraphs 14 and 18 to 20 :-

"14. Referring to the decision of the Constitution Bench in *Gurbaksh Singh Sibbia* v. *State of Punjab*, wherein the application of Section 438 CrPC had been considered in detail, Mr Dutta submitted that the said provision had been interpreted to be a beneficent provision relating to personal liberty guaranteed under Section 21 of the Constitution. Mr Dutta submitted that the Constitution Bench had observed that since denial of bail amounts to deprivation of personal liberty, the court should lean against the imposition of unnecessary restrictions on the scope of Section 438 CrPC.

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18. Furthermore, it has also been consistently indicated that no blanket order could be passed under Section 438 CrPC to prevent the accused from being arrested at all in connection with the case. To avoid such an eventuality it was observed in *Adri Dharan Das case* that anticipatory bail is given for a limited duration to enable the accused to surrender and to obtain regular bail. The same view was reiterated in *Salauddin case* wherein it was, inter alia, observed that anticipatory bail should be of limited duration only and primarily on the expiry of that duration or extended duration, the court granting anticipatory bail should leave it to the regular court to deal with the matter on an appreciation of evidence placed before it after the investigation has made progress or the charge-sheet is submitted.

[9](2010) 1 SCC 679

19. The object of Section 438 CrPC has been repeatedly explained by this Court and the High Courts to mean that a person should not be harassed or humiliated in order to satisfy the grudge or personal vendetta of the complainant. But at the same time the provisions of Section 438 CrPC cannot also be invoked to exempt the accused from surrendering to the court after the investigation is complete and if charge-sheet is filed against him. Such an interpretation would amount to violence to the provisions of Section 438 CrPC, since even though a charge-sheet may be filed against an accused and charge is framed against him, he may still not appear before the court at all even during the trial.

20. Section 438 CrPC contemplates arrest at the stage of investigation and provides a mechanism for an accused to be released on bail should he be arrested during the period of investigation. Once the investigation makes out a case against him and he is included as an accused in the charge-sheet, the accused has to surrender to the custody of the court and pray for regular bail. On the strength of an order granting anticipatory bail, an accused against whom charge has been framed, cannot avoid appearing before the trial court.

21. If what has been submitted on behalf of the appellant that Respondent 1 has never appeared before the trial court is to be accepted, it will lead to the absurd situation that charge was framed against the accused in his absence, which would defeat the very purpose of sub-section (2) of Section 240 CrPC."

6. In **Satpal Singh** v.**The State of Punjab**[10] at paragraph 14, it has been held:

"**14.** In any case, the protection under Section 438, Cr.P.C. is available to the accused only till the court summons the accused based on the charge sheet (report under Section 173(2), Cr.P.C.). On such appearance, the accused has to seek regular bail under Section 439 Cr.P.C. and that application has to be considered by the court on its own merits. Merely because an accused was under the protection of anticipatory bail granted under Section 438 Cr.P.C. that does not mean that he is automatically entitled to regular bail under Section 439 Cr.P.C. The satisfaction of the court for granting protection under Section 438 Cr.P.C. is different from the one under Section 439 Cr.P.C. while considering regular bail."

[10](2018) SCC Online SC 415

7. It is relevant to point out that placing reliance on **Sibbia** (supra), the two-Judge Bench in **Mhetre**(supra) has taken the stand that the decisions in **Salauddin** (supra), **K.L.Verma** (supra), **Adri Dharan Das** (supra) and **Sunita Devi** (supra) are *per incuriam*. To quote:-

> "**123.** In view of the clear declaration of law laid down by the Constitution Bench in *Sibbia case*, it would not be proper to limit the life of anticipatory bail. When the Court observed that the anticipatory bail is for limited duration and thereafter the accused should apply to the regular court for bail, that means the life of Section 438 CrPC would come to an end after that limited duration. This limitation has not been envisaged by the legislature. The Constitution Bench in *Sibbia case* clearly observed that it is not necessary to rewrite Section 438 CrPC. Therefore, in view of the clear declaration of the law by the Constitution Bench, the life of the order under Section 438 CrPC granting bail cannot be curtailed.
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> **124.** The ratio of the judgment of the Constitution Bench in *Sibbia case* perhaps was not brought to the notice of Their Lordships who had decided the cases of *Salauddin Abdulsamad Shaikh* v. *State of Maharashtra*, *K.L. Verma* v. *State*, *Adri Dharan Das* v. *State of W.B.* and *Sunita Devi* v. *State of Bihar*.
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> **125.** In *Naresh Kumar Yadav* v. *Ravindra Kumar* a two-Judge Bench of this Court observed: (SCC p. 632*d*)
>
> > "the power exercisable under Section 438 CrPC is somewhat extraordinary in character and it [should be exercised] only in exceptional cases."
>
> This approach is contrary to the legislative intention and the Constitution Bench's decision in *Sibbia case*.
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> **xxx xxx xxx xxx**
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> **127.** The judgments and orders mentioned in paras 124 and 125 are clearly contrary to the law declared by the Constitution Bench of this Court in *Sibbia case*[1]. These judgments and orders are also contrary to the legislative intention. The Court would not be justified in rewriting Section 438 CrPC.
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> **xxx xxx xxx xxx**

A **138.** The analysis of English and Indian law clearly leads to the irresistible conclusion that not only the judgment of a larger strength is binding on a judgment of smaller strength but the judgment of a coequal strength is also binding on a Bench of Judges of coequal strength. In the instant case, judgments mentioned in paras 124 and 125 are by two or three Judges of this Court. These judgments have clearly ignored the Constitution Bench judgment of this Court in *Sibbia case* which has comprehensively dealt with all the facets of anticipatory bail enumerated under Section 438 CrPC. Consequently, the judgments mentioned in paras 124 and 125 of this judgment are per incuriam."

C 8. Shri Harin P. Raval, learned Senior Counsel and *Amicus Curiae* submits that in the light of the two conflicting schools of thought the matter needs consideration by a larger Bench. According to him even the Constitution Bench in **Sibbia**(supra) does not, in so many words, lay down a proposition that the protection of anticipatory bail is available to D an accused till the conclusion of the trial.

9. Also having heard learned counsel appearing on both sides, we are of the *prima facie* view that the Constitution Bench in **Sibbia** (supra) has not laid down the law that once an anticipatory bail, it is an anticipatory bail forever.

E 10. In **Sibbia** (supra), this Court has briefly dealt with the question of duration of anticipatory bail. It seems to us that the discussion primarily pertained to grant of anticipatory bail at the pre-FIR stage (see paragraph 43 quoted below). It appears that there are indications in **Sibbia** (supra) that anticipatory bail may be for a limited period. To quote paragraphs F 19, 40, 42 and 43:-

"19. … While granting relief under Section 438(1), appropriate conditions can be imposed under Section 438(2) so as to ensure an uninterrupted investigation. One of such conditions can even be that in the event of the police making out a case of a likely G discovery under Section 27 of the Evidence Act, the person released on bail shall be liable to be taken in police custody for facilitating the discovery. Besides, if and when the occasion arises, it may be possible for the prosecution to claim the benefit of Section 27 of the Evidence Act in regard to a discovery of facts made in pursuance of information supplied by a person released on bail by H invoking the principle stated by this Court in *State of U.P.* v.

Deoman Upadhyaya to the effect that when a person not in custody approaches a police officer investigating an offence and offers to give information leading to the discovery of a fact, having a bearing on the charge which may be made against him, he may appropriately be deemed so have surrendered himself to the police. The broad foundation of this rule is stated to be that Section 46 of the Code of Criminal Procedure does not contemplate any formality before a person can be said to be taken in custody: submission to the custody by word or action by a person is sufficient. For similar reasons, we are unable to agree that anticipatory bail should be refused if a legitimate case for the remand of the offender to the police custody under Section 167(2) of the Code is made out by the investigating agency.

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40. We have said that there is one proposition formulated by the High Court with which we are inclined to agree. That is proposition (2). We agree that a 'blanket order' of anticipatory bail should not generally be passed. This flows from the very language of the section which, as discussed above, requires the applicant to show that he has "reason to believe" that he may be arrested. A belief can be said to be founded on reasonable grounds only if there is something tangible to go by on the basis of which it can be said that the applicant's apprehension that he may be arrested is genuine. That is why, normally, a direction should not issue under Section 438(1) to the effect that the applicant shall be released on bail "whenever arrested for whichever offence whatsoever". That is what is meant by a 'blanket order' of anticipatory bail, an order which serves as a blanket to cover or protect any and every kind of allegedly unlawful activity, in fact any eventuality, likely or unlikely regarding which, no concrete information can possibly be had. The rationale of a direction under Section 438(1) is the belief of the applicant founded on reasonable grounds that he may be arrested for a non-bailable offence. It is unrealistic to expect the applicant to draw up his application with the meticulousness of a pleading in a civil case and such is not requirement of the section. But specific events and facts must be disclosed by the applicant in order to enable the court to judge of the reasonableness of his belief, the existence of which is the sine qua non of the exercise of power conferred by the section.

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42. There was some discussion before us on certain minor modalities regarding the passing of bail orders under Section 438(1). Can an order of bail be passed under the section without notice to the Public Prosecutor? It can be. But notice should issue to the Public Prosecutor or the Government Advocate forthwith and the question of bail should be re-examined in the light of the respective contentions of the parties. The ad interim order too must conform to the requirements of the section and suitable conditions should be imposed on the applicant even at that stage. Should the operation of an order passed under Section 438(1) be limited in point of time? Not necessarily. The court may, if there are reasons for doing so, limit the operation of the order to a short period until after the filing of an FIR in respect of the matter covered by the order. The applicant may in such cases be directed to obtain an order of bail under Section 437 or 439 of the Code within a reasonably short period after the filing of the FIR as aforesaid. But this need not be followed as an invariable rule. The normal rule should be not to limit the operation of the order in relation to a period of time.

43. During the last couple of years this Court, while dealing with appeals against orders passed by various High Courts, has granted anticipatory bail to many a person by imposing conditions set out in Section 438(2) (*i*), (*ii*) and (*iii*). The court has, in addition, directed in most of those cases that (*a*) the applicant should surrender himself to the police for a brief period if a discovery is to be made under Section 27 of the Evidence Act or that he should be deemed to have surrendered himself if such a discovery is to be made. In certain exceptional cases, the court has, in view of the material placed before it, directed that the order of anticipatory bail will remain in operation only for a week or so until after the filing of the FIR in respect of matters covered by the order. These orders, on the whole, have worked satisfactorily, causing the least inconvenience to the individuals concerned and least interference with the investigational rights of the police. The court has attempted through those orders to strike a balance between the individual's right to personal freedom and the investigational rights of the police. The appellants who were refused anticipatory bail by various courts

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have long since been released by this Court under Section 438(1) of the Code."

(Emphasis supplied)

11. In the light of the conflicting views of the different Benches of varying strength, we are of the opinion that the legal position needs to be authoritatively settled in clear and unambiguous terms. Therefore, we refer the following questions for consideration by a larger Bench :-

(1) Whether the protection granted to a person under Section 438 CrPC should be limited to a fixed period so as to enable the person to surrender before the Trial Court and seek regular bail.

(2) Whether the life of an anticipatory bail should end at the time and stage when the accused is summoned by the court.

12. Accordingly, we direct the Registry to place the papers before Hon'ble the Chief Justice of India.

Ankit Gyan Matters referred to larger Bench.

A AMRIT PAUL SINGH & ANR.

v.

TATA AIG GENERAL INSURANCE CO. LTD. & ORS.

(Civil Appeal No.2253 of 2018)

B MAY 17, 2018

[DIPAK MISRA, CJI AND A.M. KHANWILKAR, J.]

Motor Vehicles Act, 1988 – s.166 – Fatal accident – Truck of appellant No.2 hit the motorcycle of the victim as a result of which victim sustained multiple injuries and died – Claim for compensation C *before the MACT – Tribunal held that the insurer was not liable, however, directed the amount of compensation with interest to be paid by the insurer with direction to recover the same from the owner and driver of the vehicle – Held: It is clear from the materials brought on record that the vehicle at the time of accident did not have a* D *permit – Use of a vehicle in a place without a permit is a fundamental statutory infraction – Nothing was brought on record by the insured to prove that he had permit of the vehicle – In such a situation, the onus cannot be cast on the insurer – Therefore, the tribunal as well as the High Court had rightly directed the insurer to pay the* E *compensation amount to the claimants with interest with stipulation that the insurer shall be entitled to recover the same from the owner and the driver – Doctrines/Principles – Pay and recover principle.*

Dismissing the appeal, the Court

HELD: The insurer had taken the plea that the vehicle in F **question had no permit. The existence of a permit of any nature is a matter of documentary evidence. Nothing has been brought on record by the insured to prove that he had a permit of the vehicle. In such a situation, the onus cannot be cast on the insurer. Therefore, the tribunal as well as the High Court had directed** G **the insurer to pay the compensation amount to the claimants with interest with the stipulation that the insurer shall be entitled to recover the same from the owner and the driver. The said directions are in consonance with the principles stated in *Swaran Singh* and other cases pertaining to pay and recover principle. [Para 23] [851-F-H]**

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National Insurance Co. Ltd v. Swaran Singh and Others **(2004) 3 SCC 297 : [2004] 1 SCR 180 – relied on.**

National Insurance Co. Ltd. v. Challa Bharathamma and Others **(2004) 8 SCC 517 : [2004] 4 Suppl. SCR 587 ;** *Ashok Kumar Khemaka v. Oriental Insurance Company Ltd. and Others* **2014 (3) RCR (Civil) 1018** ; *National Insurance Company Limited v. Kamlesh Kaur and Others* **2006 (3) RCR (Civil) 634 ;** *Moti Ram v. ICICI Lombard and Others* **2015 ACJ 1793 ;** *United India Insurance Co. Limited v. Lehru* **(2003) 3 SCC 338 : [2003] 2 SCR 495 ;** *Lakhmi Chand v. Reliance General Insurance* **(2016) 3 SCC 100 ;** *Oriental Insurance Co. Ltd. v. Meena Variyal and Others* **(2007) 5 SCC 428 : [2007] 4 SCR 641 ;** *HDFC Bank Limited v. Reshma and Others* **(2015) 3 SCC 679 ;** *Purnya Kala Devi v. State of Assam and Others* **(2014) 14 SCC 142 – referred to.**

Case Law Reference

[2004] 4 Suppl. SCR 587	**referred to**	**Para 3**
2014 (3) RCR (Civil) 101	**referred to**	**Para 4**
2006 (3) RCR (Civil) 634	**referred to**	**Para 4**
2015 ACJ 1793	**referred to**	**Para 4**
[2004] 1 SCR 180	**relied on**	**Para 12**
[2003] 2 SCR 495	**referred to**	**Para 15**
(2016) 3 SCC 100	**referred to**	**Para 18**
[2007] 4 SCR 641	**referred to**	**Para 18**
(2015) 3 SCC 679	**referred to**	**Para 19**
(2014) 14 SCC 142	**referred to**	**Para 19**

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 2253 of 2018.

From the Judgment and Order dated 10.08.2016 of the High Court of Punjab and Haryana at Chandigarh in FAO No.1702/2016.

A Sudhir Walia, Ms. Niharika Ahluwalia, Abhishek Atrey, Advs. for the Appellants.

Amit Kumar Singh, Mrs. K. Enatoli Sema, Advs. for the Respondents.

The Judgment of the Court was delivered by

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DIPAK MISRA, CJI 1. The legal representatives of the deceased, Jagir Singh, the husband of the second respondent, preferred a claim petition being MACT Case No. 70 of 2013 under Section 166 of the Motor Vehicles Act, 1988 (for brevity, 'the Act') before the Motor Accident Claims Tribunal, Pathankot (for short, 'the tribunal') claiming
C compensation to the tune of Rs. 36,00,000/-. The claim petition was filed on the basis that on 19.02.2013, Jagir Singh was travelling to Pathankot on his motor cycle and at that juncture, the offending truck bearing temporary registration No. PB-06-6894 belonging to the appellant No. 2 driven in a rash and negligent manner hit the motor cycle of the deceased
D as a result of which he sustained multiple injuries, and eventually, succumbed to the same when being taken to the hospital. The claim put forth was sought to be sustained on many a basis which need not be adverted to.

2. The insurer, the first respondent herein, opposed the claim on
E the ground that the vehicle in question was driven in violation of the terms of the insurance policy and further the driver was not having a valid and effective driving license and, therefore, it was not obliged to indemnify the insured. That apart, a stand was taken that the vehicle did not have the permit on the date of the accident. On behalf of the owner of the vehicle and driver, assertions were made that the vehicle was
F insured with the first respondent as per the insurance policy, that the vehicle was registered and the driver had the requisite driving licence. Additionally, copy of the route permit of the offending truck was brought on record.

3. The tribunal noted that the vehicle was purchased in September
G 2012 and insured on 20.12.2012. It was registered on 26.02.2013. The accident, as stated earlier, occurred on 19.02.2013. The tribunal, placing reliance on the decision rendered by this Court in ***National Insurance Co. Ltd. v. Challa Bharathamma and others***[1], held that the insurer

[1](2004) 8 SCC 517

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was not liable and proceeded to quantify the amount of compensation and determined the same at Rs. 15,63,120/-. The tribunal directed the amount to be paid by the insurer along with interest at the rate of 9% from the date of award till its realisation and recover the same from the owner and driver of the vehicle. A further direction was given for attachment of the truck in question till the award was satisfied.

4. The award dated 20.11.2014 passed by the tribunal was challenged in FAO No. 1702 of 2016 before the High Court of Punjab and Haryana at Chandigarh. It was contended in appeal that the appellant No. 2, the owner of the offending vehicle, had deposited the necessary fees along with application on 19.02.2013 for issue of route permit and the same was issued on 27.02.2013. It was further urged that when the owner of the vehicle had already submitted the documents in the transport office for grant of permit along with the requisite fees, the tribunal was in error in holding that the vehicle was being plied without a valid permit. In support of the submissions, reliance was placed upon ***Ashok Kumar Khemaka v. Oriental Insurance Company Ltd. and other***[2], ***National Insurance Company Limited v. Kamlesh Kaur and others***[3] and ***Moti Ram v. ICICI Lombard and others***[4].

5. The High Court scrutinized Annexure A-1 which was filed to justify the stand that the application for issue of the route permit was made to the competent authority and, on a scrutiny of the same, came to hold that the owner had not been able to establish that he had submitted the application for issue of permit before the accident. Referring to Section 66 of the Act and placing reliance on ***Challa Bharathamma*** case, the High Court opined that even assuming that the owner had already applied for grant of the permit before the accident, the same would not entitle the owner to ply the vehicle. It is worthy to note that the learned single Judge distinguished the decisions cited before him and, resultantly, confirmed the award of the tribunal.

6. We have heard Mr. Sudhir Walia, learned counsel for the appellants, and Mr. Amit Kumar Singh, learned counsel for the respondent-insurer.

7. The conclusions recorded by the tribunal and further confirmed by the High Court clearly show that the accident occurred on 19.02.2013

[2] 2014 (3) RCR (Civil) 1018
[3] 2006 (3) RCR (Civil) 634
[4] 2015 ACJ 1793

A and the competent authority issued the permit on 27.02.2013. In this regard, Sections 2(28) and 2(31) of the Act that define "motor vehicle" or "vehicle" and "permit" are reproduced below:-

> "(28) "motor vehicle" or "vehicle" means any mechanically propelled vehicle adapted for use upon roads whether the power
B of propulsion is transmitted thereto from an external or internal source and includes a chassis to which a body has not been attached and a trailer; but does not include a vehicle running upon fixed rails or a vehicle of a special type adapted for use only in a factory or in any other enclosed premises or a vehicle having less than four wheels fitted with engine capacity of not exceeding twenty-
C five cubic centimetres;
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> (31) "permit" means a permit issued by a State or Regional Transport Authority or an authority prescribed in this behalf under this Act authorising the use of a motor vehicle as a transport vehicle;"
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On a perusal of both the definitions, it is quite clear that a permit has to be issued by the competent authority under the Act for use of a motor vehicle as a transport vehicle. The emphasis is on the words "use" as well as "transport vehicle".

E 8. Section 2(47) states that "transport vehicle" means a public service vehicle, a goods carriage, an educational institution bus or a private service vehicle. Section 66 stipulates necessity for permits. Sub-section (1) thereof provides that no owner of a motor vehicle shall use or permit the use of the vehicle as a transport vehicle in any public place, whether or not such vehicle is actually carrying any passengers or goods save in
F accordance with the conditions of a permit granted or countersigned by a Regional or State Transport Authority or any prescribed authority. Various provisos have been appended to the main provision stipulating conditions for use of the vehicle and purpose of carriage of goods vehicle. Sub-section (2) states that the holder of a goods carriage permit may
G use the vehicle for the drawing of any trailer or semi-trailer not owned by him, subject to such conditions as may be prescribed. It is necessary to mention here that a proviso has been added by Act 54 of 1994 with effect from 14.11.1994 allowing the holder of a permit of any articulated vehicle to use the prime-mover of that articulated vehicle for any other semi-trailer. Section 2(2) defines "articulated vehicle" to mean a motor
H vehicle to which a semi-trailer is attached.

9. It is apt to note here that sub-section (3) of Section 66 carves out certain exceptions to sub-section (1). The relevant part of sub-section (3) is extracted below:-

"(3) The provisions of sub-section (1) shall not apply—

(a) to any transport vehicle owned by the Central Government or a State Government and used for Government purposes unconnected with any commercial enterprise;

(b) to any transport vehicle owned by a local authority or by a person acting under contract with a local authority and used solely for road cleansing, road watering or conservancy purposes;

(c) to any transport vehicle used solely for police, fire brigade or ambulance purposes;

(d) to any transport vehicle used solely for the conveyance of corpses and the mourners accompanying the corpses;

(e) to any transport vehicle used for towing a disabled vehicle or for removing goods from a disabled vehicle to a place of safety;

(f) to any transport vehicle used for any other public purpose as may be prescribed by the State Government in this behalf;

(g) to any transport vehicle used by a person who manufactures or deals in motor vehicles or builds bodies for attachment to chassis, solely for such purposes and in accordance with such conditions as the Central Government may, by notification in the Official Gazette, specify in this behalf;

(h) x x x x

(i) to any goods vehicle, the gross vehicle weight of which does not exceed 3,000 kilograms;

(j) subject to such conditions as the Central Government may, by notification in the Official Gazette, specify, to any transport vehicle purchased in one State and proceeding to a place, situated in that State or in any other State, without carrying any passenger or goods;

(k) to any transport vehicle which has been temporarily registered under section 43 while proceeding empty to any place for the purpose of registration of the vehicle;

A (l) x x x x

(m) to any transport vehicle which, owing to flood, earthquake or any other natural calamity, obstruction on road, or unforeseen circumstances, is required to be diverted through any other route, whether within or outside the State, with a view to enabling it to
B reach its destination;

(n) to any transport vehicle used for such purposes as the Central or State Government may, by order, specify;

(o) to any transport vehicle which is subject to a hire-purchase, lease or hypothecation agreement and which owing to the default
C of the owner has been taken possession of by or on behalf of the person with whom the owner has entered into such agreement, to enable such motor vehicle to reach its destination; or

(p) to any transport vehicle while proceeding empty to any place for purpose of repair."

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10. In the case at hand, the findings would show that the appellant No. 2 did not have a permit for the vehicle. There is no dispute that the vehicle initially had a temporary registration and eventually the permanent registration. It is the stand of the appellants that the tribunal and the High Court did not appreciate that the chasis of the vehicle was sent to
E the body where the body of the truck was fabricated and when the vehicle was driven out of the work shop at which point of time it met with an accident. A contention has been made that the insurance policy was in force at the relevant time and, hence, the insurer is legally obliged to indemnify the insured. A distinction has to be made between "route
F permit" and "permit" in the context of Section 149 of the Act. Section 149(2) provides the grounds that can be taken as defence by the insurer. It enables the insurer to defend on the ground that there has been breach of a specific condition of the policy, namely, (i) a condition that excludes 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
G to ply for hire or reward, or (b) for organized racing and speed testing, or (c) for a purpose not allowed by the permit under which the vehicle is used, where the vehicle is a transport vehicle, or (d) without side-car being attached where the vehicle is a motor cycle. That apart, it also entitles the insurer to raise the issue pertaining to a condition that excludes

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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 that excludes liability for injury caused or contributed to by conditions of war, civil war, riot or civil commotion. A further defence that can be availed of by the insurer is that the policy is void on the ground that it has been obtained by non-disclosure of the material fact or by representation of act which is false in the material particular.

11. On a perusal of the written statement filed by the owner and the driver, it is evident that the factum of accident having been caused by the vehicle in question had been denied. That apart, there is also a denial of liability that relates to the manner in which the accident had occurred as alleged in the claim petition. It was the specific assertion of the insurer before the tribunal that the vehicle was running in contravention of the provisions of the Act, for it did not possess a route permit. The tribunal, on the basis of the materials brought on record to the effect that the route permit was issued on 27.02.2013 and the accident occurred on 19.02.2013, returned a finding that the vehicle in question did not have the permit. As stated earlier, the High Court has affirmed the same.

12. Learned counsel for the appellants would submit that in the obtaining factual matrix, the breach would not exonerate the insurer from satisfying the judgment and an award in terms of Section 149 of the Act. He has drawn inspiration from the decision of a three-Judge Bench in ***National Insurance Co. Ltd v. Swaran Singh and others***[5]. In the said case, the Court was dealing with the interpretation of Section 149(2)(a)(ii) vis-à-vis the proviso appended to sub-sections (4) and (5) of Section 149 of the Act. The issue centrally pertained to the necessity of having a driving licence. After adverting to various provisions, the Court also delved into the fundamental concept of third party right. Regard being had to the nature of the beneficial legislation, the Court observed:-

> "39. 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."

[5](2004) 3 SCC 297

A 13. The Court posed the question as to whether an insurer can avoid its liability in the event it raised the 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. The Court analysed the language employed in sub-section (2) of Section 149, specifically clause (a), and, after scrutinizing the same and referring to various authorities, opined:-

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> "69. 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. (See Sohan Lal Passi[6])
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> 70. 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 a different problem which must be resolved having regard to a large number of factors governing the case including conduct of parties as regards 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, therefor, 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 the contract of insurance, on the part of the insurer 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.
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> 71. 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 to the liability of the insurer to satisfy the decree at the first instance.

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H [6]*Sohan Lal Passi v. P. Sesh Reddy and others*, (1996) 5 SCC 21

83. 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 not 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."

[Emphasis supplied]

14. We may fruitfully note that the three-Judge Bench adverted to situations where the driver does not have a licence and the same has been allowed to be driven by the owner of the vehicle by such person, the insurer would be entitled to succeed in defence and avoid liability, but the position would be different where the disputed question of fact arises as to whether the driver had a valid licence and where the owner of the vehicle committed a breach of the terms of the contract of insurance as also the provisions of the Act by consciously allowing any person to drive a vehicle who did not have a valid driving licence.

15. The Court held that if, on facts, it is found that the accident was caused solely because of some other unforeseen or intervening causes like mechanical failures and similar other causes having no nexus with the driver not possessing the requisite type of licence, the insurer

A will not be allowed to avoid its liability merely for technical breach of conditions concerning driving licence. That apart, minor and inconsequential deviations with regard to licensing conditions would not constitute sufficient ground to deny the benefit of coverage of insurance to third parties. The other category of cases that the Court addressed to included cases where the licence of the driver is found to be fake. In that context, the Court expressed its general agreement with ***United India Insurance Co. Limited v. Lehru***[7] and stated thus:-

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> "92. … In *Lehru case* the matter has been considered in some detail. We are in general agreement with the approach of the Bench but we intend to point out that the observations made therein must be understood to have been made in the light of the requirements of the law in terms whereof the insurer is to establish wilful breach on the part of the insured and not for the purpose of its disentitlement from raising any defence or for the owners to be absolved from any liability whatsoever .."

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16. The three-Judge Bench summed up its conclusions and we think it appropriate to reproduce the relevant part of the same:-

> "110. (iii) The breach of policy condition e.g. disqualification of the driver or invalid driving licence of the driver, as contained in sub-section (2)(a)(ii) of Section 149, has to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards the insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by a duly licensed driver or one who was not disqualified to drive at the relevant time.
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> x x x x
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> (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 the insured unless the said breach or breaches on the

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[7](2003) 3 SCC 338

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 under Section 149(2) of the Act.

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

17. Learned counsel for the appellants would submit that there has been no fundamental breach of the policy conditions. In this context, we may profitably refer to the decision in ***Challa Bharathamma*** (supra) wherein a two-Judge Bench squarely dealt with the absence of a permit and ruled that plying a vehicle without a permit is an infraction and insurer is not liable.

18. In ***Lakhmi Chand v. Reliance General Insurance***[8], the Court was concerned with an order passed by the National Consumer Disputes Redressal Commission (NCDRC) that had declined the relief to the petitioner therein. The insurer in the said case had taken the plea that the complainant had violated the terms and conditions of the policy, for five passengers were travelling in the goods carrying vehicle at the time of the accident, whereas the permitted seating capacity of the motor vehicle of the appellant was only 1 + 1. The two-Judge Bench referred to ***Oriental Insurance Co. Ltd. v. Meena Variyal and others***[9] and expressed the view that in order to avoid liability, the insurer must establish that there was breach on the part of the insured.

19. The obtaining fact situation is sought to be equated with the factual score in the said case. In this regard, it is useful to refer to the Bench decision in ***HDFC Bank Limited v. Reshma and others***[10]. The issue that arose before the Court was whether the financier was liable to pay the compensation or it was the liability of the borrower. The tribunal had returned the finding that the duty of the financier was to see that the borrower did not neglect to get the vehicle insured and, therefore, it was jointly and severally liable along with the owner. The High Court

[8] (2016) 3 SCC 100
[9] (2007) 5 SCC 428
[10] (2015) 3 SCC 679

had concurred with the said conclusion. The Court referred to ***Purnya Kala Devi v. State of Assam and other1***[11] that has dealt with the definition of the term "owner" as contained in Section 2(30) of the Act. In the said case, the vehicle in question was under the requisition of the State of Assam under the provisions of law. In that context, the Court has expressed that:-

> "16. … The High Court failed to appreciate that at the relevant time the offending vehicle was under the requisition of Respondent 1 State of Assam under the provisions of the Assam Act. Therefore, Respondent 1 was squarely covered under the definition of 'owner' as contained in Section 2(30) of the 1988 Act. The High Court failed to appreciate the underlying legislative intention in including in the definition of 'owner' a person in possession of a vehicle either under an agreement of lease or agreement of hypothecation or under a hire-purchase agreement to the effect that a person in control and possession of the vehicle should be construed as the 'owner' and not alone the registered owner. The High Court further failed to appreciate the legislative intention that the registered owner of the vehicle should not be held liable if the vehicle was not in his possession and control. The High Court also failed to appreciate that Section 146 of the 1988 Act requires that no person shall use or cause or allow any other person to use a motor vehicle in a public place without an insurance policy meeting the requirements of Chapter XI of the 1988 Act and the State Government has violated the statutory provisions of the 1988 Act."

20. Be it noted, in the said case, the liability was fixed on the State keeping in view the legislative intention behind Section 146 of the Act, no person shall use or cause or allow any other person to use a motor vehicle in a public place without an insurance policy as that is the mandatory statutory requirement under the Act. Emphasis was laid on possession and control of the vehicle and accordingly liability was fixed on the State of Assam.

21. In ***HDFC Bank Limited*** (supra), the three-Judge Bench opined that the hypothecation agreement did not convey that the appellant financier had become the owner and was in control and possession of

[11](2014) 14 SCC 142

the vehicle. It was the absolute fault of the respondent No. 2 to take the vehicle from the dealer without full payment of the insurance, more so when nothing had been brought on record that the said fact was known to the appellant financier or that it was done in collusion with the financier.

22. The Court held that when the intention of the legislature is quite clear to the effect that a registered owner of the vehicle should not be held liable if the vehicle is not in his possession and control and there was evidence on record that the respondent No. 2, plied the vehicle without the insurance in violation of the statutory provision contained in Section 146 of the Act, the High Court could not have mulcted the liability on the financier and finally, the financer was absolved of the liability.

23. In the case at hand, it is clearly demonstrable from the materials brought on record that the vehicle at the time of the accident did not have a permit. The appellants had taken the stand that the vehicle was not involved in the accident. That apart, they had not stated whether the vehicle had temporary permit or any other kind of permit. The exceptions that have been carved out under Section 66 of the Act, needless to emphasise, are to be pleaded and proved. The exceptions cannot be taken aid of in the course of an argument to seek absolution from liability. Use of a vehicle in a public place without a permit is a fundamental statutory infraction. We are disposed to think so in view of the series of exceptions carved out in Section 66. The said situations cannot be equated with absence of licence or a fake licence or a licence for different kind of vehicle, or, for that matter, violation of a condition of carrying more number of passengers. Therefore, the principles laid down in ***Swaran Singh*** (supra) and ***Lakhmi Chand*** (supra) in that regard would not be applicable to the case at hand. That apart, the insurer had taken the plea that the vehicle in question had no permit. It does not require the wisdom of the "Tripitaka", that the existence of a permit of any nature is a matter of documentary evidence. Nothing has been brought on record by the insured to prove that he had a permit of the vehicle. In such a situation, the onus cannot be cast on the insurer. Therefore, the tribunal as well as the High Court had directed the insurer was required to pay the compensation amount to the claimants with interest with the stipulation that the insurer shall be entitled to recover the same from the owner and the driver. The said directions are in consonance with the principles stated in ***Swaran Singh*** (supra) and other cases pertaining to pay and recover principle.

A 24. In view of the aforesaid analysis, we do not perceive any merit in the appeal and, accordingly, the same stands dismissed without any order as to costs.

Ankit Gyan Appeal dismissed.