(2013) 12 AP CK 0124

In the Andhra Pradesh High Court

Case No : M.A.C.M.A. No. 208 of 2011

IFTCO-TOKIO General Insurance Co. Ltd., Hyderabad — APPELLANT

Vs

Kuntimaddi Khathija and Another — RESPONDENT

Date of Decision : 10-12-2013

Acts Referred:

Citation : (2013) 12 AP CK 0124

Hon'ble Judges : B. Siva Sankara Rao, J

Bench : Single Bench

Advocate : T. Mahender Rao, for the Appellant; I. Venkata Prasad, for the Respondent

Final Decision : Partly Allowed

Judgement

B. Siva Sankara Rao, J.—The 2nd respondent-insurance company, in the claim petition, filed this appeal having been aggrieved by the Order/Award of the Motor Accidents Claims Tribunal-cum-IV Additional District Judge (FTC), Anantapur (for short ''the Tribunal'') in O.P. No. 630 of 2008 dated 15.09.2010, awarding compensation of Rs. 61,000/- (Rupees sixty one thousand only) with interest at the rate of 7 1/2% per annum as against the claim of the claimant of Rs. 1,50,000/- (Rupees one lakh fifty thousand only), in the claim petition under sections 140 & 166 of the Motor Vehicle Act, 1988 (for short ''the Act''). Heard Sri T. Mahender Rao, learned standing counsel for appellant and Sri I. Venkata Prasad, learned counsel for respondent No. 1. The 2nd respondent called absent with no representation and thus taken as heard the 2nd respondent for the absence to decide on merits and perused the material on record. The parties hereinafter are referred to as arrayed before the Tribunal for the sake of convenience in the appeal.

2. The contentions in the grounds of appeal in nutshell are that the award of the Tribunal is unjust and unsustainable and findings of the Tribunal in fixing the liability on the insurer instead of exempting the insurer, the driver of the vehicle has no valid driving licence as on the date of the accident as proved from the

evidence of RWs. 1 and 2 with reference to Ex. B2 driving licence is not a valid transport driving license, which is violation of terms and conditions of the policy u/s 10(2)(e) of the Motor Vehicles Act; that the said finding of the Tribunal is contrary to several expressions of Apex Court in exonerating from the liability for such breach, hence to exempt the insurer from liability by holding if at all the award against the insured. In support of the said contention, the appellant besides the judgment referred before the trial Court placed reliance upon National Insurance Corporation Ltd. Vs. Mrs. Kanti Devi and Others, 1544 National Insurance Co. Ltd. Vs. Kusum Rai and Others, 1336 Oriental Insurance Co. Ltd. Vs. Syed Ibrahim and Others, New India Assurance Co. Ltd. Vs. Prabhu Lal, , New Indian Assurance Co. Ltd. Vs. Roshanben Rahemansha Fakir and Another, Oriental Insurance Co. Ltd. Vs. Angad Kol and Others, and that the quantum of compensation awarded by the Tribunal is also on high side, hence to set aside the award of the Tribunal and also so far as fixing the liability by exonerating the insurer.

3. Whereas it is the contention of claimant in opposing the appeal and in supporting the findings of the tribunal by also referring to the latest expression of the Apex Court in S. Iyyapan Vs. United India Insurance Company Ltd. and Another, by contending that the tribunal rightly came to conclusion in directing to pay and recover the amount from the owner by the insurer in the same proceedings by following the Apex Court''s expression in Swaran Singh (Supra) and in New India Assurance Co. Ltd. V. Suresh Singh 2009 SA 679 SC and to dismiss the appeal.

4. Now the points that arise for consideration in the appeal are:

1. Whether the compensation awarded by the Tribunal against the owner and insurer with joint liability is unsustainable and the quantum of compensation awarded is also not just and requires interference by this Court while sitting in appeal against the award and if so with what amount to arrive a just compensation and with what rate of interest and with what finding on liability of insurer if any?

2. To what result?

POINT-1:

5. The facts of the case as proved before the Tribunal and not in dispute in this appeal are that, on 21.06.2008 the petitioner boarded an auto at Dharmavaram town, at that time the tractor and trailer bearing No. AP 02 W 5015 and 5016 came in opposite direction driven by its driver in a rash and negligent manner, dashed against the backside of the auto, as a result, the petitioner sustained fracture and simple injuries which occurrence is proved from the evidence of claimant PW. 1 with reference to Ex. A.1 First Information Report and Ex. A.3 charge sheet. Thus, there is nothing to interfere on the finding of the tribunal that the accident was the result of rash and negligent driving of tractor driver, for nothing to show auto driver contributed to the accident even the accident

occurred while both vehicles proceeding in opposite direction to each other.

6. Before coming to decide, what is just compensation in the factual matrix of the case, it is apt to state that perfect compensation is hardly possible and money cannot renew a physique or frame that has been battered and shattered, nor relieve from a pain suffered as stated by Lord Morris. In Ward v. James 1965 (1) All. E.R 563, it was observed by Lord Denning that award of damages in personal injury cases is basically a conventional figure derived from experience and from awards in comparable cases. Thus, in a case involving loss of limb or its permanent inability or impairment, it is difficult to say with precise certainty as to what compensation would be adequate to sufferer. The reason is that the loss of a human limb or its permanent impairment cannot be measured or converted in terms of money. The object is to mitigate hardship that has been caused to the victim or his or her legal representatives due to sudden demise. Compensation awarded should not be inadequate and should neither be unreasonable, excessive nor deficient. There can be no exact uniform rule in measuring the value of human life or limb or sufferance and the measure of damage cannot be arrived at, by precise mathematical calculation, but amount recoverable depends on facts and circumstances of each case. Upjohn LJ in Charle red House Credit v. Tolly 1963 (2) All. E.R 432 remarked that the assessment of damages has never been an exact science and it is essentially practical. Lord Morris in Parry v. Cleaver 1969 (1) All. E.R 555 observed that to compensate in money for pain and for physical consequences is invariably difficult without some guess work but no other process can be devised than that of making a monitory assessment though it is impossible to equate the money with the human sufferings or personal deprivations. The Apex Court in R.D. Hattangadi Vs. M/s. Pest Control (India) Pvt. Ltd. and Others, at paragraph No. 12 held that in its very nature whatever a Tribunal or a Court is to fix the amount of compensation in cases of accident, it involves some guess work, some hypothetical consideration, some amount of sympathy linked with the nature of the disability caused. But all the aforesaid elements have to be viewed with objective standard. Thus, in most of the cases involving Motor Accidents, by looking at the totality of circumstances, an inference may have to be drawn and a guess work has to be made even regarding compensation in case of death, for loss of dependent and estate to all claimants; care, guidance, love and affection especially of the minor children, consortium to the spouse, expenditure incurred in transport and funerals etc., and in case of injured from the nature of injuries, pain and sufferance, loss of earnings particularly for any disability and also probable expenditure that has to be incurred from nature of injuries sustained and nature of treatment required.

7. From the above legal principles and coming to the facts, as per evidence of PW. 1 and PW. 2-Dr. M. Atmaram with reference to Ex. A2 wound certificate and Ex. A5 discharge summary, PW. 1 sustained fracture of right humerus and another simple injury and was operated by, treated as inpatient. He was originally admitted in Government Hospital, Dharmavaram and latter shifted to

Meda Nursing Home, Anantapur and Ex. A4 medical bills filed for Rs. 24,150/- claimed incurred and for all including for pain and sufferance, expenditure for treatment, loss of earnings, extra nourishment, transport and attendant charges, what the amount awarded by the tribunal of Rs. 61,500/- with interest at the rate of 7 1/2% per annum, no way on high side to interference and reduce.

8. Now coming to decide whether the insurer can be exonerated from liability to indemnify the insured to the third party claimant concerned:

i) No doubt in National Insurance Co. Ltd. Vs. Vidhyadhar Mahariwala and Others, , the two judge bench of the Apex Court in this decision by referring to National Insurance Co. Ltd. Vs. Swaran Singh and Others, apart from other expressions in National Insurance Co. Ltd. Vs. Kusum Rai and Others, and Oriental Insurance Co. Ltd. Vs. Shri Nanjappan and Others, and Ishwar Chandra and Others Vs. The Oriental Insurance Co. Ltd. and Others, 2 held that the insurer is not liable to indemnify the owner, when the driver has no license to drive the crime vehicle.

ii) In Ishwar Chandra (supra) it was held by the two judge bench that the driver''s licence when expired 30 days prior to the date of accident and no renewal application filed even by date of accident to say a renewal dates back to date of application, it is suffice to hold the driver has no valid licence as on date of accident.

iii) In Kusumrai (supra) it was held by the two judge bench that, the vehicle was used as taxi (commercial) and the driver is required to hold appropriate licence but not having valid commercial vehicle licence and from that breach, the insurer is held entitled to rise the defence.

iv) In Vidhyadhar Mahariwala (supra)--in para-8 of the judgment, it was observed that in Swaran Singh (supra) it was held as follows:-

45. Thus, a person whose license is ordinarily renewed in terms of the Motor Vehicles Act and the Rules framed thereunder, despite the fact that during the interregnum period, namely, when the accident took place and the date of expiry of the license, he did not have a valid license, he could during the prescribed period apply for renewal thereof and could obtain the same automatically without undergoing any further test or without having been declared unqualified therefore. Proviso appended to Section 14 in unequivocal terms states that the license remains valid for a period of thirty days from the day of its expiry.

46. Section 15 of the Act does not empower the authorities to reject an application for renewal only on the ground that there is a break in validity or tenure of the driving license has lapsed, as in the meantime the provisions for disqualification of the driver contained in Sections 19, 20, 21, 22, 23 and 24 will not be attracted, would indisputably confer a right upon the person to get his driving license renewed. In that view of the matter, he cannot be said to be delicensed and the same shall remain valid for a period of thirty days after its

expiry.

v) In Ram Babu Tiwari Vs. United Indian Insurance Co. Ltd. and Others, by referring to Ishwar Chandra, Kusum Rai, Swaran Singh (supra) among other expressions, held that when a driving license of the driver of the offending vehicle was expired about three years prior to accident and it was got renewed only subsequent to the accident it was held as violation of the terms of the policy by referring to Kusum Rai (supra) followed in Ishwar Chandra (Supra) observed that in view of the Section 15(1) of the Act even the license after period of expiry remains valid for thirty days to renew meantime any renewal subsequently would be renewed from the date of renewal only to say as on the date of accident even be subsequent renewal long after thirty days expiry of the statutory period not a valid renewal to say no valid license to exonerate the Insurer and thus exonerated the insurer.

vi) The above decisions other than Swaran Singh (Supra) mostly speak of no valid license as on the date of accident though earlier it was from its lapse and timely non-renewal or holding one license not valid to drive other type of vehicle.

vii) On perusal of Swaran Singh (Supra) referring earlier expressions speaks several categories of cases as to such imperfect license or lapsed license with no license in subsistence or a fake license or even driver with no license at all. An extreme case of this type is of driver having no license at all driving the vehicle knowingly without even application for licence and without experience to drive even admittedly and in his saying it is to the willful and conscious knowledge of the owner as a fundamental breach.

Coming to the cases no license is concerned:-

viii) In Sardari and Others Vs. Sushil Kumar and Others, the facts show one Jageeru, Tonga driver on 10-2-85 met with accident when it colluded with tractor and he later was expired on 15-2-85 and the Insurance Company in the counter contended that the driver of the tractor did not hold valid and effective licence and there is no liability to indemnify. In the course of trial, the said tractor driver Sushil Kumar categorically deposed that he does not know how to drive a tractor as he never even tried to learn driving tractor, that he had not been possessing any licence to drive a tractor and he did not even apply for licence. It was therefrom, the Tribunal held that admittedly when the driver of crime tractor was not knowing to drive tractor and not even having any licence at all to drive, the Insurance Company is not liable to indemnify owner of the tractor. The appeal was also dismissed confirming the said finding of the tribunal when preferred by driver and owner of the tractor for no appeal by claimants. In that factual context it was observed in para 6 of the judgment by the Supreme Court that, time and again made distinction between cases where III party is involved Vis-?-vis owner of the vehicle was involved. The object of Sections 147 & 149 of the MV Act enacted was social justice doctrine envisaged in the preamble of the constitution, however, the Act itself provides where the insurance company can avoid its liability. The avoidance of such liability by insurer largely depends upon violation of conditions of the Insurance Contract. Where the breach is ex-facie apparent from the record, court need not fasten liability on the insurer. In certain situations, however, the court while fastening liability on insured, may direct the insurer to pay to the claimants and recover the same from the insured.

ix) In United India Insurance Co. Ltd. Vs. Gian Chand and others, it was observed that when the insured handed over the vehicle to an un-licenced driver, insurer would be exonerated from liability to meet III party claims.

x) In Swaran Singh (three judges bench-supra) it was laid down that the owner of the vehicle has a responsibility to see that no vehicle is driven except by a person who doesn''t satisfy Sections 3 & 4 of the MV Act. In a case where the driver admittedly did not hold licence and the same was allowed consciously to be driven by the owner of the vehicle by such person insurer in its defence succeed to avoid liability. The matter, however, may be different where a disputed question of fact arises as to driver had a licence or owner committed a breach of the policy terms by consciously allowing a person to drive without having a valid driving licence.

xi) In U.P. State Agro Industrial Corporation Ltd. Vs. Kisan Upbhokta Parishad and Others, 6 it was a claim arisen out of Consumer District Forum holding no liability of the insurer against the National Consumer Commission''s verdict fixing responsibility.

xii) In Premkumari and Others Vs. Prahlad Dev and Others, it was also observed that owner of the vehicle cannot contend no liability to verify the fact as to whether the driver possessed a valid licence or not.

xiii) By referring all these expressions at Para 9 of the Judgment of the Apex Court in Saradari (supra), the Apex Court did not choose to interfere with the finding of the tribunal confirmed by the High Court, in not chosen to make liable the insurer.

xiv) In Surina Durvasulu (died) by LRs. Vs. Bhava Narayana Murthy and Others, it was held that when the driver had no valid driving licence to drive tractor and the charge sheet also mentions a penal provision for violation of the same in driving with no licence and nothing deposed by owner despite contention of Insurance Company, that he has taken all necessary precautions to entrust the vehicle to a person who had valid driving licence, insurance company not made liable holds good.

9. The other type of cases are driver possessing a fake license and not any real license to drive and driving the vehicle entrusted by owner it all depends upon the facts as to the owner consciously by knowing it is a fake license allowed or believing as genuine allowed and what extent the liability to enquire lies on the owner concerned, the cases on that principle are as follows:-

i) In National Insurance Co. Ltd. Vs. Laxmi Narain Dhut, , it was held by the Apex

Court referring to Swaran Singh (supra) and New India Assurance Co., Shimla Vs. Kamla and Others etc. etc., at para 41 that the defense available to the Insurer to indemnify the insured or not (any) of a third party claim u/s 149 of the Act includes the license claim as genuine is fake. In that case on facts found the license possessed was fake and it was even renewed by the Regional Transport Officer concerned ignorant if the fact or otherwise held that mere renewal of a fake license cannot cure the inherent defect as renewal cannot transform a fake license as genuine as held in Kamala (supra) was the conclusion arrived.

ii) The other decision on that is Oriental Insurance Co. Limited Vs. Prithvi Raj, which is also a fake license and proved so and held that a renewal cannot take away the effect of fake license to make the Insurer liable and the Insurer cannot thereby be liable to that conclusion, they followed Kamala (Supra) besides United India Insurance Company Ltd. Vs. Lehru and Others,

iii) The other decisions regarding fake license is National Insurance Company Limited Vs. Dupati Singaiah and Others, referring to Lehru, Swaran Singh, Gain chand, Prithvi Raj, Prahlad dev (supra), not to mention Oriental Insurance Company Limited Vs. Meena Variyar 2012 ACJ 1284 earlier expression in Skandia Insurance Co. Ltd. Vs. Kokilaben Chandravadan and Others, and United India Insurance Co. Ltd. Vs. Rakesh Kumar Arora and Others, held that in Swaran Singh (supra) at para-102 it was held that an insurer is entitled to raise a defense in a claim filed u/s 163A and 166 of the Act, in terms of Section 149(2)(a)(ii) of the Act, as to breach of the policy conditions including disqualification of the driver or invalid license of the driver etc., and to avoid such a liability the defense has to be proved by the insurer with a plea raised to establish such breach. However, it was not laid down in Swaran Singh (supra) any criteria as to how said burden would be discharged. Thus same would depend upon facts and circumstances of each case. The question as to whether owner has taken a reasonable care to find out as to whether driving license produced by driver is fake or otherwise does not fulfill the requirements of law or not will have to be determined in each case. If available at the time of the accident was driven by a person having learner''s license, Insurance Company would be liable to satisfy the claim. Thus, unless the Insurer proves willful breach of specific conditions of policy they cannot escape from liability. In Swaran Singh (supra), at para-85 and 94 as well as 102(3) observed that it may be true that a fake or forged license is as good as no license, however, the question is whether Insurer must prove that owner was guilty of willful breach of the conditions of the policy in the contract of Insurance as considered with some details in Lehru (Supra). To agree said conclusion of Swaran Singh and Lehru (supra), it was observed in Dhupati Singaiah (supra) at para-820 that in most of cases drivers and owners remaining ex-parte by taking it for granting that in the event of negligence being proved, the Insurance Company would discharge its statutory liability. It is the only Insurer that has to lead evidence both on the question of negligence and on the question of liability, therefore, main defense available to the Insurer is u/s

149(2) of the Act when if Insurer leads evidence to show license found in the vehicle involved in the accident is fake or the driver had no license or valid license, it can be taken sufficient proof of breach of conditions as per Section 149(2)(a) of Act therefrom Section 149(2)(a)(ii) of the Act enables the Insurer to escape from liability if shown that there has been a breach of specified condition of policy and on facts therefrom held Insurer to be exonerated from liability.

iv) In Ashok Gangadhar Maratha Vs. Oriental Insurance Co. Ltd., and Roshanben (supra) also the above principles of law are reiterated in exonerating the insurer.

v) In fact, the three judges bench judgment of the Apex Court in Swaran Singh (supra) well laid down the law in this regard referring to Lehru (supra) and Kamala (supra) that followed the earlier three-Judges bench decision Sohan Lal Passi Vs. P. Sesh Reddy and others, wherein the reference was answered upholding the view taken Skandia Insurance Co. Ltd. Vs. Kokilaben Chandravadan and Others, and the principle laid down therefrom in Swaran Singh (supra) was approved and reiterated even in the subsequent decisions including the above but for distinguishing for the facts on hand in each of the cases as held by the Apex Court in National Insurance Co. Ltd. Vs. Geeta Bhat and Others, that the principle is the same but for any deviation from factual matrix of each case if at all to say non-liability.

vi) The Apex court in Lehru (supra), Swaran Singh (supra), Nanjappan (supra), Geetabhat (supra) and several other expressions in the cases relating to no license at all or imperfect and no valid license held that even it is one of breach of terms of policy and violation of rules, since the policy otherwise covers risk, though denied liability from no valid license, the insurer is to pay and recover. The insurance company cannot escape liability unless the violation proved willful with conscious knowledge and fundamental, every violation of policy conditions cannot be considered to escape the insurer from liability to indemnify the owner (insured) to the 3rd party claimants.

vii) Even in Geetabhat (supra) it was held reiterating the principle laid down in the above decisions after referring the above among other several decisions that when insurer seeks to avoid liability on ground of fake or no licence of driver of the vehicle of the insurer, but for saying no licence issued by RTO in name of the driver, even taken alleged licence as fake, insurer has to pay to the third party claimants and recover from insured.

viii) In fact, in Swaran Singh''s case (supra), the Apex Court observed that it is the obligation on the part of owner to take equitable care to see that the driver had an appropriate license to drive the vehicle. The question as regards the liability of owner vis-?-vis the driver being not possessed of a valid license concerned, at para-89, it was observed that Section 3 of the Act casts an obligation on a driver to hold an effective driving license for the type of vehicle which he intends to drive. Section 10 of the Act enables the Central Government to prescribe forms of driving licenses for various categories of vehicles mentioned in sub-section (2) of this Section. The various types of vehicles described for which a driver may obtain a license for one or more of them are: (a) motorcycle without gear, (b) motorcycle with gear, (c) invalid carriage, (d) light motor vehicle, (e) transport vehicle, (f) road roller, and (g) motor vehicle of other specified description.

ix) Furthermore, in Oriental Insurance Co. Ltd. Vs. Brij Mohan and Others, while holding that insurance company has no liability, however, invoked Article 142 and 136 of the Constitution in directing the insurer to pay first and recover from the vehicle owner, like in several other cases within the power of the Apex Court.

x) The other decision of Apex Court in Roshanben (supra) did not lay any different proposition, it was in fact held that in the absolute proof of the defect of licence contributed to the cause of accident, for the defect alone the insurer cannot be absolved from liability. It was a case of driving licence was meant for driving non-transport auto and held not meant to drive the transport auto.

xi) In National Insurance Co. Ltd. Vs. Baljit Kaur and Others, it was held (even the case of unauthorized passenger of goods vehicle) as a general observation that interest of justice would be sub-served in giving such a direction to pay and recover having regard to the scope and purport of Sections 149 read with 168 of the MV Act, 1988.

xii) In another judgment of two judges bench in National Insurance Company Limited Vs. Parvathneni & Another1, the Apex Court doubted the correctness of the directions issued in various judgments to the insurer to pay even though not liable and therefrom formulated issues for consideration by a larger bench.

xiii) In fact, by referring to the above expression in Swaran Singh''s case (supra), this Court (High Court of Andhra Pradesh) in an appeal by insurance company, observed in The New India Assurance Company Limited Vs. G. Sampoorna and Others, from paras-6 onwards that insurer raised the contention of driver was not having valid license at the time of accident and examined employee of Regional Transport Office, besides employee of the insurance company and the owner of the vehicle did not speak anything. No evidence produced by claimants to show that there was a license or it was even if lapsed renewed later. However, the Tribunal held that even in the absence of driving license, insurance company has to pay and recover rather than escaping from liability for the claimants are not parties to the contract of insurance of the vehicle between insurer and insured.

xiv) Therefrom further held that the conclusion is not acceptable from reading of Section 149(2)(a) r/w. Section 3 of the Act and by referring to Vidhyadhar Mahariwala case (supra) in saying the statute itself excludes insurer''s liability in such a case, thereby the fact whether the claimant being a third party is not a privy to the policy between insurer and insured has no relevance. It is however, by referring to the Swaran Singh (supra) apart from the earlier expressions referred therein, observed that the proposition laid down in Swaran Singh (supra) is referred to a larger bench and it is still pending.

xv) In Swaran Singh (supra) it was held that the Tribunals and Courts in exercise of their jurisdiction to issue any direction for pay and recovery considering, depending upon facts and circumstances of each case. In the event of such a direction has been issued despite arriving at a finding of fact to the effect that the insurer has been able to establish that the insured has committed a breach of contract of insurance u/s 149(2)(a)(ii) of the Act, the insurance company shall be entitled to realise the award amount from owner or driver, as the case may be, in execution of the same award in view of Sections 165 and 168 of the Act.

xvi) It is from this, the Court in Sampoorna (supra) from para-13 onwards observed that "In my opinion from the afore-extracted passage of the judgment, it is evident that direction to the insurance company to pay the compensation does not automatically follow in every case where the insurance company is found not liable. The same depends upon the fats and circumstances of each case. In all the aforementioned cases, which were referred to by the Supreme Court, directions were given on the facts of each case and considered the fact that the provisions of the Act dealing with insurance and payment of compensation are beneficial in nature".

xvii) In paragraph 81 of Swaran Singh (supra), it was observed that right to avoid liability in terms of Section 149(2) is restricted as has been discussed herein before. 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 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.

xviii) The Supreme Court in subsequent judgments have not treated the previous judgments including Swaran Singh (supra) as laying down unexceptionable principle that in every claim brought before the Tribunal, the insurance company should be directed to pay compensation amount first even though its defence was found accepted, as evident from some of the later expressions like in National Insurance Co. Ltd. Vs. Bommithi Subbhayamma and Others, , (a case of passenger in a goods vehicle).

xix) By referring to the above, from paragraph 20, the High Court in Sampoorna (supra) observed that on the strength of the discussion undertaken above, it is not possible for this Court to treat the judgment in Swaran Singh (supra) as containing mandatory directions to Tribunals and Courts to invariably direct the insurer to pay at first instance and recover from owner of the vehicle even though they are held not liable. Pending resolution of the issues by the larger bench of the Supreme Court, it would be reasonable to understand the judgment in Swaran Singh (supra) as leaving discretion to the Tribunals and the Courts to give appropriate directions depending upon facts and circumstances of each case.

xx) By applying the ratio in Swaran Singh (supra) at para-21 of the judgment, the High Court held that some amount that was already deposited by the insurance company, which holds good to withdraw, and for the rest, insurance company is not liable.

10. In fact besides Lehru (supra), Swaran Singh''s (supra) and Nanjappan (supra) in holding that from lack of license or fake license or imperfect or defective license, the insurer can be ordered firstly to satisfy the claimants by indemnifying the owner and then recover from owner and driver;

i) Even in the subsequent expressions of the Apex Court in Kusum Lata and Others Vs. Satbir and Others, 9 it was held that the Tribunal has got inherent power to issue such directions to insurer to pay and recover.

ii) Even in the recent expression of the High Court in Jaya Prakash Agarwal V. Mohd. Kalimulla (2013) 11 SCC 35 having considered the law at length taken similar view, while saying at para-39 that each case has to be decided on its own facts and circumstances.

iii) Even in the latest expression of the Apex Court in S. Iyyapan Vs. United India Insurance Company Ltd. and Another, a two judge bench of the Apex Court held that even though the insurer has taken the defence that there is a breach of conditions of the policy excluding from liability, from the driver is not duly licenced in driving the crime vehicle when met with accident, third party has a statutory right u/s 149 read with 168 of the Act to recover compensation from insurer and it was for the insurer to proceed against the insured for recovery of amount paid to third party in case there was any fundamental breach of condition of Insurance policy.

11. From the above propositions, there is discretion of the Tribunal to exercise in directing the insurer to satisfy the claim; in the facts show the driver was having licence as per RW 1 and Ex. B2 to drive non-transport LMV which includes tractor and trailer (non-transport) other than transport. The Tribunal held that there is nothing to show the crime tractor and trailer is not non-transport but Transport in the defence of insurer. RW. 1 deposed that the driver of owner can transport for personal use goods and agricultural products etc., as a non-transport use. However, as per RW. 2, the tractor and trailer was insured under Ex-B3 policy as a commercial vehicle. As such the Tribunal should have consider the disputed fact of the vehicle was a transport vehicle, to say the licence for LMV non-transport is defective. Further, when there is nothing to say the vehicle was in non-transport use, the difference is even in use and not in size or change of driving with any special skill and a breach is a breach. No doubt, there is nothing proved of the breach was to the conscious and willful knowledge of owner, to avoid liability. Thus, the conclusions arrived by the tribunal of joint liability be modified to pay and recover.

Accordingly, point-1 is answered.

POINT No. 2:

In the result, the appeal is partly allowed instead of joint and several liability of the insurer only to the extent of pay and recovery. The appellant shall deposit said amount within one month, failing which the claimants can execute and recover. It is made clear from the settled expressions of the Apex Court in Lehru (supra) & Nanjappan (supra) that the insurer is entitled, while depositing the amount payable, if not deposited or paid any amount so far to deposit in bank to approach the Tribunal to direct the RTA concerned not to register any transfer of the crime vehicle and to seek for attachment of the crime vehicle or other property of the insured as an assurance for execution and recovery in the same proceedings or under revenue recovery as the M.V. Act, 1988 and also ask the tribunal not to disburse the deposited amount to claimants (but for to invest in a bank) till such attachment order is made. However, after the same, the tribunal shall not withhold the amount of the claimants, if there is any necessity to permit for any withdrawal but for to invest the balance in fixed deposit in a nationalized bank. Rest of the terms of the award of the tribunal holds good. There is no order as to costs.

Miscellaneous petitions, pending if any, in this MACMA shall stand closed.

1 Appeal (Civil) C.C. No. 10993 of 2009

