
(2014) 02 AP CK 0007
In the Andhra Pradesh High Court
Case No : M.A.C.M.A. No. 389 of 2007

M. Swarupa and three Others	Vs	APPELLANT
Musapet Narsimhulu and Another		RESPONDENT

Date of Decision : 11-02-2014

Acts Referred:

Constitution of India, 1950 — Article 136, 142
Evidence Act, 1872 — Section 106, 3
Motor Vehicles Act, 1988 — Section 10, 14, 147, 149, 149(2)

Citation : (2014) 02 AP CK 0007

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

Bench : Single Bench

Advocate : A. Ramakrishna Reddy, Advocate for the Appellant; N. Mohan Krishna for the Respondent No. 2, Advocate for the Respondent

Final Decision : Partly Allowed

Judgement

Dr. B. Siva Sankara Rao, J.—The claimants 1 to 4 who are the wife, two minor children and mother of the deceased Ramulu, Pillion Rider of the Bajaj CT-100 motor bike (temporary registration No. AP23J T/R 2221 belongs to the claim petition respondent No.1 M. Narsimhulu, insured with claim petition respondent No. 2 Bajaj Allianz General Insurance Company Limited, covered by Ex.B.1 policy, preferred the claim for death of the said Ramulu. They filed this appeal having been aggrieved by the Order/Award of the Motor Vehicle Accident Claims Tribunal-cum-XXI Additional Chief Judge, Red Hills, Hyderabad (for short, "Tribunal") in M.V.O.P. No. 325 of 2005 dated 18.12.2006, awarding compensation of Rs.4,23,000/-(Rupees Four lakhs and twenty three thousand only) with interest at 7.5% per annum only against the respondent No.1 owner of the vehicle by exonerating the respondent No.2 insurer mainly relying upon the Apex Court expression in United India Insurance Co. Ltd., Shimla Vs. Tilak Singh and Others, of Pillion Rider risk when not covered by the policy is an unauthorised gratuitous passenger, as against the claim of the claimants of Rs.6,50,000/-(Rupees Six lakh and fifty thousand only), in the claim petition u/s

166 of the Motor Vehicle Act, 1988 (for short, "the Act").

2. Heard Sri A. Ramakrishna Reddy, the learned counsel for the appellants and Sri N. Mohan Krishna, learned counsel for the respondent No.2. Perused the material on record. The parties hereinafter are referred to as arrayed before the Tribunal for the sake of convenience in the appeal.

3. The contentions in the grounds of appeal as well as oral submissions by the appellants in nutshell are that the Award of the Tribunal is contrary to law, weight of evidence and probabilities of the case, that the Tribunal ought to have fixed joint and several liability against the bike owner and insurer, that even Ex.B.1 policy covers the Pillion Rider, the Tribunal not properly appreciated the same and erred in relying upon Tilak Singh's proposition, even it is not applicable to the facts, that the Tribunal also erred in not considering the medical bills amount, and hence to allow the appeal as prayed for before the Tribunal. In the course of hearing the counsel for the appellants placed reliance upon the Insurance Regulatory and Development Authority (for short "the IRDA") regulations dated 16.11.2009 which speaks that the insurance companies are liable in respect of Occupant(s) carried in a Private Car and pillion rider carried on two wheeler under the Standard Motor Package Policy and also with reference to the said IRDA regulations; two expressions of this Court in Ch. Jayamma and Others Vs. N. Krishnakanth and Others, and Sohel Sardar Khan Vs. S. Rama Pathi Rao and another, referring to the regulation, in saying the insurance company is liable from the respective standard policy covering risk of pillion rider also. The respondent No.1 owner of the vehicle remained ex parte before the Tribunal and also herein. The respondent No.2 insurer while opposing the appeal claim contended that the Tribunal's Award/decreree is just by relying upon the Apex Court's expression as on the date of the accident i.e., 03.11.2004 and the IRDA regulations now placed reliance dated 16.11.2009 not mentioned retrospective in operation and for this Court while sitting in appeal either with said finding or with the quantum arrived, there is nothing to interfere, but for if at all should reduce the quantum for want of cross objections, and hence to dismiss the appeal.

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

Whether the award of the Tribunal exonerating the insurer holding the policy not covered the risk of pillion rider being a gratuitous passenger for not specific additional premium paid as laid down in Tilak Singh's case of the Apex Court is unsustainable and requires interference by this Court while sitting in appeal, so also on the quantum and with what observations ?

To what result?

POINT-1:

5. The fact that the accident was the result of the rash and negligent driving of the rider of the crime bike i.e., respondent No.1 owner, in which the deceased

while proceeding as pillion rider met with death of the road accident, which was dated 03.11.2004 at Domadugu village of Medak District, not in dispute.

6. Now coming to the liability of the insurer, the regulation of IRDA referred in the two decisions of this Court one in Smt. Ch. Jayamma & others (supra) para 14 and Sohail Sardar Khan (supra) para 17 reads as under:

"Section II - Liability to Third Parties"

1. Subject to the limits of liability as laid down in the Schedule hereto the Company will indemnify the insured in the event of an accident caused by or arising out of the use of the insured vehicle against all sums which the insured shall become legally liable to pay in respect of -

(i) death or bodily injury to any person including occupants carried in the vehicle (provided such occupants are not carried for hire or reward) but except so far as it is necessary to meet the requirements of Motor Vehicles Act, the Company shall not be liable where such death or injury arises out of and in the course of employment of such person by the insured.

It is further brought to the attention of insurers that the above provisions are in line with the following circulars earlier issued by the Tariff Advisory committee on the subject;

(1) Circular M.V. No.1 of 1978 - dated 18th March 1978 (regarding occupants carried in Private Car) effective from 25th March 1977.

(2) MOT/GEN/10 dated 2nd June 1986 [regarding Pillion Riders in a Two-Wheeler] effective from the date of the circular.

The above circulars make it clear that the insured's liability in respect of occupant(s) carried in a Private Car and Pillion Rider carried on two-wheeler is covered under the Standard Motor Package Policy. A copy each of the above circulars is enclosed for ready reference.

The Authority vide circular no.066/IRDA/F&U/Mar-08 dated March 26,2008 issued under File & Use Guidelines has reiterated that pending further orders the insurers shall not vary the coverage, terms and conditions, wordings, warranties, clauses and endorsements in respect of covers that were under the erstwhile tariffs. Further the Authority, vide circular no. 019/IRDA/NL/F&U/Oct-08 dated November 6, 2008 has mandated that insurers are not permitted to abridge the scope of standard covers available under the erstwhile tariffs beyond the options permitted in the erstwhile tariffs.

All General Insurers are advised to adhere to the aforementioned circulars and any non-compliance of the same would be viewed seriously by the Authority.

This is issued with the approval of Competent Authority.

A reading of the circular speaks it is a clarification regarding two earlier circulars with prospective effect given of which the circular No.2 is relating to the pillion

rider which is effective from 02.06.1986. It is thereby crystal clear that the circular relating to pillion rider risk coverage from Standard Motor Package Policy after issued is there even from the date of this circular and it is not stated it is effective only from 16.11.2009 to apply to the policies issued thereafter or accidents occurred thereafter. The accident was undisputedly dated 03.11.2004 and the same is covered by the circular. Once that is the case, from Ex.B.1 policy filed by the respondent No.2 insurer, it speaks on the right top column Two-wheeler Comprehensive. No doubt in the schedule of premium there is nothing to say covered the risk of the pillion rider. It is the best person including u/s 106 of the Evidence Act i.e., the insurer to say this policy is not Standard Motor Package Policy from no additional premium paid for covering the risk of pillion rider from the contents in the schedule of premium. It is on the top of the policy once mentioned as two-wheeler comprehensive, it cannot be construed as not covered the risk of pillion rider even additional premium not shown covered to the pillion rider but for PA Cover to Owner-cum-Driver of Rs.1,00,000/- very collection of additionally Rs.50/-. The respondent No.2 insurer could not substantiate the contention in regard to the policy contents of not the Standard Motor Package Policy to cover by the IRDA regulations. Having regard to the above, it can be said that the policy covered the risk.

7. Coming to the next contention of fixing the liability on the insurer concerned, the driver-cum-owner has no license to drive. Ex.A.1 is the F.I.R which set the law in motion by the own brother of the deceased none other than the villager of the rider and pillion rider (deceased), who categorically mentioned that the bike is that of the kind unregistered and unnumbered. Ex.B.1 policy issued itself shows it is after registration even temporary. Charge Sheet speaks the temporary registration AP23J T/R 2221. Thus, the bike is not shown the temporary registration expired and regular registration not obtained. So, it is registered and roadworthy for the vehicle in use in a public place. Once such is a case, the other aspect from the contention of the insurer is the driver has no license is how far proved. There is a specific plea taken by the insurer in the counter filed that is also reflected in para 3 of the award of the Tribunal regarding the bike driver has no valid driving license. The respondent No.1 owner of the vehicle having been served the claim petition, did not choose to put forth appearance before the Tribunal. R.W.1 is employee of the insurer who placed reliance on the certificate of the Ex.B.1 policy (supra) and xerox copy of the acknowledgment Ex.X.1 notice issued to the owner for production of the license particulars. There is no reply given according to R.W.1 evidence. R.W.1 further deposed as reproduced in para 7 and 8 of the award that though the R.T.A records show from their verification that the insured was also fined by the R.T.A, Medak for non-registration of the vehicle and also non-production of driving license and he has paid a sum of Rs.1300/- to the R.T.A. Regarding registration is it discussed supra. Coming to the license and fining by the RTA for non-production of license concerned, in the cross examination, R.W.1, admitted that he did not produce the R.T.A record regarding imposing of fine for non-

possessing of driving license from the respondent No.1 owner-cum-rider. No doubt it is important to note here that, Ex.A.4 M.V.I. Report filed by the claimants itself shows no driving license particulars are with the vehicle at the time of accident much less produced by the rider to furnish in the M.V.I report. Non-production of the license particulars despite the insurer sought by the owner and non-furnishing of the license particulars even to the M.V.I. who inspected the vehicle to reproduce in the M.V.I. report itself is sufficient to brought the interference against the respondent No.1 owner-cum-rider on the bike that, had he possessed license he could have rather kept quite, but for no license u/s 3 of the Evidence Act as an ordinary prudent man is supposed to respond and from that proof of the insurer in discharge of the burden, the burden shifts on the claimants or the owner to rebut said evidence. It is clear from preponderance of probability in proving of the fact of no license to the bike rider. To say still that the driver-cum-owner got license by suggestion in the cross examination of R.W.1 by the claimant, they did not even furnish any particulars, much less referred any license particulars to put to the witness, to say there from burden again shifts on the insurer to summon the RTA record or the rider as Court witness to produce or the like. Having regard to the above, it is clear that the owner cum rider of the bike without license driven the bike and when he himself is the owner, nothing more is required to say that he got conscious knowledge of the fact of driving without license.

8. Now to consider whether the breach is so fundamental to exonerate the insurer from the policy as discussed supra covered the risk and once the policy covered the risk u/s 149 read with Section 168 of the Motor Vehicle Act, the insurer has to pay and then to recover concerned, the law is the following:

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, 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 Kusum Rai (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)*whereupon 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 of driver having no license at all driving the vehicle knowingly without even application for license 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-licensed 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*, 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 deposited 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.*, 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. Lehu and Others*, .

iii) The other decisions regarding fake license is *National Insurance Company Limited Vs. Dupati Singaiah and Others*, referring to *Lehu*, *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 163-A 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 Lehu (Supra). To agree said conclusion of Swaran Singh and Lehu (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 granted 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 Lehu (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 Lehu (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 & Another Appeal (Civil) C.C. No. 10993 of 2009, 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*, 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 facts 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 Sampoorana (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 Lehu (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, 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 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 it is a fit case that the owner is having conscious knowledge in driving the vehicle without driving license, from the liability to pay and recover subject to directions to safeguard the interest of the insurer.

12. Coming to decide the dispute on quantum as to 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 *Charles 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 *LORD v.* in 555 All.E.R (1) 1969 *Cleaver, Parry Morris* 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 monetary 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*, 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.

13. From the above facts coming to the quantum of compensation concerned, the deceased as per the F.I.R given by the brother of the deceased, aged about 35 years that is also reflected in the charge sheet and the Ex.A.3 Post Mortem

report. The first claimant wife of the deceased shown her age more than 28 years in the claim petition and the two minor children aged 6 and 4 years and the mother aged more than 55 years. They did not produce any proof of age much less any civil supplies card. Thus, the age of the deceased can be taken between 36 to 40 and the multiplier applicable is 15 as per Smt. Sarla Verma and Others Vs. Delhi Transport Corporation and Another, . Here the claimants are 4 in number who are wife, two minor children and mother of the deceased are the dependants of the deceased and as per Sarla Verma (supra) para 27 to 32 if the dependants are 4 to 6 the deduction for personal expenses is 1/4th and above six numbers it is 1/5th. Thus, 1/4th personal expenses deduction to be given.

14. Now coming to the avocation of the deceased referred as Hamali, there is no other proof filed but for to say own brother of the deceased in the F.I.R mentioned as deceased was Hamali. The accident was dated 03.11.2004. Even as per the Apex Court expression in Lata Wadhwa and Others Vs. State of Bihar and Others, in the absence of the proof of earnings the amount of Rs.3,000/- can be taken. Here there is no proof regarding Hamali, but for from the statement of P.W.1 the wife of the deceased to rely for nothing rebutted however no proof regarding the earning to take, as per the above expression at Rs.3,000/- and the accident is three years after the said expression to say from the increase in the cost of living index to take at Rs.3,300/- per month and if 1/4th deducted for personal expenses it comes to Rs.2,475/-x12x15 = Rs.4,45,500/-, loss of consortium Rs.1,00,000/-, funeral expenses Rs.25,000/-, loss of estate minimum Rs.5,000/-, care and guidance to two minor children at Rs.10,000/- each vide Rajesh and Others Vs. Rajbir Singh and Others, it comes to Rs.5,95,500/- rounded to Rs.5,95,000/-, is the compensation entitled by the claimants from the owner of the vehicle to indemnify to the extent of pay and recovery by the insurer of the vehicle. Accordingly, Point No.1 is answered.

POINT No.2 :

15. In the result, the appeal is partly allowed while enhancing the compensation from Rs.4,23,000/- (Rupees Four lakh and twenty three thousand only) to Rs.5,95,000/- (Rupees Five lakh and ninety five thousand only) with interest at 7.5% p.a. from the date of claim petition till the date of realization with joint and several liability of the insurer and insured (respondents 1 and 2) to pay by the insurer and then to recover. The respondents 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 Lehu (supra) & Nanjappa (supra) that the insurer is entitled, while depositing the amount payable, if not deposited or paid any amount so far to deposit the balance, 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 per the Motor Vehicle 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, if any pending in this appeal, shall stand closed.