

(2011) 09 KL CK 0009
In the High Court Of Kerala
Case No : M.A.C.A. No. 5 of 2008

New India Assurance Company Ltd.

APPELLANT

Vs

Balakrishnan and others

RESPONDENT

Date of Decision : 29-09-2011

Acts Referred:

Motor Vehicles Act, 1988 — Section 10(2), 102, 149, 149(2), 149(4)

Citation : (2011) 4 ILR (Ker) 311 : (2012) 1 RCR(Civil) 112

Hon'ble Judges : R. Basant, J; M.C. Hari Rani, J

Bench : Division Bench

Advocate : K.K.M. Sherif and Sri A.A. Ziyad Rahman, for the Appellant; P. Jayaram for 4th respondent, for the Respondent

Final Decision : Dismissed

Judgement

R. Basant, J.—(i) Should the driver of a passenger autorickshaw (LMV - motor cab) possess a further authorisation/badge in addition to the driving licence to drive the said vehicle?

(ii) Even when the said vehicle is being used personally by the driver for his personal purposes (other than to carry passengers), should/can such authorisation be insisted?

(iii) Whether the mere non availability of such authorisation amounts to infraction of the conditions of the policy of insurance u/s 149(2) of the Motor Vehicles Act (hereinafter referred to as "the Act")?

(iv) In the facts of the case does that infraction amount to breach within the meaning of Section 149 (2)(a) of the Act?

(v) Assuming that there is a breach, can that infraction/breach be held to be a breach attracting application of Section 149(2) of the Act applying the rule of main purpose and the concept of fundamental breach referred to in para. 102

(vi) of National Insurance Co. Ltd. v. Swaran Singh 2004 (1) KLT 781 (S.C.)?

(vi) Is the decision in Moidu P. T. v. Oriental Insurance Co. Ltd. 2007 (4) KLT 790 valid in the light of the subsequent decision of the Supreme Court in Oriental Insurance Co. Ltd. Vs. Angad Kol and Others, ?

The above questions do arise for consideration in this case.

2. To the vitally relevant facts first. The claimants are parents and a sibling - a minor sister, of a minor child, who suffered injuries and succumbed to injuries in an accident which took place on 13-8-2005. They claimed an amount of ` 3 lakhs as compensation. The deceased was a 9 year old minor child on the date of the accident. The deceased was a pedestrian. The vehicle in question-a passenger autorickshaw, was owned and driven by the 4th respondent. The vehicle was validly insured against third party risks with the appellant insurance company.

3. The insurance company contended, inter alia, that the driver of the autorickshaw, though he had a valid driving licence to drive an LMV, was not duly licenced to drive the passenger autorickshaw in question inasmuch as he did not possess the requisite authorisation to drive a transport vehicle. The Tribunal by the impugned award came to the conclusion that the claimants are entitled for an amount of ` 1,80,000 as compensation along with interest and cost. The Tribunal did not accept the contention of the appellant/insurance company that the appellant is entitled to avoid liability u/s 149(2) a(ii) of the Act. Inasmuch as the owner/driver was not duly licenced, it was contended that the appellant was entitled to recover the amount under the proviso to Section 149(4) of the Act. That contention was not accepted by the Tribunal. The relevant discussion appears in para. 7 of the impugned award.

4. The learned counsel for the appellant contends that there has been a breach of the relevant condition u/s 149(2) a(ii) and consequently the Tribunal ought to have issued a direction in favour of the appellant to recover the amount from the 4th respondent owner/insured after satisfying the award by making payment to the claimants.

5. We shall look at the law first of all. The relevant provisions appear in Section 149(2) of the Act which we extract below:

149. Duty of insurers to satisfy judgments and awards against persons insured in respect of third party risks--

(1) * * * *

(2) No sum shall be payable by an insurer under sub-section (1) in respect of any judgment or award unless, before the commencement of the proceedings in which the judgment or award is given the insurer had notice through the Court or, as the case may be, the Claims Tribunal of the bringing of the proceedings, or in respect of such judgment or award so long as execution is stayed thereon pending an appeal; and an insurer to whom notice of the bringing of any such proceedings is so given shall be entitled to be made a party thereto and to defend the action on any of the following grounds, namely:

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

(i) a condition excluding the use of the vehicle--

(a) for hire or reward, where the vehicle is on the date of the contract of insurance a vehicle not covered by a permit to ply for hire or reward, or

(b) for organised racing and speed testing, or

(c) for a purpose not allowed by the permit under which the vehicle is used, where the vehicle is a transport vehicle, or

(d) without side-car being attached where the vehicle is a motor cycle; or

(ii) a condition excluding driving by a named person or persons or by any person who is not duly licenced, or by any person who has been disqualified for holding or obtaining a driving licence during the period of disqualification; or

(iii) a condition excluding liability for injury caused or contributed to by condition or war, civil war, riot or civil commotion; or

(b) that the policy is void on the ground that it was obtained by the non disclosure of a material fact or by a representation of fact which was false in some material particular.

(emphasis supplied)

The relevant statutory provisions came up for consideration by a 3 Judge Bench of the Supreme Court in Swaran Singh's case (supra). It would be apposite to refer to the summary of findings in para. 102 of the said decision. The relevant finding appears in para. 102(vi), which we extract below:

102. The summary of our findings to the various issues as raised in these petitions are as follows:

(i) * * * *

* * * *

* * * *

(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards insured unless the said breach or breaches of the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of fundamental breach" to allow defences available to the insurer under S. 149(2) of the Act.

(emphasis supplied)

6. It will be apposite straight away to refer to the relevant observations in paragraphs 82 and 83 of Swaran Singh's case (*supra*), which according to us really explain the summary of findings in para 102(vi) extracted above.

82. S.3 of the Act casts an obligation on a driver to hold an effective driving licence for the type of vehicle which he intends to drive. S.10 of the Act enables Central Government to prescribe the forms of driving licences for various categories of vehicles mentioned in sub-section (2) of said section. The various types of vehicles described for which a driver may obtain a licence for one or more of them are (a) motor cycle without gear; (b) motor cycle with gear; (c) invalid carriage; (d) light motor vehicle; (e) transport vehicle; (f) road roller; and (g) motor vehicle of other specified description. The definition clause in S.2 of the Act defines various categories of vehicles which are covered in broad types mentioned in sub-section (2) of S.10. They are "goods carriage", "heavy goods vehicle", "heavy passenger motor vehicle", "invalid carriage", "lightmotor vehicle", "maxicab", "medium goods vehicle", "medium passenger motor vehicle", "motorcab", "motorcycle", "omnibus", "private service vehicle", "semitrailer", "tourist vehicle", "tractor", "trailer" and "transport vehicle". In claims for compensation for accidents, various kinds of breaches with regard to the conditions of driving licences arise for consideration before the Tribunal. A person possessing a driving licence for "motor cycle without gear", (may be found driving a motor cycle with gear?) for which he has no licence. Cases may also arise where holder of driving licence for "light motor vehicle" is found to be driving a "maxicab", "motor cab" or "omnibus" for which he has no licence. In each case on evidence led before the Claims Tribunal, a decision has to be taken whether the fact of the driver possessing licence for one type of vehicle but found driving another type of vehicle, was the main or contributory cause of accident. If on facts, it is found that accident was caused solely because of some other unforeseen or intervening causes like mechanical failures and similar other causes having no nexus with driver not possessing requisite type of licence, the insurer will not be allowed to avoid its liability merely for technical breach of conditions concerning driving licence.

83. We have construed and determined the scope of sub-clause (ii) of sub-section (2)(a) of S. 149 of the Act/Minor breaches of licence conditions, such as want of medical fitness certificate, requirement about age of the driver and the like not found to have been the direct cause of the accident, would be treated as minor breaches or inconsequential deviation in the matter of use of vehicles. Such minor and inconsequential deviations with regard to licensing conditions would not constitute sufficient ground to deny the benefit of coverage of insurance to the third parties.

(emphasis supplied)

7. Swaran Singh's case (*supra*) is a decision by a 3 Judge Bench. The dictum in

Swaran Singh's case (supra) holds the field even now. No observations in any subsequent decision can be lightly assumed to overrule or run counter to the dictum in Swaran Singh's case (supra) referred above.

8. We shall immediately advert to a contention raised that Swaran Singh's case (supra) was concerned only with liability of the insurance company to third parties. Observations out of context cannot be extracted. In the summary of findings it is clearly stated that the "insurer would not be allowed to avoid its liability to the insured unless...." [see para 102(vi) extracted above]. A reading of Swaran Singh's case (supra) clearly reveals that the Supreme Court was called upon to consider the liability of the insurer towards the insured and it was not a case where the liability of insurer to the victim alone came up for consideration. The circumstances under which the insurer would be allowed to avoid its liability towards the insured was the focus of consideration, inter alia, in Swaran Singh's case (supra).

9. With this backdrop of facts, the statutory provision and the binding precedent of the 3 Judge Bench we shall now try to answer the various questions that are raised.

Question No. (i):

10. There is no dispute on facts. The driver-cum-owner (4th respondent herein) who was driving the vehicle at the relevant time did have a driving licence authorising him to drive a light motor vehicle. He did not have a further authorisation specifically authorising him to drive the passenger autorickshaw-a transport vehicle. That the driver was driving a transport vehicle without the requisite specific authorisation to drive a transport vehicle (hereinafter referred to as the badge for convenience) is not disputed. It is of course true that subsequently the driver had obtained a badge authorising him to drive the transport vehicle/passenger autorickshaw. On the date of the accident, admittedly he did not have a valid badge authorising him to drive a transport vehicle. The accident was on 13-8-2005 and he had the requisite badge only w.e.f. 13-12-2005.

11. It will be apposite now to advert to Section 3 of the M.V. Act. We extract the same below:

3. Necessity for driving licence.--(1) No person shall drive a motor vehicle in any public place unless he holds an effective driving licence issued to him authorising him to drive the vehicle; and no person shall so drive a transport vehicle [(other than a "motor cab or motorcycle" hired for his own use or rented under any scheme made under sub-section (2) of Section 75] unless his driving licence specifically entitles him so to do.

(2) The conditions subject to which sub-section (1) shall not apply to a person receiving instructions in driving a motor vehicle shall be such as may be prescribed by the Central Government.

12. The learned counsel for the insurance company contends and it is not virtually disputed that the further authorisation (badge) as insisted by the latter part of Section 3 (1) was not there for the owner-cum-driver. It is now trite that a person driving a motor vehicle must first possess the driving licence referred to in the former part of Section 3(1). But if he was driving a transport vehicle, he must have the further authorisation (badge) as insisted by the latter part of Section 3(1). It is unnecessary to embark on a more detailed discussion on this aspect. The last trace of doubt, if any, on this aspect is laid to rest by the decision in Angad Kol's case (*supra*). It, therefore, is evident that the 4th respondent was not duly licenced u/s 3(1) to drive the passenger autorickshaw (insured vehicle) which he was found driving at the relevant time. Such authorisation/badge is essential and there certainly is an infraction of the provision of Section 3(1) which insists that the driver must have the requisite licence and badge issued to him if he was to drive a transport vehicle,

13. Question No. (ii):

Undeterred, the learned counsel for the appellant argues that in the instant case though it was a passenger autorickshaw (transport vehicle), the owner/driver was driving the vehicle/using it not as a transport vehicle; but he was using it for his private purpose. Though a pleading to that effect is raised, there is not a semblance of evidence in support of such theory. In fact, the final report/charge-sheet in the case reveals that there was a passenger also in the vehicle driven by the 4th respondent at the relevant time. We shall, for a moment, assume that there was no passenger in the vehicle and the driver was proceeding in the passenger autorickshaw for some private purpose of his. The status of a transport vehicle which is defined in Section 2(47) of the Act does not at all depend on the manner of use of the vehicle at the given point of time. A transport vehicle continues to be a transport vehicle even when it is used for the moment for purposes other than carriage of persons/goods. The contention that the vehicle was being used by the owner/driver for purposes other than to carry passengers cannot have any impact on the obligation of the driver to possess a licence and badge u/s 3.

14. The learned counsel further contends that words "other than a motor cab or motor cycle hired for his own use or rented under any scheme made under sub-section (2) of Section 75" must be read in such a manner as to suggest that a motor cab hired for his own use by a driver can be driven without the latter authorisation (badge) as insisted by Section 3(1). We find no merit in this contention at all. A reading of Section 75 would clearly reveal why the saving is provided in Section 3(1). A person who hires for his own use or takes on rent a motor cab or motorcycle in accordance with the scheme u/s 75(2) is permitted to drive/ride the vehicle even without a badge. The very scheme of Section 75 would suggest that such motor cab/motorcycle which is by definition a transport vehicle can be rented out to persons for their personal use. Such transport vehicles can be driven by persons who take on rent such vehicles. Though a

transport vehicle, such vehicle is being used for the peculiar purpose mentioned in Section 75. Such use of the vehicle by a nonprofessional driver who takes on rent the cab/motorcycle under the scheme u/s 75 is permitted even without a badge. The laborious arguments attempted to be built on the basis of the words "other than.....Section 75" in Section 3(1) is thus found to be without any substance. We take the view that whatever be the purposes for which the transport vehicle was being used by its driver (not under the scheme of Section 75), the badge as required under the latter part of Section 3(1) must be possessed by him. Question No. (ii) is thus answered against the 4th respondent.

15. Question No. (iii):

Infraction of the condition of the policy of insurance that the driver must be duly licenced is thus proved. u/s 149(2)(a), violation of the policy condition has to be established. If the driver who drives the vehicle does not have a valid driving licence complying with both parts of Section 3(1) it certainly amounts to infraction of the conditions of the policy u/s 149(2)(a)(ii). On this aspect also, we find no scope for any dispute surviving. Question No. (iii) is also hence answered against the 4th respondent.

16. Question No. (iv):

The next question is whether such infraction/violation can be said to amount to a breach u/s 149(2)(a). Law is well-settled that every instance of non-compliance with a condition of policy does not ipso facto amount to a breach. The concept of breach brings with it a deliberate or intentional violation. A contumacious violation alone can amount to a breach. Precedents galore on this aspect. The decision in Swaran Singh's case (supra) concludes the issue. There can be no doubt that in the peculiar facts and circumstances of each case, the court will have to consider whether the alleged violation/infraction amounts to breach of a specified condition of policy.

17. On this aspect also, as rightly contended by the learned counsel for the insurance company, the breach is self-evident. It is not a case where some other person was driving the autorickshaw. The owner was driving the vehicle. He did not have a badge as insisted by the latter part of Section 3(1). He can, under no circumstances, in the facts of this case, successfully raise a contention that the violation was not a conscious violation and that it does not amount to a breach of the conditions of the policy. It is true that in Swaran Singh's case (Supra) the Three Judge Bench had opined that whether the infraction amounts to conscious and contumacious breach will have to be considered in the facts and circumstances of each case. But, in the facts and circumstances of this case, as pointed out by the learned counsel for the insurance company, the owner himself was driving the vehicle. He knew or must be assumed to know that he was not having the requisite authorisation/badge u/s 3(1). The proved violation must, in the facts of this case, be held to be a breach u/s 149(2)(a). Question No. (iv) is also hence answered against the 4th respondent.

18. Questions (v) and (vi):

We now come to the most important questions to be decided in this case. We have already noted that Swaran Singh's case (supra) is rendered by a Three Judges Bench. We have also extracted the relevant observations in paragraphs 82, 83 and 102(vi) of Swaran Singh's case (supra). The law declared by Swaran Singh's case (supra), it is evident, states clearly that it is not enough if the violation and contumacious breach are proved. An insurer will not be allowed to avoid its liability towards insured merely on proof of the violation and breach. It is up to the insurer to show that the breach is so fundamental that it is found to have contributed to the cause of the accident. The rule of main purpose and fundamental breach is to be imported to ascertain whether the breach was such that it can be said to have contributed to the cause of the accident Any liability u/s 166 of the M.V. Act is built only on proof of negligence on the part of the driver/owner. The contribution to the cause of the accident cannot certainly be said to refer to that breach of duty under the law of torts. It has to be established that the breach of the condition of the policy was responsible or had contributed to the cause of the accident. That evidently is the mandate of the stipulation in paragraph 102(vi). We understand paragraph 102(vi) of Swaran Singh's case (supra) to mean that violation is to be proved. In addition contumacious breach has to be proved. Further it has got to be proved that the alleged breach of the policy condition was so fundamental and the same had contributed to the cause of the accident. We are unable to agree that an insurer can avoid liability to the insured merely on proof of violation or on proof of the breach. It has got to be proved further that the breach was so fundamental and the breach had caused or contributed to the cause of the accident.

19. The learned counsel for the 4th respondent heavily relies on the relevant observations in paragraphs 82 and 83 of Swaran Singh's case (supra). Minor and inconsequential deviations with regard to licencing conditions would not constitute sufficient ground u/s 102(vi). This is evident from the relevant statement of the law in paragraph 83. The learned counsel for the fourth respondent particularly relies on the portions in paragraph 82 emphasised in the portions extracted above. In each case, the tribunal has to take a decision as to whether the fact of the driver possessing a defective licence was the main or contributory cause of the accident. It is only if that question is answered against the insured that the insurer can seek an order u/s 149(4) to enable him to recover the amount from the insured.

20. The learned counsel for the appellant contends that these observations in paragraphs 82 and 83 have to be realistically understood. According to the counsel, where the accident is attributable solely to the negligence of the driver, no further enquiry is contemplated at all and it has to be held that no licence or inadequate licence by the driver had contributed to the cause of the accident. According to the learned counsel for the appellant it is only when the accident takes place on account of reasons other than the negligence of the driver that

paragraphs 82, 83 and 102(vi) of Swaran Singh's case (supra) can have any application. We are afraid that the very clear express language of Paragraphs 82, 83 and Section 102(vi) does not enable us to accept the contention of the learned counsel for the appellant. The argument that the observations in paragraphs 82, 83 and Section 102(vi) of Swaran Singh's case (supra) can have application only in a case where reasons other than negligence of the driver (like fire, viz. major etc.) had caused the accident does not appear to be acceptable. The specific reference to ""want of medical fitness certificate, requirement about age of the driver and the like" in paragraph 83 knocks the bottom out of this contention.

21. Another Division Bench of this Court in P.T. Moidu Vs. The Oriental Insurance Co. Ltd. and Others, had occasion to consider this very specific question. The Bench considered the question whether the fact that the driver of a transport vehicle did not possess the badge was sufficient reason for the insurer to avoid the liability to indemnify the insured and answered the question against the insurance company. There is no dispute that the decision in Moidu's case (supra) holds the field now in Kerala. We find no reason to disagree with the conclusions of the Division Bench in Moidu's case (supra) on that question. We agree and hold that the mere absence of a badge for the driver cannot be held to be sufficient to enable the insurer to avoid liability to the insured, going by the dictum in Moidu's case (supra). The learned counsel for the appellant contends that Moidu's case (supra) cannot be reckoned as valid law any longer because of the decision of the Supreme Court in Angad Kol's case (supra). The learned counsel builds up an argument that in the light of the decision in Angad Kol's case (supra), the absence of a badge is sufficient for the insurer to avoid liability to the insured. We have been taken through Angad Kol's case (supra) in detail. It is true that in Angad Kol's case (supra), the Supreme Court reiterated that to be duly licenced the driver must possess not only the driving licence under clause 3(1); when he is driving a transport vehicle, he must possess the further authorisation/badge under the latter part of Section 3(1). That position is well-settled. The Supreme Court thereupon in Angad Kol's case (supra), proceeded to hold that the insurer can recover from the insured the amount paid. But, however, we find that the question whether proposition (vi) in paragraph 102 of Swaran Singh's case (supra) has been satisfied or not has not been considered in that decision. It evidently appears that the learned Judges who rendered the judgment in Angad Kol's case (supra) were satisfied on facts that the accident in that case was attributable to absence of authorisation/badge for the driver in that case. That is why evidently Their Lordships did not advert in detail to the proposition in paragraph 102 (vi) of Swaran Singh's case (supra). The mere fact that the said question was not considered by the smaller Bench in Angad Kol's case (supra) cannot lead us to the conclusion that proposition (vi) in paragraph 102 of Swaran Singh's case (supra) need not be complied with. The theory of implied overruling of Moidu's case (supra) by Angad Kol's case (supra) cannot, in these circumstances, be accepted.

22. The learned counsel for the 4th respondent has pressed into service some circumstances to suggest that in any case the breach in this case cannot be held to be fundamental. The main purpose rule, if applied, verdict in favour of the 4th respondent must be given, contends the learned counsel for the 4th respondent.

23. First of all, the learned counsel contends that the 4th respondent is duly licenced to drive a light motor vehicle. A light motor vehicle is defined in Section 2(21) as follows:

Section 2(21): "light motor vehicle" means a transport vehicle or omnibus the gross vehicle weight of either of which or a motor car or tractor or road-roller the unladen weight of any of which, does not exceed (7500) kilograms;

24. There is no dispute that the passenger autorickshaw in this case is one which falls within the definition of light motor vehicle. It is true that on a strict interpretation of Section 3, the further authorisation (badge) is required; but it cannot be lost sight of that the appellant was driving a light motor vehicle as defined u/s 2(21) for which he had the requisite licence. The definition of light motor vehicle clearly indicates that the specified transport vehicle is also included in the definition of light motor vehicle. In the light of the decision in Angad Kol's case (supra) certainly the licence to drive a light motor vehicle may not be sufficient to justify driving such a transport vehicle without due authorisation/badge by the driver. But the fact remains that Section 2(21) read with 3(1) must, at any rate, suggest that the breach is not fundamental as to enable the insurance company to get over the proposition (vi) in paragraph 102 of Swaran Singh's case (supra). We find force in that contention.

25. The learned counsel for the 4th respondent further contends that no additional qualifications are necessary for getting a badge to drive an autorickshaw which the 4th respondent was driving at the relevant time. The learned counsel submits that there was only a mere omission to apply for authorisation/badge. If the 4th respondent had applied for licence, the same should have been given to him. The point is that no further qualification is insisted to enable the 4th respondent to get the requisite authorisation for driving a transport vehicle. We extract rule 6 below:

6. Authorisation to drive transport vehicles.--Application for--An application for the grant of an authorisation to drive transport vehicles shall be made to the Licencing Authority in Form "LTA" and shall be accompanied by the driving licence and an adult First Aid Certificate obtained from the St. John Ambulance Association (India) or a Certificate of competence of the applicant in first aid work in Form "FA" issued by a Medical Officer in Government service not below the rank of an Assistant Surgeon:

Provided that no authorization to drive a Transport Vehicle shall be granted unless the applicant satisfies the Licensing Authority concerned that he has passed Standard IV as his minimum educational qualification:

Provided further that if the applicant is the holder of a driving licence authorizing him to drive only a light Motor Vehicle, no such authorization shall be granted unless he satisfies the licensing authority that he has had one year's experience in driving light motor vehicles:

Provided also that experience for a period of one year shall not be necessary in the case of an applicant for authorization to drive an autorickshaw or a motorized cycle rickshaw.

(emphasis supplied)

The 3rd proviso to Rule 6 makes it clear that experience for a period of one year is not necessary when the application is to drive a passenger autorickshaw (transport vehicle). If that be so, it is evident that the alleged omission to apply for and obtain a badge is purely technical and cannot, in anyway, be held to be a fundamental breach offending the main purpose rule as insisted by proposition (vi) in paragraph 102 of Swaran Singh's case (supra).

26. In the light of the above discussions, we answer questions (v) and (vi) in favour of the 4th respondent. We hold that Moidu's case (supra) holds the field even now and that Angad Kol's case (supra) cannot be held to impliedly overrule the dictum in Moidu's case (supra). We further hold that applying the test in proposition (vi) in paragraph 102 of Swaran Singh's case (supra), it cannot be held that there was any such fundamental breach suggesting that the accident in this case was attributable to want of requisite authorisation (badge) by the 4th respondent/driver to drive the transport vehicle.

27. The above discussions lead us to the conclusion that the challenge against the impugned award at the instance of the appellant cannot succeed. The challenge fails. This appeal is, in these circumstances, dismissed.