(2010) 09 MAD CK 0385

In the Madras High Court

Case No : C.M.A. No. 3044 of 2005

United India Insurance Co. Ltd. APPELLANT

Vs

V. Vijayakumar and others RESPONDENT

Date of Decision : 08-09-2010

Acts Referred:

Constitution of India, 1950 — Article 136
Motor Vehicles Act, 1988 — Section 107, 11, 111, 12, 138

Citation : (2012) ACJ 1235

Hon'ble Judges : R. Banumathi, J;G.M. Akbar Ali, J

Bench : Division Bench

Advocate : S. Arunkumar, for the Appellant; K. Thilageswaran, for the Respondent

Judgement

R. Banumathi, J.—This appeal arises out of the award dated 29.11.2004 passed in M.C.O.P. No. 428 of 2003 on the file of the Motor Accidents Claims Tribunal (Principal Subordinate Judge), Coimbatore, awarding compensation of Rs. 19,59,895 for the injuries sustained by the respondent No. 1-claimant. The brief facts of the case are as follows:

On 7.7.2002, respondent No. 1-claimant was walking on the road opposite to Annur Bus Stand. At about 7.45 p.m., the respondent No. 3 drove the tourist maxi cab-Mahendra van bearing registration No. TN 27-L 3638 from west to east in a rash and negligent manner and dashed against the claimant. A criminal case was registered against the van driver in Crime No. 292 of 2002 on the file of Annur Police Station. After investigation, charge-sheet was filed against the van driver-respondent No. 3.

2. The claimant sustained severe head injuries, diffuse axonal injury on the corpus callosum, subartical areas on both hemispheres. He was admitted in K.M.C.H. Hospital, Coimbatore in the Intensive Care Unit and Neuro Ward up to 25.12.2002. Later he was shifted as referred case to Chander Hospital at Tiruppur. The claimant is a B.Com. graduate and at the time of accident he was

working as accountant in a garment manufacturing unit and earning Rs. 4,500 per month. Alleging that accident was due to rash and negligent driving of respondent No. 3, claimant has filed claim petition claiming compensation of Rs. 25,00,000.

3. The owner and the driver of the van remained ex parte. While admitting the existence of policy of insurance, the insurance company resisted the claim petition by filing counter contending that on the date of accident, the respondent No. 3 was not holding a valid and effective driving licence to drive tourist maxi cab-Mahendra van. It was further averred that offending vehicle bearing registration No. TN 27-L 3638 driven by the respondent No. 3 is a public service tourist maxi cab requiring driver of the vehicle to be specifically authorised by way of a badge as required by rules and regulations. Further contention was that since the respondent No. 3 was not holding a badge, the terms and conditions of the policy and the corresponding stipulations of the Motor Vehicles Act have been violated by the owner-insured, who had permitted the respondent No. 3 to drive the vehicle and, therefore, no liability could be fastened on the insurance company and only owner and driver of the vehicle are liable to pay the compensation.

4. In the trial court, mother of claimant was examined as PW 1. Eyewitness Praveen was examined as PW 6. The doctors were examined as PWs 3 to 5. Easwaramurthy, owner of the garment company, and Dr. C. Venugopal, the physiotherapist, were examined as PWs 2 and 7 and Exhs. A1 to A14 were marked. On the side of respondents, the Motor Vehicles Inspector was examined as RW 1 and the Assistant Administrative Officer in the insurance company was examined as RW 2 and Exhs. B1 and B2 were marked.

5. Upon consideration of oral and documentary evidence, Tribunal held that there was no evidence to show that the driver of the offending vehicle, respondent No. 3, was not competent to drive the tourist maxi cab. The Tribunal further held that even if there is violation of policy conditions the insurer cannot avoid liability unless there had been breach of policy conditions. The Tribunal further held that the respondent No. 3 had LMV driving licence and there was no proof to show that the respondent No. 4 failed to take reasonable care and there was no fundamental breach of the policy conditions and held that the appellant insurance company is liable to pay the compensation. Insofar as the quantum of compensation, Claims Tribunal has taken the monthly income of the claimant at Rs. 4,500 and the percentage of disability at 95 per cent and awarded compensation of Rs. 19,59,895 under the following heads:

Permanent disability

Rs. 8,20,800

Pain and suffering

Rs. 25,000

Mental agony

Rs. 75,000

Extra nourishment

Rs. 1,000

Transportation

Rs. 1,000

Medical expenses

Rs. 9,37,095

Loss of income

Rs. 1,00,000

Total

Rs. 19,59,895

6. Challenging the award passed by the Tribunal, both on liability as well as on quantum, the learned counsel for appellant insurance company, Mr. Arunkumar, contended that once the defence by the insurer is established in the proceedings before the Tribunal, the Tribunal is bound to discharge the insurer and fix the liability only on the owner/driver of the vehicle and while so the Tribunal erred in saying that the appellant is liable to pay the compensation in spite of the fact that the respondent No. 3 has no driving licence to drive the offending vehicle. It was further submitted that on the evidence of RWs 1 and 2 and Exhs. B1 and B2, the Tribunal ought to have held that respondent No. 4 has violated the policy conditions and held that the appellant is not liable to pay compensation. Insofar as the quantum, the learned counsel would submit that the quantum of compensation awarded by the Tribunal is without any basis and excessive.

7. Learned counsel for the respondent Nos. 1 and 2 submitted that the burden to prove the defence raised by the insurer as regards the question as to whether there has been any breach or violation of policy conditions of the insurance policy and the policy has been issued or not, would be upon the insurer and the evidence adduced by the appellant insurer is not sufficient to prove the defence. It was further submitted that to absolve the liability of insurer, the breach on the part of insured must be a wilful one, being of the fundamental condition by the insured himself and the burden of proof thereof would be on the insurer. It was further submitted that with a view to avoid its liability, it is not sufficient to show that the respondent No. 3 was not duly licensed but it must be further established that there was breach on the part of the insured, which is lacking in this case.

8. We have carefully considered the rival contentions, materials on record and

the award passed by the Claims Tribunal. The points falling for our consideration in this case are:

(1) Whether the Tribunal was right in fastening the liability on the appellant insurance company jointly along with the owner and the driver of the vehicle maxi cab bearing registration No. TN 27-L 3638?

(2) Whether the appellant insurer has proved the defence as to breach or violation of policy conditions?

(3) Whether based upon section 149 (1) of Motor Vehicles Act and the principle laid down in the case of National Insurance Co. Ltd. Vs. Swaran Singh and Others, ''pay and recover from the owner'' can be ordered?

(4) Whether the quantum of compensation awarded by the Tribunal is without basis and excessive as contended by the appellant insurance company?

Point Nos. 1 to 3:

9. The manner of accident is not in dispute. On 7.7.2002, at about 7.45 p.m. while the respondent No. 1-claimant was walking on the road opposite to Annur Bus Stand, respondent No. 3 drove Mahendra van bearing registration No. TN 27-L 3638 from west to east in a rash and negligent manner, hit against the claimant and the claimant sustained severe head injuries. To prove the accident and negligence of van driver Praveen, PW 6, was examined. In his evidence, PW 6 has stated that while he was standing in front of Annur Bus Stand near flower shop and was talking to his friend-claimant and both of them were walking on the left side of the road towards east, Mahendra van bearing registration No. TN 27-L 3638 came in a high speed, driven in a rash and negligent manner and hit against the claimant, who sustained grievous head injury. In his evidence, PW 6 has clearly stated that the accident was due to negligent driving of Mahendra van. His evidence is strengthened by the recitals in F.I.R. (Crime No. 292 of 2002), Exh. A1. After completion of investigation, charge-sheet was filed against the van driver in S.T.C. No. 448 of 2003. By perusal of Exh. A6 judgment in S.T.C. No. 448 of 2003, it is seen that the driver of the offending vehicle, viz., the respondent No. 3 had admitted the offence and paid fine, which strengthens the claimant''s version. The admission of guilt by the respondent No. 3 would show that he had no substantive defence. Evidence of PW 6 coupled with the admission of guilt by the van driver clearly shows that the accident was due to negligence of the maxi cab-Mahendra van driver and the Tribunal rightly held that the respondent No. 3, driver of Mahendra van, was responsible for the accident.

10. The main points falling for consideration are: whether the statutory liability can be fastened upon insurance company or whether there was breach of policy condition and whether the insurance company can be absolved of its statutory liability as contended by it?

11. As pointed out earlier, respondent Nos. 3 and 4, driver and owner of maxi

cab Mahendra van, remained ex parte. The plea of insurance company is that respondent No. 3-driver was holding only LMV licence and was not in possession of a badge required under Motor Vehicles Act and without badge, he was permitted to drive the public service tourist maxi cab vehicle and there was violation of the conditions of the policy by the owner-insured and, therefore, the insurance company is not liable to pay the compensation. To substantiate their defence, Junior Assistant serving in the office of Motor Vehicles Inspector, Mettur, RW 1, was examined. In his evidence, RW 1 has stated that Mari-muthu, the respondent No. 3, was holding driving licence No. 1407/97 and he was licensed to drive light motor vehicle and no badge has been issued permitting him to drive the private transport vehicle. Further contention of the insurance company is that even though the offending vehicle bearing registration No. TN 27-L 3638 is a light motor vehicle, the respondent No. 3 was not having a badge as required under the provisions of the Motor Vehicles Act and Tamil Nadu Motor Vehicles Rules and, therefore, there was violation of policy conditions.

12. Learned counsel for the appellant, Mr. Arunkumar, contended that a person cannot be said to be duly licensed unless he has been granted a permanent licence for driving a particular vehicle in terms of the provisions of Chapter II of Motor Vehicles Act. It was further contended that a vehicle cannot be said to be driven by a person duly licensed therefore if (a) he does not hold a licence; (b) he holds a fake licence; (c) he holds licence but the validity thereof had expired; (d) he does not hold a licence for the type of vehicle which he was driving in terms of Chapter II of the Motor Vehicles Act, 1988 or (e) he holds merely a learner''s licence. It was further contended that by examination of RW 1, an official from Motor Vehicles Inspector''s Office, the burden cast upon the insurer that the respondent No. 3 did not possess a valid licence for transport vehicle-tourist maxi cab was discharged and while so Claims Tribunal erred in fastening the statutory liability upon the insurance company.

13. Learned counsel for the respondent has submitted that once a certificate of insurance is issued in terms of the provisions of the Act, the insurer has a liability to satisfy the award for the injuries sustained by the third party. It was further contended that in terms of section 149 (1) of Motor Vehicles Act, the insurer should pay first to the third parties and recover the same if they are absolved on any of the grounds in sub-section (2) thereof. In support of his contention, the learned counsel placed reliance upon National Insurance Co. Ltd. Vs. Swaran Singh and Others, It was further argued that breach on the part of the insured must be a wilful one being of a fundamental condition by the insured himself and the burden of proof, therefore, would be on the insurer.

14. Section 2 of the Motor Vehicles Act provides definitions of the terms. As per 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;"

As per section 2 (47), ''transport vehicle'' means:

a public service vehicle, a goods carriage, an educational institution bus or a private service vehicle;

15. Although the definition of the ''light motor vehicle'' brings within its umbrage both ''transport vehicle'' and ''omnibus'', there is a clear distinction between ''light motor vehicle'' and ''transport vehicle''. In Oriental Insurance Co. Ltd. Vs. Angad Kol and Others, the Supreme Court held as under:

(10) The distinction between a ''light motor vehicle'' and a ''transport vehicle'' is, therefore, evident. A transport vehicle may be a light motor vehicle but for the purpose of driving the same, a distinct licence is required to be obtained. The distinction between a ''transport vehicle'' and a ''passenger vehicle'' can also be noticed from section 14 of the Act. Subsection (2) of section 14 provides for duration of a period of three years in case of an effective licence to drive a ''transport vehicle'' whereas in case of any other licence, it may remain effective for a period of 20 years.

The effect of the different terms of licences granted in terms of the provisions of section 2 (14) and 2 (47) has also been considered by the Apex Court in New India Assurance Co. Ltd. Vs. Prabhu Lal, .

16. Section 3 emphasises upon the necessity for driving licence. Section 9 provides for ''Grant of driving licence'', which reads as under:

9. Grant of driving licence.--(1) Any person who is not for the time being disqualified for holding or obtaining a driving licence may apply to the licensing authority having jurisdiction in the area--

(i) in which he ordinarily resides or carries on business, or

(ii) in which the school or establishment referred in section 12 from where he is receiving or has received instruction in driving a motor vehicle is situated, for the issue to him of a driving licence...

17. Section 14 deals with ''Currency of licences to drive motor vehicles'', which reads as under:

14. Currency of licences to drive motor vehicles.--(1) A learner''s licence issued under this Act shall, subject to the other provisions of this Act, be effective for a period of six months from the date of issue of the licence.

(2) A driving licence issued or renewed under this Act shall,--

(a) in the case of a licence to drive a transport vehicle, be effective for a period of three years:

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(b) in the case of any other licence,--

(i) if the person obtaining the licence, either originally or on renewal thereof, has not attained the age of fifty years on the date of issue or, as the case may be, renewal thereof,--

(A) be effective for a period of twenty years from the date of such issue or renewal; or

(B) until the date on which such person attains the age of fifty years, whichever is earlier;

(ii) xxx xxx xxx

Provided that every driving licence shall, notwithstanding its expiry under this sub-section, continue to be effective for a period of thirty days from such expiry.

18. As per section 15 (1) of the Motor Vehicles Act, on application made to it, any licensing authority may renew a driving licence issued under the provisions of the Act with effect from the date of its expiry. Section 15 (2) stipulates that application for the renewal of a driving licence shall be made in such form and accompanied by such documents as may be prescribed by the Central Government. As per section 3, 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. The Central Government has framed the Rules known as ''Central Motor Vehicles Rules, 1989''. The word ''Form'' has been defined in rule 2 (e) of the said Rules as "Form appended to the Central Motor Vehicles Rules".

19. In exercise of the powers conferred by sections 28, 38, 65, 95, 107, 111 and 138 read with section 211 of the Motor Vehicles Act, 1988, the Government of Tamil Nadu framed the Tamil Nadu Motor Vehicles Rules, 1989. Chapter II of the Tamil Nadu Motor Vehicles Rules deals with ''Licensing of Drivers of Motor Vehicles''.

20. As per rule 3 (i) of Tamil Nadu Motor Vehicles Rules, ''Form'' means a Form appended to the Tamil Nadu Motor Vehicles Rules, Rule 7 provides for application for authorisation to drive a transport vehicle. As per rule 7, the holder of a driving licence may, at any time, appeal to the licensing authority in Form LTV A for the grant of an authorisation to drive a transport vehicle. Such application shall be accompanied by the driving licence and appropriate fee as specified in the Table under rule 49. Rule 10 deals with ''Issue of authorisation'', which reads as under:

10. Issue of authorisation.--The licensing authority granting an authorisation to drive a transport vehicle shall allot a badge number, sign the driving licence accordingly and return the same to the holder thereof and shall, if it is not the authority which issued the licence at the same time, send intimation in Form LTV to the authority by which the driving licence was issued.

21. As per rule 12, every driver of a transport vehicle shall, in addition to the driving licence, carry an authorisation issued by the owner of the vehicle in the

prescribed Form AVT. As per rule 21, the driver of a transport vehicle, while on duty, display on his left chest pocket a white plastic plate of size 8 cm x 2 cm inscribed with his name in bold black letters of size 0.5 cm, both in English and in Tamil, with badge number and the name of the District as set forth in the rule. The cost of the nameplate shall be borne by the driver himself.

22. Rule 37 deals with the conduct of driver of a transport vehicle while on duty. Rule 40 deals with duty of driver in the motor cab stand. Form LTV A is the form of application for authorisation to drive a transport vehicle. Form LTV is the form of intimation of grant of an authorisation to drive a transport vehicle. Form AVT is the form of authorisation to be carried by a driver of a transport vehicle.

23. A person holding a driving licence to ply ''light motor vehicle'' cannot ply a ''transport vehicle''. By a combined reading of rules 7, 10, 21 and 40, it is seen that a specific authorisation is required to drive a transport vehicle and such authorisation is by way of badge number, which has to be displayed by the driver of the transport vehicle. The conduct is also stipulated for the driver of the transport vehicle while on duty and for the driver of the motor cab while on duty in the motor cab stand.

25. Respondent No. 3 was having only LMV licence to ply light motor vehicle. A person holding mere LMV licence is not a duly licensed driver to drive transport vehicle. To establish that respondent No. 3 did not possess a valid licence to drive transport vehicle, Junior Assistant from the Motor Vehicles Inspector''s Office was examined as RW 1. In inspection report of the Motor Vehicles Inspector, Exh. A3, as against the column "particulars of driver''s licence", it is stated as ''1407/96-5.6.2016''. In his evidence, RW 1 has clearly stated that the respondent No. 3 was not granted any authorisation to drive the transport vehicle nor allotted a badge number and, therefore, respondent No. 3 was not duly licensed to drive a transport vehicle. By examining RW 1 and by adducing evidence on the driving licence particulars of respondent No. 3, the insurance company has discharged the burden cast upon it in establishing that the driver did not have a valid driving licence to drive a transport vehicle and that there was violation of the policy conditions.

25. During cross-examination of RW 1, it was suggested to him that the respondent No. 3 might have obtained the badge elsewhere in Tamil Nadu or in India and office of RW 1 might not have known about the same. To that question RW 1 has replied as under:

(Omitted as in vernacular)

26. Referring to the above answer of RW 1, and referring to National Insurance Co. Ltd. Vs. Swaran Singh and Others, the Tribunal held that respondent No. 3 might have obtained the badge elsewhere and that the same might not have been brought to the notice of the licensing authority and that there was no fundamental breach of the policy conditions. The Tribunal further held that even though the respondent No. 3-driver was not in possession of valid driving licence

to drive a maxi cab there was no fundamental breach of the policy conditions and, therefore, the insurance company cannot avoid the liability on the ground that there was breach of condition.

27. There is no force in the contention that the driver might have obtained badge elsewhere and that the same might not have been brought to the notice of the office of the Motor Vehicles Inspector in Mettur. As per rule 35 of Tamil Nadu Motor Vehicles Rules, a licensing authority renewing a driving licence under the provisions of sub-section (6) of section 15 shall intimate the fact to the licensing authority by which the driving licence was issued in Form LR. Rule 36 deals with ''Intimation of addition to driving licence'' which reads as under:

A licensing authority adding u/s 11 to the classes of motor vehicle which a driving licence authorises the holder to drive shall, if it is not the authority by which the driving licence was issued, intimate the addition to that authority in Form LAD.

It is, thus, clear that any additions made u/s 11 to the classes of motor vehicle which a driving licence authorises the holder to drive shall intimate the addition to the licensing authority. The absence of any endorsement in the driving licence as to the issuance of authorisation to drive the transport vehicle and non-mention of allotment of badge number clearly shows that the respondent No. 3 was not in possession of a valid driving licence and that he was not duly licensed to drive the transport vehicle and there was violation of policy conditions. The insurer and insured are bound by the conditions enumerated in the policy and the insurer is not liable to the insured if there is violation of policy conditions.

28. We need to consider whether the insurer can be directed to pay compensation to the claimant and recover the same subsequently from the insured. The doctrine of ''pay and recover'' has been recognised by the Supreme Court in several decisions. In New India Assurance Co., Shimla Vs. Kamla and Others etc. etc., the Supreme Court held as follows:

(21) A reading of the proviso to subsection (4) as well as the language employed in sub-section (5) would indicate that they are intended to safeguard the interest of an insurer who otherwise has no liability to pay any amount to the insured but for the provisions contained in Chapter XI of the Act. This means, the insurer has to pay to the third parties only on account of the fact that a policy of insurance has been issued in respect of the vehicle, but the insurer is entitled to recover any such sum from the insured if the insurer were not otherwise liable to pay such sum to the insured by virtue of the conditions of the contract of insurance indicated by the policy.

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(25) The position can be summed up thus: The insurer and insured are bound by the conditions enumerated in the policy and the insurer is not liable to the insured if there is violation of any policy condition. But the insurer who is made

statutorily liable to pay compensation to third parties on account of the certificate of insurance issued shall be entitled to recover from the insured the amount paid to the third parties, if there was any breach of policy conditions on account of the vehicle being driven without a valid driving licence...In the present case, if the insurance company succeeds in establishing that there was a breach of the policy condition, the Claims Tribunal shall direct the insured to pay that amount to the insurer. In default the insurer shall be allowed to recover that amount (which the insurer is directed to pay to the claimants-third parties) from the insured person.

29. In National Insurance Co. Ltd. Vs. Swaran Singh and Others, the Apex Court examined the liability of the insurance company vis-a-vis the owner and held that the liability of the insurance company would arise both from contract as well as from statute. Elaborately considering the insurer''s contractual liability as well as the statutory liability vis-a-vis the claims of third parties, the Supreme Court held as under:

(26) A right of the victim of a road accident to claim compensation is a statutory one. He is a victim of an unforeseen situation. He would not ordinarily have a hand in it. The negligence on the part of the victim may, however, be contributory. He has suffered owing to wrongdoing of others. An accident may ruin an entire family. It may take away the only earning member. An accident may result in the loss of her only son to a mother. An accident may take place for variety of reasons. The driver of a vehicle may not have a hand in it. He may not be found to be negligent in a given case. Other factors such as unforeseen situation, negligence of the victim, bad road or the action or inaction of any other person may lead to an accident.

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(65) A beneficent statute, as is well-known, must receive a liberal interpretation. [See Bangalore Water Supply and Sewerage Board Vs. A. Rajappa and Others, Steel Authority of India Ltd. and Others etc. etc. Vs. National Union Water Front Workers and Others etc. etc., I.T.I. Ltd. Vs. Siemens Public Communications Network Ltd., ; Amrit Bhikaji Kale and Others Vs. Kashinath Janardhan and Another, and Kunal Singh Vs. Union of India (UOI) and Another,

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(75) Proviso appended to sub-section (4) of section 149 is referable only to sub-section (2) of section 149 of the Act. It is an independent provision and must be read in the context of section 96 (4) of the Motor Vehicles Act, 1939. Furthermore, it is one thing to say that the insurer will be entitled to avoid its liability owing to breach of terms of a contract of insurance but it is another thing to say that the vehicle is not insured at all. If the submission of the learned counsel for the petitioner is accepted, the same would render the proviso to sub-section (4) as well as sub-section (5) of section 149 of the Act otiose, nor can any effective meaning be attributed to the liability clause of the insurance

company contained in sub-section (1). The decision in New India Assurance Co., Shimla Vs. Kamla and Others etc. etc., has to be read in the aforementioned context.

(76) Sub-section (5) of section 149, which imposes a liability on the insurer, must also be given its full effect. The insurance company may not be liable to satisfy the decree and, therefore, its liability may be zero but it does not mean that it did not have initial liability at all. Thus, if the insurance company is made liable to pay any amount, it can recover the entire amount paid to the third party on behalf of assured. If this interpretation is not given to the beneficent provisions of the Act having regard to its purport and object, we fail to see a situation where beneficent provisions can be given effect to. Sub-section (7) of section 149 of the Act, to which pointed attention of the court has been drawn by the learned counsel for the petitioner, which is in negative language may now be noticed. The said provision must be read with sub-section (1) thereof. The right to avoid liability in terms of sub-section (2) of section 149 is restricted as has been discussed hereinbefore. It is one thing to say that the insurance companies are entitled to raise a defence but it is another thing to say that despite the fact that its defence has been accepted having regard to the facts and circumstances of the case, the Tribunal has power to direct them to satisfy the decree at the first instance and then direct recovery of the same from the owner. These two matters stand apart and require contextual reading...

30. After referring to various decisions, in National Insurance Co. Ltd. Vs. Swaran Singh and Others, the Apex Court summarised its findings on the various decisions, which are as follows:

(102) The summary of our findings to the various issues as raised in these petitions is as follows:

(i) Chapter XI of the Motor Vehicles Act, 1988 providing compulsory insurance of vehicles against third party risks is a social welfare legislation to extend relief by compensation to victims of accidents caused by use of motor vehicles. The provisions of compulsory insurance coverage of all vehicles are with this paramount object and the provisions of the Act have to be so interpreted as to effectuate the said object.

(ii) An insurer is entitled to raise a defence in a claim petition filed u/s 163A or section 166 of Motor Vehicles Act, 1988, inter alia, in terms of section 149 (2) (a) (ii) of the said Act.

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

(iv) The insurance companies, however, with a view to avoid their liability must not only establish the available defence(s) raised in the said proceedings but must also establish ''breach'' on the part of the owner of the vehicle, the burden of proof wherefore would be on them.

(v) The court cannot lay down any criteria as to how said burden would be discharged, inasmuch as the same would depend upon the facts and circumstances of each case.

(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 on 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 the defences available to the insurer u/s 149 (2) of the Act.

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

(viii) If a vehicle at the time of accident was driven by a person having a learner''s licence, the insurance companies would be liable to satisfy the decree.

(ix) The Claims Tribunal constituted u/s 165, read with section 168, is empowered to adjudicate all claims in respect of the accidents involving death or bodily injury or damage to property of third party arising from use of motor vehicle. The said power of the Tribunal is not restricted to decide the claims, inter se, between claimant or claimants on one side and insured, insurer and driver on the other. In the course of adjudicating the claim for compensation and to decide the availability of defence or defences to the insurer, the Tribunal has necessarily the power and jurisdiction to decide disputes inter se between insurer and the insured. The decision rendered on the claims and disputes inter se between the insurer and insured in the course of adjudication of claim for compensation by the claimants and the award made thereon is enforceable and executable in the same manner as provided in section 174 of the Act for enforcement and execution of the award in favour of the claimants.

(x) Where on adjudication of the claim under the Act the Tribunal arrives at a conclusion that the insurer has satisfactorily proved its defence in accordance with the provisions of section 149 (2) read with sub-section (7), as interpreted by this court above, the Tribunal can direct that the insurer is liable to be reimbursed by the insured for the compensation and other amounts which it has been compelled to pay to the third party under the award of the Tribunal. Such determination of the claim by the Tribunal will be enforceable and the money found due to the insurer from the insured will be recoverable on a certificate issued by Tribunal to the Collector in the same manner u/s 174 of the Act as arrears of land revenue. The certificate will be issued for the recovery as arrears of land revenue only if, as required by sub-section (3) of section 168 of the Act, the insured fails to deposit the amount awarded in favour of the insurer within thirty days from the date of announcement of the award by the Tribunal.

(xi) The provisions contained in subsection (4) with proviso thereunder and sub-section (5) which are intended to cover specified contingencies mentioned therein to enable the insurer to recover amount paid under the contract of insurance on behalf of the insured can be taken recourse to by the Tribunal and be extended to claims and defences of insurer against insured by relegating them to the remedy before regular court in cases where on given facts and circumstances adjudication of their claims inter se might delay the adjudication of the claims of the victims.

31. All the subsequent cases are guided by National Insurance Co. Ltd. Vs. Swaran Singh and Others, Onus is always upon the insurance company to prove that the driver had no valid driving licence and that there was violation of breach of policy conditions. Whenever the driver did not possess valid driving licence and breach of policy conditions where third party risk is involved, applying the ratio of decision in Swaran Singh''s case (supra) is not automatic. In the facts and circumstances of each case, Tribunal/ court has to consider the nature of alleged breach of policy conditions and the court may in its discretion direct the insurer to pay first and order recovery.

32. Cases in which insurance company held not liable but ordered to pay and recover: In the case of National Insurance Co. Ltd. Vs. Kusum Rai and Others, , the vehicle was being used as a taxi and it was, therefore, a commercial vehicle. The driver of the said vehicle was required to hold an appropriate licence. Ram Lai, who allegedly was driving the said vehicle at the relevant time, was holder of a licence to drive light motor vehicle only and he did not possess any licence to drive a commercial vehicle. Therefore, there was a breach of condition of insurance policy. In such circumstances, the Apex Court held the appellant National Insurance Co. Ltd., therefore, could raise the said defence. While considering the stand of the insurance company, the Apex Court, pointing out the law laid down in National Insurance Co. Ltd. Vs. Swaran Singh and Others, concluded that the owner of the vehicle cannot contend that he has no liability to verify the fact as to whether the driver of the vehicle possessed a valid licence or not. However, taking note of the fact that the owner has not appeared and that the victim was aged only 12 years, the claimants are from a poor background and to avoid another round of litigation applying the decision in Oriental

Insurance Co. Ltd. Vs. Shri Nanjappan and Others,), in exercise of jurisdiction under Article 136 of the Constitution, Apex Court declined to interfere with the impugned judgment thereon and permitted the appellant insurance company therein to recover the amount from the owner of the vehicle.

33. Cases where the insurance company was exonerated from its liability and ''no order as to pay and recover'': In a catena of decisions, the Supreme Court held that on the basis of section 149 (1) of the Motor Vehicles Act and applying of ratio held in National Insurance Co. Ltd. Vs. Swaran Singh and Others,), is not automatic. Onus is on the insurance company to prove that the driver had no driving licence to escape from the liability. In Premkumari and Others Vs. Prahlad Dev and Others, , the driving licence was a fake one. The Tribunal held that the driver, who was the brother of the insured, did not possess a valid and effective licence on the date of the accident and exonerated the insurance company from liability.

34. In National Insurance Co. Ltd. Vs. Laxmi Narain Dhut, the following conclusions in para 41 are relevant:

(41) In view of the analysis the following situations emerge:

(1) The decision in National Insurance Co. Ltd. Vs. Swaran Singh and Others, , has no application to cases other than third party risks.

(2) Where originally the licence was a fake one, renewal cannot cure the inherent fatality.

(3) In case of third party risks the insurer has to indemnify the amount and if so advised to recover the same from the insured.

(4) The concept of purposive interpretation has no application to cases relatable to section 149 of the Act."

35. In Bhuwan Singh Vs. Oriental Insurance Company Ltd. and Another, the driver of the offending vehicle was holding a learner''s licence and it expired on 22.12.2000. Accident occurred on 5.1.2001. He applied for a regular licence only on 22.1.2001. The Supreme Court referred to various provisions of the Motor Vehicles Act and also referred to the fact that while section 3 of the Act uses the words ''effective licence'', section 149 (2) uses the words ''duly licensed''. The Supreme Court held that since the driver had applied for grant of licence after the accident, therefore, the insurance company was not liable.

36. Considering the above decisions and from the facts and evidence that emerges from the records, the respondent No. 3, who was driving the tourist maxi cab, had no licence on the date of the accident. But as pointed out earlier, the respondent No. 3 was having a driving licence for LMV, he had not obtained necessary authorisation to drive a transport vehicle and badge was not allotted to him and he had not obtained the badge for driving a transport vehicle/tourist maxi cab.

37. The respondent No. 3 had a licence, but not a valid one. As there was violation of conditions of policy, Tribunal was not right in fastening the statutory liability upon the insurance company. Since there was violation of policy conditions the Tribunal ought not to have fastened the statutory liability upon the insurance company. Keeping in view the nature of injuries sustained by the claimant and that the claimant is now reduced to vegetable existence, the only just and reasonable course would be to direct the insurance company to pay compensation to the respondent No. 1 -claimant and recover it from the owner for his breach of the policy conditions.

Point No. 4:

38. In the instant case, the claimant has sustained severe head injuries--diffuse axonal injury and avulsion of right pinna. Because of severe head injury, after the accident, claimant became unconscious. In her evidence, mother of claimant, PW 1, has stated that after the accident, claimant became unconscious. After the accident, claimant was admitted in Kovai Medical Centre and Hospital Ltd., where he was in intensive care unit for about 51/2 months. He was on ventilator for a period of 46 days. Tracheostomy was performed for better tracheal toileting. From discharge summary, Exh. A8, patient was given chest physiotherapy and occupational therapy was given to the limbs. It is seen that tracheostomy was performed and removed after 4 months.

39. From the evidence of PW 1 and from Exh. A8, it is seen that even after intensive treatment, there was motor loss and loss of speech to the claimant, he was put on tube feeding and was not able to swallow and all the limbs were decerebrating. He has taken treatment as inpatient for five months and at the time of discharge, he was advised to continue physiotherapy, occupational therapy and good nursing care. In her evidence PW 1 stated that even after treatment, claimant was not able to move his hands and legs and only liquid food was provided through a tube. PW 1 has stated that they have spent nearly Rs. 12,00,000 for the medical treatment. PW 1 has produced bills, Exh. A9.

40. Dr. Manohar, Plastic Surgeon of Kovai Medical Centre and Hospital Ltd., PW 4, who has also treated the claimant has spoken about the nature of treatment and performing of operation. PW 2 has also stated that at the time of discharge claimant was not able to speak and there was no function of the body and food has to be provided through nasal tube and he was discharged with advice for physiotherapy treatment. PW 4 has also stated that the claimant is not able to speak and he is not able to hear. Exh. A13 is the disability certificate issued by PW 4.

41. PW 4 has assessed the permanent disability at 95 per cent and issued disability certificate, Exh. A13. In disability certificate, Exh. A13, it is clearly stated that PW 4 has examined the claimant on 5.7.2004 and noticed that he was totally paralysed and not able to move all four limbs and he is not responding to any stimulation and he is not able to obey any commands. PW 4

has also stated that the injured-claimant is totally bedridden and no control over his bladder or bowel movements and that he is not able to swallow any solid food and not able to speak or hear anything. From the evidence of PW 4, it is seen that claimant is totally paralysed and almost in a coma stage. Throughout his life the claimant needs constant care and attention.

42. Dr. Maragatham Swaminathan, PW 5, has spoken about the nature of treatment and the medical expenses. Dr. K. Bhaskar, PW 3, has provided physiotherapy treatment for the claimant and the amount of Rs. 28,000 was paid as his charges. Dr. C. Venugopal, PW 7, has also provided treatment in his Modern Physiotherapy Clinic at Tiruppur from 27.12.2002 to 11.12.2003 and he charged a sum of Rs. 67,500. Taking into account Exh. A9 and evidence of PWs 3, 5 and 7, the Tribunal has awarded compensation of Rs. 9,37,095 for medical expenses and we maintain the same.

43. At the time of accident, deceased was working as accountant in Kumaran Garments. He was working as a part-time employee in Kumaran Garments and about one month prior to the accident he was full-time employee in Kumaran Garments. He was paid salary of Rs. 4,500. PW 2 has produced salary certificate, Exh. P10, evidencing that the claimant was getting salary of Rs. 4,500 per month. Claimant is a B.Com graduate and was aged 22 years at the time of accident. The claimant is now reduced to a vegetable existence and for rest of his life he has to depend on others. Keeping in view the nature of injuries and the qualification of claimant, the Tribunal was justified in taking the salary of the claimant at Rs. 4,500 and fixed the percentage of disability at 95 per cent. In fact, the salary taken and percentage of disability is quite conservative if we may say so.

44. In the case of United India Insurance Company Ltd., Branch Officer Vs. Veluchamy and Another, Division Bench of this court has held that having regard to the nature of injuries, in appropriate cases, court can adopt the multiplier method to award compensation for permanent disability. The determination of the quantum must be liberal and not meagre. The entire future of the claimant is now crippled and he is now confined to bed and incapacitated. The Tribunal has taken the income of the claimant at Rs. 4,500 per month and rightly adopted multiplier of 16. In our considered view, the compensation of Rs. 8,20,800 (Rs. 4,500 x 12 x 16 x 95/100) awarded for the permanent disability is just and reasonable and the same is maintained.

45. Insofar as pain and suffering, Tribunal has awarded only a sum of Rs. 25,000 and for mental agony a sum of Rs. 75,000 has been awarded. Though compensation under the separate head of mental agony is not maintainable and cannot be ordered, having regard to the less amount of compensation awarded for pain and suffering, the compensation of Rs. 75,000 awarded under the head mental agony could be clubbed under the head pain and suffering and the same is enhanced to Rs. 1,00,000. Insofar as the conventional damages under the heads extra nourishment and transport, the Tribunal has awarded Rs. 1,000 each

and the same is maintained. As pointed out earlier, the claimant has been continuously taking treatment and the compensation of Rs. 1,00,000 awarded for actual loss of income is also reasonable and the same is maintained. The Tribunal in fact could have awarded more compensation for the future medical expenses and attendant charges. Since there is no cross-appeal/objection, we leave at that. In our considered view, the total compensation of Rs. 19,59,895 along with interest at 9 per cent per annum awarded by the Tribunal to the claimant cannot be said to be excessive or on the higher side.

46. For the reasons stated above, in view of the decision of National Insurance Co. Ltd. Vs. Swaran Singh and Others, and reiterated in other decisions, we are of the view that the appellant insurer must pay the amount to the claimant-respondent No. 1 and then recover the same from the insured and to that extent the award passed by the Tribunal has to be modified.

47. In the result, the quantum of compensation of Rs. 19,59,895 awarded by the Tribunal in M.C.O.P. No. 428 of 2003 on the file of the Motor Accidents Claims Tribunal (Principal Subordinate Judge), Coimbatore is confirmed. Award passed by the Tribunal holding that the appellant insurance company is jointly and severally liable to pay the compensation along with driver and owner, respondent Nos. 3 and 4, of the vehicle is modified and it is held that the appellant insurance company must pay the compensation amount to the respondent No. 1-claimant along with interest at 9 per cent per annum and then recover the same from the insured and civil miscellaneous appeal is partly allowed to that limited extent. The insurance company is entitled to file execution petition against respondent Nos. 3 and 4 in the same proceedings and on the basis of this judgment/award. As per the direction of the court, the appellant insurance company has already deposited Rs. 15,00,000, out of which the claimant has withdrawn the lump sum amount of Rs. 10,00,000. The appellant insurance company is directed to deposit the balance amount of compensation along with accrued interest within a period of 8 weeks from the date of receipt of copy of this judgment. On such deposit, the claimant is permitted to withdraw the entire compensation amount along with accrued interest at the rate of 9 per cent per annum. However, there is no order as to costs in this appeal.

