

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE T.R. RAMACHANDRAN NAIR

THE HONOURABLE MR. JUSTICE A.V. RAMAKRISHNA PILLAI

&

THE HONOURABLE SMT. JUSTICE P.V. ASHA

TUESDAY, THE 16TH DAY OF DECEMBER 2014/25TH AGRAHAYANA, 1936

MACA.No. 1653 of 2010 ()

AGAINST THE AWARD IN OPMV 906/2006 of M.A.C.T., ANJERI DT 20-05-2010
APPELLANT(S)/R3 IN OPMV 906/2006:

NATIONAL INSURANCE COMPANY LTD.,
DIVISIONAL OFFICE, P.B.NO.40, BANK ROAD
KANNUR, REPRESENTED BY ITS MANAGER, REGIONAL OFFICE
OMANA BUILDINGS, M.G.ROAD, ERNAKULAM.

BY ADV. SRI.LAL GEORGE

RESPONDENT(S)/CLAIMANTS AND RESPONDENTS 1 AND 2 :

1. JISHA K.P., AGED 29 YEARS,
W/O.LATE P.M.VINOD KUMAR, RESIDING AT PADINHARE
MATHANCHERI HOUSE, VALLIKUNU P.O., THIRURANGADI TALUK
MALAPPURAM DISTRICT.

2. SAROJINI AMMA, AGED 50 YEARS,
W/O.LATE GOPALAKRISHNAN NAIR, RESIDING AT
PADINHARE MATHANCHERI HOUSE, VALLIKUNU P.O.
THIRURANGADI TALUK, MALAPPURAM DISTRICT.

3. ARYAKRISHNA, AGED 7 YEARS, MINOR,
D/O.(LATE)P.M.VINODKUMAR, RESIDING AT
PADINHARE MATHANCHERI HOUSE, VALLIKUNU P.O.
THIRURANGADI TALUK, MALAPPURAM DISTRICT
REPRESENTED BY 1ST RESPONDENT

4. GOPUKRISHNAN, AGED 2 1/2 YEARS,
MINOR, S/O.LATE P.M.VINODKUMAR
RESIDING AT PADINHARE MATHANCHERI HOUSE, VALLIKUNU
P.O., THIRURANGADI TALUK, MALAPPURAM DISTRICT
REPRESENTED BY 1ST RESPONDE

5. SAJEEVAN, S/O.RAGHAVAN,
VADAKKEL HOUSE, PARASSINIKADAVU P.O., KANNUR DISTRICT.

6. SATHEESHAN, S/O.RAGHAVAN,
VADAKKEL HOUSE, PARASSINIKADAVU P.O., KANNUR DISTRICT.

R,R5-6 BY ADV. SRI.SUNIL NAIR PALAKKAT
R,R5-6 BY ADV. SRI.K.N.ABHILASH
R,R6 BY ADV. SMT.R.LEELA
R,R6 BY ADV. SMT.N.K.SHEEBA
R,R1-4 BY ADV. SRI.R.SUDHISH
R,R1-4 BY ADV. SMT.M.MANJU
R,R1-4 BY ADV. SRI.K.R.RANJITH

THIS MOTOR ACCIDENT CLAIMS APPEAL HAVING COME UP FOR ORDERS
ON 12-11-2014, ALONG WITH MACA. 2640/2010, THE COURT ON 16-12-2014
PASSED THE FOLLOWING:

**T.R.RAMACHANDRAN NAIR,
A.V. RAMAKRISHNA PILLAI &
P.V. ASHA, JJ.**

M.A.C.A.Nos.1653/2010 & 2640/2010

DATED THIS THE 16TH DAY OF DECEMBER, 2014

ORDER

Ramachandran Nair, J.

These appeals have been referred to the Full Bench to examine the following question:

“Whether the absence of a badge by the driver of a transport vehicle is sufficient to exonerate the insurance company from liability to pay compensation to the claimant or at least whether the insurance company is entitled to the right to recover the compensation paid by them to the claimant from the owner?

M.A.C.A. No.1653/2010 is filed by the insurance company and M.A.C.A. No.2640/2010 is filed by the claimant.

2. The accident in this case occurred on 3.12.2005 at about 2.15 p.m. and it involves two vehicles. The deceased was travelling in a lorry bearing registration No.KL 01X 9354 from Town AR Camp to Malappuram SP Camp for bringing barricades. At a place called Siyamkandam, Pulikkal the vehicle stopped for bringing water and the deceased got down from the

lorry. Then the offending vehicle, viz. ambassador car bearing Reg. No.KL 13/J 1950 came recklessly from Malappuram side and hit against the deceased, thus causing grievous injuries to him. He succumbed to the injuries later. The insurance company contended that the first respondent driver had no badge to drive the transport vehicle and it amounts to violation of the policy conditions. The Tribunal rejected the contentions and directed the insurance company to pay the amount awarded in full.

3. Before the Division Bench, learned counsel for the owner relied upon the judgment of the Apex Court in **S. Iyyappan v. M/s. United India Insurance Company Ltd. And another** (2013 (3) KLJ 306). Learned counsel also relied upon another judgment of a Division Bench of this Court M.A.C.A. No.105/2012 holding the view that the absence of a badge is not a violation of the policy condition enabling the insurance company to recover the amount from the owner and driver. Another decision of a learned Single Judge in **Kuruvila v. Jijo Joseph** (2013 (4) KLT 700) was also relied upon.

4. In the reference order, the Bench noted that the said Bench, in M.A.C.A. No.1676/2010, gave right to the insurance company to recover the amount paid by it to the claimant on the ground that the absence of badge is a violation of the policy conditions. After observing that there is considerable merit in the contention of the learned counsel for the owner, in relying upon the decision of the Apex Court in **S. Iyyappan's case** (2013 (3) KLJ 306), the cases were referred to the Full Bench for consideration.

5. We heard learned counsel for the insurance company, Shri Lal George, Shri R.Sudhish and Smt. Manju M., learned counsel for the claimant and Shri Sunil Nair Palakkat, learned counsel for the owner.

6. Shri Lal George mainly contended that there should be effective licence for a driver, going by Section 3 of the Motor Vehicles Act, 1988 (the 'Act' for short) to drive a vehicle. Learned counsel invited our attention to the definition of "driving licence" in Section 2(10) and the other definition clauses including "private service vehicle" (Section 2(33)), "public service vehicle" (Section 2(35)), "goods carriage" (Section 2(14)) and "transport vehicle" (Section 2(47) of the Motor Vehicles Act, 1988. It is submitted

that in the light of the provision under Section 3 of the Act, any person driving a transport vehicle should have proper authorisation and herein, the absence of a badge therefore will be a violation of the conditions of the policy under Section 149(2)(a)(ii) of the Act. Elaborating his contentions, it is submitted by relying upon various decisions of the Apex Court that under different circumstances the Apex Court has examined various legal aspects coming under the above provision which also support the case of the insurance company.

7. Per contra, learned counsel for the owner Shri Sunil Nair submitted that the rules framed as regards issuance of licence are in tune with the power conferred on the Central Government under Section 27 of the Motor Vehicles Act, 1988. With respect to issuance of licence under Section 27, the State Government has no power to make rules. The power to make rules by the State Government is under Section 28 in which alone a badge is provided. The proficiency for driving alone will have to be considered while issuing a driving licence whereas for issuance of badge, such is not the test. Under the rules framed by the State Government, on a

formal application the badge is being granted and it will not be a case of violation of the policy, if a driver is not having badge which will be clear from Rule 6 of the Kerala Motor Vehicles Rules, 1989. It is therefore submitted that in a matter like this, the aspect to be considered is only with regard to the proficiency of the driver to drive a vehicle and the insurance company will have to establish that absence of a badge for the driver is the fundamental cause for the accident, as held by the Apex Court in **National Insurance Company Ltd. v. Swaran Singh** {(2004) 3 SCC 297}. Hence, the contention of the insurance company that breach of the policy is automatic in such a situation, cannot be accepted. In this case, the claimants are third parties, going by the facts of the case. Learned counsel for the claimants supported the above arguments.

8. As regards the interpretation to be placed on Sections 3 and 149 (2)(a)(ii) of the Act, the Apex Court in the landmark judgment in **Swaran Singh's case** {(2004) 3 SCC 297}, after analysing the various provisions as well as various earlier decisions of the Apex Court, has laid down the principles in detail. The difference in phraseology, viz. “effective driving

licence” in Section 3 and “duly licenced” in Section 149(2)(a)(ii) of the Act has been noted by the Apex Court. The relevant principles can be summarised as follows:

- a) Under Section 149(2) an insurer can defend the action on any of the grounds mentioned therein; (para 34)
- b) The provision opens with the words that “there has been breach of a specified condition of the policy implying that the insurer's defence of the action would depend upon the terms of the policy”; (para 35)
- c) In Section 3 of the Act, the words used are “effective licence”. It has been differently worded in Section 149(2)(a)(ii), ie. “duly licenced”; (para 36)
- d) The absence of effective licence on the date of the accident will make the person liable for prosecution in terms of Section 181 of the Act. But Section 149 pertains to insurance as regards third party risk; (Para 36)
- e) The penal provision in a statute and a provision which is

beneficial to the third party will have to be interpreted differently;
(para 37)

f) The words “effective licence” used in Section 3 cannot be imported for Section 149(2) of the Act; (para 38)

g) The words “duly licenced” used in Sub-section (2) of Section 149 are used in past tense; (para 38)

h) Where the insurers relying upon the violation of provisions of law by the assured takes an exception to pay the assured or a third party, they must prove a wilful violation of the law by the assured.

In some cases violation of criminal law, particularly, violation of the provisions of the Motor Vehicles Act may result in absolving the insurers but, the same may not necessarily hold good in the case of a third party.” (para 45)

In paragraph 82 their Lordships further gave emphasis to the fact that in each case it should be considered whether the driver possessing one type of licence but was found driving another type, was the main cause of the accident. We extract the said paragraph hereinbelow:

“82.....In each case on evidence led before the 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.”

Apart from the same, in paragraph 83 it is held that 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. We extract the said paragraph also for easy reference:

“We have construed and determined the scope of sub-clause (ii) of sub-section (2) of Section 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 of 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.”

The summary of the findings on various issues is available in paragraph 102 which we extract in full:

“(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) Insurer is entitled to raise a defence in a claim petition filed under Section 163-A or Section 166 of the Motor Vehicles Act, 1988 inter alia in terms of Section 149(2)(a)(ii) of the said Act.

(iii) The breach of policy condition e.g. disqualification of driver or invalid driving licence of the driver, as contained in sub-section (2)(a)(ii) of Section 149, have 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 are, 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 defences available to the insured under Section 149(2) of the Act.

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

(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 under Section 165 read with Section 168 is empowered to adjudicate all claims in respect of the accidents involving death or of bodily injury or damage to property of third party arising in 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 Sections 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 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 the tribunal to the Collector in the same manner under Section 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 sub-section (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 of 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.”

Sub para (vi) is important for the purpose of this case.

9. One of the earliest decisions is that of the Apex Court in **Ashok Gangadhar Maratha v. Oriental Insurance Co. Ltd.** {(1999) 6 SCC 620}. Therein, the meaning of the words “effective licence” under Section 3 of the Act was examined. On facts, it is clear that the vehicle therein, viz. a truck weighing less than the maximum limit prescribed in Section 2(21) of the Act, was involved in the accident. The contention by the insurance company was that the insured committed breach of the terms of the insurance policy by entrusting a transport vehicle to a person who did not hold a valid licence and the insurer was, thus, not liable to indemnify the appellant. After examining the relevant clauses in the policy, in paragraph 14 it was held that in the light of the fact that the vehicle weighed only 5920

kgs. and the driver had the driving licence to drive a light motor vehicle, it is noted that, therefore, the insurance policy covered a transport vehicle which meant a goods carriage. It was further held that “the whole case of the insurer has been built on a wrong premise.”

10. Shri Lal George, learned counsel relied upon a series of decisions, particularly the following ones to contend for the position that in the case of absence of a badge it amounts to violation of the policy to attract Section 149(2)(a)(ii) automatically and no further proof on the part of the insurer is required. He relied upon **National Insurance Co. Ltd. v. Kusum Rai** (2006 (2) KLT 300 - SC), **National Insurance Co. Ltd. v. Laxmi Narain Dhut** {(2007) 3 SCC 700}, **Oriental Insurance Co. Ltd. v. Syed Ibrahim and others** (2007 ACJ 2816), **New India Assurance Company Ltd. v. Prabhu Lal** {(2008)1 SCC 696} and **Premkumari and others v. Prahlad Dev and others** {(2008) 3 SCC 193} in this context. He further argued that at any rate, this is a case where the insurance company should be given freedom to recover the amount from the owner.

11. Before going into the various decisions referred to by the learned

counsel, we extract hereinbelow the relevant provisions of the Act brought to our notice:

“2(10) “Driving licence” means the licence issued by a competent authority under Chapter II authorising the person specified therein to drive; otherwise than as a learner, a motor vehicle or a motor vehicle of any specified class or description;

2(47) “Transport vehicle” means a public service vehicle, a goods carriage, an educational institution bus or a private service vehicle;

3. Necessity for driving licence.- (1) No person shall drive a motor vehicle in any public place unless he holds of 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 motor cycle 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 to do so;

149(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:-

XXXXXXX

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

12. Kusum Rai's case ((2006) 4 SCC 250 = 2006 (2) KLT 300 - SC)

is one where the vehicle involved was a jeep which was being used as a taxi. The person who drove the vehicle was one Shri Ram Lal, working as a Khalasi in it and used to drive it. He was having a licence for driving a light motor vehicle. In paragraph 8 it was held that there was a breach of condition of the contract of insurance. Finally, in paragraph 16 their Lordships allowed the insurance company to recover the amount from the owner.

13. Laxmi Narain Dhut {(2007) 3 SCC 700} is a case where the

Apex Court considered the liability of the insurer and the defence available in own damage claim not involving any third party. The Apex Court finally, after explaining the dictum laid down in **Swaran Singh's case** {(2004) 3 SCC 297} held in paragraph 24 as follows:

“24. In the background of the statutory provisions, one thing is crystal clear i.e. the statute is beneficial one qua the third party. But that benefit cannot be extended to the owner of the offending vehicle. The logic of fake license has to be considered differently in respect of third party and in respect of own damage claims.”

Finally, in paragraph 38 it was held that the decision in **Swaran Singh's case** {(2004) 3 SCC 297} has no application to cases other than third party risk and that in case of third party risks the insurer has to indemnify the amount, and if so advised, to recover the same from the insured. Clearly that was a case of own damage.

14. The decision of the Apex Court in **Syed Ibrahim's case** (2007 ACJ 2816) is one wherein the Apex Court allowed the insurance company to get the amount paid by it recovered from the assured. Therein, the driver had licence to drive light motor vehicles, whereas he was driving heavy

goods vehicle at the time of accident.

15. In **Prabhu Lal's case** {(2008) 1 SCC 696} the relevant facts show that, therein the owner of the vehicle approached the District Consumer Disputes Redressal Forum for compensation for the damages sustained by the vehicle. It was contended by the Insurance Company that the vehicle was driven by his own brother. The vehicle was a truck, a goods carrier. The driver had valid licence to ply only light motor vehicles and there was no endorsement thereon authorising to drive transport vehicles. It was held that the owner was not entitled to claim any compensation from the insurer. Various decisions of the Apex Court have been discussed therein including **Ashok Gaangadhar Maratha v. Oriental Insurance Co. Ltd.** {(1999) 6 SCC 620}. In paragraph 42 of the above judgment, it was held by the Apex Court as follows:

“42.....Ram Narain was having a licence to drive Light Motor Vehicle only and there was no endorsement as required by Section 3 of the Act read with Rule 16 of the Rules and Form No. 6. In view of necessary documents on record, the Insurance Company was right in submitting that *Ashok Gangadhar* {(1999) 6 SCC 620} does not apply to the case on hand and the Insurance Company was not liable.”

The facts are not similar in this case.

16. The question whether the insurance company can be exonerated from the liability to pay compensation merely because the driver who was driving a commercial vehicle was not having a badge, was addressed by a Division Bench of this Court in **P.T. Moidu v. The Oriental Insurance Co. Ltd. & others** (2008 (1) KLJ 378). Before the Division Bench, reliance was placed on a decision of another Division Bench of this Court in **Govindankutty Nair v. Gopalakrishnan** (2000 (1) KLT 224), **United India Insurance Company Ltd. v. Gian Chand and others** (AIR 1997 SC 3824) and **Rukmani and others v. New India Assurance Company and others** (JT 1998 (7) SC 473). The Division Bench, in paragraph 2 noted that **Gian Chand's case** (AIR 1997 SC 3824) and **Govindankutty Nair's case** (2000 (1) KLT 224) are cases where the driver had no licence at all. Therefore, those decisions have no application to the point in issue. It was also noted that the decision of the Apex Court in **Rukmani's case** (JT 1998 (7) SC 473) was explained by the Apex Court in **Swaran Singh's case** {(2004) 3 SCC 297}, in paragraph 63 of the judgment. Therefore, the Bench

was of the view that in all the above cases, the absence of badge was not the issue considered and **Govindankutty Nair's case** (2000 (1) KLT 224) was a case which interpreted Section 96(2) of the Motor Vehicles Act, 1939 and in that decision itself it was stated that the provisions in the Motor Vehicles Act, 1988 are different.

17. The Division Bench noted another Bench decision of this Court in **Ramachandran v. Unnikrishnan** (2006 (2) KLT SN Page15, C. No.20) which held that “mere absence of a badge to drive a commercial vehicle is not sufficient, but it must be proved that it was the reason for the accident and then only insurance company can get exonerated from the liability for violation of policy conditions.” After referring to various decisions, the Division Bench took the following view in paragraph 8:

“Merely because driver of the vehicle who was duly licensed was not having a badge will not enable the insurance company to shirk its liability as per Section 149 of the Motor Vehicles Act and insurance company also failed to prove that insured has committed fundamental breach of the policy conditions resulting in the accident.”

The dictum laid down therein was considered by a later Division Bench in **Balakrishnan's case** (2011 (4) KLT 412). In paragraph 18, the Division

Bench, after following the dictum laid down in **Swaran Singh's case** (supra), has held as follows:

“.....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.....”

Finally, in the said paragraph it has been held that they were 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. In paragraph 21 their Lordships agreed with the view taken in **P.T. Moidu's case** (2008 (1) KLJ 378) and held that “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** (supra).” Their Lordships also distinguished the judgment

of the Apex Court in **Oriental Insurance Company Ltd. v. Angad Kol** (AIR 2009 SC 2151). As far as the required authorisation is concerned, in paragraph 25 Rule 6 of the Motor Vehicles Rules, 1989 was examined and the principles have been explained in paragraph 26 and we extract hereinbelow the relevant portions:

“Rule 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 Licensing 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 authorisation 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 authorising him to drive only a light motor vehicle, no such authorisation 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 authorisation to drive an autorickshaw or a motorised cycle rickshaw”.

“In the light of the above discussions, we answer questions (v) and (vi) in favour of the 4th respondent. We hold that *Moidu* (supra) holds the field even now and that *Angad Kol* (supra) cannot be held to impliedly overrule the dictum in *Moidu* (supra). We further hold that applying the test in proposition (vi) in paragraph 102 of *Swaran Singh* (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.”

18. Still later, another Division Bench in the judgment in M.A.C.A. No.105/2012 also examined the very same question in the light of various decisions including the judgment in **Balakrishnan's case** (2011 (4) KLT 412), **P.T. Moidu's case** (2008 (1) KLJ 378) and **Swaran Singh's case** {(2004 (3) SCC 297)}. The Division Bench examined in detail the relevant provisions of the Motor Vehicles Act, 1988 and Rule 16 of the Central Motor Vehicles Rules, 1989 as well as the form in which the licences are being issued. The rules were compared with the Kerala Motor Vehicles Rules, 1989. It was noticed that unlike the Central Motor Vehicles Rules,

1989 which prescribes another driving test before issuing authorisation to drive transport vehicles, such a prescription is not there in the Kerala Rules.

We extract paragraphs 14 to 16 hereunder:

“14. Section 9(4) of the Motor Vehicles Act, 1988 provides that where the application is for a licence to drive a transport vehicle, no such authorisation shall be granted to any applicant unless he possesses such minimum educational qualification as may be prescribed by the Central Government and a driving certificate issued by a school or establishment referred to in Section 12. Rule 16 of the Central Motor Vehicles Rules, 1989 provides that every driving licence issued or renewed by a licensing authority shall be in Form 6. Rule 17 of the said rules provides that an application for addition of another class or description of motor vehicle to the driving licence shall be made in Form 8 to the licensing authority and shall be accompanied by

(a) an effective learner's licence and driving licence held by the applicant;

(b) in the case of an application for addition of a transport vehicle, the driving certificate in Form 5;

[x x x x x]

(d) appropriate fee as specified in Rule 32.

Form No.8 provides that along with the application, the applicant shall enclose :

- (a) a medical certificate in Form 1A;
- (b) Learner's licence in Form No.3;
- (c) Driving licence in Form 6/7;
- (d) Driving certificate in Form No.5 if the application is to drive a transport vehicle. Along with the application, a certificate of test of competence to drive after conducting a test issued by testing authority is to be attached.

Therefore, it is clear that authorisation to drive transport vehicles and badge will be given to the applicant after conducting driving test, medical test etc.

15. Rule 6 of the Kerala Motor Vehicles Rules, 1989

reads as follows :

“6. Authorisation to drive transport vehicles -- Applicationfor -- An application for the grant of an authorisation to drive transport vehicles shall be made to the Licensing 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 authorisation 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 authorising him to drive only a light motor vehicle, no such authorisation 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 authorisation to drive an autorickshaw or a motorised cycle rickshaw”.

16. Form LTA prescribes the production of driving licence and Form FA certificate issued by a Medical Officer should certify that the applicant is qualified to use a first aid box intelligently. **The Kerala Rules do not prescribe conduct of another driving test before issuing authorisation to drive transport vehicles.”**

The difference in the concerned rules has thus been highlighted in the said paragraph. Their Lordships therefore distinguished the judgments in **Kusum Rai's case** (2006 (2) KLT 300 - SC), **New India Assurance Co. Ltd. v. Roshanben Rahemansha Fakir and another** (2008 (3) TAC 20 - SC) and **Prabhu Lal's case** {(2008) 1 SCC 696} wherein the Supreme Court had no occasion to consider the Kerala Rules. It was therefore held that the view taken in **P.T. Moidu's case** (supra) will apply. In paragraph 18 the Bench expressed its view that the alleged omission to apply for and obtain a badge is purely technical and cannot in any way be held to be a fundamental breach offending main purpose of the rules as insisted by Clause (vi) in paragraph 102 of the decision in **Swaran Singh's case**

(supra). We extract the said portion hereunder:

“The Insurance Company has no case that on the date of accident, the driver was not qualified to apply for badge to drive transport vehicles. Therefore, it is evident that the alleged omission to apply for and obtain a badge is purely technical and cannot in any way be held to be a fundamental breach offending main purpose rules as insisted by Clause (vi) in paragraph 102 of the decision in *Swaran Singh's case* (supra). The accident in this case cannot be attributable to want of requisite authorisation (badge) by the driver to drive transport vehicles. Therefore, we are of the view that the Tribunal is not justified in finding that the second respondent in the Original Petition (MV) has violated the conditions of the policy issued by the third respondent and we hold that the Insurance Company is not entitled to recover the amount after depositing the same, from the owner of the vehicle.”

19. A learned Single Judge of this Court again examined a similar contention in the decision reported in **Kuruvila v. Jijo Joseph** (2013 (4) KLT 700). After elaborately discussing various judgments of this Court and the Apex Court, it was reiterated in the light of the judgment in **P.T. Moidu's case** (supra) and **Balakrishnan's case** (supra) that the insurance

company cannot avoid the liability. We extract the relevant portion from paragraph 33 hereunder:

“Reading Ss.3, 9, 14 and 149(2)(a)(ii) of the Act in the light of the decision in *National Insurance Company Ltd. v. Swaran Singh* ((2004 (1) KLT 781 (SC)), it is clear that a distinction has been drawn for the purpose of avoidance of liability to the third parties and indemnification of the insured between “effective license” occurring in S.3 and “is not duly licensed” occurring in S.149 (2)(a) (ii) and it was held that it is not sufficient that the insurer proves that the driver of the offending vehicle had no “effective license” on the date of the accident but it has to be proved that he was either not duly licensed or was disqualified from holding a license or, other circumstances stated in S.149(2)(a)(ii) of the Act existed and further, that the mere fact of there being no effective license, in the sense that the driver was not authorised to drive a transport/goods vehicle on the date of the accident by itself, is not sufficient unless the insurer is also able to prove that the breach of the condition of driving license is/are so fundamental as is/are found to have contributed to the cause of the accident. That is what the Division Benches of this Court have pointed out in *P.T. Moidu v. The Oriental Insurance Company Ltd. & Ors.* (2008 (1) KLJ 378), *New India Assurance Co.Ltd. v. Balakrishnan* (2011 (4) KLT 412) and in

M.A.C.A.No.105 of 2012. In other words, that there was no authorisation/badge to drive a transport/goods vehicle on the date of the accident may amount to an infraction of S.3 of the Act opening the person concerned to prosecution under the relevant provisions of the Act but, in the absence of proof that absence of authorisation/badge has contributed to the cause of accident, the insurer is not absolved of its liability to the third parties or, its duty to indemnify the insured.”

20. **Balakrishnan A.N. v. Indulekha and others** (2014 KHC 3115) is by a Division Bench of this Court wherein, in a short judgment the Division Bench was of the view that absence of a badge for the driver is not a ground for absolving the insurance company from liability.

21. One of the decisions relied upon by the learned counsel for the respondents is **Prabhakaran P.P. v. James and others** (2008 (3) KHC 690). The exact point raised herein was not the issue considered therein. That was a case where the driver was authorised to drive only light motor vehicle when the accident occurred on 17.11.1995. Later, he obtained an endorsement in the licence that he was authorised to drive tractor with effect

from 18.1.1996 to 17.1.1999. A contention was raised that licence for driving a light motor vehicle is sufficient to drive a tractor and this Court held the view that “a person holding a licence to drive light motor vehicle can drive any motor vehicle falling within the definition of 'light motor vehicle' with the licence obtained by him.” While taking the view, the definition of “light motor vehicle” in Section 2(21) of the Act was considered and it was held that “the tractor is treated as a light motor vehicle, if the unladen weight of it is below 7500 kgs.”

22. The decision of a learned Single Judge of Andhra Pradesh High Court in **New India Assurance Co. Ltd. v. Bhimavarapu Prathap and others** (2006 ACJ 1076) is also relied upon by the learned counsel for the respondents. The accident occurred while the claimant was riding a bicycle. Therein, the offending vehicle involved was a jeep and the appellant insurance company contended before the High Court that the driver of the jeep did not obtain badge from the Regional Transport Authority and without the badge he cannot drive a passenger vehicle. The provision with regard to the issuance of badge was governed by Rule 49 of Andhra

Pradesh Motor Vehicles Rules, 1964 which presently, is superseded by Rule 37 of Andhra Pradesh Motor Vehicles Rules, 1989. In paragraph 11 of the judgment, Rule 49 stands extracted which we reproduce hereunder:

“49. Drivers badge: The driver of a public service vehicle shall while on duty, display on Ms left breast a metal badge, in the Form illustrated in the Second Schedule to these Rules issued by and inscribed with the name of the district of the authority by which an authorisation to drive a transport vehicle has been granted and the word “DRIVER” together with an identification number. A badge granted under this Rule shall be valid throughout the State:

Provided that this sub-rule shall not apply to a person holding an effective driving licence authorising him to drive a motor-car and is driving a motor-car hired by him for his own use.....”

Rule 37(4) is in pari materia. This aspect is discussed in paragraph 12 which we extract below:

“Rule 49 of the A.P.M.V.Rules, 1964 is superseded by Rule 37 of the A.P.M.V. Rules, 1989 which is verbatim the same as extracted above. Rule 37(4) further mandates that the driver of a public service vehicle, while on duty, in addition to the badge display on his right breast a plate in white plastic of size 8 CM X 2 CM inscribed with his name in bold black letters of size 0.5 cm. Both in

English and Telugu, one below the other respectively. The cost of the name plate shall be borne by the weaver himself. Now what is required to be considered is whether non-wearing of the metallic drivers badge, mandated by Rule 37 of the size as prescribed in Second Schedule to the Rules, showing the name of the driver and the Authority of the District which has issued the same to drive the public transport vehicle, in any way contributed for the occurrence of the accident. Incidentally, the Court has to also see whether the insured - owner of the jeep has intentionally engaged the driver to drove the transport vehicle knowing well that he is not having a badge, in terms of Rule 37. The Apex Court, had an occasion to deal with the words “duly licensed” occurring in Section 149(2)(a) (ii) of the Motor Vehicles Act, 1988 in a decision *National Insurance Company Limited v. Swaran Singh and others*, wherein the Apex Court has considered the scope and ambit of Sections 3 and 10 of the Motor Vehicles Act with regard to the obligation of driver to hold effective driving licence for the type of vehicle which he intends to drive. Section 10 prescribes forms of driving licences for various categories of vehicles mentioned in sub-section (2) thereof. Various types of vehicles for which the driver may obtain a licence for one or more of them are described, in para 89 of the judgment as under:

“84. Section 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. Section 10 of the Act enables Central Government to prescribe 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) 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. The definition clause in Section 2 of the Act defines various categories of vehicles which are covered in broad types mentioned in sub-section (2) of Section 10. They are 'goods carriage', 'heavy-goods vehicle', 'heavy passenger motor-vehicle', 'invalid carriage', 'light motor-vehicle', 'maxi-cab', 'medium goods vehicle', 'medium passenger motor-vehicle', 'motor-cab', 'motorcycle', 'omnibus', 'private service vehicle', 'semi-trailer', 'tourist vehicle', 'tractor', 'trailer', and 'transport vehicle'."

After considering various aspects, in paragraph 15 it was held that non-wearing of the badge is not a violation of the terms and conditions of the insurance policy and we extract the said paragraph hereunder:

"15. Admittedly, the driver of the jeep was holding an effective

licence and it was subsisting as on the date of accident. That apart, the contention of the learned counsel for the appellant that since the driver did not wear the metallic badge, as contemplated under Rule 37 and it amounts to violation of terms and conditions of the policy, cannot be countenanced, for the simple reason that the purpose of issuance of the metallic badge (Rule 37(1) or the name plate (Rule 37(4), only for the identity of the driver and the District Authority which has issued the same, apart from authorising such driver to drive the public transport vehicle throughout the State. By any stretch of imagination, non-wearing of the badge, as contemplated under Rule 37, can be extended to attribute any cause for occurrence of the accident. Therefore, in view of these facts, I hold that non-wearing of the metallic badge, as mandated by Rule 37, is not violative of the terms and conditions of the insurance policy.”

23. We will now come to the decision of the Apex Court in **S. Iyyappan's case** {(2013 (7) SCC 62)}. The facts of the case show that the deceased was riding his bicycle when the offending vehicle, a Mahindra van dashed against him. The Tribunal took the view that the person possessing licence to drive light motor vehicle is entitled to drive Mahindra Maxi Cab. The High Court in appeal was of the view that since the vehicle was being used as a taxi, which was a commercial vehicle, the driver of the said

vehicle was required to hold an appropriate licence and held that the insurance company is not liable to pay compensation. The Apex Court in paragraph 8 considered in detail Section 149 of the Motor Vehicles Act. In paragraph 10 their Lordships relied upon the decision of a three Judge Bench of the Apex Court in **Sohan Lal Passi v. P. Sesh Reddy** {(1996) 5 SCC 21}, especially paragraph 12. After referring to a series of decisions of the Apex Court including **Swaran Singh's case** (supra) and **Kusum Rai's case** (supra), finally in paragraphs 16 to 18 the legal position has been explained thus:

“The heading “Insurance of Motor Vehicles against Third-Party Risks” given in Chapter XI of the Motor Vehicles Act, 1988 (Chapter VIII of the 1939 Act) itself shows the intention of the legislature to make third-party insurance compulsory and to ensure that the victims of accident arising out of use of motor vehicles would be able to get compensation for the death or injuries suffered. The provision has been inserted in order to protect the persons travelling in vehicles or using the road from the risk attendant upon the user of the motor vehicles on the road. To overcome this ugly situation, the legislature has made it obligatory that no motor vehicle shall be used unless a third-party insurance is

in force.

17. Reading the provisions of Sections 146 and 147 of the Motor Vehicles Act, it is evidently clear that in certain circumstances the insurer's right is safeguarded but in any event the insurer has to pay compensation when a valid certificate of insurance is issued notwithstanding the fact that the insurer may proceed against the insured for recovery of the amount. Under Section 149 of the Motor Vehicles Act, the insurer can defend the action inter alia on the grounds, namely.

- i) the vehicle was not driven by a named person,
- ii) it was being driven by a person who was not having a duly granted licence, and
- iii) person driving the vehicle was disqualified to hold and obtain a driving licence.

Hence, in our considered opinion, the insurer cannot disown its liability on the ground that although the driver was holding a licence to drive a light motor vehicle but before driving light motor vehicle used as commercial vehicle, no endorsement to drive commercial vehicle was obtained in the driving licence. In any case, it is the statutory right of a third party to recover the amount of compensation so awarded from the insurer. It is for the insurer to proceed against the insured for recovery of the amount in the event there has been violation of any condition of the insurance

policy.

18. In the instant case, admittedly the driver was holding a valid driving licence to drive light motor vehicle. There is no dispute that the motor vehicle in question, by which accident took place, was Mahindra Maxi Cab. Merely because the driver did not get any endorsement in the driving licence to drive Mahindra Mai Cab, which is a light motor vehicle, the High Court has committed grave error of law in holding that the insurer is not liable to pay compensation because the driver was not holding the licence to drive the commercial vehicle. The impugned judgment is, therefore, liable to be set aside.”

In paragraph 18 it was held thus:

“Merely because the driver did not get any endorsement in the driving licence to drive Mahaindra Maxi Cab, which is a light motor vehicle, the High Court has committed grave error of law in holding that the insurer is not liable to pay compensation because the driver was not holding the licence to drive the commercial vehicle.”

24. Learned counsel for the appellants, Shri Lal George referred to the last sentence in paragraph 17 that “It is for the insurer to proceed against the insured for recovery of the amount in the event there has been violation

of any condition of the insurance policy” and submitted that in the light of the above view taken, the dictum laid down therein will only be in favour of the insurance company. Learned counsel for the respondents submitted that such an interpretation cannot be made, as the said observation cannot be taken out of the context and that it was made while explaining the scheme of Section 149 of the Act and not on the facts of the said case. We are of the view that the Apex Court therein has clearly held that since the driver was holding a valid driving licence to drive a light motor vehicle, the absence of any endorsement in the said licence to drive Mahindra Maxi Cab is not fatal. In paragraph 17, Section 149 was explained.

25. In the light of the view taken in paragraph 18 of the above judgment, the question is whether the absence of badge will be fatal. Under Section 149(2)(a)(ii) of the Act, it should be proved by the insurance company to avoid the liability under the policy that the vehicle was being driven by a person who was not duly licensed. As far as authorisation is concerned, it is only provided under Section 3 of the Act. The words “duly licenced” have been interpreted by the Apex Court in **Swaran Singh's case**

(supra) and **Iyyappan's case** (supra). In **Swaran Singh's case** (supra), it was held in paragraph 38 that the words “effective licence” used in Section 3 cannot be imported for sub-section (2) of Section 149 of the Motor Vehicles Act. The words “duly licenced” used in sub-section (2) of Section 149 are used in past tense. Their Lordships have considered an important factor that as far as third parties' right to get compensation is concerned, the insurance company will have to meet the liability. The Division Bench of this Court in **Balakrishnan's case** (2011 (4) KLT 412), after interpreting Rule 6 of the Rules, was of the view that the alleged omission to apply for and obtain a badge is purely technical and cannot be said to be a fundamental breach as insisted by sub-para (vi) in paragraph 102 of the judgment in **Swaran Singh's case** (supra). As far as the proficiency for driving a vehicle is concerned, what is important is the obtaining of a driving licence under the relevant rules, viz. The Central Motor Vehicles Rules framed under Section 27 of the Act. As far as badge is concerned, Rule 6 of the Kerala Rules alone is important. The State rules do not cover definitely, the area and the subjects covered by the Central Rules for

issuance of licence, as rightly pointed out by the learned counsel for the respondents. Even though Shri Lal George submitted that the emphasis given with regard to the interpretation of Section 149(2)(a)(ii) in **Swaran Singh's case** (supra) cannot apply herein, we cannot agree. In that view of the matter, the insurance company will have to prove that absence of a badge was so a fundamental breach which has contributed to the cause of the accident. Therefore, any technical violation of the rules cannot help the insurance company in such cases. We are of the opinion that the view taken by the Apex Court in **Swaran Singh's case** (supra) in sub-para (iv) of para 102, as already noted, and in the light of the provision under Section 149(2)(a)(ii) which uses the words “duly licenced”, minor breach cannot help the insurance company to avoid liability.

26. In **Iyyappan's case** {(2013) 7 SCC 62}, as we have already noticed, the intention of the legislature with regard to the provisions in Chapter XI has been examined and it was explained that the legislature has made third party insurance compulsory, so as to ensure that the victims of the accident could be able to get compensation for the death or injuries

suffered. In the light of the above principles, an interpretation of Section 149 of the Act commensurate with the legislative policy, will have to be adopted. The statute has provided the liability on the part of the insurer so as to pay compensation to third parties. Thus, it can be seen that as laid down by the decisions of the Apex court, a more extensive remedy has been conferred upon those who have obtained judgments against the user of the vehicle. The question, therefore, will be whether the insurer can try to avoid liability without proving that the breach was so fundamental. In the light of the discussion made already, a mere technical violation like absence of a badge could not lead to such a situation, whereby the insurer can avoid liability of the third party. The scheme of the Act will have to be taken into consideration while testing the sustainability of the arguments raised by the insurance company. If that be so, we are of the view that the argument raised by the learned counsel for the insurance company cannot hold good. Therefore, the words “effective licence” in Section 3 cannot ipso facto come to the aid of the insurance company in such cases. The above interpretation will only serve the object and purpose of the enactment and in

tune with the same. The dictum laid down in **Iyyappan's case** {(2013) 7 SCC 62}, therefore, will squarely apply herein. In the absence of any evidence to show that the breach was so fundamental in causing the accident, there cannot be any automatic direction in allowing the insurance company to recover the amount from the owner also.

27. Recently, the Apex Court in another judgment, viz. **Kulwant Singh & others v. Oriental Insurance Company Ltd.** (2014 (12) SCALE 356), has relied upon the judgment in **Iyyappan's case** (supra). That was a case where one Abdul Kadir died while driving Tempo No.HR-G-5234 which was hit by a Tempo (Tata-407) bearing No.DL-IL-D3 186. The offending vehicle was a light goods vehicle. It was contended by the insurance company that they are entitled to recovery rights as the driving licence was for driving light motor vehicle and could not be equated with light goods vehicle. The High Court accepted their prayer. In paragraph 10 the view taken in **S. Iyyappan's case** (supra) was followed and we extract the said paragraph herein below:.

“10. In *S. Iyyappan* (supra), the question was whether the driver who had a licence to drive 'light motor vehicle' could drive 'light

motor vehicle' used as a commercial vehicle, without obtaining endorsement to drive commercial vehicle. It was held that in such a case, the Insurance Company could not disown its liability. It was observed:

18. In the instant case, admittedly the driver was holding a valid driving licence to drive light motor vehicle. There is no dispute that the motor vehicle in question, by which accident took place, was Mahindra Maxi Cab. Merely because the driver did not get any endorsement in the driving licence to drive Mahindra Mai Cab, which is a light motor vehicle, the High Court has committed grave error of law in holding that the insurer is not liable to pay compensation because the driver was not holding the licence to drive the commercial vehicle. The impugned judgment (Civil Misc Appeal No.1016 of 2002, order dated 31.10.2008 (Mad) is, therefore, liable to be set aside.”

No contrary view has been brought to our notice.”

In paragraph 11 it was held that there was no breach of any condition of insurance policy entitling the insurance company to recovery rights.

In the light of the discussion made above, we affirm the judgments of this Court in, **P.T. Moidu's** case (2008 (1) KLJ 378), **Balakrishnan's** case

(2011 (4) KLT 412), M.A.C.A. NO.105/2012, and **Kuruvila's case** (2013 (4) KLT 700).

The reference is answered accordingly.

(T.R.RAMACHANDRAN NAIR, JUDGE)

(A.V. RAMAKRISHNA PILLAI, JUDGE)

(P.V. ASHA, JUDGE)

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