**THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY**

**M.A.C.M.A.No.2614 OF 2016**

**ORDER**:

This appeal is filed under Section 173 of Motor Vehicles Act (for short 'Act'), challenging the award in M.V.O.P.No.382 of 2014 dated 20.07.2016 passed by the Motor Accidents Claims Tribunal (Special Judge for Trial of Cases Under S.Cs & S.Ts (P.O.A) Act-cum-Additional District Judge, Vizianagaram, directing the appellant/insurance company to pay Rs.1,90,000/- to the first respondent herein/injured and then to recover the same from the owner of the vehicle by filing execution petition.

The first respondent/injured/claimant filed M.V.O.P.No.382 of 2014 under Section 166 of the Act, claiming compensation of Rs.2,50,000/- for the injuries received by him in the accident that occurred on 11.06.2013 at about 8:00 A.M, while he was proceeding in Auto bearing No. AP 31 TB 6513 to go to his co-brother's house, situated at Pakeru Village. After some time, another Auto bearing No. AP 31 TD 3705, driven by the second respondent/owner in a rash and negligent manner, at high speed, came from opposite direction and dashed the auto in which the first respondent herein was travelling, as a result, the first respondent herein sustained fracture to right femur and upper 1/3rd of right fibula and tibia and other injuries all over the body. Immediately, after the accident, the first respondent/injured was taken to Sri Sai Super Speciality Hospital, Vizianagaram for treatment, where the Doctor found fractures on right femur and upper 1/3rd of right fibula and tibia and injuries on vital part of the body and doctor conducted surgeries to his right femur, right fibula and tibia by fixing implants. The Station House Officer, Padmanabham Police Station registered a case in Crime No.35 of 2013 under Section 338 of I.P.C, against the second respondent herein/driver-cum-owner, the appellant herein/insurer of the Auto bearing No. AP 31 TD 3705 by the time of accident under valid policy and hence, both the appellant herein and the second respondent herein are jointly and severally liable to pay compensation to the first respondent herein, for the injuries suffered by him.

The second respondent herein/driver-cum-owner of the Auto bearing No. AP 31 TD 3705 remained exparte. The appellant herein/Insurance Company filed counter, denying its liability and contended that the injuries sustained by the first respondent/injured did not create any permanent disability which reduces the permanent earning capacity of the injured and the accident was occurred due to rash and negligent driving of driver of Auto bearing No.AP 31 TB 6513 in which the first respondent/injured was travelling, but not due to negligent driving of the second respondent/ driver-cum-owner of the Auto bearing No. AP 31 TC 3705. Further, it is stated in the counter that the second respondent herein is not holding valid driving license at the time of accident, which is a clear violation of terms of policy and therefore, the appellant herein is not liable to pay compensation to the first respondent herein.

On the strength of the pleadings, the Tribunal framed the following issue.

> "***Whether the accident took place due to rash and negligent driving of driver of Auto bearing No.AP 31 TD 3705 or both of them contributed for the accident? If so, to what percentage?***"

During enquiry, on behalf of the first respondent/claimant P.Ws.1 & 2 were examined and marked Exs.A-1 to A-6 and Exs. X-1 & X-2. On behalf of the respondents R.Ws.1 to 3 were examined and marked Exs.B-1 to B-3.

Upon hearing argument of both the counsel, the Tribunal partly allowed M.V.O.P.No.382 of 2014 directing the Insurance Company to pay compensation of Rs.1,90,000/- to the claimant, in the first instance and then recover the same from the second respondent/owner of the vehicle by filing execution petition. Aggrieved by the order of the Tribunal, the present MACMA is preferred by the Insurance Company.

Further, the Tribunal held that the Insurance Company is not liable to pay the amount to the first respondent herein/claimant, as the second respondent herein/owner caused fundamental breach of the terms and conditions of the policy and dismissed the petition against the appellant herein. However, the Tribunal directed the insurance company to pay the compensation awarded to the claimant and later recover the same from the second respondent/owner. Aggrieved by the award passed by the Tribunal, the present appeal is filed under Section 173 of the Act, mainly contending that, when the Tribunal found that the appellant herein/Insurance Company is not liable to pay compensation, the Tribunal ought not to have directed to pay compensation, remitting the company to recover the same from the owner and the findings recorded by the Court are incident and mutually destructive. When the Tribunal was not competent to hold that the owner of the auto was not holding a valid driving licence, it is a fundamental breach of terms and conditions of the policy and thereby insurance company cannot be made liable and a direction issued to pay and recover the said amount by the insurance company is also contrary to the principles laid down in various judgments and prayed to set-aside the award passed by the Court below.

During hearing, learned counsel for the appellant Sri Kota Subba Rao mainly demonstrated that the driver of the auto was not holding valid and effective driving license at the time of accident and thereby, he is not eligible to drive an auto, as per driver's clause in the policy and thereby the appellant/insurance company cannot be made liable to pay and recover the compensation amount and placed reliance on the judgments of the Supreme Court in **National Insurance Company Limited v. Kusum Rai and others[1], Sardari v. Sushil Kumar[2], National Insurance Company Limited v. Laxmi Narain Dhut[3], United India Insurance Company Limited v. Sujata Arora[4] and Jawahar Singh v. Bala Jain[5].**

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[1] 2003 (6) SUPREME COURT CASES 272
[2] 2008 ACJ 1307
[3] (2007) 3 SCC 700
[4] 2013 ACJ 2129
[5] 2011 (3 ) ALJ 1677 SC

On the strength of the law laid down in the above judgments, learned counsel for the petitioner contended that the direction issued by the Tribunal is contrary to the law laid down in the above judgments and the appellant/insurance company is not liable to pay compensation and the Tribunal ought not to have issued such a direction to pay and recover the amount from the second respondent/owner.

Whereas, learned counsel for the second respondent contended that, in view of the Full Bench judgment of the Supreme Court in **National Insurance Company Limited v. Swaran Singh**[6], wherein, the Apex Court held that 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 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 the assured. If this interpretation is not given to the beneficent provisions of the Act having regard to its purport and object, fails 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. Further, it is stated

[6] AIR 2004 SC 1531

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.

Therefore, **Swaran Singh**[6] case is applicable only to third parties liability, but not in case of owner's liability. By applying the principles laid down in **Swaran Singh**[6] case, the findings recorded by the Tribunal cannot be disturbed and prayed to dismiss the present appeal, confirming the direction issued by the Tribunal.

The real controversy is with regard to liability to pay compensation and recovery of the same from the insured by the insurer.

In view of the limited compass of the issue, I would like to advert to the contentions raised by the appellant before the Tribunal. It is the case of the appellant that the driver of the auto was not holding valid and effective driving license to drive the vehicle at the time of accident, thereby, Insurance Company cannot be made liable to pay compensation, as driving an auto without valid and effective driving licence amounts to fundamental breach of terms of policy. The appellant/Insurance Company examined the witnesses to establish its contentions, the Tribunal accepted the contentions and finally concluded that the driver was not holding valid and effective driving licence to drive auto at the time of accident. Further, in paragraph 24 of the award passed by the Tribunal, the Tribunal held that the petition against R-2/appellant herein was dismissed without costs. But, at the end, R-2/appellant herein was directed to pay compensation amount at the first instance and then recover the same from R-1/owner of the vehicle by filing execution petition, without filing any separate suit. It is an undisputed fact that the driver was not holding valid and effective driving licence at the time of accident. In such case, whether the Tribunal was right in directing the appellant to pay and recover the amount of compensation from the owner of the vehicle is a question to be decided, as the claimant was the third party.

The contract of insurance is between insurer/insurance company and insured/owner of the vehicle is a pure contract to indemnify the loss suffered by the third party in certain contingencies. The first respondent/injured is a third party i.e. a person who is not a party to the contract of insurance. Therefore, the first respondent/injured is undisputedly a third party.

The principle laid down in **Swaran Singh**[6] case, was discussed at length in the subsequent judgments, which the learned counsel for the appellant relied upon.

In paragraph no. 18 of **Kusum Rai**[1] case, the Division Bench of the Supreme Court held as follows:

> "Although, thus, we are of the opinion that the Appellant was not liable to pay the claimed amount as the driver was not possessing a valid licence and the High Court was in error in holding otherwise, we decline to interfere

> with the impugned award, in the peculiar facts and circumstances of the case, in exercise of our jurisdiction under Article 136 of the Constitution of India but we direct that the Appellant may recover the amount from the owner in the same manner as was directed in **Oriental Insurance Company v. Nanjappan**[7]."

In paragraphs 12 & 13 of **Kusum Rai**[1] case, the Supreme Court relied on the principle in **Swaran Singh**[6] case, in turn, the Supreme Court noticed the principle in **Malla Prakasarao v. Malla Janaki**[8]**,** wherein, the Apex Court was of the view that, according to the terms of the contract, the Insurance Company has no liability to pay any compensation where an accident takes place by a vehicle, driven by a driver without a driving licence. In that view of the matter, we do not find any merit in the appeal.

Again, in **Kusum Rai**[1] case, the Supreme Court relied on the principle in **Swaran Singh**[6] case, clearly laying down that the liability of the insurance company vis-a-vis the owner would depend upon several factors. The owner would be liable for payment of compensation in a case where the driver was not having a licence at all. It was the obligation on the part of the owner to take adequate care to see that the driver had an appropriate licence to drive the vehicle. The question as regards the liability of the owner vis-a-vis the driver being not possessed of a valid licence was considered in **Swaran Singh**[6] case at length and concluded that, 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 the Central Government to prescribe forms of driving licences for

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[7] 2004 (13) SCC 224
[8] (2004) 3 SCC 343

various categories of vehicles mentioned in sub-section (2) of the 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". In claims for compensation for accidents, various kinds of breaches with regard to the conditions of driving licences arise for consideration before the Tribunal as a person possessing a driving licence for "motorcycle without gear", [sic may be driving a vehicle] for which he has no licence. Cases may also arise where a holder of driving licence for "light motor vehicle" is found to be driving a "maxi-cab", "motor-cab" or "omnibus" for which he has no licence. 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 the accident was caused solely because of some other unforeseen or intervening causes like mechanical failures and similar other causes having no nexus with the 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.

In **Sardari**[2] case, the Division Bench of the Apex Court held that, the principle laid down by the Apex Court in **Swaran Singh**[6] case is distinguished in some cases holding that where the owner of the vehicle himself is involved, Insurance Company will not be liable. Reiterating, the principle in **Swaran Singh**[6] case, the Supreme Court held that the owner would be liable for payment of compensation in a case where the driver was not having a licence at all. It was the obligation on the part of the owner to take adequate care to see that the driver had an appropriate licence to drive the vehicle.

In the facts of the above judgment, the insured was the owner of the vehicle himself. Since the principle laid down by the Supreme Court in **Swaran Singh**[6] case is applicable to the third parties, but not to insured i.e. owner of the vehicle, in such case, insurance company cannot be held liable for payment of compensation when the owner himself is involved in the accident.

In **Laxmi Narain Dhut**[3], the Apex Court held that, the inevitable conclusion therefore is that the decision in Swaran Singh's case (supra) has no application to own damage cases. The effect of fake license has to be considered in the light of what has been stated by the Apex Court in **New India Assurance Co., Shimla v. Kamla and Ors**[9]. Once the license is a fake one the

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[9] (2001 (4) SCC 342)

renewal cannot take away the effect of fake license. It was observed in Kamla's case (supra) as follows:

> "12. As a point of law we have no manner of doubt that a fake licence cannot get its forgery outfit stripped off merely on account of some officer renewing the same with or without knowing it to be forged. Section 15 of the Act only empowers any Licensing Authority to "renew a driving licence issued under the provisions of this Act with effect from the date of its expiry". No Licensing Authority has the power to renew a fake licence and, therefore, a renewal if at all made cannot transform a fake licence as genuine. Any counterfeit document showing that it contains a purported order of a statutory authority would ever remain counterfeit albeit the fact that other persons including some statutory authorities would have acted on the document unwittingly on the assumption that it is genuine".
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> As noted above, the conceptual difference between third party right and own damage cases has to be kept in view. Initially, the burden is on the insurer to prove that the license was a fake one. Once it is established the natural consequences have to flow.

The inevitable conclusion therefore is that the decision in Swaran Singh's case (supra) has no application to own damage cases. The effect of fake license has to be considered in the light of what has been stated by this Court in Kamla's case (supra). Once the license is a fake one the renewal cannot take away the effect of fake license. It was observed in Kamla's case (supra) as follows:

> "12. As a point of law we have no manner of doubt that a fake licence cannot get its forgery outfit stripped off merely on account of some officer renewing the same with or without knowing it to be forged. Section 15 of the Act only empowers any Licensing Authority to "renew a driving licence issued under the provisions of this Act with effect from the date of its expiry". No Licensing Authority has the power to renew a fake licence and, therefore, a renewal if at all made cannot transform a fake licence as genuine. Any counterfeit document showing that it contains a purported order of a statutory authority would ever remain counterfeit albeit the fact that other persons including some statutory authorities would have acted on the document unwittingly on the assumption that it is genuine".

> As noted above, the conceptual difference between third party right and own damage cases has to be kept in view. Initially, the burden is on the insurer to prove that the license was a fake one. Once it is established the natural consequences have to flow.
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> In view of the above analysis the following situations emerge:
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> ***1. The decision in Swaran Singh's case (supra) has no application to cases other than third party risks.***
>
> ***2. Where originally the license 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.***"

In paragraph 8 of the judgment in **Sujata Arora**[4] case, the Apex Court while relying on **Laxmi Narain Dhut** (supra) and **Jawahar Singh** (supra), held that, in case it is found that the offending vehicle as driven by driver who was either holding no licence or a fake licence, then it amounts to violation of terms and conditions of policy and in that circumstance, no liability can be fastened on the insurance company. The same view was expressed by the Punjab & Haryana High Court in **Subhash Chand v. Satya Rani**[10].

In view of the law declared by various Division Benches of Supreme Court and Punajb & Haryana High Court, in case of liability arising out of the accident involving the insured or owner of the vehicle himself, the principles laid down in **Swaran Singh**[6] case have no application, since the principle laid down in **Swaran Singh**[6] case is limited to third parties, where the insurance

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[10] 2013 (3) Punjab Law Reporter 329

company cannot avoid its liability to pay compensation to the claimant and entitled to recover the same by applying the principles laid down in the said case. Therefore, the direction issued by the Tribunal is in accordance with law, but recording a finding that the insurance company is not liable is contrary to the direction issued by the Court. Therefore, liability of the insurance company is limited to pay and recover the amount.

The insurer shall pay the quantum of compensation fixed by the Tribunal, about which there was no dispute raised, to the respondents-claimants within three months from today. For the purpose of recovering the same from the insured, the insurer shall not be required to file a suit. It may initiate a proceeding before the concerned Executing Court as if the dispute between the insurer and the owner was the subject matter of determination before the Tribunal and the issue is decided against the owner and in favour of the insurer. Before release of the amount to the insured, owner of the vehicle shall be issued a notice and he shall be required to furnish security for the entire amount which the insurer will pay to the claimants. The offending vehicle shall be attached, as a part of the security. If necessity arises the Executing Court shall take assistance of the concerned Regional Transport authority. The Executing Court shall pass appropriate orders in accordance with law as to the manner in which the insured, owner of the vehicle shall make payment to the insurer. In case there is any default it shall be open to the Executing Court to direct realization by disposal of the securities to be furnished or from any other property or properties of the owner of the vehicle, the insured. (vide **Nanjappan**[7] case).

Hence, the Tribunal is directed to follow the guidelines in **Nanjappan**[7] case, while releasing the amount payable to the claimant and on compliance of such direction alone, the claimant be permitted to withdraw the amount deposited by the Insurance Company, so as to enable the Insurance Company to recover the amount from the Insurer/second respondent/owner of the vehicle. In view of the limited controversy involved in this matter, the other aspects need no further examination by this Court. Hence, I find that the order passed by the Tribunal is free from any illegality, warranting interference of this Court, except to the extent indicated above.

With the above direction, the appeal is dismissed.

Consequently, miscellaneous applications pending if any, shall also stand dismissed. No costs.

**JUSTICE M. SATYANARAYANA MURTHY**

Date:14.02.2018

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