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Court : Kerala

Decided On : Nov-09-2015

Judge : P.R. Ramachandra Menon & K. Harilal

Appeal No. : MACA. No. 1026 of 2014

Appellant : Shaji

Respondent : Pradeesh and Others

Judgement :

Reference Order:

P.R. Ramachandra Menon, J.

1. The law stands declared by a Full Bench of this Court, vide decision reported in 2015 (1) KLT 1 (National Insurance Company Ltd. vs. Jisha K.P. And others), that mere absence of 'badge' by driver of a transport vehicle is not sufficient to exonerate the insurer from the liability to pay compensation to the claimant and that absence of 'badge' is not a fundamental breach of the statutory/policy condition to enable the insurer to have recovery from the insured, after satisfying the liability to the claimant/third party. The question remains to be considered is what is a 'badge' and is it the same as 'authorisation to drive a transport vehicle'. If it is not the same, will it not come within the purview of statutory defence under Section 149 (2) r/w. Sub-sections 4 and 5 of Section 149 of the M.V.Act, enabling

the insurer to have recovery from the insured for driving the transport vehicle without authorisation to drive such vehicle (based on the experience to be gathered at least for 'one year' as envisaged under Section 7 (1) of the M.V.Act), which right in fact stands declared by the Apex Court as well, as per the celebrated judgment in 2004 (1) KLT 781 (SC) (National Insurance Company Ltd. vs. Swaran Singh). It also remains a matter to be considered whether some of the observations made by the Full Bench in 2015 (1) KLT 1 (cited supra) as to the meaning of the term duly licensed are correct, in view of the subsequent Larger Bench decision of this Court explaining the meaning of the said term in 2015 (1) KLT 682 (Oriental Insurance Company Limited vs. Poulouse).

2. In understanding the findings of the Supreme Court in Swaran Singh's case, as summed up in paragraph 102 of the judgment, it is essential to have reference to the actual point mooted by the appellants before the Apex Court, as contained in paragraph 11 of the judgment and the rival contentions of the respondents in paragraph 12, as to whether the Insurance Company could 'avoid' the liability in cases of such violation (instead of the settled principle of pay and recover), thus leading to the findings in paragraphs 62, 63 and 64 that the Insurance Company cannot absolve its liability; that each case will have to be considered and decided by the facts in each case, (since no factual position was considered by the Apex Court but for the question of law); further holding that it would be the liability of the insurer to satisfy the decree at the first instance with liberty to proceed under sub section (4) and (5) of Section 149.

3. The M.V.Act, of course, is a 'beneficial statute' requiring liberal interpretation as observed in paragraph 65 of the judgment in Swaran Singh's case (cited supra). But is it not for the benefit of the victim, or is it for extending unlawful gain to the 'wrong doer/owner or driver' who violates the law?. Is it still not a matter of mistake of fact made by the Full Bench in 2015 (1) KLT 1 (cited supra) while observing in 'paragraph 25' that the words duly licensed under Section 149(2)(a)(ii) of the M.V. Act has been used in 'Past Tense'; (which in fact has been used in the Present Perfect Tense)?. Since a number of decisions have already been rendered both ways round, it still requires clarity in understanding the provision; particularly as to whether 'badge' is same as 'authorisation' to drive transport

vehicle; more so when the term 'badge' is nowhere defined either under the Act or under the Central/State Rules.

4. Another important question to be considered is, if any contrary/limited eligibility is stipulated under the Kerala Rules (Rule 6) unlike the Central Rules, as referred to by the Full Bench in 2015 (1) KLT 1(cited supra), can any rules framed by the Central or any State override /overreach the clear provisions of the 'Act'- insisting to have specific authorisation to drive a 'transport vehicle' after obtaining the minimum experience of one year from the date of obtaining the basic licence for driving, by virtue of the mandate under Section 7 and 10 of the M.V.Act, read with Section 3 (1)of the same enactment?.

5. In so far as this case is concerned, the grievance of the appellant/ insured/owner-cum-driver of the transport vehicle is in respect of the right of recovery given to the insurer, for realisation of the amount after satisfying the liability to third party/passenger, for violation of the statutory/policy conditions in causing the vehicle to be driven by the appellant /owner-cum-driver himself without any authorisation to drive the transport vehicle.

6. Before proceeding with the analysis on the legal aspects mentioned above, it is necessary to understand the law, as understood and explained by the Apex Court in the celebrated decision in Swaran Singh's case (cited supra). This is because, the said decision is seen quoted in several judgments with mere reference to the 'conclusions in paragraph 102'. Absence of driving licence to drive a particular type of vehicle and the resultant violation/infringement of the statutory/policy conditions was the subject matter. The Insurance companies contended that, once there was infringement of the statutory provisions and the defence of the insurer was established, the Tribunal was bound to discharge the insurer and fix the liability only on the owner or the driver of the vehicle. It was also asserted by the Insurers that once such defence was established, the Tribunal or the Court cannot direct the Insurance Company to pay the award amount to the claimant and seek recover the same from the owner /driver of the vehicle . This is discernible from the paragraph 11 of the said verdict.

7. The contentions raised on behalf of the respondents who were third parties/claimants was that, two different expressions were used in the statute by the Parliament ('effective driving licence' under Section 3(1) and 'duly licensed' under Section 149(2)], which suggested that, once a driver was licensed, he would continue to be duly licensed for the purpose of Chapter II of the Act, unless he was disqualified and that mere non-renewal of the licence would not come within the scope of Section 149 of the Act to confer any statutory defence to the insurer, which will pop up only in the event of lapsing 5 years from the date of expiry of licence. It was contended that the Insurance Company, under no circumstance, except under Section 149(2)(b) (involving fraud in obtaining policy) would be able to avoid the claim of the third parties. It was further asserted that by virtue of Section 149(1), the insurer should pay the due amount first to the third parties and they can recover the same if any of the grounds was established under Section 149 (2) of the Act and also that the breach on the part of the insured must be wilful, being of fundamental in character, to avoid the liability. This is discernible from paragraph 12 of the verdict in Swaran Singh's case (cited supra).

8. Referring to the plight of innocent persons, who virtually came to be thrown to streets, who are either the victims or the dependents of the victims of mounting road accidents scaling new heights, [as noted by the Apex Court in Sohan Lal Passi Vs. P. Sesh Reddy [1996 ACJ 1044 (SC)], the Apex Court observed in 'paragraph 15' onwards, as to the conscious attempt made by the Parliament to incorporate beneficial provisions to protect the interest of the claimants and observed in 'paragraph 19', that in the batch of cases dealt with by the Apex Court, the issue was mostly concerned with the 3rd party right under the policy and that any condition in the policy, whereby right of the 3rd party is taken away, would be void.

9. Referring to the law declared by a Constitution Bench of the Supreme Court in New India Assurance Co. Ltd. Vs. C.M. Jaya [2002 (1) KLT 596 (SC)], it was observed that it was open for the parties to enter into a contract for wider coverage, than the statutory extent, and in the absence of such a term in the policy, the limited statutory liability cannot be expanded to make it unlimited or higher and if it is so done, it would amount to rewriting the Statute or the contract

of insurance, which is not permissible.

10. The question considered was whether the Insurance Company can avoid its liability, if a statutory defence is raised under Section 149 (2) of the Act, as observed in paragraph 33, which reads as follows :

33. The question as to whether an insurer can avoid its liability in the event it raises a defence as envisaged in sub-s.(2) of S.149 of the Act corresponding to sub-s.(2) of S.96 of the Motor Vehicles Act, 1939 had been the subject-matter of decisions in a large number of cases.

The difference in the terminology used in section 3 (where it is effective licence) and under Section 149 (2) (where it is duly licensed) was noted in paragraph 36 of the judgment and observed in paragraph 38 that the words effective license used in Section 3 cannot be imported for sub section 2 of Section 149, where it is for the benefit of a '3rd party', as observed in the previous paragraphs.

11. Referring to the mandate of Sections 14 and 15 of the M.V. Act, it was observed by the Apex Court, in paragraphs 39 and 40 of the judgment, that even after the expiry of the driving licence, it will remain valid for a period of '30 days' after its expiry. To make it clear, once it is renewed within 30 days, the licence will continue without break and there will not be any violation of the statutory/policy condition. This however is not in acceptance of the proposition/theory mooted by the respondents: 'once a license, always a license', which has not been accepted anywhere in the judgment. This becomes more clear from paragraph 44, where the Apex Court holds that under the Motor Vehicles Act, holding of a valid licence is one of the conditions of contract of insurance and driving of the vehicle without a valid licence is an offence. The Apex Court observed in paragraph 41 that, if a person has been given a licence for a particular type of vehicle, as specified therein, he can drive another type of vehicle of the same category, as in the case of a person who has been granted license to drive the light motor vehicle, who can drive either a 'car' or a 'jeep' and it is not necessary that he must have a driving license of both the 'jeep' and 'car' separately; it being of the 'same category'. It was held in the subsequent paragraph that the Insurance Company, in order to 'avoid' the liability, is required to establish the breach on the part of the insured, apart

from the fact that the insured had used or caused or permitted the vehicle to be used in breach of the Act.

12. From the above, it is clear that under certain circumstances, the Insurance Company may be justified in seeking for absolving the insurer, but the same may not necessarily hold good in the case of a 3rd party. Obviously, absolving the insurer from the liability is different from satisfying the liability towards the 3rd party and thereafter to get it recovered from the insured, for breach of the statutory/policy conditions. This is more so, in view of the observation made by the Apex Court, in paragraph 49, that a contract of insurance also falls within realm of contract and hence like any other contract intention of the party must be gathered from the expression used therein, also adding, in paragraph 51, [with reference to the decision rendered in *Oriental Insurance Co. Ltd. Vs. Sony Cheriyan* [1999 CCJ 1333 (SC)], that terms of the agreement have to be strictly construed to determine the extent of liability of the insurer.

13. What is a 'technical breach' and what is a 'fundamental breach' is explained, with reference to Sections 10 and 3 of the Act, dealing with the form and contents of the license and necessity to hold an effective driving licence, as discussed in Paragraphs 81 and 82 of the verdict in *Swaran Singh's case* (cited supra).

14. Incidentally, a question arose as to whether the benefit could be extended to a 3rd party in a case where the vehicle was being driven by a person, who was having only 'learners license', more so when Section 2 (10) of the Act defining the term 'driving license' specifically excludes the learner's license. The Apex Court held with reference to Section 4 (3), 7 (2), 10 (2) and Section 14, that a learner's license' is also a license within the meaning of the provisions of the Act and it cannot, therefore be said that a vehicle, when being driven by the learner subject to the condition mentioned in the license he would not be a person, who is not duly licensed, conferring any right to the insurer to avoid the claim of 3rd party (paragraph 86). This by itself makes it clear that such extended application will be there, only when the learner is driving the vehicle, subject to the conditions mentioned in the licence i.e. in the course of receiving the instructions on learning (with duly licensed person on the pillion- if it is a two wheeler and with a licensed

person sitting on his side- it it is a four wheeler or such other type of vehicle, as the case may be).

15. Based on the above discussions, the Apex Court held that, it is for the Insurance Company to satisfy the decree at the first instance and to recover the Award amount from the owner or driver thereafter, was the law holding the field for a long time and that, apart the doctrine of 'stare decisis' persuaded the Court not to deviate from such principles. The findings in 'paragraphs 96 and 97' are reproduced below for easy reference.

96. It is, therefore, evident from the discussions made hereinbefore that the liability of the insurance company to satisfy the decree at the first instance and to recover the awarded amount from the owner or driver thereof has been holding the field for a long time.(emphasis supplied)

97. Apart from the reasons stated hereinbefore the doctrine of stare decisis persuades us not to deviate from the said principle.

It was thereafter that the Apex Court made clear that, it was for the Tribunal to consider each case separately to ascertain whether any breach was involved in terms of Section 149 (2) (a) (ii) of the Act and whether the Insurance Company will be entitled to realize the Award amount from the owner or driver as the case may be. The crux of the above discussions was given as summary of the findings, in paragraph 102 of the judgment as mentioned already.

16. From the above, it is crystal clear that the point considered by the Apex Court in Swaran Singh's case (cited supra) was in relation to the contentions raised by the Insurance Company that they should be exonerated from the liability in toto, when there was violation of statutory/policy condition, instead of directing them to satisfy the liability initially and to have it recovered later from the insured, which plea was rejected, also adding that the liability will have to be satisfied in respect of the 3rd party (also in respect of a person who was driving the vehicle with the learners licence, subject to the condition mentioned in the said license). In other words, the above decision does not hold it anywhere that the Insurance Company cannot recover the amount from the insured, if the violation is established or that

once a licence, always a licence was the Rule. The point involved in the present case as to the absence of authorization to drive a particular type of vehicle (transport vehicle) has to be considered and analysed in the light of the declaration of law as aforesaid.

17. Now comes to the question as to the absence of 'badge'. If it were mere absence of badge, it could only be technical, which would confer no right of recovery upon the insurer, as held by the Full Bench of this Court in 2015 (1) KLT 1 (cited supra). But if it is an absence of specific authorization to drive a 'transport vehicle' (which can be acquired only after obtaining one year's experience as stipulated under Section 7 of the Act), the position may be different.

18. The term 'badge' is nowhere defined either under the Act or under the State/Central Rules. But reference can be seen from Rules 11, 12 and 13 of the Kerala Motor Vehicles Rules, 1989.; which are extracted below:

11. Issue of authorisation to drive transport vehicles:- The Licensing Authority granting an authorisation shall,-

(a) issue a driver's badge to the applicant on payment of the prescribed fee, endorse upon the driving licence accordingly and return the driving licence to the holder thereof along with the badge issued; and

(b) send intimation in form 'LTI' to the Authority by which the driving licence was issued if it is not the authority which issued the licence.

12. Driver's Badge and its fee:- (i) The metal badge issued to a driver on authorising him to drive transport vehicle shall be in the form illustrated in the First Schedule to these rules and inscribed with the word Driver and identification number and the name of the district in which it was issued.

(ii) A driver shall not hold more than one such badge.

(iii) The fee payable by an applicant for the issue of a badge shall be fifty rupees.

Provided that the fee payable by an applicant authorized to drive only a motorised cycle-richshaw for the issue of badge shall be five rupees.

13. Driver's badge issued under the old rules- Validity of.- A driver's badge in force immediately before the commencement of these rules shall, after such commencement be deemed to be effective as if issued under these rules.

19. An issue came up for consideration before the Apex Court in National Insurance Co. Ltd. vs. Annappa Irappa Nesaria ((2008) 3 SCC 464=AIR 2008 SC 1418) as to whether a person who was holding a licence to drive a light motor vehicle could drive light goods vehicle on 09.12.1999. It was observed by the Bench that the amendment of the provisions under the Central Motor Vehicle Rules, 1989, particularly clause (e) to (h) of Form 4, in which application for granting a driving licence was to be filed, came to be deleted and after the term 'light motor vehicle' under clause (d), a separate class was carved out as 'transport vehicle' under clause (e) (replacing the earlier entries of medium goods vehicle, medium passenger vehicle, heavy goods vehicle and heavy passenger vehicle.). Reference was also made to Section 2(21) of the MV Act , which defines the term 'Light Motor Vehicle', which included a 'transport vehicle' as well , if unladen weight did not exceed 7500 Kgm. But a distinction was carved out to 'transport vehicle' in differentiation from light motor vehicle under clause (d). It was contended before the Supreme Court that in the said circumstance, the licence to drive a light motor vehicle was not enough to drive a transport vehicle . But the Apex Court observed that the clause (e) referring to transport vehicle was introduced only by virtue of amendment of the rules/Form w.e.f. 28.03.2001 and as such, the term 'light motor vehicle' defined under Section 2(21), as then existed, included a light transport vehicle as well. It was in the said circumstance, that the challenge raised was repelled, holding that the driver was duly licensed as on the date of the accident i.e., 09.12.1999, i.e. prior to the date of the amendment i.e., w.e.f. 28.03.2001.

20. A Division Bench of this Court in 2007(4) KHC 385 (P.T. Moidu vs. Oriental Insurance Co.Ltd. and others) observed that absence of valid badge to drive a commercial vehicle will attract penal consequences, but, it cannot be a ground to deny statutory liability to third party compensation. The right of recovery reserved in favour of the insurance Company by the Tribunal after satisfying the liability towards claimant was intercepted by the Bench; also making an observation that, at the time of the accident, according to the appellant/insured, though the vehicle

involved was having a taxi permit, it was actually being used by the owner for travel of his family (private). No reference was made to Section 3, 7 and 10 of the relevant Act or Rule 6 of the Kerala Rules; but for placing reliance on the decision rendered by the Full Bench in *Oriental Insurance Co. Ltd. vs. Paulose* (2004 (1) KLT 8) so as to arrive at an inference as to what duly licensed was meant. But it remains a fact that the above decision rendered by the Full Bench in 2004(1) KLT 8 (cited supra) has already been overruled by a Larger Bench of this Court in 2015 (1) KLT 682 (LB) (cited supra).

21. The Act is a beneficial statute and hence it has to be liberally construed for the benefit of the victim, but not for the benefit of 'wrong doer'; more so, in view of alarming increase in the number of road traffic accidents because of the reckless use/driving of transport vehicles, without any regard to the lives and limbs of the general public. As mentioned already, mere absence of 'badge' cannot be held as violation or involvement of breach of statutory/policy conditions, providing a ground of defence under Section 149 (2) of the M.V.Act. But authorization to drive the vehicle of a particular class, as stipulated under the Act has necessarily to be there. This is more so, since a person on obtaining a learner's licence cannot claim authorisation to drive a transport vehicle as a matter of right on the same day and he has necessarily to gather experience of one year to obtain such authorisation as discernible from Sections 7 and 10 of the Act and as per Rule 6 of the Kerala Motor Vehicles Rules, 1989.

22. Particulars of the licence, the procedure ,the contents and such other aspects come strictly within the rule making power of the Central Government by virtue of Section 27 of the Act. The rule making power of the State Government is only with reference to the matters enunciated under Section 28 and as such, the State Government cannot transgress into the powers and authorities of the Central Government in this regard. Even in the case of Kerala Rules, Rule 9 stipulates that a person who is applying to obtain authorization to drive transport vehicle, subject to the proviso of having gathered one year's experience , shall be issued a summons to appear for an oral test to ascertain the factual position before granting the authorisation to drive the transport vehicle. The rule further stipulates that, if the authority finds that the person concerned was actually not having any

experience for the past one year immediately preceding the application, he can be asked to undergo a fresh test to have granted the licence. This being the position, 'test' is mandatory whether it be 'oral' or 'otherwise'; the sum and substance of which shows that it is not automatic. The scheme of the statute is to safeguard the rights and interests of the general public, particularly the lives and limbs of the passengers or the persons who are proceeding along the road.

23. It is also relevant from the rules quoted above that, on obtaining authorisation to drive transport vehicle, the person concerned shall be given a metallic badge showing him as a driver as contemplated therein. In other words, a 'badge' is a material object given to the party, who is authorised to drive a transport vehicle, to be given while returning the licence after effecting endorsement as to his authorisation as provided in Rule 11 of the Kerala Rules. This being the position, authorisation to drive a transport vehicle is one thing; while 'badge' supplied after effecting the endorsement of authorization in the licence is another thing. As such, if the person concerned has not applied for and obtained a badge to be worn on his left chest, as prescribed by the rules does not do so, the absence of badge by itself cannot be said to be 'fundamental breach' and that it could only be 'technical'. Under such circumstance, the Insurance Company cannot disown the liability or claim the right of recovery from the insured. But if there is no authorisation at all, enabling the driver to drive the transport vehicle, it is a fundamental lapse and under such circumstance, it is open for the Insurance Company to proceed with steps for recovery from the insured, who is violator of law. This is more so since, as observed by the Apex Court in Swaran Singh's case (cited supra), insurance is also a contract and the provisions have to be strictly interpreted to give effect to the terms agreed between the insured and the insurer.

24. The statute/M.V Act is of course a welfare legislation, which intends to extend benefit/welfare to the victims/third parties/claimants. A person who is committing any breach involving an offence under Section 3(1) of the Act r/w Sec.181 of the MV Act is a person who is having no regard to the rule of law and as such, the provision is not intended to extend any benefit to such wrong-doer. It is settled law that, provision of law is not liable to be interpreted in favour of a 'wrong-doer'.

25. In the above circumstance, we respectfully disagree with the view expressed by the learned Judges of the Full Bench in 2015 (1) KLT 1 (cited supra).

The Registry is directed to place the matter before the Hon'ble Chief Justice, to cause the matter to be considered by the Bench of appropriate strength, to resolve the issue once and for all.

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