IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO. 999 OF 2010
WITH
CA/5803/2010 IN FA/999/2010
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The New India Assurance Company Ltd.,
a Subsidiary of the General Insurance
Corporation of India and a company
incorporated under the Companies Act
Having its Divisional office at
Adalat Road, Aurangabad
Through its Senior Manager
Shri Vishwas s/o Bansi Gaikwad,
age 53 years, Occ. Service as
Senior Manager, the New India Assurance
Co., D.O. No.1, Adalat Road, Aurangabad.

..Appellant..
[orig resp no.2.]

VERSUS

1. Smt Swati Dhondiram Nagargoje,
age 19 years, Occ. Household,
R/o Son Hivra, Tq. Parli Vaijnath,
Dist. Beed.

2. Uttam s/o Raghunath Nagargoje,
age 46 years, Occ. Agri,
R/o as above.

3. Sow Rukmin w/o Uttam Nagargoje,
age 40 years, Occ. Household,
R/o as above.

4. Bibhishan s/o Uttam Nagargoje
age 17 years, Occ. Education,
U/g of father claimant no.2 Uttam
Nagargoje, R/o as above.

5. Mr. Dhiraj s/o Sampatlal Bafna
age major, Occ. Business,
R/o Room No.9, Survey No.40,
Pote Chawl, Near Tempo Chowk,
Mojeshwadi, Wadgaon, Pune. 411 014.

[Resp No.1 to 4 orig claimants and
resp no.5 orig. respondent no.1.]

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Advocate for Appellant : Mr A B Kadethankar
Advocate for Respondents 1-4 : Mr R B Deshpande
Respondent No.5 – served absent.

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CORAM : V.K. JADHAV, J.
Dated: April 06, 2016

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ORAL JUDGMENT :-

1. Being aggrieved by the Judgment and Award dated 16.10.2009 passed by the Member, Motor Accident Claims Tribunal, Ambajogai in M.A.C.P. No.96 of 2008, the Respondent-insurer has preferred this appeal.

2. Brief facts, giving rise to the present appeal are as under :-

a] Deceased Dhondiram was serving as Sheet Metal Worker in Tata Motors Limited Pimpri, Pune. On 17.7.2008, at about 11.40 am he was proceeding to attend the work at Chinchwad Pune. On way, near temple one Tempo–407 bearing registration No.MH-04/C-9657 gave him dash from his back side and fled away. In consequence of which, deceased Dhondiram had sustained the injuries. He was immediately shifted to the Government Hospital at Pimpri-Chinchwad, Pune where he declared dead on arrival. Legal representatives of deceased Dhondiram preferred claim petition No. 96 of 2008 before the Motor Accident Claims

Tribunal, Ambajogai.

B] Respondent No.1-the owner, though, duly served, remained absent and therefore, hearing of the claim petition ordered to be proceeded ex-parte against him. The appellant-insurer has strongly resisted the claim by filing written statement mainly on the ground that the driver of the tempo involved in the accident was not holding valid and effective driving licence and, thus, there has been breach of the specified conditions of the policy. The learned Member of the Motor Accident Claims Tribunal, Ambajogai, by its impugned Judgment and Award dated 16.10.2009 partly allowed the claim petition with proportionate costs and thereby directed the respondents Nos 1 and 2 to pay jointly and severally Rs.7,65,000/- alongwith interest at the rate of Rs.6% p.a. from the date of application till the amount is paid. Hence, this appeal is filed by the original respondent/insurer.

3. The learned counsel for the appellant-insurer submits that, as per the certificate issued by the RTO Pune, the driver of the said tempo was holding a licence to drive LMVTR/LMV[NT] vehicle and validity period of the said driving licence is 28.2.2003 to 27.2.2006. Learned counsel

submits that the accident had taken place on 17.2.2008 and on the date of accident, the driver of the said tempo was not holding valid and effective driving licence. The validity period of the licence as produced before the Tribunal was expired on 27.2.2006 and thereafter it was not renewed. Learned counsel submits that, the Tribunal has not considered the same and, accordingly directed the respondent-appellant insurer to pay the compensation to the claimants jointly and severally with the respondent owner.

4. Learned counsel for the respondents-claimants submits that, the appellant insurer has not proved before the Tribunal the certificate extract issued by the R.T.O, Pune. Learned counsel submits that, said extract was produced before the Tribunal at the time of arguments and the Tribunal has directly exhibited the same. Learned counsel submits that, assuming that the driver of the tempo was not holding valid and effective driving licence at the time of accident, in view of the authoritative pronouncement of the Supreme Court in case of **S. Iyyapan Vs. United India Insurance Company Limited and another** reported in **(2013) 7 Supreme Court Cases 62,** the appellant Insurer is liable to pay the compensation and then recover it from the respondent-owner. Learned counsel for respondent-claimant

places his reliance on a case Bajaj Alianz General Insurance Co. Ltd., Vs. Wahidbi Pashabhai Shaikh and another reported in **2015 (1) Bom.C.R. 672**, wherein, this Court by placing the reliance on **S. Iyyapan's** case (supra) in the similar facts of the case, directed the insurance company to pay the compensation first and then recover the amount from the owner. Respondent no.1 owner, though duly served, remained absent and none appears for him before the Tribunal.

5. It appears that the driver of the Tempo was holding driving licence prior to the accident. It is not the case that, the driver of the tempo was not having any driving licence at all. The certificate extract issued by the RTO, Pune was produced before the Tribunal by the appellant-insurer and the same was exhibited by the Tribunal. It appears from the record that, the respondents/original claimants have not raised any objection to exhibit the said document. It thus appears that the appellant-insurer succeeded in proving that the driver of the tempo was not having valid and effective driving licence at the time of accident. In view of this, the Tribunal has committed an error to saddle the appellant-insurer with liability to pay the compensation alongwith respondent no.1.

6. In a case **S. Iyyapan** (supra) in paragraph no.17 of the judgment, the Supreme Court has made following observations :-

> "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.
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> 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."

7. In view of this, the appellant-insurer has to pay first the compensation and then to proceed against the insured for recovery of the amount. Hence, I proceed to pass the

following order.

O R D E R

I. Appeal is hereby partly allowed.

II. Judgment and Award dated 16.10.2009 passed by the learned Member of the Motor Accident Claims Tribunal, Ambajogai in MACP No.96 of 2008 is hereby modified in the following manner :-

a] “Respondent No5 owner (original Respondent No.1 Owner) is directed to pay the compensation of Rs.7,65,000/- (Rs. Seven lac sixty five thousand only) alongwith interest @ 6% p.a. from the date of application till the amount is paid. However, the appellant/ original respondent No.2-Insurer shall pay the amount of Rs.7,65,000/- (Rs. Seven lacs sixty five thousand only) alongwith interest @ 6% p.a. from the date of application till the amount is paid to the claimants and the appellant-insurer/original respondent no.2-insurer is entitled to recover the said amount from the original respondent no.1/respondent no.5-owner without filing any independent proceedings.

III. First Appeal is disposed of.

IV. Award be drawn up accordingly.

V. The Respondents claimants are permitted to withdraw the compensation amount, if deposited by the appellant-insurer before this Court, in the proportion of 75% to claimant No.1 widow and 25% equally between the claimant nos. 2,3 and 4.

VI. In view of disposal of first appeal, pending civil application also stands disposed of.

(V.K. JADHAV, J.)

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aaa/-