IN THE HIGH COURT AT BOMBAY
APPELLATE SIDE, BENCH AT AURANGABAD

FIRST APPEAL NO. 2052 OF 2013

Bajaj Allianz General Insurance Co. Ltd.
Through it's Branch Manager,
2nd Floor, Rajendra Chamber,
Adalat Road, Aurangabad. **....Appellant.**
(Org.Resp.No.2**)**

Versus

1 Sangeeta W/o. Dharoji Jadhav,
Age: 27 years, Occu: Household,

2 Madhavi D/o. Dharoji Jadhav,
Age: 9 years, Occu: Education,

3 Sonali D/o. Dharoji Jadhav,
Age: 7 years, Occu. Education,

4 Archana D/o. Dharoji Jadhav,
Age: 5 years, Occu. Education,

5 Omkar S/o. Dharoji Jadhav,
Age: 3 Years, Occu. Nil

(No. 2 to 5 are Minors, U.G. Of
Respondent no. 1)

6 Parvatibai W/o. Arjun Jadhav,
Age: 57 years, Occu. Household,

7 Arjun S/o. Sonaji Jadhav,
Age: 62 years, Occu. Nil

All R/o. Bhaigaon, Tq. & Dist. Nanded

8 Ramkumar s/o. Jyoti Prasad,
Age: Major, Occu. Business,
R/o. Tatarpur Khalsa Tahsil Rewari,
District Rewari (Haryana) **....Respondents.**
(Res No. 1 to 7- Org. Claimants, Res No. 8- Org. Res No.1**)**

Ms. S.G. Chapalgaonkar, advocate for appellant.
Mr. H.I. Pathan, advocate for respondents No. 1 to7.

CORAM : T.V. NALAWADE, J.
DATED : 08th February,2016.

JUDGMENT :

1. The appeal is filed by the Insurance Company to challenge the judgment and award of Claim Petition No. 20/2011, which was pending before the Claims Tribunal, Nanded. Heard the learned counsel for Insurance Company and the learned counsel for claimants. Nobody has turned up for the owner of the offending vehicle, truck.

2) The learned counsel for Insurance Company argued on following two points.

(i) That, the driver of the offending truck was not holding valid and effective driving licence to drive the truck, but the relevant record was not available with the Insurance Company when the matter was decided by the Tribunal. The record is now available showing that no licence was issued by Mathura R.T.O. Office in favour of truck driver and copy of driving licence was of fake driving licence.

(ii) That, the motorcycle of the deceased gave dash to the truck from backside and there was contributory negligence on the part of the deceased.

3) There is no dispute about the quantum of compensation. So far as the second ground is concerned, it can be said that there was opportunity to the Insurance Company to lead the evidence by examining truck driver or other eye witness to prove that there was contributory negligence on the part of deceased. The contributory negligence cannot be inferred. It needs to be pleaded specifically and it needs to be proved by adducing evidence and as that was not done by the Insurance Company, there is no question of setting aside the judgment and award on that point. The accident took place in night time and the case was filed against the driver of the truck. In view of this circumstance, the appeal cannot be allowed to set aside the finding of negligence given by the Tribunal against the driver of the truck.

4) So, far as second ground is concerned, it can be said that there is now record with the Insurance Company to show that Mathura R.T.O. Office has not issued any licence in favour of the truck driver and there is probability that copy of of licence produced by the truck driver before the police is of fake driving

licence. If the Insurance Company proves that the licence was fake, it will be entitled to recover the amount from the owner of the truck. Considering this possibility and availability of the record, this Court holds that opportunity needs to be given to the Insurance Company to lead the evidence to prove the breach of terms and conditions of policy. In the result, following order is made.

O R D E R

(I) The appeal is partly allowed.

(II) The finding of the Tribunal with regard to the liability of the Insurance Company to indemnify the owner is hereby set aside. However, the amount deposited by the Insurance Company as compensation is to be disbursed as per the award made by the Tribunal in favour of claimants.

(III) The matter is remanded back to the Tribunal for deciding the case of the Insurance Company in respect of breach of conditions of policy. The matter is to be decided within three months from the date of receipt of the record. If concrete steps are not taken by the Insurance Company to prove such defence by calling witnesses and adducing evidence, it will be open to the Tribunal to again give similar decision on that point.

(IV) Award is to be prepared accordingly.

(V) Both the sides are to appear before the Tribunal on 14.3.2016. The Tribunal is to see that the notice of the proceeding is given to the owner as owner is not before this Court.

(VI) Record and proceeding be sent back to the Tribunal.

[T.V. NALAWADE, J.]

ssc/