**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

FIRST APPEAL NO. 3 OF 2013

ICICI Lombard General Insurance Co.
Ltd., Through its Legal Officer,
Mr Rahul Sanap,
age 26 yrs, Occ. Service,
R/o C/o. ICICI Lombard General
Insurance Company Ltd.,
Alaknanda, Ist Floor, Adalat Road,
Aurangabad. ..appellant...
(orig resp No.3)

VERSUS

1. Sunita w/o Ashok Rode,
age 42 yrs, Occ. Household

2. Amol s/o Ashok rode,
age 23 yrs, Occ. Education,
Residents of at Samarth Nagar,
Post Kannad, Tq. Kannadl Dist.
Aurangabad.. ..Resp No.1 and 2
orig claimants....

3. Shaikh Ashpak s/o Sk Adiya
@ Sk. Rafiq Ahmed,
age 42 yrs, Occ. Transportation,
R/o at Post Daulatabad, Tq. & Dist.
Aurangabad. Orig resp no.1 owner
...dismissed....

4. Tushar s/o Vilas Pimple,
age 27 yrs, Occ. Rickshaw Driver,
R/o Samarth Nagar, Kannad
Dist. Aurangabad. ..orig resp no.2 driver
...Respondents...

...

Advocate for Appellant : Mr S S Patil
Advocate for Respondents 1,2 : Mr P F Patni
R/3 Dismissed

...

CORAM : V.K. JADHAV, J.
Dated: July 13, 2017

...

ORAL JUDGMENT :-

1. Being aggrieved by the judgment and award passed by the Member, Motor Accident Claims Tribunal, Aurangabad dated 24.1.2011 in MACP no.641/2008, original respondent no.3-insurer has preferred this appeal.

2. Brief facts, giving rise to this appeal are as follows :-

a] On 5.4.2008, at about 02.00 p.m. deceased Ashok was proceeding by ape rickshaw bearing registration No.MH-20/T-3471 as a passenger from Pishor to Kannad Road. On way, within the limits of village Hasta Khandi, Tq. Kannad, Dist. Aurangabad, the driver of the said ape rickshaw had driven it in high speed, and in rash and negligent manner. In consequence of which, ape rickshaw turned turtled. Deceased Ashok was seriously injured. He was immediately shifted to Rural Hospital, Kannad, where he was declared dead on arrival. The claimants legal representatives of deceased Ashok approached the Tribunal by filing motor accident claim petition no.641/2008 for grant of compensation under various heads. It has been contended that deceased Ashok was working in one sugar factory and earning Rs.1.00 lac per annum and the appellants-claimants were depending upon his income.

b] Respondent No.1 though duly served, remained absent before the Tribunal and as such, hearing of the claim petition ordered to proceed ex-parte against him.

c] Respondent No.2 has strongly resisted the claim by filing written statement and denied that he was driving ape rickshaw at the relevant time. The appellant-insurer has also strongly resisted the claim petition by filing written statement. It has been contended that, driver of the ape rickshaw was not holding valid and effective driving licence and passengers (more than capacity) were carried in the said ape rickshaw and thus there has been breach of the specified conditions of the policy.

d] The claimants have adduced oral and documentary evidence in support of their contentions. The appellant-insurer has also adduced oral and documentary evidence. The learned Member of the Tribunal by its impugned judgment and award dated 24.1.2011 allowed the claim petition and thereby directed the respondents to pay compensation of Rs.6,06,300/- jointly and severally with interest @ 9% p.a. Hence, this appeal.

3. Learned counsel for the appellant-insurer submits that, appellant-insurer has given notice to respondent nos.1 and 2 for production of the licence, however, respondent no.1 has not responded to the said notice and respondent no.2 has submitted his reply and contended therein that detail say has been filed in the Court pending the claim petition and as such, matter is

subjudiced before the Court. Learned counsel submits that, appellant-insurer has also examined its legal manager to substantiate its defence, however, the Tribunal has not considered the same and fastened the liability on the appellant-insurer to pay the compensation jointly and severally alongwith respondent-owner.

4. Learned counsel for respondents-claimants submits that, burden is on the appellant-insurer to prove the defence and, in the instant case, the appellant-insurer has failed to discharge said burden. Learned counsel submits that, in the given set of facts and on the basis of oral and documentary evidence on record, the learned Member of the Tribunal has also observed that, respondent no.1 owner is not responsible for the breach, if any, of the specified conditions of the policy and as such, the appellant-insurer is liable to pay the compensation jointly and severally alongwith respondent owner. Learned counsel submits that, there is no merit in the appeal and thus, the appeal is liable

to be dismissed.

5. During the pendency of the appeal, appeal came to be dismissed against respondent owner for want of steps. Appellant-insurer has not taken any steps to restore the appeal against respondent-owner.

6. On careful perusal of the pleadings, evidence and judgment and award passed by the Tribunal, it appears that, appellant-insurer has failed to discharge the burden to substantiate its defence that respondent no.2 was not having valid and effective driving licence at the time of accident. Legal Manager of appellant-insurer has admitted in his cross-examination that respondent no.2 was not prosecuted for the offence of driving the vehicle without having valid and effective valid licence. He has also admitted that on verification of the police papers, it does not transpired that respondent no.2 was carrying more passengers than permitted. So far as notice exh.55 is issued to respondent no.1 and 2 is concerned, the same looses its significance since

respondent no.2 has strongly resisted the claim petition by filing his written statement. Thus, the burden is on the appellant-insurer to substantiate its defence and as such, the Tribunal has rightly saddled the liability on the appellant-insurer to pay the compensation jointly and severally alongwith respondent owner. I do not find any substance in the appeal on merits. Further, the appellant-insurer has also not taken any steps to restore the appeal against respondent-owner and as such, in absence of the respondent owner, the grounds raised by the appellant-insurer in the present appeal cannot be considered. Thus, on both the counts, the appeal is liable to be dismissed. Hence, following order.

O R D E R

1. Appeal is hereby dismissed with costs.

2. If any amount is deposited before this Court, the respondents-claimants are permitted to withdraw the same.

3. Appeal is accordingly disposed of.

(V.K. JADHAV, J.)

aaa/-