IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO. 1959 OF 2011

ICICI Lombard General Insurance
Company Ltd.
Through its Legal Officer,
Mr. Rahul Sanap
Age : 29 years, occu.: service
R/o : C/o ICICI Lombard General
Insurance Company Ltd.,
Alaknanda, 1st Floor, Adalat Road,
Aurangabad. **Appellant**.

Versus

1. Rewati Kalidas Gholve
Age : 38 years, occu.: household

2. Varsha d/o Kalidash Gholve
Age : 10 years, occu.: education.

3. Sudarshan s/o Kalidas Gholve
Age : 14 years, occu.: education.

4. Vasant s/o Narayan Gholve
Age : 67 years, occu.: nil.

5. Rukmini Vasant Gholve
Age : 61 years, occu.: nil

All r/o Gholewadi, Post Pandhari,
Taluka Barshi, District Solapur
At present r/o Samarth Nagar,
Kanadi Road, Kaij, Dist. Beed.

6. Uttamrao Dagdoji Ragde
Age : major, occu.: business
R/o Shipora Bajar, Tq. Bhokardan,
District Jalna. **Respondents**.

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Mr. S.S. Patil, Advocate holding for
Mr. R.H. Dahat, Advocate for the appellant.
Mr. Shrikant Kulkarni, Advocate for respondent Nos.2 and 3.
Mr. R.R. Imle, Advocate for respondent No.6. (Absent)
Mr. S.S. Deshmukh, Advocate for respondent Nos.1,4 & 5 (Absent).

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CORAM : SUNIL K.KOTWAL, J.

DATED : 19th September 2018.

JUDGMENT.

1. This appeal is directed by the original respondent No.2 – Insurance Company against the judgment and award passed by the Motor Accident Claims Tribunal, Ambejogai in Motor Accident Claim Petition No.110/2009, awarding compensation of Rs. 32,49,958/- and direction was given to respondent No.2 to pay the said compensation amount to the claimants and later on recover it from the owner of offending vehicle (original respondent No.1). The original respondent No.1 has also filed Cross Objection against the order of direction to Insurance Company to pay compensation and recover it from owner of the offending vehicle.

2. Mr. Patil, learned Counsel for the appellant – Insurance Company submits that the judgment and award passed by the Tribunal is assailed on two grounds that when there was fundamental breach of condition of policy of insurance, pay and recover order cannot be passed against the Insurance Company. His second ground of objection is that there was contributory negligence on the part of the deceased as he was under the influence of liquor and the spot of the head-on collision of both vehicles is in the middle portion of the road, as shown in the spot panchnama.

3. Mr. Shrikant Kulkarni, learned Counsel for respondent Nos.2 and 3 (original claimants) submits that as the claimants were not in a position to recover the compensation amount from owner of the offending vehicle, the learned Tribunal has rightly exercised discretion by passing 'pay and recover' order against the Insurance Company. He has drawn my attention to the case of **"Amrit Paul Singh and another Vs. TATA AIG General Insurance Company Ltd." [2018 (7) Scale 502]**.

4. The next submission of learned Counsel for respondent Nos.2 and 3 is that no medical evidence is available

on record to prove that at the time of occurrence, the deceased was under the influence of liquor.

5. So far as correctness of pay and recover order is concerned, from the case of **"Amrit Paul Singh Vs. TATA Aig General Insurance Co."** (supra), it is clear that despite fundamental breach of policy of insurance, if the pay and recover order is passed by the Tribunal against Insurance Company, the same need not be interfered by the Appellate Court. Therefore, obviously in view of the law settled by the Apex Court in the above-cited Authority, the pay and recover order passed by the Tribunal cannot be faulted.

6. Regarding contributory negligence of the deceased, no evidence has been placed on record by the Insurance Company to prove that at the time of occurrence of accident, the deceased was driving his motorcycle in rash and negligent manner. On the other hand, copy of F.I.R. (Exh.22) lodged by deceased indicates that the accident occurred due to rash and negligent driving by offending truck bearing registration No. MH-18-M-3013. Even the spot panchnama (Exh.23) does not indicate that the actual collision in between truck and motorcycle occurred in the middle

portion of the road. Therefore, by no stretch of imagination, it can be held that at the time of occurrence of accident, the deceased was driving his motorcycle from the middle portion of the road in rash and negligent manner.

7. Regarding the allegation of consumption of liquor by deceased at the time of occurrence of accident, the postmortem report (Exh.25) clearly shows that there was no peculiar smell to the contents of the stomach of deceased. Even Dr. Nitin Sasturkar (DW-2) examined by the Insurance Company has admitted in his cross-examination that when he examined the deceased on 21.05.2009, he did not find any alcoholic smell and during his clinical examination he did not find that the deceased was under influence of alcohol. Thus, no substance is placed on record by the Insurance Company to prove that at the time of occurrence of accident, the deceased drove his motorcycle under the influence of liquor by the middle portion of the road and thereby contributed in the occurrence of the accident. I hold that the appellant – Insurance Company failed to bring on record any iota of evidence to prove that there was contributory negligence on the part of the deceased at the time of occurrence of the

accident.

8. The judgment and award passed by the learned Tribunal is not assailed on any other additional ground by the learned Counsel for the appellant.

9. In the result, I hold that the judgment and award passed by the Tribunal is correct, proper and needs no interference.

10. It follows that this appeal and Cross Objection filed by owner of the offending vehicle deserve to be dismissed.

11. Accordingly, First Appeal No.1959/2011 and Cross Objection are dismissed. Pending Civil Applications are disposed of accordingly. Parties to bear their respective costs of the appeal.

(SUNIL K. KOTWAL)
JUDGE

vdd/