IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO. 4447 OF 2016
WITH
CIVIL APPLICATION NO. 12001 OF 2016
AND
CIVIL APPLICATION NO.15575 OF 2016

Bharti Axa General Insurance
Company Limited,
Through its Manager,
R/o Bharti Axa General Insurance
Company Ltd., Dhole Patil Road,
Pune. **Appellant**.

Versus

1. Gayabai Devrao Weldode
Age : 40 yrs, occu.: household
R/o Peer Bajar, Osmanpura,
Aurangabad.

2. Deorao Natha Weldode
Age : 42 yrs, occu.: Nil
R/o as above.

3. Sk. Jafar Sk. Bismillaha
Age : major, occu.: business
R/o Jamalshah Colony,
Tal. Sillod, Dist. Aurangabad.

4. Sk. Yakub Sk. Isak
Age : major, occu.: driver
R/o Avhana Road, Tal.Sillod,
District Aurangabad. **Respondents**.

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Mr. S.S. Patil, Advocate for the appellant.
Mr. G.R. Syed, Advocate for respondent Nos.1 and 2.

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CORAM : SUNIL K.KOTWAL, J.

Judgment reserved on : 15 March 2019.

Judgment pronounced on : 25 March 2019.

JUDGMENT.

. This appeal is directed by Insurer of the offending Jeep bearing registration No.MH-20-AA-574 against the judgment and award passed by Motor Accident Claims Tribunal (hereinafter referred to as "Tribunal), Aurangabad in Motor Accident Claim Petition No. 529/2013.

2. Respondent Nos. 1 and 2 are the original claimants. Respondent No.3 is owner and respondent No.4 is driver of offending Jeep. Hereinafter the parties are referred to in accordance with their status in the original proceeding as "claimants", "owner", "driver" and "insurer".

3. The facts leading to institution of this appeal are that on 01.05.2013 the deceased was riding the motorcycle by Aurangabad to sillod Road along with his friend as a pillion rider. That time the offending Jeep came from wrong side and dash against the motorcycle of deceased resulting into his death.

Therefore, the claimants had filed Motor Accident Claim Petition before the Tribunal, Aurangabad for compensation under section 166 of the Motor Vehicles Act.

4. Owner and driver of the offending Jeep were proceded expert. Only Insurer of the offending vehicle filed written statement (Exh.18) denied its liability. Contention of the Insurance Company is that the offending jeep was insured with the Insurance Company for the period from 04.05.2013 to 03.05.2014. However, the accident occurred on 01.05.2013 when the policy of insurance was not in force. Therefore, the Insurer is not liable to indemnify owner of the offending vehicle for the accident which occurred on 01.05.2013. Other statutory defences were also taken by the Insurer.

5. After considering the evidence placed on record, the learned Tribunal held that the claimants are entitled to compensation of Rs.6,11,000/- and owner, driver and Insurance Company jointly and severally liable to pay compensation to the claimants. That award is challenged by Insurance Company in the present appeal.

6. Heard Mr. S.S. Patil, learned Counsel for the

Insurance Company and Mr. Syed, learned Counsel for the original claimants. Learned Counsel for the owner and driver was absent at the time of final hearing.

7. Learned Counsel for the Insurance Company submits that on the date of accident i.e. on 01.05.2013 the policy of insurance was not in force as the offending vehicle was insured only for the period starting from 04.05.2013 to 03.05.2014. He has drawn my attention towards true copy of the policy of insurance (Exh. 37), which was in force from 04.05.2013 to 03.05.2014. He has also draw on my attention towards the receipt of the premium of insurance paid by owner of offending vehicle on 09.05.2013. He submit that the policy of insurance (Exh.29) relied on by the claimants is a fake policy as it is not in accordance with the record of Insurance Company. He has pointed out that owner of the offending vehicle did not contest the claim petition and even the claimants have not taken pains to examine owner of offending vehicle to prove that the policy of insurance was obtained on 24.04.2013 and it was in force up to 22.04.2014, as mentioned in the copy of policy (Exh.29) relied on by the claimants.

8. Learned Counsel for the claimants submits that the copy of the policy of insurance (Exh.29) was obtained by the claimants from police and it shows that it was valid for the period from 24.04.2013 to 22.04.2014, and therefore, the Insurance Company cannot avoid its liability to indemnify owner of the offending vehicle. In the alternate his contention is that if there is any breach of condition of policy, then this Court can pass an order directing the Insurance Company to first pay the compensation to the claimants and later on recover it from the owner of offending vehicle. To substantiate this contention he placed reliance on the cases of **"United India Insurance Co. Ltd. Vs. Sindhubai Kondiram Darwante and others" [2010 ALL MR (Supp.) 220]** and **"United India Insurance Co. Ltd. Vs. Smt. Sunita Sanjay Gujar and others" [2016 (10) LJSOFT 42]**.

9. After hearing learned Counsels for both the parties, following points arise for my consideration.

	POINTS		FINDINGS
1	Whether on 01.05.2013 i.e. on the date of accident the offending jeep was duly insured with the appellant/ Insurance Company?	:-	No.

2	Whether 'pay and recover' order can be passed against the Insurance Company?	:-	No.
3	What order?	:-	Appeal is partly allowed. Original respondent No.3 is exonerated in toto from its liability to indemnify the owner of offending vehicle.

<u>REASONS</u>

10. In the case at hand, at the stage of argument occurrence of the accident due to negligence on the part of driver of the offending vehicle as well as quantum of compensation awarded by tribunal is not disputed by the Insurance Company. Therefore, I need not touch correctness of the award passed by the Tribunal to that effect.

11. The only question for determination is whether on the date of the accident policy of insurance of the offending vehicle was in force? According to Insurance Company, policy of the insurance was in force from 04.05.2013 to 03.05.2014 and not on 01.05.2013 i.e. on the date of occurrence of accident. Policy of the insurance relied on by the claimants is at Exh.29 which is a simple xerox copy of policy of insurance of offending jeep, which is shown as in force from 23.04.2013 to midnight of 22.04.2014.

However, on behalf of Insurance Company Ashwinkumar Gawai (DW-1), who is the Legal Manager of the Insurance Company, stepped in witness box and he has filed and proved true copy of the original policy of insurance issued by Insurance Company (Exh.37), which was in force from 04.05.2013 to 03.05.2014. According to the said witness, policy of the insurance (Exh.29) filed by the claimants is a tampered document and some person has changed the period of insurance. In addition to this true copy of the original policy, this witness has also proved the receipt of premium (Exh.43) paid by the owner of offending vehicle, which shows that the premium was received by Insurance Company on 09.05.2013. From the cross-examination of this witness it emerges that the insurance (Exh.29) relied on by the claimants and the insurance policy (Exh.37) relied on by respondent No.1 bears same policy numbers. Even the date of issuance of these policies is shown as 03.05.2013. When these both policies show that the policy of insurance was issued on 03.05.2013, certainly it does not cover the risk of the offending vehicle on the date of accident i.e. 01.05.2013. Otherwise also, the claimants have not taken pains two examine the owner of offending vehicle and to prove the receipt of payment of premium to show that at least premium of the insurance was paid by the owner of offending vehicle before the date of accident i.e. 01.05.2013.

12. Thus, obviously on the date of accident the offending jeep was not insured with the appellant / Insurance Company. On 01.05.2013 there was no contract of insurance in between the Insurance Company and the owner of offending vehicle. It follows that the Insurance Company is not liable to indemnify the owner of offending vehicle for the accident which occurred on 01.05.2013. In the circumstances, considering the date of payment of premium on 09.05.2013 (Exh.43), I have no hesitation to hold that copy of insurance policy filed by the claimants at Exh.29 is certainly a fake and tampered policy of insurance. Therefore, the appellant / Insurance Company is not at all liable to pay the compensation to the claimants. As this is not the case of breach of condition of policy, but the case of absence of contract of insurance of the offending vehicle on the date of accident, even the 'pay and recover' order cannot be passed against the Insurance Company. Both the cases relied on by the original claimants are distinguishable on facts.

12. In the result, I hold that the appellant / Insurance Company deserves to be exonerated in toto and no direction can be issued against the Insurance Company to pay compensation amount to the claimants and later on recover it from the owner of offending vehicle. Accordingly, I answer point Nos. 1 and 2 in negative.

13. In view of the findings of point Nos.1 and 2, this appeal filed by Insurance Company deserves to be allowed and the award passed by the Tribunal is to be modified.

14. First Appeal No.4447 of 2016 is partly allowed. Judgment and award passed by the Tribunal, Aurangabad in M.A.C.P. No.529/2013 is modified as under:-

"(i) M.A.C.P. No.529/2013 is partly allowed with proportionate costs.

(ii) Respondent Nos.1 an 2 do jointly and severally pay compensation of Rs. 6,11,000/- (inclusive of the amount under "no fault liability) to the claimants along with interest there on @ 9% per annum from the date of filing of petition till realisation of the entire amount.

(iii) On depositing the compensation amount, the same be equally apportioned in between the claimants.

(iv) Half share of each claimant shall be invested in fixed deposit in any Nationalized Bank of their choice and remaining half share shall be paid to them by issuing separate account payee cheques in their respective names.

(v) Claim Petition against respondent No.3 is dismissed".

15. Parties to bear their respective cost of the appeal.

16. Compensation amount deposited by Insurance Company in this Court be refunded to it after the period of appeal is over.

17. Pending Civil Applications are disposed of accordingly.

(SUNIL K. KOTWAL)
JUDGE

vdd/