IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO. 629 OF 2023

Reliance General Insurance Co. Ltd. Ins. Of M/ Dumper No. MH-01-LA-9201 Having their office at 4th Floor, Chintamani Avenue, Off. Western Express Highway, Next to Virwani Industrial Estate, Goregaon (E), Mumbai. Ins. Policy No. 1111742343000148 Ins. Validity from 24-12-2014 to 23-12-2015	Appellant
Versus	
1. Nasim Ahamad Khalil Ahamad Pathan Aged 44 years (Father of the Deceased) 2. Fazlunnisha Nasim Ahamad Pathan Aged 40 years (Mother of the deceased) Both are residing at Kamla Raman Nagar, Baiganwadi, Furkaniya Chowk, Govandi, Shivaji Nagar, Mumbai – 400 043	Respondents

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Ms. Kalpana Trivedi, Advocate for the Appellant.
Mr. Milind V. More, Advocate for Respondents.

CORAM : SHIVKUMAR DIGE, J.
DATE : 30th JANUARY, 2024.

JUDGMENT:

1. The issue involved in this appeal is at the time of accident driver was not holding effective and valid driving licence and there was breach of terms and conditions of Insurance Policy.

2. It is contention of learned counsel for appellant/Insurance Company that at the time of accident, driver of offending vehicle was holding the driving licence to drive light motor vehicle transport goods but he was driving heavy goods vehicle. There was breach of terms and conditions of Insurance Policy, but this facts is not considered by the Tribunal. Learned counsel further submitted that at the time of accident, the goods loaded in the offending vehicle were more than capacity. There was breach of terms and conditions of insurance policy, but this fact is not considered by the Tribunal. Learned counsel further submitted that the Tribunal has considered monthly income of deceased at Rs.5,000/- which is on higher side. Hence, requested to allow the appeal.

3. It is contention of learned counsel for respondents/claimants that no defence was taken by the appellant/Insurance Company in their written statement about the breach of terms and conditions of insurance policy, regarding loading of goods more than capacity in the offending vehicle. At the time of accident, the driver of offending vehicle was holding licence to drive the light motor vehicle, so he can drive the heavy vehicle. He relied on the judgment of the Hon'ble Apex Court in the case of ***Mukund Dewangan (S) v. Oriental Insurance Company Limited*** [1].

4. I have heard both the learned counsel. Perused the Judgment and Order passed by the Motor Accident Claims Tribunal, Mumbai (for short "**the Tribunal**"). To prove the income of the deceased, the claimants have examined claimant No.2 she has stated that deceased was 15 years

1 2017 AIR SC 3668.

old and he was 9th Std. student and if he had been alive today, he could have earned more than Rs.25,000/- per month. Considering the evidence on record, the Tribunal has considered notional monthly income at Rs.5,000/- per month. I do not find infirmity in it. To prove their defence that driver was not holding valid driving licence at the time of accident, the appellant/Insurance Company examined their Legal Retainer - Ms. Jui Sule. She has stated that at the time of accident, the driver of offending vehicle was holding the driving licence to drive light motor vehicle transport goods vehicle but he was driving heavy goods vehicle. The driving licence is at Exhibit-31 and Insurance Policy is at Exhibit-32. While dealing with this issue, the Tribunal has observed that the said defence was not taken in the written statement and law is settled that no party can be traversed beyond the pleading and it cannot be permitted to adduce the evidence by way of surprise. I do not find infirmity in it.

5. It is contention of learned counsel for the appellant/Insurance Company that goods were loaded in the offending vehicle more than capacity. While dealing with this issue, the Tribunal has observed that no such plea of breach of terms and conditions of Insurance Policy was mentioned in the written statement, on that ground the Tribunal has rejected the contention of appellant/Insurance Company. I do not find infirmity in it. In my view, if the Insurance Company takes defence it should have been pleaded in the written statement, if defence is not taken in the written statement it cannot be considered.

6. In view of the above, I pass following Order:

ORDER

i. The appeal is dismissed.

ii. The claimants are permitted to withdraw the deposited amount along with accrued interest thereon.

iii. The statutory amount along with accrued interest be transferred to the Tribunal. The parties are at liberty to withdraw it as per rule.

iv. All pending Applications are also disposed off.

SONALI SATISH KILAJE Digitally signed by SONALI SATISH KILAJE Date: 2024.02.09 11:15:02 +0530

(SHIVKUMAR DIGE, J.)