

(2016) 03 GUJ CK 0068

In the Gujarat High Court

Case No : First Appeal Nos. 3274 to 3281 of 2005

National Insurance Co. Ltd.

APPELLANT

Vs

Sumitra Ben Mangabhai Vasava and Others

RESPONDENT

Date of Decision : 09-03-2016

Acts Referred:

Motor Vehicles Act, 1988 — Section 147

Citation : (2016) 03 GUJ CK 0068

Hon'ble Judges : R.P. Dholaria, J.

Bench : Single Bench

**Advocate : G.C. Mazmudar and H.G. Mazmudar, Advocates, for the Appellant;
D.N. Pandya, Advocate, for the Respondent**

Final Decision : Dismissed

Judgement

R.P. Dholaria, J.—1. This group of eight appeals is filed by the appellant National Insurance Company Limited against the common judgment & award dated 9.5.2005 passed by learned Motor Accident Claims Tribunal (Aux.), Bharuch in Motor Accident Claim Petition No. 22 of 1999 & other group petitions. The appellant is insurer of Tempo No. GJ-9-V-1639 which is admittedly a goods carriage vehicle wherein the injured claimants as well as other deceased were travelling on the day of accident which had taken place on 24.5.1998. The said goods carriage vehicle turned turtle due to negligence on the part of the driver of the aforesaid vehicle. It is a case of the claimants that due to said accident, all persons who were travelling in said goods carriage vehicle sustained injuries. Eleven claim petitions came to be filed by victims of said accident. The learned Tribunal vide its impugned common judgment was pleased to allow all claim petitions and awarded amount of compensation against the opponent jointly and severally.

2. Heard Mr. H.G. Mazmudar, learned advocate for the appellant-Insurance Company and Mr. D.N. Pandya, learned advocate for the respondents. At the outset, Mr. D.N. Pandya, learned advocate for the respondents has raised

preliminary objection regarding service of notice to the owner of the vehicle. However, on going through the records made available to this Court, it is noticed that the driver of vehicle-Magan Somji Vasva has been served with the notice and so far as the owner of the vehicle is concerned, it appears that he has refused to accept the direct service of notice. The said fact has been brought on record by way of affidavit by the notice server. Refusal to accept direct service of notice is good service itself. The owner of the vehicle has chosen not to appear before this Court.

3. Learned Advocate Mr. H.G. Mazmudar, for the appellant has submitted that once learned Tribunal has found that all persons travelling in said goods carriage vehicle at time of accident were passengers travelling in tempo in order to attend marriage party, then as per the provisions of Section 147 of Motor Vehicles Act and as per the decision of the Honourable Apex Court in the case of "New India Assurance Company Ltd. v. Asha Rani" reported in , (2003) 2 SCC 223 as well as in the case of "National Insurance Co. Ltd. v. Rattani" and others reported in , (2009) ACJ 925, the appellant insurer of said goods carriage vehicle could not have held liable to pay compensation and more particularly, he has placed reliance upon Rattani (supra) in para Nos. 5, 6, 7, 8, 12, 13, and 14 which reads as under:

"5. Separate claim petitions were filed by the heirs and legal representatives of the deceased as well as by the injured before the Motor Vehicles Claims Tribunal, Bhiwani.

In the claim petition in question, the relevant portion of the claim form was filled up as under:--

"Was the person in respect of the whom compensation is claimed, traveling in the motor vehicle involved in the accident, if so, give the name of station and start of journey and its destination?

Yes, the deceased Sunil Kumar alongwith others was traveling as a Barati in the Tata 407 being driven by the respondent No. 1 and they were returning after attending the marriage function from village Jharli to Kusumbi."

Against the column "cause of accident with brief descriptions" it was stated:--

"Brief facts of the accident are that the deceased Sunil Kumar alongwith others was traveling in the capacity as Barati in Tata 407 in question and after attending the marriage function were returning from Jharli to village Kusumbhi in the Tata 407 which was being driven by the respondent No. 1. The vehicle was being driven rashly, negligently and at a very high speed and inspite of warning to the respondent No. 1 to drive the vehicle slowly the respondent No. 1 continued driving rashly and negligently and on 15.5.2002 at about 6.30 PM when the vehicle after crossing Railway Phatak of Dhalwas and were going towards Sehlanga due to rash and negligent driving of respondent No. 1, the respondent No. 1 lost control on the vehicle resulting to turn turtle and several persons

suffered grievous injuries and deceased Sunil and one Photographer named Hazari died at the spot. On the statement of Rameshwar son of Akhey Ram, r/o. Mundhal Khurd, one of the eye witness and traveling as Barati FIR No. 98 dated 16.5.2002 was lodged against the respondent No. 1, which contains the detailed manner of accident how it took place and be read as part of this petition. The respondents being the driver, owner and insurer, are jointly and severally liable to pay compensation to the petitioners."

6. As a reference has been made to the first information report bearing No. 98 dated 16th May, 2002, which was lodged against the driver, first respondent in the claim petition, we may also notice the relevant portion of the contents thereof from the award of the Tribunal.:-

"...He referred to the contents of FIR Ex. P2 wherein it is mentioned that all the members of marriage party were the occupants of the four wheeler and there was no mention that dowry articles or some furniture etc. were loaded in the vehicle."

7. We are not oblivious of the fact that ordinarily an allegation made in the first information would not be admissible in evidence per se but as the allegation made in the first information report had been made a part of the claim petition, there is no doubt whatsoever that the Tribunal and consequently the appellate courts would be entitled to look into the same.

8. However, in their depositions, the claimants raised a new plea, namely that the deceased and the other injured persons were travelling in the said truck as representatives of the owner of the goods.

12. Even if the submission of Mr. Subramonium Prasad that in the truck the goods offered by way of gift by the bride party were being transported is correct, the deceased and others could not have become the representatives of the owner of the goods. Even otherwise in view of the averments made in the claim petition and the first information report the said contention cannot be accepted.

Furthermore in their depositions the witnesses examined on behalf of the claimants themselves stated that about 30 - 40 persons were travelling in the tempo truck. All 30 - 40 persons by no stretch of imagination could have been the representatives of the owners of goods, meaning thereby, the articles of gift.

13. The question as to whether burden of proof has been discharged by a party to the lis or not would depend upon the facts and circumstances of the case. If the facts are admitted or, if otherwise, sufficient materials have been brought on record so as to enable a court to arrive at a definite conclusion, it is idle to contend that the party on whom the burden of proof lay would still be liable to produce direct evidence to establish that the deceased and the injured passengers were gratuitous passengers.

As indicated hereinbefore, the First Information Report as such may or may not be taken into consideration for the purpose of arriving at a finding in regard to

the question raised by the appellant herein, but, when the First Information Report itself has been made a part of the claim petition, there cannot be any doubt whatsoever that the same can be looked into for the aforementioned purpose.

14. An admission made in the pleadings, as is well-known, is admissible in evidence proprio vigore. We, thus, are of the opinion that the Tribunal as also the High Court committed a serious error in opining that the insurance company was liable.

Reliance placed by the learned counsel on a decision of this Court in *National Insurance Co. Ltd. v. Baljit Kaur and Others* [, (2004) 2 SCC 1] is misplaced. The question which arose for consideration therein was as to whether the words "any person" shall include a gratuitous passenger despite the amendment made in Section 147 of the Act by reason of the Motor Vehicles (Amendment) Act, 1994.

Following *New India Assurance Co. Ltd. v. Asha Rani* [, (2003) 2 SCC 223], it was categorically held:

"20. It is, therefore, manifest that in spite of the amendment of 1994, the effect of the provision contained in Section 147 with respect to persons other than the owner of the goods or his authorized representative remains the same. representative would now be covered by the policy of insurance in respect of a goods vehicle, it was not the intention of the legislature to provide for the liability of the insurer with respect to passengers, especially gratuitous passengers, who were neither contemplated at the time the contract of insurance was entered into, nor was any premium paid to the extent of the benefit of insurance to such category of people."

In *National Insurance Co. Ltd. v. Cholleti Bharatamma and Others*[, (2008) 1 SCC 423], this Court categorically held:

"27. The learned counsel appearing for the respondent, submitted that from the aforementioned finding, it is evident that the respondent was travelling as the owner of the goods. We do not think that the said submission is correct. PW 2, in his evidence, stated:

"I am doing tamarind business. I witnessed the accident which took place about 3 years back at about 6 a.m. at Borrampalem junction beyond Talluru. At the time of the accident I was in the crime lorry by the side of the driver. Myself and 6 others were carrying tamarind in that lorry belonging to us. We boarded the lorry along with our load of tamarind at Dharamavaram to go to Rajanagaram. We were selling the tamarind at Rajanagaram in retail by taking the tamarind there in our lorry from our village of Dharamavaram."

28. The Tribunal, therefore, correctly recorded that according to PW 2, he was travelling with his goods as owner thereof and not the deceased."

We, therefore, in the facts and circumstances of the case, have no hesitation to

hold that the victims of the accidents were travelling in the truck as gratuitous passengers and in that view of the matter, the appellant herein was not liable to pay the amount of compensation to the claimants. "

4. Mr. Mazmudar has further submitted that learned Tribunal has no power under the law to give such direction to pay and recover as there was no statutory liability cast upon the appellant to pay the compensation to the passengers were travelling in the goods carriage vehicle. In support of his argument, he has also relied upon the recent decision of this Court dated 26.11.2015 passed in First Appeal No. 3421 of 2005.

5. On the other hand Mr. D.N. Pandya, learned advocate appearing for the original claimants has supported the impugned judgment of learned Tribunal. He has submitted that the claimants were travelling in goods carriage vehicle alongwith goods and consequently therefore, the learned Tribunal has rightly fastened the liability upon the Insurance Company. He has in alternative way submitted that if this Court comes to the conclusion that the appellant is not at all liable to pay compensation in that event, this court may pass appropriate order so that the amount already disbursed and paid to the claimants may not be recovered from the claimants as such.

6. Heard learned advocate for the respective parties at length and considered submissions advanced by all the advocates. The common question which arise for consideration of this Court in these batch of appeals is as to whether learned Tribunal is justified in law by directing appellant insurance company to pay compensation to claimants and then to recover it from its insured-owner of goods carriage vehicle No. GJ-9-V-1639?

7. The issue involved in these appeals is no more res integra. It is by now well settled legal position of law that once learned Tribunal finds a person travelling in goods carriage vehicle as passenger and not as an owner of goods or its representative, in such situation, insurer of goods carriage vehicle is not liable to pay compensation and learned Tribunal cannot fasten the liability upon the insurer to pay compensation and then to recover it from its insured. On going through the particulars of the policy, it is noticed that no additional premium is being levied by the Insurance Company for coverage of risk of any passenger travelling upon the vehicle involved in the accident. The risk of passenger travelling in goods carriage vehicle is not covered under Motor Vehicle Act, 1988. The Act has not envisaged risk of passenger to be covered under Section 147 of the said Act and law in this regard has been declared by the Hon"ble Apex Court in a case of Asha Rani (supra) and reiterated in other decisions. It is an admitted fact that injured claimants were travelling as passengers in order to attend marriage party from Kundiamba to Navagam in the said goods carriage vehicle insured with the appellant insurance company. This fact is clearly forthcoming even from the respective petitions which came to be filed by the claimant wherein they have clearly mentioned that they were travelling upon the aforesaid Tempo as passengers to attend the marriage party alongwith their goods. The

same fact have been narrated in their respective affidavits which came to be filed during the course of adducing oral evidence. In the cross examination, all claimants have admitted that they were passengers who were travelling upon the aforesaid goods carriage in order to attend the marriage party.

8. FIR produced at Exh:49 also discloses that soon after the accident one Navalbhai Vasva resident of Navagam, Taluka Dediapada, District Narmada, lodged complaint before the Police indicating that the marriage of his son Suresh was scheduled on 24th May, 1998, and he had hired tempo No. GJ-9-V-1639 for attending marriage party at Navagam. While they were travelling upon the aforesaid tempo, the driver was driving in a very hectic speed and in the result, tempo turned turtle and they sustained injuries.

9. In view of the aforesaid factual position and in light of the pleadings came to be made by the respective claimants, and in light of the affidavit filed by the respective claimants, this Court is of the opinion that the appellant-Insurance Company is not liable to pay compensation and the learned Tribunal has committed error of law in directing the appellant-Insurance Company to deposit the awarded amount and then to be recovered from its insured-owner of the goods carriage vehicle.

10. In view of the above stated reasons, these appeals are allowed. The impugned common judgment and award is quashed and set aside qua appellant only. The original opponents except appellant insurance company are liable to pay compensation jointly and severally. As stated herein above, appellant insurance company is entitled to recover the amount so deposited before learned Tribunal in respective claim petitions with accrued interest thereon. However, it is made clear that, if any amount is disbursed and paid to the respective claimants the same shall not be recovered.

10.1. The amount disbursed and paid to the claimants shall be recovered from the owner by way of filing execution petition. The Tribunal is further directed to release the amount invested in fix deposit, if any, so far as the present petitions are concerned to the Insurance Company alongwith interest thereon. It is also made clear that if any amount is lying before the Registry of this Court in these appeals, the same shall be transmitted to learned Tribunal forthwith. R & P be sent back to the concerned lower court forthwith. No order as to costs.