

(2012) 04 GUJ CK 0015
In the Gujarat High Court

Case No : First Appeal No's. 3752, 4074 and 4073 of 2006

Oriental Insurance Co.

APPELLANT

Vs

Ashraf Jemalbhai Jalmsanghi and 1

RESPONDENT

Date of Decision : 23-04-2012

Acts Referred:

Motor Vehicles Act, 1988 — Section 149(2)

Citation : (2012) 04 GUJ CK 0015

Hon'ble Judges : K. S. Jhaveri, J

Bench : Single Bench

Advocate : Shalin N. Mehta, for the Appellant; R.C. Kakkad for Defendant : 1
and Mr. Nitin M. Amin for Defendant : 2, for the Respondent

Final Decision : Allowed

Judgement

K.S. Jhaveri, J.—The above appeals are directed against the judgement and award passed in Motor Accident Claim Petition No. 854/1999 (F.A./3752/2006) and 836/1999 (F.A.4073/2006) passed by learned Motor accident Claims Tribunal (Auxi) & FTC No. 4, Jamnagar dated 9th July 2004 whereby the Tribunal has awarded a sum of Rs. 2,46,000/- along with interest at the rate of 7.5% I MACP No. 854/1999, Rs. 1,44,000/- along with interest at the rate of 7.5% per annum in MACP No. 836/99 and Rs. 64170/- along with interest respectively. The appeals are at the instance of the Insurance Company. On 2nd September 1999 the original claimants along with others were traveling in a Matador bearing registration No. GJ 10 U 5825 with their goods from village Chella Bedi. When the said Matador reached near village Khadhambhalia, the driver lost control of the vehicle and it turned turtle. The claimants sustained serious injuries and therefore the aforesaid claim petitions came to be filed wherein the respective awards were passed.

2. According to the appellant, the claimants were mere gratuitous passengers not carried for hire or reward in a goods carriage. According to the appellant, the Tribunal has committed an error in accepting the mere say of the original

claimants that they were traveling with goods in a goods carriage without any corroborating evidence. He placed reliance on the decision of the Hon''ble Supreme Court in case of National Insurance Company Ltd. Vs. Savitri Devi and Others etc., wherein it is held that insurance company could not be held liable to make compensation when there was clear violation of terms and condition of the policy.

3. Learned Advocates appearing for the respondents-claimants submitted that the claimants were travelling in the Matador bearing No. GJ 10 U 5825 with their goods. He further submitted that the learned Advocate for the appellant-Insurance Company contended before the Tribunal that the insurance company cannot be held liable to pay an amount of compensation claimed by the petitioners in M.A.C. P. 834 of 1999, 836/1999, 837/ 1999, 849/1999 and 231 of 1999. However, the M.A.C.P. No. 854 of 1999 was not mentioned by the learned Advocate for the appellant against which First Appeal No. 3752 of 2006 is preferred. Hence, according to him, the First Appeal No. 3752 of 2006 is required to be dismissed.

4. Learned advocate appearing for the respondent No. 2 has supported the judgement and award of the learned Tribunal and contended that the learned Tribunal has rightly held that the insurance company is liable to pay the compensation and the appeals may be dismissed.

5. Heard the learned Advocates for the respective parties and perused the documents on record.

6. Before the Tribunal the Insurance Company had argued that the claimants were gratuitous passengers. There is no mention about the goods in the FIR nor in their statements. However, the Tribunal has concluded that the Insurance Company has not discharged its burden and thus in absence of oral evidence of original opponent no.2 adverse inference can be drawn against it. Therefore the Tribunal has held that the Insurance Company is liable to satisfy the award.

7. From the record it is evident that the vehicle in question is a goods vehicle. According to the claimants, they were traveling along with their goods. When the claimants claim that they were traveling with the goods, the onus is on the claimants to prove that they were traveling along with their goods. They could have examined the driver of the vehicle in order to prove that they were traveling along with their goods and that they paid payment for the same.

8. Further, the Matador was a goods carriage. As per the clear terms and conditions of the insurance policy of the Matador, travel by any passenger was prohibited. Therefore the driver of the Matador could not have permitted any passenger, be it a gratuitous passenger or an owner of goods. By permitting such passengers there is breach of specific term or condition of the insurance policy and the Insurance Company cannot be held liable to indemnify the insured u/s 149(2) of the Act. It is also required to be noted that in so far as a goods carriage is concerned, there was total prohibition under the Act with regard to

any passenger being carried in the goods carriage. As per the principles laid down in case of National Insurance Company Ltd. Vs. Savitri Devi and Others etc., the appellant-insurance company could not be held liable to make compensation when there was clear violation of terms and condition of the policy.

9. It is also required to be noted that the FIR is also silent about the goods being carried by the claimants. The claimants could have specified that they were traveling with their goods and description of goods also should have been stated and proved. This was not done.

10. In view of the above I am of the opinion that the Tribunal has committed an error in saddling the Insurance Company with the liability. For the foregoing reasons, the appeals are allowed. The impugned judgement and awards passed by the Tribunal are quashed and set aside qua the imposition of liability on the appellant-Insurance Company to make the payment of compensation. It is, however, observed that if the amount deposited before the Tribunal is already withdrawn by the original claimants, the same shall not be recovered from the original claimants and the Insurance Company shall be at liberty to recover the same from the owner of the vehicle. If the amount is not withdrawn by the original claimants, it will be open to them to recover the same from the owner of the vehicle. The award of the Tribunal is modified accordingly. The amount, if any, lying with the Registry of this Court shall be transmitted to the concerned Tribunal forthwith. No order as to costs.