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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Decision: 11th February, 2016

+ **MAC.APP. 878/2014**

JHOLI MANDAL & ANR

..... Appellants

Through: Mr. Anshuman Bal, Adv.

versus

**MANISH KAKKAR & ORS (UNITED INDIA INSURANCE
COMPANY LTD)**

..... Respondent

Through: Mr. Amit Kumar Singh and Mr.
K. Enatoli Sema, Advs. for R-3

CORAM:

HON'BLE MR. JUSTICE R.K.GAUBA

JUDGMENT

R.K.GAUBA, J (ORAL):

1. Raju Mandal aged 19 years suffered injuries in a motor vehicular accident at about 7.45 PM on 27.02.2008 in the area of Amarpali Chauraha falling within the jurisdiction of police station Sector 39, Noida (U.P.), to which he succumbed on the same day. His parents (the appellants) brought a claim petition seeking compensation under Section 163A of Motor Vehicles Act, 1988 (MV Act) before the Motor Accident Claims Tribunal (the Tribunal) in Delhi. Noticeably, the bus bearing registration No.DL 1PB 8777 which according to their case was involved in the accident leading to the fatal injuries suffered by Raju Mandal is owned by the first respondent and was driven on the relevant date and time by the second respondent, it having been insured against

third party risk with the third respondent for the relevant period. The first and second respondents, upon notice, filed a joint written statement denying involvement of the bus in the accident. The third respondent in its written statement also adopted the same defence, additionally taking the plea that no liability could be fastened on it since terms and conditions of the insurance policy had been contravened, referring in this context to the requirement of a valid and effective driving licence and permit.

2. The Tribunal held inquiry in the course of which the first appellant examined himself on the strength of his affidavit (Ex.PW1/A) mainly to prove the factum of relationship, death, status and loss of dependency. The claimants also examined Parikshan Mandal (PW2) brother-in-law of the deceased Raju Mandal on the basis of his affidavit (Ex.PW2/A). In addition, the claimants submitted certified copies of the first information report (FIR) No.68/2008 registered in the local police station of Sector 39, Noida, U.P. on 28.02.2008 for offences punishable under Sections 279 and 304-A of Indian Penal Code, 1860 (IPC) based on the statement of Parikshan Mandal (PW2) and connected documents including post mortem report, copy of the certificate of registration of the bus, proof of identity etc. The claimants made several attempts to call the Investigating Officer of the said FIR to examine him so as to bring on record the evidence gathered during the investigation but the presence of Investigating Officer could not be secured in spite of the processes being sent even through Senior Superintendent of Police. The proceedings recorded by the Tribunal show that since the claimants were unable to get the processes served so as to enforce the attendance of the Investigating officer of the FIR, in the opinion of the Tribunal

sufficient time having been given, the opportunity for evidence was closed.

3. The Tribunal, by judgment dated 21.03.2014, held that the claimants had not been able to prove the involvement of the bus in the accident leading to the death of Raju Mandal. The relevant part of the discussion on this subject appears in (paras 13 to 18 of) the impugned judgment which must be quoted in *extenso* :

“13. Regarding the accident PW1 in his affidavit Ex.PW1/A had deposed that his son met with an accident on 27.2.2008 with Bus NO.DL-1PB-8777 and died. During cross-examination PW1 stated that he had not seen the accident. Thus PW1 had not witnessed the accident taking place. PW2 was examined as an eye-witness of the accident and had deposed that on 27.2.2008 at about 7.45 p.m. he along with his brother in law Shri Raju Mandal was going from Delhi to Noida in Bus No.DL-1 PB-8777. When the bus reached Amarpali Chauraha, his brother in law was getting down from the bus when the driver with a jerk drove away the bus as a result of which his brother in law fell down and came under the wheel of the bus. He stated that the driver of the bus ran away from the spot. He took Raju Mandal to Government Hospital, Nithari where the doctors declared him dead. During cross-examination PW2 was cross-examined regarding his residence and he admitted that he had no proof of residence/ stay at the address i.e. Sector-94, jhuggi near Shamshaan Ghat, Noida, District Gautam Budh Nagar. He denied the suggestion that he had never stayed/ resided at the said address and that is why he could not produce any proof of residence of the said address. He stated that he had not submitted any proof of residence/ working of Raju Mandal which could show that Raju Mandal was working in Delhi or residing in Delhi. He admitted that at the time of accident he had not furnished any address of the deceased Raju which showed his residence at Delhi. However nothing much turns on that as the deceased could have

been travelling from any place to any other place and it cannot be disputed that the post mortem of the deceased had been conducted at Hospital, District Gautam Budh Nagar.

14. PW2 was also cross-examined on not revealing his name and address to the doctor who attended the deceased and not lodging the FIR the same day and during cross-examination PW2 stated that he had not mentioned his name and address to the doctor who attended the deceased Raju for the first time in the hospital. He could not tell the name of the hospital to which the deceased Raju was removed. He had not informed the police on 27.2.2008. He denied the suggestion that since he was not with the deceased on 27.2.2008 therefore he had not informed the police regarding the accident on the same day or that he had not removed the deceased Raju to the hospital just after the accident. He denied the suggestion that the deceased Raju was removed to the hospital by the police and he was deposing falsely being the relative of the deceased. He admitted that FIR in the present case was got registered by him on the next day of the accident. He denied the suggestion that he had not lodged the FIR on the date of accident itself because he was not with the deceased or that he had not witnessed the accident. Thus PW2 stated that he had not mentioned his name and address to the doctor who attended the deceased for the first time in the hospital but more importantly he could not even tell the name of the hospital to which the deceased was removed. Moreover the accident had taken place on 27.2.2008 and the FIR was got registered only on 28.2.2008 and no explanation has been put forth by PW2 for getting the FIR registered the next day.

15. Further during cross-examination PW2 stated that he had noted the number of the bus himself as he was going with the deceased. He stated that after the accident he took him to the hospital. He stated that he could not identify the driver then as the bus had left the spot. Thus PW2 could not identify the driver at the time of his cross-examination. PW2 denied the suggestion that he never worked or resided

at Delhi. PW2 stated that he had proceeded from Noida to Delhi at 10 a.m. on 27.2.2008 and reached Delhi at 1.00p.m. and remained In Delhi upto 4.00 p.m. He could not tell what was the route number of the bus which they had boarded from Delhi to Noida. He stated that first of all he took the bus from NT Gate upto Apollo and thereafter he changed the bus for Noida. He admitted that he had not mentioned the route number of the bus in which they had travelled from Apollo to Noida. He stated that he had never enquired about the fact that the bus in question was being driven by the respondent on route No.460 from Badarpur to Minto Bridge and there was no occasion for the driver to take the bus from Delhi to Noida. He admitted that he had never enquired whether the bus in question may go to Delhi to Noida or not. He denied the suggestion that the bus in question had not gone to Noida as the said bus was not permitted to go to Noida as per its permit as the said bus was being run under STA permit. He stated that he had not given any travelling ticket to the police regarding their travel in the bus in question. He denied the suggestion that the alleged accident was never caused by the bus of respondents which was in question. He denied the suggestion that since he had not travelled in the bus in question of the respondent that is why he had not produced the travelling ticket of the bus in question before the police. He denied the suggestion that the deceased may have travelled in the bus in question in Delhi on 27.2.2008 or that since he was not with the deceased he found the ticket of the bus in question in the pocket of the deceased on the basis of which he had lodged the present false FIR with the Noida police involving the bus in question without verifying the facts that the said bus could not go to Noida from Delhi as per its permit. He denied the suggestion that since he was not with the deceased at the time of the accident therefore he could not see the actual offending vehicle or that he had given the number of the bus in question falsely because he could not get the particulars of the actual offending bus which had actually caused the accident or that he was deposing falsely being the relative of the deceased.

16. *It is thus seen that PW2 could not even tell what was the route number of the bus which they had boarded from Delhi to Noida and he admitted that he had never enquired whether the bus in question may go to Delhi to Noida or not. He had also not given any travelling ticket to the police regarding their travel in the bus in question. A suggestion was put to PW2 that the deceased may have travelled In the bus in question in Delhi on 27.2.2008 or that since he was not with the deceased he found the ticket of the bus in question in the pocket of the deceased on the basis of which he had lodged the present false FIR with the Noida police which he denied but it is significant that PW2 had neither lodged the FIR the same day, nor could he tell the name of the hospital to which the deceased was removed, nor could he identify the driver, nor could he tell the route number of the bus which he and the deceased had allegedly taken nor he had given the travelling ticket to the police. All this casts doubt on the presence of PW2 with the deceased at the time of the accident.*

17. *During cross-examination RW1 stated that he is a driver by profession. He stated that he was employed by Manish Kakkar, owner of the bus. The bus plied on route No.460 from Badarpur border to Minto Road. He stated that there were two drivers who were operating the said bus. Other driver was Vijay. He stated that the driver Vijay drove the bus till 3.30 p.m. and then he took over the vehicle and last trip ended at 9.30 p.m. His further cross was deferred. Though the cross-examination of RW1 could not be completed it has been the consistent stand of the respondents that the bus in question was not involved in the accident. It would be argued on behalf of the petitioners that this being a petition u/s. 163A MV Act no rashness/negligence is to be proved on the part of the driver of the offending vehicle. It is true that it is sufficient for grant of compensation u/s. 163A MV Act that there is an accident involving a motor vehicle and as a result of such accident death or permanent disability results to the victim. In the instant case it cannot be disputed that death had resulted and the post mortem report in respect of the deceased is Ex.PW1/2. However it has been specifically*

disputed by the respondents that the bus in question was involved in the accident and it would be essential to show that the accident was involving the bus in question in order to fix any liability on the respondents.

18. The petitioners would then argue that once the number of bus in question was mentioned in the FIR nothing further needs to be shown. However that would not be so in the instant case as the involvement of the bus in question is specifically disputed and further the final report filed by the police is on record and in fact the attested copy of the same was placed on record by the petitioners. As per the same the bus bearing No.DL-1 PB-8777 was found not to have come towards Noida. It was further mentioned that the last round of the bus started from Badarpur border at 19.56 and it reached Minto Road at 21.36 and that the accident was not found to have been committed by the said bus. Once the final report filed by the police is on record the same cannot be ignored. Moreover if the bus had started from Badarpur border at 19.56 there would have been no occasion for it to be at Noida at about 7.45 p.m. i.e. the time of the alleged accident nor would it have been possible for the bus to be at Noida and thereafter reach Badarpur border in time. The copy of the permit and the time table and route of the bus and documents of DTC are also on record though they were not proved. However even otherwise when as per the final report of the police the bus was not found involved in the accident and there are material discrepancies in the testimony of PW2 it cannot be said that the deceased died in an accident involving bus bearing No.DL-1PB-8777.”

4. Having heard both sides at length, this Court finds substance in the grievance of the appellants (claimants) that the approach of the Tribunal was not correct. The evidence of PW2 has been disbelieved because he did not lodge the FIR on the same day as of the accident and also for the reasons that he was unable to identify the driver or specify the route number of the bus. It was also noted by the Tribunal that the

witness though claiming that he was travelling with the deceased in the bus, was unable to produce the travelling ticket against which he would have been authorized to be a passenger in the bus. Taking note of the copy of the permit, time table and route of the bus and the other documents connected thereto, the Tribunal concluded that there was no occasion for the bus to be at Noida at the stated time for the accident to have occurred.

5. The FIR shows that it was registered on the basis of the statement of PW2 who affirmed that he was travelling with the deceased in the bus at the relevant point of time. He mentioned the particulars of bus and also narrated the negligent manner in which it was driven by its driver, such conduct having led to the deceased losing balance and coming under the wheels of the vehicle. Delay in the registration of FIR, in the facts and circumstances of the case, and also having regard to the strata of society from which the parties in question come, cannot be attributed to neglect on the part of PW2. The evidence on record clearly shows that Raju Mandal had suffered injuries which, in absence of any other theory being propounded, would have occurred in a motor vehicular accident. At least this is what is corroborated by the post mortem report. The injuries suffered in such accident would be on account of an event that would ordinarily have occurred at a public place. It is clear from the material on record that the victim was taken to the hospital. If it were so, the delay in registration of the FIR, if it is of some consequence, required to be explained by the local police rather than by PW2.

6. The deposition in judicial proceedings is not a test of memory. It is inconsequential that PW2 was unable to recall such particulars as

route number of the bus. It was not of any import that he was unable to identify the driver of the bus. The driver was not subjected to any identification parade. It has to be borne in mind that the test in such proceedings as at hand is of preponderance of probabilities rather than proof beyond all reasonable doubts. It was unfair to draw adverse inferences on the basis of permit or documents depicting the time table or route of bus, particularly when such material had not been proved by either side.

7. The Tribunal seems to have been persuaded to hold against the case of the claimants also on account of closure report having been submitted by the local police under Section 173 of the Code of Criminal Procedure, 1973 with conclusion that sufficient evidence could not be gathered to prove the involvement of the bus in the accident. Such conclusions of the investigating police would undoubtedly be of import and significant to test the veracity of the eye witness examined by the claimants but not without the material on which the said impressions were gathered by the investigating officer. The evidence on which the Investigating Officer reached such inferences has not been shared with the Tribunal. No effort was made by the respondents, including the insurance company which only is now resisting the appeal, the others having suffered these proceedings *ex parte*, to bring on record the material which would render the word of PW2 incredible.

8. In above facts and circumstances, the conclusions reached by the Tribunal to above effect cannot be upheld. There was no reason why the evidence of PW2 should have been disbelieved.

9. In above circumstances, the appeal is allowed. The impugned judgment is set aside. It is held that the claimants have proved the

involvement of the bus bearing registration number DL 1PB 8777 in the accident resulting in death of Raju Mandal.

10. Thus, the matter is remitted to the Tribunal for further inquiry to address the issue of compensation that deserves to be awarded in the present case. The parties are directed to appear before the Tribunal for further proceedings in accordance with law on 08.04.2016.

11. Though the claimants have already led some evidence with regard to the loss of dependency and other factors relevant for computation of compensation, the Tribunal will ascertain, and if so chosen, grant further opportunity to the claimants to such effect. Needless to add, the respondents, including the insurance company, will also be entitled to lead evidence in rebuttal.

12. The appeal is disposed of in above terms.

13. Tribunal's record be returned.

R.K. GAUBA
(JUDGE)

FEBRUARY 11, 2016
VLD