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

Date of decision: November 16, 2016

+ **MAC.APP. 937/2014 & C.M.No. 17297/2014**

TATA AIG GENERAL INSURANCE CO LTD. Appellant

Through: Ms. Shanta Devi Raman &
Mr. Arihant Jain, Advocates

Versus

ANITA & ORS. Respondents

Through: Mr. Nishant Anand & Ms. Shilpa
Dewan, Advocates

CORAM:
HON'BLE MR. JUSTICE SUNIL GAUR

JUDGMENT
ORAL

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1. Impugned Award of 24th July, 2014 grants compensation of ₹55,19,926/- with interest to respondents-claimants on account of death of one-*Anil Kumar*, who was driving motor cycle on 29th October, 2010 at *Dhaura Kuan* under pass towards AIIMS side and was hit by a car at noon time. Due to the injuries sustained, the injured had died on the spot although he was removed to the Army Hospital near *Dhaura Kuan*. While relying upon the evidence of the eye witness- *Pawan Kumar*, who happens to be the brother of the deceased, and other evidence, learned Motor Accident Claims Tribunal has granted compensation, which is under challenge in this appeal by insurer on the ground that negligence of

the offending vehicle i.e. the car does not stand proved.

2. Learned counsel for appellant draws the attention of this Court to the deposition of eye witness- *Pawan Kumar* to point out that in the chief examination, he has stated that his statement was not recorded by the police whereas in the cross-examination, he has stated that his statement was not recorded by the police and the reason given for it, is that the police did not reach the spot after the accident. It is pointed out by appellant's counsel that the statement of eye witness was recorded after 4½ months of the accident in question. Attention of this Court is drawn to the deposition of SI Chandan Singh (*PW-3*), who had stated that he had recorded the statement of the eye witness on 15th March, 2012 and supplementary statement was recorded on 28th April, 2012. It is pointed out by appellant's counsel that due to inadvertence, the year of 2012 is mentioned but it was recorded in the year 2011.

3. Attention of this Court is also drawn by learned counsel for appellant to the copy of '*Cancelled Case File Register*' to show that the motor cycle driven by deceased had met with an accident on 29th October, 2010 at about 12:00 noon with a swift car, which was driven by a lady whereas the case set up herein is that the offending car was driven by respondent No.5- *Harbhajan Singh*. Thus, it is submitted that in view of the aforesaid contradiction, the deposition of eye witness- *Pawan Kumar* cannot be relied upon and the learned Tribunal has erred in doing so and thus, appellant is not liable to pay the compensation awarded. Reliance is placed upon a decision of a Coordinate Bench of this Court in *New India Assurance Company Limited Vs. Harish Mishra & ors.* III (2015) ACC435 (Del.) to submit that in a case where eye witness was not

examined, the matter was remanded back to the Tribunal.

4. During the course of hearing, learned counsel for appellant has drawn the attention of this Court to the copy of FIR pertaining to the accident in question, to point out that no eye witness was there. It is pointed out by appellant's counsel that even in the hospital, the police did not find any eye witness. Thus, it is submitted that the evidence regarding offending vehicle being rashly and negligently driven is utterly lacking and so, the impugned Award qua appellant deserves to be set aside.

5. Learned counsel for respondents-claimants supports the impugned Award and submits that the entry in the '*Cancelled Case file Register*' is not duly proved on record and the evidence of SI Chandan Singh (PW-3) cannot be read to mean that the accident was not witnessed by real brother of the deceased, who was travelling on another vehicle at the time of accident, as it is up to the police when they choose to record the statement of witnesses and such a witness has no control over it. It is pointed out by respondent's counsel that the contents of the FIR referred to by learned counsel for appellant cannot persuade this Court to reach the conclusion that eye witness was not present at the time of accident because there was a time gap between police reaching the spot and eye witness immediately removing injured to the hospital.

6. It is submitted by learned counsel for respondents-claimants that there is no contradiction in the chief examination and cross-examination of eye witness, as the utterance in the cross-examination regarding his statement not being recorded by the police at the spot and it cannot be read out of context and has to be read in continuation with the last sentence, wherein this witness had stated that police did not reach the

spot after the accident. It is further submitted that a reasonable inference can be drawn by police that statement of this eye witness was not recorded by police at the spot but was later on recorded. It is next submitted that regarding manner of taking place of the accident, there is no anomaly in the evidence of eye witness to render it unreliable and the decision in *Harish Mishra (Supra)*, relied upon by appellant's counsel is of no avail, as in the said decision, eye witness was not examined whereas in the instant case, eye witness has been examined and so, this appeal deserves dismissal.

7. Upon hearing and on perusal of the impugned Award, evidence led and the decision cited, I find that the extract of '*Cancelled Case file Register*' is not duly proved on record and so, it cannot be looked into, to demolish the case of eye witness. In any case, presence of eye witness at the spot cannot be ruled out merely because his name does figure in the FIR or concerned police official in his evidence has not stated anything about the presence of eye witness. Such a view is being taken because the police normally reaches the spot after the eye witness takes the injured to the hospital and it has so happened in the instant case. Such a lapse on the part of police official cannot be made the basis to discard the evidence of the eye witness- *Pawan Kumar* because in the chief examination, this witness has stated that his statement was recorded by the police. It is quite apparent from the cross-examination of eye-witness-*Pawan Kumar* that his statement was not recorded by the police at the spot but it cannot be said that his statement was not subsequently recorded. In any case, the statement of eye witness recorded in the criminal proceedings cannot be transposed in the

proceedings under the Motor Vehicles Act, 1988. The entry in the '*Cancelled Case file Register*' is a secondary evidence and in the absence of primary evidence, i.e. of Deepak s/o Suresh Kumar, it cannot be relied upon to conclude that real brother of deceased had not witnessed this accident. The decision in *Harish Mishra (Supra)* is of no assistance to the case of appellant because in the said case, eye witness was not examined whereas in the instant case, the evidence of the eye witness has been recorded by the learned Motor Accident Claims Tribunal.

8. In the considered opinion of this Court, the finding of negligence returned by the Motor Accident Claims Tribunal is well justified in the face of evidence on record. Finding no substance in this appeal, it is dismissed.

9. The appeal and the application are accordingly disposed of.

(SUNIL GAUR)
JUDGE

NOVEMBER 16, 2016

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