

**IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE**

PRESENT:

THE HON'BLE JUSTICE BIVAS PATTANAYAK

FMA 2948 of 2016

Gosai Konra & Ors.

versus

The HDFC ERGO General Insurance Company Ltd. & Anr.

For the Appellants- : Mr. Uday Shankar Chattopadhyay, Advocate
Claimants : Mr. Suman Sankar Chattopadhyay, Advocate
Ms. Trisha Rakshit, Advocate
Mr. Santanu Maji, Advocate
Mr. Gourab Das, Advocate

For the Respondent No.1- : Mr. Rajesh Singh, Advocate
Insurance Company

Heard on : 17.01.2023, 31.01.2023

Judgment on : 03.10.2023

Bivas Pattanayak, J. :-

1. This appeal is preferred against the judgment and award dated 30th June, 2015 passed by learned Additional District Judge-cum-Judge, Motor Accident Claims Tribunal, Fast Track, 2nd Court, Burdwan in M.A.C. Case No. 21 of 2014 dismissing the claim application of the claimants filed under Section 163A of the Motor Vehicles Act, 1988.

2. The brief fact of the case is that on 15th January, 2014 at about 5:00 P.M. while the victim was standing on the *kacha* portion of the road at that time the offending vehicle bearing registration no. WB 41G-5085 (tractor) in a rash and negligent manner dashed the victim which resulted in severe injuries on her person and consequent death of the victim on the spot. On account of sudden demise of the victim, the claimants being sons and

daughter filed application for compensation of Rs. 3,00,000/- under Section 163A of the Motor Vehicles Act, 1988.

3. The claimants in order to establish their case examined two witnesses and produced documents which have been marked as **Exhibits-1 to 9** respectively.

4. The respondent no.1-insurance company did not adduce any evidence.

5. In spite of service of notice of appeal, none appeared on behalf of the respondent no.2-owner of the offending vehicle.

6. Upon considering the materials on record and the evidence adduced on behalf of the claimants, learned Tribunal dismissed the claim application of the claimants filed under Section 163A of the Motor Vehicles Act, 1988.

7. Being aggrieved by and dissatisfied with the impugned judgment and award of the learned Tribunal, the claimants have preferred the present appeal.

8. Mr. Uday Shankar Chattopadhyay, learned advocate for the appellants-claimants submitted that the learned Tribunal has erred in holding that the offending vehicle was not involved in the accident and failed to consider the evidence of appellant no.1 and one eyewitness to the occurrence, both of whom deposed of the involvement of the offending vehicle. The insurance company did not adduce any evidence to disprove the case of the claimants of the involvement of the offending vehicle in spite of taking leave under Section 170 of the Motor Vehicles Act. Once such recourse is not taken by the insurance company as aforesaid, the Tribunal is left with no other alternative but to accept the contentions of the claimants of the involvement of the offending vehicle. To buttress his

contention, he relied on the decision of this Court passed in ***The New India Assurance Co. Ltd. versus Mita Samanta & Ors.***¹.

So far as the quantum is concerned, Mr. Chattopadhyay, learned advocate for the appellants-claimants submitted that the income of the victim has been claimed at Rs. 3,300/- per month by selling vegetables and such claim has been supported by the oral evidence of P.W.1, son of the deceased-victim. Further since the victim at the time of accident had three dependents, the deduction towards personal and living expenses of the deceased should be 1/3rd. He further submitted that the deceased at the time of accident was 53 years of age and was self-employed and as such the claimants are entitled to an amount equivalent to 10% of the annual income of the victim towards future prospect. In light of his aforesaid submissions, he prayed for setting aside the order of dismissal of the learned Tribunal and granting compensation in favour of the appellants-claimants.

9. In reply to the contentions raised on behalf of the appellants-claimants, Mr. Rajesh Singh, learned advocate for respondent no.1-insurance company submitted that P.W.1, Gosai Konra (informant) stated in the written complaint that he could not see the number of the offending vehicle which fled away from the place of occurrence since they were otherwise busy. Such aspect clearly shows that he was present near the scene of occurrence. But curiously he denied to be an eyewitness to the occurrence in his evidence, which makes him an unreliable witness. In cross-examination, the witness P.W.1 stated that on the following date of

¹ (2010) 1 WBLR (Cal) 137

accident, the number of the vehicle was made known to him by Bapi Konra and Dhananjay Konra. However, the number of the vehicle was not mentioned in the FIR lodged on the subsequent date. The alleged offending vehicle was seized after one and a half months of the accident. The aforesaid fact clearly depicts of implantation of the vehicle for getting compensation. There is no explanation provided by the claimants in not disclosing the vehicle number which was available to them prior to lodging of the written complaint. Relying on the decision of the Hon'ble Supreme Court passed in **Anil and Ors. versus New India Assurance Co. Ltd. and Ors.**², he submitted that where the facts indicate that the case is brazenly false, the compensation should not be granted in favour of the claimants. In light of the aforesaid, he submitted that the learned Tribunal has rightly dismissed the claim application of the claimants which should be affirmed in the interest of justice.

10. Having heard learned advocates for the respective parties, the only issue that has fallen for consideration is whether the offending vehicle on the relevant date was involvement in accident or not.

11. In order to establish the involvement of the vehicle, the claimants have examined claimant no.1, Gosai Konra who is the FIR maker and one eyewitness namely Dhananjay Konra. Although P.W.1 Gosai Konra in his evidence-in-chief stated of involvement of vehicle but both in his evidence-in-chief as well as in cross-examination he has deposed that he did not witness the accident. Further there is contradiction in the evidence of P.W.1 (informant) vis-à-vis his statement in FIR relating to his presence

² (2018) 2 SCC 482

near the scene of occurrence which makes him an unreliable witness. Hence, his evidence with regard to involvement of the offending vehicle is inconsequential. In his cross-examination, the witness stated that on the following date of accident, he came to know of the number of the offending vehicle from Bapi Konra and Dhananjay Konra prior to lodging of the FIR. Further he deposed that Bapi Konra and Dhananjay Konra were the eyewitness to the occurrence and wrote number of the offending vehicle in piece of paper which was shown to him. Furthermore he deposed in cross-examination that at the time of lodging of FIR, he told the number of the offending vehicle to the scribe. Furthermore, after the written complaint was drafted, the same was read over and explained to him and after understanding the contents thereof, he put his signature. From the aforesaid evidence, it is quite clear that the informant (P.W.1) had the knowledge of the number of the offending vehicle prior to lodging of the FIR, which was provided to him by Bapi Konra and Dhananjay Konra, who, as per the informant, were witness to the occurrence. The witness disclosed the number of the offending vehicle to the scribe who after drafting has narrated the contents of the written complaint. It is pertinent to note that the written complaint does not disclose the number of the alleged offending vehicle. There is no evidence that the informant, after the contents of the written complaint was read over and explained to him, raised any objection to the contents or asked the scribe to incorporate the number of the offending vehicle in the written complaint. It is also not the case of the claimants that the scribe on his own drafted the written complaint. The evidence of the witness is silent as to why the number of

the offending vehicle is not appearing in the FIR if at all the same was known to him and he told the number to the scribe prior to lodging of the FIR. Thus, it is found that no explanation has been provided by the informant for not incorporating the number of the offending vehicle in the written complaint when, as per the evidence of P.W.1 (informant), the same was within his knowledge prior to lodging of the FIR. P.W.2 Dhananjay Konra though deposed of the involvement of the offending vehicle in examination-in-chief, however, this witness never stated in his evidence that he wrote the number of the offending vehicle and showed it to P.W.1 (informant) which has been claimed by P.W.1. P.W.1 never stated in the written complaint that this witness informed him of the involvement of the vehicle. This makes the presence of the witness near the scene of occurrence as well as his evidence of involvement of the vehicle doubtful. In cross-examination, the witness stated that the number plate of the offending vehicle was white on which black number was written. The nature of the number plate stated by the witness in general pertains to private vehicle. Such aspect raises doubt so far as the witnessing of the accident by the witness is concerned. Further it is relevant to note that the offending vehicle has been seized after one and a half months of the accident which also raises suspicion with regard to involvement of the vehicle in the facts and circumstances of this case.

12. Relying on the decision of this Court passed in *Mita Samanta (supra)*, learned advocate for appellants-claimants tried to impress upon the Court that since upon taking leave to contest on all merits under Section 170 of the Motor Vehicles Act the insurance company did not adduce any

evidence of the owner or the driver of the offending vehicle regarding non-involvement of the vehicle, the version of the claimants of the involvement of the offending vehicle is to be accepted. In *Mita Samanta (supra)*, there were evidence of the eyewitness which was found to reliable. There was no plausible reason found to disbelieve the version of the eyewitness. Reverting back to the fact of the case, it is already found that evidence of P.W.2, Dhananjay Konra, who claimed to be an eyewitness to the occurrence, is unreliable. Thus, the decision of *Mita Samanta (supra)* is distinguishable in the facts. I find substance in the submissions of Mr. Singh, learned for respondent no.1-insurance company relying on *Anil (supra)*.

13. In view of the above, the appeal stands dismissed. The impugned order of dismissal of the claim application passed by the learned Tribunal is affirmed. No order as to costs.

14. All connected applications, if any, stand disposed of.

15. Interim order, if any, stands vacated.

16. Let a copy of this judgment be forwarded to the learned Tribunal along with lower court records for information.

17. Urgent photostat certified copy of this judgment, if applied for, be given to the parties upon compliance of necessary legal formalities.

(Bivas Pattanayak, J.)