

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

**PRESENT:
THE HON'BLE JUSTICE BIVAS PATTANAYAK**

**FMA 2078 of 2014
CAN 2 of 2014 (Old No. CAN 11847 of 2014)
National Insurance Company Limited
versus
Nirmalya Chakraborty & Anr.**

For the Appellant-Insurance Company : Mr. Rajesh Singh, Advocate

For the Respondent No.1- Claimant : Mr. Jayanta Kumar Mandal, Advocate

Heard on : 13.03.2023

Judgment on : 08.12.2023

Bivas Pattanayak, J. :-

1. This appeal is preferred against the judgment and award dated 27th January, 2014 passed by learned Additional District Judge-cum-Judge, Motor Accident Claims Tribunal, Fast Track, 1st Court, Paschim Medinipur in M.A.C. Case No. 310 of 2012 granting compensation of Rs.1,50,000/- together with interest in favour of the claimant under Section 166 of the Motor Vehicles Act, 1988.

2. The brief fact of the case is that on 28th May, 2012 at about 6:30 P.M. the claimant along with his family members including his minor son (victim) was proceeding towards Midnapore from Garhbeta in a car bearing registration no. WB-06/F-8634 (Tata Indigo) through NH-60 and near Ledapole under P.S. Garhbeta, the vehicle was stopped beside the road and the claimant along with the other family members got down from the

said car and started talking to each other standing in front of their car. At that time, the offending vehicle bearing registration no. WB-34/Z-5225 (Maruti van) coming from Midnapore side and going towards Garhbeta side in rash and negligent manner dashed the minor son of the claimant as well as the Tata Indigo car. As a result of the aforesaid accident, the minor victim sustained grievous bleeding injury on his head and body and he died on spot. On account of sudden demise of the victim, the claimant being the father of the minor victim filed application for compensation of Rs.2,00,000/- under Section 166 of the Motor Vehicles Act, 1988.

3. The claimant in order to establish his case examined himself and produced documents which have been marked as **Exhibits-1** to **7** respectively.

4. The appellant-insurance company also adduced the evidence of two witnesses and produced documents which have been marked as **Exhibits-A** and **B** respectively.

5. The owner of the offending vehicle though appeared before the learned Tribunal and filed his written statement but subsequently did not contest the claim application and the case was proceeded *ex parte* against him. In the present appeal despite service of notice of appeal, the owner of the offending vehicle did not appear to contest.

6. Upon considering the materials on record and the evidence adduced on behalf of respective parties, learned Tribunal granted compensation of Rs.1,50,000/- together with interest in favour of the claimant under Section 166 of the Motor Vehicles Act, 1988.

7. Being aggrieved by and dissatisfied with the impugned judgment and award of the learned Tribunal, the insurance company has preferred the present appeal.

8. Mr. Rajesh Singh, learned advocate for appellant-insurance company submitted that the alleged offending vehicle, which is a Maruti van, was not involved in the accident and it was subsequently implanted in the case to obtain illegal and unlawful benefits from the insurance company. From the materials on record, it would suffice that the entire front portion of the Tata Indigo car was badly damaged but curious enough only the front steel bumper of the alleged Maruti van was pushed in. He drew the attention of the Court to the fact that if at all the Maruti van was involved in the accident in the manner alleged by the claimant, then the same would also have been damaged to a large extent. He further submitted that there is no independent eyewitness to the occurrence examined by the claimant. The only witness is the claimant who is an interested witness. Moreover, the claimant in his evidence has deliberately avoided to disclose the name of his driver which clearly raises doubt in his evidence. He further indicated that the mother of the claimant, who also died in the said accident, was a councilor of Medinipur Municipality and the news of the accident was published in the local newspaper as well as the television channels which reported that the accident has taken place while the Tata Indigo car hit a roadside tree and, therefore, the involvement of the Maruti van as alleged is far-fetched. He further submitted that there has been delay of 33 days in lodging the FIR which in the facts and circumstances of the case is indicating that the alleged offending vehicle was arranged in the meantime

to be implanted in the case. Moreover, neither the owner nor the driver of the alleged offending vehicle intimated the police of such occurrence as per the requirement of Section 134 of the Motor Vehicles Act, 1988. He further relying on the decision of the Hon'ble Supreme Court passed in ***Safiq Ahmad versus ICICI Lombard General Insurance Co. Ltd. and Others***¹ submitted that the Hon'ble Court taking cognizance of the fact of fake claim cases being filed for making unlawful gains, has set up SIT for making investigation. In light of his aforesaid submissions, he prayed for dismissal of the claim application by setting aside the impugned judgment and award of the learned Tribunal.

9. In reply to the contentions raised on behalf of the appellant-insurance company, Mr. Jayanta Kumar Mandal, learned advocate for respondent no.1-claimant submitted that there is no material on record to show that on the relevant date the vehicle Tata Indigo car in which the claimant and his family members were travelling hit a roadside tree. No local inspection commission was held to ascertain the damage to any roadside tree by the Tata Indigo car and, therefore, such argument advanced on behalf of the insurance company is short of merit. He further relying on the decisions of the Hon'ble Supreme Court passed in ***Sunita and Others versus Rajasthan State Road Transport Corporation and Another***² and in ***Anita Sharma & Ors. versus The New India Assurance Co. Ltd. & Anr.***³ submitted that the standard of proof in motor accident claim cases should be one of preponderance of probabilities rather than beyond reasonable doubt. The role of Courts is not to find fault with non-

¹ 2021 (4) T.A.C. 682 (S.C.)

² 2019 (1) T.A.C. 710 (S.C.)

³ 2021 SAR (Civ) 1

examination of some best eyewitnesses but instead analyse the materials placed on record by the parties to ascertain whether the claimant's version is more likely than not true. He further submitted that P.W.1 (claimant), who was injured in the said accident, had categorically deposed of the involvement of the vehicle which is also supported by the documents namely the FIR and chargesheet and such evidence of the claimant of the involvement of the offending vehicle has not been disproved by the insurance company by adducing the evidence of the driver or the owner of the offending vehicle in spite of taking leave under Section 170 of the Motor Vehicles Act, 1988. Therefore, the version of the claimant of involvement of the offending vehicle is to be accepted. To buttress his contention, he relied on the decision of this Court passed in ***The New India Assurance Co. Ltd. versus Mita Samanta and Ors.***⁴. In light of his aforesaid submissions, he prayed that the impugned judgment and award of the learned Tribunal should be affirmed in the interest of justice.

10. Having heard learned advocates for respective parties, the only issue which has fallen for consideration is whether the offending vehicle was involved in the said accident or not.

11. Before proceeding to deal with issue involved in the present appeal, I concur with the submissions of Mr. Mandal, learned advocate for respondent no.1-claimant relying on *Sunita (supra)* and *Anita Sharma (supra)* that standard of proof beyond reasonable doubt cannot be applied while dealing with motor accident cases instead one of preponderance of probabilities is to be considered.

⁴ (2010) 1 WBLR (Cal) 137

11.1. In order to appreciate the aforesaid issue, it would be appropriate to relate to the pleadings of the respective parties with regard to the involvement of the vehicle. It is the claimant's case that on 28th May, 2012 at about 6:30 P.M. the claimant along with his family members including the victim (minor) was proceeding towards Midnapore from Garhbeta in a car bearing registration no. WB-06/F-8634 (Tata Indigo) from Garhbeta side through NH-60 and near Ledapole under P.S. Garhbeta, the vehicle was stopped beside the road and the petitioner along with the other family members got down from the said car and started talking to each other standing in front of their car. At that time, the offending vehicle bearing registration no. WB-34/Z-5225 (Maruti van) coming from Midnapore side and going towards Garhbeta side in rash and negligent manner dashed the victim as well as the Tata Indigo car. *Per contra*, the insurance company in its written statement has specifically pleaded that on the relevant date of accident, the vehicle bearing registration no. WB-06/F-8634 in which the claimant and his family member were travelling was driven in rash and negligent manner and it hit a roadside tree resulting in death of three persons on the spot and damage to the vehicle. The alleged Maruti van bearing registration no. WB-34/Z-5225 was never involved in the said accident and the case has been fabricated to make illegal gains from the insurance company. In order to establish the involvement of the vehicle, the claimant has adduced his evidence. The insurance company in order to disprove the involvement of the vehicle examined two witnesses namely of O.P.W.1 Mr. Ram Sundar Samui, Motor Vehicle Inspector (Technical) and O.P.W.2 S.I. Bikash Kumar Sardar.

11.2. At the outset, it is found that there are no evidence on record to suggest that the Tata Indigo car in which the claimant and his family members were travelling on the relevant date hit a roadside tree resulting in death of the victim. Be that as it may, the question of involvement of alleged offending Maruti van requires to be analysed on the basis of materials on record to ascertain whether the claimant's version is more likely or not.

11.3. P.W.1 Nirmalya Chakraborty (claimant) in his evidence-in-chief stated that on the relevant date he and his family member got down from the Tata Indigo car in which they were travelling and while they were talking to each other on Raigange-Midnapore Road, the offending Maruti van bearing registration WB-34/Z-5225 with a very high speed dashed the stationary Tata Indigo car. In his cross-examination, he deposed that after the accident the offending Maruti van was standing at the place of accident till he lost his consciousness. There is no case made out that the offending vehicle Maruti van fled away from the place of occurrence. Be that as it may, at this juncture, it would be apposite to examine whether in the given set of facts it was possible for the Maruti van to flee away from the place of occurrence. As per the claim case, the offending Maruti van in a high speed dashed the stationary Tata Indigo car in which the claimant and his family members were travelling. O.P.W.1 Ram Sundar Samui, Motor Vehicle Inspector (Technical) deposed that on 10th January, 2013 he examined the Tata Indigo car bearing registration no. WB-06/F-8634 which was kept within the compound of Garhbeta P.S. On examination, he found that the body shell of the said Tata Indigo car having golden colour

was fully damaged and deformed. He further deposed that he found that the engine and steering system, instrument panel board, break system, air condition system, front suspension system fully damaged and were not serviceable. Battery was found damaged, wind shield glass and front door glass and head lamp were broken. Front show and radiator of the vehicle were fully damaged and deformed. He further deposed that due to such damage, the car became inoperative and was not road worthy. O.P.W.1 in his cross-examination deposed that if the said Maruti van having a steel bumper dashed the stationary vehicle, in his opinion both the vehicles shall sustain damage. It is pertinent to note that in the said accident two persons died on the spot and one person died while being shifted to the hospital and another person sustained injury. The extent of damage to the Tata Indigo vehicle and the death of several persons in the accident clearly suggest that the impact of the accident was grave. Thus, in all probability, the Maruti van, which is claimed to be involved in the accident, in such event should also be damaged to a great extent. As per the evidence of P.W.1, before losing his consciousness he found two persons standing on the opposite side of NH-60. It is of common prudence that when such a massive accident takes place on a public highway, immediately the people in and around rush and gather near the scene of occurrence. For the aforesaid reasons and in the circumstances as above, it would not be possible for the alleged Maruti van which having been damaged to a great extent and in midst of gathering of people to flee away from the scene of occurrence. O.P.W.2 S.I. Bikash Kumar Sardar deposed that after the accident the Tata Indigo car was brought to the police station on the date

of accident i.e. 28th May, 2012 with the help of recovery van. In the facts and circumstances of the case, had the Maruti van been involved in the accident, it would have been found in damaged condition near the scene of occurrence and the police would have also taken the said Maruti vehicle to the police station along with the Tata Indigo vehicle by the recovery van and would have started specific case against the driver of the offending Maruti van.

11.4. It is relevant to note that O.P.W.2 categorically stated that no specific case was started on 28th May, 2012 (i.e. date of occurrence). P.W.1 in his cross-examination deposed that he saw the registration number of the Maruti van which he informed to his father after five days of the accident. However, such registration number was never intimated to the police authorities till the F.I.R. came into existence after 33 days. Although it is trite law delay in lodging F.I.R. is not fatal to claimant's case but in the present context considering the preponderance of probabilities as above and bearing in mind the nature of a massive accident resulting in death of three persons and injury to one, the delay becomes fatal and suspicious. In all probabilities, had the alleged Maruti van been involved in the accident, the surviving family members, who lost several near and dear ones, would immediately on getting information of the offending vehicle report it to police authorities in order to bring the offending driver to books.

11.5. Further it is found that soon after lodgment of the F.I.R. the Maruti van bearing registration no. WB-34/Z-5225 was seized by the investigating agency on the date of F.I.R. at 15:25 hours. O.P.W.2, S.I. of Police, in his

evidence-in-chief deposed that the owner of the Maruti Omni brought the said vehicle to the police station and subsequently the vehicle was seized. He further deposed that the Maruti van was in running condition and was brought to the police station by driving the same. He also deposed that the Maruti van was in tip-top running condition. It is already discussed that due to the impact of the accident and the extent of the damage to the Tata Indigo car there is every possibility that the Maruti van, alleged to be involved, would also be damaged to a large extent. In such circumstances, it is quite impossible to decipher as to how the Maruti van claimed to be involved could be brought to the police station by driving on the date of lodgment of the F.I.R. itself after 33 days that too in a tip-top running condition. Mr. Mandal, learned advocate for the respondent no.1-claimant relying on the decision of the Hon'ble Supreme Court passed in ***Mangla Ram versus The Oriental Insurance Company Ltd. & Ors.***⁵ submitted that since the vehicle is seized after one month of the accident, the possibility of it having been repaired cannot be ruled out. The facts before the Hon'ble Supreme Court in *Mangla Ram (supra)* was that the offending jeep dashed a motorcycle from behind and the Mechanical Inspection Report stated only a scratch on the mudguard of the left tyre of the vehicle. The vehicle was seized after one month. Bearing in mind the above facts, the Hon'ble Court observed that the possibility of the same having been repaired in the meantime could not be ruled out. The facts involved in the cited decision is quite dissimilar to the case at hand where it is found that there is large impact of the accident on both the vehicles and due to such

⁵ 2018 SAR (Civil) 633

impact one vehicle i.e. Tata Indigo car has become totally inoperative and thus the ratio does not apply to the facts of the case. Further there is no case made out that the alleged offending Maruti van after the accident has been repaired.

11.6. It is also relevant to note that neither the owner nor the driver of the alleged offending vehicle has informed of the incident to the police when facts clearly goes to suggest that there was a massive accident.

11.7. P.W.1 in his cross-examination deposed that the vehicle belonged to their company namely *Explore Business Management* of which he is one of the directors. However, curious enough he deposed that he does not know the name of the driver of the said vehicle. Such aspect clearly shows that P.W.1 tried to suppress the name of the driver of the offending Tata Indigo car.

11.8. Bearing in mind the preponderance of probabilities and in view of the above discussion, the evidence of P.W.1, who is claimant and eyewitness to the occurrence, cannot be accepted and at the same time the involvement of the alleged Maruti van in the said accident also becomes very much doubtful.

11.9. Referring to the decision of this Court in *Mita Samanta (supra)*, Mr. Mandal, learned advocate for the respondent no.1 tried to impress upon the Court since the driver or the owner of the offending vehicle has not been examined to disprove the involvement of the offending vehicle, hence the claim of the claimant in such regard should be accepted. It is a fact that the driver or the owner of the offending vehicle has not been examined. In the cited decision, there was evidence of eyewitness of the

involvement of the vehicle which was found to be reliable whereas such reliable evidence of eyewitness is lacking in this case. Be that as it may, the role of the Courts is to analyse the materials placed on record by the parties to ascertain whether the claimant's version is acceptable on the touchstone of preponderance of probabilities. Since from the evidence on record it is palpable that the involvement of the Maruti van in the said accident is doubtful, the non-examination of the driver or the owner of the offending vehicle by the insurance company does not *ipso facto* lead to acceptance of the claimant's version regarding involvement of the alleged vehicle. There is no other independent eyewitness examined in support of the involvement of the vehicle.

11.10. Mr. Mandal, learned advocate for respondent no.1-claimant strenuously argued that the F.I.R. and the chargesheet show involvement of the Maruti van and hence the claimant's version of involvement of the vehicle should be accepted. Such argument pressed into service as above is not sustainable since F.I.R. and chargesheet are not conclusive piece of evidence (***See Kamlesh and Others versus Attar Singh and Others***⁶).

11.11. In view of the above discussion, it is found that the claimant had failed to establish the involvement of the alleged Maruti van in the said accident.

12. In the event the appeal succeeds. The impugned judgment and award of the learned Tribunal is set aside. The claim application stands dismissed. No order as to costs.

⁶ (2015) 15 SCC 364

13. The appellant-insurance company is granted liberty to withdraw the amount of Rs. 1,48,960/- deposited vide OD Challan No. 830 dated 7th July, 2014 and statutory deposit of Rs. 25,000/- vide OD Challan No. 359 dated 14th May, 2014 before the registry of this Court together with accrued interest.

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 in accordance with rules.

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.)