

9.2. 2024
item No.3
n.b.
ct. no. 551

FMA 343 of 2022
with
IA No. CAN 2 of 2023

SBI General Insurance Co. Ltd.
Vs.
Gita Roy & Ors.

Mr. Rajesh Singh,
.....for the appellant.
Mr. Krishanu Banik,
Mr. Tathagata Banik,
... for the respondents.

The instant appeal has been preferred against the Judgment and award dated January 28, 2022 passed by the learned Judge, Motor Accident Claims Tribunal, 3rd Court, Howrah in Motor Accident Claim Case No. 247 of 2018.

The learned Tribunal has allowed the claim case in favour of the claimants and directed the Insurance Company to pay compensation amounting to Rs37,79,104/- together with interest.

Being aggrieved by and dissatisfied with the said award the present appeal has been preferred by the Insurance Company.

Factum of accident

The claimant has filed the claim application; in para 23 they have stated the factum of accident as follows:

“ On 9.9.2009 at about 6.31 hours when victim Prafulla Roy was travelling by a motor cycle along with left side of road with a slow speed, at that material time one Maruti Car bearing No. WB-12C 5748 which was proceeding rashly and negligently which was coming from Dankuni side suddenly dashed the victim with a great forces and as a result the victim sustained severe injuries and subsequently died on 13.9.2018.”

Grounds of Appeal against award passed by the learned Tribunal

Learned advocate appearing on behalf of the insurance Company, Mr. Rajesh Singh submits that the sole ground of challenge before this appellant court is that the so-called vehicle bearing WB-12C 5748 was not at all involved in the alleged accident.

Secondly, the learned Tribunal has not considered the evidences adduced by the Insurance Company as O.P.W. 1 and O.P.W. 2. The learned Tribunal was also erroneous in finding that the Insurance Company has filed the written notes of argument admitting the income of the deceased.

Argument advance on behalf of the Insurance Company.

Learned advocate appearing on behalf of the Insurance Company Mr. Singh submits that the alleged accident was happened on 9.9.2018. Thereafter the victim was admitted to the Phoenix Hospital, Durgapur Express

Way on the same day at about 7.22 a.m. The victim was accompanied by Bhudeb @ Dipandar Roy, his name was appearing in the in-patient form of Phoenix Hospital the history of the injury was stated in the said admission form as patient brought unconscious following on RTA heated by Tata Sumo while patient was travelling Scooty today on 9.9.2018. Therefrom patient was shifted finally on BRMC Hospital on September 12, 2018. On September 13, 2018 the patient died. Surprisingly, on September 13, 2018 the brother of the deceased, namely, Dipankar Roy lodged a written complaint with the Chanditala P. S. stating that her elder brother was heated by a unknown vehicle. After such lodging of FIR, Chanditala P. S. case No. 392 of 2018 dated 13.9.2018 under Sections 279/304A/427 IPC was started. After completion of investigation the police has submitted charge sheet of that case vide charge sheet no.531 of 2018 under Sections 279/340A/427 IPC against the one accuse namely, Prasatn Singh son of Shark Singh, being the driver of a vehicle bearing no. WB-12C 5748.

Mr. Singh further submits that the entire case of the alleged accident would suggest that initially the fact of the case was started regarding accident of the victim by a Tata Sumo car. Subsequently, after the lodging of FIR the present Maruti Suzuki Wagon R car was implanted on the behest of the complaint with the other unscrupulous persons. He argued that from the charge-sheet it would be revealed the same de facto complainant on the next

day of filing FIR i.e on 14.9.2018 along with one eyewitness came to the Police Station and submitted a written complaint regarding the offending vehicle Maruti Wagon R registration no. WB-12C 5748. The I.O. has enclosed the same statement with CD and examined the eyewitness and recorded statement under Section 161 of the Code of Criminal Procedure.

Mr. Singh, learned advocate further argued that police case has contained two FIR one was registered on 13.9.2018 and another was registered with the I.O. on 14.9.2018. In a criminal case, where the two FIR was registered; the investigation of the police has to be done in respect first FIR. He further argued about several instances where the vehicles, which actually committed the accident had fled away, subsequently, the vehicle which was not involved the alleged accident was falsely implanted to procure money. He also argued, this type of practicing fraud upon the police prosecution as well as upon the court is rampant in the society to get or procure money from the Insurance Company. He again argued that in this case the claimant along with owner of the so-called offending vehicle and the driver were in collusion with each other to exercise framed upon court.

He further argued that learned Tribunal erroneously opined that, the Insurance Company has not adduced any evidences. On the other hand, the paper book contained the evidences of O.P.W. 1 who is the officer of the

Insurance Company and O.P. W. 2 is the investigator of the Insurance Company. He read out the entire observation of the learned Tribunal nowhere the evidences of the Insurance Company was mentioned or put any importance.

In support of his contention he cited that this court as well as Hon'ble Supreme Court in several cases where the claimant has produced the eyewitnesses and the charge sheet has been submitted by the police in support of the claimants regarding the accident, the appellate Court as well as the Hon'ble Supreme Court has disbelieved the fact of the claimant and decided the case of non-involvement of so-called offending retractor in favour of the Insurance Company.

In support of this contention he cited the observation of this in **Smt. Kalpana Ruidas & Ors. Vs. Shriram Insurance Co. Ltd. & Anr., Gosai Konra & ors. Vs. The HDFC ERGO General Insurance Co. Ltd. & Anr., Haripada Halder Vs. The New India Assurance Co. Ltd., Bajaj Allianz General Insurance Co. Ltd. Vs. Anjali Mondal, National Insurance Co. Ltd. Vs. Smt. Sandhya Rani Sau & ors., Subir Sikder Vs. New Indian Assurance Company Ltd. & Ors.**

Mr. Singh also cited and referred to decision of Hon'ble Supreme Court in **Sofia Ahmad Vs. ICICI Lombard Insurance Co. Ltd. & Ors.** wherein the Hon'ble Supreme Court has taken cognizance of a fact that a

number of fake claim cases were being filed for unlawful gain in collusion with the investigating agency and has directed to set up SIT for making proper investigation. On the basis of such argument Mr. Singh argued that in this case the vehicle was implanted in collusion with claimant, the police authority as well as the owner and driver of offending vehicle. So, in this case the award passed by the learned Tribunal need be set aside.

He also cited the paragraph 11 observation of the Hon'ble Supreme Court passed in **Raj kumar Vs. Ajoy Kumar** where a duty has been imposed upon the Tribunal under Section 168 and 169 of the Act to "hold an enquiry into the claim according to the law" but not remain as a mere spectator.

Learned advocate appearing on behalf of the claimant/respondent Mr. Krishanu Banik submits that the entire argument advanced by the learned advocate for the Insurance Company cannot be considered at this stage. The matter has been agitaated time and again by Insurance Company and the same plea was argued before this court. The involvement of offending vehicle has been categorized and principle therein has been settled by the decision of the Division Bench of this Court in **New India Assurance Co. Ltd. Vs. Mita Samanta & Ors.** followed by **National Insurance Co. Ltd. Vs. Pratima Barik**. He argued that the claimants are before the learned Tribunal stating the number of the offending vehicle which dashed

the victim. The claimant deposed as P.W. 1 to corroborate this facts and pleadings. One eye-witness also adduced his evidences. The evidence of eye witness is very specific to that fact that the offending vehicle bearing no. WB-12C 5748 was involved in the accident. To support and prove the case, some documentary evidences were adduced by the claimants which are not at all the personal document of the claimant. The document pertains to the police paper including seizure list, FIR, and charge sheet of Chanditala P.W. case no.392 of 2018 dated 13.9.2018. The learned Tribunal has observed the pleadings of the claimant also he has perused the proof that the oral and documentary evidences. In this case, the Insurance Company has created a cook and bull story to that effect that the vehicle was not involved. The evidences has laid by the P.W. 1 and P.W. 2; they may is under the control of the claimants but the other evidences i.e. documentary evidences(FIR, charge sheet, Seizure List etc.) were prepared by the police authority. They are independent documents which supported the case of the claimant. He specified his argument on the basis of the observation of the another Division Bench in **Mita Samanta(Supra)** wherein the Hon'ble Division Bench of this Court has held that to contradict the involvement of a vehicle the best person is the owner and the driver of the offending vehicle. The Insurance Company has the responsibility to call the owner and the driver to disapprove the case of the

claimant. The Hon'ble Division Bench was of a clear view, when the Insurance Company has not produced the owner and the driver of the offending vehicle on dock, then, the evidences of P.W. 2 (eyewitnesses) cannot be dis-believed.

He also cited several decisions regarding delay in lodging FIR but it appears that this point was not agitated or argument was not advanced by Insurance Company before this Court. So, I am not concentrating about the citations as referred by the learned advocate for the claimant on the ground of delay in lodging FIR.

Learned advocate for the claimant Mr. Banik also argued that in some cases the relative of the victim were more engaged to treat the victim at the time of admitting the hospital. They must have so busy with the victim that they could not be provided the proper number and the particulars of the offending vehicle. These matters was also appeared before the Hon'ble High Court in several matters wherein it has been held by this Court that hospital records does not show the actual scenario of the involvement of the vehicle. In support of his contention he cited some decisions of **Bajaj Allianz General Insurance Co. Ltd. Vs. Anjali Mondal, National Insurance Co. Ltd. Vs. Shila Devi & Ors., Smt. Jhuma Ghorai Vs. Bajaj Allianz General Insurance Co. Ltd.**

He also argued the case of the claimant cannot be strait way dismisses on the ground of non-mentioning of registration number of offending vehicle in the FIR.

Subsequently, charge sheet has been submitted and charge contain actual number of offending vehicle. The Hon'ble Supreme Court as well as this court also ascertained the fact in several cases that not mentioning the number of offending vehicle in the FIR cannot be dismissed the claimant's case. In support of his submission he cited two decisions **Ashalata Suryakanta Patil & Ors. Vs. New India Assurance Co. Ltd. & Ors** reported in **2023(2) TAC 725(SC)** and **National Insurance Co. Ltd. Vs. Sarmistha Sikdar & Ors.** reported in **2018(4) TAC 295(CAL)**. He also place his reliance upon the decision of this Court in FMA 958 of 2011 wherein the investigation report of the investigating officer which was not in conformity with the evidence of eyewitnesses was not considered.

He also argued that the claim Tribunal are to decide the claim case in a summary procedure in which the strict principle of criminal trial and the law laid down in evidence Act cannot be strictly followed, rather in the claim case, the accident has to be proved on the touch stone of principle of preponderance of probabilities. On the above submission, the learned advocate submits the learned Tribunal has committed no error. Learned Tribunal has categorically perused the evidence of P.W.1 and P.W.2. The learned Tribunal has also perused the final investigation of report of the police including F.I.R., charge-sheet and seizure list etc. wherefrom he came to

an opinion that the claimants are entitled to get compensation. The award passed by the learned Tribunal is not erroneous. So the appeal is liable to be dismissed.

Heard the learned advocates, perused the materials and also perused the observation of the Hon'ble Supreme Court and Hon'ble Division Bench of this Court in the several decisions as forwarded by rival parties before this Court.

Firstly, it appears to me that the learned Tribunal in deciding the pleadings and proof of the parties is of the opinion that opposite party no.1 i.e. insurance company had chosen not to adduce any evidence, whether oral or documentary evidence of the claimant.

The observation of the learned Tribunal appears to me erroneous as the Paper Book contained evidences of O.P.W.1, who is one of the officer of the insurance company and O.P.W.2, who is the investigator of the insurance company. During depositions they have also produced some documents, which were marked by the learned Tribunal. However, the learned Tribunal has erroneously not considered those witnesses both oral or documentary as adduced by the insurance company. It appears to be an error on the part of the learned Tribunal which may have suffered decision making process in the final decision of the instant case.

The Memo of the Appeal of the insurance company has raised regarding the filing of the two F.I.R.s. It was

argued by the learned advocate for the respondent/claimant that there are only one F.I.R. and the ground as stated by the insurance company is erroneous. In perusing the final report of the police, it appears to me that the final report i.e. charge-sheet was submitted on 31.12.2018. The police case was started on the basis of the F.I.R. on 13.09.2018, which was marked as Exhibit – 1. On perusing the charge-sheet submitted by the police at page 28 (inner page 5 of the charge-sheet)

“During investigation I visited the P.O. drew up rough sketch map with index, examined the compit and all available witnesses and recorded statements and I seized victim motor cycle (one Honda Activa Scooter) bearing Reg. No. WB 18AA 2239. Received message dt. 14.09.18 from S.P Hooghly (torn) police District Hooghly through P.S. serestha vide O.R.G. No. 2331/Reade date 14.09.2018 that the above noted case is treat as S.A. vide no 498/18. Complainant Dipankar Roy, S/o – Kalipada Roy of Vill : Chikrand, Jallapara, P.O.- Chikrond, P.S. – Chanditala, Hooghly along with one following eye witness came to P.S. and he submit a written complaint regarding the offending vehicle has been identified vide vehicle (Maruti Owagan) regn no WB 12C – 5748 which I received and enclosed the same with C.D and I examined the following eye witness and recorded his statement u/s 161 Cr.P.C. in a separate sheet of paper. I send message to the Inspector Traffic Branch (H.Q.) Bhabani Bhaban, 4th floor with prayer for

kindly arrange to provide the particulars of vehicle bearing Regn. No WB 12C – 5748 and received vehicle particulars of Maruti Suzuki, Wagon R LXI BS IV bearing Regn. No WB 12C – 5748 vide Org no790/CR/THQ in the n/o Supriya Chaudhury D/o – R. Chaudhury of 280 Ntaji Subhash Road 4th floor, Dist. – Howrah. I send notice u/s 133 MV Act to the owner of offending vehicle bearing Regn. No WB 12C – 5748 to Supriya Chaudhury, S/o R. Chaudhury of 280 Ntaji Subhash Road 4th floor, Dist. Howrah. I received surrender slip from Ld ACJM Serampore Court in the n/o Prasant Singh who surrendered before the Ld ACJM Serampore Court as driver of Maruti Suzuki, Wagon R LXI BS IV bearing Regn. No. WB 12C- 5748. Therefore the driver cum petitioner & power of attorney holder Prasant Singh, S/o – Ashok Singh of village 14/1 Jaibibi Road, Ghusuri, Dist. – Howrah came to P.S. and he produced offending vehicle bearing regn. No WB 12C – 5748 and it's M.V papers which I seized under proper seizure list.”

So from the final report from the police it appears that 14.09.2018, the de facto complainant, Mr. Dipankar Roy appeared before the concerned police station and submitted a written complaint regarding the fact that the offending vehicle has been identified vide vehicle no. WB-12C 5748. So, in this case from the charge-sheet it appears that there are a first complaint lodged by the de facto complainant, Mr. Dipankar Roy on 13.09.2018 on the basis of which the police case was started and

thereafter on the next day, he lodged another complaint with the police containing number of the vehicle (Maruti Wagon R). He appeared in the police station with an eye witness. The I.O. has recorded the statement of Dipankar Roy as well as eye witness. Thus, it is true that in the entire police case, there are one written complaints and one statement of same de facto complainant. The said de facto complainant was present at the time of admission of the victim at the hospital for the first time i.e. before the hospital (Fonix Hospital) on 09.09.2018. The in patient admission form has specifically mentioned the name of the relative/guardian who was present as “Bhudev/Dipankar Roy”. The hospital authority has also entrusted the facts of injury as “patient brought unconscious following RTA hit by Tata Sumo while patient was driving scooty today on 09.09.2018”. So, it is quite true that the de facto complainant was all along present at the time of first admission of the victim at the hospital. The said de facto complainant lodged written complaint with the police on 13th September, 2018 and again 14th September, 2018. The de facto complainant stated the number of the vehicle first time. The conduct of the de facto complainant appears to me doubtful. Let me consider the evidence eye witness of the case and what he has stated in respect of alleged accident. The name of the eye witness is Ranjan Barui. He stated that *“at the day of accident he was standing Jaikestopur by side of the road and found that*

one offending vehicle came with a high speed and dashed the victim. The number of the vehicle is WB-12C 5748. I along with other persons took the victim and sent to the nearest hospital. I do not informed to the police, I informed the family members over phone.” So, it was admitted that P.W.2 i.e. eye witness that he was seen the accident in his own eyes; after the accident he admitted the victim to the hospital and informed the matter to the family members. The brother of the victim Dipankar Roy(de facto complainant) was himself present at the time of admission in the hospital. So his information to the family members regarding the accident appears to me false. Mr. Ranjan Barui was sited as charge-sheet witness no.3 in the charge-sheet. During his evidence, he never stated that he gave the statement to the police regarding the correct number of the offending vehicle. So, in the entire case, it appears that the de facto complainant stated differently regarding the vehicle in question which actually dashed the victim.

Let me see whether such matter was at all considered by the learned Tribunal. In paragraph 11, the learned Tribunal has considered the plea of non-involvement of the offending vehicle. He is of the view that “This Court opines that it has to take a holistic view of the matter, keeping in mind that strict proof of accident caused by a particular vehicle in a particular manner may not be brought on record by the claimant”. The question of

non-involvement of the vehicle has heavily raised by the insurance company in this case. But the learned Tribunal not considered those matters or evidences as led by the insurance company through O.P. No.1 and O.P. No.2. If to decide a case under Section 166 of the Motor Vehicles Act, wherein the rash and negligent driving of the driver of the particular offending vehicle is *sine qua non*. The matter has to be looked into very appropriately, whether the particular driver, or the particular vehicle was involved at all or not. The facts and circumstances of the case goes to show the insurance company has led to evidences namely, O.P. No.1 and O.P. No.2 along with some documents. The insurance company has produced the documents, which were marked as Exhibit – F and Exhibit – G. To disapprove the claim of the claimant, the investigator of the insurance company is of the opinion that the vehicle is not involved in the alleged accident. Learned Tribunal has mislead or omitted to read those evidences in deciding the issues involved. The principal laid down by the Hon'ble Division Bench in **Mithu Samanta (supra)** regarding the liability of the insurance company to disapprove of the claimant has observed as follows.

“15. The aforesaid principle applies with greater force when a party even does not dispute the statement made in the pleading of the other side and decides to remain ex parte. We are quite conscious that in the

proceedings for compensation under the Motor Vehicles Act, when the offending vehicle is insured, the owner of the vehicle may not be interested to appear at the witness-box in spite of the fact that he is a party to the proceedings. For that reason, the legislature has incorporated the provision contained in section 170 of the Act permitting the insurance company to contest the proceedings on all points. Once such leave is granted, it is the duty of the insurance company to summon the owner of the vehicle to appear as a witness for disputing the allegation of the claimants. If the insurance company, after taking leave of the Tribunal under section 170 of the Act, decides not to lead any evidence by summoning the relevant witnesses including the party who liability it has undertaken, its position in law will be just like the party who is afraid of appearing in the witness-box to face the cross-examination of the claimants. It is preposterous to suggest that the court will hold against the claimants notwithstanding the fact that in spite of the allegation of rashness or negligence against the driver, the driver or the owner of the vehicle is deliberately avoiding the court and the claimants are unable to cross-examine the owner against whom the compensation is claimed or the errant driver who identity has been disclosed in a civil proceeding.”

So, the dictum of the Division Bench of this Court that if the insurance company has taken a leave from the learned Tribunal under Section 170 of the M.V. Act to

contest the matter on all reasonable ground, so it is the duty of the insurance company to produce the owner of the driver of the offending vehicle in the witness box to disapprove the claim of the claimant. The Division Bench of this Court in **Pratima Bari (supra)** also followed the same principle.

The ratio of law laid by Hon'ble Supreme Court in **Pratima Bari(supra)** and **Mita Samanta(supra)** is well applicable to the facts and circumstances of the cited cases, where the insurance company is completely silent to give any evidence to disapprove the case of the claimant.

Moreover, in this case the insurance company has argued that the owner of the driver of the offending vehicle has clubbed together to make a conspiracy to procure money from the insurance company by dint of alleged involvement of the false vehicle, so, it can well perceived that when driver and owner of the vehicle was colluded with the claimant in a conspiracy, then it would be futile exercise to the insurance company to call the owner/driver of the vehicle in the witness, who must not support the case of the insurance company but it will support the case of the claimant in furtherance to the conspiracy hatched between them.

In my view when there is a specific allegation of Insurance Company for non-involvement of the vehicle on the ground that the owner/driver of the offending vehicle

has implanted this vehicle in collusion with claimant, in those cases, the principle of **Mithu Samanta(supra)** and **Pratima Bari(supra)** are not applicable.

Let me consider whether the document produced by the insurance company before the learned Tribunal or evidences therein are so powerful to disapprove the case of the claimant, which was based on the police paper as well as evidence of eye witness. The insurance company has produced the document of admission form in Phoenix Hospital, which was exhibited as Exhibit – G. The claimant not raise any objection at the time of exhibiting those documents. I have categorically perused admission form, which stated a Tata Sumo was involved in the alleged accident. The claimants pleaded that the Maruti Wagon R was involved in the alleged accident. The eye witness P.W.2 also deposed that the Wagon R was involved in the alleged accident. On the other hand, O.P. No.1 and O.P. No.2 deposed the Tata Sumo was involved.

So, there are rival pleadings as well as proof by both the parties. In those cases, where there are to affidavits and counter affidavits, the Court must go into documentary evidences of this case. The documentary evidences i.e. the F.I.R. dated 13.09.2018 had stated that a unknown vehicle heat the victim but thereafter during the course of investigation, the same de facto complainant stated that the Maruti Wagon R was involved. The eye witness was also stated as charge-sheeted witness. Eye

witness i.e. P.W. 2 has appeared before the learned Tribunal and stated that he witnessed and informed the family member of the victim, which is actually false; the relatives, that is, the brother of the victim was all along present at the time of admission of the victim at the hospital. The witness never stated that he first time stated the fact to the I.O. i.e. that the Maruti Wagon R was involved with the accident. More surprisingly, the police case, which was started on the basis of the written complaint dated 13.09.2018 has not proceeded to enquire anything about unknown vehicle. The statement of de facto complainant second before time as well as the statement of the so-called eye-witnesses not appears to truthful. The conduct of the police and the investigation thereof, appears to be perfunctory. A report of the police stated that the police has enquired about the Wagon R vehicle after seizing the same, but it was not mentioned whether the front side of the vehicle was damaged due to reasons of the accident. It further appears that the driver of the Wagon R vehicle i.e. accused person himself appears before the police with the vehicle papers but the owner kept mum all along. Naturally, the owner used to appear before the police after getting information of the accident but in this case, the driver appeared before the police to produce the offending vehicle or the papers of the offending vehicle. The confusion would also go high when

it appears that the owner after receiving summons has not chose to appear before the learned Tribunal.

Considering the entire aspect and considering the fact of the instant case, I am of the view that the learned Tribunal initially has committed error not deciding the issue after taking a considered view of O.P.W. 1 and O.P.W.2. Moreover, the learned Tribunal has decided the matter in slip shod manner. The vehicle which cause accident was fled away and the de facto complainant who was present at the time of admission in the hospital stated nature of the vehicle(Tata Sumo). But thereafter, the vehicle was changed and introduced in this case as Maruti Wagon R vehicle.

Considering the materials I find the observation of the learned Tribunal is not correct. The so called vehicle i.e. Maruti being No. WB-12C 5748 was not involved in the alleged accident. The award passed by the learned Tribunal appears to me not correct and the same is hereby set aside. The appeal being meritorious, is allowed. The award passed by the learned Tribunal is set aside.

The Insurance Company is directed to return back the deposited amount along with accrued interest if any from the office of the learned Registrar General, High Court, Calcutta on usual terms and conditions.

Accordingly FMA 343 of 2022 is disposed of.

Connected applications, if any are also disposed of.

All parties shall act on the server copy of this order
duly downloaded from the official website of this Court.

(Subhendu Samanta, J.)