

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

**FAO No. 9776 of 2014 (O&M)
Date of decision: 04.11.2015**

National Insurance Co. Ltd. ... Appellant
versus
Kamlesh and others Respondents

CORAM: HON'BLE MR. JUSTICE K. KANNAN

Present: Mr. R.C. Gupta, Advocate for the appellant.

Mr. Ashwani Arora, Advocate for respondent Nos. 1 and 2.

K.Kannan, J.

The petition for compensation is brought by the LR of the deceased pillion rider. The accident is said to be taken place when the unknown vehicle coming from behind the motor cyclist hit the motor cycle in which the deceased was travelling on 20.08.2013 at 4.00 am. The FIR was lodged by the driver of the motor cycle referring to the accident as having been caused while he was driving the vehicle by another vehicle that hit him from behind. At the trial, the claimants put PW1 as a person who is coming just behind the motor cycle and he saw that the motor cycle was going at the middle of the road and he said that he was a witness to the accident which was taken place due to the negligence of the car driver and the negligence of the driver of the motor cycle. In the cross-examination, the insurer was attempting to state that he did not even know the driver of the vehicle who was said to be driving the car in which he was traveling and it was most artificial that he could have been a personal witness to the accident. He admitted in cross-examination that he did not know whether any police official came to the site. He also admitted that he did not file the FIR and he did not know whether any FIR had been filed by any person at all.

The driver of the motor cycle himself was not examined and the Tribunal therefore held that it must be taken only to be a case

of composite negligence and the owner of the motor cycle could become liable under the package policy for the risk of the pillion rider or the motor cycle. He proceeded to assess the compensation on the basis of the evidence regarding the income of the deceased and made the insurer liable. Learned counsel appearing on behalf of the insurer reads out to me the evidence of PW1, the alleged Eye witness, and wants me to hold that he was a planted witness and he could have been present. If his evidence were to be totally discarded then we will be left with only the evidence brought through FIR which admits to the accident as having resulted from the collision of two vehicles. The driver of the vehicle himself will not take the witness stand, which he should have, were to be brought out that he carefully drove the vehicle but still another unknown vehicle dashed against him in utter disregard to his own careful driving. Any party who pleads want of negligence shall plead so at the trial. It cannot be merely a matter of inference only because the FIR lodged by the driver of the motor cycle does not inculcate himself as in any way responsible. If only documentary evidence should be the basis for courts to render decision, there is not even a need for allowing for oral evidence to be given. We require specific instances of negligence or lack of it to be brought by the appropriate supporting oral evidence that can stand the test of cross-examination. If the claimants were, therefore, trying to place on record the evidence of PW1 to say that the accident was the result of the negligent driving of the driver of motor cycle also, the insurer that would want to evade liability ought to place best evidence that was possible. The insured, after all, was not a stranger to the insurer. It is the insured that gives business to the insurer and therefore was very much within its reach to secure appropriate evidence. Even the Motor Vehicles Act enables the insurer to secure details of the accident from the insured under Section 133 and it would be perfectly competent for the insurer to secure the presence of the insured to give evidence that could have suited the insurer's purpose. I am loathe to interfere with the

finding of the negligence as involving the conduct of the driver of the motor cycle as well and the assessment of the Tribunal that there was composite negligence of both the vehicles. It meant that claimant was entitled to proceed against the owner of any one of the vehicles which was involved in the accident and if there was also a package policy that provided the insurance cover to the representatives of the deceased pillion rider, the liability of the insurer is inescapable. Counsel wants to make reliance on R7 site plan which shows that the motor cycle was on the left in corner of the road. The position of where the vehicle was found need not necessarily to be the place of impact and this could hardly provide a sure guide for appearing negligence without supporting evidence at the trial.

The counsel also has an argument that the case could have been present under Section 163-A. I cannot accept such a plea by the insurer for there was no necessity for the claimants to subject themselves to a lower scale of compensation if they could make an implication on the driver of the motor cycle as responsible for the accident and if they were making a plea for just compensation on proof of negligence of the driver of the motor cycle, it was perfectly tenable. Even an argument that the claim could have been under the Employees Compensation Act, 1963 is equally meaningless for Section 167 itself provides for an option to the claimant to resort either to the provisions of the Motor Vehicles Act or Employees Compensation Act. The claimants have adopted what was more beneficial to them and no exception could be taken to such a course.

The award of the Tribunal is sustained and the appeal by the insurer is dismissed.

(K.KANNAN)
JUDGE

04.11.2015

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