

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

**FAO No.4436 of 2013 (O&M)
Date of Decision: May 04, 2018.**

Nazma Khatoon and others

.....APPELLANT(s).

VERSUS

Rameshwar Kumar and others

.....RESPONDENT(s).

CORAM:- HON'BLE MR. JUSTICE SURINDER GUPTA

Present: Mr. Neeraj Khanna, Advocate
for the appellant (s).

Mr. Ajay Aggarwal, Advocate
for respondents No.1 and 2.

Mr. Paul S. Saini, Advocate
for respondent No.3.

SURINDER GUPTA, J.

This is appeal by Nazma Khatoon and others claimants against the award dated 04.12.2012 passed by Motor Accident Claims Tribunal, Ambala, whereby the claim petition filed by appellants seeking compensation for the death of Tasleem Miyan (later referred to as 'the deceased') in a motor vehicle accident with motorcycle bearing registration No.HR54-2611 (later referred to as 'the offending vehicle'), was dismissed.

The manner in which the accident took place, has been described in para 24 of the claim petition, which reads as follows:-

“That on 12.4.2011 at about 4:00 p.m., when Tasleem Miyan was going from Northern side to Southern side of

Ambala to Jagadhri side road and when after crossing entire 35 feet wide metalled road, he had taken 2-3 steps on kachcha berm of the road and had reached near Govt. Tubewell within the area of village Khudda Khurd. In the mean time, a Hero Honda Splendor Motorcycle bearing registration No.HR54-2611 came from Saha side. Respondent No.1 Rameshwar Kumar was driving said motorcycle rashly, negligently, in zigzag manners, without blowing horn and an uncontrollable speed. Respondent No.1 on leaving entire vacant road went on his extreme left side of the road on kachcha berm and hit against Tasleem Miyan. As a result of this accident, Tasleem Miyan fell down on kachcha berm on the road side and suffered multiple and grievous injuries. This accident was witnessed by Sarwan Kumar, who was going from Ambala Cantt to his village Manglai on his motorcycle. On inquiry by Sarwan Kumar, respondent No.1 disclosed his name and address as Rameshwar Kumar respondent No.1. Tasleem Miyan and respondent No.1 had suffered injuries. Both the injured persons were taken to Civil Hospital, Ambala Cantt from the spot, from where Tasleem Miyan was referred to PGI, Chandigarh, where he died on 13.04.2011 at about 9.00 p.m. During the course of treatment. This accident took place on account of sole rash and negligent driving of Motorcycle No.HR-54-2611 by respondent No.1, owned by respondent No.2 and insured with respondent No.3.”

The respondents denied the accident and their liability to pay any compensation.

From the pleadings of the parties, issues were framed as follows:-

- (1) Whether the accident in question causing death of

Tasleem Miyan took place due to rash and negligent driving of Motorcycle No.HR-54-2611 by respondent no.1, as alleged? OPP

- (2) If issue No.1 is proved to what amount of compensation, the claimant is (sic claimants are) entitled to and from whom? OPP
- (3) Whether the insurance company is not liable to pay any compensation, in view of the preliminary objections raised in the written statmeent and whether there has been a breach of terms and conditions of the policy of insurance? OPR-3
- (4) Relief.

The tribunal, while recording findings on issue No.1, discarded the statement of PW2 Mohd. Nasir, who appeared as eyewitness of the occurrence and held that the claimants have failed to prove that the accident was caused due to rash and negligent driving of offending vehicle by respondent No.1 Rameshwar Kumar.

Learned counsel for the appellants has argued that Mohd. Nasir had appeared before the tribunal as PW2 and described the manner in which the accident took place. The tribunal has discarded his statement by making observations against the evidence on record. This witness had stated that he was not related to the deceased or his family but the tribunal has observed that he was there due to relationship with the deceased's family. He had categorically stated that after admitting the deceased and respondent No.1 in the hospital, he had gone to the spot to take his motorcycle. He also picked up offending vehicle i.e. motorcycle of respondent No.1 and parked the same in the premises of Government Tubewell of village Khudda Kalan. He had stated that the accident was caused due to rash and negligent driving of the driver of offending vehicle. The mere fact that FIR was not recorded

on his statement and in criminal case the author of the FIR had turned hostile, is absolutely no reason to discard the statement of this witness. Sarwan Kumar, author of the FIR may have his own reasons to turn hostile before the trial Court. PW2 Mohd. Nasir was also cited as witness by the police in the criminal case but he was not examined. The mechanical report of the motorcycle shows that offending vehicle was damaged and the respondents No.1 and 2 have not come up with any explanation regarding the damage to the motorcycle. This corroborates the testimony Mohd. Nasir. The tribunal has committed grave error while discarding his statement.

Learned counsel for the respondents have argued that the tribunal has rightly discarded the version of the accident as given by the claimants, as PW2 Mohd. Nasir was not examined before the criminal Court to prove the charge framed against respondent No.1 and the author of the FIR Sarwan Kumar has not been examined in this case. He had appeared before learned Magistrate in the criminal case but turned hostile. This shows that testimony of PW2 has been rightly discarded by the tribunal.

The accident took place on 12.04.2011. The police had recorded the FIR on 15.04.2011 on the statement Sarwan Kumar. Offending vehicle was taken into possession and was got examined from Motor Mechanic, who found that left side front indicator, side mirror, left side sheet, left side leg-guard of the motorcycle were damaged. There were other signs of damage on the motorcycle as well. Challan was presented against Rameshwar and he was charge-sheeted for the offence punishable under Section 304-A and 279 of Indian Penal Code. Mohd. Nasir was cited

as one of the prosecution witness. Police has also recorded his statement regarding the accident, copy of which has been placed on file as mark-B. Perusal of the judgment passed by learned Magistrate, Ambala shows that the prosecution examined only Sarwan Kumar and closed its evidence without examining Mohd. Nasir. Sarwan Kumar had not supported the prosecution case, resulting in acquittal of respondent no.1.

The question, which arise for consideration, is as to whether the acquittal of driver of the offending vehicle and statement of Sarwan Kumar recorded by the learned Magistrate make out any reason for discarding the statement of Mohd. Nasir and the version of the claimants regarding the accident. The answer to this in all fairness will be in negative. Sarwan Kumar may have his own reasons while not supporting the case of the prosecution and to shy away from appearing in support of the case of claimants. The testimony of Mohd. Nasir cannot be doubted as the same appears to be natural and truthful. He has stated that on the day of accident, he was going from Saha, District Ambala to Ambala Cantt. on his motorcycle. At about, 4.00 p.m., when he reached near Government Tubewell of village Khudda Kalan on Jagadhari-Ambala road, he found that deceased after crossing the metalled road, had crossed 2-3 steps on kachcha berm of the road and reached near Government Tubewell, which was on left side of the road, while going from Saha to Ambala Cantt, when the offending vehicle came from behind and hit the deceased. It was being driven by respondent No.1 in a rash and negligent manner at a very high speed. Respondent No.1 after overtaking his motorcycle went on the left hand side of the road on kachcha berm and before hitting the deceased from

behind, as a result of which deceased and driver of offending vehicle fell on the road and suffered injuries. The accident was also witnessed by Sarwan Kumar and many people gathered at the spot. On inquiry, driver of the offending vehicle disclosed his name and address and both injured were taken to General Hospital, Ambala Cantt in a three-wheeler by him and Sarwan Kumar. After giving first aid to the deceased, he was referred to PGI, Chandigarh. He (Mohd. Nasir) gave his address and mobile number to Sarwan Kumar and came to the spot to fetch his motorcycle. He removed the offending vehicle from the spot and kept the same in the premises of Government Tubewell of village Khudda Kalan. He has specifically stated that the accident was caused due to rash and negligent driving of offending vehicle by respondent No.1. The police had taken into possession motorcycle of respondent No.1 from the spot in his presence on 15.04.2011 vide recovery memo, which was also signed by him. Though he stated that his statement was not recorded by the police but it was a fact that he was cited as witness in the criminal case and his statement under Section 161 Cr.P.C.was also recorded. He has stated that deceased was not related to him in any manner but the tribunal has recorded a finding that he was there due to his relationship with deceased's family.

The tribunal while discarding the statement of this witness, has observed that this witness was not aware of the residential address of the deceased and his statement was not recorded by the police. The tribunal has also taken note of the fact that Sarwan Kumar had not supported the prosecution version. Some of the other reasons which led to the discarding of statement of PW2, as discussed by the tribunal are as follows:-

“The FIR in this case was recorded on the statement of one Sarwan Kumar but the said witness does not know his address and telephone number. The said Sarwan Kumar never called the said witness and never came to the place of the said witness. However, he volunteered that the said Sarwan Kumar made a call to the said witness through police but he does not know the name of that police official. The said witness had received a call on 15.04.2011, when the Hero Honda Splendor motorcycle was to be recovered. The said witness received only that call in the present case on his mobile No.9466608950 but does not know the number from which he received the call. The said witness does not know the contents of the FIR registered in the present case. He also does not know as to whether the said Sarwan Kumar had reported to the police that at the time of the accident in question, the deceased was crossing the road. The said witness does not know the identity of any person gathering at the spot except the said Sarwan Kumar. He also does not know any official or attendant at the Tubewell near place of the accident. At the time of accident, no one was present at the tubewell. When the Hero honda Splendor motorcycle was recovered, no one was present at the Tubewell. The said witness was there due to his relationship with the deceased's family. The accused was got identified by the said witness on 20.04.2011 but the police did not record the statement of the said witness on the said date and also did not obtain his signature on any document.”

The police had received the information of accident on 12.04.2011 itself. If the police had recorded the FIR on 15.04.2011, this cannot be any reason to discard the statement of PW2 Mohd. Nasir. The

tribunal has observed that accident had taken place when the deceased was crossing the road. Respondents No.1 and 2 i.e. driver and owner of the offending vehicle have not come up with any version regarding the accident. The testimony of Mohd. Nasir PW2 is unshattered, reliable and suffers from no infirmity. The tribunal has doubted the presence of Mohd. Nasir at the spot for the reason that no document showing his presence has been placed on record. There could not be any documentary evidence regarding presence of Mohd. Nasir at the spot. His statement shows that after the accident, he had taken injured to the hospital, where Sarwan Kumar was looking after the injured. After giving Sarwan Kumar his mobile number and address, he again went to the spot of accident to fetch his motorcycle. He parked the offending motorcycle in the premises of Government Tubewell of village Khudda Kalan, from where it was taken into possession by the police. All this shows that this witness was present at the spot and had witnessed the accident and his testimony cannot be discarded for the reasons as recorded by the tribunal. Testimony of this witness is reliable and proves on record that accident was caused due to rash and negligent driving of offending vehicle by respondent No.1. Respondent No.1 has not dared to appear as witness to give his own version of accident and to rebut testimony of Mohd. Nasir about the mode of accident. The finding of the tribunal on issue No.1 is set aside and it is held that the claimants have been able to prove that the accident was caused due to rash and negligent driving of the offending vehicle by respondent No.1.

The tribunal, in view of findings on issue No.1, had decided issues No.2 and 3 against the claimants without looking at the evidence.

Issues regarding assessment of compensation and liability to pay the same have not been discussed by the tribunal. Deciding both these issues in appeal will take away valuable right of the parties of first appeal, as such, matter is remitted to the Motor Accident Claims Tribunal, Ambala with direction to hear arguments of counsel for the parties on issues No.2 and 3 and record its findings on issues No.2 and 3 afresh. It is, however, made clear that if the tribunal is of the opinion that further evidence is required, it may afford opportunity to this effect to the parties.

Accordingly, this appeal is allowed in above terms. Parties are directed to appear before the tribunal on 28.05.2018.

May 04, 2018.
Sachin M.

(SURINDER GUPTA)
JUDGE

Whether speaking/reasoned: ***Yes/No***

Whether Reportable: ***Yes/No***