to take an average of the above-noted transactions except Exhibits P-93, P-94, P-87 and P-70 to fix the market value of the suit land. These four transactions have to be ruled out of consideration for the reason that these are not proximate to the date of notification as these are more than an year earlier to the notification. On the basis of this calculation the rate per square yard comes to Rs. 36.72. The appellants, however, cannot be compensated at this very rate in view of the extent or the smallness of the plots covered by these transactions. It is patent that had the appellants to sell their lands in the form of plots covered by these transactions, they would have lost one-third of their land for providing roads and other community amenities, etc. In the light of this, it appears fair to impose a cut of one-third to the above noted rate to determine the market value payable to the appellants. The rate thus comes to Rs. 24.48 per square yard. However, to make it a round figure, I fix the market value of the suit land at Rs. 25 per square yard. Besides this, the appellants are also held entitled to the benefits envisaged by sections 23(1-A), 23(2) and 28 of the Act as these stand after the enforcement of Act No. 68 of 1984. They are also made entitled to the proportionate costs of their appeals.

SCK.

Before G. R. *Majithia, J.*

SURJIT SINGH and another,—*Appellants.*

versus

SANTOSH KUMARI WD./O GURMUKH SINGH ETC.,—*Respondents.*

First Appeal from Order No. 324 *of* 1984

December 17, 1988.

Motor Vehicles Act (IV of 1939)—Ss. 95(2), 110-*A—Death of Pillion rider of motor cycle—Such rider not being covered in pursuance of any contract of employment—Liability of Insurance Company.*

Held, that sometimes a thing may take place in such circumstances as to render it practically impossible for any one to speak

to its happening just like in a case of accident on a highway where there are no witnesses or where persons who could speak to the occurrence are not available for whatever reason it be. The doctrine of *res ipsa loquitur* does not dispense with the need to prove a falt alleged by a person. It only effects the mode of proof. With a view to mitigating the rigour of proof of negligence under certain circumstances, the common law involved the aforesaid doctrine. It applies whenever it is so improbable that such an accident would have happened without the negligence of the defendant that a reasonable jury could find without further evidence that it was so caused. (Paras 10 and 12).

Held, that the provisions of the insurance policy clearly excludes a passenger on the vehicle itself. The policy does not cover the passenger on the pillion. He was never carried on hire or reward nor he was carried on in the course of employment. The insurance company in the present case is not liable to compensation the death of the pillion rider. (Para 16).

First Appeal from the order of the Court of Shri R. P. Bhasin, Motor Accident Claims Tribunal, Ambala, dated 28th January, 1984 ordering that the sum of Rs. 57,600 is payable by the respondents No. 1 and 2 to the claimants in equal shares with interest at the rate of 12 per cent per annum from the date of filing of claim petition to the date of payment of amount awarded. The claimants are also entitled to costs of the proceedings.

Claim:—Petition under section 110 of the Motor Vehicles Act.

Claim in Appeal:—For the reversal of the order of the lower Court.

M. B. Singh, Advocate, *for the appellant.*

L. M. Puri, Advocate, *for Respondent No. 4.*

S. K. Goyal, Advocate. *for Respondents 1, 2 and 3.*

JUDGMENT

G. R. Majithia, J.

1. This appeal is directed against the award dated January 28, 1984, of Motor Accident Claims Tribunal Ambala.

2. The respondent No. 1 and her two sons filed an application under Section 110 of the Motor Vehicles Act, 1939, against the appellants and respondent No. 3. The deceased, husband of Santosh

Kumari and the father of two minor sons, was working as a Salesman in the Sadhaura Marketing Cooperative-cum-Processing Society Limited Sadhaura. Appellant No. 1 was arrayed as respondent No. 1 in the petition. He is working as Sub-Inspector attached to the office of Assistant Registrar, Cooperative Societies, Naraingarh. On the date of filing of the application, he was posted at Shazadpur, Tehsil Naraingarh, District Ambala. Both Sadhaura and Shazadpur fall in Tehsil Naraingarh, District Ambala while villages Bhogpur and Bassatianwala fall in Tehsil Jagadhri, District Ambala. On April 2, 1981, after the close of the office appellant No. 1 happened to meet the deceased in Sadhaura and offered him a lift on his motor-cycle since he was going to his village Bassatianwala and he would drop him at village Bhogpur on his way. The deceased used to go to village Bhogpur on his own cycle. At about 8.30/9.00 p.m. appellant No. 1 was seen driving his motor-cycle in a reckless and negligent manner by Gurdial Singh son of Shri Singh Ram and Ramji Lal son of Shri Dilla Ram resident of village Bhogpur, who were sitting on the roadside Tea Stall near Vishal Cinema, Sadhaura, on Sadhaura-Barara Road. They saw the deceased sitting on the pillion of the above said motor-cycle. Soon thereafter some unknown and unrecognisable person informed the persons present at the tea stall that accident of a motor-cycle has taken place just now. Both the above mentioned persons at once started towards the informed site of the accident and found Gurmukh Singh deceased lying on the right side of the Pucca road in a pool of blood and in unconscious state. The motor-cycle and the driver namely appellant No. 1 were nowhere in sight. Per chance a van happened to pass that way. The deceased was at once removed to Primary Health Centre, Sadhaura. Before any medical aid could be afforded, the injured breathed his last. Gurdial Singh lodged the First Information Report with police station Sadhaura on April 2, 1981.

3. Besides earning his salary, the deceased used to attend to his agricultural land measuring four acres and his income from this source was approximately Rs. 1,000 per month. The deceased was hardly spending a sum of Rs. 100/150 per month on himself and the balance amount he used to contribute towards the maintenance of his family. The deceased was enjoying a very good health and was in the prime of his life. The span of life in the family of the deceased was normally within the range of 70/75 years. Thus, the claimants claimed Rs. 100,000 as compensation.

(4) The appellant filed a joint written statement *inter alia* pleading that the deceased met appellant No. 1 when he was going on his motor-cycle and requested him that he had an urgent work in his village. In view of this urgency, the appellant No. 1 allowed the deceased to occupy the pillion seat of the motor-cycle. Appellant No. 2 is the owner of the vehicle. The exact defence taken by respondents No. 1 and 2 is contained in para No. 24 of the written statement which reads as under :—

> "That para No. 24 of the claim petition is wrong and is denied. The averments made in this para of the claim petition are false and wrong. It is absolutely wrong that the respondent No. 1 himself asked the deceased to accompany him on the motor-cycle. As a matter of fact, the respondent No. 1 motor-cycle was coming on the motor-cycle, the deceased requested him that he has got some urgent piece of work and he has to go immediately and he has not likely to have any other conveyance and if he has become late. he would suffer irreparable loss and on the pastering of the deceased that he should be given lift, the respondent No. 1 agreed and and gave him the lift. The deceased was sitting on the pillion of the motor-cycle. The answering respondent No. 1 was driving the motor cycle at the correct side of the road with a slow speed and at the place of the accident the truck came at a very rash speed driven in a negligent manner. The truck driver was driving the truck in a rash and negligent manner, hit the truck against the motor-cycle and the motor-cycle of the respondent was hit by the driver of the truck by bringing the truck on the wrong side of the road as a result of which the answering respondent and the deceased both received injuries. The answering respondent No. 1 received number of injuries and fractures. He has become permanently disabled and he cannot walk even properly. He could not and cannot do any agriculture work. The answering respondent No. 1 is not at all at fault. The accident never took place on account of any fault on the part of the answering respondent No. 1 and it was on the repeated requests of the deceased that the answering respondent No. 1 gave him free lift on his motor cycle out of sympathy and the

deceased voluntarily of his own took a ride on the motor-cycle of the answering respondent No. 1 as mentioned above. So that the applicants are not entitled to any compensation from the answering respondents. The answering respondents never asked the deceased to accompany him. All the averments made in this para of the claim petition are false and frivolous and are denied. As a result of serious injuries sustained by the answering respondent No. 1, truck driver and the truck could not be identified. The applicant out of greed at the instance of some interested person filed the present false claim petition against the answering respondents. Hence it is prayed that the claim petition which deserves dismissal may be ordered to be dismissed with costs."

(5) The Insurance Company, which was arrayed as respondent No. 3 in the petition, filed a separate written statement and denied its liability on the ground that the deceased was sitting on the pillion of the motor-cycle at his own accord. Resultantly, it is not liable to pay any compensation.

(6) On the pleadings of the parties, the following issues were framed—

(1) Whether Gurmukh Singh died on account of rash and negligent driving of Surjit Singh respondent No. 1 on 2nd April, 1981 at Sadhaura-Barara Road ? OPA

(2) To what amount of compensation are the claimants entitled and from whom ? OPA

(3) Whether the respondent No. 3 is not liable because the deceased was merely a pillion rider and a *gratis* passenger ? OPR No. 3

(4) Relief.

(7) Under issue No. 1, the learned Tribunal recorded a finding that the accident took place due to rash and negligent driving of appellant No. 1. Under issue No. 2, the learned Tribunal assessed the compensation payable to the legal heirs of the deceased at Rs. 57600 payable with interest at the rate of Rs. 12 per cent per annum from the date of filing of the claim application to the date of

payment of the amount awarded. Under Issue No. 3, the learned Tribunal held that Insurance Company is not liable to pay any compensation to the claimants.

(8) The learned counsel for the appellant submitted that A.W.2 Gurdial Singh and A.W. 3 Ramji Lal are not the eye witnesses of the occurrence and if their evidence is ignored, there is no other evidence to record a finding that the accident has taken place as a result of rash and negligent driving of the motor-cycle by appellant No. 1.

(9) The learned counsel is not correct in his submissions. In the circumstances of the present case, it was for the appellant No. 1 to prove the manner in which the accident took place. The exact facts were within his knowledge. He has failed to prove so. In the circumstances of the present case undoubtedly the maxim of *res ipsa loquitur* applies.

(10) The maxim *res ipsa loquitur* applies whenever it is so improbable that such an accident would have happened without the neglience of the defendant that a reasonable jury could find without further evidence that it was so caused. See Salmond on the Law of Torts (15th Edition) Page 306. The following passage from, Halsubry's Laws of England (3rd Edition) at page 77 is very inceptive —

> "An exception to the general rule that the burden of proof of the alleged negligence is in the first instance on the plaintiff occurs wherever the facts already established are such that the proper and natural inference arising from them is that the injury complained of was caused by the defendant's negligence "tell its own story" of negligence on the part of the defendant, the story so told being clear and unambigous."

(11) In *Pushpabai* v. *Ranjit G & P. Co.* (1) referring to the doctrine of *res ipsa loquitur,* the Apex Court at page 346 observed thus :—

> "The normal rule is that it is for the plaintiff to prove negligence but as in some cases considerable hardship is caused to the plaintiff as the true cause of the accident is not

(1) 1977 A.C.J. 343.

known to him but is solely within the knowledge of the defendant who caused it, the plaintiff can prove the accident but cannot prove how it happened to establish negligence on the part of the defendant. This hardship is sought to be avoided by applying the principle of *res ipsa loquitur*. The general purport of the words *res ipsa loquitur* is that the accident "speaks for itself" or tells its own story. There are cases in which the accident speaks for itself so that it is sufficient for the plaintiff to prove the accident and nothing more. It will then be for the defendant to establish that the accident happened due to some other cause than his own negligence.

It is further observed thus :—

"Where the maxim is applied the burden is on the defendant to show either that in fact he was not negligent or that the accident might probably have happened in a manner which did not cannote negligence on this part."

(12) Some times a thing may take place in such circumstances as to render it practically impossible for any one to speak to its happening just like in a case of accident on a highway where there are no witnesses or where persons who could speak to the occurrence are not available for whatever reason it be. The doctrine of *res ipsa loquitur* does not dispense with the need to prove a fact alleged by a person. It only effects the mode of proof. With a view to mitigating the rigour of proof of negligence under certain circumstances, the common law invoked the aforesaid doctrine. In the present case A.W. 2 Gurdial Singh and A.W. 3 Ramji Lal are the only witnesses who could have the knowledge of the accident and the manner of its occurrence. The doctrine of *res ipsa loquitur* applies to the persons who are opposing the claim of the claimants and could not discharge the onus cast on them on account of the doctrine of *res ipsa loquitur*. The contrary version set up by the appellants could not be substantiated by them despite numerous opportunities having been afforded to them. The version of the appellant is contained in the application dated September 26, 1981 (Exhibit R/2) submitted to the higher authorities. In this application, he mentioned that Darshan Singh, son of Rur Singh resident of Sadhaura and Bhupinder Singh resident of Malikpur (Ambala)

witnessed the occurrence. Despite various opportunities afforded to them, they were not produced.

(13) The learned Tribunal found that the evidence of A.W.2 Gurdial Singh and A.W.3 Ramji Lal inspire confidence and nothing was brought out in cross-examination to suggest that they were not present at the time of occurrence or that they were inimically disposed of towards appellant No. 1. In *Sarju Pershad Ramdeo Sadhu* v. *Jwaleshwari Partap Narain Singh* (2), the Apex Court held as under :—

> "when there is a conflict of oral evidence of the parties on any matter in issue and the decision hinges upon the credibility of witnesses, the appellate Court should be slow in interfering with the finding of the trial Judge on a question of fact."

(14) I do not find any infirmity in the view taken by the learned trial Judge. Resultantly, I affirm the finding under issue No. 1.

(15) The learned counsel for appellant strongly contended that the respondent No. 3 namely Insurance Company is liable to pay the compensation amount. He submits that there is no dispute that the motor-cycle was owned by appellant No. 2 and at the time of accident, it was driven by appellant No. 1 and was duly insured with respondent No. 3. The Insurance Company filed written statement denying all the allegations made in the claim petition. However, the insurance policy (exhibit R/1) was produced at the trial. In the insurance policy, the following provision is made under the heading 'liability to third parties' and clause 1 under that heading reads thus :—

> "1. Subject to the Limits of Liability the company will idemnify the insured in the event of accident caused by or arising out of the use of the Motor Cycle against all sums including claimant's costs and expenses which the insured shall become legally liable to pay in respect of ; (a) death of or bodily injury to any person but except so far as is

(2) A.I.R. (38) 1951 S.C. 120.

necessary to meet the requirements of section 95 of the Motor Vehicles Act, 1939, the company shall not be liable where such death or injury arises out of and in the course of the employment of such person by the insured and excluding liability to any person being conveyed in or on the motor cycle unless such a person is being conveyed by reason of or in pursuance of a contract of employment.

(b) damage to property other than property belonging to the Insured or held in trust by or in the custody or control of the Insured or any member of the Insured's household or being conveyed by the Motor Cycle."

(16) This clause clearly excludes passenger on the vehicle itself. The policy does not cover the passenger on the pillion. He was never carried on hire or reward nor he was carried on in the course of employment. This matter came up for consideration before a Full Bench of this Court in *Oriental Fire and General Insurance Co. Ltd* v. *Gurdev Kaur and others* (3) in which it was observed as under :—

"Apparently, the terms of clause (ii) of the proviso to subsection (1) of section 95 of the Act 4 of 1939 do not cover the case of such passengers because on a public carrier they could not travel as passengers and they were on it as owners of the goods carried in it. So they were apparently not on it 'by reason of or in pursuance of a contract of employment' for they had no contract of employment with any body to be on the truck, and they could not possibly have a contract of employment with themselves. The cases cited support this view. There is an indirect support for this approach from the decision in Izzard's case reported in (1937) A.C. 773 as well".

(17) This judgment was followed by D. K. Mahajan, J. in *Unique Motor and Genl. Ins. Co. Ltd* v. *Mrs. Krishna Kishori and others* (4), and it was held thus :—

"There is no provision in the Motor Vehicles Act, 1939 requiring an insurance company to cover any risk to a person

(3) 1967 A.C.J. 158.
(4) 1968 A.C.J. 318.

carried on the pillion seat of a motor cycle. Therefore, the company is not liable to pay compensation for the death of or injury to a person carried on the pillion seat.

But the position will be different if the injury has to be idemnified by the insurer as in the case of a comprehensive insurance policy."

Similar matter came up for hearing before the Madras High Court in *M. Muthu Krishna* v. *R. Brindha and others* (5) where the Bench was pleased to observe as under :—

"The liability of the insurance company has now to be examined. The case of a pillion rider even under a comprehensive policy has been examined by this Court in the case of N. Ganapathy *v.* K. Viswanathan C.M.A. Nos. 764 of 1977 and 18 of 1978; decided on 29th October, 1980. In the said judgment to which one of us (Ramanujam, J.), was again a party. The relevant decisions have been discussed and the matter has also been considered in the light of the conditions of the private car tariff, which are adopted by all the insurance companies functioning in this country. In the following passage, the legal position has been set out :

"Thus clause (a) in section II(1) of Motor Cycle Comprehensive Policy does not cover a risk in respect of a person being conveyed in or on the motor cycle unless such person is being conveyed by reason of or in pursuance of a contract of employment. Therefore, the comprehensive policy in relation to a motor cycle specifically excludes the risk to a pillion rider unless such pillion rider is conveyed by reason of or in pursuance of a contract of employment."

"In the light of this legal position, the insurance company in the present case is not liable to compensate the death of the pillion rider. Therefore, we do not find it possible to accept the submission of the learned counsel for the appellant that the decree has to be passed as against the insurance company also in the present case. As he was a passenger, there is no third party liability here."

(5) 1982 A.C.J. (Supp) 428

This judgment was again followed in *New India Assurance Co. Ltd* v. *Kuppuswamy Naidu and others* (6).

(18) The learned counsel for the appellant referred to *National Insurance Company Ltd.* v. *Nathibai Chaturabhuj and others* (7), to substantiate his plea that the Insurance company is liable to pay the amount of compensation. This judgment, although, supports the learned counsel for the appellant but I am bound by the Full Bench decision of this Court rendered in *Gurdev Kaur's case* (supra) notwithstanding the contrary view taken in *Ambaden* v. *Usmanbhai Amirmiya Shekih* (8), and *National Insurance Company* v. *Nathibai Chaturbhuj* (9) by Gujarat High Court. The matter was again referred to a Full Bench of this Court in view of the contrary view taken in these decisions but the Full Bench in its judgment in *Des Raj Angra,* v. *Oriental Fire & Genl. Ins. Co. Ltd. and others* (10), held that merely because a contrary view has been taken by another High Court, it will not necessitate the reconsideration of the Full Bench decision in *Gurdev Kaur's case* (supra). No decree can be passed against the Insurance Company.

(19) Before I part with this judgment, I must record my appreciation for the very able and effective assistance rendered by Shri L. M. Suri, the learned counsel for the Insurance Company.

(20) In view of my findings recorded above, this appeal is dismissed. However, I leave the parties to bear their own costs.

P.C.G.

(6) 1988 A.C.J. 774.

(7) 1982 A.C.J. 153.

(8) 1979 A.C.J. 292 Gujrat.

(9) 1982 A.C.J. 153 Gujrat.

(10) 1985 A.C.J. 401.