

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.R.RAMACHANDRA MENON

&

THE HONOURABLE MR.JUSTICE K.HARILAL

TUESDAY, THE 3RD DAY OF NOVEMBER 2015/12TH KARTHIKA, 1937

MACA.No. 1149 of 2005

AGAINST THE AWARD IN OPMV 2406/1997 of M.A.C.T., ERNAKULAM
DATED 05-08-2004

APPELLANT/RESPONDENT NO.1:

K.V.JOSE, S/O.VARGHESE, KODIYAN HOUSE,
CHENDAMANGALAM P.O., ERNAKULAM DISTRICT.

BY ADV. SRI.JEEMON K.ABRAHAM

RESPONDENT(S)/PETITIONERS 1 TO 5 IN OPMV
ORIGINAL RESPONDENTS 2 TO 6:

1. AMBUJAKSHI, AGED 50, W/O.LATE
KUNJAPPAN, RESIDING AT PARACKAL HOUSE,
NEAR U.C.COLLEGE,
U.C.COLLEGE P.O. ALUVA.

2. P.K.DADU, AGED 28, S/O.LATE
KUNJAPPAN, RESIDING AT PARACKAL HOUSE
NEAR U.C.COLLEGE, U.C.COLLEGE P.O. ALUVA.

3. P.K.SOYA, AGED 30, D/O.LATE KUNJAPPAN,
RESIDING AT PARACKAL HOUSE, NEAR U.C.COLLEGE
U.C.COLLEGE P.O. ALUVA.

4. P.K.HIJI, AGED 25, D/O.LATE
KUNJAPPAN, RESIDING AT PARACKAL HOUSE
NEAR U.C.COLLEGE, U.C.COLLEGE P.O. ALUVA.

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5. P.K.JEEMOL, AGED 21, D/O.LATE KUNJAPPAN,
RESIDING AT PARACKAL HOUSE, NEAR U.C.COLLEGE
P.O.ALUVA.

6. A.LONAN @ LONAPPAN, MOONJELIL VEETTIL,
CHENGAMANANADU VILLAGE, ALUVA.

7. THE ORIENTAL INSURANCE COMPANY LTD.,
COCHIN 35.

8. ANN MARY P.GEORGE, PAINUMKAL HOUSE,
TRIPUNITHURA.

9. JALEEL, THANDAMKUNNATHU VEETTIL,
KANJIRAMATTOM, AMBALLOOR VILLAGE.

10. THE NATIONAL INSURANCE COMPANY LTD.,
KOCHI 35.

R10 BY ADV. SRI.MATHEWS JACOB (SR.)
R10 BY ADV. SRI.P.JACOB MATHEW
R1 TO R5 BY ADV. SRI.R.SUDHISH
R1 TO R5 BY ADV. SMT.M.MANJU
R7 BY ADV. SRI.M.JACOB MURICKAN
R6 BY ADV. SRI.M.M.SAIDU MUHAMMED
R9 BY ADV. SRI.VIJAI MATHEWS

THIS MOTOR ACCIDENT CLAIMS APPEAL HAVING BEEN
FINALLY HEARD ON 06-10-2015, ALONG WITH CO. 48/2006,
THE COURT ON 03-11-2015 DELIVERED THE FOLLOWING:

**P.R. RAMACHANDRA MENON &
K. HARILAL, JJ.**

**M.A.C.A. No.1149 of 2005 &
Cross-objection No.48 of 2006**

Dated this the 3rd day of November, 2015

JUDGMENT

Harilal, J.

The appellant is the 1st respondent in O.P.(MV) No.2406/1997 on the files of the Motor Accidents Claims Tribunal, Ernakulam. The above claim petition was filed by the respondents 1 to 5 herein under Sec.166 of the Kerala Motor Vehicles Act, claiming compensation for the irretrievable loss suffered by them, by the death of Sri. Kunjappan, the husband of the 1st respondent and the father of the respondents 2 to 5. According to the respondents 1 to 5, on 27/9/1996, while the said Kunjappan was travelling along with goods in a tempo van bearing

Registration No.KL7/E-3364 along the Vaikom - Tripunithura road from south to north, when reached near Udayamperoor Perumthrikkovil Temple, the tempo van dashed against the service bus bearing Registration No.KCE-2970 which came from the opposite direction and as a result of the hit, the said Kunjappan was thrown off the vehicle and at the nick of the moment, the right back wheel of the bus ran over his body causing him very serious injuries and on the way to the hospital, he died. At the time of accident, the tempo van was being driven by the 6th respondent, owned by the appellant and insured with the 7th respondent herein and the accident was caused by rash and negligent driving of the tempo van driven by the 6th respondent herein. The respondents 8 to 10 are the driver, owner and insurer of the bus at the time of accident. At the time of accident, the said Kunjappan was aged 54 years and he was travelling with the goods. The respondents 1 to 5 claimed an

amount of ₹5 lakhs from the appellant and the respondents 6 and 7. No amount was claimed from the respondents 8 to 10 as the death was caused due to the rash and negligent driving of the tempo van alone.

2. To substantiate the claim, the 1st respondent was examined as P.W.1 and Exts.A1 to A9 were marked. No evidence, either oral or documentary, was adduced by the appellant or the respondents 6 to 10 herein. After considering the evidence on record, the Tribunal passed the impugned award fixing the liability on the appellant and 6th respondent alone and directed them to pay an amount of ₹1,17,000/- as compensation to the respondents 1 to 5. The 7th respondent insurer was absolved from the liability in the absence of policy coverage. Dissatisfied with the fixation of the liability on the appellant and the 6th respondent alone, this appeal is filed on various grounds. The respondents 1 to 5 filed a cross-

objection on the ground that the quantum of compensation determined by the Tribunal is inadequate and unjust.

3. Heard the learned counsel for the appellant and the learned counsel appearing for the respondents.

4. The learned counsel for the appellant advanced arguments mainly canvassing two points. Firstly, according to the learned counsel, the Tribunal went wrong in completely absolving the insurer of the tempo van holding that the deceased was neither the owner; nor an authorized representative of the owner of the goods carrying in the tempo van at the time of accident. Secondly, it is contended that the rash and negligent driving of the bus also contributed to the cause of accident. So, the Tribunal ought to have proportionately fixed the liability on negligence contributed by both parties, the driver of the bus and the driver of the tempo van, as the immediate cause

of death was running over the deceased by the bus. Thirdly, it is contended that the tempo van while proceeding from Vaikom to Tripunithura, when it reached at Udayamperoor, a scooter bearing Registration No.KBT 8559 had suddenly leaped into the road from the western side and in that circumstances, the driver of the tempo van was left with no alternative, other than to suddenly twist the vehicle to the eastern side, to save the life of the scooterist. It is also contended that the accident had occurred on the returned trip of the tempo van, after safely delivering the oven manufactured by 'Aluva Settlement Industries' to its customer at Vaikom for which the tempo van was hired by 'Aluva Settlement Industries' and the deceased was a worker of that company.

5. Per contra, the learned counsel for the 7th respondent advanced arguments to justify the findings that the deceased was not accompanied with goods

either as owner or as the authorised representative of the owner of the goods and thereby, the 7th respondent is not liable to compensate the appellant as the vehicle had 'Act policy' only. It is also pointed out that there is no evidence on record to show that the deceased was travelling as an authorised representative of the owner of the goods; but, on the other hand, the evidence on record shows that the tempo van was empty at the time of accident.

6. The point that arises for consideration in the appeal is, whether the Tribunal is justified in absolving the 3rd respondent from the liability to compensate the appellant. Indisputably, Ext.B1 will show that it was only an 'Act policy' and the same will not cover bodily injury or death caused to a gratuitous passenger in the goods vehicle.

7. Then, the question is, whether the deceased was a gratuitous passenger or not. According to Sec.147(b) of the M.V. Act, the owner of the goods or

his authorised representative carried in the vehicle alone are covered by 'Act policy'. Going by the facts pleaded in the claim petition, it is seen that the specific case of the appellant was that the deceased was travelling with the goods. But, it is pertinent to note that the nature of goods with which he was accompanied or the ownership of the goods or the relationship of the deceased with the goods was not disclosed in the petition. The person for whom the deceased was carrying the goods was also not disclosed in the petition. As rightly held by the Tribunal, the capacity in which the deceased was travelling in the tempo van will decide the liability of the 7th respondent. Neither Ext.A2 charge sheet; nor the scene mahazar would show the presence of any kind of goods in the tempo van at the relevant time of accident. Absolutely there is no evidence on record to show that the deceased was travelling with the goods at the time of accident.

8. Surprisingly, in this appeal, the appellant has set up a new plea that the accident had occurred on the return trip of the tempo van after delivering the oven manufactured by the 'Aluva Settlement Industries' to its customer at Vaikom and he was travelling in the tempo van as a authorized representative of the owner of the goods. At this juncture, it is pertinent to note that even though notice had been duly served to him, he has not appeared before the trial court with the above contention so as to get absolved from the liability, and there lacks the bona fides of the above contention which is raised belatedly in this appeal only.

9. No document has been produced to show that the deceased was working in 'Aluva Settlement Industries'. Had he been working in the said industrial unit, certainly, either the appellant or the respondents 1 to 5 could have produced some documents to prove his employment as contended by them. It is true that

in Ext.A9 inquest report the name of 'Aluva Settlement Industries' is referred to as a place of employment of the deceased. But, no inference can be gathered from Ext.A9 alone to the extent that he was travelling in the tempo van as authorised representative of 'Aluva Settlement Industries'. There is no evidence on record to show that the tempo van was being used for transporting goods owned by 'Aluva Settlement Industries'. Moreover, in the inquest report, there is a statement that he was travelling in the tempo van which was empty.

10. To sum up, according to the respondents 1 to 5, the deceased was travelling with goods, whereas the case set up by the appellant in this appeal is that accident had occurred on the return trip of the tempo van, after delivering the goods manufactured by 'Aluva Settlement Industries'. Needless to say, the pleadings of the appellant and the respondents 1 to 5 are mutually destructive and opposite. As regards the

nature of or the purpose for which the deceased was travelling in the tempo van, absolutely there is no evidence to prove either the case set up by the respondents 1 to 5 in the claim petition or the defence plea taken by the appellant in this appeal. In this analysis, the Tribunal is justified in finding that the deceased was none other than a gratuitous passenger in the tempo van at the time of accident and the 7th respondent is not liable to compensate the legal heirs of the deceased, for his death, as he was a gratuitous passenger only.

11. The next point to be considered is whether the Tribunal is justified in absolving the respondents 8 to 10 from the liability to compensate the appellant.

12. At the outset, it is pertinent to note that the specific case of the respondents 1 to 5 is that the accident had occurred due to rash and negligent driving of the tempo van by the 6th respondent alone and the appellant and the respondents 6 and 7 are

jointly and severally liable to pay compensation to them and they have no such case alleging negligence against the respondents 8 to 10. As has been stated above, in spite of receipt of the notice along with the copy of the claim petition containing such pleadings against the appellant and the respondents 6 and 7, the appellant has not chosen to enter appearance to defend such a case put forward against him and the respondents 6 and 7.

13. In this appeal, the appellant has come up with another plea that when the tempo van reached at the place of occurrence, a scooter bearing Registration No.KBT 8559 had suddenly leaped into the road from western side of the road and in that circumstance, the driver of the tempo van was left with no alternative other than to suddenly twist the vehicle to the eastern side to save the life of the scooterist. Such a story does not find a place either in the pleadings in the claim petition or in the written statement filed by the

6th respondent or in Exts.P1 to P3 documents prepared by the police after investigation into the cause of accident. Had there been any bona fides or truth in this contention, certainly, the 6th respondent, who was driving the tempo van could have raised such a contention in his written statement. The absence of such a contention in the written statement of the 6th respondent would falsify this story, which put forward by the appellant in this appeal only. The new story put forward in this appeal to show a circumstance which made the accident unavoidable deserves to be dismissed at the threshold, for the lack of credibility and bona fides.

14. On the other hand, Ext.A3 scene mahazar shows that the accident took place at the eastern side of the road. Admittedly, the tempo van was proceeding from south to north. It follows that the tempo van had gone to the extreme wrong side and dashed against the bus, which was proceeding from

north to south, keeping its correct side. Exts.P1 to P3 further show that the tempo van after reaching at the opposite side, dashed against the bus and due to that impact, left side door of the tempo van got opened and the deceased was thrown off to the road and back wheel of the bus happened to run over his body. The driver of the bus had no opportunity to apply its brake before the run over as the same was caused by back wheel. No kind of negligence can be attributed to the 9th respondent, the driver of the bus. So, the Tribunal is justified in absolving the respondents 8 to 10 from the liability to compensate the appellant. At all points, this appeal fails and is dismissed accordingly.

15. Coming to the cross-objection, there is no evidence to show the actual income of the deceased Kunjappan. Had he been a worker in the 'Aluva Settlement Industries', the respondents 1 to 5 could have produced evidence to prove his employment and salary. In the absence of any evidence as regards to

the income of the deceased, at the time of accident, the Tribunal is justified in fixing the monthly income at ₹1,500/- as notional income. So also, the multiplier taken by the Tribunal is also correct. It appears that at the time of death, the respondents 2 to 4 are not the dependents of the deceased and no evidence has been adduced to prove otherwise. There is no reason to interfere with the relevant inputs taken to calculate the quantum of compensation. Therefore, there is no reason to interfere with the quantum of compensation as the same appears to be just and proper. Hence the cross-objection filed by the respondents 1 to 5 will stand dismissed.

Sd/-

(P.R. RAMACHANDRA MENON, JUDGE)

Sd/-

(K. HARILAL, JUDGE)

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P.S. to Judge