

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE T.R.RAMACHANDRAN NAIR

&

THE HONOURABLE SMT. JUSTICE P.V.ASHA

WEDNESDAY, THE 11TH DAY OF FEBRUARY 2015/22ND MAGHA, 1936

MACA.No. 2406 of 2012 ()

AGAINST THE AWARD IN OPMV 141/2010 of MACT PALA DATED 27-08-2012

APPELLANT(S)/PETITIONERS:

1. REENA
W/O.LATE JACOB THOMAS @ JOJI, KAINIKARA HOUSE
KURUMBANADU KARA, MADAPPALLY VILLAGE, CHANGANASSERY.

2. ANAKHA JACOB (MINOR)

3. ALEX JACOB (MINOR)

4. AMITHA JACOB (MINOR)

MINORS REPRESENTED BY NEXT FRIEND & GUARDIAN MOTHER
APPELLANT NO.1 REENA, W/O.LATE JACOB THOMAS @ JOJI
KAINIKARA HOUSE, KURUMBANADU KARA, MADAPPALLY VILLAGE
CHANGANASSERY.

5. MARYKUTTY THOMAS
W/O.THOMAS JOSEPH, KAINIKARA HOUSE, KURUMBANADU KARA
MADAPPALLY VILLAGE, CHANGANASSERY.

BY ADVS.SRI.MATHEW JOHN (K)
SRI.DOMSON J.VATTAKUZH

RESPONDENT(S)/RESPONDENTS:

1. BINU JOHN.E
S/O.JOHN.E.J., ETTICKAL HOUSE, MANAKUZH
MALLAPPALLY, PATHANAMTHITTA DISTRICT-689645.

2. CHERIAN THOMAS
MANIYAMPADAVATHIL HOUSE, NALUNAKKAL POST, VAKATHANAM
CHANGANASSERY-686101.

3. THE MANAGER
THE NATIONAL INSURANCE CO.LTD.
REPRESENTED BY ITS BRANCH MANAGER
NATIONAL INSURANCE CO.LTD., PALA-686575.

R3 BY ADV. SRI.RAJESH THOMAS
R BY SRI.M.A.GEORGE

THIS MOTOR ACCIDENT CLAIMS APPEAL HAVING COME UP FOR
ADMISSION ON 11-02-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

T.R.RAMACHANDRAN NAIR & P.V ASHA, JJ.

M.A.C.A No.2406 of 2012

Dated this the 11th day of February, 2015

JUDGMENT

Asha, J.

The legal heirs - widow, 3 minor children and mother - of deceased Jacob Thomas have filed this appeal seeking enhancement in compensation. They are also challenging the finding of the Tribunal attributing 30% contributory negligence on the deceased and the consequential deduction from the compensation to that extent. The deceased Jacob Thomas met with an accident on 21.11.2009 when the Tata Sumo vehicle he was driving collided with a stage carriage bus. The deceased was a driver and it was claimed that he was earning a sum of Rs.8,000/- per mensem. The Tribunal awarded an amount of Rs.5,33,500/- as compensation and after deduction of 30%, reduced the same to Rs.3,73,450/-.

2. The accident occurred on account of the head on collision between the Tata Sumo vehicle and the stage carriage bus.

3. The learned counsel appearing for the appellant points out that the finding of the Tribunal regarding contributory negligence is contrary to evidence and assessment of compensation under various heads are thoroughly inadequate. We heard the learned counsel appearing for the respondent Insurance Company who opposed the claim for enhancement and supported the award.

4. Oral evidence was adduced before the Tribunal by examination of PWs 1 to 3 and by documentary evidence by way of Exts.A1 to A13 on behalf of the appellants. No evidence was adduced on behalf of the respondents, either oral or documentary. On an examination of the relevant materials on record, we find that the respondents did not adduce any evidence in order to establish the contention raised in their written statement as to the contributory negligence on the part of the deceased. The Tribunal had considered 4 issues namely,

(i) Whether the accident occurred due to the rash and negligent driving of the bus by R1?

(ii) Whether there was contributory negligence on the part of the deceased?

(iii) Are the petitioners entitled compensation from the

respondents with cost?

(iv) Reliefs and costs.

5. On a consideration of issue No.(i), the Tribunal arrived at a finding that the accident occurred mainly due to the rash and negligent driving by the 1st respondent, who is the driver. The above conclusion was arrived at after consideration of Ext.A3 A.M.V.I report in respect of the stage carriage bus and Ext.A4 A.M.V.I report in respect of the Tata Sumo van and Ext.A5 charge sheet.

6. While considering issue No.(ii), the Tribunal found that there was 30% contributory negligence on the part of the deceased. This finding has been arrived at on the basis of the argument raised by the learned counsel appearing for the Insurance Company with reference to page 30 of the charge sheet that, the accident occurred while the deceased was trying to overtake an auto which was proceeding in the same direction. It was contended that the deceased having seen the bus coming from the opposite direction, should have taken due care and caution to avoid collision. In support of the conclusion, the Tribunal relied upon the judgment of the Apex Court reported in **Bijoykumar Dugar v. Vidyadhar Dutta and Ors.** [2006 ACJ

1058] to the effect that, head on collision between car and bus coming from opposite direction resulting in the death of the car driver, involved contributory negligence. But on examination of the factual circumstances arising in the above case, we find that the evidence adduced in that case before the Tribunal, proved contributory negligence on the part of the driver of the car. But in this case, the appellants had adduced evidence by examining PW2, who is an eye witness to the accident. On a perusal of the deposition, we are unable to find anything which supports the finding of the Tribunal. As per his testimony, it was the bus which overtook the autorickshaw and he denied the suggestion as to overtaking done by the deceased. We also find that in the decision in **Jiju Kuruvila v. Kunjamma Mohanbi** [2013 ACJ 2141], the Apex Court has held that cogent evidence is necessary for attributing contributory negligence. In that decision, the Apex Court found that there was no evidence on record to suggest any negligence on the part of the deceased and it was merely on the basis of the scene mahazar that, contributory negligence was found by the Tribunal. In para.24 of the said judgment the Apex Court found that, from the scene of the accident only one may suggest or presume the manner in

which the accident occurred, but in the absence of any direct or corroborative evidence, no conclusion can be drawn as to whether there was negligence on the part of the driver. In the absence of such direct or corroborative evidence, the court cannot give any specific finding about negligence. There also, the accident occurred on account of head on collision between two vehicles. In **Meera Devi & Anr. v. Himachal Pradesh Road Transport Corporation & Ors.** [(2014) 4 SCC 511] also, the Apex Court held that in the absence of cogent evidence, contributory negligence cannot be attributed. Therefore, we find that the conclusion arrived at by the Tribunal regarding contributory negligence on the part of the deceased is unfounded and we vacate that finding.

7. The deceased was aged 33 years and it was claimed that he was earning a sum of Rs.8,000/- per mensem. The employer was examined and the salary certificate was also produced as Ext.A7. The Apex Court has in its judgment in **Minu Rout & Anr. v. Satya Pradyumna Mohapatra & Ors.** [(2013) ACJ 2544] held that the income of a skilled driver, can be reckoned as Rs.6,000/-. In this case apart from Ext.A7 salary certificate, driving license(Ext.A8) of the deceased was also

produced. Therefore, there cannot be any dispute that the deceased was working as a driver. The income claimed in the claim petition was therefore only reasonable. The accident had occurred in the year 2009. We therefore reckon Rs.8,000/- as his monthly income. As the deceased was aged 33 years, the appropriate multiplier is 16. There are 5 dependents including 3 children, widow and mother. Therefore, $\frac{1}{4}$ th of the income has to be deducted towards personal expenses. Therefore, the compensation under the head 'loss of dependency' will be Rs.8,000X12X $\frac{3}{4}$ X16, which will come to Rs.11,52,000/-. The Tribunal has not awarded any amount towards pain and suffering. We therefore award an amount of Rs.10,000/- towards pain and suffering. Similarly under the head 'funeral expenses', 'loss of love and affection' and 'loss of consortium', the Tribunal has awarded only a sum of Rs.5,000/-, Rs.10,000/- and Rs.5,000/- respectively. In the light of the decision of the Apex Court in **Rajesh v. Rajbir Singh** [2013(3) KLT 89(SC)], we award Rs.25,000/- towards funeral expenses, Rs.1 lakh to the widow towards loss of consortium and Rs.1,50,000/- towards loss of love and affection, as there are 3 children, mother and widow. The Tribunal has awarded a sum of Rs.20,000/- towards mental shock

and since we are awarding compensation under various heads, we deem it appropriate to delete the amount under this head. Towards loss of estate, the Tribunal has awarded Rs.10,000/- only. We enhance the same to Rs.50,000/-. The award is modified accordingly as follows:

<i>Sl.No.</i>	<i>Head of claim</i>	<i>Amt.</i>
1	Transportation to Hospital	Rs. 3,000.00
2	Damages to clothing and articles	Rs. 500.00
3	Funeral expenses	Rs. 25,000.00
4	Pain and suffering	Rs. 10,000.00
5	Loss of dependency	Rs. 11,52,000.00
6	Loss of love and affection	Rs. 1,50,000.00
7	Loss of consortium for the 1 st appellant	Rs. 1,00,000.00
8	Loss of estate	Rs. 50,000.00
	TOTAL	Rs. 14,90,500.00

(Rupees Fourteen lakhs ninety thousand and five hundred only)

The appellants will be entitled to a total compensation of Rs.14,90,500/- (Rupees Fourteen lakhs ninety thousand and five hundred only) and the enhanced amount will carry interest @9% per annum from the date of petition. The 3rd respondent is given 3 months' time to deposit the amount.

The appeal is allowed accordingly. The parties will bear their respective costs.

The Court Fee in deficit towards the total awarded amount shall be recovered by the Tribunal before disbursement.

Sd/-
T.R.RAMACHANDRAN NAIR
Judge

Sd/-
P.VASHA
Judge

rtr/

/true copy/

P.S to Judge