

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. 1574 of 2015 (B)

AGAINST THE AWARD IN OPMV 899/2011 of M.A.C.T., MUVATTUPUZHA
DATED 04-10-2014

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APPELLANT(S)/PETITIONERS 1 TO 3:

1. MAYA SUBHASH CHANDRA BOSE, AGED 47 YEARS,
W/O. LATE SUBHASH CHANDRA BOSE, PUTHENPURACKAL HOUSE,
NELLADU P.O., PIN - 686 721, KUNNATHUNADU TALUK,
ERNAKULAM DISTRICT.

2. NIKHIL BOSE, AGED 25 YEARS,
S/O. LATE SUBHASH CHANDRA BOSE, PUTHENPURACKAL HOUSE,
NELLADU P.O., PIN - 686 721, KUNNATHUNADU TALUK,
ERNAKULAM DISTRICT.

3. NOYNA, AGED 22 YEARS,
D/O. LATE SUBHASH CHANDRA BOSE, PUTHENPURACKAL HOUSE,
NELLADU P.O., PIN - 686 721, KUNNATHUNADU TALUK,
ERNAKULAM DISTRICT.

BY ADVS.SRI.K.S.BABU
SMT.N.SUDHA
SRI.BABU SHANKAR

RESPONDENT(S)/RESPONDENTS:

1. JINOY JACOB
S/O. JACOB P.M, AE-19 (OLD NO. 44), 10TH MAIN ROAD,
ANNA NAGAR, CHENNAI - 600 040, TAMIL NADU,
NOW RESIDING AT PALLATHU HOUSE, NELLIMATTOM KARA,
NELLIMATTOM, PIN-686692, KUTTAMANGALAM VILLAGE,
KOTHAMANGALAM TALUK, ERNAKULAM DISTRICT.

2. RAMANI JACOB,
W/O. JACOB PO.M., AE-19 (OLD NO. 44), 10TH MAIN ROAD,
ANNA NAGAR, CHENNAI - 600 040, TAMIL NADU,
NOW RESIDING AT PALLATHU HOUSE, NELLIMATTOM KARA,
NELLIMATTOM, PIN-686692, KUTTAMANGALAM VILLAGE,
KOTHAMANGALAM TALUK, ERNAKULAM DISTRICT.

3. THE ORIENTAL INSURANCE COMPANY LIMITED,
MALHOTRA TOWER, PRADHAN NAGAR, HILL CART ROAD,
SILGURI, DARJEELING, WEST BENGAL - 734 003.

R3 BY ADV. SRI.A.R.GEORGE
R3 BY SMT.K.S.SANTHI

THIS MOTOR ACCIDENT CLAIMS APPEAL HAVING BEEN FINALLY
HEARD ON 29-09-2015, THE COURT ON 03-11-2015 DELIVERED THE
FOLLOWING:

OKB

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

M.A.C.A.No.1574 of 2015

Dated this the 3rd day of November, 2015.

JUDGMENT

Harilal, J.

The appellants are the claim petitioners 1 to 3 in O.P(MV) No.899/11 on the files of the Motor Accidents Claims Tribunal, Muvattupuzha. They are the legal heirs of the deceased Subhash Chandra Bose, who died in a road traffic accident. The above claim petition was filed under Section 166 of the Motor Vehicles Act, claiming compensation for the irretrievable loss caused to him by the death of the said Subhash Chandra Bose, in the said accident. According to the appellants, on 1.1.2011 at about 12.15 a.m. while the deceased Subhash Chandra Bose was driving his car bearing Registration No.KL-40/B-8699 through the Ernakulam-Muvattupuzha National Highway from west to east, with normal speed, and when he reached at Nambiarupadi, Kadamattom, a Tata Sierra car, bearing

Registration No.TN-27/W-1234 driven by the 1st respondent, came from the opposite direction with excessive speed, hit the car driven by the deceased and as a result of the accident, the said Subhash Chandra Bose and four other co-passengers of the car had sustained fatal injuries. Eventually, Subhash Chandra Bose succumbed to his fatal injuries at 5.30 a.m., on the same day, while undergoing treatment at the Medical College Hospital, Kolenchery. According to the appellants, the accident occurred solely due to the rash and negligent driving of the Tata Sierra car by the 1st respondent. The 2nd and 3rd respondents are the registered owner and insurer respectively of the said offending vehicle. So, the respondents 1 to 3 are jointly and severally liable to pay compensation to the appellants. They claimed Rs.33,50,000/- as compensation from the respondents.

2. The 1st and 2nd respondents remained ex parte. The 3rd respondent filed the written statement admitting the policy issued in favour of the 2nd respondent with respect to the said Tata Sierra car for

the period from 25.5.2010 to 24.5.2011; but, strongly contended that the accident has occurred due to the rash and negligent driving of the deceased himself. According to the 3rd respondent, the deceased was driving the car in a most rash and negligent manner through the wrong side of the road and thereby, hit against the Tata Sierra car. After completing the investigation, the police had laid a Final Report against the deceased for the offences punishable under Section 279 read with Section 304A of the IPC. Since the accident occurred solely due to negligent act of the deceased, the appellants are not entitled to get any compensation. Without prejudice to the above contentions, the 3rd respondent disputed the age, occupation and monthly income of the deceased. According to the 3rd respondent, the compensation claimed under various heads are too excessive and without any legal basis and reasoning. On the above premises, the 3rd respondent prayed for dismissal of the petition.

3. Heard the learned counsel for the appellants

and the learned counsel appearing for the 3rd respondent.

4. The learned counsel for the appellants vehemently contended that the Tribunal went wrong in appreciating the facts and evidence on record while determining the cause of accident. The Tribunal ought to have given due weight to the evidence of P.W.1, which proved that the accident has not happened due to the rash and negligent driving of the deceased Subhash Chandra Bose. According to the learned counsel, since P.W.1 was travelling in the same car with the deceased at the time of accident, there is no reason to disbelieve his evidence. The sum and substance of his argument is that the misappreciation of the evidence on record culminated into the dismissal of the claim petition on erroneous finding of facts. Even if the deceased was at fault, the Tribunal ought to have found that for granting compensation under 'no fault liability', the negligence of the deceased is irrelevant.

5. The appellants filed I.A. No.1886/2015 in this

appeal under Order VI Rule 17 and Section 151 of the C.P.C. seeking an order permitting them to amend the original petition by substituting Section 163(A) of the M.V. Act with Sections 166 and 140 of the M.V. Act.

6. Per contra, the learned Standing Counsel for the 3rd respondent advanced arguments to justify the findings in the impugned order, whereby the Tribunal dismissed the claim petition. According to the learned Standing Counsel, the Tribunal has rightly appreciated the facts and evidence in its correct perspective. The learned Standing Counsel further drew our attention to the scene mahazar and submitted that the scene mahazar itself obviously establishes the rash and negligent driving of the car through extremely wrong side of the road, which culminated in the accident. So also, it is contended that no reliance can be placed on the evidence of P.W.1, who filed O.P (MV) No.596/2011, claiming compensation from the insurer of the WagonR car on the allegation that the accident occurred due to the rash and negligent driving of the said car by the deceased Subhash

Chandra Bose.

7. In view of the submissions made at the Bar, the question that arises for consideration is, whether the Tribunal is justified in dismissing the claim petition on a finding that the accident was caused by the rash and negligent driving of the WagonR car by the deceased Subhash Chandra Bose himself.

8. As per the case pleaded by the appellants, the accident occurred solely due to the rash and negligent driving of the Tata Sierra car bearing Registration No.TN-27/W-1234 driven by the 1st respondent. Per contra, the case of the 3rd respondent is that the accident was caused by the rash and negligent driving of the WagonR car by the deceased himself. According to the 3rd respondent, since the accident occurred solely due to the rash and negligent act of the deceased, his legal representatives are not entitled to get compensation under Section 166 of the M.V.Act.

9. Exts.A1 to A5 are the copies of the FIR, FIS, scene mahazar and MVI Reports in connection with the said accident. After investigation, the Sub Inspector

of Police, Puthencruz had filed the Final Report under Section 173(2) of the Cr.P.C. for the offences punishable under Sections 279, 338 and 340A of the IPC on the allegation that the accident was caused by the rash and negligent driving of the deceased Subhash Chandra Bose. As per the description in Ext.A3 scene mahazar the place of accident is 1.15 Mtrs. towards northern direction from the southern tar end having a total width of 7.7 Mtrs. Indisputably, since the deceased was driving the car from west to east, his correct side was the northern side of the National Highway. It has come out in evidence that the 1st respondent was driving the Tata Sierra car from east to west and his correct side was the southern side of the National Highway. Since the place of accident is 1.5 Mtrs. towards northern direction from the southern tar end of the National Highway, it is correct to say that the accident has occurred on the extreme wrong side of the car driven by the deceased. The court below rightly appreciated the scene mahazar, which obviously established the negligence of the deceased

Subhash Chandra Bose in driving the vehicle. We are in full agreement with the finding of the Tribunal that if the car driven by the deceased was proceeding through his correct side, he could have averted the accident. There is no explanation for proceeding the car through the extreme wrong side of the road. Ext.A3 scene mahazar further gets assurance from Exts.A4 and A5 inspection reports which disclosed that extensive damage was sustained on the front side of both the vehicles by way of head on collision.

10. Ext.B2 Award passed in O.P(MV) No.432/11 of the same Tribunal would disclose that the said original petition was filed by the 1st respondent herein, as the driver of the offending vehicle, claiming compensation on account of the injuries sustained to him in the very same accident and the Tribunal arrived at a finding that the accident occurred solely due to the rash and negligent driving of the car by Subhash Chandra Bose. The 1st and 2nd appellants herein are the 1st and 2nd respondents in O.P(MV) No.432/11 and they remained ex parte in the said OP even after receipt of the notice

issued from the Tribunal. As rightly held by the Tribunal, the finding in Ext.B2 Award, as regards the cause of accident, is binding on the appellants and they are estopped from contending that the accident occurred due to the rash and negligent act of the 1st respondent.

11. Coming to the evidence of P.W.1, in cross examination, he has admitted that he was a close friend of the deceased Subhash Chandra Bose. The sum and substance of his evidence is that while Subhash Chandra Bose was driving the car, a tipper lorry, which was proceeding in front of the vehicle towards the same direction, gave signal to overtake the same and that when Subhash Chandra Bose attempted to overtake the said lorry, the Tata Sierra car from the opposite direction came at an excessive speed and hit against the WagonR car driven by Subhash Chandra Bose and thereby, the accident had occurred. In short, the accident was caused by the rash and negligent driving of the Tata Sierra car by the 1st respondent. It is pertinent to note that such a story, as regards the

cause of accident, does not find a place in the Original Petition No.596/11 filed by P.W.1 seeking compensation before the same Tribunal. More importantly, the allegation in the above OP was that the accident was occurred due to the rash and negligent driving of the WagonR car, in which he was travelling, by the deceased Subhash Chandra Bose. For the above reason, the Tribunal is justified in discarding the evidence of P.W.1 in toto.

12. In view of the discussions made above, we find that the Tribunal is justified in finding that the accident had occurred solely due to the rash and negligent driving of the car bearing Registration No.KL-40/B-8699 by the deceased Subhash Chandra Bose and as such, the appellants are not entitled to get compensation from the respondents. There is no illegality or impropriety in the above findings and we do not find any kind of perversity in the appreciation of evidence from which those findings are arrived at.

13. In this appeal, the appellants have filed I.A.No.1886/2015 under Order VI Rule 17 and Section 151

of the CPC seeking an order granting permission to amend the original petition by substituting Section 163(A) of the M.V. Act with Section 166 of the said Act. This Court, in various decisions, has held that the principles of Code of Civil Procedure will have to be followed by the Motor Accidents Claims Tribunals, unless it is specifically excluded by statute. [See K.V.Aboo v. Commissioner for Workmen's Compensation (1977 ACJ 446), Cheru Ouseph v. Kunjipathumma (1981 KLT 495), Mohammed v. Chakkappan (1983 KLT 854) and Abdulla v. Rent Controller (1984 KLT 865)].

14. The original petition was filed under Section 166(1)(a) of the M.V. Act claiming compensation from the respondents 1 to 3 on the allegation that the accident had occurred solely due to the rash and negligent driving of the Tata Sierra car by the 1st respondent. Now, after the dismissal of the original petition, on a finding that the accident had occurred due to the rash and negligent driving of the deceased Subhash Chandra Bose alone, the appellants want to

amend the original petition so as to bring the claim under Section 163(A) of the M.V. Act to claim the benefit of structured formula, notwithstanding the lack of negligence on the part of the 1st respondent.

15. Needless to say, the claim under Sections 166 and 163(A) of the M.V. Act is entirely different and distinct. The purpose of Section 163(A) is to protect the victims, who have suffered from the accidents, which are not caused on account of negligence of any person. The new claim sought to be raised by way of amendment is one inconsistent with the earlier stand and it will basically alter the nature of claim itself. More over, it will cause prejudice and injustice to the opposite party. The amendment can be allowed only when the proposed amendment does not alter or substitute a new cause of action on the basis of which the original lis was raised or defence taken. Inconsistent and contradictory allegations in negation to the admitted position of facts or mutually destructive allegations of facts should not be allowed to be incorporated by means of amendment to the

pleadings. The amendment can be allowed at any stage; but, subject to satisfaction of the conditions requisite in the proviso to Order VI Rule 17 of the CPC. Thus, the scope of amendment, after the commencement of trial has been shrunk after the introduction of the proviso under Order VI Rule 17 of the CPC by the Act 22 of 2002. Here, the matter sought to be incorporated by way of amendment was one which could have been raised before the commencement of trial, and thereby, the same is barred by the said proviso also.

16. In *Oriental Insurance Co. v. Hansrajbhai* [2001 (2) KLT 235 (SC)], the Supreme Court held that the claimant cannot pursue his remedies under both Sections 166 and 163(A) of the M.V. Act simultaneously. If that be so, in our view, it must follow that the claimant cannot pursue for compensation under Sections 166 and 163A of the Act, one after another by way of amending the plea after dismissal of one plea which was taken during the course of trial. Compensation for death or injuries caused by the accident can never be an experimental exercise, in our

view. In the above view of the matter, we are liable to dismiss the above I.A. and we do so.

This appeal is devoid of merits and dismissed accordingly.

Sd/-

P.R. RAMACHANDRA MENON, JUDGE

Sd/-

K. HARILAL, JUDGE

okb.