

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE T.R.RAMACHANDRAN NAIR

&

THE HONOURABLE SMT. JUSTICE P.V.ASHA

THURSDAY, THE 22ND DAY OF JANUARY 2015/2ND MAGHA, 1936

MACA.No. 2011 of 2011 ()

AGAINST THE AWARD IN OPMV 85/2004 of ADDL.D.C. & MACT, PARAVUR DATED
30-06-2011

APPELLANT(S) PETITIONER:

M.J.ABRAHAM AGED 59 YEARS
S/O. JOSEPH, MANDHRA VEETIL, WEST OF MATHA CHURCH
OCHANATHURUTHU KARA, ELAMKUNNAPUZHA VILLAGE
NORTH PARUR TALUK.

BY ADVS.SRI.K.JANARDHANAN
SRI.K.J.MANU RAJ

RESPONDENT(S) /RESPONDENTS:

1. N.A.VINOD AND OTHERS
S/O. ARAVINDAKSHAN, NIKATHIL HOUSE, NARAKKAL.

2. MARTIN A.J., AGED 38 YEARS
S/O. JOSEPH A.A., ARAKKAL VEETIL, NAYARAMBALAM VILLAGE
NAYARAMBALAM P.O.

3. UNITED INDIA INSURANCE CO. LTD.
BRANCH N.PARUR.

R3 BY ADV. SRI.MATHEWS JACOB (SR.)
R3 BY ADV. SRI.P.JACOB MATHEW

THIS MOTOR ACCIDENT CLAIMS APPEAL HAVING BEEN FINALLY HEARD
ON 3/12/2014 THE COURT ON 22-01-2015, DELIVERED THE FOLLOWING:

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

M.A.C.A.No.2011 of 2011

Dated this the 22nd day of January, 2015

JUDGMENT

Ramachandran Nair, J.

This appeal is filed by the claimant before the Tribunal. The main challenge is against the quantum of compensation. The Tribunal awarded a total compensation of Rs.5,66,300 as against the claim for Rs.15,61,000/-.

2. The appellant sustained injuries in a motor vehicle accident which occurred on 16.5. 2002 at about 9.30 p.m. He was riding his motor cycle bearing registration NoKL 7Z 4031 through Nayarambalam - Vyppin road towards south. When it reached the place called Veliyathamparambu a bus bearing registration No.KL 865 which was going ahead of the same, abruptly stopped. This caused the accident and the appellant as well as the pillion rider sustained serious injuries.

3. The appellant was aged 52 years at the time of the accident and was a Merchant Navy Officer. It was claimed that he was getting nearly

Rs.1 Lakh per month as income.

4. The insurance company contested the matter alleging that the accident was caused due to the negligence of the appellant who was in an intoxicated stage. Therefore, it was contended that he has contributed to the accident. There was a valid insurance policy at the time of the accident.

5. Before the Tribunal P.Ws. 1 to 4 were examined and Exts.A1 to A24 have been marked. No evidence was adduced by the insurance company. The Tribunal found that it is a case of composite negligence and the driver of the bus as well as the appellant had contributed to the accident. Hence 75% negligence has been attributed to the bus driver and 25% to the appellant. As against the appellant, negligence is attributed for the reason that Rule 23 of Road Regulations 1989, was seen violated by him, in not keeping safe distance from the bus.

6. We heard learned counsel for the appellant and learned Senior Counsel for the third respondent insurance company.

7. Learned counsel for the appellant submitted that the finding regarding contributory negligence on the part of the appellant is not sustainable. The evidence in this case fully supports the version of the appellant. The evidence of P.W.1, the injured, P.W.2, the pillion rider and

P.W.3, an occurrence witness is to the effect that the accident occurred due to the abrupt stopping of the bus which was going ahead of the motor cycle.

8. The driver of the bus himself was examined as P.W.4. He remained ex parte in the proceedings. His evidence is to the effect that he was driving the bus from Munambam to Vypin from north to south and he alone was present inside the bus as it was meant for parking on the side of the road. When he applied break, he heard a sound from the rear side and it was found that the two wheeler and the riders have fell down. The accident had occurred since he applied break suddenly, according to him.

9. Before the Tribunal, Ext.A2 final report in the crime registered was also produced. Therein, the appellant is alleged to have committed offences under Sections 279, 337 and 338 IPC and Section 185 of the Motor Vehicles Act.

10. The judgment rendered by the Judicial First Class Magistrate, Kochi was also produced as Annexure A6 by the appellant. He was found not guilty of the above offences and accordingly he was acquitted. The Tribunal therefore found that there is no clear evidence to show that at the time of accident the appellant had driven the motor cycle in an intoxicated stage. There was no evidence to show that the prescribed quantity of

alcohol mentioned in Section 185 of the Act was present in his blood.

11. Learned Senior Counsel for the insurance company submitted that in the wound certificate it is noted that there was smell of alcohol in his breath. It is therefore submitted that negligence can be attributed to the appellant. This contention is answered by the learned counsel for the appellant by stating that mere smell of alcohol does not lead to the inference that there will be contributory negligence.

12. The Tribunal rested upon its conclusions in the light of Section 185 of the Motor Vehicles Act. It prescribes quantity of alcohol in the blood, viz. 30 mg. per 100 ml. or more which makes it an offence. The breath analysis test was also not conducted.

13. Apart from that, Ext.A6 judgment of the criminal court found him not guilty of various offences. The court found therein, in paragraph 8 that on an analysis of evidence there is absolutely nothing to connect the accused with the offence alleged. Therefore, we also concur with the view of the Tribunal that there is no evidence to show that he was driving the vehicle in an intoxicated stage.

14. The negligence attributed to the appellant at 25% is due to the fact that he did not keep safe distance from the bus. The Tribunal, in this

context relied upon Rules 23 and 24 of the Road Regulations, 1989. Rule 23 directs the driver of the motor vehicle which is going behind another vehicle to keep sufficient distance so as to avoid collision, if the vehicle going in front suddenly slow down or stop. Rule 24 directs that no driver of the vehicle shall apply break abruptly unless it is necessary to do so for safety reasons.

15. The admission of P.W.4 that he applied break suddenly is there. This was for parking vehicles on the road side. It is evident that he did not verify whether any vehicle was coming from the rear side. It is also therefore clear that he has not applied for safety measures.

16. The question is whether there is any violation of Rule 23 of the Road Regulations on the part of the appellant. Of course, if he had provided a clear distance from the bus the collision might have been avoided, but regarding the same there is no evidence at all. Therefore, the only question is whether 25% negligence can be attributed to the appellant. Herein, the insurance company has not adduced any independent evidence. The evidence of P.Ws.1 to 3 is that the driver of the bus abruptly applied the break. We are therefore of the view that negligence attributed to the appellant at 25% by the Tribunal cannot be justified. But since there is

violation of Rule 23, we fix it at 10% and therefore we find that the driver of the bus is negligent at 90% and the appellant at 10%.

17. The medical evidence adduced by the appellant are Exts.A7 to A11 which are treatment records. Ext.A7 is the wound certificate issued from the Medical Trust Hospital and Ext.A11 is the discharge summary issued from the same hospital. Exts.A8 to A10 are case summaries issued from Specialist Hospital, Ernakulam.

18. The period of treatment of the appellant is 164 days in total, i.e. 117 days in Medical Trust Hospital and 43 days in Specialist Hospital. The injuries noted in Ext.A11 are the following:

“Type III B open fracture both bones left leg, fracture medial malleolus with open left ankle injury, deformity left leg middle third, lacerated wound 6 x 3 cm. Over anterior aspects of leg with fracture bones exposed, lacerated wound 8 x 1 cm. Over anterior aspect of ankle with medial malleolus exposed in the wound (Severe contamination).”

Wound debridement and nailing left tibial and ORIF medial malleolus ORIF fibula left with 1/3rd tubular plate screws done. The Tribunal found that serious injuries have been caused to his left leg and there is deformity on left leg.

19. Much argument was raised on the actual disability sustained by the appellant and the incapacities he is having in pursuing his normal avocations in life. Ext.A12 is the disability certificate issued by the Medical Board of the General Hospital, Ernakulam. We hereinbelow reproduce the details in the said certificate:

“We, members of the Board, have today examined Abraham, 55 years, merchant navy, whose signature is given above and found that he had an RTA on 17/5/02 as per hos.no.705343 of Medical Trust Hospital, Ernakulam, in which he sustained # BB (L) leg, # med. Malleolus & open # ankle injury ().

C/o. Difficulty in walking

O/E walks with limp

(L) leg shows extensive skin grafting area over anter lateral aspect of lower 2/3.

(L) foot swollen. Skin discolored.

3 cm shortening of (L) leg.

(L) knee-movements from 180 to 70 flexion.

(L) ankle - no movements.

X-ray (L) leg-united # tibia midthird with 10 anterior angulation

(L) ankle-bony ankylosis of ankle. United # lower ¼ of fibula with plate & screws.

Based on the above findings his total permanent physical

disability is assessed to be 19% as per Mc Birde's scale.”

The certificate evidences the fact that in the left leg extensive skin grafting was done and there is 3cms. Shortening of left leg. Knee movements show flexion from 180 to 70 and in the left ankle it is reported as “no movements”. It is also recorded that in the left leg there is ankle-bony ankylosis of ankle.

20. The percentage of disability reported is 19 accepting McBirde's scale. This was re-assessed as evident from the certificate dated 19.1.2012 forwarded to this Court by the Director of Health Services, wherein the percentage of disability is 23 which we accept.

21. Then the important consideration will be as to the monthly income claimed at Rs.1 Lakh as Merchant Navy Officer. Exts.A14 to A22 are the documents which were explained by the appellant who was examined as P.W.1 before the Tribunal. His case is that after the accident he is unable to attend his job. Learned counsel for the appellant attacked the finding of the Tribunal that the documents will not show that he was working as such on the date of accident. Learned Senior Counsel for the insurance company also submitted that it is

evident that he was not working as Merchant Navy Officer as on the date of accident and the period of contract was over.

22. Ext.A15 is the certificate issued by Geepee Shipping Agencies Private Limited dated 10.1.2002. It will show that he was working in the concern with effect from 28.10.1991. Initially he was working as 3rd officer and subsequently he as working as 2nd officer. But it will also show that after 3.6.2001 he was not working there, whereas the accident took place on 16.5.2002. There was no evidence before the Tribunal that he had worked from 3.6.2001 till the date of accident as Merchant Navy Officer.

23. As regards the remuneration, the Tribunal found that there is no clear evidence on the monthly income. Ext.A18 is the appointment order issued by Great Circle Shipping Agency Ltd., Thailand wherein his remuneration is shown as 2048 US Dollars. There was no evidence to prove before the Tribunal that he had joined service pursuant to Ext.A18. Therefore, the remuneration claimed at such an amount was not accepted, rightly, by the Tribunal.

24. The Tribunal then examined the question whether he was a

qualified person to work as Merchant Navy Officer and reliance is placed on Ext.A17 which would prove that he underwent Radar Observer's Course at the National Institute of Port management.

25. By relying upon the principles stated by this Court in **Vijayalakshmi v. Rajasekharan Nair** (1994 (2) KLT 1020), learned counsel for the appellant submitted that even if the person is out of employment, the matter will have to be assessed going by the qualification and other details and that non-engagement cannot be taken as the circumstance to ignore the potentialities and possibilities of securing a job later.

26. The Tribunal fixed the monthly income at Rs.10,000/-. Considering the age of the appellant as 52 years, 11 was taken as the multiplier. The compensation for permanent disability is accordingly assessed Rs.2,50,800/-.

27. The strong objection raised by the learned Senior Counsel for the Insurance Company as regards the above aspect is that since the appellant was aged 52 years, the multiplier adopted is a higher one or at any rate, the income cannot be spread over to 11 years as there will

be retirement in between.

28. The vehement argument raised by the learned counsel for the appellant is that the monthly income fixed is too low.

29. As regards the age upto which he can get employment is concerned, there is no reliable evidence. It is clear that he was not having a permanent employment with any employer, but he was getting employment on contract basis on specific terms.

30. We have gone through the evidence of P.W.1. According to him, he was employed by Great Circle Shipping Company, Bangkok from 1989 and G.P. Shipping Company is their agent. It was a contract employment, but it was a regular one also. He submitted that he can do work upto 60 years of age.

31. The question is whether the multiplier even though can be taken as 11, the admission by P.w.1 that he can work only upto 60 years will enable him to earn the same amount for three years further after the age of 60. Coupled with it is the question whether the amount fixed as Rs.10,000/- per month is correct or not.

32. The background of the appellant has been proved through the

evidence. He had been employed as a Merchant Navy Officer. Apart from the total remuneration the other conditions of service and facilities like accommodation, etc., if any, are not evident from the certificate produced. In a matter like this, since he was working with a foreign employer, such details ought to have been placed before the Tribunal for appropriate consideration.

33. The fixation of multiplicand will depend upon many imponderables. If the future prospectus of a person can be quantified and added along with the income obtained at the time of the accident, the possibility of reduction of the sum after a number of years will also be a relevant factor. Therefore, appropriate multiplicand will have to be arrived at by taking the two aspects together and balancing them. The principles in this regard are clear from paragraph 9 of the judgment of the Apex Court in **KSRTC v. Susamma Thomas** (1994 (1) KLT 67). We are therefore of the view that considering the employment background of the appellant and other factors, his monthly income can be fixed at least Rs.15,000/- notionally for the purpose of assessing compensation, for the period upto the age of 60. After 60

years of age, since there will be a reduction, the same also will have to be taken into account. There is no evidence to show that he will be able to gain any amount by way of remuneration from any shipping company after the age of 60 years. Therefore, both these factors will have to be balanced. In the light of the above, after considering all aspects, we are of the view that Rs.12,500/- p.m. can be taken as the average multiplicand which will do justice to both sides and will lead to assessment of a fair compensation.

34. For assessing the compensation we adopt the multiplier as 11. Therefore, we grant an amount of Rs.3,79,500/- ($12500 \times 12 \times 11 \times 23/100$) as compensation for permanent disability.

35. The evidence is to the effect that he was hospitalised for a period of 160 days. He had undergone several treatment procedures also during this period. The disability certificate evidences the fact that extensive skin grafting was done.

36. The Tribunal has assessed compensation for pain and suffering at Rs.40,000/-, which according to the learned counsel for the appellant, is too meagre. According to us, considering the detailed

treatment undergone and the period of inpatient treatment, an amount of Rs.60,000/- can be granted under the head “pain and suffering”. The amount granted towards loss of earnings for six months, viz. Rs.60,000/- is refixed at Rs.75,000/-. The Tribunal granted an amount of Rs.1,68,000/- towards medical expenses and for transportation expenses an amount of Rs.4,000/- has been granted. Rs.15,000/- has been granted towards by-stander's expenses. The accident is of the year 2002 and we will be justified in granting Rs.150/- per day as by-stander's expenses and the total amount will be Rs.24,000/- since the period of inpatient treatment was 160 days. We grant an amount of Rs.5,000/- under the head “extra nourishment”.

38. One of the items which learned counsel submitted that the Tribunal has granted meagre amount, is loss of amenities and enjoyment in life, discomfort and inconvenience caused. The evidence shows that the injuries have affected his normal avocations. He could walk only with the aid of stick and there is deformity on his left leg also. For disfigurement and deformity, no amount has been granted by the Tribunal. All these factors will have to be taken into consideration

for assessing a just compensation. Therefore, we fix an amount of Rs.75,000/- under the head “loss of amenities and enjoyment in life” and Rs.25,000/- towards disfigurement and deformity. Thus, in total we award the following amounts as compensation which will carry interest at the rate of 9% per annum from the date of petition.

<i>Head of claim</i>	<i>Amount awarded by the Tribunal(Rs)</i>	<i>Amount modified by this Court (Rs)</i>
Medical & treatment expenses	168000	168000
Transportation expenses	4000	4000
Bystander expenses	15000	24000
Extra nourishment	3000	5000
Loss of earnings for 6 months	60000	75000
Damage to clothing & articles	500	500
Pain and sufferings	40000	60000
Permanent disability	250800	379500
Loss of amenities of life, discomfort & inconvenience	25000	75000
Compensation for disfigurement and deformity		25000
	566300	816000

(Rupees Eight Lakhs and Sixteen thousand only)

The appellant will get 90% of the said amount with interest. The third respondent insurance company is directed to deposit the entire amount of compensation less the amount already deposited before the

Tribunal, within a period of three months. No costs.

(T.R. RAMACHANDRAN NAIR, JUDGE.)

(P.V. ASHA, JUDGE.)

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