

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 20TH DAY OF MAY 2015/30TH VAISAKHA, 1937

MACA.No. 1075 of 2009 ()

AGAINST THE AWARD IN OPMV 1395/2000 of ADDL.D.C.& MACT,PATHANAMTHITTA
DATED 20-01-2009
APPELLANT(S)/3RD RESPONDENT::

THE ORIENTAL INSURANCE CO.LTD.,
THIRUVALLA, REPRESENTED BY ITS, ASSISTANT MANAGER
REGIONAL OFFICE, ERNAKULAM NORTH, KOCHI-18.

BY ADV. SRI.GEORGE CHERIAN (THIRUVALLA)

RESPONDENT(S)/CLAIMANTS::

1. SHOBHANA OMANAKUTTAN,
W/O.LATE OMANAKUTTAN, SASI MANDIRAM, VALACHUZHI.

2. GAYATRI, D/O.LATE OMANAKUTTAN,
SASI MANDIRAM, VALACHUZHI (MINOR REPRESENTED
BY MOTHER FIRST RESPONDENT).

3. JOSEPH M.J., MARATTUKULAM HOUSE,
MARKET ROAD, KAVALA, CHANGANACHERRY.

R,R1 & 2 BY ADV. SRI.P.V.BABY
R,R1 & 2 BY ADV. SRI.A.N.SANTHOSH

THIS MOTOR ACCIDENT CLAIMS APPEAL HAVING BEEN FINALLY HEARD ON
3.2.2015, ALONG WITH MACA 2974/2009,, THE COURT ON 20-05-2015 DELIVERED
THE FOLLOWING:

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

M.A.C.A.Nos.1075 & 2974 of 2009

Dated this the 20th day of May, 2015

JUDGMENT

Ramachandran Nair, J.

These two appeals arise from the judgment in O.P.(MV) No.1395/2000 on the file of the Motor Accidents Claims Tribunal, Pathanamthitta. The insurance company is the appellant in M.A.C.A. No.1075/2009 and the claimants before the Tribunal are the appellants in M.A.C.A. No.2974/2009. Before the Tribunal, the claimants filed application under Section 166 of the Motor Vehicles Act for grant of compensation consequent on the death of the late husband of appellant No.1 in M.A.C.A. No.2974/2009. Appellant No.2 therein is the daughter.

2. The accident occurred on 7.11.2000 at 4.45 p.m. The deceased Sri Omanakuttan was riding his scooter bearing Reg. No.KL-4/D-5090 through Kozhencherry - Pathanamthitta public road from

Pathanamthitta to Chengannoor, i.e. from east to west. The accident spot is near Chirackala junction and the offending vehicle is a motor cycle bearing Reg. No.KL-5/C-1997. The first respondent before the Tribunal was driving it and the said vehicle was coming from west to east. It hit the scooter, as a result of which the deceased fell down and sustained severe injuries. He was immediately taken to Muthoot Medical Centre, Kozhencherry and was treated there from 7.11.2000 to 8.11.2000 on which date he was taken to Pushpagiri Hospital, Thiruvalla for better treatment. He succumbed to the injuries on 12.11.2000 at 3 a.m. at the said hospital.

3. The claimants raised a total claim for Rs.41,95,000/- as compensation and the Tribunal awarded a sum of Rs.27,13,495/- with interest at 7.5% from the date of petition (20.11.2000) till realisation and cost of Rs.60,000/-.

4. The deceased was nearing 42 years of age at the time of accident (his date of birth being 20.5.1959). It was contended that he was working as an Aircraft Mechanic at Qatar Emirates Air-force and was getting a monthly income of Rs.50,000/-. Before he joined Qatar

Air-force, he was working in Indian Navy, as Helicopter Mechanic from 1975 to 1986.

5. We heard learned Senior Counsel for the insurance company Shri George Cherian and Shri A.N. Santhosh, learned counsel appearing for the claimants.

6. The Tribunal found, on the evidence adduced by the claimants, that the rider of the offending vehicle was negligent in causing the accident. P.W.1 is appellant No.1 in M.A.C.A. No.2974/2009 who is the widow of the deceased and P.W.2 was examined to prove the income and prospects of the deceased. The documents marked on the side of the appellants are Exts.A1 to A24. The respondents did not examine any witness and did not produce any documents also and the owner of the vehicle remained ex-parte.

7. Learned Senior Counsel appearing for the insurance company, Shri George Cherian submitted that it was the contention of the Company that the accident occurred due to the contributory negligence of the deceased also. It is submitted that even though originally the rider of the motor cycle was impleaded as first

respondent, later he was removed from the party array. Therefore, the finding regarding negligence on the part of the driver, cannot be sustained. It is submitted that the first respondent before the Tribunal was a necessary party and any finding on negligence without him in the party array cannot be accepted at all. Learned Senior Counsel therefore sought for a remand of the matter to the Tribunal for fresh trial.

8. In support of his contention that the driver of the offending vehicle is a necessary party, he invited our attention to Rules 377 and 378 of the Kerala Motor Vehicles Rules, 1989. It is submitted that Rule 377 will show that the Tribunal will have to send a copy of the application together with a notice fixing the date for appearance, to the owner, driver and insurer. It is submitted that Rule 378(1) will also show that mention is made about the right of the owner, driver and insurer to file written statement. It is submitted that a reference to the form for filing application for compensation, viz. Form "Comp.A" prescribed under Rule 371 will show that column 16 provides for giving the name and address of the owner of the vehicle, column 17 provides for giving the name and address of the insurer and column 18

provides for showing the name and address of the driver of the vehicle. It is therefore submitted that this being important, the Tribunal had to issue notice to the driver, allow him to file a written statement and then alone it could have entered into a finding regarding negligence. It is also submitted by referring to Section 168 of the Motor Vehicles Act that when an award is passed, the Tribunal will have to specify the amount which shall be paid by the insurer or owner or driver of the vehicle involved in the accident or by all or any of them, as the case may be and therefore the impleadment of the driver in the proceedings is imperative. He relied upon the decisions of the Apex Court in **Oriental Insurance Co. Ltd. v. Meena Variyal and others** {(2007) 5 SCC 428} and **Machindranath Kernath Kasar v. D.S. Mylarappa and others** {(2008) 13 SCC 198}. He also raised a contention regarding the merits of the claim also and finally prayed that the claim petition may be remanded for fresh consideration. Learned Senior Counsel further relied upon the Law of Torts, 18th Edn. by Salmond, especially paragraph 167 at page 417, to explain the

principle regarding liability of joint tortfeasors. It is submitted that in cases where the accident was caused due to the composite negligence or in a case like this where the deceased also is alleged to have contributed to the accident, the driver is a necessary party. He relied upon the judgment of a learned Single Judge of this Court in **Surendran v. Shajahan** (2014 CDJ 2178 - OP(MAC) No.187/2014) wherein it was held that the impleadment of driver is necessary.

9. Shri A.N. Santhosh, learned counsel appearing for the claimants who are respondents 1 and 2 in M.A.C.A. No.1075/2009, opposed the above contentions and submitted that in the light of the decision of a Division Bench of this Court in **Anuradha Varma v. State of Kerala** (1993 (2) KLT 777) holding the view that an application without impleading the driver is maintainable, the argument raised by the learned Senior Counsel for the insurance company cannot be accepted.

10. Shri A.N. Santhosh submitted that even if in the form for application claiming compensation, provision is made to show the

details of the driver, the impleadment as a respondent is not imperative. Herein, there is no plea of violation of the conditions of policy and even though there was a plea by the insurance company of contributory negligence on the part of the deceased, the owner remained ex-parte without contesting the case and thereby admitting the negligence on the part of the rider of the motor cycle and the liability. As far as the insurance company is concerned, even though permission was obtained by invoking Section 170 of the Act to contest the claim on various grounds, no attempt was made to adduce any evidence. It is submitted by referring to the findings rendered by the Tribunal on negligence, that it is clearly a case where the rider of the motor cycle was negligent and the deceased has not contributed to the accident. He was riding the scooter on its correct side. It is submitted that the Police had charge-sheeted the rider of the motor cycle who was the accused therein and Ext.A3 is the charge-sheet in Crime No.792/2000 of Pathanamthitta Police Station. The Tribunal has correctly assessed the evidence by relying upon Ext.A1 F.I.R., Ext.A2 certified copy of scene mahazar and Ext.A3 charge sheet. It is submitted that the charge-sheet will prima

facie establish negligence as against the driver of the offending vehicle and he drew support from the decision of a Division Bench of this Court in **New India Assurance Company Ltd. v. Pazhaniammal** (2011 (3) KLT 648) wherein it was held that “production of Police charge sheet is prima facie sufficient evidence of negligence for purpose of a claim under Section 166 of the Act.” It is also submitted that the insurance company did not make any attempt even to examine the driver of the motor cycle as a witness. Therefore, the finding as regards negligence cannot be assailed on any ground.

11. It is further submitted that in the written statement filed by the insurance company before the Tribunal, there was no contention regarding non-joinder of necessary parties. The insurance company did not insist to frame any issue as to whether the driver of the said vehicle is a necessary party. It is therefore submitted that they cannot be heard to say in the appeal that there is non-joinder of necessary parties. It is submitted that the decisions of the Apex Court relied upon by the learned Senior Counsel for the insurance company do not lay down the principle that without impleading the driver of the offending vehicle,

the claim petition is not maintainable. In that context he relied upon three decisions of the Bombay High Court wherein the decision of the Apex Court in **Machindranath Kernath Kasar's case** {(2008) 13 SCC 198} has also been considered. They are: **New India Assurance Company Ltd. v. Sitaram Devidayal Jaiswal & others** (CDJ 2012 BHC 465), **Divisional Manager, United India Insurance Company Ltd. v. Sharad and others** (CDJ 2012 BHC 2335) and **Maharashtra State Road Transport Corporation v. Kusumbai and others** (CDJ 2012 BHC 2342). In support of his contention that the objection, if any, with regard to the non-joinder of parties should be taken before the issues are framed and cannot be allowed to be raised in appeal, he relied upon the decision of a learned Single Judge of this Court in **Varghese Cherian v. Ouseph Korathu** (1960 KLT 1080). In support of the claim for further enhancement of compensation, he relied upon the decisions in **Jiju Kuruvila and others v. Kunjuamma Mohan and others** {(2013) 9 SCC 166}, **Pawan Kumar v. Harkishan Dass Mohanlal** (2014 (1) KLT 571 - SC), **Puttamma v. Narayana Reddy**

(2014 (1) KLT 738 - SC), **Valsamma v. Binu Jose** (2014 (1) KLT 10) and **New India Assurance Co. Ltd. v. Lettish Remy and others** (2015 (1) KLJ 76).

12. Shri George Cherian, learned Senior Counsel for the insurance company, in reply, submitted that even the provisions of the Kerala Torts (Miscellaneous Provisions) Act, 1976, especially Section 8 will show that there should be apportionment of amount of compensation where there is contributory negligence which can be made only in the presence of the driver. He also relied upon the judgments of this Court in **National Insurance Co. Ltd. v. Sivasankara Pillay** (1995 (1) KLT 51) and **National Insurance Co. Ltd. v. Yohannan** (1997 (2) KLT 771). Learned Senior Counsel further submitted that the rider of the motor cycle had filed O.P.(MV) No.1181/2002 but the insurance company, viz. the appellant in MACA No.1075/2009 was not a party therein and to his knowledge the said application was dismissed for default. It is also submitted that for deciding the legal issue, both these matters ought to have been heard

together by the Tribunal.

13. We have gone through the records in this case. In O.P.(MV) No.1395/2000 filed by the appellants in MACA No.2974/2009, the first respondent was shown as the rider of the motor cycle. His details have been given in column No.17. The second respondent was the owner of the vehicle whose details have been given in column NO.16 and the third respondent is the insurer of the vehicle and the details of the company have been given in paragraph 18. In the cause title the addresses of respondents 1, 2 and 3 have been shown also.

14. The “B” diary shows that on 8.6.2001 respondents 2 and 3 were made ex-parte and for return of notice of the first respondent the case was posted to 24.11.2001. On 24.11.2001 there was no sitting. The next posting was on 18.3.2002 on which date the first respondent was removed from the party array. The order making the third respondent insurance company ex-parte was set aside and for the written statement of the third respondent, the case was posted to 1.1.2003. On that day the case was adjourned to 21.4.2003 and as the insurance company filed written statement on the said date, the case

was posted for evidence. After several adjournments, the evidence finally started on 25.6.2008 on which date Exts.A1 to A12 have been marked and P.W.1 was examined. P.W.1's examination continued on 14.8.2008 and as per the order in I.A.No.2881/2008, Exts.A13 to A16 were marked. P.W.2 was examined on 29.8.2008 and Exts.A17 to A22 have been marked. On 26.9.2008 Exts.A23 and A24 have been marked and the evidence on the part of the claimants was closed. For the evidence of the third respondent, the case was adjourned to 28.10.2008 and on that day there was no sitting and the case was adjourned to 19.11.2008. On 19.11.2008 it was represented on behalf of the third respondent insurance company that there is no evidence for them and the case was adjourned for hearing to 10.12.2008. The arguments were finally heard on 2.1.2009 and the award was passed on 20.1.2009.

15. In the written statement filed by the insurance company, it is averred in paragraph 5 that “the motor cycle bearing Reg. No.KL-5/C-1997 was driven by the first respondent with due care and caution. The accident occurred solely due to the negligence on the part of the

deceased while riding scooter bearing Reg. No.KL-4/D-5090. This is a case of collision and at any rate, there is contributory negligence on the part of the deceased. So, the petitioners are not entitled to compensation to the extent of the degree of negligence on the part of the deceased.” I.A. No.1148/2007 is the one filed under Section 170 of the Motor Vehicles Act, 1988.

16. P.W.1 is claimant No.1, the widow of the deceased. Proof affidavit has been filed in support of the allegations in the claim petition. It is averred in paragraph 3 that the accident occurred due to the rash and negligent driving of the motor cycle bearing Reg. No. KL-5/C-1997 by the rider of the vehicle and it hit the scooter which was being plied by her husband. She was cross examined by the learned counsel for the insurance company. The cross examination is confined to the employment of the deceased in Qatar, the claim regarding emoluments as well as the financial background of the deceased. Regarding contributory negligence alleged in the written statement, it is seen that no suggestions and questions have been put to P.W.1. She had given an answer on the earlier part that she did not see the accident

actually. No other questions have been put to her either with regard to the documents relating to the accidents produced as Exts.A1 to A3 and her version that the motor cycle was coming in great speed and was being driven rashly and negligently by the rider.

17. Of course, no contention has been raised by the insurance company in the written statement that the rider of the motor cycle is a necessary party. The issues framed, going by paragraph 8 of the award, are the following:

- “1. Who is responsible for the accident?
2. What, if any, is the quantum of compensation the petitioner is entitled to get?
3. Who is liable to pay compensation?
4. Regarding reliefs and costs?

No issue has been sought to be framed as to whether the rider of the motor cycle is a necessary party. The Tribunal has recorded in paragraph 9 that the contesting third respondent has not adduced any evidence on their side.

18. In paragraph 10 while deciding issue No.1, the Tribunal has referred to the contention of the third respondent/insurer that the

accident occurred due to the negligence of the deceased and at least there was contributory negligence on the part of the deceased. It is observed that in order to substantiate this contention, the contesting third respondent has not adduced any evidence before the Tribunal. Exts.A1 to A3 have been discussed thereafter. It is further observed in the said paragraph that the rider of the motor cycle KL-5/C-1997 has been arrayed as accused in the criminal case. Ext.A3 is the final report submitted by Police after investigation of the crime in Ext.A1, before the Chief Judicial Magistrate Court of the District. Reference has been made about the fact that the rider of the motor cycle was having licence which is recorded in Ext.A2 scene mahazar. The offences alleged, going by Ext.A3 final report, are under Sections 279, 338 and 304-A I.P.C. The Tribunal has observed that there is a specific allegation in Ext.A3 final report that the accident occurred due to the rash and negligent driving of the motor cycle bearing Reg. No.KL-5/C-1997 by the driver of the offending motor cycle.

19. The plea regarding contributory negligence raised in the written statement was addressed in paragraph 11 and in that context,

the contents of Ext.A2 scene mahazar have been discussed. Going by Ext.A2, the accident spot is 1.35 metre towards north from the southern end of the tar portion of the road. It is also noted in Ext.A2 that at the place of accident tar portion of the road is having 6.08 metre width. The Tribunal therefore found that from Ext.A2 it is clear that the accident has taken place on the southern side of the tar portion of the road. We extract the further findings in paragraph 11 of the award and the conclusion drawn that the accident occurred due to the rash and negligent driving of the motor cycle by its rider at the time of accident:

“That means at the time of accident the left side of the scooter which was ridden by the deceased was the southern side of the road and the left side of the motor cycle which was ridden by the first respondent was the northern side of the road. If that be so, from the scene mahazar it is clear that motor cycle which was ridden by the first respondent was in wrong side. If that be so, from the evidence available before this Tribunal it can be safely inferred that the accident was occurred due to the rash and negligent riding of the motor cycle bearing Reg. No.KL-5/C-1997 by the first respondent. Issue is found in favour of

the petitioners.”

20. We had also called for the records in O.P.(MV) NO.1181/2002 which was filed by the rider of the motor cycle claiming compensation for the injuries alleged to have been sustained by him in the very same accident. Therein, the first respondent is the widow of the deceased and the second respondent is the insurer of the scooter, viz. National Insurance Company Ltd., Pathanamthitta. He had claimed a total compensation of Rs.2 Lakhs. He had alleged that the deceased Omanakuttan was driving his scooter rashly and negligently. The first respondent widow filed a written statement denying the allegation of negligence and mention is made about the pendency of O.P.(MV) No.1395/2000 and the fact that the Pathanamthitta Police has charged a case against the petitioner therein, the rider of the motor cycle as Crime No.792/2000 and has charge-sheeted him under Section 304-A I.P.C. The insurance company has also filed a written statement denying the various aspects including the allegation of negligence on the part of the deceased.

21. The proceedings paper shows that the case was being

adjourned from time to time. It is seen filed on 5.10.2002. After several postings for evidence, starting from 2.7.2009, it was again adjourned for evidence to 26.8.2011 on which date it was adjourned to 17.10.2011. There was no sitting on that day and the O.P. was adjourned to 9.12.2011. On 9.12.2011 there was no representation for the petitioner and notice was ordered to him to appear on 13.2.2012. On 13.2.2012 the petitioner was called absent and the claim petition was dismissed for no representation. On verifying the files, it is seen that the said O.P. has not been restored to file. The records in the said case were called for as requested by both sides, to verify the various aspects.

22. In the first of the decisions relied upon by learned Senior Counsel Shri George Cherian, viz. **Meena Variyal's case** {(2007) 5 SCC 428}, the facts show that the vehicle involved in the accident was used for travelling by the deceased Suresh Chandra Variyal, who was employed as Regional Manager in M/s. Apace Savings and Mutual Benefits (India) Ltd. The employer, the owner of the vehicle, was also impleaded before the Tribunal. The claim petition was filed by the

widow and daughter under Section 166 of the Motor Vehicles Act impleading the owner as well as the insurance company. It was alleged that one Mahmood Hasan, a companion of the deceased was driving the car but he was not impleaded. The Tribunal found on the evidence that the vehicle was being driven by the deceased himself. The insurer was exonerated from liability as there was no coverage for the employee of the owner. In appeal filed before the High Court, the insurance company was directed to pay the amount of compensation and they were allowed to recover the compensation from the insured. The insurance company approached the Apex Court challenging the above direction. In paragraph 10, the Apex Court has made certain general observations. On the general principles available under the contract of insurance, it was held in that paragraph that “once the driver is liable, the owner of the vehicle becomes vicariously liable for payment of compensation. It is this vicarious liability of the owner that is indemnified by the Insurance Company.” It was also held that “under the general principles one would expect the driver to be impleaded before an adjudication is claimed under Section 166 of the Act.” On the

facts of the said case, the Apex Court in paragraph 11 held that the Tribunal ought to have directed the claimant to implead Mahmood Hasan who was allegedly driving the vehicle at the time of accident.

23. In the subsequent decision, viz. **Machindranath Kernath Kasar's** case {(2008) 13 SCC 198} various aspects and the question whether the driver will be a necessary party before the Tribunal, etc. were examined in the light of Rule 235 of Karnataka Motor Vehicles Rules, 1989. The facts of the case are relevant and they are the following: The appellant before the Apex Court was the driver of a bus belonging to Karnataka State Road Transport Corporation. The accident occurred on 18.4.1995 when the bus collided with a truck. Several passengers were injured and the driver was also injured. The passengers and the driver filed separate applications for payment of compensation before the Tribunal concerned. In the criminal case the appellant driver was prosecuted for rash and negligent driving. No criminal prosecution was there as against the driver of the truck. In the claim petitions filed by the passengers the appellant driver was examined in support of the case of the Corporation, the owner of the

bus. He was not impleaded as a party therein. The Tribunal found that the driver of the bus was driving the bus rashly and negligently. The claim petitions filed by the passengers were allowed and no appeal was filed by the Corporation and the said awards attained finality.

24. In the claim petition filed by the appellant driver, the Tribunal again considered the issue regarding negligence and it was found against the appellant driver. Even though he filed an appeal before the High Court, that was dismissed. It was found by the High Court, inter-alia that the finding as regards negligence in the earlier claim petitions has attained a finality and hence dismissed his appeal. It is seen from the discussion that the driver of the truck was not impleaded in the claim petition filed by the appellant driver of the bus but he was examined before the Tribunal as RW.1. The non-impleadment of the driver in the respective cases is in the light of Rule 235 of the Karnataka Motor Vehicles Rules, 1989.

25. Rule 235 of Karnataka Motor Vehicles Rules, 1989 which is quoted in paragraph 23 of the judgment, is extracted hereinbelow:

"235. Notice to the parties involved-- (1) The Claims Tribunal

shall on an application made to it by the applicant send to the owner or the driver of the vehicle or both from whom the applicant claims relief and the insurer, a copy of the application, together with the notice of the date on which it will dispose of the application, and may call upon the parties to produce on that date any evidence which they may wish to tender.

(2) Where the applicant makes a claim for compensation under Section 140 the Claims Tribunal shall give notice to the owner and insurer if any, of the vehicle involved in the accident directing them to appear on the date not later than 10 days from the date of issue of such notice. The date so fixed for such appearance shall also be not later than fifteen days from the receipt of the claim application filed by the claimant. The Claims Tribunal shall state in such notice that in case they fail to appear on such appointed date, the Tribunal will proceed ex-parte on the presumption that they have no contention to make against the award of compensation.”

We also quote Rules 377 and 378(1) of the Kerala Motor Vehicles Rules, 1989 for convenience:

377. Notice to parties involved:- (1) If the application is not dismissed under Rule 373 the Claims Tribunal shall send to the

owner of the motor vehicle involved in the accident, its insurer and its driver a copy of the application together with a notice of the date on which it will hear the application and may call upon the parties to produce on that date any evidence that they may wish to tender:

Provided that in the case of an application for compensation under section 140 of the Act the owner or insurer or driver, as the case may be, shall be directed to appear not later than 10 days from the date of issue of the notice and the date so fixed shall also be not later than 15 days from the date of receipt of the claim application.

(2) If the insurer is not impleaded as a party to the application as originally filed, or if the name of the insurer is not correctly given therein, it shall be open to the applicant to make an application to the Claims Tribunal for appropriate amendment to the application for the purpose of bringing the insurer on record.

(3) Whenever the Claims Tribunal deems fit, it may receive from the applicant addressed envelopes with sufficient postal stamps affixed for service of notice.

378. Appearance and examination of parties:- (1) The owner of the Motor Vehicle, the insurer and the driver may, and if so required by the Claims Tribunal shall, at or before the first

hearing or within such further time as the Claims Tribunal may allow, file a written statement dealing with the claims raised in the application, and any such written statement shall form part of the records.”

26. A reading of Rule 235 of the Karnataka Rules and Rule 377 (1) of the Kerala Rules will show that sub-rule (1) in both are worded somewhat similarly. Before the Apex Court attention was invited to a Division Bench judgment of Karnataka High Court in **Patel Roadways v. Manish Chhotalal Thakkar** (ILR (2000) Kant. 3286) wherein it was held that a claim petition would be maintainable even without impleading the driver. The Apex Court has noted in paragraph 26 that "the Kerala, Bombay, Madras, Allahabad, Patna, Punjab and Haryana and Delhi High Courts, on the one hand, noticing a large number of decisions, held that drivers are not necessary parties." Reference was made to a contrary decision of the Madhya Pradesh High Court in **New India Assurance Co. Ltd. v. Munnidevi** (1993 ACJ 1066) and **M.P. SRTC v. Vijanti** (1995 ACJ 560) wherein it was held that the driver of the offending vehicle would be a necessary party.

Those two decisions were distinguished by the Karnataka High Court in **Patel Roadways's case** (ILR 2000 Kant.3286) by pointing out that under the Madhya Pradesh Motor Vehicles Rules the driver was required to be impleaded.

27. The view taken by Karnataka High Court, which has been extracted in paragraph 27 of the judgment of the Apex Court, is that the owner and driver of the motor vehicle being joint tortfeasors, who are jointly and severally liable for the negligence of the driver, the claimant can sue either the owner or the driver or both. It was also held that a claim petition can be maintained as against the owner and insurer of the vehicle without impleading the driver. For making the owner vicariously liable for the act of the driver, the negligence on the part of the driver will have to be proved, whether the driver is impleaded or not. But where the driver is not impleaded as a party no decree or award can be passed against him. Personal liability can be cast on the driver only if he is impleaded as a party and notice of the proceedings has been issued to him.

28. With regard to the joint liability of the owner and driver, the

Apex Court in paragraph 28 has held as follows:

“28. When a damage is caused upon act of negligence on the part of a person, the said person is primarily held to be liable for payment of damages. The owner of the vehicle would be liable as he has permitted the use thereof. To that effect only under the Motor Vehicles Act, both driver and owner would be jointly liable. This, however, would not mean that they are joint tort feasers in the strict sense of the term. There exists a distinction between the liability of the owner of a vehicle which was used in commission of the accident and that of the driver for whose negligence the accident was caused, but the same would not mean that the owner and the driver are joint tort feasers in the sense as it is ordinarily understood.”

Significantly, after referring to the Karnataka Rules, their Lordships held in paragraph 29 that "in this case we are not required to lay down a law that even in absence of any rule, impleadment of the driver would be imperative." In paragraph 30 their Lordships referred to Section 168 of the Motor Vehicles Act whereby the Tribunal has to specify the amount to be awarded against the owner, driver and insurer and held that the proceedings will not be vitiated in the absence of the driver and

the driver may not be a necessary party. We extract hereinbelow paragraph 30:

“30. It is however, of some interest to note the provisions of Section 168 of the Motor Vehicles Act. In terms of this aforementioned provision, the Tribunal is mandatorily required to specify the amount which shall be paid by the owner or driver of the vehicle involved in the accident or by or any of them. As it is imperative on the part of the Tribunal to specify the amount payable inter alia by the driver of the vehicle, a fortiori he should be impleaded as a party in the proceeding. He may not, however, be a necessary party in the sense that in his absence, the entire proceeding shall not be vitiated as the owner of the vehicle was a party in his capacity as a joint tort feaser.”

After finding so, their Lordships considered the plea of the appellant driver as against the driver of the truck and observed in paragraph 32 thus:

“32. The principles of natural justice demand that a person must be given an opportunity to defend his action.”

Even though learned Senior Counsel Shri George Cherian submitted that the findings thereafter in various paragraphs will lead to the

conclusion that the driver was a necessary party, according to us, on a close reading of the various findings, the Apex Court has not held that impleadment of driver is imperative.

29. We will now proceed to explain the various findings. The question posed has been noted in paragraph 38 which is as to whether the driver is a necessary party or the owner alone can be impleaded. We extract the said paragraph hereunder:

“38. The issue to be examined herein is whether in the claims cases before the Motor Vehicles Accident Claims Tribunal, the driver of a vehicle who has been accused of negligence is a necessary party to the proceedings or whether the owner alone can be impleaded.”

After noticing that the driver of the bus was examined as RW.1, in the first set of cases filed by the passengers, it was held that he was a party to the proceedings. On the question whether in the claim petition filed by the driver of the bus, the driver of the truck should necessarily be made a party it was held that "he was not". We extract hereinbelow paragraph 40 in full:

“40. The analysis of our findings aforementioned is:-

(i) In the first set of claims cases, the driver of the bus was held to be negligent and, therefore, a ruling that the driver is a necessary party would mean that the bus driver must necessarily be involved in these proceedings. However, the driver of the bus had sufficient opportunity to make a representation against the allegation of negligence as he was examined as RW1 in the claim cases filed by the passengers, even though he was not formally impleaded as a Respondent. Hence, the High Court has correctly held that he was a “party” to the proceedings.

(ii) In the claims filed by the driver of the bus (namely the Appellant herein), specific allegations were made against the driver of the truck. Hence, the question is whether the driver of the truck must necessarily be made a party to the proceedings. He was not.

Here, one must bifurcate the terms 'party' and 'necessary party'. 'Party' has been correctly defined by the High Court in the impugned judgment in terms of involvement in the proceedings regardless of formal impleadment. However, a necessary party has been defined in the 5th Edn. of *Black's Law Dictionary* as follows:-

"In pleading and practice, those persons who must be joined in an action because, inter alia, complete relief cannot be given to those already parties without their joinder. Fed. R. Civil P. 19 (a)"

30. The said paragraph will show that the Apex Court was of the

view that the terms “party” and “necessary party” will have to be bifurcated. A party will be one who is involved in the proceedings regardless of formal impleadment. “Necessary party” is one without whose presence complete relief cannot be granted. Then, in paragraph 41 their Lordships observed that natural justice mandates that when adverse finding is rendered, he should be allowed an opportunity at least to make a representation as a witness. This is clear from the following sentence:

“First and foremost, as has been stated in the body of the judgment, natural justice would mandate involvement of a driver, as an adverse finding on negligence cannot and should not be made against him without giving him the opportunity to at least make a representation as a witness.”

While referring to the judgment in Patel Roadways' case (supra), it has been observed further that: “However, the fact that joint tortfeasors have been mentioned in the judgment is relevant.” (emphasis supplied by us)

31. Shri George Cherian, learned Senior Counsel raised an argument that strictly the driver and owner may not be joint tortfeasors.

But according to us, the following paragraph, viz. paragraph 42 of the judgment of the Apex Court in **Machindranath Kernath Kasar's case** (supra) will show that the owner who is vicariously liable, will also be a joint tortfeasor. We extract in full paragraph 42 to have a proper analysis of the dictum laid down by the Apex Court therein.

“42. Joint tortfeasors, as per the 10th edition of Charlesworth & Percy on Negligence, have been described as under:-

"Wrongdoers are deemed to be joint tortfeasors, within the meaning of the rule, where the cause of action against each of them is the same, namely that the same evidence would support an action against them, individually. Accordingly, they will be jointly liable for a tort which they both commit or for which they are responsible because the law imputes the commission of the same wrongful act to two or more persons at the same time. This occurs in cases of (a) agency; (b) vicarious liability; and (c) where a tort is committed in the course of a joint act, whilst pursuing a common purpose agreed between them."

Hence, employer and employee, the former being vicariously liable while the latter being primarily liable are joint tortfeasors and are therefore jointly and severally liable. However, by virtue of the fact that the cause of action is the same and that the same evidence would support an action

against either, it follows that this evidence must necessarily include an examination of the driver who is primarily liable. To make a finding on negligence without involving the driver as at least a witness would vitiate the proceedings not only on the basis of the fact that the driver has not been given an opportunity to make a representation, but also because the evidence to make a finding regarding negligence would necessarily be inadequate.”

As far as joint tortfeasors are concerned, they will be jointly liable for a tort which they both commit or for which they are responsible. In order to attract the second limb, it should be a case where the law imputes the commission of the same wrongful act to two or more persons at the same time. It was held by the Apex Court that the said cases are: (a) agency; (b) vicarious liability; and © where a tort is committed in the course of a joint act, whilst pursuing a common purpose agreed between them. According to us, the next sentence in the judgment will have much application herein also. Therein, the Apex Court held that the employer will be vicariously liable and the employee will be primarily liable and they are joint tortfeasors and are,

therefore, jointly and severally liable. Learned Senior Counsel emphasised the latter part of the said paragraph to contend that there is a clear finding that in regard to a finding on negligence, it could be entered only if the driver is impleaded as a party. According to us, the position has been further made clear in paragraph 43 of the judgment which we extract below:

“43. On this basis, a driver should be made a 'party' to the proceedings. It was done in the instant case. In the present case, the contention of the counsel for the respondent Insurance Company, namely that without contrary evidence led by the appellant or Corporation, the finding of negligence on the part of the appellant cannot be interfered with, must be upheld. Without a deposition on the part of the truck driver and without his involvement at least as a witness, an adverse finding on negligence cannot be made against him.”

The latter half of paragraph 42 wherein it was held that “to make a finding on negligence without involving the driver as at least a witness would vitiate the proceedings” will have to be understood in the background of the finding in paragraph 43 that “On this basis he should be made a party to the proceedings. Without his involvement at

least as a witness, an adverse finding on negligence cannot be made against him.” Clearly, their Lordships considered these aspects in the light of the fact that the bus driver was attacking the finding on negligence against him and tried to impute the negligence on the part of the truck driver. The principle laid down is that when primary liability as against the driver is sought to be established, at least he should be involved as a witness. This is far from saying that he is a necessary party to be impleaded. Paragraph 42 will have to be read and understood on the special context of the said case.

32. In paragraph 44 their Lordships noticed that the truck driver was examined as R.W.1 and a reading of paragraph 45 which we extract below, will show that the Apex Court did not accept the contention of the driver of the bus and held that the judgment of the High Court does not suffer from any legal infirmity:

“45. If we accept the contention of Ms. Suri that the Tribunal committed an error, in effect and substance, we will be holding that the Tribunal committed an illegality in awarding compensation to the passengers of the bus. It was in that sense, the High Court cannot be said to have committed any error in

holding that the appellant was also an aggrieved person. Furthermore, both the Tribunal and the High Court have rightly arrived at a finding of fact that it was the appellant alone who was rash and negligent in driving of the vehicle. No case had been made out to differ with the said finding of fact.”

33. That was a case where the driver of the bus pressed for a finding as against the driver of the truck on negligence. The crucial findings in paragraphs 40 to 44 will lead to the conclusion that the driver is a not necessary party in the proceedings and without his junction the claim petition will be maintainable. It was only held that he should a “party” at least as a witness or at least he should be allowed an opportunity to explain the facts. Significantly, we also notice that the view taken in **Patel Roadways' case** (ILR (2000) Kant. 3286) that the application can be maintained without personally impleading the driver as a necessary party, has not been set aside. The view taken by this Court and Bombay, Madras, Allahabad, Patna, Punjab and Haryana and Delhi High Courts that the driver is not a necessary party, has not been varied or overruled.

34. The sum and substance of the conclusions in **Machindranath**

Kernath Ksar's case (supra) are the following:

- i) The insurance company will be liable under the contract of insurance to indemnify the owner;
- ii) The driver of the offending vehicle will be primarily liable and the owner will be vicariously liable;
- iii) The driver and owner of a vehicle will be joint tortfeasors and they will be jointly and severally liable;
- iv) The driver may not be a necessary party and the entire proceedings will not be vitiated in his absence once the owner of the vehicle was a party in his capacity as joint tortfeasor;
- v) The driver of the offending vehicle, if sought to be made liable to satisfy the award or part of it, then he should be given an opportunity to defend the action, so that the principles of natural justice are satisfied. He should be given an opportunity to at least make a representation as a witness; and

35. This decision cannot be understood as laying down the proposition that even as against the owner, to render a finding with regard to the vicarious liability, when findings are rendered with regard

to negligence, the driver should be necessarily be made a party. This is clear from the crucial sentence in paragraph 30 that “he may not, however, be a necessary party in the sense that in his absence, the entire proceedings shall not be vitiated as the owner of the vehicle was a party in his capacity as a joint tortfeasor.”

36. Salmond on the “Law of Torts” 20th Edn. at page 434, explains the term “joint tortfeasors.” We extract hereinbelow the following portion from paragraph 20.11:

“Where the same damage is caused to a person by two or more wrongdoers those wrongdoers may be either joint or independent tortfeasor. Persons are to be deemed joint tortfeasors within the meaning of this rule whenever they are responsible for the same tort--that is to say, whenever the law for any reason imputes the commission of the same wrongful act to two or more persons at once. This happens in at least three classes of cases--namely, agency, vicarious liability, and common action, i.e. where a tort is committed in the course of a common action, a joint act done in pursuance of a concerted purpose. In order to be joint tortfeasors there must be a concurrence in the act or acts causing damage, not merely a coincidence of separate acts which by their conjoined effect

cause damage. The *injuria* as well as the *damnum* must be the same. So that if the presence of a particular mental intent is necessary to constitute liability each tortfeasor must be proved to have that intent. ”

In fact, learned Senior Counsel Shri George Cherian wanted to emphasise that the owner and driver cannot be treated as joint tortfeasors. But as explained by the Apex Court in the above decision, the owner will also be responsible and will be treated as a joint tortfeasor, since the law imputes the commission of the same wrongful act to two or more persons at the same time even in the case of vicarious liability. Even though Shri George Cherian relied upon the decision of a Division Bench of this Court in **National Insurance Co. Ltd. v. Sivasankara Pillay** (1995 (1) KLT 51), therein also the same principle has been laid down as is clear from paragraph 8. Their Lordships have held as follows therein:

“..... In the book by Street on ‘Torts’ the categories of joint tortfeasors have been enumerated at page 473 in the 7th Edition. They are: (a) Master and servant in those cases where the master is

vicariously liable for the tort of the servant. (b) Where one person instigates another to commit a tort. (c) Where there is a breach of a duty imposed jointly on two or more person, e.g., two occupiers are joint tortfeasors if they are sued by a visitor for failure to take reasonable care in respect of the premises jointly occupied by them. (d) Where persons take concerted action to a common end and in the course of executing that joint purpose, any one of them commits a tort.”

Therefore, the owner and driver will have to be held as joint tortfeasors and as jointly and severally liable.

37. Now we will refer to the decisions of the Bombay High Court relied upon by Shri A.N. Santhosh, learned counsel appearing for the claimants wherein the decision of the Apex Court in **Machindranath Kernath Kasar's case (supra)** has also been relied upon to hold that the driver is not a necessary party and without him the application can be maintained.

38. The first one is **Sitaram Devidayal Jaiswal's case** (CDJ 2012 BHC 465). Paragraph 3 of the judgment shows that therein the insurance company which was the appellant, had raised a contention

that the driver of the car was a necessary and proper party and since he was not impleaded, the claim petition is not maintainable. After referring to various decisions of the same High Court, the learned Judge considered Rule 260 of the Maharashtra Motor Vehicles Rules, 1989 which is similarly worded like the Kerala Rules. Sub-rule (1) states that “if the application is not dismissed under Rule 259, the Claims Tribunal shall, send to the owner or the driver of the vehicle or both involved in the accident and its insurer, a copy of the application.....” In paragraph 10 it has been held as follows:

“10. Thus, the law is that the claimant while filing a claim application is under no obligation to ensure that all necessary and proper parties are impleaded as opponents to the claim petition. Considering the nature of the proceedings, the responsibility is of the Tribunal to ensure that the notices are issued to all the necessary parties. This power can be exercised by the Tribunal at any stage of the proceedings.”

In paragraph 11, it was held that if the insurer has not raised a contention and pursued it before the Tribunal that the driver is not a necessary party, the said contention cannot be allowed to be raised in

appeal. We extract the said paragraph herein for easy reading:

“11..... It is obvious that if such contention is not pressed by the party to whom the notice is served, the said party cannot be allowed to raise the said contention for the first time in the appeal. A claimant cannot be allowed to suffer as he is under no obligation to implead any party as the opponent to the claim petition. In such a case, if the driver is aggrieved by the adverse finding recorded against him by the award of the Tribunal, he has a remedy of preferring an appeal against the award after obtaining a leave of the Appellate Court. If neither the owner nor the insurer raises a contention before the Tribunal regarding the non-joinder of the driver, it is not open for them to contend in the appeal that the driver was a necessary party and that the award is vitiated because of non-joinder of the driver.”

The same is relied upon by Shri A.N. Santhosh to contend for the position that the insurance company in this case has not pursued their contention regarding contributory negligence of the driver, before the Tribunal by adducing any evidence. In paragraph 12 of the above judgment, it was held that even though there was a contention in the written statement, it appears that no issue was framed and the said

contention was not pressed at the time of final hearing and therefore in the appeal the insurance company cannot be allowed to raise the said contention.

39. The next decision is **Kusumbai's case** (CDJ 2012 BHC 2342). Therein, the contention raised by the appellant by relying upon the judgment in **Machindranath Kernath Kasar's case** (supra) was that the driver is a necessary party. This contention was negated by observing that the appellant owner of the bus could bring the driver to the witness box for examination. Finally, it was held that the bus driver was not a necessary party.

40. In **Sharad's case** (CDJ 2012 BHC 2335) the appellant was the insurance company. It was contended by the appellant that the driver was a necessary party. In paragraph 12 the decision of the Apex Court in **Machindranath Kernath Kasar's case** (supra) has been considered and in paragraph 14 it was finally held that the driver of the bus in the present case, was not a necessary party and the contention of the appellant was rejected. In paragraph 15 it was also noted that the

driver has been charge-sheeted in the criminal case.

41. We will now come to the decision of a Division Bench of this Court in **Anuradha Varma v. State of Kerala** (1993 (2) KLT 777) wherein it was held that the application can be maintained without impleading the driver. Reliance was placed on the fact that the liability of the owner and driver will be joint and several and they are joint tortfeasors. Their Lordships had also relied upon the provisions contained in Section 7 of the Kerala Tort (Miscellaneous Provisions) Act, 1977. Paragraph 7 of the judgment will show that therein the State contended that the driver is a necessary party. The Division Bench consisting of T.L. Viswanatha Iyer and P. Krishnamoorthy, JJ. (speaking through P. Krishnamoorthy, J.), held in paragraph 7 thus:

“7. In torts the liability of the joint tortfeasors is joint and several. In other words, the liability of the owner and the driver of the vehicle is joint and several and any person who suffers damages is entitled to sue any one of them. May be the person against whom an award is passed and who has paid the amount is entitled to contribution from the other joint tortfeasor. That does no prevent or disentitle a claimant from suing one of the

joint tortfeasors. This view has been expressed by two Division Bench decisions of this Court reported in *Insurance Company v. Varghese* (1988 (2) KLT 871) and *United India Insurance Co. Ltd. v. Ratnamma* (1988 (1) ACJ 435). In the latter case it was observed:-

“The owner and driver are joint tortfeasors and therefore absence of one of them will not be a bar for a suit for compensation. This does not mean that the negligence of the driver need not be proved. Even in the absence of the driver evidence regarding the negligence of the driver can be adduced. Take for example, a case where the driver also die in the accident without leaving any legal representative. That will not preclude the injured from claiming compensation against the owner or the insurer. The owner and driver are joint tortfeasors, whose liability is joint and several. Each may be sued alone or jointly and each will be liable for the whole damage”.

Further, from the provisions contained in S. 7 of the Kerala Torts (Miscellaneous Provisions) Act, 1977 it is clear, that a suit against one of the joint tortfeasors alone is maintainable, for that Section provides that the other joint tortfeasor will be entitled to contribution from the tortfeasor who was not a party to the proceeding. The Section also provides that the filing of a suit or other proceeding against one of the joint tortfeasors “ will not be a bar for the claimant for filing another claim or suit against the other tortfeasor. From this provision also it is clear that a

claimant is entitled to sue one of the joint tortfeasors for relief without impleading the other joint tortfeasor. Rule 6 of the Kerala Motor Accidents Claims Tribunal Rules, 1977 does not make it obligatory on the part of a claimant to make the driver also a party to the proceedings. That rule only provides that the Claims Tribunal shall send notice to the owner and the driver of the motor vehicle along with copy of the application. If the name of the driver is available, the Tribunal is enjoined to send notice to him also. This does not mean that an application without impleading the driver is not maintainable. In that view of the matter, we overrule the second contention raised by the Government Pleader as well.”

The importance of the provisions under Section 7 of the above Act has been explained by the Division Bench therein.

42. Now we will consider, for the purpose of this case also, the provisions under Section 7 since Shri George Cherian, learned Senior Counsel tried to distinguish the dictum laid down therein on the particular facts of this case. We extract herein Sections 7 and 8 in full:

“7. Proceedings against, and contribution between, joint and several tort-feasors-- (1) Where damage is suffered by any person as a result of a tort (whether a crime or not),

(a) judgment obtained against any tortfeasor liable in respect of that damage shall not be a bar to an action against any other person who would, if sued, have been liable as a joint tortfeasor in respect of the same damage;

(b) if more than one action is brought in respect of that damage by or on behalf of the person by whom it was suffered, or for the benefit of his estate, or of the dependants of that person, against tortfeasors liable in respect of the damage (whether as joint tortfeasors or otherwise), the sum recoverable under the judgments given in those actions by way of damages shall not in the aggregate exceed the amount of the damages awarded by the judgment first given; and in any of those actions, other than that in which judgment is first given, the plaintiff shall not be entitled to costs unless the court is of opinion that there was reasonable ground for bringing the action;

(c) any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise, so however that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is

sought.

(2) In any proceedings for contribution under this section, the amount of the contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage; and the court shall have power to exempt any person from liability to make contribution, or to direct that the contribution to be recovered from any person shall amount to a complete indemnity.

(8) Apportionment of liability in case of contributory negligence.-- (1) Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damages:

Provided that --

(a) this sub-section shall not operate to defeat any defence arising under a contract;

(b) where any contract or enactment providing for the limitation of liability is applicable to the claim, the amount of

damages recoverable by the claimant by virtue of this sub-section shall not exceed the maximum limit so applicable.

(2) Where damages are recoverable by any person by virtue of sub-section (1), subject to any reduction as is therein mentioned, the court shall find and record the total damages which would have been recoverable if the claimant had not been at fault.

(3) Section 7 shall apply in any case where two or more persons are liable or would, if they had all been sued, be liable by virtue of sub-section (1) in respect of the damage suffered by any person.

(4) Where any person dies as the result partly of his own fault and partly of the fault of any other person or persons, and accordingly if an action were brought for the benefit of the estate under Part II of this Act, the damages recoverable would be reduced under sub-section (1), and damages recoverable in an action brought for the benefit of the dependants of that person under the Indian Fatal Accidents Act, 1855, shall be reduced to a proportionate extent.

(5) Where, in any case to which sub-section (1) applies, one of the persons at fault avoids liability to any other such person or his personal representative on the plea that the claim is barred by limitation, he shall not be entitled to recover any

damages or contribution from that other person or representative by virtue of that sub-section.

Explanation.-- In this section, “fault” means negligence, breach of statutory duty or other act or omission which gives rise to a liability to tort or would, apart from this Act, give rise to the defence of contributory negligence; and “damage” includes loss of life and personal injury.”

Section 7 relates to the proceedings against, and contribution between, joint and several tortfeasors and Section 8 provides the way in which the liability will have to be apportioned in case of contributory negligence. Going by Section 7, the following aspects are relevant: (a) Judgment obtained against any tortfeasor shall not be a bar to an action against any other person who would have been liable as a joint tortfeasor in respect of the same damage; (b) If more than one action is brought in respect of that damage, the sum recoverable under the judgments given in those actions by way of damages shall not in the aggregate exceed the amount of the damages awarded by the judgment first given; © Any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued

have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise; and (d) The contribution recoverable shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for such damage.

43. Section 8 (1) will imply that the claim of a person who has suffered damage as a result partly of his own fault and partly of the fault of any other person or persons, shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damages. Sub-section (3) of Section 8 is important wherein it is stated that Section 7 shall apply in any case where two or more persons are liable or would, if they had all been sued, be liable by virtue of sub-section (1) in respect of the damage suffered by any person.

44. The rules, viz. Kerala Motor Accidents Claims Tribunal Rules, 1977 will also show that the present Rule 377 which we have already referred to, is a verbatim reproduction of Rule 6(1) of the old

rules. The Rules of 1977, especially Rule 5 provides for “summary dismissal of application.” The Rules of 1989, viz. Rule 373 is under the heading “summary disposal of application”. Rule 6(1) is the relevant rule which is identically worded to Rule 377(1). The same is extracted below:

“6(1) **Notice to parties involved:-** (1) If the application is not dismissed under Rule 5, the Claims Tribunal shall send to the owner of the motor vehicle involved in the accident, its insurer and its driver a copy of the application together with a notice of the date on which it will hear the application and may call upon the parties to produce on that date any evidence that they may wish to tender.”

The Division Bench in **Anuradha Varma's case** (supra) was of the view that Rule 6 does not make it obligatory on the part of the claimant to make the driver also a party to the proceedings. We have also considered the effect of Rule 377 and the interpretation of Rule 6 of 1977 Rules will squarely apply herein also.

45. We respectfully agree with the view taken in **Anuradha Varma's case** (1993 (2) KLT 777) that the proceedings can be

maintained without impleading the driver as a necessary party. The driver and owner will be joint tortfeasors and an action can be made against any one of the tortfeasors. The provisions under Section 7 are unique and since such provision will have application herein, non-impleadment of driver will not vitiate the proceedings. Section 7 of the Act permits an action against a person as a joint tortfeasor even though judgment has been obtained against another tortfeasor. The implications are therefore evident. The said provisions will therefore go against the contentions of the Insurance Company.

46. We will now come to the judgment of a learned Single Judge of this Court in O.P.(MAC) No.187/2014 which was relied upon by Shri George Cherian, learned Senior Counsel. The facts of the case show that the claimant before the Tribunal approached this Court challenging an order passed by the Tribunal refusing to review its order dated 8.8.2014 directing the claimant to take steps for impleadment of the driver of the alleged offending vehicle. The Tribunal had held that the driver is a necessary party in the proceedings based on Rule 377 of the Kerala Motor Vehicles Rules. In the course of argument, reliance

was placed by the learned counsel for the claimant on the decision of the Apex Court in **Machindranath Kernath Kasar's case** (supra). The learned Single Judge, in paragraph 7 held that the Apex Court in that decision held that the driver may not be a necessary party since the joint tortfeasor, the owner, was impleaded in that capacity. The issue was answered specifically relying on Rule 235 of Karnataka Rules. Thereafter, Rule 377(1) of the Kerala Rules and its effect was considered and it was held that the rule makes it mandatory for issuance of notice to the driver of the vehicle and obliges the claimant to implead such driver as a necessary party. The learned Single Judge relied upon the decision of the Apex Court in **Meena Variyal's case** {(2007) 5 SCC 428} while sustaining the order passed by the Tribunal.

47. Of course, if the Tribunal feels at a later stage of the proceedings that the driver should be issued notice, it can do so. We understand that the judgment of the learned Single Judge was rendered only in that context and it cannot be said that the decision will go to show that without the junction of the driver, the application cannot be said to be maintainable.

48. We in this context, will refer to paragraph 9 of the judgment of the Bombay High Court in **Sitaram Devidayal Jaiswal's case** (CDJ 2012 BHC 465) which we have already considered. Rule 260 of Maharashtra Rules, 1989 which is similar in terms to Rule 377 of Kerala Rules and the procedure to be adopted by the Tribunal, has been considered in paragraph 9. We extract below paragraph 9 in full:

“9. Perusal of the provisions of the said Act and the said Rules of 1989 show that a claim petition is not at all a civil suit and neither the said Act nor the said Rules of 1989 require a claimant to implead any person as a party opponent to a claim petition. A duty is cast upon the Tribunal by virtue of Rule 260 of the said Rules of 1989 to issue the notices to the concerned parties. On this aspect, it will be necessary to make a reference to the decision of the Division Bench of this Court in the case of *Bessarlal Laxmichand Chirawala v. The Motor Accidents Claims Tribunal, Greater Bombay and others* (1970 ACJ 334). In paragraph No.10 of the said decision, the Division Bench held thus:

“10..... In that connection it requires to be noticed that provisions in the Motor Vehicles Act and the Rules made in connection with application for claims for

compensation do not require any parties to be mentioned as opposite parties in the title of the application. When the formality of the amendment was asked for, it was the legal duty of the Tribunal in this case to ascertain true facts as regards the ownership of the B.E.S.T. Undertaking itself and thereafter it was permissible for the Tribunal even without an amendment having been granted to make an award of compensation in favour of the petitioner against the Municipal Corporation.”
(underline supplied)

39. Of course, the said decision was rendered in a claim petition under the Motor Vehicles Act, 1939. But even under the said Act and the said Rules of 1989, the legal position continues to be the same. However, Rule 260 of the said Rules of 1989 is now very clear which enjoins the Tribunal to issue notices to the concerned parties. Rule 260 of the said Rules of 1989 reads thus:-

“Rule 260. Notice to the parties involved:-

(1) If the application is not dismissed under Rule 259, the Claims Tribunal shall, send to the owner or the driver of the vehicle or both involved in the accident and its insurer, a copy of the application, and the annexures thereto together with the notice of the date on which the

parties shall enter their appearance either in person, or through their duly authorised agents, and may also file their written statement, if any, with additional copies of the same, for being furnished to the other parties connected with the matter. It will dispose off the application, and may call upon the parties to produce on that date any evidence which they may wish to tender.

(2) The service of the notice shall be effected on the owner, the driver and the insurer of the vehicle in question, as the case may be, by way of personal service, through the bailiff or by Registered Post A/D or both.

(3) Whether the applicant makes a claim for compensation under Section 149, the Claims Tribunal shall give notice to the owner and insurer, if any, of the vehicle involved in the accident directing them to appear on the date, not later than fifteen days from the date of issue of such notice. The date so fixed for such appearance shall also be not later than fifteen days from receipt of the claim application filed by the claimant. The Claims Tribunal shall state in such notice that in case they fail to appear on such appointed date, the Claims Tribunal shall proceed ex parte on the presumption that they have no contention to make against the award of

compensation.”

49. We have already extracted paragraph 10 of the said judgment in paragraph 38 above. It is therefore clear that the power to issue notice can be exercised by the Tribunal at any stage, if called upon to do so even by any other respondents. The same would imply that the petition cannot be rejected as not maintainable by holding that the driver is a necessary party. Further, we notice that the decision of the Division Bench of this Court in **Anuradha Varma's case** (1993 (2) KLT 777) was not brought to the notice of the learned Single Judge. Therefore, we record our inability to accept the contention of the learned Senior Counsel based on the judgment in O.P.(MAC) No.187/2014 that the driver is a necessary party. The said judgment will have to be understood on the peculiar facts of the said case.

50. We are, therefore, of the view that it cannot be said that the driver of the offending vehicle is a necessary party. But to hold that the owner of the vehicle is vicariously liable, necessarily a finding will have to be rendered about the negligence of his servant for which it is not imperative to implead the driver as held by the Apex Court in

Machindranath Kernath Kasar's case (supra) in paragraph 30 and the entire proceedings will not be vitiated or the owner is a joint tortfeasor. The only aspect to be made clear is that when the driver is not personally impleaded as a party, no award can be made against him. This is the view taken by the Karnataka High Court in **Patel Roadways' case** (ILR (2000) Kant. 3286) which we have already discussed above.

51. As far as the present case is concerned, even though in the written statement the insurance company raised a contention that the deceased is answerable for contributory negligence, that contention was never pursued. No suggestion or question was put to P.W.1 in that regard. The driver of the offending vehicle was not cited as a witness on behalf of the insurance company and no attempt was made to adduce any evidence even by trying to examine any independent witnesses. Therefore, it is clearly a case where the contention regarding contributory negligence was not at all sought to be proved in evidence. The judgment of the Tribunal will show that the owner and the insurer alone are made liable to satisfy the award and not the driver.

This is clear from paragraph 19 of the judgment. It was held that respondents 2 and 3 (i.e. the owner and insurer) are jointly and severally liable to pay the amount of compensation. The Tribunal has found that the second respondent is vicariously liable and the insurance company is liable to indemnify the owner. It was also noticed that even though there was another contention raised in the written statement that the insured has violated the policy conditions, in order to substantiate that contention the third respondent has not adduced any evidence before the Tribunal. Therefore, it is strictly a case where no award has been passed against the driver making him liable to satisfy the claims of the claimants. In that view of the matter, the finding by the Tribunal with regard to the negligence on the part of the rider of the motor cycle is only to find the owner vicariously liable.

52. As regards the finding regarding negligence also, as rightly pointed out by the learned counsel for the claimants, the production of Police charge-sheet is prima facie sufficient evidence of negligence. A Division Bench of this Court in **Pazhaniammal's case** (2011(3) KLT 648) has addressed that question and has held as follows in paragraphs

7 and 8:

“As a general rule it can safely be accepted that production of the police charge sheet is *prima facie* sufficient evidence of negligence for the purpose of a claim under S.166 of the Motor Vehicles Act. A system cannot feed itself on a regular diet of distrust of the police. *Prima facie*, charge sheet filed by a police officer after due investigation can be accepted as evidence of negligence against the indictee. If any one of the parties do not accept such charge sheet, the burden must be on such party to adduce oral evidence. If oral evidence is adduced by any party, in a case where charge sheet is filed, the Tribunals should give further opportunity to others also to adduce oral evidence and in such a case the charge sheet will pale into insignificance and the dispute will have to be decided on the basis of the evidence. In all other cases such charge sheet can be reckoned as sufficient evidence of negligence in a claim under S.166 of the Motor Vehicles Act. We mean to say that on production of such charge sheet the shifting of burden must take place. It is not as though we are not conscious of the dangers and pit falls involved in such an approach. But we feel that adoption and recognition of such practice would help to reduce the length of the long queue for justice before the Tribunals. The judicial recognition of the practice will help the

Tribunals to ensure the optimum use of judicial time at their disposal for productive ventures. We do not intend to say that collusive charge sheets need be accepted. Wherever on the facts of a given case the Tribunals feel that the police charge sheet does not satisfy their judicial conscience, the Tribunals can record that the charge sheet cannot be accepted and can call upon the parties, at any stage, to adduce oral evidence of the accident and the alleged negligence. In such a case, the issue of negligence must be decided on the other evidence, ignoring the charge sheet.”

Herein, through P.W.1, the charge sheet has been marked as Ext.A3. The same, therefore, is prima facie sufficient evidence of negligence. The onus of proof has been shifted to the insurance company and as already found above, it is recorded in the “B” diary, that the third respondent insurance company reported that there is no further evidence. Therefore, the finding on negligence has been rightly rendered by the Tribunal. Further, there is no contention in the written statement of the insurance company that the driver is a necessary party. The written statement was filed after the driver was deleted from the

party array. Therefore, as regards non joinder of parties, no issues have been sought to be framed on the part of the insurance company. Hence, it is evidently a case where an objection regarding non joinder of parties was not raised before the Tribunal. Even at a later stage notice was not requested to be issued to the first respondent driver. In **Varghese Cherian's case** (1960 KLT 1080) it was held by the learned Single Judge that “a contention of non-joinder of parties, under Order I, Rule 9 C.P.C. ought to be taken before the settlement of issues in the case. If such a contention has not been taken in proper time it cannot be entertained as a fresh plea in Second Appeal.” Herein also, what we find is that the only contention raised in the written statement is one concerning the alleged contributory negligence of the deceased and not that the driver is a necessary party and therefore we find that in the appeal we will not be justified in accepting the said contention and we cannot accede to the vehement plea raised by the learned Senior Counsel for the insurance company for a remand of the matter.

53. The decision of a Division Bench of this Court in **National Insurance Co. Ltd. v. Yohannan** (1997 (2) KLT 771) was a case of

composite negligence wherein it was held that the Tribunal is competent to apportion the liability between the wrong doers. Even though the same is relied upon by the learned Senior Counsel, the same may not have an application here.

54. Now we will come to the claim for enhancement of the quantum of compensation, in the appeal filed by the claimants. The arguments are mainly that the deceased was having a regular employment in Qatar, that the amount of contribution has to be assessed by converting the amount of salary received by him and that he had great prospects even if he had come back to India and the evidence of P.W.2 is relied upon in this context. Learned counsel also sought for enhancement of the claim awarded under different heads.

55. The evidence of P.W.1 is to the effect that the deceased was an Air-craft Mechanic. He was employed in Indian Navy from 1.11.1975 to 31.12.1986 as Aircraft (Helicopter) Mechanic. He obtained voluntary retirement from Navy. He had attended the courses like General Engineering, General Electricity and Aircraft Radio Equipments, Theory of Flight (Fixed and Rotary wing Aircraft) Piston

Engine, Jet Engine, Turbo Prop. Engine, General and Leading particulars of various Aircraft Engines, etc.etc. According to her, he was engaged during his service in Flight servicing, routine maintenance, rigging of Aircraft and its control, fault diagnosis, defect rectification, crack detection, first and second line servicing, aircraft husbandary and corrosion, prevention maintenance, supervision of associated ground support equipments, aircraft maintenance control organisation etc. etc., i.e flight maintenance and servicing areas. Ext.A6 is the certificate of Record of Service and discharge from Indian Navy. Ext.A7 series are certificates showing the courses attended by him while he was serving Indian Navy. He entered service in Qatar Emiri Air-force as Aircraft Mechanic and continued there for 13 years. Ext.A8 series are the passports produced to prove the same and he had valid visa upto 12.4.2002 and but for his death it would have been renewed. He came back to India on leave for three months consequent on the death of his mother. Ext.A9 is the certificate countersigned by Embassy of India (Doha) Qatar showing his salary as 4575 Qatar Riyal which is claimed to be equal to Indian Rupee

55,000/-. Ext.A10 is the service certificate issued by Qatar Emiri Airforce dated 4.12.2000 countersigned by Indian Embassy. It is also claimed that even if he had returned back to India, he would have been well employed as an Aircraft Technician. Ext.A13 is the passport of P.W.1 which is produced to prove that she was also in Qatar and was staying with him for some time. It is stated that he was maintaining NRE Account No.11179 in Indian Overseas Bank, Pathanamthitta Branch and Account No.1809 in State Bank of Travancore, Pathanamthitta Branch. Ext.A15 is produced to show the transactions between 1.4.2000 to 5.9.2000 in Indian Overseas Bank, Pathanamthitta Branch and Ext.A16 is the certificate showing the exchange rate.

56. The Tribunal has assessed various materials from paragraph 12 onwards. His date of birth was 20.5.1959, going by Ext.A6 which also will prove that he was working in India Navy from 1.11.1975 to 31.12.1986 in Aviation Branch (Technical). For 14 years he has been employed in Qatar as evident from Ext.A8 series passports. The exchange rate, going by Ext.A16, is Rs.12.25. Therefore, the Tribunal has observed that as on the date of accident he was getting a monthly

salary of Rs.50,000/- from his job at Qatar. Ext.A7 will prove that he has completed the Leading Air Craft Mechanic Qualifying course and therefore the Tribunal found that he was a qualified Air Craft Mechanic and he had served in Indian Navy and Qatar Air-force. Based on the series of documents produced with regard to the maintenance of bank account, it was held that the deceased was getting good salary in Qatar.

57. P.W.2 is one Shri N.L Jacob who was working with the deceased in Indian Navy and had been in Qatar also under the same designation. After coming back from Qatar, he has been working in Cochin Air Craft Maintenance Company and is getting Rs.52,250/- as monthly salary. Exts.A18 to A22 are the documents concerning the employments and salary, etc. of P.W.2. It will also support his case that he had been working in Qatar Air-force. The Tribunal, in paragraph 15, accepted the argument of the learned counsel for the insurance company that the employment of the deceased was only on contract basis and there was no security for employment. Accordingly, the Tribunal held that he would have been working there at least for a period of five years and would have been getting a monthly salary of

Rs.50,000/- which can be calculated to find out the contribution for five years. It was also held that in the native place in Kerala he would have been employed on his return and would have been obtaining at least a sum of Rs.7,500/- per month. 15 has been adopted as the multiplier. The average monthly income has been fixed at Rs.21,667/- in that manner and the yearly contribution has been calculated as Rs.2,60,000/- and after deducting $\frac{1}{3}$ rd for personal expenses, the contribution to the family has been assessed at Rs.1,73,333/-. By adopting the multiplier of 15, the loss of dependency has been calculated at Rs.25,99,995/-.

58. The Tribunal further granted a sum of Rs.15,000/- towards loss of consortium and for loss of love and affection a sum of Rs.20,000/- has been granted. For loss of estate, an amount of Rs.15,000/- has been granted. Amounts have been awarded towards medical expenses, pain and suffering, transport to hospital, damage to clothing, bystander's expenses and funeral and allied expenses.

59. Learned counsel for the claimants, by relying upon the decision of the Apex Court in **Puttamma's case** (2014 (1) KLT 738 -

SC) contended that split multiplier should not have been adopted. The judgment in **Jiju Kuruvila's case** {(2013) 9 SCC 166} is relied upon to contend for the position that the actual income on the date of death in a foreign country will have to be reckoned. Learned counsel relied upon the decision of a Division Bench of this Court in **Valsamma's case** (2014 (1) KLT 10) to contend for the position that even in case of a contract employment, the income will have to be assessed properly in the context of Indian standards and therefore the income obtained by P.W.2 should have been taken as a guidance.

60. The decision of the Apex Court in **Jiju Kuruvila's case** {(2013) 9 SCC 166} will show that the deceased was working as a Manager in Freeman Management Corporation, New York Branch. The evidence therein was to the effect that as per the conditions of service he would have continued in service upto the age of 65 years. There was evidence to show that the actual salary he was getting at that point of time was 2500 US dollars equivalent to Rs.43,100/-. It was found in paragraph 23 that the deceased would have continued in

service upto the age of 65 years.

61. But herein, the evidence, even though is to the effect that the deceased was in Qatar for a period of 14 years, regarding his continuance for a long period in future there and as to the permanent nature of employment, the evidence is not convincing which is the view taken by the Tribunal also. Of course, his contract would have been subjected to renewal and there was a chance for the same.

62. A like case was considered by a Division Bench of this Court in **Valsamma's case (supra)**. The Division Bench was of the view that in case of a permanent employment, income can be reckoned accordingly. But in the case of a non permanent employment with uncertainty regarding continuance, it is not safe to rely upon that income for the purpose of assessing compensation under the head of loss of dependency. It was held therefore that in such cases this Court will have to assess the income of the person, in the context of Indian standards, taking the probable income which he may have fetched if he was working in India during the relevant time.

63. Likelihood of termination of contract employment in Gulf

countries, therefore, looms large. But the background of the deceased will show that he had served Indian Navy for a considerably long period of 11 years and he had been in Qatar Air-force for a period of 14 years. Of course, learned counsel for the claimants raised a plea for accepting the amount of salary obtained by P.W.2 in India which, according to the learned counsel, would have been earned by the deceased on his return to India. Being in the age group of 42, we are also of the view that he would have been able to get a proper employment here, in India.

64. The question is whether the method adopted by the Tribunal to quantify the remuneration at Rs.7,500/- for service in India could be accepted. Even though vehement arguments have been raised with regard to the consideration of a proper rate of increase for future prospects, it can be done only by a proper guess work in the special facts and circumstances of the case and on assessment of the documentary evidence.

65. It is submitted by the learned Senior Counsel for the insurance company that going by the decision of the Apex Court in

Sarla Verma v. Delhi Transport Corporation (2010 (2) KLT 802 - SC) the multiplier to be adopted is 14 instead of 15 taken by the Tribunal herein. We will have to adopt 14 as the multiplier. As regards the monthly income for the remaining years fixed at Rs.7,500/-. we are of the view that it requires a reasonable enhancement, as the same is too low. Going by his academic background as well as experience, he would have earned more income in India if placed in an equivalent post. According to us, a reasonable amount of Rs.12,000/- can be fixed as salary on an average if he was employed in India for the remaining 9 years. Therefore, the yearly income by combining the two will be Rs.3,06,857/- and monthly it will come to Rs.25,570/- which we adopt as it is reasonable, fair and just. After deducting $\frac{1}{3}$ rd for personal expenses, the contribution can be fixed and by adopting 14 as the multiplier, the total compensation towards loss of dependency will come to Rs.28,64,000/- (Rs.25,570/- x $12 \times 14 \times \frac{2}{3}$). In the light of the decision of the Apex Court in **Rajesh v. Rajbir Singh** (2013 (3) KLT 89 SC) we award a sum of Rs.1 Lakh towards compensation for loss of consortium and another sum of Rs.1

Lakh towards loss of love and affection. The amount fixed as compensation under the head of loss of estate, viz. Rs.15,000/- is too low and we award an amount of Rs.1 Lakh under this head. For funeral expenses an amount of Rs.25,000/- is awarded.

66. Accordingly, the total compensation is refixed in the following manner:

<i>Head of claim</i>	<i>Amount awarded by the Tribunal</i>	<i>Modified award passed by this Court</i>
Loss of dependency	2599995	2864000
Loss of consortium	15000	100000
Loss of estate/expectancy	15000	100000
Loss of love and affection	20000	100000
Medical and treatment expenses	31500	31500
Pain and suffering	20000	20000
Transportation expenses and damage to clothing	1500	1500
Bystander's expenses	500	500
Funeral and allied expenses	10000	25000
Total	2713495	3242500

(Rupees Thirty-two lakhs forty-two thousand and five hundred only)

The enhanced amount of compensation will carry interest at 9% per annum from the date of petition till realisation. The amount will be shared equally by the claimants-appellants by M.A.C.A. No.2974/2009.

67. M.A.C.A. No.1075/2009 is dismissed and M.A.C.A. No.2974/2009 is allowed. The insurance company is directed to deposit the amount of compensation less the amount already deposited, within a period of three months and we permit the first appellant to withdraw her share. We permit the second claimant also to withdraw her share if she has become a major now and if otherwise, the amount in her favour will be deposited in a nationalised bank till she attains majority.

The parties are directed to suffer their costs in the appeals.

(T.R. RAMACHANDRAN NAIR, JUDGE.)

(P.V. ASHA, JUDGE.)

kav/