

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE T.R.RAMACHANDRAN NAIR

&

THE HONOURABLE SMT. JUSTICE P.V.ASHA

FRIDAY, THE 16TH DAY OF JANUARY 2015/26TH POUSHA, 1936

MACA.No. 1136 of 2010 ()

AGAINST THE AWARD IN OPMV 1480/2001 of IST ADDL.M.A.C.T, KOZHIKODE
APPELLANT(S)/PETITIONER:

NIRMAL.S, AGED 31 YEARS,
S/O.ADV.P.SACHEENDRAN, H.NO.19/180A
NEAR ACHUTAN GIRLS HIGH SCHOOL, CHALAPPURAM
KASABA AMSOM DESOM, KOZHIKODE DISTRICT.

BY ADV. SRI.K.P.BALASUBRAMANYAN

RESPONDENT(S):RESPONDENTS

1. MRS.JOSE PHILIP,
MURINGAKKIL HOUSE, MARIKUNNU P.O., KOZHIKODE
(R.C.OWNER AND DRIVER OF AMBASSADOR
CAR BEARING NO. KLN 1252).

2. M/S.ORIENTAL INSURANCE CO.LTD.,
KINGSWAY BUILDING, KOZHIKODE.

RR1 BY ADV. SRI.THOMAS ANTONY

R2 BY ADV. SRI.VPK.PANICKER

THIS MOTOR ACCIDENT CLAIMS APPEAL HAVING BEEN FINALLY HEARD
ON 16-01-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

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

M.A.C.A.No.1136 of 2010

Dated this the 16th day of January, 2015

JUDGMENT

Ramachandran Nair, J.

The claimant has come up in appeal aggrieved by the finding of negligence as well as the inadequacy of quantum of compensation. The accident occurred while he was driving a motor cycle. He was a student of the Law College at that point of time. He was riding his motor bike bearing Reg. NO.KL-11/H 9103 from the hostel of the Law College at Vellikadukunnu to his house at Chalappuram. The road is lying in the east west direction. He was riding the motor bike from east to west. The spot of accident is near Malaparambu Housing Colony bus stop. The offending vehicle is an Ambassador car bearing Reg. No.KLN 1252 which was coming from the opposite direction. The claimant alleged negligence on the part of the driver of the car.

2. Before the Tribunal, evidence was let in. The appellant was

examined as P.W.1 and another witness was examined as P.W.2. Exts.A1 to A5 were produced by the claimant/appellant. The insurance company produced Exts.B1 to B3. Ext.B1 is the copy of the scene mahazar and Ext.B2 is the copy of the charge sheet. Even though the Police registered a crime, it was referred.

3. Going by the findings of the Tribunal, the appellant has also contributed to the accident at 50%. As regards the total compensation claimed by him, it can be seen that the appellant was treated in the hospital for five days. He had comminuted fracture lower 1/3 left humerus, fracture lower end right radius and lacerated wound left knee. He was treated in the Medical College Hospital, Calicut and thereafter at Baby Memorial Hospital, Calicut.

4. Towards medical bills, Ext.A5 series were produced showing a total amount of Rs.4,246/- out of which only Rs.2,764/- has been granted. He has sustained 6% permanent disability. Taking Rs.1,250/- as notional income and applying 17 as the multiplier, going by the age of the appellant as 25, the Tribunal granted an amount of Rs.15,300/-

towards compensation for permanent disability. For pain and suffering, an amount of Rs.36,000/- has been granted. Apart from the same, Rs.2,000/- has been granted towards transport to hospital, extra nourishment, damage to clothing, etc. and another sum of Rs.2,765/- has been granted towards purchase of medicines and accordingly the total compensation is assessed at Rs.71,065/- out of which, an amount of Rs.35,533/- has been granted to the appellant.

5. The Tribunal has considered the scene mahazar for recording the spot of accident. Going by the scene mahazar, the tar road at that place is having a width of 8 metres and the accident spot is shown as 4 metres from the tar end on the north towards south. It is further recored in the scene mahazar that 3 metres further from the spot of accident towards east and from the northern tar end tyre marks are seen at a width of 3m 420 cm.. The evidence of P.W.1 is that he was moving in the correct side and the offending vehicle came in a great speed and hit the motor cycle. Of course, in cross examination no specific suggestions have been made to him except to ask him whether it was

due to his negligence the accident occurred, which he denied.

6. P.W.2 is the other witness who is stated to have witnessed the accident. According to him, the bike was coming towards Kozhikode side and at a place called Malaparamba, the offending vehicle, while trying to overtake another vehicle, hit the bike. He denied the suggestion that the claimant was trying to overtake a KSRTC bus. Based on the tyre marks, the Tribunal found that the driver of the car had applied break on seeing the motor cycle. The same is not a correct observation, since the tyre mark is seen 3 metres away from the spot of accident towards east. The Tribunal was of the view that it is not possible to conclude that there was no negligence on the side of the claimant. This finding is made since the accident occurred almost in the middle of the road. Shri Harish, learned counsel for the appellant submitted that the evidence of P.W.1, coupled with the oral evidence of P.W.2 will definitely show that the car driver was totally negligent.

7. Shri Thomas Antony, learned counsel appearing for the owner of the car and Shri V.P.K. Panicker, learned counsel appearing

for the insurance company submitted that since the scene mahazar shows that the spot of accident is exactly in the middle of the road, unless the claimant was able to challenge the same by any known process of law, the Tribunal was correct in fixing the spot of accident as the middle of the road. It is further submitted that the theory that the car was trying to overtake another vehicle, is not support by any evidence. Finally, the Tribunal fixed negligence at 50% as far as the appellant is concerned. We find from the scheme mahazar that the motor cycle had sustained damage on its front side. The aspect of contributory negligence normally, will have to be considered by assessing the exact spot of accident and the spot where the vehicles were lying at that time. In many of the cases the vehicles will be removed from the accident spot, before drawing the mahazar, for easing traffic, making it impossible to fix the spot in a correct manner. But herein, the drawer of the scene mahazar has not been summoned for challenging the veracity of the recorded versions as regards the spot of accident and tyre marks. Therefore, we will not be justified in reversing the finding

of the Tribunal in toto. It is true that there is no suggestion to P.W.1 in cross examination, but still, we are of the view that evidence is lacking to show that the car has crossed the middle line as suggested now, in that it was trying to overtake another vehicle. As regards the apportionment of negligence between the drivers of both the vehicles, even though the Tribunal fixed contributory negligence on the part of the appellant at 50%, we are of the view that it can be fixed at the ratio of 40 : 60 between the appellant and the driver of the car.

8. As far as the compensation is concerned, we grant the entire amount claimed towards medical expenses, viz. Rs.4,246/-. Being a student, only a notional income can be taken. But the income now assessed by the Tribunal is too low. The accident being of the year 1999, for the purpose of assessing compensation, we take the notional income as Rs.3,000/-. Going by the disability certificate, the percentage of disability is 6. Apart from the same, it is recorded that there is shortening of upper arm and there is a deformity on left elbow. Therefore, the appellant will have to be compensated for this item.

Accordingly, the compensation for permanent disability is fixed at Rs.36,720/-. We enhance the compensation under the head “transportation charges, extra nourishment and damage to clothing” to Rs.5,000/-. The Tribunal has not awarded any amount for deformity and other aspects and for loss of amenities consequent on the impact of the disability in his normal avocations. As we have already noted, there is shortening as well as deformity on left elbow. But towards loss of income an amount of Rs.15,000/- has been granted by the Tribunal which has to be corrected and has to be awarded under the correct head. Since he was a student, we delete Rs.15,000/- granted towards loss of earnings. Therefore, we grant an amount of Rs.35,000/- each under these two heads and the total compensation will be as follows:

<i>Head of claim</i>	<i>Amount awarded by the Tribunal (Rs)</i>	<i>Amount modified by this Court (Rs)</i>
Permanent disability	15300	36270 (3000 x 12 x 17 x 6/100)
Pain and suffering	36000	36000
Loss of income	15000	
Transportation charges, extra nourishment, damage to clothing	2000	5000

<i>Head of claim</i>	<i>Amount awarded by the Tribunal (Rs)</i>	<i>Amount modified by this Court (Rs)</i>
Medical expenses + cost of medicine	2764 + 2765 = 5529	2765 + 4246 = 7011
Deformity		35000
Loss of amenities & enjoyment in life		35000
Total	71065	154281

The appellant will be entitled to 60% of the total compensation, viz. Rs.92,568.6 which we rounded off to Rs.92,570/- (Rupees Ninety-two thousand five hundred and seventy only). The above amount will carry interest at the rate of 9% from the date of petition. The insurance company is directed to deposit the above amount less the amount already deposited before the Tribunal, within a period of three months.

The appeal is allowed as above. No costs.

(T.R. RAMACHANDRAN NAIR, JUDGE.)

(P.V. ASHA, JUDGE.)

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