

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

THURSDAY, THE 8TH DAY OF JANUARY 2015/18TH POUSHA, 1936

OP (MAC).No. 187 of 2014 (O)

**(AGAINST THE ORDER IN I.A.NO.8934/13 IN O.P(MV)595/2008 DATED 25.11.2014 OF
MOTOR ACCIDENTS CLAIMS TRIBUNAL, THIRUVANANTHAPURAM)**

PETITIONER:

**SURENDRAN AGED 44 YEARS
S/O.RAGHAVAN, CHANIKKAVILA VEEDU, EDAPAZHANJI
THIRUMALA P.O., THIRUVANANTHAPURAM.**

**BY ADVS.SRI.B.S.SWATHY KUMAR
SRI.REMYA MURALI
SRI.A.K.RAJESH
SMT.GRACEAMMA THOMAS**

RESPONDENT(S):

**1. SHAJAHAN
93/1, ANSI MANZIL, MANICKAMANGALAM
NELLANADU P.O., NEDUMANGAD, THIRUVANANTHAPURAM-695506.**

**2. THE SENIOR DIVISIONAL MANAGER
THE ORIENTAL INSURANCE COMPANY LTD.
DIVISIONAL OFFICE, THAKARAPARAMBU ROAD
THIRUVANANTHAPURAM-695 001.**

R2 BY STANDING COUNSEL SMT.K.S.SANTHI

**THIS OP (MAC) HAVING COME UP FOR ADMISSION ON 08-01-2015, THE
COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

OP (MAC).No. 187 of 2014 (O)

APPENDIX

PETITIONER(S)' EXHIBITS :

EXT. P1 : TRUE COPY OF THE OP(MV)NO.595/2008 FILED BEFORE THE MOTOR ACCIDENTS CLAIMS TRIBUNAL, THIRUVANANTHAPURAM DATED 23-6-2008.

EXT. P2 : TRUE COPY OF THE 'B'DIARY IN OP(MV)NO.595/2008 BEFORE THE MOTOR ACCIDENTS CLAIMS TRIBUNAL, THIRUVANANTHAPURAM.

EXT. P3 : TRUE COPY OF THE ORDER IN I.A.NO.8934/2014 IN OP(MV)NO.595/2008 OF THE MOTOR ACCIDENTS CLAIMS TRIBUNAL, THIRUVANANTHAPURAM, DATED 25-11-2014.

EXT. P4 : TRUE COPY OF THE 'B' DIARY IN OP(MV)NO.1068/2008 BEFORE THE MOTOR ACCIDENTS CLAIMS TRIBUNAL, THIRUVANANTHAPURAM.

EXT. P5 : TRUE COPY OF THE 'B' DIARY IN OP(MV)NO.60/2009 BEFORE THE MOTOR ACCIDENTS CLAIMS TRIBUNAL, THIRUVANANTHAPURAM.

RESPONDENT(S)' EXHIBITS : NIL

// TRUE COPY

P.A TO JUDGE

iap

K. Vinod Chandran, J

O.P.(MAC).No.187 of 2014-O

Dated this the 08th day of January, 2015

JUDGMENT

The petitioner-claimant, an injured in an accident, impugn Exhibit P3 order dated 25.11.2014, of the Motor Accidents Claims Tribunal, Thiruvananthapuram [for short "the Tribunal"], which refused to review its order dated 08.08.2014, directing the applicant to take steps for impleadment of the driver of the alleged offending vehicle. The Tribunal found that the driver is a necessary party in the proceedings based on Rule 377 of the Kerala Motor Vehicles Rules, 1989 [for brevity "Kerala Rules"] as also a decision of this Court in ***Tamil Nadu State Transport Corporation v. Velu* [2014 ACJ 2178]**.

2. The learned counsel for the petitioner contends that there is absolutely no requirement for impleadment of the driver, as has been held by the Hon'ble Supreme Court in ***Machindranath Kernath Kasar v. D.S.Mylarappa* [2008 ACJ 1964]**. The learned counsel, with reference to the facts of the case, would vehemently urge that the owner, who is vicariously

liable, is impleaded before the Tribunal and he has chosen to remain *ex parte*. It is also contended that the driver of the offending vehicle, before the Magistrate Court wherein offence under the Indian Penal Code was pending trial, had pleaded guilty and, hence, the negligence stands admitted.

3. Essentially it is to be noticed that the allegation of the petitioner-claimant is that the accident was caused by the rash and negligent driving of the autorickshaw, which came from the opposite side, and hit the motor-cycle in which the petitioner-claimant was a pillion rider. The claim petition itself was filed in the year 2008, without the driver of the offending vehicle in the party array and in the year 2014, the aforesaid orders were passed, which are sought to be challenged before this Court.

4. The short issue raised is that, there is no necessity to implead the driver as has been held by the Hon'ble Supreme Court in ***Machindranath Kernath Kasar*** (*supra*). The facts of the aforesaid case would reveal that, a bus of the Karnataka State Road Transport Corporation [for brevity "KSRTC"] and a truck were involved in a collision and the appellant before the Supreme Court was the driver of the KSRTC bus. The said driver too

suffered injuries in the accident and filed a claim petition, which was rejected for reason of the negligence found on him. The passengers travelling in the KSRTC bus, also alleged negligence on its driver. Neither the driver of the bus nor the driver of the truck were impleaded in either of the claims, i.e., filed by the passengers or that by the driver of the KSRTC bus. While the claim petition of the passengers of the KSRTC bus was allowed, finding negligence on the driver of the bus, the bus driver's claim petition stood dismissed for reason of the accident having occasioned due to his negligence.

5. The driver was in appeal before the Hon'ble Supreme Court against the rejection of his appeal before the Karnataka High Court. The Hon'ble Supreme Court specifically took into consideration Rule 235 of the Karnataka Motor Vehicles Rules, 1989 [for brevity "Karnataka Rules"], wherein, under sub-rule (1) the Claims Tribunal was required to send a copy of the application made by a claimant, to **the owner or the driver** of the vehicle, **or both**, from whom the appellant claims relief **and the insurer**. Sub-rule (2) also mandated notice to the owner and the insurer alone when a claim for compensation under

Section 140 of the Motor Vehicles Act, 1988 [for brevity “the Act”] was made. The prescribed forms as per the Rules also did not require the driver to be made a party.

6. The Hon'ble Supreme Court, in paragraph 18, specifically noted that their Lordships were not called upon to lay down a law that even in the absence of any rule the impleadment of the driver of the vehicle is imperative. Section 168 of the Act was noticed, wherein the Tribunal was mandatorily required to specify the amount which shall be paid by the owner or the driver of the vehicle involved in the accident or by or any of them. As the provision made it imperative on the Tribunal, to specify the amount payable, *inter alia*, by the driver of the vehicle, it was held:

“*a fortiori*, he should be impleaded as a party in the proceeding”.

7. It was also held that the driver may not be a necessary party, since the joint tortfeasor, the owner, was impleaded in that capacity. Hence, the issue was answered specifically relying on Rule 235 of the Karnataka Rules.

8. As was rightly noticed by the Tribunal; herein, the Kerala Rules, however, stand to the contrary and require notice to the driver also. Rule 377; sub-rule (1) without its proviso, is extracted hereunder:

“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”.

This 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”.

9. In ***Machindranath Kernath Kasar*** (*supra*), the peculiar circumstance, of two sets of claims having been heard together, was noticed; one of which was sought to be sustained on the allegation of negligence on the bus driver, who was the claimant in the other. It was held that there could not be contrary findings of negligence, with respect to the very same accident. No case of contributory negligence having been made out, it was

held that the Tribunal was required to hold that either the driver of the bus or the truck is responsible for the accident and liable to pay compensation, which liability would have to be fastened on the registered owner of the vehicle, whose driver was found to be negligent. It was categorically held that though a driver may not be a necessary party, to find negligence, he would be a proper party. In the two sets of claims adjudicated upon by the Tribunal, it was held that the driver of the bus though not a party, was examined therein and had sufficient opportunity to assail the allegation of negligence against him. It was categorically held that a driver, against whom the allegation of negligence is raised, should be made a “party to the proceeding”, which was held to be sufficient even by way of participation as a witness. The truck driver was also found to have been examined as a witness in the case. However, since compensation was awarded to the passengers of the bus in their claim applications, the Hon'ble Supreme Court refused to interfere with the dismissal of the claim of the bus driver. It has to be emphasised that the said judgment was only in the context of the specific rule in the Karnataka Rules and the context of the drivers, who were held to

be only 'proper-parties', having been examined as witnesses.

10. It is also to be noticed that the decision of the Karnataka High Court in ***Patel Roadways v. Manish Chhotalal Thakkar* [2001 ACJ 180]** held that though the driver of a car is a proper party, was not a necessary party and that it would be appropriate to implead him. It was also categorically held that if the driver is made liable to pay compensation amount, he should be made a party and given notice.

11. As early as in 1977 the Hon'ble Supreme Court in ***Minu B.Mehta v. Balkrishna Ramachandra Nayan* [1977 ACJ 118]**, held that it is incumbent on the claimants to prove negligence before the owner or the Insurance Company is held liable for compensation and a finding of negligence against the driver can only be with proper notice to him.

12. Apposite would be a reference to the decision in ***Oriental Insurance Co. Ltd. v. Meena Variyal* [(2007) 5 SCC 428]**:-

“Ordinarily, a contract of insurance is a contract of indemnity. When a car belonging to an owner is insured with the insurance company and it is being driven by a driver employed by the insured, when it meets with an

accident, **the primary liability under law for payment of compensation is that of the driver. 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. A third party** for whose benefit the insurance is taken, **is therefore entitled to show**, when he moves under Section 166 of the Motor Vehicles Act, **that the driver was negligent** in driving the vehicle resulting in the accident; that the **owner was vicariously liable** and that the insurance company was **bound to indemnify the owner and consequently, satisfy the award made.**

Therefore, under general principles, firstly, the driver ought to be impleaded before an adjudication is claimed under Section 166 of the Act, especially when there may be some controversy as to whether it was the deceased or the alleged driver who was actually driving, as in the present case”.

13. In the above circumstance, the plea raised by the petitioner is frivolous and found to be not maintainable. The claim application is seen filed in 2008, without the driver of the offending vehicle in the party array. A direction to implead the driver was also not complied with. This Court found that the challenge raised in the Original Petition is devoid of merit. The

Insurance Company cannot be mulcted with the liability of interest when an improper claim petition as per the Rules was kept pending in the Tribunal for so long. In such circumstances, the claim petition if eventually allowed, the Tribunal shall not levy any interest from the date of application to the date on which the petitioner-claimant files an application for impleadment of the driver.

The Original Petition is dismissed with the above observation.

Sd/-
K.Vinod Chandran,
Judge

vkul/-

(true copy)