IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A. BADHARUDEEN

FRIDAY, THE 10TH DAY OF JUNE 2022 / 20TH JYAISHTA, 1944

MACA NO. 350 OF 2012

AGAINST THE AWARD DATED 12.09.2011 IN OPMV 1459/2005 OF MOTOR ACCIDENTS CLAIMS TRIBUNAL, ALAPPUZHA

APPELLANT/3RD RESPONDENT:

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

BY ADV SRI.GEORGE CHERIAN (THIRUVALLA)

RESPONDENTS/CLAIMANTS:

1. V. BABU
S/O.VASAVAN, THAITHARA HOUSE, MP WARD 5,
MANNANCHERRY P.O., ALAPPUZHA, PIN-688538.
2. BIJIL BABU
S/O.V.BABU, THAITHARA HOUSE, MP WARD 5,
MANNANCHERRY P.O., ALAPPUZHA, PIN-688538.
3. SHILIN BABU
S/O.V. BABU, THAITHARA HOUSE, MP WARD 5,
MANNANCHERRY P.O., ALAPPUZHA, PIN-688538.

BY ADVS.

SRI.A.T.ANILKUMAR
SMT.V.SHYLAJA

THIS MOTOR ACCIDENT CLAIMS APPEAL HAVING COME UP FOR ADMISSION ON 10.06.2022, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

"C.R"

A. BADHARUDEEN, J.

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M.A.C.A.No.350 of 2012

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Dated this the 10th day of June, 2022

J U D G M E N T

This is an appeal filed under Section 173 of the Motor Vehicles Act by the 3rd respondent in O.P(MV).No.1459/2005 on the file of the Motor Accident Claims Tribunal, Alappuzha. Respondents 1 to 3 herein are the original petitioners.

2. Heard the learned counsel Advocate George Cherian appearing for the petitioner and Advocate A.T.Anilkumar, appearing for the 2nd respondent. Though notice was served upon respondents 1 and 3, they did not appear.

3. I shall refer the parties in this appeal as to their status before the Tribunal, viz., `petitioners' as well as the `3rd respondent'.

4. Summary of the case: Husband and 2 sons of deceased

one `Lalam' had filed application under Section 166 of the Motor Vehicles Act before the Tribunal on the allegation that the above said `Lalam' died in a motor accident occurred on 17.05.2005 at about 3 p.m while she was travelling on a motorcycle bearing Reg.No.KL-04/Q-4895 as a pillion rider, which was driven by the 2nd respondent, who is none other than the brother of the above said `Lalam'. According to the petitioners, the accident was the contribution of negligence on the part of the 2nd respondent, the rider of the motorcycle. On the above facts, the petitioners claimed Rs.7,50,000/- as compensation from respondents 1 to 3. The 1st respondent is the owner, 2nd respondent is the rider and 3rd respondent is the insurer of the motorcycle.

5. Respondents 1 and 2 were set exparte by the Tribunal.

6. The 3rd respondent, insurer, filed written statement raising the following contentions. The accident involving motorcycle bearing Registration No.KL-04/Q-4895 and the

negligence attributed against the 2nd respondent were denied. It was contended that police not registered any case at the first instance and later, crime was registered on the basis of a private complaint lodged before the Magistrate Court, after a period of 3½ months. The death of `Lalam' was not due to motor accident or due to the resultant cause of injuries sustained. The death was natural one and there was no postmortem certificate or inquest, to hold otherwise. It was contended further that the above said Lalam underwent valve surgery about 10 years back at Sree Chitra Thirunal Hospital and she died in consequence of the said trauma. Apart from that, while admitting the policy in relation to the motorbike bearing Registration No.KL-04/Q-4895, the claim under various heads also was disputed.

7. The Tribunal ventured the matter. PW1 and PW2 were examined and Exts.A1 to A16 documents were marked on the side of the petitioners. Exts.B1 and B2 documents were marked on the

side of the respondents.

8. Thereafter, the Tribunal found negligence against the 2nd respondent and granted Rs.4,68,856/- together with interest @ 7.5% per annum from the date of petition till the date of realisation.

9. The learned counsel for the 3rd respondent/appellant/insurer zealously argued that the Tribunal went wrong in holding that `Lalam' died in consequence of the injuries sustained by her in the alleged accident. It is also argued that no evidence adduced before the Tribunal to find negligence on the part of the 2nd respondent. According to the learned counsel, in this matter, though the accident was on 17.05.2005 and `Lalam' died thereafter, no crime was registered regarding the occurrence. Similarly, consequent on the death of `Lalam', no inquest, no postmortem certificate etc. were prepared to prove *prima facie* that the death of `Lalam' was sequel to the accident or the same as an unnatural death. However, after 3 ½ months, ie. on 3.9.2005, crime

was registered alleging commission of offences under Sections 279, 337, 338 and 304(A) of I.P.C, pursuant to a private complaint lodged before the Magistrate Court. The learned counsel for the 3rd respondent would urge that the petitioners not produced the final report in the above crime, before the Tribunal. However, the insurer produced the same as Ext.B2. According to the learned counsel, Ext.B2 would indicate that on a detailed investigation, the investigating officer found that the entire allegations led to registration of the crime investigated as per Ext.B2 as false. It is argued further that even though the final report marked as Ext.B2 does not support the allegation of negligence attributed against the 2nd respondent, by the petitioners, the petitioners did not adduce any independent evidence to prove the negligence. Apart from that, it is pointed out by the learned counsel for the insurer that PW1 and PW2 were examined; PW2 is the doctor who treated Lalam and PW1 is none other than the 1st petitioner, who is the husband of Lalam. However, the evidence of PW1 could not be

given emphasis to find negligence, since admittedly he is not a witness to the occurrence and his evidence is nothing but hearsay.

10. Per contra, the learned counsel appearing for the 2nd petitioner would urge that even though police not registered any crime soon after the occurrence and even after the death of `Lalam', Ext.A15 wound certificate in relation to `Lalam' would indicate that she sustained injuries consequent to R.T.A (Road Traffic Accident). He also argued that the evidence of PW1 along with the other documents would establish negligence against the 2nd respondent. But the learned counsel failed to substantiate negligence against the 2nd respondent by highlighting convincing and cogent evidence.

11. While addressing the rival contentions, the prime question arises for consideration is as to whether, what are the conditions to be established to claim compensation in a petition filed under Section 166 of the Motor Vehicles Act when the

petitioners allege negligence on the part of the driver/rider of the vehicle and death as its consequence? The answer to the above question is; twin conditions must be satisfied in this regard. The first one is proof of negligence on the part of the rider or driver of the vehicle alleged to be involved in the accident and the second one is proof of death of person in consequence of accidental injuries.

12. In the case on hand, it could be noticed that though the occurrence was on 17.05.2005, police registered F.I.R in this matter only on 3.9.2005, that too, when the Judicial First Class Magistrate Court, Alappuzha referred a private complaint filed by the 1st petitioner, for investigation under Section 156(3) of Cr.P.C. As per Ext.A1 F.I.R, it is alleged that rash and careless driving on the part of the 2nd respondent caused the accident. But as per Ext.B2 final report, the investigating officer, on detailed investigation filed report stating that the allegations in Ext.A1 F.I.R and the private

complaint are false. It is relevant to note that though the police referred the case as `false' as per Ext.B2, nothing available on record to see that any protest complaint was filed before the Magistrate Court against the said finding and proceeded further to establish the allegation in Ext.A1, the copy of F.I.R and Ext.A2, the private complaint. On perusal of Ext.A1 and the private complaint (Ext.A2) led to registration of the said crime, 2 independent witnesses and 5 doctors were cited in Ext.A2. None of the occurrence witnesses cited in Ext.A2 were examined before the Tribunal. The 7th witness in Ext.A2 got examined as PW2.

13. As I have already pointed out, in a claim under Section 166 of the Motor Vehicles Act, proof of negligence is mandatory to canvass compensation from the tortfeasers and the indemnifier. Apart from that, in cases of death there should be proof to hold that the death of the person involved in the accident is the direct consequence of the accidental injuries. Thus it is the burden of the

petitioners to adduce evidence to satisfy the allegation of negligence attributed against the driver or rider of the vehicle involved in the accident and to prove that the person died due to accidental injuries, since grant of compensation therein is based on the principle of `fault' liability. It is the settled law that police charge/final report attributing negligence against the tortfeaser/driver/rider can be relied on to find negligence, if the contrary is not established otherwise, by means of positive evidence. Here, the final report is totally against the contention raised by the petitioners in the matter of negligence on the part of the 2nd respondent. Thus the final report is against the contention raised by the petitioners. There is no rigid rule that police charge/final report is the last word to find negligence on the part of the driver/rider. No doubt, independent substantive evidence, namely, the evidence of eye witnesses to the accident, if adduced, the said substantive evidence, if reliable, will supersede the police charge/final report. Indubitably, in the absence of such substantive

evidence, negligence could not be found against the driver/rider. Having found so, the question emerges is; what is the evidence available in this case to find negligence on the part of the 2nd respondent/the rider of the motorcycle? In fact, either the police charge/final report or any other substantive evidence adduced in this case to find negligence on the part of the 2nd respondent. Viewing so, in this case, it is possible for the petitioners to examine somebody, who had witnessed the occurrence, to prove the negligence and to negative Ext.B2 final report. In the case on hand, instead of examining the persons, if any, who witnessed the occurrence, PW1, the husband of the 1st petitioner, got examined. His evidence is nothing but `hearsay' as he admittedly is not an eye witness to the accident. Thus it appears that the Tribunal had given emphasis to the `hearsay' evidence of PW1 alone to find negligence on the part of the 2nd respondent.

14. Though the learned counsel for the 2nd petitioner given

much reliance to Ext.A15, the copy of wound certificate cum discharge certificate, issued from Medical Trust Hospital dated 18.05.2005, in his attempt to establish negligence on the part of the 2nd respondent, on perusing the same, the history and alleged cause of injury are recorded as "R.T.A, pillion rider of a bike skid and fell down at Kalavoor 17.5.05 at 1 p.m". Thus as per Ext.A15 also, nothing could be gathered to find negligence on the part of the rider, though a road traffic accident is referred. The above entry in Ext.A15 itself does not suggest that the accident was the contribution of the negligence on the part of the 2nd respondent and, therefore, the said entry cannot be the sole foundation to establish negligence on the part of the 2nd respondent. Therefore, this contention is negatived.

15. As per Ext.A15, the following are the injuries noted in the certificate:

"(i) Edema with tenderness of left knee with dark

pigmentation of left knee;

(ii) Hemarthrosis left knee.”

So, the injuries, even as per the entries in Ext.A15, are only in relation to the left knee without any fracture. It is true that subsequently `Lalam' died. No autopsy examination done or even inquest prepared to satisfy that the death was due to the accidental injuries.

16. However, the Tribunal, after finding negligence against the 2nd respondent, given emphasis to the evidence of PW2 and granted compensation treating this as a case of death arising out of a motor accident. On reading the evidence of PW2, he stated that the death was due to septic shock with multi organ disfunction. However, PW2 never given evidence that the injuries noted in Ext.A15 contributed the death of `Lalam'. In fact, PW2 also not given any convincing evidence to substantiate that the death of `Lalam' is sequel to the accident. That apart, PW2 also conceded

that in cases of death arising out of accident, normally autopsy would be done. Be it so, no cogent evidence available in this case even to hold that `Lalam' died in consequence of the injuries sustained in a motor accident. As I have already pointed out, in a claim under Section 166 of the M.V Act, the petitioners must prove not only the negligence on the part of the driver or rider, but also to prove that the person alleged to have sustained injuries in a motor accident died in consequence of the accidental injuries. In this case, this particular aspect also not proved at all.

17. To summarise, the question as to whether the petitioners herein established the allegation of negligence against the 2nd respondent and they proved the death of `Lalam' as a result of the accidental injuries, I have no hesitation to hold that the petitioners miserably failed to establish the negligence against the 2nd respondent and the reason for the death as direct consequence of accidental injuries. If so, negligence could not be found against the

2nd respondent without support of evidence. In view of the matter, without much ado, it has to be held that the award impugned is not liable to sustain. Therefore, the same stands set aside.

In the result, the appeal stands allowed. Consequently, the award impugned stands set aside. O.P(MV).No.1459/2005 stands dismissed. Considering the nature of this particular case, the contesting parties are directed to suffer their respective cost.

Sd/-

(A. BADHARUDEEN, JUDGE)

rtr/