(2025) 04 KL CK 1276

In the High Court Of Kerala

Case No : M.A.C.A Nos.310, 1430 Of 2024 & I.A. No. 1 of 2024

Santha Kumari Amma APPELLANT

Vs

Thara.T.Pillai RESPONDENT

Date of Decision : 04-04-2025

Acts Referred:

Code of Criminal Procedure, 1973 — Section 161, 162, 172, 172(2), 172(3)
Indian Penal Code, 1860 — Section 279, 304A
Motor Vehicles Act, 1988 — Section 166, 168
Evidence Act, 1872 — Section 145

Citation : (2025) 04 KL CK 1276

Hon'ble Judges : Johnson John, J

Bench : Single Bench

Advocate : T.K.Koshy, V.V.Risani, Anil George, George Cherian

Final Decision : Allowed

Judgement

Johnson John, J

1. The above appeals are filed by the claim petitioners and the 5th respondent insurance company against the award dated 05.10.2023 in O.P.(MV) No. 1433 of 2011 on the file of the Motor Accident Claims Tribunal, Pathanamthitta.

2. The claim petitioners and the 4th respondent are the legal representatives of the deceased Thankappan Pillai, who died in a motor vehicle accident. According to the petitioners, on 10.07.2010, while the deceased was driving a car, lorry driven by the 2nd respondent in a rash and negligent manner caused to hit the car and the deceased, who sustained serious injuries, succumbed to his injuries while on the way to hospital.

3. Before the Tribunal, PWs 1 to 6 were examined and Exhibits A1 to A14 were marked from the side of the petitioners and from the side of the respondents, RWs 1 and 2 were examined and Exhibits B1 to B4 were marked. The Tribunal recorded a finding that the accident occurred because of the negligence on the

part of the 2nd respondent.

4. Heard Sri.T.K. Koshy, the learned counsel for the appellants/claim petitioners, Sri. George Cherian, the learned Senior Counsel appearing for the insurance company and Sri. Basil Chandy Vavachan, the learned counsel for the 3rd respondent in M.A.C.A No. 1430 of 2024.

5. The learned counsel for the appellant insurance company argued that the Tribunal relied on Exhibit A5, further investigation report, to record a finding of negligence against the 2nd respondent in the impugned award. It is brought to my notice that originally, the claim petition was dismissed as per award dated 12.02.2019 and as per the judgment in M.A.C.A No. 547 of 2020 of this Court, the matter was remanded for fresh disposal and after the remand, PWs 4 to 6 were examined from the side of the claim petitioners and without considering their evidence, the Tribunal accepted Exhibit A5 charge sheet as prima facie evidence of negligence against the driver of the lorry.

6. It is argued that after registering Exhibit A1 FIR and conducting investigation, the police filed Exhibit B3 refer report on 16.11.2010 and subsequently after further investigation, the police filed Exhibit A5 charge sheet and the Tribunal has not considered the findings of the Investigating Officer in Exhibits B1 and B2, portions of the case diary marked in evidence.

7. Admittedly, after the remand, the petitioners examined PWs 4 and 5 to prove the occurrence and negligence against the 2nd respondent, driver of the lorry.

8. The evidence of PW4 shows that he witnessed the occurrence and at the time of occurrence, he was riding a motorcycle along with his friend Nishanth as pillion rider and the car driven by the deceased was moving ahead of his motorcycle. According to PW4, the offending lorry which came from the opposite side was driven in over-speed and in a negligent manner and caused to hit on the front side of the maruti car. The evidence of PW4 shows that the 2nd respondent was the driver of the lorry and he also reiterated that the accident occurred because of the negligence on the part of the driver of the lorry.

9. PW5 is another occurrence witness. According to PW5, at the time of occurrence, he was standing in a bus waiting shed near the place of occurrence. His evidence shows that the lorry which came from the opposite side was driven in over-speed and in a negligent manner and it caused to hit the front side of the maruti car. PW5 also deposed that the accident occurred only because of the negligence on the part of the driver of the lorry.

10. In New India Assurance Co.Ltd. v. Pazhaniammal and Others (2011(3) KHC 595), this Court held that as a general rule, production of the police charge sheet is prima facie sufficient evidence of negligence for the purpose of a claim under Section 166 of the Motor vehicles Act. In the said decision, it was also held that if any one of the parities do not accept such charge sheet, the burden must be on such party to adduce oral evidence and 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. It was further held that in all other cases, such charge sheet can be reckoned as sufficient evidence of negligence in a claim under Section 166 of the Motor Vehicles Act.

11. The evidence of RW1, retired Sub Inspector, shows that he registered Exhibit A1 FIR in connection with the accident and conducted the investigation. RW2 was the Sub Inspector of Pandalam Police Station on 10.07.2010 and his evidence shows that he filed Exhibit B3 final report in Crime No. 711 of 2010 of Pandalam Police Station as motor occurrence. In Exhibit B3, it is stated that the accident occurred while the deceased was overtaking another lorry in his maruti car and when he lost control of the vehicle. On the basis of Exhibit B3 and the evidence of RWs1 and 2, the learned counsel for the appellant insurance company argued that there was no negligence on the part of the 2nd respondent, driver of the lorry and that the evidence of PWs 4 and 5 regarding the occurrence cannot be relied upon.

12. The evidence of PW3 shows that he was the Circle Inspector of Pandalam Police Station on 20.06.2014 and that he conducted further investigation in Crime No. 711 of 2010 of Pandalam Police Station after obtaining order from the jurisdictional Magistrate.

13. PW2 was the Circle Inspector of Pandalam Police Station on 25.05.2015 and his evidence shows that he filed Exhibit A5 charge sheet against the 2nd respondent for the offences under Sections 279 and 304A IPC after completing the further investigation. It is pertinent to note that no occurrence witness was examined before the Tribunal from the side of the respondents to challenge the conclusion of the Investigating Officer in Exhibit A5 charge sheet against the 2nd respondent, driver of the lorry.

14. The decision of the Hon'ble Supreme court in Mathew Alexander v. Muhammed Shafi (2023 INSC 621) shows that strict proof of an accident caused by a particular vehicle in a particular manner need not be established by the claimants and that the claimants need only to establish their case on the touchstone of preponderance of probabilities. In the said case, it was also held that the standard of proof beyond reasonable doubt cannot be applied while considering the petition seeking compensation on account of death or injury in a road traffic accident. Therefore, on a careful re-appreciation of the available evidence, I find no reason to disagree with the finding of the Tribunal that the accident occurred because of the negligence on the part of the 2nd respondent driver of the lorry.

15. It is brought to my notice that the Tribunal has summoned the case diary in Crime No. 711 of 2010 of Pandalam Police Station and marked portions of the said case diary in evidence as Exhibits B1 and B2 while examining RW1 by

ignoring the objection raised by the counsel for the petitioners. Exhibit B1 is the case diary proceedings dated 12.7.2010 and Exhibit B2 is the case diary proceedings dated 11.07.2010. Section 172 Cr.P.C reads thus:

172. Diary of proceedings in investigation.

(1)Every police officer making an investigation under this Chapter shall day by day enter his proceedings in the investigation in a diary, setting forth the time at which the information reached him, the time at which he began and closed his investigation, the place or places visited by him, and a statement of the circumstances ascertained through his investigation.

[(1A) The statements of witnesses recorded during the course of investigation under Section 161 shall be inserted in the case diary.

(1-B) The diary referred to in sub-section (1) shall be a volume and duly paginated.]

(2)Any Criminal Court may send for the police diaries of a case under inquiry or trial in such Court, and may use such diaries, not as evidence in the case, but to aid it in such inquiry or trial.

(3)Neither the accused nor his agents shall be entitled to call for such diaries, nor shall he or they be entitled to see them merely because they are referred to by the Court; but, if they are used by the police officer who made them to refresh his memory, or if the court uses them for the purpose of contradicting such police officer, the provisions of section 161 or section 145, as the case may be, of the Indian Evidence Act, 1872 (1 of 1872), shall apply.

16. It cannot be disputed that summoning and marking potions of the case diary in evidence is a clear violation of Section 172 Cr.P.C and in view of sub-clause 2 of Section 172, which empowers only the criminal court to send for the police diaries of a case under inquiry or trial in such court, the Tribunal is not justified in summoning the case diary for the purpose of an inquiry under Section 168 of the Motor vehicles Act.

17. In Balakram v. State of Uttarakhand, (2017) 7 SCC 668 , the Honourable Supreme Court held as follows in paragraphs 15 and 16:

"15. The police diary is only a record of day-to-day investigation made by the investigating officer. Neither the accused nor his agent is entitled to call for such case diary and also are not entitled to see them during the course of inquiry or trial. The unfettered power conferred by the statute under Section 172(2) CrPC on the court to examine the entries of the police diary would not allow the accused to claim similar unfettered right to inspect the case diary.

16. This Court in Mukund Lal v. Union of India [Mukund Lal v. Union of India, 1989 Supp (1) SCC 622 : 1989 SCC (Cri) 606 : AIR 1989 SC 144] , while considering the question relating to inspection of the entries made in the case diary by the accused has observed thus : (SCC pp. 626-28, paras 3-4)

“3. … We are of the opinion that the provision embodied in sub-section (3) of Section 172 CrPC cannot be characterised as unreasonable or arbitrary. Under sub-section (2) of Section 172 CrPC the court itself has the unfettered power to examine the entries in the diaries. This is a very important safeguard. The legislature has reposed complete trust in the court which is conducting the inquiry or the trial. It has empowered the court to call for any such relevant case diary; if there is any inconsistency or contradiction arising in the context of the case diary the court can use the entries for the purpose of contradicting the police officer as provided in sub-section (3) of Section 172 CrPC. Ultimately there can be no better custodian or guardian of the interest of justice than the court trying the case. No court will deny to itself the power to make use of the entries in the diary to the advantage of the accused by contradicting the police officer with reference to the contents of the diaries. In view of this safeguard, the charge of unreasonableness or arbitrariness cannot stand scrutiny. The petitioners claim an unfettered right to make roving inspection of the entries in the case diary regardless of whether these entries are used by the police officer concerned to refresh his memory or regardless of the fact whether the court has used these entries for the purpose of contradicting such police officer. It cannot be said that unless such unfettered right is conferred and recognised, the embargo engrafted in sub-section (3) of Section 172 CrPC would fail to meet the test of reasonableness. For instance in the case diary there might be a note as regards the identity of the informant who gave some information which resulted in investigation into a particular aspect. Public interest demands that such an entry is not made available to the accused for it might endanger the safety of the informants and it might deter the informants from giving any information to assist the investigating agency, as observed in Mohinder Singh v. Emperor [Mohinder Singh v. Emperor, 1931 SCC OnLine Lah 454 : AIR 1932 Lah 103] : (SCC OnLine Lah para 42)

‘42. … the accused had no right to insist upon a police witness referring to his diary in order to elicit information which is privileged. The contents of the diary are not at the disposal of the defence and cannot be used except strictly in accordance with the provisions of Sections 162 and 172 CrPC. [Section 172] shows that a witness may refresh his memory by reference to them but such use is at the discretion of the witness and the Judge, whose duty it is to ensure that the privilege attaching to them by statute is strictly enforced.’

***

4. The public interest requirement from the standpoint of the need to ensure a fair trial for an accused is more than sufficiently met by the power conferred on the court, which is the ultimate custodian of the interest of justice and can always be trusted to be vigilant to ensure that the interest of accused persons standing the trial, is fully safeguarded.”

18. In Sidharth v. State of Bihar [(2005) 12 SCC 545], the Honourable Supreme Court held in para 27 as follows:

“27. … But if the entire case diary is made available to the accused, it may cause serious prejudice to others and even affect the safety and security of those who may have given statements to the police. The confidentiality is always kept in the matter of criminal investigation and it is not desirable to make available the entire case diary to the accused. In the instant case, we have noticed that the entire case diary was given to the accused and the investigating officer was extensively cross-examined on many facts which were not very much relevant for the purpose of the case. The learned Sessions Judge should have been careful in seeing that the trial of the case was conducted in accordance with the provisions of CrPC. ”

19. While considering the scope of Section 172(3) Cr.P.C with reference to Section 145 of the Indian evidence Act, the Honourable Supreme Court in Malkiat Singh v. State of Punjab [(1991) 4 SCC 341], observed as follows in para 11:

“11. It is manifest from its bare reading without subjecting to detailed and critical analysis that the case diary is only a record of day-to-day investigation of the investigating officer to ascertain the statement of circumstances ascertained through the investigation. Under sub-section (2) the court is entitled at the trial or enquiry to use the diary not as evidence in the case, but as aid to it in the inquiry or trial. Neither the accused, nor his agent, by operation of sub-section (3), shall be entitled to call for the diary, nor shall he be entitled to use it as evidence merely because the court referred to it. Only right given thereunder is that if the police officer who made the entries in the diary uses it to refresh his memory or if the court uses it for the purpose of contradicting such witness, by operation of Section 161 of the Code and Section 145 of the Evidence Act, it shall be used for the purpose of contradicting the witness i.e. investigating officer or to explain it in re-examination by the prosecution, with permission of the court. It is, therefore, clear that unless the investigating officer or the court uses it either to refresh the memory or contradicting the investigating officer as previous statement under Section 161 that too after drawing his attention thereto as is enjoined under Section 145 of the Evidence Act, the entries cannot be used by the accused as evidence.”

20. It is pertinent to note that while cross-examining PWs 2 and 3, the learned counsel for the insurance company has not put any question regarding the statements under Section 161 Cr.P.C of CWs 1 to 5 cited as occurrence witnesses in Exhibit A5 charge sheet against the 2nd respondent, driver of the lorry. In view of the settled legal position that the case diary maintained by the Investigating Officer cannot be used as evidence in the case, the Tribunal ought to have desisted from summoning and marking the case diary in evidence.

21. The insurance company is not challenging the quantum of compensation fixed by the Tribunal. But, the appellants/claim petitioners are challenging the findings of the Tribunal regarding the monthly income of the deceased. According to the appellants/claim petitioners, the deceased was aged 60 years and was an ex-serviceman conducting business of provision and stationary items and earning

Rs.52,000/- per month.

22. Even though, the appellants/claim petitioners filed I.A. No. 1 of 2024 for amending the original claim petition to substitute the monthly income of the deceased as Rs.1,00,000/- per month in the place of Rs.52,000/-, the learned counsel for the appellants/claim petitioners represented at the time of hearing that the appellants are not pressing the said petition and hence, I.A. No. 1 of 2024 is dismissed as not pressed.

23. On the basis of Exhibit A10, revised pension details of the deceased, the Tribunal recorded a finding that the monthly pension of the deceased was Rs.8050/-. But, a perusal of Exhibit A10 would show that Rs.8,050/- was the last drawn pay of the deceased, who was discharged from service on 30.04.2000. The occurrence in this case was on 10.07.2010 and from Exhibit A10, it can be seen that the revised pension of the deceased from 01.07.2009 is Rs.13,450/-.

24. A Division Bench of this Court in Geethakumari v. Rubber Board [1994 KHC 150], relied on a five Judges Bench decision of Gauhati High court in Saminder Kaur v. Union of India [1986 SCC OnLine Gau 50 = 1987 ACJ 7] and held that the benefits received by the legal representatives of the deceased, such as insurance policy amount, family pension, gratuity, provident fund etc. are not deductible from the amount of compensation which the claimants are found entitled to. In the said decision, it was held thus:

“The widow is receiving family pension under the service conditions of the deceased. The provident fund, or pension, or gratuity are deferred payments for satisfactory service or savings and contributions of the deceased employee. His family would have been entitled to get these amounts even in case the employee died a natural death. The life insurance payment was payable because premiums were paid by the deceased and a contract was entered into for such payment on death. According to the judgment the wrong doer cannot be permitted to gain or to take advantage of these payments by deducting the payments received by the family of the deceased under these heads.”

25. The learned counsel for the appellants/claim petitioners argued that the Tribunal has not considered the evidence of PW1 and Exhibit A13 while fixing Rs.10,000/- as the notional monthly income of the deceased from his business. But, the learned counsel for the insurance company pointed out that even though Exhibit A13 trading profit and loss details is marked through PW1, PW1 has not stated anything in the chief affidavit regarding the contents of A13.

26. In cross examination, PW1 stated that Exhibit A13 is prepared by a Chartered Accountant and she denied the suggestion that Exhibit A13 is falsely created for the purpose of this case. A perusal of Exhibit A13 shows the seal and signature of a Chartered Accountant. The learned counsel for the appellants/ claim petitioners argued that Exhibit A13 is prepared by a Chartered Accountant as per Section 44AB of the Income Tax Act,1961.

27. But, it is pertinent to note that Exhibit A13 is not certified by the Chartered Accountant to show that the audit was conducted according to the provisions of Section 44AB of the Income Tax Act. It is not forthcoming as to what relevant documents and registers are verified by the Chartered Accountant for preparing Exhibit A13.

28. I find force in the argument of the learned counsel for the insurance company that in the absence of a report or certificate by the Chartered Accountant stating that the audit was conducted according to the provisions of Section 44AB of the Income Tax Act and that the financial statements in Exhibit A13 are true and fair to the best of their knowledge and belief, the same cannot be accepted as a proof for recording a finding regarding the income of the deceased from the business conducted by him.

29. Even though, while cross examining PW1, the learned counsel for the insurance company has challenged the genuineness of Exhibit A13, there was no attempt on the part of the petitioners to examine the Chartered Accountant who prepared the same.

30. A person conducting business in a shop room is required to maintain sales register and stock register as per the provisions under the Goods and Services Tax Law. In this case, the petitioners have not produced the sales register and stock register maintained by the deceased in connection with the business conducted by him. Therefore, I find that it is not possible to arrive at a decision regarding the income of the deceased from his business on the basis of Exhibit A13.

31. However, I find merit in the argument of the learned counsel for the appellants/claim petitioners that the notional monthly income of the deceased from his business fixed as Rs.10,000/- by the Tribunal is on the lower side. From Exhibit A11, certificate issued by the Secretary of Kodumon Grama Panchayat and A12 certificate issued by the General Secretary of Kerala Vyapari Vyavasayi Ekopana Samithi, it can be seen that the deceased was running a stationery shop at Koduman in the name of 'A to Z'. Further, Exhibit A10 will show that the deceased was holding the rank of Subedar Major in military at the time of his retirement. From Exhibit A3 inspection report of the vehicle involved in the accident, it can be seen that the deceased was the registered owner of the maruti car involved in the accident. From the evidence on record and circumstances of the deceased, it can be seen that he maintained a reasonable standard of living as evidenced by his use of a maruti car for commuting.

32. In Kirti v. Oriental Insurance Co. Ltd., [(2021) 2 SCC 166], the Honourable Supreme Court held that preserving the existing standard of living of a deceased's family is a fundamental endeavour of motor accident compensation law. Therefore, considering the facts and circumstances, I find that the monthly notional income from his business can be fixed at Rs.15,000/- per month. Therefore, the total monthly income of the deceased from his business and

pension can be accepted as Rs.28,450/- (15,000 + 13,450). The appellants/ claim petitioners challenged only the quantum of compensation fixed under the head ‘loss of dependency’ and the compensation fixed by the Tribunal under the other heads are not under challenge.

33. Since the deceased was aged 60 years at the time of death, the Tribunal applied the multiplier of ‘9’ and deducted one-third of the income towards the personal and living expenses of the deceased and the same is not under challenge. The Tribunal also made an addition of 10% of the established income towards future prospects as per the decision of the Honourable Supreme Court in National Insurance Co. Ltd. v Pranay Sethi [(2017) 16 SCC 680].

34. Thus, while re-assessing the compensation for loss of dependency as per the revised criteria, the amount would come to Rs.22,53,240/- [(28,450 + 10%) x 12 x 9x 2/3]. The Tribunal has already granted Rs.14,29,596/- under this head. Therefore, the appellants/claim petitioners are granted an additional compensation of Rs.8,23,644/- towards loss of dependency. I find that the compensation granted by the Tribunal under other heads are reasonable and requires no interference.

35. The appellants in M.A.C.A No.310 of 2024/claim petitioners are entitled to the enhanced compensation as given below:

Particulars

Compensation awarded by the Tribunal (Rs.)

Additional amount granted by this Court (Rs.)

Loss of dependency

14,29,596/-

8,23,644/-

Total enhanced compensation

8,23,644/-

36. In the result, M.A.C.A No. 1430 of 2024 is dismissed and M.A.C.A No. 310 of 2024 is allowed and a total amount of Rs.8,23,644/-(Rupees Eight Lakhs Twenty Three Thousand Six Hundred and Forty Four only) is awarded as enhanced compensation. The said amount shall carry interest at the rate of 9% per annum from the date of the application till realization. The appellants/claim petitioners would also be entitled to proportionate costs in the case. The claimants shall furnish the details of the bank account to the insurance company for transfer of the amount.

