IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE P.V.KUNHIKRISHNAN

TUESDAY, THE 16TH DAY OF MARCH 2021 / 25TH PHALGUNA, 1942

MACA.No.1433 OF 2010

AGAINST THE AWARD IN OPMV 28/2008 DATED 30-01-2010 OF MOTOR ACCIDENT CLAIMS TRIBUNAL TIRUR

APPELLANT/3RD RESPONDENT:

NATIONAL INSURANCE CO.LTD.
KASARAGOD NOW REPRESENTED BY ITS ASSISTANT, MANAGER,
KOCHI REGIONAL OFFICE, OMANA BUILDING,, M.G.ROAD,
KOCHI - 35.

BY ADVS.
SRI.MATHEWS JACOB (SR.)
SRI.P.JACOB MATHEW

RESPONDENTS/PETITIONERS:

1 **KADEEJA MUSLIYAR,**
W/O.LATE MOHAMMEDKUTTY, KURUNKATTIL, PANKOL HOUSE,
OTHUKKUNGAL AMSOM, MATTATHUR P.O.,, MALAPPURAM
DISTRICT.

2 **SAIFUL ISLAM.V.**
S/O.LATE MOHAMMEDKUTTY, DO. DO.

3 **IRSHAD V.**
S/O.LATE MOHAMMEDKUTTY, DO. DO.

4 **SAMSHAD**
S/O.LATE MOHAMMEDKUTTY, DO. DO.

5 **SHAHEEDA V.MINOR**
D/O.LATE MOHAMMEDKUTTY, DO. DO.

6 **IRFAN V.MINORVC**
S/O.LATE MOHAMMEDKUTTY, DO. DO.
(MINOR RESPONDENTS 5 & 6 ARE REPRESENTED BY THEIR MOTHER GUARDIAN 1ST RESPONDENT.)

THIS MOTOR ACCIDENT CLAIMS APPEAL HAVING BEEN FINALLY HEARD ON 16-03-2021, ALONG WITH MACA.1952/2010(C), THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE P.V.KUNHIKRISHNAN

TUESDAY, THE 16TH DAY OF MARCH 2021 / 25TH PHALGUNA, 1942

MACA.No.1952 OF 2010

AGAINST THE AWARD IN OPMV 28/2008 DATED 30-01-2010 OF MOTOR ACCIDENT CLAIMS TRIBUNAL TIRUR

APPELLANTS/PETITIONERS

1. KADEEJA MUSALIYAR, 43 YEARS,
W/O. DECEASED VAIDYAKKARAN MOHAMMEDKUTTY,
KURUNKATTIL, RESIDING AT PANKOL HOUSE,
OTHUKKUNGAL AMSOM, P.O. MATTATHUR,MALAPPURAM
DISTRICT.

2. SAIFUL ISLAM V., 25 YEARS, S/O. LATE MOHAMMEDKUTTY,
RESIDING AT PANKOL HOUSE, OTHUKKUNGAL AMSOM,
P.O.MATTATHUR,
MALAPPURAM DISTRICT.

3. IRSHAD V., 22 YEARS, S/O. LATE MOHAMMEDKUTTY,
RESIDING AT PANKOL HOUSE, OTHUKKUNGAL AMSOM,
P.O.MATTATHUR,
MALAPPURAM DISTRICT.

4. SAMSHAD.V., 22 YEARS,
S/O.LATE MOHAMEDKUTTY,
RESIDING AT PANKOLHOUSE,
OTHUKKUNGAL AMSOM, P.O.MATTATHUR,
MALAPURAN DISTRICT.

5. SHAHIDA V., D/O.MOHAMMEDKUTTY, (MINOR)
RESIDING AT PANKOL HOUSE,
OTHUKKUNGAL AMSOM, P.O.MATTATHUR,
6. MALAPPURAM DISTRICT.

IRFAN, V., 14 YEARS, (MINOR), S/O. LATE
MOHAMMEDKUTTY
-DO-
(MINOR APPLICANTS 5&6 ARE REPRESENTED BY
GUARDIAN/MOTHER 1ST PETITIONR KADEEJA M.K.).

BY ADV. SRI.K.M.SATHYANATHA MENON

RESPONDENTS/RESPONDENTS:

1. **RIYAS MANAKKADAVAN, S/O. MOIDEEN, MANAKKADAVAN HOUSE, VALIYAPEEDIKA, KUNNUMPURAM P.O., MALAPPURAM DISTRICT(DRIVER) PIN-673132**

2. **REMA ASHOK, W/O. ASHOKAN, 28/129A, SARORAG HOUSE, KASBA BEACH, KASARAGOD P.O., KASRAGOD DISTRICT (OWNER) – 671121**

3. **THE NATIONAL INSURANCE CO. LTD.,BRANCH OFFICE, KASARAGOD P.O., KAARAGOD DISTRICT- 671121.**

R1 BY ADV. SRI.P.JACOB MATHEW
R1 BY ADV. SRI.S.JIJI
R1 BY ADV. SRI.MATHEWS JACOB SR.

THIS MOTOR ACCIDENT CLAIMS APPEAL HAVING BEEN FINALLY HEARD ON 16-03-2021, ALONG WITH MACA.1433/2010, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

CR

P.V.KUNHIKRISHNAN, J

M.A.C.A.Nos. 1433/2010 & 1952/2010

Dated this the 16h day of March, 2021

JUDGMENT

When a pillion rider of a motorcycle, who was not wearing a helmet, died in an accident is entitled to full compensation in a claim petition filed before a claims tribunal and whether the Tribunal can attribute contributory negligence on the part of the deceased in such cases is the short point to be decided in these appeals.

2. These appeals are filed by the third respondent and the petitioners in O.P.(MV) No. 28/2008 on the file of Motor Accident Claims Tribunal, Tirur. The above claim petition was disposed of by the Tribunal along with O.P. (MV) No.29/2008. (Hereinafter, the parties are referred as per their rank before the Tribunal).

3. The petitioners are the legal heirs of the deceased Mohammedkutty Vaidyakkaran. Their case, in brief, is like this:- On 08.08.2007 at about 10.30 a.m. while the petitioner in O.P.(MV) No. 29/2008 was riding his Motor Cycle bearing Registration No. KL-10-S-6298 from Mattathur towards Tirurangadi carrying his father Mohammedkutty Vaidyakkaran in a moderate speed with due care and caution reached Kunnath in Oorakam and then a Tata sumo bearing Registration No. KL-14-E-1401 driven by the 1st respondent came in a rash and negligent manner with uncontrollable speed from the opposite direction through the wrong side and dashed against the Motor Cycle. Due to the heavy impact of hitting, Mohammedkutty Vaidyakkaran was thrown out from the Motor Cycle. Both the rider and the pillion rider sustained very serious injuries. The pillion rider, who is Mohammedkutty Vaidyakkaran succumbed to his injuries. Hence two claim petitions were filed for compensation before the Tribunal by the legal heirs of Mohammedkutty

Vaidyakkaran and also the injured rider of the Motorcycle.

4. To substantiate the case, Exts. A1 to A29 were marked on the side of the petitioners. After going through the evidence and documents, the Tribunal found that since Mohammedkutty Vaidyakkaran was not wearing the protective headgear conforming to the Bureau of Standards at the time of the accident, 20% of the compensation has to be reduced attributing contributory negligence on the part of Mohammedkutty Vaidyakkaran. Total compensation of Rs.33,03,700/- was awarded by the Tribunal. From the above amount 20% was deducted because there is contributory negligence on the part of the deceased. Accordingly, the reduced compensation of Rs.26,42,960/- was awarded by the Tribunal with interest at the rate of 6% per annum. Aggrieved by the quantum of compensation awarded, by the Tribunal, the third respondent Insurance Company filed M.A.C.A. No.1433/2010. Aggrieved by the finding of the Tribunal to the effect that there is contributory negligence on the

part of the deceased and also contending that there is insufficient compensation, the claimants filed M.A.C.A.No.1952/2010. Since both these appeals are connected I dispose of these two appeals by a common judgment.

5. The first point to be decided in this case is whether the Tribunal is justified in fixing contributory negligence on the part of the deceased for the simple reason that the deceased was not wearing a helmet. No oral evidence is adduced by the parties in this case. Section 129 of the Motor Vehicles Act(for short Act) as on the date of the accident, in this case, reads like this:

> **"129. Wearing of protective headgear**.— Every person driving or riding (otherwise than in a side car, on a motor cycle of any class or description) shall, while in a public place, wear protective headgear conforming to the standards of Bureau of Indian Standards:
>
> Provided that the provision of this sections shall not apply to a person who is a Sikh, if he is, while driving or riding on the motor cycle, in a public place, wearing a turban:
>
> Provided further that the State Government may, by such rules, provide for such exceptions as it may think fit.
> Explanation.—"Protective headgear" means

helmet which,—
(a) by virtue of its shape, material and construction, could reasonably be expected to afford to the person driving or riding on a motor cycle a degree of protection from injury in the event of an accident; and
(b) is securely fastened to the head of the wearer by means of straps or other fastenings provided on the headgear."

6. Rule 347 of the Kerala Motor Vehicles Rules 1989 (for short Rules) read like this:-

"347. **Protective headgear:**- The headgear to be worn by any person driving or riding on, a motorcycle shall be of the ISI standards".

7. As per notification G.O.(P) No.46/2003/Tvm. Dated 13.10.2003, published as SRO No.942/2003 in K.G.Ext.No.1864 dated 13.10.2003, the Government inserted Rule 347A in the Rules, which says that "Any person riding on a motorcycle other than the driver thereof, need not wear a protective headgear." When the above rule was inserted, the same was challenged before this court and this court stayed the operation of Rule 347A. Ultimately, the government conceded before this court that the above rule is redundant in the light of the subsequent

amendment in the Act. Recording the submission of the government, this Court disposed of the case. The relevant portion of the judgment of this Court in **George John and others V. Chief Secretary, Government of Kerala & Others (2020 (1) KLT 19)** is extracted hereunder:

> "3. Pursuant to the directions, Writ Petition Nos. 25181/2010 and 27865/2015 have been posted today along with W.A No. 2261/2015. On instructions, Sri. P. Santhosh Kumar, learned Special Government Pleader for motor vehicles submitted that W.A No.2261/2015, may be dismissed as withdrawn. Inviting the attention of this Court to proceedings issued by the Government of India, Ministry of Road Transports and Highways, New Delhi, dated 12th March, 2019 addressed to the Chief Secretary, Puduchery Administration, Sri. P. Santhosh Kumar, learned Special Government Pleader for motor vehicles submitted that instructions are issued to carry out enforcement drive that all persons driving or riding two wheeler vehicles to wear protective headgear (helmet) conforming to such standards as may be prescribed by the Central Government.
> 4. Heard Sri. Joy Thattil Ittoop, learned counsel appearing for the petitioner in WP(C) 25181/2010, Sri. P. K. Sebastian, learned counsel appearing for the petitioner in WP(C) 27865/2015 and Sri. P. Santhosh Kumar, learned Special Government Pleader appearing for the State in W.A. No. 2261/2015.
> 5. For the reasons contained in order dated 14th November, 2019 in W.A 2261/2015 and for other reasons contained in Writ Petition Nos. 25181/2010 and 27865/2015 respectively, G.O(P) No. 46/2003 / Tran. Dated 13/10/2003 amending the Kerala Motor Vehicles Rules, 1989, has to be set aside as inoperative by virtue of amendment to S.129 of the Kerala Motor Vehicles Act.
> 6. Sri. P. Santhosh Kumar, learned Special Government Pleader for motor vehicles submitted that, instructions would be issued in the form of a circular to all the

> Regional Transport Authorities, law and enforcement Agencies and others, for effective implementation of the Central enactment, ie., S.129 of the Kerala Motor Vehicles Act.
>
> 7. For the reasons contained in order dated 14th November, 2019 and for other grounds in Writ Petition Nos. 25181/2010 and 27865/2015, G.O. (P)No.46/2003 / Tran. dated 13/10/2003 inserting R.347A in the Kerala Motor Vehicles Rules,1989 granting exemption to pillion riders in wearing headgear (helmet) is inoperative and consequently invalid.
>
> 8. In the result, impugned G.O(P) No.46/2003 / Tran. Dated 13/10/2003 inserting R.347A of the Kerala Motor Vehicles Rules is set aside. Sri. P. Santhosh Kumar, learned Special Government Pleader seeks time to issue the circular, as stated supra, and also to make enforcement drive so as to enable the riders as well as the pillion riders to wear headgear (helmet). Respondents are directed to initiate and complete the above said exercise, as expeditiously as possible and wearing of helmet should be done compulsorily in respect of riders and pillion riders.
>
> Accordingly, Writ Appeal and Writ Petitions are disposed of as above."

8. From the above discussion, it is clear that as per Section 129 of the Act, every person riding or driving on a motorcycle of any class, description shall, while in public place wear protective headgear conforming to the Standards prescribed in this regard. The explanation to Section 129 of the Act makes it clear that protective gear means a helmet. There is no doubt to the fact that Section 129 of the Act is mandatory. Admittedly, the deceased in

this case had not used a helmet at the time of the accident. He was the pillion rider in the motorcycle. Therefore, there is a violation of Section 129 of the Motor Vehicles Act. Whether in such a situation, the Claims Tribunal can fix contributory negligence while assessing compensation is the question to be decided by this Court.

9. This Court in **P.J.Jose & Ors V. Vanchankal Niyas & Ors. (2016 (1) KLJ 596**) considered this point in detail. The relevant portion is extracted hereunder:

> "6. The learned counsel appearing for the insurance company submits that the consequence of non-wearing of the Helmet and the course that could be followed by the Tribunal in apportioning negligence had come up for consideration before a Division Bench of this Court and as per the judgment reported in Siby Paul v. Praveen Kumar (2009 (1) KLT 322) it has been held that it could be raised as a defence from the part of the insurance company to apportion the liability to an appropriate extent. The Tribunal, in the award, has referred to the instance of non-wearing of the 'Helmet' leading to the death of the deceased and in turn, has fixed 25% contributory negligence on the part of the rider. No other aspect was discussed by the Tribunal in the award. We find it difficult to agree with the proposition that non- wearing of 'Helmet', though an offence under the relevant provisions of the M.V.Act, could be taken as a ground to fix contributory negligence on the part of the rider. What is to be considered with regard to the apportionment of negligence is whether the party concerned had any role/part in causing or contributing to the accident. In other words, the consequence pursuant to the accident is not a circumstance to be weighed for fixation of negligence in causing the accident. With regard to the non-wearing of 'Helmet' and resultant death because of

the head injury, it is only a 'consequence' after the accident. Because of the non-wearing of 'Helmet', the injury sustained to the head became fatal, leading to the death of the deceased. It is true that, had the deceased been wearing a 'Helmet', probably his life could have been saved and the gravity of the injury would not have been this much severe, to have resulted in the death of the deceased. But the consequence because of the non-wearing of 'Helmet' was not the reason for knocking down the rider of the motor cycle by the driver of the jeep which was coming from the opposite side and this being the position, negligence cannot be fixed on the shoulders of the rider of the vehicle merely for not wearing the 'Helmet' ".

10. Of course this Court also considered the judgment in **Siby Paul V. Praveen Kumar (2009(1) KLT 322)** in which this Court observed that in a case where there is non-wearing of helmets by riders of two wheelers, the insurance company can plead that there is contributory negligence. The relevant portion of the judgment of this Court in **Siby Paul** is extracted hereunder.

"4. Before parting with this matter, we feel obliged to take note of the conduct of the petitioner which led to the head injury for him and the consequent disability at a very young age. S.129 of the Motor Vehicles Act, 1988 provides for wearing of protective head gear by those riding two wheelers. Under explanation to the said section protective head gear is 'helmet', the use of which has proved it's capacity to protect the rider from head injury in the event of accident. The Section specifically states that every driver and pillion rider of a motor cycle of any class or description shall wear a protective head gear. The Supreme Court has in the case of Ajay Canu v. Union of India, 1988 KHC 705 :

1988 (4) SCC 156 : 1988 (2) KLT SN 68 : AIR 1988 SC 2027 held that wearing of crash helmet is mandatory for drivers of two wheelers. The violation of mandatory provision of the Act and Rules attract penal provisions. But so long as the riders are not caught, they will escape from punishment. However, apart from punishment, if a rider gets into an accident and suffers head injury, we feel defence will be available to the Insurance Company to plead that there is contributory negligence, inasmuch as the use of helmet would have reduced the impact of the accident which has resulted in head injury for the rider. When protection that a helmet provides to a rider is statutorily recognized and when it is mandatory under statute for the riders and drivers of two wheelers to wear the same, we feel it is a matter to be considered by the Motor Accidents Claims Tribunal as to whether the injured in a motor bike accident had suffered head injury and if so, whether at the time of accident the driver or pillion rider, as the case may be, who claims compensation for head injury was wearing a helmet. If the protective head gear, namely, helmet, the use of which is mandatory under S.129 of the Act, was not worn by the drivers or pillion riders who sustained head injury, then contributory negligence can be assumed, if not for causing the accident but for sustaining injury which could have been prevented or the impact of which could have been reduced through compliance of the statutory provision by wearing a helmet. In fact the want of helmet for the rider may not be contributory to the accident. However, the use of helmet would prevent head injury or at least reduce the impact of the injury in the event of accident for the driver and pillion rider of the bike or two wheeler. Therefore, in our opinion, it is for the Tribunal to consider whether in case of claim of compensation for death or injury of drivers or pillion riders of two wheelers they were wearing helmet at the time of accident and if not whether wearing of helmet would have prevented the death or injury or reduced the impact of the injury and if the same should be reckoned as an aspect of contributory negligence for reducing the compensation amount. Any claim made by riders about wearing of helmet at the time of accident should be critically examined and if found bogus the same should

> be rejected. Besides this, we feel in addition of the other conditions in the insurance policy such as the driver of the vehicle should have a valid driving licence, the insurance company can impose a condition in the policy making helmet compulsory for the riders of two wheelers to claim compensation for head injury and consequent disability or death. The 3rd respondent insurance company, will take up this matter with the head quarters for considering incorporation of the condition of requirement of helmet for riders of two wheelers for claiming benefit under policy. The MACA is disposed of with the above observation. ”

11. In **Siby Paul's** case (supra) this Court observed that the violation of mandatory provisions of the Act and Rules attract penal provisions. This Court also observed that when protection that a helmet provides to a rider is statutorily recognised and when it is mandatory under the statute for the drivers of the two wheelers to wear the same, it is a matter to be considered by the Motor Accidents Claims Tribunal. This court held that the tribunal has to find out whether the injured in a motorcycle accident has suffered a head injury and if so, whether at the time of the accident, the driver or the pillion driver as the case may be, who claims compensation for head injury was wearing a helmet. Therefore, this Court only observed in Siby Paul's

case (supra) that if there is a violation of the statutory provisions, the Motor Accidents Claims Tribunal shall consider the same to find out whether there is contributory negligence.

12. After considering the judgment in Siby Paul's case, this Court in **P.J.Jose's** case (supra) observed that what is to be considered with regard to the apportionment of negligence is whether the party concerned had any role/part in causing or contributing to the accident. In other words, the consequences pursuant to the accident are not a circumstance to be considered for fixation of negligence in causing the accident. With regard to the non-wearing of the helmet and the resultant death because of the head injury, this Court observed that it is only a consequence after the accident. This Court also observed that because of the non-wearing of the helmet, the injury sustained to the head became fatal leading to the death of the deceased. It is true that had the deceased be wearing a helmet, probably his life could have been saved and the

gravity of the injury would not have been this much severe to have resulted in the death of the deceased. But the consequence because of the non-wearing of the helmet was not the reason for knocking down the rider of the motorcycle by the offending vehicle. In such a situation, this Court observed that this being the position, negligence cannot be fixed on the shoulders of the rider of the vehicle merely for not wearing the helmet. In this situation, it will be better to understand the jurisdiction of the Claim Tribunal constituted as per the Act. Section 165 of the Act deals with Claims Tribunal. It is better to extract Section 165(1) of the Act:-

> " 165 (1) A State Government may, by notification in the Official Gazette, constitute one or more Motor Accidents Claims Tribunals (hereafter in this Chapter referred to as Claims Tribunal) for such area as may be specified in the notification for the purpose of adjudicating upon claims for compensation in respect of accidents involving the death of, or bodily injury to, persons arising out of the use of motor vehicles, or damages to any property of a third party so arising, or both.
>
> Explanation.—For the removal of doubts, it is hereby declared that the expression "claims for compensation in respect of accidents involving the death of or bodily injury to persons arising out of the use of motor vehicles" includes claims for compensation under section 140 and Section 163A."

Section 166 of the Act deal with an application for

compensation. Section 166 (1) of the Act is extracted:-

> " 166 (1) An application for compensation arising out of an accident of the nature specified in sub-section (1) of section 165 may be made—
>
> (a) by the person who has sustained the injury; or
>
> (b) by the owner of the property; or
>
> (c) where death has resulted from the accident, by all or any of the legal representatives of the deceased; or
>
> (d) by any agent duly authorised by the person injured or all or any of the legal representatives of the deceased, as the case may be:
>
> Provided that where all the legal representatives of the deceased have not joined in any such application for compensation, the application shall be made on behalf of or for the benefit of all the legal representatives of the deceased and the legal representatives who have not so joined, shall be impleaded as respondents to the application."

From the above provision, it is clear that the duty of the Claims Tribunal is an assessment of compensation arising out of an accident or in other words the claims tribunals are for adjudicating the compensation claim in respect of an accident involving death, injury etc. The consequences of the non-waring of a helmet by rider or pillion rider is not the reason to knock down a motorcycle.

13. The Apex Court in **Mohammed Siddique Vs. National Insurance Company Ltd. (AIR 2020 SC 520)**

considered almost a similar point. The Apex Court observed that for attracting contributory negligence, there must be either a casual connection between violation and accident or a casual connection between violation and impacts of the accident upon victim. The relevant portion of the Apex Court judgment in **Mohammed Sidiqque's** case is extracted hereunder.

> "12. It is seen from the material on record that the accident occurred at about 2:00 a.m. on 05/09/2008. Therefore, there was no possibility of heavy traffic on the road. The finding of fact by the Tribunal, as confirmed by the High Court, was that the motor cycle in which the deceased was travelling, was hit by the car from behind and that therefore it was clear that the accident was caused by the rash and negligent driving of the car. In fact, the High Court confirms in paragraph 4 of the impugned order that the motor cycle was hit by the car from behind. But it nevertheless holds that 3 persons on a motor cycle could have added to the imbalance. The relevant portion of paragraph 4 of the order of the High Court reads as follows:
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> > "On careful assessment of the evidence led, this Court finds substance in the plea of the insurance company. While it is correct that the offending car had no business to strike from behind against the motor - cycle moving ahead of it, even if the motor cycle was changing lane to allow another vehicle to overtake, the fact that a motor vehicle meant for only two persons to ride was carrying, besides the driver, two persons on the pillion would undoubtedly have added to the imbalance."
>
> 13. But the above reason, in our view, is flawed. The fact that the deceased was riding on a motor cycle along with the driver and another, may not, by itself, without anything more, make him guilty of contributory negligence. At the most it would make him guilty of being a party to the violation of the law. S.128 of the Motor Vehicles Act, 1988, imposes a restriction on the driver of a two - wheeled

motor cycle, not to carry more than one person on the motor cycle. S.194C inserted by the Amendment Act 32 of 2019, prescribes a penalty for violation of safety measures for motor cycle drivers and pillion riders. Therefore, the fact that a person was a pillion rider on a motor cycle along with the driver and one more person on the pillion, may be a violation of the law. But such violation by itself, without anything more, cannot lead to a finding of contributory negligence, unless it is established that his very act of riding along with two others, contributed either to the accident or to the impact of the accident upon the victim. There must either be a causal connection between the violation and the accident or a causal connection between the violation and the impact of the accident upon the victim. It may so happen at times, that the accident could have been averted or the injuries sustained could have been of a lesser degree, if there had been no violation of the law by the victim. What could otherwise have resulted in a simple injury, might have resulted in a grievous injury or even death due to the violation of the law by the victim. It is in such cases, where, but for the violation of the law, either the accident could have been averted or the impact could have been minimized, that the principle of contributory negligence could be invoked. It is not the case of the insurer that the accident itself occurred as a result of three persons riding on a motor cycle. It is not even the case of the insurer that the accident would have been averted, if three persons were not riding on the motor cycle. The fact that the motor cycle was hit by the car from behind, is admitted. Interestingly, the finding recorded by the Tribunal that the deceased was wearing a helmet and that the deceased was knocked down after the car hit the motor cycle from behind, are all not assailed. Therefore, the finding of the High Court that 2 persons on the pillion of the motor cycle, could have added to the imbalance, is nothing but presumptuous and is not based either upon pleading or upon the evidence on record. Nothing was extracted from PW - 3 to the effect that 2 persons on the pillion added to the imbalance.

14. Therefore, in the absence of any evidence to show that the wrongful act on the part of the deceased victim contributed either to the accident or to the nature of the injuries sustained, the victim could not have been held guilty of contributory negligence. Hence the reduction of

10% towards contributory negligence, is clearly unjustified and the same has to be set aside. ”(Emphasis supplied)

14. In the above case, the Apex Court was considering the violation of Section 128 of the Motor Vehicles Act which deals with safety measures of drivers and pillion drivers. Section 129 deals with the wearing of protective headgear. When the Apex Court observed that if there is a violation of Section 128 of the Motor Vehicles Act, that alone is not a reason to conclude that there is contributory negligence, the same principle is applicable in a case in which there is a violation of Section 129 of the Motor Vehicles Act on the part of the victim in an accident. Simply because there is a violation of Section 129 of the Motor Vehicles Act 1988 by a victim in an accident, there is no presumption that there is contributory negligence on the part of the person who was not wearing the helmet. It is to be decided in the facts and circumstances of each case. In other words, simply because a person is not wearing a helmet and there is violation of Section 129 of the Motor

Vehicles Act, the Tribunal cannot attribute contributory negligence on the part of the deceased or the injured. Therefore, the finding by the Tribunal to the effect that there is contributory negligence on the part of the deceased is to be set aside. I make it clear that this is not a licence to drive motorcycles without wearing a helmet. The authorities concerned shall see that Section 129 of the Motor Vehicles Act is complied in its letter and spirit. The Full Bench of this Court considered this aspect and issued necessary direction in **Narayanan Nair V. State of Kerala [2003(3) KLT 676]**. The relevant portion of the above judgment is extracted hereunder:

> "7. S.129 of the Act is one of the safety measures provided by the Parliament. In fact, S.128 and 129 regulate the use of two wheelers. S.128 inter alia provides - no driver of a two wheeled motorcycle shall carry more than one person in addition to himself. The apparent intention is to avoid the consequences of over loading. Under S.129, every person driving or riding a motorcycle has to wear a protective headgear. The mandate of the provision is clear and categoric. It is true that the second proviso permits the State to make rules and provide for certain exceptions. The indication in this behalf is also available in the first proviso. Factually, the State had a proposal to exempt the rider. However, it is not shown to have been finalized. So far as the present case is concerned, it

> is the admitted position that the State has framed a positive rule, which makes it mandatory for the driver as well as the pillion rider to wear protective headgear. This provision is contained in R.347 of the Motor Vehicles Rules. It reads as under:
> 347. Protective head gear : - The head gear to be worn by any person driving or riding on, a motor cycle shall be of the ISI standards.
>
> 8. A perusal of the above provision shows that the Act and the Rule require the driver as well as the rider of a motorcycle to wear protective headgear. It should conform to the ISI standards. The mandate is binding on everyone. The obligation is of the citizen. In case of default, the State has the power to impose the penalty.
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> 11. The petitioner has placed material on record to show that the number of fatal accidents is raising. Each accident is a tragedy for the family. It has implications for the society as well. The amount of compensation and the cost of treatment are clear economic factors. It is a matter of concern for all. It is true that carrying extra weight on the head or in hand cannot be convenient. Yet, mere inconvenience cannot be a good ground to ignore the advantage or the mandate of law. We need to realize that it is better to wear the helmet than to hurt the head."

15. The authorities are bound to follow the above directions of this court in its letter and spirit. I made certain observations in this judgment based on Section 129 of the Act and it is only to show that there cannot be any contributory negligence for the simple violation of Section 129 of the Motor Vehicles Act. To attribute contributory negligence, some other additional evidence is necessary in

addition to the violation of Section 129 of the Motor Vehicles Act. Therefore, the finding of the Tribunal to the effect that there is contributory negligence on the part of the deceased is to be set aside. I do so.

16. Then the next question to be decided is whether the compensation awarded by the Tribunal is just compensation. The counsel for the appellant in M.A.C.A No.1433/2010 submitted that the Tribunal accepted Ext.A17 salary certificate of the deceased and fixed the monthly income of the deceased as Rs.37,308/-. The Senior counsel who appeared for the Insurance Company submitted that the age of the deceased at the time of the accident was 52. He has got only three more years of service. But the Tribunal took a multiplier of 11. The Senior counsel submitted that taking a multiplier of 11 for the multiplicand Rs.37308/- in the facts of this case is wrong. According to the Senior counsel, the multiplicand Rs.37308/- can be taken only for three years because the deceased will retire within three years. I think there is

some force in the argument of the Senior counsel. Admittedly, the deceased was aged 52 and he will retire from service at the age of 55. Therefore, the multiplicand of Rs.37308/- can be taken only for three years. Thereafter, the multiplicand is to be decided by this Court separately. In other words, a split multiplicand is to be used for deciding the loss of dependency. Since the deceased was working as a Senior Grade Lecturer in a private college, there is a chance to get better teaching opportunities for the deceased in the future also. But without any evidence, I am not in a position to accept the same multiplicand for deciding the dependency. Therefore, I am taking half of the multiplicand for fixing the loss of dependency for the post-retirement period of 8 years. While doing so I am relying on the principle laid down by this Court in **Oriental Insurance Company Limited V. Valsala**(2015(1) KLT 781) and **Kumaran V.Roy Mathew**(2017(1)KLT 668). If that is the case, the multiplicand for the 8 years after the retirement is to be taken as Rs.18,654/-. Therefore, the

loss of dependency is to be re-assessed. In the light of the decision of the Apex Court in **National Insurance Company Vs. Pranay Sethi (2017 (4) KLT 662 (SC**), 15% is to be added to the income towards future prospects. If that is the case 15% of the income is to be added to the multiplicand for assessing the compensation till his retirement. Thus the monthly income of the deceased for assessing dependency compensation will be Rs.42,904/- (Rs.5596/- + Rs.37,308/- = Rs.42,904/-). Then the annual income will be Rs.42,904x12 = Rs.5,14,848/-. From the above amount, the income tax payable by the deceased is to be deducted. The Tribunal fixed Rs.54,900/- as the income tax. Then the balance amount will be (Rs.5,14,848- Rs.54,900) Rs.4,59,948/-. Then the dependency compensation is to be re-assessed in the following manner:

Rs.4,59,948x3x3/4=Rs.10,34,883/-. As far as the post-retirement period is concerned, the calculation will be like this: Rs. 18,654x12x3/4x8= Rs.13,43,088/-. Then the

total compensation for the dependency will be like this:-

Rs.10,34,883+Rs.13,43,088= Rs.23,77,971/-

17. As far as the loss of consortium is concerned, the widow and minor children are entitled to Rs.40,000/- each in the light of the decision of the Apex Court in **Magma General Insurance Co. Ltd. Vs. Nanu Ram alias Chuhru Ram (2018 (18) SCC 130).** If that is the case, the total amount entitled for loss of consortium will be Rs.1,20,000/-. From this, the amount (Rs.20,000/-) already granted by the Tribunal is to be deducted. Then the balance amount will be Rs.1,00,000/-. Towards, funeral expenses, the appellants are entitled altogether an amount of Rs.15,000/- in the light of **Pranay Sethi's** case(supra). The Tribunal only awarded an amount of Rs.5,000/- and therefore, the appellant is entitled another amount of Rs.10,000/- under this head also. For loss of estate, the appellant is entitled to an amount of Rs.15,000/- also. Therefore the total compensation entitled by the petitioners after modification can be summarised like this.

1. Compensation towards dependency	Rs.23,77,971
2. Loss of consortium	Rs.1,20,000
3.Funeral expenses	Rs.15,000
4. Loss of estate	Rs.15,000/-
5. Medical expenses	Rs. 37,822/-
6. Bye standers expenses	Rs.300
Total	**Rs. 25,66,093/-**

In the result, these appeals are allowed in part. The impugned award is modified. The claimants are entitled to a total compensation of **Rs.25,66,093/-** (Twenty-five lakhs sixty-six thousand and ninety-three only) with interest at the rate of 7.5% from the date of application till realisation.

sd/-

P.V.KUNHIKRISHNAN

JUDGE

Al/-+.