

Saji Mathew Vs. Ajithkumar

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SooperKanoon Citation : sooperkanoon.com/51787

Court : Kerala

Decided On : May-20-2015

Judge : Honourable Mr.Justice T.R.Ramachandran Nair

Appellant : Saji Mathew

Respondent : Ajithkumar

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM PRESENT: THE HONOURABLE MR.JUSTICE T.R.RAMACHANDRAN NAIR & THE HONOURABLE SMT. JUSTICE P.V.ASHA WEDNESDAY, THE 20TH DAY OF MAY 2015 30TH VAISAKHA, 1937 MACA.No. 689 of 2010 () ----- AGAINST THE AWARD IN OPMV3792008 of MACT PALA DATED 16/12/2009 APPELLANT/CLAIMANT: ----- SAJI MATHEW, AGED 36 YEARS S/O.MATHEW, PAZHEMPALLIL HOUSE, PULIYANNOOR VILLAGE PADINJATTINKARA KARA, KOTTAYAM DIST REPRESENTED BY HIS WIFE AND NEXT, FRIEND CELIN W/O.SAJI MATHEW, AGED 34 YEARS, PAZHEMPALLIL HOUSE PULIYANNOOR VILLAGE PADINJATTINKARA KARA, KOTTAYAM DISTRICT BY ADV. SRI.THOMAS M.JACOB RESPONDENTS/RESPONDENTS : ----- 1. AJITHKUMAR, S/O.THANKAPPAN, KUTTHAHKUZHAYIL HOUSE, ELACKADU VILLAGE VAYALA KARA, KOTTAYAM DISTRICT.

2. THE REGISTRAR, KERALA AGRICULTURE UNIVERSITY, VELLANIKKARA, TRICHUR DISTRICT.

3. THE ASSOCIATE DIRECTOR AGRICULTURAL RESEARCH STATION, PATTAMBI PALAKKAD DISTRICT' 4. THE NEW INDIA, ASSURANCE CO LTD REPRESENTED BY ITS MANAGER MUNICIPAL SHOPPING COMPLEX, PALA P.O KOTTAYAM DISTRICT. R1 BY ADV. SRI.A.P.SUBHASH R4 BY ADV. SRI.A.C.DEVY R2 BY ADV. SRI.BABU JOSEPH KURUVATHAZHA,SC,KERALA AGRICULTURAL UNIVERSITY R2 BY K.P.MUJEEB THIS MOTOR ACCIDENT CLAIMS APPEAL HAVING BEEN FINALLY HEARD ON0904/2015, ALONG WITH MACA. 2137/2010, THE COURT ON2005/2015 DAY DELIVERED THE FOLLOWING: T.R.RAMACHANDRAN NAIR & P.V.ASHA, JJ.

----- M.A.C.A.Nos.689 & 2137 OF2010- -----
----- Dated this the 20th day of May, 2015

JUDGMENT

Ramachandran Nair, J.

Both these appeals arise from the award in O.P.No.379/2008 of the Motor Accidents Claims Tribunal, Pala. M.A.C.A.No.689/2010 is filed by the claimant represented by his wife as next friend aggrieved by the inadequacy of compensation. M.A.C.A.No.2137/2010 is filed by the Insurance Company, which was the fourth respondent before the Tribunal. We will refer to the parties as arrayed before the Tribunal.

2. First we will come to the appeal filed by the Insurance Company.

3. We heard the learned Senior Counsel for the Insurance Company Sri.Mathews Jacob, the learned counsel for the claimant Sri.Thomas M.Jacob and the learned counsel for the respondents Sri.Ravi Sanker P.K. and Sri.Babu Joseph Kuruvathapzha, the learned standing counsel for the respondent Kerala Agricultural University MACA Nos.689/2010 & 2137/2010 2 (the owner of the vehicle). In the connected appeal M.A.C.A.No.689/2010, we also heard Sri.A.C.Devi, the learned counsel for the Insurance Company.

4. Before going to the respective contentions, we will refer to the facts leading to the passing of the award. The accident occurred on 17.12.2007 at about 12.30 p.m. at a junction on Pala - Ettumanoor Highway. The injured /claimant was riding a motor cycle bearing Reg.No. KL-35-5149, which was hit by a jeep bearing Reg.No.KL-8- A-9926 driven by the first respondent before the Tribunal. The claimant was immediately removed to a nearby hospital, namely, Marian Medical Centre, Pala. On the next day, he was taken to the Matha Hosptial, Thellakom. He was later treated in the Medical Trust Hospital. He was aged 34 at the time of the accident and was a qualified welder. A total amount of Rs.30 lakhs was claimed. As a result of the injuries sustained in the accident, he has become totally incapacitated and the disability assessed by the Medical Board is 97%. He has also lost his power of speech. We will come to the various MACA Nos.689/2010 & 2137/2010 3 details while considering his claim for enhancement.

5. In M.A.C.A.No.2137/2010, the appeal filed by the Insurance Company, the learned Senior Counsel for the Insurance Company mainly contended that the policy has become void which is one of the defences available to the Insurance Company under Section 149 (2) (b) of the Motor Vehicles Act. According to the learned Senior Counsel, the offending vehicle was registered as Omni bus and in 2007 it was altered as Educational Institution Bus. The renewal of the policy was obtained for the period in question namely on 21.11.2007 without disclosing of the material fact concerning alteration of class. The classification of the vehicle having been changed as educational institution bus, the policy which was renewed as a private service vehicle really became void. The tariff rate applicable to the commercial vehicles had to be collected and there is appreciable difference in the premium and therefore non-disclosure of the material fact makes the policy void and the Insurance Company is not liable to satisfy the award. MACA Nos.689/2010 & 2137/2010 4 6. It is submitted that the policy issued for the period in question is valid from 21.11.2007 to 20.11.2008. Initially the policy was taken for a private car and the conversion made was from 10.04.2007. Evidence was given by examination of RWs 1 and 2 and Exts.B1 to B9 have been marked. It is submitted that as the vehicle is a transport vehicle and is used for transporting staff and students, it can be considered only as a commercial vehicle, for which the premium is on a higher rate than that of a private service vehicle. In that

context, the learned Senior Counsel invited our attention to definition of Transport Vehicle and the decision reported in Julian v. Peethambaran (1997 (2) KLT763 and in M.A.C.A.No.979/2005. Section 4 of the Indian Motor Tariff as applicable to commercial vehicles will apply to the vehicle in question, but the premium paid is under Section 2. Ext.B1 produced is the certificate of registration of the vehicle, Ext.B2 is the permit of the vehicle. Ext.B4 is the copy of the policy certificate.

7. It is submitted that the evidence of RW1 and RW2 will show that the owner had not produced the relevant documents MACA Nos.689/2010 & 2137/2010 5 including registration certificate for verification when the policy was renewed. The learned Senior counsel invited our attention to the finding made by the Tribunal that there was a break while renewing the policy and therefore the Insurance Company would have verified the documents and vehicle would have been subjected to examination. It is submitted that actually there was no break in issuing the policy and the policy which was renewed from 21.11.2007 to 20.11.2008 was obtained as a private car policy after altering the class of vehicle on 10.4.2007 as educational institution bus. It is therefore submitted that there is suppression of material fact which will come under the purview of Section 149 (2)(b) of the Act.

8. The learned counsel for the claimant and the learned counsel for the other respondents opposed these contentions. It is submitted, by inviting our attention to the clauses of the policy and the documents produced before the Tribunal, that the vehicle was initially registered as Omni bus. It is submitted that the vehicle is not used as a public service vehicle or commercial vehicle and therefore the tariff MACA Nos.689/2010 & 2137/2010 6 rate applicable to commercial vehicle under IMT will not apply. By referring to the amount of the premium paid, it is submitted that even going by the premium paid for the present policy, the premium rate is same even if the vehicle is considered under Section 4 of IMT under the heading 'Miscellaneous and special type of vehicles'. Actually the said provision will not cover the vehicle in question. Hence none of the clauses in Section 4 of IMT will apply. The learned counsel therefore submitted that the view taken by the Tribunal is perfectly justified. The contention raised is that the tariff for private car under Section 2 alone will apply for the vehicle in question and the policy issued is not at

all void. It is also explained, by relying upon the oral evidence of RW1, that the documents of the vehicle were produced before the concerned officer of the Insurance Company and those were verified. The registration book and other documents were actually produced for verification. It is submitted that there is no non-disclosure or any suppression of a material fact. It is submitted that the said officer has not been examined by the Insurance Company MACA Nos.689/2010 & 2137/2010 7 in spite of mentioning of her name in the witness schedule. It is therefore submitted that the stand taken by the Insurance Company that there is suppression is not correct or proved. The learned counsel explained various aspects with regard to the oral and documentary evidence adduced by the party respondents.

9. The original of the registration book has been marked as Ext.B1 produced by the respondents 2 and 3. At page No.3, class of vehicle originally noted is "LMV Omni bus" and the same has been changed as EIB (Educational Institution Bus). The said endorsement is recorded in page 16. The alteration is made by the RTO, Thrissur on 10.4.2007. The class noted is " TV-LMV-Edcn.Ins." 'LMV' stands for light motor vehicle, which is common in both endorsements. The permit has been produced as Ext.B2. It is a private service vehicle permit. It is valid from 10.4.2007 to 9.4.2012 and in column 9, the purpose of use is shown as for conveyance of staff and students. The registered owner is Kerala Agricultural University, Thrissur. Ext.B3 produced is the receipt for payment of premium and the total amount MACA Nos.689/2010 & 2137/2010 8 paid is Rs.1460/- which includes premium amount and service tax. Ext.B4 is the policy which is valid from 21.11.2007 to 20.11.2008. Under the heading 'limitation as to use', it is stated as follows : The policy covers use of the vehicle for any purpose other than a) Hire or Reward ----- which alone is relevant here.

10. While coming to the provisions of the Act, including the definition clause, it is relevant to consider the following definitions : "Educational Institution Bus" is defined under Section 2(11) of the Motor Vehicles Act, 1988 as follows : "Educational institution bus means an omnibus, which is owned by a college, school or other Educational Institution and used solely for the purpose of transporting students or staff of the Educational Institution in connection with any

of its activities." 11. Section 2 (29) defines Omni bus as follows : "Omnibus means any motor vehicle constructed or adapted to MACA Nos.689/2010 & 2137/2010 9 carry more than six persons excluding the driver." 12. Going by the definition under Section 2(22) of maxi cab it is also a vehicle adapted to carry more than six passengers, but not more than twelve passengers including the driver for hire or reward.

13. The definition of motor cab under Section 2(25) also will show that it is a motor vehicle constructed or adapted to carry not more than six passengers including driver for hire or reward.

14. The definition of private service vehicle is given under Section 2(33) which reads as follows : Private service vehicle means a motor vehicle constructed or adapted to carry more than six person excluding the driver and ordinarily used by or on behalf of the owner of such vehicle for the purpose of carrying persons for, or in connection with, his trade or business otherwise than for hire or reward but does not include a motor vehicle used for public purposes.

15. The motor vehicle used for public purpose will not come under the said definition. MACA Nos.689/2010 & 2137/2010 10 16. The definition of public service vehicle under Section 2(35) reads as follows : public service vehicle means any motor vehicle used or adapted to be used for the carriage of passengers for hire or reward, and includes a maxi cab, a motor cab, contract carriage and a stage carriage; 17. We are also extracting the definition of transport vehicle under Section 2(47) which is the following : transport vehicle means a public service vehicle, a goods carriage, an educational institution bus or a private service vehicle.

18. The educational institution bus or a private service vehicle will come within the definition of "transport vehicle".

19. When we read together the definition of "Omnibus" and "private service vehicle" what is relevant to note is that both the class of vehicles can be used to carry more than six persons excluding the driver. The "educational institution bus" going by its definition under Section 2(11) will imply that it is an 'omnibus' and it

should be used only for the purpose of transporting students and staff. Therefore by MACA Nos.689/2010 & 2137/2010 11 changing the class from "Omnibus" to Educational Institution Bus, the use will come to transportation of students and staff of the educational institution. Obviously it cannot be termed as a public service vehicle. It will continue to be a private service vehicle. There is no use for public purposes. It is not to be used for hire or reward, which is significant. Of course, the Educational Institution bus and private service vehicle will come within the purview of the term "Transport vehicle". The learned Senior counsel for the Insurance Company submits that being a transport vehicle and not being a private car, the premium will have to be paid under Section 4 of IMT. We will now address the said question.

20. It is pointed out by the learned counsel Sri.Ravisankar for one of the party respondents that the Insurance Company in their written statement has not stated the tariff rate applicable. It is submitted that there is no contention that the vehicle should be treated as one for which commercial tariff policy will have to be issued. We have perused the same. In the written statement filed on behalf of the MACA Nos.689/2010 & 2137/2010 12 appellant (fourth respondent before the Tribunal) - New India Assurance Company Ltd., what is contended is that the policy is void ab initio for the reason that it was obtained by suppression of material facts. The vehicle was converted as T.V.LM.V Educational Institution Bus by the insured on 10.4.2007 prior to the issuance of policy and the owner has taken this policy by suppressing the fact of conversion from the insurer. It is true that there is no contention that the tariff rate applicable is one for commercial vehicles.

21. In Indian Motor Tariff ("IMT" for short) section 2 deals with tariff for private car. In categorization No.1, it is mentioned under (a) that "Private Car Type vehicles used for social, domestic and pleasure purposes and also for professional purposes (excluding the carriage of goods other than samples) of the insured or used by the insured's employees for such purposes but excluding use for hire or reward, racing, pace making, reliability trial, speed testing and use for any purpose in connection with the Motor Trade. The words " excluding use for hire or reward" are important for the purpose of this case, as the MACA Nos.689/2010 & 2137/2010 13 vehicle is one for which use for hire or reward is not permitted.

22. In page 29, the rate of premium is given as Rs.500/- for cubic capacity not exceeding 1000 cc , `600/- for cubic capacity exceeding 1000 cc but not exceeding 1500 cc and `700/- for cubic capacity exceeding 1500 cc.

23. Section 3 prescribes tariff for motorised two wheelers, which is not applicable here. Section 4 deals with tariff for commercial vehicles. Item 'A' is tariff for goods carrying vehicles. Item B is tariff for trailers. Item C is tariff for vehicles used for carrying passengers for hire or reward. Item D is tariff for miscellaneous and special types of vehicles. Items e, f, g are not relevant here. We will have to find out whether the vehicle herein had to be issued a policy for commercial vehicles after the change of class. Items A, B and C will not obviously apply here, as the vehicle is not a goods carrying vehicle, a trailer or a vehicle used for carrying passengers for hire or reward. Then the item which has to be considered is D, namely 'miscellaneous and special types of vehicles'. MACA Nos.689/2010 & 2137/2010 14 24. It is explained by the learned counsel Sri.Ravi Sanker that the same also will not apply since in the list of vehicles given under the said heading in Annexure to Section 4 of IMT, the educational institution bus is not included. We have perused the said Annexure. There are 58 types of vehicles mentioned therein, starting from agricultural tractors to trolleys and goods carrying tractors and the vehicle herein will not come therein, also.

25. The learned Senior Counsel for the Insurance Company contended that when Sections 2 and 3 of IMT will not apply, the vehicle herein will have to be issued a policy under Section 4 providing tariff for commercial vehicles. Clause 1 of the regulation states that Commercial Vehicles Tariff (CVT) is applicable to all vehicles not provided for under any other section of this Tariff, excluding vehicles running on rails.

26. But we are of the view that applicability of Section 4 will have to be negated since tariff rates provided under the said section for different types of vehicles are not applicable to the vehicle in question. MACA Nos.689/2010 & 2137/2010 15 What we find on a reading of Section 4 is that the vehicle herein will not come under "A, B, C or D". There is no case in the written statement filed by the Insurance Company that the vehicle will have to be issued a policy for commercial

vehicles.

27. Going by the description and use of different types of vehicles given under Section 4 of IMT, the vehicles should be of a class carrying passengers for "hire or reward" which is not the case herein. Herein, it is used only for taking students and staff. The learned Senior Counsel contended that they may usually be carried for hire or reward. But there is no such contention by the Insurance Company in the written statement. No question has been put to RW1 also in the cross examination as to whether the students and employees are being carried for hire or reward. Evidently, since it comes under the definition of private service vehicles and educational institution bus, its use is not for hire or reward. The statute is very clear on this, as we have already noted from the various definitions. Therefore, the said contention cannot be accepted. Hence the burden was on the Insurance Company MACA Nos.689/2010 & 2137/2010 16 to plead and prove that the tariff for commercial vehicles will apply. The heading "commercial vehicles" itself in Section 4 of IMT is important which will definitely indicate that it is used for a purpose different from a private service vehicle. Therefore as rightly pointed out by the learned counsel for the respondents 1 and 2 Section 2 alone will be relevant whereby the tariff for private car type vehicles alone will apply. Such vehicles include vehicles used for professional purposes also but excluding the use for hire or reward. Same is the situation here.

28. We are also of the view that the change of class of the vehicle will not have much impact, since going by the definition of "Omnibus", the vehicle could carry more than six persons excluding the driver. As far as a "private service vehicle" also, it can carry more than six persons excluding the driver. When it is used as "educational institution bus", the further restriction is that it can carry only staff and students. The definition of Educational Institution Bus is important that it is an "Ominibus" owned by a college or an educational MACA Nos.689/2010 & 2137/2010 17 institution. Therefore the type as "Omnibus" is common for the definition under Section 2(11) of "Educational Institution bus" as well as "Omini bus" under Section 2(29). Hence, if it is understood in that manner also, we find that both will come under the definition of private service vehicle as the use of the vehicle is important.

29. The learned Senior counsel for the Insurance company submitted that under the definition of private service vehicle, it is stated that it can be used for trade or business which will indicate commercial purposes. We cannot agree. Here the purpose being the use for students and staff, it cannot be termed as a "commercial use." "Commercial Use" will definitely have a monetary element i.e. use for hire or reward. In this context, we will refer to the judgment of the Apex Court in Hindustan Aeronautics Ltd. v. Registering Authority and Others [(1999) 8 SCC169] relied upon by the learned counsel for the respondents 1 and 2. There the question was considered under the Orissa Motor Vehicles Taxation Act, 1957 for the purpose of assessment of tax. The vehicles were private service vehicles engaged MACA Nos.689/2010 & 2137/2010 18 for transporting employees of Hindustan Aeronautics Ltd. to different work sites and were also used for transporting the school and college going students of the employees. The contention was that the vehicle cannot be termed as contract carriage. The Apex Court in paragraphs 6 and 7 after considering the meaning of the term 'plying for hire' held as follows :

"6. Tax under Entry 4 of the Schedule to the Act is attracted if a motor vehicle is "plying for hire and used for conveyance of passengers including motor cabs". In view of the language adopted in the charging provision, namely, Entry 4 of the Schedule to the Act the question for consideration is whether the motor vehicle was plied for hire under Entry 4 of the Schedule and that must be a vehicle which is used for conveying passengers.

7. In Sales v. Lake(1922 (1) KB553 1992 ALL ER689 the expression " plies for hire" arose for consideration. The language used in the provision considered therein was " every carriage of different descriptions or other vehicle which is intended or used for the conveyance of passengers and which plies for hire in any street, road or MACA Nos.689/2010 & 2137/2010 19 place and in which the passengers or any of them are charged to pay separate and distinct or at the rate of separate and distinct fares for the respective places or seats therein". The Court was of the view that a vehicle cannot accurately be said to ply for hire unless two conditions are satisfied. Firstly, there must be a soliciting or waiting to secure passengers by the driver or other person in control without any previous contract

with them. And, secondly, the owner or person in control who is engaged in or authorised the soliciting or waiting must be in possession of a carriage for which he is soliciting or waiting to obtain passengers. We are not concerned with the second condition. So far as the first condition is concerned, " a vehicle plies for hire" means that it is regularly used for such hire, that is, the vehicle which is offered for such service regularly. The expression " to ply for hire" means to exhibit the vehicle in such a way as to invite those who may desire to hire it for travel in it on payment of the usual fares or to offer its use thereby soliciting customers." (emphasis supplied by us) The said finding giving the scope of the expression "plies for hire", MACA Nos.689/2010 & 2137/2010 20 rules out the contention herein that tariff rate for commercial vehicles will apply.

30. The learned counsel relied upon the judgment in M.C.Mehta v. Union of India [(2000) 9 SCC519 wherein the Apex Court held that buses owned by the school may not strictly speaking be treated as commercial vehicles. The issue was considered in the light of the directions issued to assess the growing pollution of air. After referring to the definition under Section 2(11) for "Educational Institution bus", it was held that this definition does carve out a special category in favour of the buses etc. owned by educational institutions. It was clarified by the Apex Court that buses which are owned by college or school by other educational institution be treated as private buses for the purpose of the directions given by the court on 28.7.1998 31. We, therefore, cannot agree with the contention that educational institution buses will be treated as commercial vehicles for the purpose of collection of premium. The learned counsel for the respondents 1 and 2 handed over the revised motor tariff from 1.1.2008 MACA Nos.689/2010 & 2137/2010 21 where for private cars upto 1500 CC third party premium is Rs.800/- . For miscellaneous and special type also, the premium is the same namely Rs.800/- with an additional amount for passengers. The above is only referred to support the argument that the basic premium is the same for those two classes.

32. The decision of this Court in Julian v. Peethambaran (1997 (2) KLT763 relied upon by the learned Senior Counsel Sri.Mathews Jacob lays down the principle that the policy obtained for using the vehicle as private car cannot be used for the purpose of using the vehicle as contract stage carrying passengers for hire or

reward. The provision under Section 94 of the Motor Vehicles Act, 1939 was considered therein. But the said decision will not apply going by the facts of this case as the vehicle is not at all used for hire or reward. The learned counsel for the Agricultural University relied upon the judgment in O.P.No.7563/1994 and connected cases wherein the Agricultural University was also one of the petitioners. It is submitted that the classification had to be changed for assessment of tax under the MACA Nos.689/2010 & 2137/2010 22 Motor Vehicles Taxation Act. We are not going into the said question here.

33. Next is the judgment of a Division Bench of this Court in M.A.C.A.No.979/2005. The offending vehicle involved was a jeep. The Insurance Company contended that the policy was void abinitio since the vehicle was converted as a motor cab (taxi) which was suppressed. The policy was obtained as a private service vehicle. Evidence was let in by the Insurance Company. The Division Bench in paragraph 13 held that "the vehicle in question was being run as a contract carriage and at the same time, the policy was renewed as a private car without disclosing the fact that conversion had already been taken place even before the renewal." Accordingly it was held that the Insurance Company is not liable to satisfy the award. According to us, the said judgment will not advance the case of the Insurance Company here as there is no evidence to show that the vehicle was put for use as a commercial vehicle for hire or reward.

34. We will now come to the oral evidence adduced by the MACA Nos.689/2010 & 2137/2010 23 Insurance Company. RW2 is the Manager of Palai Branch of the Company. He had signed the written statement also. According to him, policy issued is a package policy. Ext.B6 is the proposal form for the period 2005-2006. In 2005 as there was a break, Ext.B6 proposal had to be made. For the period 2007-2008, for renewal, notice was issued and at the time of renewal, the policy certificate of the earlier period and the notice were produced. According to him, the registration book and permit were not produced. It is also stated by him that the vehicle has been converted on 10.4.2007 as educational institution bus for which commercial vehicle policy will have to be availed. He denied the suggestion that the person who came for renewal had produced the registration book and permit. According to him, premium for commercial vehicle policy will be Rs.6,200/-,

whereas for private car policy, it will be Rs.1,450/- which was paid. In the cross examination , he deposed that the premium has to be fixed as per IMT under which vehicles have been classified as private vehicle, commercial vehicle etc. and own car. According to him, commercial vehicles are those MACA Nos.689/2010 & 2137/2010 24 plied for rent (hire). Going by Ext.B2, the vehicle in question is for the use of staff and students of Agricultural University and not for the use of public. According to him, purpose for use of private cars has been defined in IMT and the vehicle can be used by the insured and its employees. The policy issued herein has not been revoked and before issuance of policy papers were bound to be verified.

35. In the cross examination by second and third respondents he deposed that the premium for the vehicle was collected on 7.11.2007 by one Sali of the said office and she is working in Palai itself. He denied the suggestion that she had gone through the documents concerning the vehicle. Lower down in the deposition, he stated that when the parties approach for payment of premium, the entire documents will not be personally verified by him and the parties will remit the amount as noted down by the officers concerned. He denied the suggestion that even though Sali's name was shown in the witness list, she was not being examined not to reveal the true facts. In re- examination, he again stated that there are vehicles known as MACA Nos.689/2010 & 2137/2010 25 commercial but which may not be used for hire or reward. According to him, vehicles for company's use, education institution bus and goods vehicles (own use) may come within the said group. Only when the policy is issued initially, there is any obligation to verify documents, according to him. 36 RW1, who deposed on behalf of the Agricultural University, gave evidence that the time when papers were shown for renewing the policy, the permit as well as RC book were shown to Smt.Sali of the Insurance Company's office and hence there was no suppression. Going by the evidence of the said witness, the documents were verified by the concerned officer. In the light of the above evidence, the learned counsel for the respondents 2 and 3 submits that non-examination of the said officer is material. It is submitted that even though the said officer is available in Pala and has been included in the witness list, the said person has not been examined. According to us, the question whether there is suppression to attract Section 149 (2) (b) will

have to be examined in the light of the clauses in the IMT MACA Nos.689/2010 & 2137/2010 26 also. The policy will be void under Section 149(2)(b) if it was obtained by non-disclosure of material fact or material particular. These two expressions have been explained in Sub Section 6, which we extract herein below : " In this section the expression " material fact" and "material particular" means, respectively a fact or particular of such a nature as to influence the judgment of a prudent insurer in determining whether he will take the risk and, if so, at what premium and on what conditions, and the expression " liability covered by the terms of the policy" means a liability which is covered by the policy or which would be so covered but for the fact that the insurer is entitled to avoid or cancel or has avoided or cancelled the policy." 37. Therefore evidently it relate to adoption of proper premium for enabling the Insurance Company to provide proper coverage. Herein, the contention of the Insurance Company raised now that the vehicle should have been treated as a commercial vehicle has not been specifically pleaded in the written statement. There are no pleadings by MACA Nos.689/2010 & 2137/2010 27 referring to IMT, either clause 2 or clause 4. The question whether the premium would have been more for educational institution bus has not been properly pleaded in the written statement. We have already discussed the relevant portions of section 4 of IMT. The vehicle herein will not come under any of the categories of vehicles A,B,C and D. Therefore as rightly pointed out by the respondents 1 and 2 it will come only under Section 2. Apart from the same, the educational institution bus is also an Omni bus going by Section 2(11) of the Act. Therefore, the change of class of vehicle cannot have much impact since the use of the vehicle as an educational institution bus will be in a restricted manner as it is only meant for use for the staff and students. Ext.B1 permit is also important. Therefore, it will only be a private service vehicle and not a commercial vehicle which will normally indicate that the use will be for hire or reward, which is absent here. Thus, the evidence adduced by the claimant and the respondents 2 and 3 will lead to the only conclusion that the policy has not been obtained by suppression of any material fact as contended by the Insurance MACA Nos.689/2010 & 2137/2010 28 Company. The view taken by the Tribunal to that extent is justified. The finding that after the break the documents have been verified for issuing the policy is not a correct one. Hence, we reject the contention

of the appellant/Insurer in M.A.C.A.No.2137/2010.

38. Now we will come to the claimant's appeal M.A.C.A.No.689/2010. The injured was aged 34 at the time of the accident. The learned counsel for the appellant submitted that the life of the injured is now in a vegetate stage. There is 97% permanent disability. Even for his personal needs, he will have to depend upon another. His capacity to assess various aspects and faculties to lead a normal healthy life have been affected because of the brain damage. He is completely bed ridden and has lost all his abilities. It is submitted that the compensation assessed by the Tribunal under various heads is too low. He was a qualified welder by profession. He was in Saudi Arabia for a considerable number of years and had come back. The monthly income claimed is @ `8,000/- which includes his income as welder and from agricultural operations. The Tribunal has adopted MACA Nos.689/2010 & 2137/2010 29 only `5,000/- as the monthly income and for fixing compensation for permanent disability again after reducing certain amounts, `3,500/- alone has been taken as the multiplicand. His future prospects for increase in wages have not been considered also.

39. We will now come to the details of the treatment undertaken by the claimant. As already noted, the accident occurred on 17.12.2007 and he was initially admitted in Marian Medical Centre, Pala and thereafter he was taken to Medical Trust Hospital on 18.12.2007.

40. Ext.A8 issued from the Medical Trust Hospital will show that his treatment continued in that hospital upto 3.3.2008. On this date, he was discharged. Going by the said certificate, investigation conducted are; CT brain, CT Thorax, CT C Spine and X-ray chest. Treatment given are described therein, which include ventilatory support, AEDs, cerebroprotective measures, antioedema measures, bronchodilators, antibiotics as per culture and sensitivity reports and analgesics. He underwent tracheostomy for better tracheobronchial MACA Nos.689/2010 & 2137/2010 30 toileting which was eventually strapped. Also percutaneous Entero-Gastrostomy has been done. Orthopaedic, CTVS, Plastic Surgery were also done. Going by the conditions noted of the patient at the time of discharge, he was mobilised on wheel chair. There is paucity of movements on left side and he was

on PEG feed and on Foley's drainage. He was advised to have active chest and limb physiotherapy and to follow orthopaedic, CTVS, plastic surgery, Gastromedicine and Physician's advice. A review was fixed after two weeks.

41. Ext.A9 is the further certificate issued by the Medical Trust Hospital dated 24.3.2008, wherein also various investigations done have been described and he was advised limb physiotherapy. The said certificate will also show that there is paucity of movements on the left side and he was on PEG feed. The said certificate will show that he was treated as inpatient for 5 days from 19/03/2008 to 24.03.2008. Thereafter, he was admitted on 19.05.2008 and was discharged on 22.05.2008 in the said hospital which is clear from Ext.A10 certificate. PEG was removed on 21.05.2008 by Gastrosurgery department. He MACA Nos.689/2010 & 2137/2010 31 has been advised active chest and limb physiotherapy and to follow gastrosurgery. Ext.A11 is the certificate dated 22.05.2008 issued from Medical Trust Hospital which describes the various details of treatment given to him. He underwent Tracheostomy for better tracheobronchial toileting on 21.12.2007 which was eventually strapped on 28.01.2008. He underwent ORIF and DCP of right ulna on 08/01/2008 by Orthopaedic Department. Percutaneous Entero-Gastrostomy was done on 23.01.2008 which was removed on 21/05/2008 as already noticed. Therein it is further recorded as follows as regards his condition : "At present still he is not oriented, unable to speak, bedridden, spastic, fixing eyes to call and at times only obeying simple commands." 42. Ext.A12 is the further certificate issued by the Medical Trust Hospital dated 8.10.2008. The said certificate records that "at present he is obeying simple commands, disoriented, unable to speak, ambulant with maximum support, dependent on others for routines. He still requires further treatment." He was examined on the said date.

43. Ext.A13 is the certificate dated 3.2.2009 issued by the MACA Nos.689/2010 & 2137/2010 32 Medical Trust Hospital. Therein it is recorded as follows : "At present he is obeying commands, unable to speak (producing few incomprehensible words), ambulant with maximum support, spastic Rt. Wrist and Rt.Lower limb and dependent on others for his daily routines. He still requires further treatment." 44. Ext.A14 is the certificate issued by the Physiotherapist. As per the said certificate, physiotherapy started on 31.05.2008 at the residence of

the patient. Treatment was being given for three days in a week upto March 31, 2009. From April 1, 2009 to June 30, 2009 treatment was given for 2 days in a week. The charge per day is `250/-. Upto to 11.08.2009, treatment was given for 160 days and it is stated that he has received ` 40,000/- towards his fees from the wife of the appellant. It is also stated that treatment is continuing now every two days in a week.

45. To prove appellant's academic qualification, Ext.A17 was produced which is the National Trade Certificate in the trade of Welder He had obtained qualification in the trade of welder for the year 1995. MACA Nos.689/2010 & 2137/2010 33 Ext.A18 is the passport of the injured. Ext.A20 is the certificate issued by the Elmandeb Contracting Company Ltd., certifying that he has been working in the company as welder from 12.7.1997 to 28.3.2005 and his salary was SAR1500(Basic) + SAR200(F.A) per month. Ext.A21 is produced to show that conversion rate of 1 Saudi riyal is equal to 11.65271 Indian Rupee. Ext.A22 is the passbook issued by the Federal Bank Limited Branch, Kidangoor. Ext.A23 is the passbook issued by the Mutholy service co-operative Bank. Ext.A24 is the certificate issued by the said bank stating that he had chitty transaction with the said bank.

46. The wife of the claimant was examined as PW1. She has spoken about the details of the accident, the employment he was having in Saudi Arabia and his avocations in life at the time of the accident. According to her he was being engaged to do job as a Welder in the workshops and was having monthly income of `8,000/- from the job as a Welder as well as from agricultural operations in their own property, 2 acres in extent. MACA Nos.689/2010 & 2137/2010 34 47. With regard to the situation of the claimant, it is stated by her that he is completely disabled and the right side is immobilized and is having only partial response. The right hand is paralysed and the right leg is partially paralysed. He has lost his capacity to understand things. He cannot speak also. He is unable to move or walk and depends upon others for every one of his needs. He has no sexual desire and cannot on his own pursue his personal needs. In order to attend him a bystander has been engaged by paying `100/- per day. She is also helping and caring him. It is also stated that he was intending to go back to Saudi Arabia within a short span and they have two children born on 18/04/2006 and 10/06/2007 and actually

preparations have been made to return back to Saudi Arabia by March 2008 and he has renewed his passport also. Salary which he was getting in Saudi Arabia amounted to ` 19,800/-, on conversion.

48. PW2 is the Physiotherapist who has spoken to in terms of the certificate issued by him. According to him, the details shown in the certificate are true. The claimant has been undertaking MACA Nos.689/2010 & 2137/2010 35 physiotherapy for which he was charging `250/- per day. PW3 has been examined to prove the accident.

49. The Tribunal has assessed the whole evidence in paragraph 10. The claimant was treated as inpatient for 86 days and was on ventilation for 42 days. After assessing the evidence, the Tribunal was of the view that the monthly income can be fixed at `5,000/-. Loss of earnings have been granted for six months ( `30,000/-) For transport to hospital, `5,000/-, for extra nourishment `7,800/-, for damage to clothing and articles `500/- and for bystander's expenses `20,000/- has been granted. The medical expenses have been proved through bills and ` 3,02,200/- has been granted. Under Part II, the Tribunal has granted `30,000/- for pain and suffering and ` 6,92,600/- for permanent disability resulting in loss of earning capacity; `30,000/- for loss of amenities and `20,000/- towards future bystander expenses, `25,000/- for physiotherapy treatment and `10,000/- for future medical expenses. Thus the total amount awarded by the Tribunal is `11,73,100/- as against the claim of `30 lakhs. MACA Nos.689/2010 & 2137/2010 36 50. The disability certificate has been marked as Ext.X1. It shows 97% disability. We have already referred to the details of the treatment and the advice given from time to time. The injuries have damaged the brain and has affected his spine. It is clear from the evidence both oral and documentary that he has lost orientation and his capacity to understand things. He is unable to speak and is also unable to lead a normal married life. The cumulative effect of the injuries has resulted in severe adverse circumstances to him. It is recorded in Ext.X1 that right side upper limbs have no movements with associated wasting and spasticity, eating, dressing and day to day activities require assistance, self care not possible. The percentage of disability for impairment of upper limb function is 7 and 5% disability is assessed for occasional urinary incontinence. As regards the neurological disability

assessed by the Medical Board of the Medical College Hospital, Kottayam, it is recorded as follows : "emotional derangement present, easily getting angry, recognises children and near relatives - 5%." MACA Nos.689/2010 & 2137/2010 37 51. It is also recorded that he can stand from sitting position with the help of two persons, but cannot walk. The percentage of disability on this count is 50%. The diagnosis is severe head injury, brainstem injury recovering, right branchial plexus injury. Speech impairment is also recorded and the percentage of disability on the said item is 25%. For absence of sexual desire or awareness 5% is shown. The total permanent disability is assessed as 97%.

52. The learned counsel for the appellant/claimant submits that the income assessed is at a very reduced rate namely `5,000/- per month. The accident occurred in the year 2007. He was a qualified skilled labourer. Therefore it is submitted that going by the situation in the State with regard to the remuneration for such skilled workers, the Tribunal ought to have fixed `8,000/- itself as the monthly income. He was also having agricultural activities in the 2 Acre plot they are having. The family is deprived of his service in that regard also. It is submitted that he was employed in Saudi Arabia from 1997 to 2005 and was earning `19,000/- per month. The learned counsel therefore MACA Nos.689/2010 & 2137/2010 38 submits that the claimant had very good future prospects also which has not been reckoned for fixing the monthly income. He was aged 34 only.

53. With regard to the state of affairs of the patient, it is submitted that he requires a bystander's assistance constantly. Future medical treatment will have to be given and physiotherapy treatment will also have to be undertaken and therefore due compensation ought to have been granted by the Tribunal. It is submitted that in spite of the treatment at Pala, Kottayam and Ernakulam, the amount awarded for transportation do not reflect the actual expenses incurred. He had to be taken in vehicles to reach the hospitals.

54. The learned counsel for the Insurance Company submitted that the multiplier adopted is on a higher side. It is also submitted that proper compensation has been awarded and at any rate compensation cannot be granted for permanent disability and loss of earning power. We have considered the rival points. As

regards the monthly income to be fixed, it is evident that he is a qualified welder, which is proved MACA Nos.689/2010 & 2137/2010 39 through Ext.A17. Evidence adduced show that he was employed in Saudi Arabia for 8 years. Therefore, the compensation will have to be assessed based on a reasonable income which he would have earned as he is an experienced and qualified welder. Of course he was not under a permanent employment with any establishment. But the evidence of the wife PW1 is that he was being engaged by several institutions situated nearby. He was indulging in agricultural activities which in turn was adding to the income of the family. He was of age 34 only at the time of the accident. Considering the various aspects, we are of the view that a reasonable amount of `6,500/- can be adopted as the monthly income for the purpose of assessing compensation. There is total loss of earning capacity as far as the appellant is concerned. The multiplier going by the judgment in Sarla Varma v. Delhi Transport Corporation (2010 (2) KLT802(SC) is 16, instead of 17 fixed by the Tribunal. We are also of the view that the amount awarded towards transportation requires modification since he was under treatment in different hospitals and had attended reviews also on several times. MACA Nos.689/2010 & 2137/2010 40 Even though the Tribunal has fixed only `5,000/-, according to us, an amount of `15,000/- will be reasonable. For extra nourishment, an amount of `7,800/- is awarded which represents the amount covered by the the canteen bills also. We award an amount of ` 15,000/- towards extra nourishment which will be reasonable going by the periods of treatment. He was being administered food through alternative method for a couple of months. As far as bystander's expenses, for the period of treatment, what is awarded by the Tribunal is `20,000/-. The evidence is to the effect that he was treated as inpatient for 86 days and since the accident is of the year 2007, we fix the bystander's expenses @ `250/- per day making the total amount to `21,500/-. For pain and suffering, the Tribunal has awarded `30,000/-. He had undergone three surgeries during the period of inpatient treatment. He was on ventilation for a period of 42 days. Various treatment procedures have been undertaken by him. The injuries were of very severe nature. Therefore, we fix an amount of `75,000/- for pain and suffering covering the period of treatment in hospitals and MACA Nos.689/2010 & 2137/2010 41 another amount of 75,000/- for pain and suffering which is continuing. There is complete loss of amenities,

enjoyment of life and normal pleasures of life including normal married life to him. He has lost orientation, lost his capacity to speak and he cannot walk freely, cannot attend to personal needs on his own. He will have to depend upon others even to lift himself up. In such a state of affairs, he is liable to be compensated properly for loss of amenities of life and enjoyment of life and the resultant loss he is suffering due to the neurological disabilities. The amount fixed at `30,000/- is too low and we enhance the same to `1,50,000/- which will be just and reasonable. We have fixed the said amount since throughout his life, he will have to continue practically like this.

55. For the expenses towards physiotherapy, what is granted by the Tribunal is `25,000/- as against the receipt issued for `40,000/-. PW2's evidence will show that physiotherapy treatment was being extended to the claimant. The evidence of PW2 is quite natural. The evidence of PW1 is also to the effect that he was being given MACA Nos.689/2010 & 2137/2010 42 physiotherapy treatment and at the time of her examination it had come down to two days a week and PW2 was being paid `250/- per day which is the evidence of PW2 also. We have already extracted the portions of Ext.A8 and A11 certificates issued by Medical Trust Hospital which will show the physiotherapy treatment was advised. Therefore no amount of suspicion can be entertained with regard to the expenses incurred and shown in Ext.A14, namely `40,000/- for 160 days. We allow the total amount of `40,000/- for the expenses claimed till that point of time.

56. As regards future treatment, what is provided by the Tribunal is only `10,000/-. Apart from the treatment given to him for physical problems, he will have to take medicines constantly for improving his faculties. The doctors have advised future treatment also and coupled with the same he will have to undertake physiotherapy continuously. Therefore, a reasonable amount will have to be fixed for future medical expenses and expenses for physiotherapy, which we fix at `1,50,000/-. MACA Nos.689/2010 & 2137/2010 43 57. For permanent disability, we award a total amount of `12,48,000/- (6500 x 12 x 16). Even though the percentage of disability is 97%, it is clear that he has lost his earning capacity. Therefore the functional disability will be 100%. For loss of earnings, ` 39,000/- ( 6500 x 6) is awarded, in total instead of ` 30,000/- awarded by the Tribunal.

58. Accordingly, the compensation is refixed as follows : Head of claim Amount awarded in rupees Loss of earnings 39000 Transport to hospital 15000 Extra nourishment 15000 Damage to clothing and articles 500 Medical expenses 302200 Bystander expenses incurred in hospital for 86 days 21500 Pain and suffering 150000 Permanent disability 1248000 Loss of amenities 150000 Physiotherapy treatment expenses as per receipt Ext.A14 40000 Future medical expenses including expenses for physiotherapy 150000 MACA Nos.689/2010 & 2137/2010 44 Head of claim Amount awarded in rupees Total 2131200 (Rupees twenty one lakhs thirty-one thousand two hundred only) 59. The enhanced amount, except for `1,50,000/- awarded for future medical expenses, will carry interest @ 9% per annum. We hold that the Insurance Company namely the fourth respondent before the Tribunal and the appellant in M.A.C.A.No.2137/2010 is liable to satisfy the award. The amount awarded above less the amount already paid will be deposited before the Tribunal by the Insurance Company within three months. We permit the appellant in M.A.C.A.No.689/2010 to withdraw 50% of the total compensation along with its interest. The remaining amount will be deposited in a Nationalised Bank atleast for a period of three years. We permit the claimant to withdraw the interest portion from time to time. We also permit the claimant appearing through his next friend (his wife) to approach the Tribunal as and when necessary to modify this part of the condition by showing the requirements for MACA Nos.689/2010 & 2137/2010 45 treatment and other expenses. M.A.C.A.No.689/2010 is allowed and M.A.C.A. No.2137/2010 is dismissed. The parties will suffer their costs in the appeals. T.R.RAMACHANDRAN NAIR, JUDGE P.V.ASHA, JUDGE sv.

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