

IN THE HIGH COURT OF BOMBAY AT GOA**FIRST APPEAL NOS. 87/2018 & 94/2018****FIRST APPEAL NO. 87 OF 2018**

Ms. Ana Paula Mendes, Aged 55 years, R/o F-1, Raj Apartment, Road-1, La Campala Colony, Miramar-Goa.

... Appellant

Versus

1. Mr. Vasant Shenvi Kukalekar, aged 25 years, driver of vehicle GA-01-S-7157, R/o Vithal Prasad, H. No. 315, Near Ella Farm, Old Goa, Tiswadi-Goa.
2. Mr. Mahendra V. Kukalekar, major in age, owner of vehicle GA-01-S-7157, H. No. 315, Baiguinim, Tiswadi, Goa.
3. National Insurance Company Limited, Panaji Divisional Office-I, Souza Towers, 2nd Floor, Dr. Roque D'Souza Road, Near Municipal Garden, Panaji-Goa.

... Respondents

Shri Emerico Afonso, Advocate for the Appellant.

Shri Amey Kakodkar, Advocate for the Respondent No. 3.

FIRST APPEAL NO. 94 OF 2018

Ms. Sonata Mendes, Aged 20 years, R/o F-1, Raj Apartment, Road-1, La Campala Colony, Miramar-Goa.

... Appellant

Versus

1. Mr. Vasant Shenvi Kukalekar, aged 25 years, driver of vehicle GA-01-S-7157, R/o Vithal Prasad, H. No. 315, Near Ella Farm, Old Goa, Tiswadi-Goa.
2. Mr. Mahendra V. Kukalekar, major in age, owner of vehicle GA-01-S-7157, H. No. 315, Baiguinim, Tiswadi, Goa.
3. National Insurance Company Limited, Panaji Divisional Office-I, Souza Towers, 2nd Floor, Dr. Roque D'Souza Road, Near Municipal Garden, Panaji-Goa.

... Respondents

Shri Emerico Afonso, Advocate for the Appellant.
Shri Amey Kakodkar, Advocate for the Respondent No. 3.

CORAM:- C. V. BHADANG, J.
RESERVED ON: 25th SEPTEMBER 2018
PRONOUNCED ON: 5th OCTOBER 2018

JUDGMENT:

These appeals are taken up for final disposal by consent of parties. Both these appeals, involve claims for compensation, arising out of the same vehicular accident. As such, they are being disposed of by this common judgment.

2. On 04.09.2016, Mrs. Ana Mendes and her daughter Ms. Sonata Mendes, were proceeding from Taleigao to Miramar on a Hero Honda Activa scooter, bearing no. GA-07/V-2526. Ana Mendes was riding the scooter, while Sonata Mendes was the pillion rider. When they reached near Vasant Vihar Building at 19:45 hours, they were hit by a Maruti Alto car bearing no. GA-01/S-7157, which came from behind. The Maruti car was driven by the respondent no. 1 and it was covered by a policy of insurance, issued by the respondent no. 3, which was valid on the date of the accident. Both, Ana Mendes and Sonata Mendes suffered injuries on account of the accident and were required to be treated and have suffered permanent disablement on account of the injuries suffered in the accident.

3. Ana Mendes filed Claim Petition No. 114/2016, before the Motor Accident Claims Tribunal, North Goa, Panaji seeking a compensation of Rs.25 lakhs against the respondents, while Sonata Mendes filed Claim Petition No. 113/2016, also seeking a compensation of Rs.25 lakhs against the respondents.

4. The Tribunal by separate judgments and award dated 01.12.2017, has partly allowed the petitions. While Ana Mendes has been granted a compensation of Rs.4,78,212/-, Ms. Sonata Mendes has been granted a compensation of Rs.5,69,843/-. The Tribunal has also allowed interest at the rate of 9% per annum, on the amount of compensation, from the date of filing of the petition, till realisation. The compensation so granted is inclusive of the compensation under Section 140 of the Motor Vehicles Act, 1988 (Act, for short). Feeling aggrieved by the inadequate compensation granted, the original claimants have filed these appeals.

5. I have heard Shri Afonso, the learned Counsel for the appellant and Shri Kakodkar the learned Counsel appearing for the contesting respondent no. 3. With the assistance of the learned Counsel for the parties, I have perused the record.

6. First Appeal No. 87/2018

It is submitted by Shri Afonso, the learned Counsel for the appellant that the appellant has suffered permanent disablement to the extent of 5% on account of fracture to the left humerus (shoulder). It is submitted that the appellant is serving as a Senior Special Assistant, with the State Bank of India and was required to take leave from 04.09.2016 to 29.01.2017 and has suffered loss on account of the fact that she would now be unable to get leave encashment for the said period. It is submitted that the Tribunal has although considered this aspect, has restricted the compensation to the basic salary for the aforesaid period. The contention is that the Tribunal ought to have allowed the full salary for the said period, for the loss of paid leave, which comes to about Rs.4,07,690/-. Secondly, it is contended that the compensation granted towards pain and suffering at Rs.25,000/- is on the lower side. In the submission of the learned Counsel for the appellant, the Tribunal ought to have granted compensation of Rs.1 lakh under this head. It is submitted that the Tribunal failed to grant any compensation on account of loss of future prospects. It is submitted that the Supreme Court has now laid down the principles of standardization of the heads under which the compensation needs to be granted, which is not

followed by the Tribunal. The learned Counsel submitted that the compensation under Section 166 of the Act has to be granted on similar considerations, as that of Section 163-A of the Act. In the submission of the learned Counsel for the appellant, in order to decide the compensation towards loss of future earning capacity and future prospects, the income in the present case will have to be taken, without deducting the tax. In the submission of the learned Counsel for the appellant, the net income i.e. after deducting the tax can only be taken in a death case. It is submitted that the Tribunal has failed to award costs.

7. Shri Kakodkar, the learned Counsel for the respondent no. 3 has supported the impugned judgment and award. It is submitted that the Tribunal has in fact been generous enough, in awarding compensation under the various heads and the compensation granted, can by no means be said to be inadequate. It is submitted that the Tribunal is required to grant "just compensation" and the claimant cannot seek windfall by way of compensation, arising out of the unfortunate accident. It is submitted that admittedly, the appellant continues in service and there is no evidence of loss of future earnings on account of loss of promotional prospects or

otherwise. Insofar as the compensation for loss of leave is concerned, it is submitted that the learned Tribunal has rightly restricted the compensation to basic salary. It is submitted that the compensation towards pain and suffering is also just and proper.

8. First Appeal No. 94/2018

It is submitted by Shri Afonso, the learned Counsel for the appellant that the appellant has suffered head injury, resulting into 20% disablement on account of inability to smell. It is submitted that the appellant was 18 years of age and was a student of Bachelor of Business Administration (BBA) at the time of the accident. It is submitted that the compensation granted by the Tribunal is grossly inadequate on all the heads. It is submitted that the appellant had suffered severe brain injury with a possibility of epilepsy attacks. As such, adequate compensation ought to have been granted for loss of future prospects, including the loss of enjoyment of life and loss of marriage prospects. It is also submitted that the Tribunal failed to award costs.

The learned Counsel for the appellant has placed reliance on the decision of the Supreme Court in the case of **V. Mekala Vs. M. Malathi & Another, (2014) 11 SCC 178, S.**

Perumal Vs. K. Ambika & Another, (2015) 11 SCC 411, Narendra Singh Vs. Nishant Sharma & Another, (2015) 14 SCC 353, National Insurance Company Limited Vs. Pranay Sethi & Others, AIR 2017 SC 5157 and Jagdish Vs. Mohan & Others, (2018) 4 SCC 571.

9. Shri Kakodkar, the learned Counsel for the respondent no. 3 has submitted that the award is generous and both the awards have already been satisfied. It is submitted that the appellant is not suffering from epilepsy. However, the Doctor has only opined that the head injury could lead to epilepsy. It is submitted that the compensation has to be just. The learned Counsel has submitted that the case of **V. Mekala** (supra) is distinguishable, where a school going girl, aged about 16 years had suffered 70% disability, consequent to which she was unable to walk without crutches.

10. I have carefully considered the rival circumstances and the submissions made. Let us now consider the claim in relation to each of the appeals.

11. First Appeal No. 87/2018

The claimant, Mrs. Ana Mendes was aged about 53 years, at the time of the accident. She is serving as a Senior

Special Assistant in the State Bank of India. She has suffered injury to the left humerus (shoulder). The claimant was initially treated in Manipal Hospital and thereafter, in the Healthway Hospital. The total period for which the appellant was unable to attend her duties is from 04.09.2016 to 29.01.2017. Admittedly, the appellant has rejoined her service, and it is neither claimed nor there is any evidence, that she has suffered any loss of promotional prospects or has been asked to work on a position, which is lower than the post on which she was working at the time of the accident. Even insofar as the period for which the appellant was unable to attend the official duty, it is not the case made out that the said period was treated as leave without pay. The appellant was paid full salary for the said period. The contention, however, is that the appellant has lost her leave, which she could have encashed at the time of her superannuation.

12. The Tribunal has relied upon the decision of the Delhi High Court in the case of **Ramveer Singh Vs. Rajesh Kumar & Others, 2014 A.C.J. 1090**, in which, the Delhi High Court has held that a victim of a vehicular accident cannot be made to suffer loss of his full pay leave or the medical leave for the benefit of the tortfeasor and that an employee loses an opportunity for encashment of leave at the time of his

superannuation, if the leave is exhausted during service. The Delhi High Court in such circumstances has held that the claimant was entitled to be paid full salary for the loss of leave. The Tribunal has although accepted this, in principle, has granted compensation to the extent of basic salary and not the full salary. I do not find that there is any justification for the same. The encashment of leave, at the time of superannuation, is allowed on the basis of the full salary, which would include the basic salary as well as dearness allowance and other emoluments. Once the Tribunal had accepted the claim under the head of loss on account of the leave encashment (which ground is not challenged by the respondent no. 3-Insurance Company), there was no reason to restrict it to basic salary only. To that extent, the contention on behalf of the appellant, to my mind, is well founded. The Tribunal has granted Rs.1,82,831, which is the basic salary for 144 days. In my considered view, the appellant would be entitled to full salary i.e. Rs.3,91,385 for the period of 144 days.

13. There is evidence on record to show that the appellant had sustained 5% permanent disability on account of fracture to the left humerus (shoulder) and as noticed earlier, she was invalidated for a period of 144 days. The question is what should be the general damages towards pain and

suffering. The Tribunal has granted Rs.25,000/- under the head of pain and suffering, which can be maintained. The Tribunal has granted compensation towards the expenditure on the treatment, which can be maintained at Rs.2,55,381/-. Similarly, the compensation of Rs.5,000/- towards the travelling expenses (taxi charges) and Rs.10,000/- towards an attendant is also maintained.

14. The next question is about the loss of future earnings or loss of future prospects. I do not find that the appellant is entitled to any compensation under these heads. As noticed earlier, the appellant continues to be in service on the same post and is drawing same salary as she was getting on the date of the accident. There is also no evidence that the appellant has suffered any loss of promotional prospects on account of the disability suffered or that she has been asked to work on a lower post.

15. The Supreme Court in the case of **Raj Kumar Vs. Ajay Kumar & Another, 2011 (1) ALL MR 402 (S.C.)** has held thus, in para 5 of the judgment:

“6. The heads under which compensation is awarded in personal injury cases are the following:

Pecuniary damages (Special Damages)

(i) Expenses relating to treatment, hospitalization, medicines, transportation, nourishing food, and miscellaneous expenditure.

(ii) Loss of earnings (and other gains) which the injured would have made had he not been injured, comprising:

(a) Loss of earning during the period of treatment;

(b) Loss of future earnings on account of permanent disability.

(iii) Future medical expenses.

Non-pecuniary damages (General Damages)

(iv) Damages for pain, suffering and trauma as a consequence of the injuries.

(v) Loss of amenities (and/or loss of prospects of marriage).

(vi) Loss of expectation of life (shortening of normal longevity).

In routine personal injury cases, compensation will be awarded only under heads (i), (ii)(a) and (iv). It is only in serious cases of injury, where there is specific medical evidence corroborating the evidence of the claimant, that compensation will be granted under any of the heads (ii)(b), (iii), (v) and (vi) relating to loss of future earnings on account of permanent disability, future medical expenses, loss of amenities (and/or loss of prospects of marriage) and loss of expectation of life.

Assessment of pecuniary damages under item (i) and under item (ii)(a) do not pose much difficulty as they involve reimbursement of actuals and are easily ascertainable from the evidence. Award under the head of future medical expenses-item (iii)--depends upon specific medical evidence regarding need for further treatment and cost thereof. Assessment of non-pecuniary damages-items (iv), (v) and (vi)--involves determination of lump sum amounts with reference to circumstances such as age, nature of injury/deprivation/disability suffered by the claimant and the effect thereof on the future life of the claimant. Decision of this Court and High Courts contain necessary guidelines for award under these heads, if necessary. What usually poses some difficulty is the assessment of the loss of future earnings on account of permanent disability - item (ii)(a). We are concerned with that assessment in this case."

(Emphasis supplied)

It can thus be seen that in routine personal injury case, compensation will be awarded only under three heads i.e. (i), (ii)(a) and (iv) above. It is only in serious cases of injury, where there is specific medical evidence, corroborating the evidence of the claimant, that the compensation will be granted under any of the heads (ii)(b), (iii), (v) and (vi). This is not a case where the compensation could be claimed or granted

under the head (ii)(b) i.e. loss of future earnings on account of permanent disability.

16. Thus, the compensation to which the appellant would be entitled is as under:

1. Salary for 144 days	3,91,385
2. Towards pain and suffering and loss of amenities	25,000
3. Expenses on medical treatment	2,55,381
4. Travelling expenses (taxi charges)	5,000
5. Towards attendant charges	10,000
Total Compensation	6,86,766

17. First Appeal No. 94/2018

The appellant, Sonata Mendes was aged 18 years and was a student of BBA at the time of the accident. She suffered closed fracture of left humerus and had a head injury, involving fracture of the skull. The appellant was admitted in Manipal Hospital from 04.09.2016 to 20.09.2016 and thereafter, took follow up treatment upto 20.11.2016. According to the appellant, she had incurred expenses of Rs.3,64,843/- on her treatment at Manipal Hospital, Rs.5,000/- as travelling expenses (taxi charges) and Rs.20,000/- on an attendant. The appellant examined herself (AW-1) and Dr. Audumber Netalkar (AW-3) alongwith other witnesses.

18. Dr. Audumber Netalkar (AW-3) is a Neurosurgeon working with Manipal Hospital. Dr. Audumber Netalkar (AW-3) had examined the appellant on 04.09.2016 to assess her permanent disability and had found that she had suffered 20% permanent disability on account of loss of smell, which is due to the injury to the brain. He claims that the head injury could lead to epilepsy, for which, she is on preventive medication. The disability certificate is produced on record at Exhibit-37 and bills of the hospital at Exhibit 38. During the cross examination, Dr. Audumber Netalkar (AW-3) stated that the chances of recovery of the appellant are nil. However, the disability will not affect her day to day activities, albeit, her quality of life will be affected, due to loss of smell and she will not be able to taste food to "some extent". He claimed that 20% disability is computed in accordance with the guidelines approved by the expert group meeting at New Delhi, in the year 1981. It can thus be seen that the appellant had suffered a serious head injury, which has resulted into loss of ability to smell and ability to smell, is integrally connected to ability to taste food. There is evidence of Dr. Audumber Netalkar (AW-3) that loss of ability to smell, would also lead to loss of ability to taste to some extent. As noticed earlier, the appellant was 18 years of age and her marriage prospects are also likely to be

affected on account of the disability. There is evidence that the appellant due to head injury is likely to have epilepsy, for which, she is on preventive treatment. The question is what should be the quantum of compensation.

19. The Tribunal has granted Rs.3,64,843/-, as the expenses on treatment, as reflected in the bills at Exhibit-38 and Rs.5,000/- as travelling expenses (taxi charges). The Tribunal has granted Rs.30,000/- towards the compensation for pain and suffering and Rs.20,000/- towards attendant charges. The Tribunal has further granted a compensation of Rs.25,000/- towards the preventive treatment for epilepsy and Rs.1 lakh on account of fact that the injury could lead to epilepsy. The Tribunal has granted an amount of Rs.25,000/- under the head of loss of amenities. The Tribunal, however, has not granted any compensation towards loss of future prospects, as in the opinion of the Tribunal, there is no evidence to show that on account of injuries suffered, the appellant was unable to pursue her studies. Let us now come to the decision of the Supreme Court in the case of **Raj Kumar** (supra).

20. Clause (i) pertaining to the expenses relating to the treatment, hospitalization, medicines, transportation etc. does

not present any difficulty, in as much as, they are actual expenses incurred, which may be evident in the form of invoices or bills or otherwise. The Tribunal has already granted Rs.3,64,843/- on account of the expenses on medical treatment, Rs.5,000/- towards travelling expenses (taxi charges) and that of an attendant as Rs.20,000/-, which would take care of item no. (i). Insofar as loss of earnings is concerned, the head comprises of two items i.e. (i) loss of earnings during the period of treatment and (ii) loss of future earnings on account of permanent disability. Evidently there is no loss of earnings during the period of treatment, in as much as, the appellant was a student, at the time of the accident and was not actually earning. Insofar as loss of future earnings is concerned, the Tribunal has refused to grant any compensation under the said head. I would propose to revert to this aspect a little later.

21. Insofar as the item no. (iii) is concerned, the Tribunal has granted Rs.25,000/- towards the preventive medical treatment and Rs.1 lakh on account of the possibility that the injury could lead to epilepsy. Thus, the total amount of Rs.1,25,000/- which is granted would take care of future medical expenses. Let us now consider the non pecuniary damages (general damages). Insofar as item no. (iv) pertaining

to pain and suffering and trauma are concerned, the Tribunal has granted Rs.30,000/-, which to my mind would be on a lower side, looking to the fact that the appellant has suffered head injury, I am inclined to enhance it to Rs.50,000/-. There is no evidence as to loss of expectation of life (shortening of the normal longevity) as envisaged by item (vi). Insofar as the loss of amenities (and/or loss of marriage prospects) is concerned, the Tribunal has only granted Rs.25,000/- towards loss of amenities. Considering the fact that not only the ability to smell, but, the ability to taste food is also likely to be affected, I am inclined to grant compensation of Rs.1,50,000/- towards loss of amenities, which would include compensation for loss of prospects for marriage.

22. Reverting back to the issue of compensation on account of loss of future earnings, I have given my anxious consideration to the question whether, the nature of disability would result into loss of any future earning capacity and I am unable to hold in the affirmative. The loss of ability to smell to a certain extent may not result into any future loss of earning capacity or prospects for getting a job or the appellant opting for being self employed.

23. The case of **V. Mekala** (supra) turned on its own facts, where the victim, who was a brilliant girl of 16 years old, had suffered 70% injury and on account of loss of both the limbs, was unable to walk without the aid of crutches. The question whether, the permanent disability would result into the loss of future earning capacity, would depend upon facts and circumstances of each case.

24. In the case of **S. Perumal** (supra), a labourer was hit by a lorry, causing chest injury alongwith fracture to the ribs and was found to have suffered 25% of disability. The Hon'ble Supreme Court enhanced the compensation to Rs.4,43,500/- considering that a labourer (who is required to do manual work) is bound to suffer loss of earning capacity, on account of multiple fractures to the ribs.

25. In the case of **Narendra Singh** (supra) also, the functional disability was assessed at 60%, as per entry 19 of schedule I of the Employee's Compensation Act, 1923.

26. Section 163-A of the Act, on which reliance was placed on behalf of the appellant, refers to permanent disability as defined in the Workmen's Compensation Act (now

Employee's Compensation Act, 1923). The explanation annexed to Section 163-A of the Act, on which reliance is placed on behalf of the appellant, provides that the permanent disability for the purpose of that section shall have the same meaning and extent as in the Workmen's Compensation Act, 1923. The said Act in turn refers to part II of schedule 1, annexed to the said Act. A bare perusal of part II of schedule I would show that it covers the cases of injuries to upper limbs (either arm) and other injuries, which involves loss of one eye, loss of vision, loss of partial vision or otherwise and loss of fingers/phalanges of the right or left hand and toes of right or left foot. The injury suffered by the appellant in this case does not fall in part II of schedule I. For this reason, reliance placed on behalf of the appellant on Section 163-A of the Act, to my mind is misplaced.

27. In the case of **Jagdish** (supra), the appellant/claimant was a carpenter, aged about 24 years, on the date of the accident and had suffered 90% permanent disability, as both his hands were not able to “perform any functions”. As noticed by the Tribunal, the case clearly turned on its own facts.

28. Thus, the appellant would be entitled to compensation as under:

1. Expenses on medical treatment	3,64,843
2. Travelling expenses (taxi charges)	5,000
3. Towards attendant charges	20,000
4. Pain and Suffering	50,000
5. Preventive treatment	25,000
6. Injury could lead to epilepsy	1,00,000
7. Loss of amenities/marriage prospects	1,50,000
Total Compensation	7,14,843

29. In the result, the following order is passed:-

FIRST APPEAL NO. 87/2018

- (i) First Appeal No. 87/2018 is partly allowed, with proportionate costs throughout.
- (ii) The impugned judgment and award of the Tribunal is modified.
- (iii) The appellant shall be entitled to compensation of Rs.6,86,766/-, jointly and severally against the respondents, alongwith interest at the rate of 9% per annum from the date of the petition, till realisation.
- (iv) The said compensation shall be inclusive of the compensation granted under no fault liability.

FIRST APPEAL NO. 94/2018

- (i) First Appeal No. 94/2018 is partly allowed, with proportionate costs throughout.
- (ii) The impugned judgment and award of the Tribunal is modified.
- (iii) The appellant shall be entitled to compensation of Rs.7,14,843/-, jointly and severally against the respondents, alongwith interest at the rate of 9% per annum from the date of the petition, till realisation.
- (iv) The said compensation shall be inclusive of the compensation granted under no fault liability.

30. Award be drawn accordingly.

C. V. BHADANG, J.

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