

IN THE HIGH COURT OF BOMBAY AT GOA

First Appeal No. 17 of 2010

Shri Gaston Tomica D'Silva
 Alias Gaston D'Silva
 aged 18 years,
 resident of H.No.451-A, Bellem,
 Navelim, Salcete, Goa. Appellant
 V/s.

- 1 Shri Noel Pinto,
 Son of Shri Gabriel Pinto,
 Major in age, age not known,
 Resident of House No.1164,
 Baradi, Betul- Goa.

- 2 Shri Fabio Alexinho Mascarenhas,
 Son of Caetano Mascarenhas,
 Major in age, age not known,
 Resident of Comba, Parricatto,
 Cuncolim, Salcete- Goa.

- 3 National Insurance Company Ltd.
 3rd floor, Unity Building, Annexe-
 72, Minion Road, Bangalore. Respondents

[In view of order dtd.20/10/2011
 passed by Id. Registrar(Judl) the
 appeal stands dismissed.]

[In view of order dtd.17/07/2015
 passed in MCA No.336/2015. The
 appeal stands restored.]

Mr. D. Vernekar, Advocate for the Appellant.

Mr. U.R. Timble with Mr. Viraj Timble, Advocates for the

respondent No.1.

Mr. M.S. Joshi, Advocate for the respondent No.2.

Coram :- SMT. M. S. JAWALKAR,J.

Reserved on : 27th November, 2020

Pronounced on: 4th December, 2020

JUDGMENT

Heard Mr. D. Vernekar, learned Advocate for the Appellant, Mr. U.R. Timble with Mr. Viraj Timble, learned Advocates for the respondent No.1 and Mr. M.S. Joshi, learned Advocate for the respondent No.2.

2. Present appeal is filed by the appellant being aggrieved by the Judgment and Award in Claim Petition No.314 of 2006 dated 30/11/2009. The appeal is filed for quashing and setting aside the judgment of the Claim's Tribunal and for the enhancement of compensation.

3. The Claimant's claim through his Guardian before the Claim Tribunal was as under :

On 14.05.2006, at about 7.40p.m, the claimant

alongwith his brother Shri Grayson D'Silva was coming to Margao from Navelim on Scooty bearing No.GA-02-N-2284, which was driven by said Shri Grayson and on which the claimant was pillion rider. The minibus bearing No.GA-02-T-4043, driven by the respondent No.1 in a rash and negligent manner, came from the opposite direction at a reckless speed and in the process of overtaking, dashed the Scooty, causing injuries to the claimant as well as brother. This accident occurred opposite Gomati Building at Navelim on the National Highway. The claimant and his brother were first brought to Hospicio Hospital and were then taken to Goa Medical College at Bambolim and the claimant remained in Goa Medical College for about fifty days and above and the right leg of the claimant was badly broken and the doctors could not rectify it by operation and hence the same was amputated. The claimant has stated that he was 14 years old student at the time of accident and is totally disabled person with full life ahead of him. The claimant has lost all his prospects in life and is also a dependent person and his education and right of lawful earning is totally jeopardized, the said minibus belonged to

the respondent No.2 and was insured with the respondent No.3 under Policy No.60200/31/05/630003100 valid from 04/10/2005 to 10/07/2006.

4. On all these counts, claimant claimed compensation to the tune of ₹25,00,000/-. He further submitted that the respondents were, jointly and severally, liable to pay the compensation to the claimant.

5. After considering the pleadings, issues were framed and the learned Tribunal awarded amount of ₹1,90,000/- along with interest at the rate of 9% per annum.

6. The learned Counsel for the appellant Mr. Vernekar submitted that the Judgment and Award is totally unjustified and erroneous. The learned Claim's Tribunal ought to have allowed the Claim Petition in terms of the compensation claimed by the appellant. The learned Tribunal misconstrued the evidence on record while holding that the appellant had failed to prove the breakup of the

compensation claimed. The learned Tribunal awarded only ₹25,000/- towards medical expenses whereas evidence on record shows that the claimant incurred an amount of ₹1,00,000/- towards medical expenses. It also misconstrued the provisions of The Motor Vehicles Act and Workmen's Compensation Act while awarding sum of ₹1,00,000/- for permanent disability. It has not properly appreciated the evidence on record. The mark list of the claimant of 9th standard is filed to show that due to accident he could not pass the examination of 9th standard. The learned Tribunal held that there is no evidence on record that the claimant thereafter could not pursue his studies and had to discontinue it forever. As per Doctor Salelkar the claimant as a young boy should not have any difficulty in his academic pursuits, on account of said permanent disability and accordingly, held that the claimant had party suffered.

7. The learned Counsel Mr. D. Vernekar for the appellant relied on **Kajal v/s. Jagdish and others** [(2020)4 SCC 413] in support of his contention that the claimant is entitled for the enhanced compensation. In

Kajal (supra) the Hon'ble Apex Court held that the victim is entitled to the compensation for (i) loss of earning (ii) medical expenses, transportation, special diet, attendant charges etc. (iii) loss or diminution to pleasures of life by loss of a particular part of body, and (iv) loss of future earning capacity. The damages pecuniary as well as non-pecuniary has to be assessed in Rupees and Paise, while it is impossible to equate human sufferings and personal deprivation without money. This citation is also relied for assessing the amount of compensation to be paid. It is submitted by the learned Counsel that the learned Tribunal failed to grant just compensation on the ground that the appellant can pursue his further studies and only on that ground just compensation cannot be denied specifically when there is a amputation of right leg causing permanent disability to the extent of 60%.

8. Learned Counsel Mr. Timble fairly conceded that the award can be enhanced but the same should be awarded as per the guiding principles laid down in **Master Mallikarjun v/s. Divisional Manager, The National**

Insurance Company Limited and Anr. [(2013) 10 Scale 668] of the Apex Court.

9. The learned Counsel for the appellant relying on judgment of **Kajal**(supra) submitted that the claimant is entitled on the line of the compensation awarded in Kajal's matter. It is true that the amount awarded is not just compensation, however, it also cannot be awarded as awarded in Kajal's matter. In the matter before Apex Court Kajal was a bright young girl. She used to attend school and lead normal life like any other child. In the accident she suffered serious injuries resulting in damage to her brain with serious consequences. Her disability has been assessed as 100%. It was also opined that her social age is only of 9 month of child. This means that Kajal while lying on the bed will grow up to be an adult with all the physical and biological attributes which a woman would get on attaining adulthood, including menstruation etc. but her mind will remain of a nine month old child. In such circumstances, some guiding principles laid down how does one assess compensation. The Hon'ble Apex Court also

referred **Raj Kumar v/s. Ajay Kumar and others** [2011 (1) All MR 402 SC], wherein the heads under which compensation is to be awarded in personal injury cases were given. Those were pecuniary damages which includes expenses relating to treatment, hospitalization, nourishing food and miscellaneous expenditure, loss of earning during the period of treatment, loss of future earning on account of permanent disability and future medical expenses. Under the head of non-pecuniary damages damages for pain, suffering and trauma as a consequence of the injuries, loss of amenities, loss of prospects of marriage and loss of expectation of life. In Kajal's matter also **Mallikarjun**(supra) is referred. However, there is no departure from the principles laid down in Mallikarjun's matter and it is observed that “*In **Mallikarjun V/s. Divisional Manager, The National Insurance Company Limited and Anr.**, this Court while dealing with the issue of awarding compensation under this head [pain and sufferings, loss of amenities] held that it should be at least ₹6,00,000/- if the disability is more than 90%. As far as the present case is concerned, in addition to the 100%*

physical disability the young girl is suffering from sever incontinence, she is suffering from sever hysteria and above all she is left with a brain of a nine-month-old child. This is a case where departure has to be made from the normal rule and pain and suffering suffered by this child is such that no amount of compensation can compensate..... Therefore, we feel in the peculiar facts and circumstances of the case even after taking a very conservative view of the matter an amount payable for the pain and suffering of this child should be at least ₹15,00,000/-."

10. The Hon'ble Apex Court confirmed the amount awarded towards loss of marriage prospects i.e. ₹3,00,000/-. Considering peculiar facts and circumstances amount towards future medical treatment is enhanced to ₹5,00,000/- from ₹2,00,000/-. The present matter cannot be equated with the Kajal's matter and even in Kajal's matter departure to the general rule laid down in **Mallikarjun**(supra) is because of peculiar facts and circumstances.

11. The learned Tribunal totally erred in holding that from the mark sheet it appears that he might have failed in 9th standard but there is no evidence to show that his future education was discontinued. It is nobody's case that his future education was discontinued but due to accident he lost crucial years of his education. Due to right leg amputation he cannot lead normal life like other children and just because no certificate of sports or other activities are produced that does not come in any way for awarding just compensation.

12. The learned Counsel for the respondent submitted that the disability of 60% is not the functional disability. Considering the age of child and right leg amputation, it would be proper to assess the disability between 30% to 60%. Accordingly, ₹4,00,000/- can be awarded towards pain and suffering. Therefore, I also feel that the compensation needs to be enhanced keeping in view the guidelines laid down in **Mallikarjun's**(supra) against the head of pain and suffering. This fact also cannot be overlooked that he lost his normal life and he cannot

enjoy the life as other children are enjoying. His marriage prospects are also hampered though he can pursue his further studies the mental depression and nervousness may definitely affect his studies. On considering his days of admission and further follow up he is also entitled for suitable traveling expenses, attendant charges and amount towards medical treatment.

13. I do not see any reason to interfere in the amount of compensation awarded under the head transportation and attendant charges. However, while granting undated bill there was no reason not to grant another bill of ₹20,000/- which is dated 04/06/2007. The Demand Draft of ₹20,000/- is dated 26/09/2007 mentioned in undated bill of ₹21,000/- (paid cash ₹1,000/- whereas the receipt of amount of ₹20,000/- shows that it was paid on 04/06/2007. It is settled principles of law that strict rules of evidence cannot be made applicable in claim petitions. Therefore, in my considered opinion amount in both the bills are required to be considered. While awarding medical expenses of ₹25,000/-, the learned Tribunal failed

to appreciate this fact that due to leg amputation the victim boy necessarily would required dressing of the said leg. As deposed by Aw1 one Dr. Hegde was doing dressing initially daily and thereafter alternate days. Just because the claimant failed to examine Dr. Hegde the Court / Tribunal has to carry out some guess work. Therefore, the learned Tribunal ought to have granted some amount incurred by the claimant on dressing and charges of the Doctor. In my considered opinion the amount of ₹40,000/- will be just towards medical expenses. In view of **Mallikarjun**(supra) there is percentage of disability more that 30% and less than 60% the amount of compensation towards pain and suffering, mental and physical shock, hardship, inconvenience, discomfort and loss of amenities in life on account of permanent disability etc. would be ₹4,00,000/-. It is admitted that the boy is of 15years of age, which is growing age and the measurements are definitely going to be changed during the passage of time. So definitely the artificial leg which he is using will require to be replaced in future. As such the claimant is also entitled for amount towards future medical expenses to the tune of ₹25,000/-.

Thus, in my considered opinion following amount of compensation would be just compensation in the present matter.

Towards pain and suffering, mental and physical shock, hardship, inconvenience, discomfort and loss of amenities in life on account of permanent disability etc.	₹4,00,000/-
Medical Bills, medical expenses (₹20,000/- + ₹21,000/- + ₹40,000/-	₹ 81000/-
Transportation	₹15,000/-
Attendant Charges	₹18,000/-
Future medical expenses	₹25,000/-
Total	₹ 5,39,000/-

Claimant is also entitled for interest @9% p.a. from the date of filing petition till its realisation.

14. Accordingly I proceed to pass the following order:-

O R D E R

1. The appeal is partly allowed.
2. The judgment and award passed in Claim Petition No.314 of 2006 dated 30/11/2009 passed by the Claims Tribunal, is hereby modified as under :

(i) Claim Petition is partly allowed with proportionate cost.

(ii) The respondents are jointly and severally liable to pay to the claimant amount of Rs.5,39,000/- (Rupees Five Lakh Thirty Nine Thousand only) (including amount awarded under Section 140 of the M.V.Act). The said amount will carry interest at the rate of 9%p.a. from the date of filing of the claim petition till its realisation.

(iii) Award be drawn accordingly.

3. If any amount is paid by the respondents as per award dated 30/11/2009 the respondents are entitled for adjustment.

4. The appeal stands disposed of accordingly.

SMT. M.S. JAWALKAR,J.