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IN THE HIGH COURT OF BOMBAY AT GOA

STAMP NUMBER (MAIN) NO.3580 OF 2017

AND

MISC. CIVIL APPLICATION NO.369 OF 2018

AND

STAMP NUMBER (APPLN) NO.1568 OF 2018

The United India Insurance Company
Limited, 24, White Road,
Chennai-600014 (T.N)
Through its Divisional Manager.

..Appellant/Applicant

Versus

1. Kimberlyn Joanna Stephanie Pereira,
Daughter of John Pereira,
20 years old, student, Represented
through her mother and next friend
Mrs. Andreza R. Pereira, Service, 44
years old, Both residents of H.No.3875,
'Little Angels', Opp. Shantilal Garage,
Fatorda, Salcete-Goa.

2. Appasaheb Balappa Naik,
Son of Balappa Naik,
Major in Age, Resident of Belgavi,
Hujjeri Taluka, District Belgaum, State
of Karnataka, (Driver of Truck No.
KA-22-B-9899)

3. Bharamanna G. Dongare,
Son of Ganapati Dongare,
Major in Age, Businessman,
Resident of 'Ganapati Krupa', 614/C/A,
E ward 1st lane, Shahupuri, Kolhapur,
State of Maharashtra.(Registered
Owner of Truck No. KA-22-B-9899)

...Respondents

Mr. Pavithran A.V., Advocate for the Appellant.
Mr. A.D. Bhobe with Ms. Kalpa Govekar, Advocate for Respondent No.1.

CORAM : M. S. SONAK, J.

Reserved on : 8th APRIL 2022
Pronounced on : 13th APRIL 2022

JUDGMENT :

1. Heard Mr. Pavithran, learned Counsel for the appellant/applicant, and Mr. A.D. Bhobe with Ms. Kalpa Govekar, learned Counsel for respondent no.1-claimant.

2. Civil Misc. Application No.369 of 2018 seeks a condonation of 246 days in instituting an appeal against judgment and award dated 17.12.2016 made by the Motor Accident Claims Tribunal, South Goa (Tribunal). Civil Misc. Application (Stamp No.) 1558 of 2019 seeks a stay on executing the impugned award.

3. In the above two Civil Misc. Applications, notices were issued on 02.05.2018. Almost four years were spent serving notices on the respondents, including, more particularly, the owner and the driver of the offending vehicle. There is an endorsement in the file that in terms of the order dated 28.08.2019, the driver and the owner were ultimately deleted

from the cause title as parties. Meanwhile, execution of the impugned award was stayed subject to deposit of the awarded amount.

4. By order dated 29.04.2019, the claimant Ms. Kimberlyn was permitted to withdraw 50% of the awarded amount. Several adjournments were applied and obtained by and on behalf of the appellant-Insurance Company. In paragraph 2 of the appeal memo dated 07.11.2017, there is a statement that the necessary statutory deposit of ₹25,000/- is made by a demand draft drawn in favor of the Registrar of Bombay High Court, Panaji-Goa. However, in the objections raised on the presentation form on 21.11.2017, there is an endorsement that no deposit was ever made, as mentioned in paragraph 2. There is no record of the clearance of this objection. Besides, there are objections about deficit court fees, no proper synopsis, etc. The Registrar took up the matter on 09.03.2018 and 13.04.2018, but there was no appearance on behalf of the appellant on both dates. All this has contributed to the delay in even taking up the application for condonation of delay in instituting the appeal.

5. All this inactivity is in a matter where Ms. Kimberlyn, all of 18 years, was hit by a rashly driven truck on 17.09.2010. As a result, she struggled for almost three years with the treatment to

save her life. She survived with 91.5% certified disabilities, which the medical evidence describes as a *vegetable state*. At least in this matter, greater sensitivity was expected and not a delay of 246 days in instituting the appeal followed by four years only to reach this stage seeking condonation. Of course, there is the usual and uninspiring explanation for the delay. But rather than prolong the matter, we all felt that an adjudication on merits at the earliest might promote the already delayed cause.

6. Though the reasons stated for the delay in the institution of this appeal are uninspiring, the delay is condoned because it is not worthwhile to prolong the matter any further on this count. The Insurance Company has simply blamed its advocate for not informing the head office about the impugned award. There is no affidavit of the advocate. There is no material evidencing any follow-up with the advocate. These are not "*unavoidable circumstances*" as pleaded by the appellant. The learned Counsel for the parties agreed that the delay could be condoned and the matter taken up for final disposal. Accordingly, delay is condoned and Misc. Civil Application No.369/2018 is disposed of.

7. On merits, Mr. Pavithran firstly submitted that the dependency compensation of ₹16,20,000/- worked out by the

Tribunal is contrary to the law laid down by the Hon'ble Supreme Court in *National Insurance Co. Ltd. V/s. Pranay Sethi*¹, because the Tribunal added 50% to the notional income of the deceased when in fact, the addition could have been only 40%. He secondly submitted that the award of ₹3,00,000/- towards future medical expenses is relatively high and must be scaled down appropriately. He thirdly submitted that the award of ₹3,00,000/- towards attendant fees is not proper because the claimant's mother is already awarded ₹2,52,600/- for staying with the claimant at home on leave without pay to attend to the claimant. He fourthly submitted that this is a case of overlapping and, therefore, compensation under one of the two heads must be deleted. He submitted that there was overlapping regarding loss of amenities & marriage prospects, where the Tribunal has awarded compensation of ₹4,00,000/- and towards loss of expectations in life, where the Tribunal has awarded compensation of ₹5,00,000/-. He finally submitted that the award of ₹3,00,000/- towards pain and suffering is also excessive. Mr. Pavithran submitted that the impugned award may be modified suitably for all these reasons.

8. Ms. Govekar not only defended the impugned award but submitted that additional compensation was payable. She pointed

¹ (2017) 16 SCC 680

out that Ms. Kimberlyn was reduced to a vegetable state on account of the accident and, therefore, the compensation awarded was inadequate. Accordingly, she urged dismissal of the appeal but after suitably enhancing the compensation amount.

9. The records and proceedings were called and perused. Though the learned Counsel for the parties agreed that the issue of quantum of compensation could be decided based on the reasoning reflected in the impugned award itself, learned Counsel were also allowed to refer to any material they desired on the aspect of quantum compensation. After hearing the Counsel, I reserved the order because I wished to assess the record entirely.

10. To appreciate the rival contentions on merits, the facts and circumstances borne out from the voluminous oral and documentary evidence on record have to be referred to. The appeal arises out of the Claim Petition No.21/2013 instituted by Ms. Kimberlyn, then about 20 years young.

11. Ms. Kimberlyn was traveling on 17.09.2010 along with her other family members in a Wagon-R bearing registration no.GA-08/E-3057 from Valankini to Goa. At Mangenkoppa, near Bhurunki Cross, on the Beedi-Alnawar road in Belgaum, Karnataka, the offending vehicle – a Tata truck bearing

registration no.KA-22/B-9899 rashly and negligently dashed the Wagon-R, causing severe injuries to its occupants. Ms. Kenosha and Mrs. Rosita succumbed to the injuries and died at the Government hospital at Khanapur. Ms. Kimberlyn struggled for life for almost three years and managed to survive with 91.5% disabilities. The medical evidence describes her present state as a *vegetable state*.

12. Ms. Kimberlyn's mother, Andreza (AW1), has deposed about the closed head injuries, fracture of the left frontal bone, and post-frontal dislocation of the right hip bone. She deposed that Ms. Kimberlyn was in a coma for three months and had to be nourished through Rylee's tube for almost ten months because she had difficulty even swallowing liquids. She deposed that even as of 23.04.2014, Ms. Kimberlyn was bedridden due to hip bone dislocation, inability to walk independently, and suffered from slurred speech, loss of memory, and, in her words, was *totally reduced to a vegetable shape from the status of a human being*.

13. Andreza also deposed that Ms. Kimberlyn was now totally dependent on others and *has no marital prospects, and her future is in total darkness*. She deposed in great detail the educational and extracurricular activities of Ms. Kimberlyn and produced documentary evidence in support. She deposed in great detail the

nature and length of the treatment at various hospitals in Bombay, Goa, and Karnataka and the expenses incurred. She produced voluminous documentary evidence in support of all this. She deposed of the attendant, who had to be engaged for Ms. Kimberlyn's specialized treatment. She deposed the travel expenses, medical expenses, etc., in great detail and backed all this with documentary evidence, which was not even challenged.

14. Andreza deposed that initially, the claim was for ₹30,00,000/- but after taking into account expenses incurred after the institution of the claim petition, the claim was enhanced to ₹50,00,000/-. She also produced bills, vouchers, invoices, airline tickets, etc., supporting the claims.

15. Andreza also produced on record certificates evidencing Ms. Kimberlyn's academic qualifications. Furthermore, she produced several certificates issued by Trinity Guild Hall, London evidencing the grades obtained by Ms. Kimberlyn in 'speech and drama.' In addition, she placed on record Ms. Kimberlyn's participation and merit certificate in such extracurricular activities.

16. Crystal Pereira (AW2), Ms. Kimberlyn's sister, also deposed in the matter. She was traveling along with Ms. Kimberlyn when

the accident took place. She is an eyewitness to this accident and has deposed about the rash and negligent manner in which the truck dashed the Wagon-R they were traveling in. In addition, she deposed about how Ms. Kimberlyn was injured and in a coma for almost three months. She also deposed Ms. Kimberlyn's health status. Again, there was no challenge whatsoever to her deposition.

17. Dr. Satendra Kumar (AW3), a Physiotherapist, deposed in the matter. He deposed that Ms. Kimberlyn could not stand or sit due to her injuries, the loss of sensation in her limbs, and reduced muscle power. He deposed about her seizure attack and how she had to be shifted to Bombay for further treatment and management. He also deposed to the fees received and receipts issued by him. Again there was no challenge to his deposition.

18. Melisa Dias (AW4), a Speech Therapist, deposed in the matter. She deposed to the treatment offered by her and the Aphasia and Dysphasia suffered by Ms. Kimberlyn. She spoke about Ms. Kimberlyn's blurred speech and memory deficit. She also deposed to the fees received and receipts issued by her. Again there was no challenge to her deposition.

19. Dr. Jorson F.N. D'Costa (AW5) is an important witness. He examined Ms. Kimberlyn for an assessment of her disability. This is what he stated on examination:-

"On examination she was found bound to the wheelchair and required assistance to all the day-to-day activities. She had recurrent uncontrolled seizures and had the following sequelae; (i) severe dysarthria (ii) right spastic haemiparesis. The MRI of the brain was done on 26.07.2013 showed the sequelae of post head injury. As per the examination her disability was assessed at 91.5% on account of the right spastic haemiparesis and severe dysarthria and recurrent uncontrolled seizures. The patient was earlier admitted in KLE Hospital, Belgaum as per the Discharge Summary given at the time of her initial examination. The Discharge Summary reflected that she had suffered a head injury due to a motor vehicular accident on 17.09.2010.

The CT scan of the brain showed left frontal extradural haematoma with fracture of the left frontal bone, bitemporal subarachnoid haemorrhage and multiple haemorrhagic contusions in both the frontal lobes. Her Glasgow Coma Scale at admission was 5/15 and she was operated for the same by the process of craniotomy. She was discharged from the hospital on 27.10.2010 and when her Glasgow Coma Scale at discharge was 9/15. The assessment of the disability has been done as per the Guidelines recommended by the Expert Group Meeting on Disability Evaluation in September 1981 at New Delhi. I identify the Disability Certificate X being that drawn by me under my signature at point A, now admitted in evidence and marked at Exh.76.

The patient has been following up treatment regularly every 3 months. There is no clarity in her speech. The patient requires assistance to stand up or sit down as also to walk. The patient was bedridden in 2010, and as of now her mobility is by using the wheelchair. The patient does not stand any chances of marriage with her condition."

20. Dr. Jorson D'Costa was not even cross-examined in the matter, and the Disability Certificate issued by him was accepted without challenge.

21. Another crucial witness is Dr. Abhishek Srivastava (AW6), Director, Physical Medicine & Rehabilitation Specialist in Neurological Rehabilitation. For almost seven years, he treated Ms. Kimberlyn at the Kokilaben Dhirubhai Ambani Hospital, Mumbai. This is what he deposed:-

"I am attached to Kokilaben Dhirubhai Ambani Hospital, Mumbai for the last seven years. I am Neurological Rehabilitation Specialist. I am also Director of Centre for Physical Medicines and Medical Rehabilitation. I am head in the Neurological Rehabilitation Department. My Unit comprises of 6 other doctors, 6 speech therapist, 18 occupational therapist, 45 physical therapist, 2 psychologists, 1 special educator. I first saw Kimberlyn Pereira on 02.08.2013. She had a head injury on 17.09.2010 alongwith right hip dislocation. The history given of the patient was a vehicular accident. She was unconscious and was

treated in Belgaum. She was seen by me 3 years thereafter. At that time, she had seizures, cognitive deficits, memory problem. She had difficulty in speaking, eye gaze paresis, severe spasticity in right upper limb and lower limb with weakness of all four limbs and difficulty in sitting, standing and walking and completely dependent on others for all aspects of self care and mobility. She was discharged on 07.08.2013. She was asked to come for follow-up after four months. She came for follow-up on 12.12.2013 and was discharged on 14.12.2013. Even at the time of second discharge, she had all earlier deficits. Her mobility had slightly improved. She could walk with the support of one or two persons. I am producing the two discharge summary reports dated 02.08.2013 and 12.12.2013. The same are marked as Exhs.80 Colly. At the time of discharge, the patient was issued 4 receipts. Shown to me now, the same are admitted in evidence and marked as Exh.81 colly.

The patient could have been transported to Mumbai only by private transport as it was difficult for her even to stand or sit and she had to be transported in a lying down position. I had last seen the patient on 04.06.2014. At that time the patient was suffering from epilepsy, seizures, spasticity. She had all the deficits described by me above. I also examined the patient today before coming to the Court. She continues to suffer with all the deficits which I have described above. She can move around only with support of one person. On her own, she is not in a position to move around."

- 22.** In his short cross-examination, this is what he stated :

"From 12.12.2013 till date, the only improvement in the patient is less frequency in seizures and she can be made to stand and walk with support of one person. The patient is on two medications for seizures. In case said medication is discontinued, she will get seizures everyday. The other medication is for spasticity. Most of the medicines prescribed by me remain the same till date. There is very minimal possibility of the patient improving from said deficits. Her speech can be now understood only by persons who are very close to her. Her short term memory is very less.

When the patient is admitted in the hospital, the medicines prescribed should be purchased from in hospital pharmacy."

23. The above evidence, on cumulative evaluation, establishes, without doubt, the essentials for the award of compensation to Ms. Kimberlyn. Mr. Pavithran, quite reasonably, did not contest this position but only urged that the quantum of compensation, as determined, was excessive.

24. Mr. Pavithran's first contention about adding 40% instead of 50% to the notional income deserves acceptance. Ms. Kimberlyn was admittedly a First-Year B.Com student, not actually employed. Her income was also computed on a notional basis. Therefore, following *Pranay Sethi (supra)*, the addition towards future prospects should have been 40% and not 50% as

determined by the Tribunal. With this addition, the loss of earnings due to the disabilities will come to ₹15,20,000/- and not ₹16,20,000/- as determined by the Tribunal. But this factor, though to be taken into account, will ultimately make no difference to the just compensation that Ms. Kimberlyn deserves in this matter for reasons discussed in the latter part of this judgment and order.

25. Mr. Pavithran's second contention about the award of ₹3,00,000/- towards future medical expenses being relatively high has no merit whatsoever. The record overwhelmingly bears out that Ms. Kimberlyn will require medical aid and assistance for the remainder of her life. The evidence of her mother, Andreza, and the medical or paramedical experts examined in this case support this position. Therefore, not only that this contention deserves rejection, but further, the amount of ₹3,00,000/- under this head warrants enhancement to ₹5,00,000/-. It is ordered accordingly.

26. On closer scrutiny, Mr. Pavithran's third contention about overlap, though attractive at the first blush, deserves to be rejected. There is clear evidence about the expenses incurred by the claimant towards attendant fees. Considering the medical evidence on record, an attendant was necessary to care for the claimant. This specialized care was not something that could have

been managed by her mother or her parents alone. In particular, her parents, including her mother, also had to devote her time, care, and attention full time. For this, the mother had to obtain leave without any pay. There is no challenge that the attendant was not, in fact, engaged. The evidence about leave without payment is also unimpeachable. Therefore, this is not a case of duplication or overlapping, but rather this is a case where awards have been made under two distinct and independent heads. There is convincing proof on record to sustain these claims to the extent indicated in the impugned award. Therefore, this contention of Mr. Pavithran will have to be rejected.

27. Mr. Pavithran's fourth contention concerns alleged overlapping of the compensation awarded for *loss of amenities & marriage prospects* and *loss of expectations in life*. The Tribunal has awarded compensation of ₹4,00,000/- for loss of amenities and marriage prospects and ₹5,00,000/- for loss of expectations in life.

28. Too pedantic an emphasis cannot be placed upon the expressions used in the impugned award. However, the substance of the award is important. The loss of amenities suffered and the resultant diminishing of marriage prospects is a distinct head that entitles Ms. Kimberlyn to suitable compensation. Further, the

injuries and the consequent disabilities have significantly impacted her life expectancy. Compensation is undoubtedly due to this distinct count as well. The compensation awarded against these two separate heads is less than the just compensation that Ms. Kimberlyn deserves.

29. The accident, let us hope and pray, has not crushed her spirit to live. Still, the accident has undoubtedly impacted her life and dreams. The accident has impacted the life and dreams of her parents as well. There is evidence that Ms. Kimberlyn was a good student. She was involved in Speech and Drama and had certificates from Trinity Guildhall, London, to prove this. The claimant has not only lost most of her amenities, but marriage prospects have also been rendered extremely remote. The accident is bound to impact her longevity and life itself, for which the compensation of ₹5,00,000/- has been awarded.

30. Based on the evidence on record, which was not even challenged, the compensation towards loss of amenities & marriage prospects of ₹4,00,000/- appears to be inadequate and not the just compensation under this head. The evidence shows that the accident has reduced Ms. Kimberlyn to a vegetative state. Moreover, Andreza and even other expert witnesses have deposed about extinguishing marriage prospects. Therefore, the

compensation under this head should be at least ₹6,00,000/- in this case.

31. The compensation of ₹5,00,000/- for loss of expectations in life is really compensation for the curtailment of the longevity of her life. Ms. Kimberlyn, in the ordinary course, had she not been so severely injured in the accident, would have looked forward to and hoped for a happy and long life. However, the accident and the resulting injuries have impacted this legitimate expectation. This is not a case of any overlapping as urged by Mr. Pavithran and, therefore, even his fourth contention will have to be rejected. The compensation of ₹5,00,000/- under this head is quite reasonable and warrants no interference.

32. Mr. Pavithran's final contention about the compensation of ₹3,00,000/- towards pain and suffering being excessive is also devoid of any merit whatsoever. As the medical evidence bears out, Ms. Kimberlyn was in a coma for three months due to the accident. For the next ten months, she could not even swallow liquids and had to be fed through Rylee's tube. Her hip bone was dislocated. She could not walk by herself or discharge the usual bodily functions without any help. She suffers from slurred speech and a loss of memory. There is no challenge to all this medical evidence assiduously collected and placed on record by

examining several doctors and experts. Based on all this, the award of only ₹3,00,000/- towards pain and suffering cannot represent just compensation that the Tribunal is expected to award in a matter of this nature. Therefore, even this amount will have to be enhanced to ₹6,00,000/-.

33. In this case, the Tribunal has awarded compensation of only ₹50,000/-towards traveling expenses. This is possibly because the claimant, before the amendment of the claim petition, had claimed ₹47,040/- towards transport charges. However, later on, with the leave of the Tribunal, the claim petition was amended to include additional compensation on account of the treatment that Ms. Kimberlyn was required to take at the Kokilaben Ambani Hospital in Mumbai and with the physiotherapists.

34. Towards traveling expenses, an additional claim of ₹1,61,176/- was made, and this was even backed by documentary evidence. There is a specific reference to this claim in the affidavit in chief tendered by Andreza (AW1). Again, there was no cross-examination on this aspect. The documentary evidence is in the form of invoices and receipts from M/s. Purushottam Bhagwan & Associates (travel agent), airline tickets, and even boarding passes. This documentary evidence is marked as Exhibit S colly. and is to be found on pages 539 to 609 of the records. There is no reason

why this amount of ₹1,61,176/- was not included under the head of travel expenses in the impugned award. Thus, towards traveling expenses, compensation of ₹2,11,176/- is due and payable and not just ₹50,000/- as awarded by the Tribunal.

35. Therefore, even after accepting Mr. Pavithran's first contention and reducing the compensation for loss of earnings due to permanent disability from ₹16,20,000/- to ₹15,20,000/-, the compensation, to qualify as *just compensation* will have to be reworked in the chart at paragraph 87 of the impugned award in the following manner:-

Sr. No.	Head of compensation	Amount
1.	Loss of earnings due to permanent disability	₹16,20,000/- ₹15,20,000/-
2.	Medical expenses	₹6,00,000/-
3.	Future medical expenses	₹3,00,000/- ₹5,00,000/-
4.	Travelling expenses	₹50,000/- ₹2,11,176/-
5.	Attendant fees	₹3,00,000/-
6.	Loss of amenities and marriage prospects	₹4,00,000/- ₹6,00,000/-
7.	Loss of expectation in life	₹5,00,000/-
8.	Pain and sufferings	₹3,00,000/- ₹6,00,000/-
9.	Loss of salary of mother	₹2,52,600/-
	Total	₹43,22,600/- ₹50,83,776/-

36. In *New India Assurance Co. Ltd. V/s. Smt. Seema Auti & Ors. (First Appeal No.1991/2011)* decided on 09.06.2017 by me at the Aurangabad Bench and in *Kadamba Transport Corporation Ltd. V/s. Smt. Akshata Sawant & Ors. (First Appeal No.110/2015)* decided by me at Goa, it is held that the appellate Court can determine the just compensation and award the same to a claimant even in the absence of any cross-appeal or cross-objection by such claimant. In *Surekha and Ors. V/s. Santosh and Ors.*², the Hon'ble Supreme Court has held that it is well settled that in the matter of insurance claim compensation about the motor accidents, the Court should not take a hyper-technical approach and ensure that just compensation is awarded to the affected persons or the claimants even though such claimants may not institute any cross-appeal or cross-objections. Even otherwise, it is well settled that the Tribunals and the Appellate Court have to determine just compensation irrespective of the computation by the claimants themselves.

37. Therefore, in this case, even after partially accepting some of the contentions of Mr. Pavithran and reducing the compensation under one of the heads and enhancing the compensation under some others, just compensation will have to be determined at ₹50,83,776/-. Therefore, the same is determined accordingly.

38. Accordingly, this appeal is disposed of by determining and awarding just compensation of ₹50,83,776/- to the claimant, Ms. Kimberlyn. The impugned award is modified to this extent only.

39. Ms. Kimberlyn will now be entitled to withdraw the balance compensation together with the interest that has accrued thereon from the Registry where the appellant-Insurance Company has deposited this amount. However, her legal guardian will have to furnish identification and bank details so that the Registry can remit the amount into her bank account.

40. The appellant-Insurance Company is directed to deposit the enhanced component within two months from today in this Court-Registry after due intimation to the learned Counsel for the claimant. Thereafter, withdrawal is permitted subject to the same conditions set out in the previous paragraph.

41. The misc. applications are disposed of as indicated above or as not surviving the disposal of the main appeal. The appeal and misc. applications therein are disposed of without any order for costs.

M. S. SONAK, J.

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42. At this stage, Mr. Pavithran A.V. seeks for a stay on the execution of this order. Already we have granted the appellant two months time to deposit the excess compensation. Further, considering the gross facts and circumstances of this case, we do not think that it will be proper to restrain the claimant from withdrawing the balance compensation already deposited in this Court. Accordingly, the request is declined.

M. S. SONAK, J.

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