

(2022) 04 BOM CK 0054

Bombay High Court (Goa Bench)

Case No: Stamp Number (Main) No.3580 Of 2017, 1568 Of 2018, Miscellaneous Civil
Application No.369 Of 2018

United India
Insurance Company

APPELLANT

Vs

Kimberlyn Joanna
Stephanie Pereira And
Others

RESPONDENT

Date of Decision: April 13, 2022

Hon'ble Judges: M. S. Sonak, J

Bench: Single Bench

Advocate: Pavithran A.V, A.D. Bhobe, Kalpa Govekar

Final Decision: Dismissed

Judgement

”

M. S. Sonak, J",,,

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 Rs.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 Rs.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 (2017) 16 SCC 680, 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 Rs.3,00,000/-",,

towards future medical expenses is relatively high and must be scaled down appropriately. He thirdly submitted that the award of Rs.3,00,000/-",,

towards attendant fees is not proper because the claimant's mother is already awarded Rs.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 Rs.4,00,000/- and towards loss of expectations in life, where the Tribunal has awarded compensation of Rs.5,00,000/-. He finally",,

submitted that the award of Rs.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 out that Ms. Kimberly,,

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 Rs.30,00,000/- but after taking into account expenses incurred after the institution of the claim",,,

petition, the claim was enhanced to Rs.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. He,,

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.",,

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.,Traveling 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,"₹43,2,60/-

₹50,83,76/-