



GAHC010106582018

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THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : MACApp./539/2018

MISS RUSHI @ RUCHI THAPA
D/O. SRI DHAN BAHADUR THAPA, VILL. URAL KAILASHPUR, P.S.
SONAPUR, DIST. KAMRUP (M), ASSAM, REP. BY HER FATHER SRI DHAN
BAHADUR THAPA

VERSUS

M/S ORIENTAL INSURANCE CO. LTD AND 2 ORS
REGIONAL OFFICE, ULUBARI, GUWAHATI-781007, DIST. KAMRUP (M),
ASSAM.

2:SRI PUSPADHAR DAS

S/O. LT. PRAHLAD CH. DAS
R/O. URAL
P.S. SONAPUR
DIST. KAMRUP (M)
ASSAM

3:SRI DIPJYOTI BORDOLOI

S/O. SRI MRIGEN BORDOLOI
R/O. ITAPARA
P.S. AND DIST. NAGAON
PIN-782002 (DRIVER OF THE VEHICLE NO. AS 01/CC-334

Advocate for the Petitioner : MR. T J MAHANTA

Advocate for the Respondent : MR S DUTTA (R1)

BEFORE
THE HON'BLE MR JUSTICE ARUN DEV CHOUDHURY

For the Appellant : Ms. P Bhattacharya, Advocate

For the Respondents : Ms. M Choudhury, Advocate
Mr. B Bora, Advocate

Date of Hearing : 07.12.2022, 14.12.2022, 09.01.2023

Date of Judgement : 20.02.2023

JUDGEMENT & ORDER (CAV)

1. Heard Ms. P Bhattacharya, learned counsel for the appellant. Also heard Ms. M Choudhury, learned counsel for the respondent No. 1 Insurance Company and Mr. B Borah, learned counsel for the respondent Nos. 2 and 3.
2. The present appeal is preferred by the claimant against the judgment and award dated 23.02.2018 passed in MAC Case No. 1431/2014 being aggrieved by the quantum of award. The Insurance Company has not preferred any appeal against the aforesaid judgment nor any cross-objection has been filed in the present proceeding.
3. **The brief facts, which are necessary for determination of the present appeal can be summarized as follows:**
 - I. The claimant, Dhan Bahadur Thapa, who is the father of the

injured victim, filed the claim petition on account of injury sustained by his minor daughter, Rushi Thapa in a road transport accident occurred on 13.04.2013 at about 10 a.m. due to rash and negligent driving of the driver of a Maxx Pick Up Van bearing registration No. As-01 CC-3349.

- II. The owner of the vehicle i.e. OP No. 2 contested the claim by filing written statement and claimed that the vehicle was duly insured with the respondent No. 1 Insurance Company and was driven by a driver having valid driving license.
- III. However, it is disputed by the said opposite party that occurrence took place due to rash and negligent driving of the driver.
- IV. The driver also took the similar stand before the learned Tribunal by filing written statement.
- V. The claimant examined two witnesses, including the doctor, who issued the disability certificate in respect of the injured and exhibited the disability certificate.
- VI. The Insurance Company adduced two witnesses. However, the owner and driver though filed written statement had not laid any evidence to prove their pleadings.
- VII. Thereafter, the learned Tribunal held that the daughter of the claimant sustained injuries in the alleged accident dated 13.04.2013 involving vehicle No. As-01 CC-3349 and the accident took place due to rash and negligent driving of the driver of the offending vehicle.
- VIII. Thereafter, the learned court below while dealing with the quantum of compensation held that the injured sustained disability

to the extent of 50% for her whole life and awarded the following amount compensation:

4. Submission on behalf of the appellant:

Ms. P Bhattacharya, the learned counsel for the appellant contends that:

- I. The Doctor, who examined the status of disability of the injured and issued the certificate was duly examined and the disability certificate was duly proved.
- II. The said disability certificate discloses that the injured suffered 75 % permanent physical impairment in relation to her left upper and lower limb and the said signatory had duly deposed before the Tribunal and exhibited the certificate as well as the signature. Her evidence remained unshaken.
- III. Therefore, the learned Tribunal ought not to have discarded the concluded 75 % permanent physical impairment in relation to her left upper and lower limb only on the ground that during the cross-examination, the said doctor had deposed that there is possibility of developing her condition provided undergoing vigorous physiotherapy and accordingly, ought not have reduced the disability. The said doctor is not an expert to suggest about physiotherapy and she came to the witness box only to prove the certificate issued by her and her signature. Therefore, such fact ought to have been ignored by the learned court below inasmuch as such deposition is having no relevant to the determination of the disability.
- IV. Ms. Bhattacharya further submits that the learned court below

has also failed to consider the future prospect of the victim as she became permanently disabled inasmuch as in view of the settled proposition of law, the notional income ought to have been considered by the learned Tribunal below and therefore the appellant is entitled for further amount on account of future prospect and more amount against her pain and suffering as she had to become bed ridden till date and she is a minor child.

V. She further contends that the court without any basis and without giving any reason has presumed that disability should be treated as 50%, which is not permitted under law.

VI. In support of contention, she relies on the decision of the Hon'ble Apex court in the case of ***V Mekala Vs M Malathi and Anr*** reported in ***(2014) 11 SCC 178*** and ***Ayush Vs Reliance General Insurance Company Ltd. reported in (2022) 7 SCC 738.***

5. **Submission on behalf of respondent No. 1:**

Per contra Ms. M Choudhury, learned counsel appearing for the insurance company argues the followings:

I. It is settled proposition of law that the court should not straight way believe the certificate of disability issued by a doctor, who had not treated the patient and admittedly the PW2 did not treat the injured victim and therefore, the learned Tribunal below has rightly taken the disability to be 50%.

II. She further contends that the disability relates to left upper and lower limb and such disability cannot be considered to be functional

disability of the body nor could it be assumed to result in a corresponding loss of earning capacity. Therefore, the learned Tribunal below has rightly not granted any amount against loss of income inasmuch as she was a minor at that point of time.

III. In support of such contention, she relies on the judgment of Hon'ble Apex Court in case of ***Rajkumar Vs. Ajay Kumar and Anr*** reported in ***(2011) 1 SCC 343*** and also relies the judgment of this court in the case of MAC App 187/2013.

6. Mr. Borah, learned counsel appearing for the owner submits that his client has been brought into as a formal party only and the learned Tribunal has held that the driver was having a valid driving license and the vehicle was also insured at that point of time and the insurance has also not challenged the validity of the driving license of the driver or any violation of the policy condition. Therefore, he will refrain from advancing any argument in favour of either of the parties.

7. This court has given anxious consideration to the submissions made by the parties.

8. **Proposition of Law:**

A. The Hon'ble Apex Court in the case of ***Ayush(supra)***, while dealing with an issue of granting compensation for future loss of income in cases of permanent disablement incurred as a result of motor accident, held that there is no justification to read the decision of ***National Insurance Company Limited Vs Pranay Sethi and Others*** reported in ***(2017) 16 SCC 680*** to exclude the possibility of compensation for future prospect in cases of accidents involving serious

injuries resulting in permanent disablement.

- B. The Hon'ble Apex Court further held that the Court should not adopt a stereotype or myopic approach but instead view the matter taking into account the realities of life, both in assessment of the extent of disabilities, and compensation under various heads. It was also held that a serious injury not only permanently imposes physical limitations and disabilities but too often inflicts deep mental and emotional scars upon the victim. The attendant trauma of victim has to leave in a world entirely different from one she or he is born into, as an invalid and with degree of dependants on others, rope of complete personal choice or autonomy, should forever be in judge's mind, whenever tasked to adjudicate compensation claim. The Court further went to held that severe limitations inflicted due to such injuries undermine the dignity (which is now recognized as an intrinsic component of Right to Life under Article 21) of the individual, thus depriving the person of the essence of right to a wholesome, life which she or he had lived, hitherto.
- C. The Hon'ble Apex court in the case of ***MallikarjunVs Divisional Manager, National Insurance Company Limited and Another*** reported in ***(2014) 14 SCC 396*** dealing with an issue of just and fair compensation for 12 years old child suffering disability, relying on certain earlier decisions of the Hon'ble Apex Court, held that a child cannot be equated with a non earning person and compensation is required to be worked out under the non-pecuniary heads in addition to the actual amounts incurred for treatment done and or to be done, transportation, assistance of attendant etc. It is further held that the

main elements in payment of damages in case of child victims are the pain, shock, frustration, deprivation of ordinary pleasure and enjoyment associated with healthy life.

- D. In case of ***Kajal Vs Jagdish Chand and Others*** reported in **(2020) 4 SCC 413**, the Hon'ble Apex Court while dealing with grant of just compensation to a minor girl child of 12 years held that such claimants are entitled to compensation for loss of earnings, medical expenses, transportation, special diet, attendant charges, loss of diminution to pleasures of life by loss of a particular part of body and loss of future earning capacity.
- E. The Hon'ble Apex court further went to held that court has to make a judicious attempt in such cases to award damages or to compensate claimant for loss suffered by victim and such determination should not be assessed very conservatively and also not so liberally so as to make it a bounty to the claimant, keeping in mind the degree of deprivation and loss caused by such deprivation which can be termed as just compensation.

9. **Evidence in the present case:**

- A. **The disability certificate**, which was exhibited during the trial discloses that the victim child was diagnosed with severe left sided hemiparesis, post head injury and she has suffered 75% permanent physical impairment in relation to her left and lower limb. The said exhibit was signed by PW2 as the signatory of the notified Medical Authority. During her examination in chief, said doctor deposed that the victim patient has been rated as case of severe nature and at the time

of examination of the victim child, her movement was found restricted because of the injury in head. She also deposed that the diagnosis was done by the Board of which she was the signatory. Such deposition is consistent with the diagnosis, that has been done in the hospital, where the child was hospitalized and treated.

B. The father of the victim examined himself as PW1 and exhibited as many as 7 documents, which includes advice slip of National Health Rural Mission (Ext 2), OPD sheet of Down Town Hospital (Ext 3) and Ext 4 is the discharge certificate and slip, Ext 5 (1) to Ext 528 are medical prescriptions and reports. During the cross-examination, said witness was examined by the Insurance Company, who basically cross-examined the witnesses as regards his entitlement of medical reimbursement of the victim, he being a Central Government Employee. The company also tried to bring a dispute as regard the academic career of the victim and suggested that she is not a brilliant student as claimed. No cross-examination was done on the severity of the injury and its impact upon the life of the injured victim. Further, no dispute was raised as regards the exhibits relating to hospitalization findings of the doctors etc.

C. This court has perused the medical document exhibited in original. The genuineness and veracity of such documents are not put to any question or doubt.

Ext 4(1) is the discharge certificate issued by Down Town Hospital, which goes to show that the patient was admitted on 13.04.2013 following head injury (brain stem injury) in a road traffic accident. She was admitted in the ICU and was intubated, connected to ventilator on

15.04.2013. Tracheostomy was done on 21.05.2013. She was receiving chest & limb physiotherapy and was having ryles tube feeding and she was out of tracheostomy tube since 07.06.2013.

On the date of the discharge, the patient was in ICU. She was having left sided hemiparesis and was having persistent tachycardia.

The Ext 4(4) is another hospital discharge slip of 151 Base Hospital, issued by one Colonel P Guha, who is Senior Registrar & OC Tps. The discharge report reveals that after the accident on 13.04.2013, the victim was treated in civil hospital conservatively on ventilatory support, tracheostomy and RT feeding. Tracheostomy closure was done on 07.06.2013.

Said discharge report reveals that the patient was hospitalized on 11.06.2013 and discharged on 02.07.2013. The said discharge report further discloses that she is in a bed ridden state with absence of cognitive functions with left hemiparesis. The MRI brain discloses diffuse ischaemic injury Grade III in the right frontal head. The said discharge report further discloses that she requires domiciliary care in the form of feeding, physiotherapy, nursing care of bed-ridden patient.

It was a further finding that the patient was suffering from severe head injury with left hemiparesis.

- D. **Ext 6 is the School Report Book** of the victim issued by Kendriya Vidyalaya Air Force Station, Digaru in respect of the victim for the session 2012-13 and has been issued by the Principal. Such document produced before the Tribunal has not been questioned during the cross-examination.

The said report discloses that the child was granted Grade A in Literary and Creative Skills. It further discloses that the victim used to write short stories and literary criticism, participates in literary and creative activities at all levels, plans and organizes literary events, reads books and shows a high degree of awareness and appreciates well written or spoken pieces of prose, poetry and expresses ideas and opinions creatively.

Against scientific skills she was given Grade A. So far relating to scientific skills, she verifies existing knowledge before accepting, finds new and more effective solutions to problems, takes initiative to plan, organize and evaluate various scientific related events and makes use of technology projects and models.

In relation to her activity (health and education), she was granted A and it was described that she demonstrates physical fitness and agility, displays courage and determination, demonstrates sportsmanship, follows rules of the games, organizes and provides leadership in this area and also takes initiative and interest in Physical Education and Wellness.

The report further reveals that her goal was to become a doctor, her strength was sincerity, her interest and hobby was dancing and she discharges the responsibilities of school assembly.

Though the author of the aforesaid documents i.e. the Principal of the school and the doctors, who issued the discharge certificate were not brought to the witness box, however, at the same time it is also crystal clear that the Insurance Company has not doubted any of the aforesaid

documents except making a suggestion that the victim was not brilliant as claimed.

- E. This court after perusal of the documents, which were exhibited in original also of the view that there is no doubt that the said document has been issued by the authority of the hospital and the school inasmuch as in a summary procedure like the present and dealing with a proceeding under a beneficial piece of legislation and in absence of any doubt being raised as to the genuineness of those documents exhibited or as to the seriousness of the injury, this court will not disbelieve such documents.

10. Determination:

- A. In the aforesaid backdrop, more particularly in view of the fact that the victim was examined by a Board duly constituted and the PW2 is only the authorized signatory on behalf of such Board, the contention of Ms. Choudhury, learned counsel appearing for the Insurance Company that such certificate should not be believed as the doctor who treated the patient has not issued the certificate, is rejected.
- B. In view of the discussions made hereinabove, this court is of the considered opinion that the learned Tribunal also committed an error holding the disability to be 50% only on the basis of mere statement of the doctor to a possibility of development of her condition provided undergoing vigorous physiotherapy inasmuch as it cannot be said that it has been established that the disability was up to 50% and not to 75% as certified by the Board. Further the learned Tribunal below has also failed to consider the other medical documents and finding of

doctors as discussed hereinabove which corroborates the permanent disablement of the victim.

- C. The learned Tribunal has also failed to consider in proper prospective grant of non-pecuniary damages such as against pain, suffering and trauma as consequences of the injuries inasmuch as a 12 years child became permanently disabled to the extent of 75% for which she will be deprived of her life, she shall also be deprived of amenities and there will be also loss of prospect of marriage, loss of expectation of life etc.
- D. Considering the age of the claimant, the nature of injuries and the extent of permanent disablement suffered by her, it is obvious that the child victim has suffered immense physical pain and mental suffering during the period she remained hospitalized. The established fact that permanent disability to the extent of 75% in relation to her left upper and lower limb bound to affect not only her day to day movement, same is going to adversely impact upon her studies as well as her marriage prospect. For such disability, she would remain crippled. Her academic career also reveals that she had not only a brilliant academic career but she was also very good in literary skill as well as sport skills, however, due to the accident, now she cannot have her life, that she enjoyed before the accident inasmuch as her studies are being hampered. Therefore, in view of the settled proposition of law, as discussed hereinabove, this court is of the considered opinion that the learned Tribunal below has failed to award just compensation and failed to award the compensation against non-pecuniary damages as well as failed to grant a notional income for determination of future prospect.

- E. The Hon'ble Apex Court in ***Ayush Vs. Reliance General Insurance Company Ltd. reported in (2022) 7 SCC 738*** while dealing with an injury of five years old victim in a road accident relying on the judgment of ***Kajal (supra)*** determined notional income on the basis of notification issued by the State of Karnataka under the Minimum Wages Act and held that compensation is to be assessed on the basis of Minimum Wages on assumption that the victim would have been able to earn after attaining majority.
- F. At the relevant point of time, the minimum wages under the Minimum Wages Act, the State of Assam had notified the minimum wages of an unskilled labour to be Rs. 169 per day and therefore the monthly income of an unskilled labour will be Rs. 5,070/-.

This court following the principle laid down in ***Ayush (supra)*** and ***Kajal (supra)*** assumes that in worst case scenario, even ignoring the very good academic career of the victim, the victim would have been able to earn minimum wages of an unskilled labour. It is well settled that determination of loss of earning capacity is something where certain guess work is necessary to assess. In the case in hand, it has been established that the victim is suffering permanent disability to the extent of 75% and such disability is the result of head injury and therefore, there shall hardly be any scope for the girl to earn anything by gainful employment. As this is case of permanent disablement, the multiplier is determined as per the scheduled corresponding to the age of the victim which comes to 15 as has been done in ***Ayush (supra)***.

11. **The award:**

Therefore, in the aforesaid established fact and taking note of the settled proposition of law as enumerated in ***Kajal (supra), V Mekala (supra), KumariKiran (supra)*** and ***Ayush (supra)***, this court is of the considered opinion that, in the given fact and circumstances of the case the following shall be a just compensation and accordingly modifies the award in term of the following:

SL No.	Heads	Amount
1.	Medical and Incidental Expenses	Rs. 84,771/-
2.	Pain, Suffering, Loss of Amenities	Rs. 3,00,000/-
3.	Loss of Marriage Prospect	Rs. 3,00,000/-
4.	Future Medical Treatment	Rs. 3,00,000/-
5.	Loss of Future Earning (income x multiplier) (Rs.5070X12X15)	Rs. 9,12,600/-
Total		Rs. 18,97,371/-

12. As the appellant is a minor, an amount of Rs. 5,59,771/- would be disbursed to the father of the appellant and rest of the amount be invested in one or more fixed deposit as to attract maximum rate of interest. The interest be paid to the father of the appellant every month. It will be open for the father/ guardian of the appellant to seek withdrawal of any amount before the learned Tribunal below if any expenses is required for major medical expenses of the victim. The interest awarded by the learned Tribunal below is not interfered.

13. Accordingly, this appeal stands disposed of in the aforesaid



terms.

14. Send back the LCRs.

JUDGE

Comparing Assistant