

**HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR**

**Mac App No. 71/2021
c/w Mac App No. 69/2021**

Reserved On: 25th August 2023
Pronounced on: 1st September 2023

- 1. National Insurance Company Ltd. Divisional
Manager, Srinagar.**
- 2. Branch Manager, National Insurance Company
Limited Branch office Bari Brahman Jammu,
Through their Administrative Officer Law,
Mr. Kumail Murtaza (Aged: 33 years)**

..... Appellant(s)

Through: Ms. Izzat Fatima, Advocate vice
Mr. Nissar A. Dendru, Advocate.

V/s

- 1. Attiqa Bano D/o Abdul Gaffar Wani,
R/o Tregam Tehsil and District Kupwara.
At present Batmaloo, Srinagar.**
- 2. Nazir Ahmad Malik S/o Subhan Malik
R/o Shumnag, Kupwara**
- 3. M/S Surrinder Singh Company,
Digiana Camp, Jammu.**

.....Respondent(s)

Through: Mr. A.A. Wani, Advocate for R-1.
Mr. M.A. Thakur, Advocate for R-3.

AND

**Attiqa Bano D/o Abdul Gaffar Wani,
R/o Tregam Tehsil and District Kupwara.
At present Batmaloo, Srinagar**

..... Appellant(s)

Through: Mr. A.A. Wani, Advocate.

V/s

1. **Nazir Ahmad Malik S/o Subhan Malik
R/o Shumnag, Kupwara (Driver)**
2. **M/S Surrinder Singh Co.
(Owner Veh. No. 8295-JK02)
R/o Digiana Camp, Jammu.**
3. **National Insurance Company through its
Divisional Manager, Srinagar.**
4. **Branch Manager,
Branch Office National Insurance Company
Bari Brahmana, Jammu.**

.....Respondent(s)

Through: Mr. M.A. Thakur, Advocate for R-2.
Ms. Izzat Fatima, Advocate vice
Mr. Nisar A. Dendru for R-3 and 4.

CORAM:

HON'BLE MR. JUSTICE RAJESH SEKHRI, JUDGE.

JUDGMENT

1. Since both the cross appeals, aforesaid trace the genesis to same motor vehicular accident, therefore, they are being disposed of by virtue of this common judgment.

2. Challenge in these appeals has been thrown to an award dated 30.11.2019, passed by learned Motor Accident Claims Tribunal, Kupwara ("Tribunal", for short) in claim petition titled 'Attika Bano vs

Nazir Ahmad Malik & Ors’, vide which, the Appellant-Insurance Company has been saddled with liability to pay compensation in the amount of Rs. 5,45,600/- with interest @ 7.5% per annum from the date of filing of the petition.

3. Before the grounds urged in the appeals are adverted to, it shall be apt to have a closer look at the background facts of the case.

4. On 20.10.2006, the appellant (in Mac App No. 69/2021, hereinafter referred to as the “claimant”), a girl student of 28 years of age, on the National Highway at Trehgam Bazar near Ziyarat, Pangar Baba Sahib, was hit by a tanker bearing Registration No. 8295/JK02, being driven by its driver, namely, Nazir Ahmad Malik, as a result whereof, she sustained grievous injuries, resulting in the fracture of her right leg and foot. A claim petition came to be preferred, by the claimant, in terms of Section 166 of Motor Vehicles Act (MVA), before learned Tribunal, *inter alia* on the grounds that as a result of accident, she was permanently disabled. It was averred that besides helping in the household work, she was pursuing higher studies after qualifying graduation. The injured was stated to be shifted to Bone & Joint Hospital, Srinagar, where she was admitted for a couple of days. The accident was registered with Police Station Trehgam in the shape of FIR No.133/2006 under Sections 279/337 RPC.

5. The owner of the offending vehicle, M/S Surinder Singh Company, did not choose to appear before the Tribunal and was proceeded ex-parte. The claim was resisted by rest of the respondents including the driver and the Insurance Company. However, after filing their respective objections to the claim petition, they also chose not to contest the claim petition and were proceeded ex-parte.

6. The Appellant-Insurance Company had resisted the claim on the predominant premise that driver of the offending vehicle, at the time of accident, was not holding a valid driving license and the offending vehicle was being plied in breach of terms and conditions of the insurance policy. On the other hand, the respondent-Driver has contended that he was holding a valid driving license at the time of accident and that he has been acquitted of the charges, in the criminal case, by the competent court of law. Since all the respondents had been set ex-parte, the claimant was called upon to produce evidence in support of the petition. The claimant besides appearing herself, examined PWs Abdul Gaffar Wani and Dr. Abdul Khaliq Sheikh, Consultant Surgeon in support of the claim petition.

7. The claimant testified in her statement that she sustained serious injuries in the accident caused by the offending vehicle on 20.10.2006, which was being driven by respondent-Driver. She was

shifted to Trehgam Hopital and later to Kupwara hospital, wherefrom, she was referred to Bone & Joint Hospital, Srinagar for treatment. She remained admitted for 4/5 days in the said hospital and spent around Rs. 1,00,000/- on her treatment. She was 22 years of age at the time of accident and sustained 50% disability. She also stated that she was studying but her study was affected due to accident. PW-Abdul Gaffar Wani also toed the same line by stating that claimant sustained 50% disability, incurred Rs. 1,00,000/- on her treatment and she was 22 years of age. He also stated that right leg and foot of the claimant was fractured in the accident. PW-Abdul Khaliq Sheikh, Consultant Surgeon, has admitted the disability certificate issued by him and deposed that disability of 50% mentioned in the first disability certificate dated 12.02.2007, had gone down to 40%, which was reflected in the subsequent disability certificate issued by him on 28.02.2008. He has also speculated the expenditure on surgery and drugs etc. at Rs. 1, 00,000/-.

8. Learned Tribunal after analysing the evidence led by the claimant, has allowed the claim petition and awarded the compensation mentioned at the outset.

9. It needs a specific mention, before merits of the appeals are adverted to, that Appellant-Insurance Company had filed a petition

before the Tribunal for setting aside of the ex-parte award *inter alia* on the grounds that due to clampdown of communication and internet in the Kashmir valley post 5th August 2019 and due to strikes and protests of transport and markets, the Appellant- Company could not establish contact with its counsel, nor its counsel apprised it about the daily status of the case, therefore, it was prevented by sufficient reason to contest the claim petition. However, learned Tribunal vide order dated 24th September 2021, rejected the contention of the Appellant-Insurance Company and dismissed the petition for setting aside the ex-parte award.

10. The Appellant-Insurance Company has assailed the impugned award in the present appeal, on the similar grounds that claim petition could not be contested by the Company due to negligence of its counsel, and that driver of the offending vehicle was not holding a valid driving license. The Appellant-Insurance Company has also assailed the impugned award on the ground that same being exorbitant, is required to be set-aside.

11. The claimant, on the other hand, has also preferred a cross appeal for enhancement of the compensation *inter alia* on the grounds that monthly income of the claimant taken by the Tribunal as Rs. 4000/- is on the lower side, which is required to be raised to Rs. 5000 to 6000, rate of interest applicable is 9% instead of 7.5% adopted by the Tribunal

and learned Tribunal has not granted any compensation for the attendant.

12. Having heard rival contentions of the parties and perused the record, I have given my thoughtful consideration to the facts emerging from the record as also the law governing the field.

13. While learned counsels for the Appellant-Insurance Company as also the Appellant-Claimant have reiterated their respective grounds urged in the memo of appeals, learned counsel for the Appellant-Claimant has relied upon **Oriental Insurance Company Ltd vs. Tauseef Ahmad Dar & Ors** reported as [2021 (2) SLJ 764]; **National Insurance Company Limited vs Tsewang Namgyal & Ors** reported as [2021 (1) SLJ 317]; and **Pappu Deo Yadav vs. Naresh Kumar & Ors** reported as **AIR Online 2020 SC 733**.

14. There is no dispute to the admitted position of fact on the record that claimant-Ateeqa Bano suffered *fracture of right leg and foot* in a motor vehicle accident on 20th June 2006 caused by a tanker bearing Registration No. 8295/JK02, being driven by the respondent-Driver. The offending vehicle at the time of accident was insured with the Appellant-Insurance Company and it was owned by M/S Surinder Singh Company, Digiana Jammu. The Appellant-Insurance Company has

questioned the impugned award primarily on the ground that it was prevented by sufficient cause, on account of disturbance in the valley in the aftermath of abrogation of Article 370 of Constitution of India on 5th August 2019. As already stated, the petition filed by the Appellant-Insurance Company for setting aside of the ex-parte award on similar grounds, has already been rejected by learned Tribunal by virtue of a well-reasoned order dated 24th September 2021. Learned Tribunal has observed in the said order that while learned counsel for the claimant continuously appeared before the Tribunal, learned counsel for the Appellant-Insurance Company did not choose to appear before it. The record bears testimony to the fact that Appellant-Insurance Company was proceeded ex-parte on 12th February 2018 and filed application for setting aside the ex-parte proceedings on 22nd May 2019, i.e. much before the aforesaid incident of 5th of August 2019. In the circumstances, the Appellant-Insurance Company cannot be heard to say that it was prevented by the aforesaid incident of 5th August 2019 to appear before the Tribunal and contest the claim petition. Be it also noted that said order dated 24th September 2021 passed by learned Tribunal by virtue of which plea of the Appellant-Insurance Company for setting aside the ex-parte award was declined by the Tribunal, having not been assailed by the Appellant-Insurance Company, has attained

finality and, therefore, the Appellant-Insurance Company cannot be allowed to raise the said issue in the present appeal.

15. However, the Appellant-Insurance Company has also challenged the impugned award on the ground that it is on the higher side. Ms. Izzat Fatima, learned counsel appearing vice Mr. Nissar A. Dendru, learned arguing counsel for the Appellant-Insurance Company during the course of arguments has confined her arguments on the quantum of compensation awarded in favour of the claimant. On the other hand, the complainant has filed cross appeal for enhancement of the compensation on various grounds, detailed above.

16. Some uncontroverted facts of the case are required to be underlined. The claimant preferred a claim petition before learned Tribunal, whereby she claimed that due to accident, her *right leg and right foot were fractured*. She was operated upon and was advised transfusion of blood, which was arranged through private sources. It is case of the claimant that she was helping in the household chores and, therefore, by any conservative estimation, she would earn Rs. 5000/- per month. The claimant has also claimed Rs. 10,000/- on account of pain and sufferings.

17. Hon'ble Supreme Court in **Raj Kumar vs. Ajay Kumar & Anr.** reported as **(2011) 1 SCC 343**, commenting upon the principle of just and fair compensation has made the following observation:

“It should fully and adequately restore the claimant to the position prior to the accident. The object of awarding damages is to make good the loss suffered, as far as money can do so, in a fair, equitable and reasonable manner.”

18. It is manifest from the principle of law enunciated by Hon'ble Supreme Court in the aforesaid judgment that object behind the doctrine of fair and just compensation is to make a sincere endeavour to restore the dignity of an individual, he had at the time of accident in a fair, equitable and reasonable manner. It is by far crystallized position of law that a victim of accident is to be compensated for personal injuries, primarily for the following damages:

- (i) Loss of earning and loss of earning capacity;**
- (ii) Loss of future income;**
- (iii) Pain and suffering and loss of amenities;**
- (iv) Medical treatment;**
- (v) Shorten expectancy of life, if any; and**
- (vi) Special damages, if any.**

19. If the present case is approached in the backdrop of legal position discussed above, the appellant-claimant is found entitled to compensation for the following damages:

Loss of earning and loss of earning capacity:

20. Back to the case, the claimant has questioned the impugned award passed by Ld. Tribunal primarily on the ground that learned Tribunal has assessed her monthly income as Rs. 4000/-, despite sufficient evidence available on the record that by any conservative assessment, she would earn Rs. 5000/- per month as she was helping in the household work. It is pertinent to mention that claimant appeared in the witness box and testified that she was studying, but her studies were affected due to accident. The claimant in her testimony before the Tribunal has nowhere stated that she was doing any kind of labour or was helping in household chores. In the circumstances, the monthly income of the claimant assessed by learned Tribunal as Rs. 4000/- appears to be justified and cannot be faulted with. As already stated, claimant claimed to be 28 years of age at the time of accident in her claim petition. Surprisingly, learned Tribunal has taken the age of the claimant/petitioner as 22 years, on the basis of her age reflected in the disability certificate. It is a matter of common knowledge that age of a patient on a medical certificate is mentioned by a Medical Officer on the

basis of declaration made by a patient or his/her attendant. Since, it was claim of the claimant herself that she was 28 years of age at the time of accident, there was no occasion for learned Tribunal to travel beyond the pleadings and assess age of the claimant on the basis of medical certificate. In this view of the matter, multiplier applicable to the case of the claimant in the age group of 26-30 years, is 17 and not 18, applied by the Tribunal.

21. Another vital aspect of the case is that, learned Tribunal has accepted the total disability of 40% certified by the Board of Doctors. It may be recalled that Appellant/Claimant claims to have suffered fracture of her “*right leg and foot*” only. It is trite that the extent of disability of a limb reflected in the disability certificate cannot be assumed as extent of disability of the whole body. It is by far a settled position of law that the assessment of compensation under the head of ‘loss of future earnings’ depends upon the impact of permanent disability suffered by the claimant on his earning capacity. The adjudicating authorities or tribunals are not obliged to apply the percentage of permanent physical disability, as percentage of economic loss or loss of earning capacity, in a perfunctory fashion, but they are obliged to assess functional disability of the claimant. This principle of law has been considered at length by Hon’ble Supreme Court in Raj Kumar (Supra). Relevant observation of the pronouncement for the facility of reference reads thus:

“10. Where the claimant suffers a permanent disability as a result of injuries, the assessment of compensation under the head of loss of future earnings, would depend upon the effect and impact of such permanent disability on his earning capacity. The Tribunal should not mechanically apply the percentage of permanent disability as the percentage of economic loss or loss of earning capacity. In most of the cases, the percentage of economic loss, that is, percentage of loss of earning capacity, arising from a permanent disability will be different from the percentage of permanent disability. Some Tribunals wrongly assume that in all cases, a particular extent (percentage) of permanent disability would result in a corresponding loss of earning capacity, and consequently, if the evidence produced show 45% as the permanent disability, will hold that there is 45% loss of future earning capacity. In most of the cases, equating the extent (percentage) of loss of earning capacity to the extent (percentage) of permanent disability will result in award of either too low or too high a compensation.”

22. Hon’ble Supreme Court on ascertainment of the effect of permanent disability on the actual earning capacity of the victim or claimant, has also made following observation in paragraph 13 of the aforesaid judgment:

“Ascertainment of the effect of the permanent disability on the actual earning capacity involves three steps. The Tribunal has to first ascertain what activities the claimant could carry on in spite of the permanent disability and what he could not do as a result of the permanent ability (this is

also relevant for awarding compensation under the head of loss of amenities of life). The second step is to ascertain his avocation, profession and nature of work before the accident, as also his age. The third step is to find out whether (i) the claimant is totally disabled from earning any kind of livelihood, or (ii) whether in spite of the permanent disability, the claimant could still effectively carry on the activities and functions, which he was earlier carrying on, or (iii) whether he was prevented or restricted from discharging his previous activities and functions, but could carry on some other or lesser scale of activities and functions so that he continues to earn or can continue to earn his livelihood.”

23. In the background of aforesaid principle of law enunciated by the Apex Court, since the Appellant/Claimant has suffered *fracture of right leg and foot* only, the extent of permanent disability suffered by the claimant, reflected in the disability certificate cannot be assumed as extent of disability of the whole body. The case law relied by learned counsel for the Appellant/ Claimant is distinguishable on facts and circumstances of the present case. In **Tauseef Ahmad Dar (supra)**, it was averred by the petitioners that deceased besides being a house wife, was doing the job of spinning and chain stitching. In **Tsewang Namgyal (supra)**, it was claimed by the petitioner that deceased besides being a driver, was working as a Carpenter during spare time and in **Pappu Deo Yadav (supra)**, the claimant claimed to be working as Data Entry

Operator/Typist and his right hand was amputated in the accident. Fortunately, there is no amputation or loss of limb suffered by the claimant in the present case. There is nothing on the record to suggest that claimant suffered any shortening of limb or the *fracture of her right leg and foot* affected her normal day to day functioning as a student or even as a helper in the household chores. Learned Tribunal has apparently fallen in gross error of law to accept the permanent disability certified by the Board of Doctors as functional disability of the claimant. In the circumstances, the functional disability of claimant is assessed as 20%.

Loss of future income;

24. As already discussed, the claimant has suffered *fracture of right leg and foot* only. There is nothing to suggest that 20% functional disability suffered by the claimant would affect her normal functioning of day-to-day life. Neither future studies of the claimant nor her daily household life is going to be affected by 20% functional disability suffered by her. Therefore, there cannot be any loss of future income to the Appellant/ Claimant.

Pain and suffering and loss of amenities;

25. Learned Tribunal has awarded Rs. 60,000/- under the head 'Pain and Suffering' and another Rs. 50,000/- for 'Inconvenience,

Hardship and Discomfort.’ Inconvenience, Hardship and Discomfort is part and parcel of ‘Pain and Suffering and loss of amenities’, and no compensation can be awarded separately under the said Head. Compensation of Rs. 60,000/- for pain and suffering is also exorbitant and, therefore, award of Rs. 10,000/- each for pain and suffering and loss and amenities shall be suffice to meet the ends of justice.

Medical treatment;

26. Although claimant has testified in her testimony before the Tribunal that she has incurred Rs. 1,00,000/- on her treatment, however, it is pertinent to mention that she has claimed Rs. 50,000/- as medical expenditure, in her claim petition, including rich diet and transportation charges. Claimant has failed to produce any bill or voucher, to establish the expenses incurred by her on her medical treatment. Tribunals are statutorily charged with the responsibility to award ‘Just Compensation’, on the basis of fair and equitable principles. A claimant cannot be denied compensation on account of medical expenses incurred by him merely due to failure on his part to produce documentary evidence. A three judge Bench of Hon’ble Supreme Court in **Jagdish v. Mohan and others** reported as **AIR 2018 SC 1347** has ruled thus:

“In making the computation in the present case, the court must be mindful of the fact that the appellant has suffered a serious disability in which he has suffered a loss of the use of

both his hands. For a person engaged in manual activities, it requires no stretch of imagination to understand that a loss of hands is a complete deprivation of the ability to earn. Nothing – at least in the facts of this case – can restore lost hands. But the measure of compensation must reflect a genuine attempt of the law to restore the dignity of the being. Our yardsticks of compensation should not be so abysmal as to lead one to question whether our law values human life. If it does, as it must, it must provide a realistic recompense for the pain of loss and the trauma of suffering. Awards of compensation are not law’s doles. In a discourse of rights, they constitute entitlements under law. Our conversations about law must shift from a paternalistic subordination of the individual to an assertion of enforceable rights as intrinsic to human dignity.”

27. In view of the aforequoted observation of Hon’ble Supreme Court, the tribunals are required to determine ‘Just and Fair’ compensation on broader conspectus of a case and taking a holistic view of the facts and circumstances and, therefore, it may include some speculative income for medical treatment.

28. Reverting to the case, according to the claimant, she was first taken to Trehgam Hospital for first aid, then to Sub District Hospital, Kupwara, wherefrom she was referred to Bone & Joint Hospital, Barzulla, Srinagar. According to the claimant, she remained in the hospital for a couple of days, where she was operated upon. She has also

averred that she was advised blood transfusion, which was arranged from private sources. Although, Appellant/Claimant has failed to produce any evidence with respect to the medical expenditure as also transfusion of blood, stated to be arranged from private sources, however, in view of the admitted position of fact on the record that Appellant/Claimant suffered fracture of right leg and foot and underwent treatment in the Government hospitals, therefore, taking a holistic view of the facts and circumstances of the case, an amount of Rs. 50,000/- for medical treatment is awarded in favour of the claimant.

Shorten expectancy of life, if any and Special Damages, if any:

29. In view of the facts and circumstances given above, since the Appellant/Claimant has suffered fracture of right leg and foot only, and there is no amputation or shortening of limb etc., therefore, no compensation can be awarded under these Heads.

30. Having regard to the legal principles discussed above, it would now be appropriate to assess the case of the Appellant/Claimant for modified compensation. Monthly income of the Appellant/Claimant has been assessed at **Rs. 4000/-**. On account of functional disability assessed as 20%, the Appellant/Claimant can be said to have suffered a loss of **Rs. 800/-** per month and annual loss of **Rs. 9600/-**. After applying the multiplier of 17, in the age group of 26-30, the total loss of income of

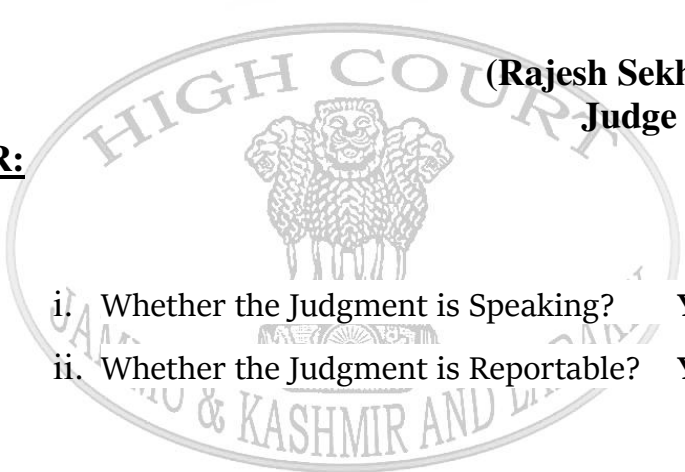
Appellant/Complainant is worked as **Rs. 1,63,200/-**. In addition, the Appellant/Claimant is found entitled to **Rs. 10,000/-** each on account of pain and suffering and loss of amenities, **Rs. 50,000/-** on account of medical expenses. Therefore, Appellant/Claimant is held entitled to a total compensation of **Rs. 2,33,200/-**.

31. For what has been observed and discussed above, the appeal preferred by the Claimant-Attika Banoo bearing Mac App No. 69/2021 being devoid of any merit, is **dismissed**. The appeal filed by the Appellant-Insurance Company is allowed in part and consequently, the Appellant-Insurance Company is directed to pay the aforesaid compensation of **Rs. 2,33,200/-** to the claimant along with interest @7.5% from date of filing of the claim petition.

32. Record be returned with convenient dispatch.

SRINAGAR:
01.09.2023
"Hamid"

(Rajesh Sekhri)
Judge

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- i. Whether the Judgment is Speaking? **Yes.**
 - ii. Whether the Judgment is Reportable? **Yes.**