

(2011) 02 OHC CK 0039

In the Orissa High Court

Case No : Writ Petition (C) No's. 1455, 1456 and 1457 of 2008 and 3214 of 2010

Guri Behera and Others

APPELLANT

Vs

D.R.M., East Coast Railway and Others

RESPONDENT

Date of Decision : 10-02-2011

Acts Referred:

Constitution of India, 1950 — Article 226, 227, 266, 41

Motor Vehicles Act, 1988 — Section 163A , 173

Railways Act, 1989 — Article 147, 11, 11, 113, 114

Citation : (2011) 02 OHC CK 0039

Hon'ble Judges : V. Gopala Gowda, C.J;B.N. Mahapatra, J

Bench : Division Bench

Final Decision : Allowed

Judgement

V. Gopala Gowda, C.J.—These writ petitions have been filed by the fathers of the deceased children who died on account of railway accident claiming compensation and praying for issuance of writ of mandamus against the opposite parties to take appropriate steps in the unmanned level crossing near Mangalajodi (Katia Sahi) so that future accidents can be avoided and to pay compensation to each of the Petitioners to the tune of Rs. 4 lakh, which is the minimum liability of the Railway authority to a passenger as per Section 124 of the Railways Act, 1989.

2. All these writ petitions have been listed together as the facts and reliefs sought for are common and they arise out of the same accident. Therefore, they are heard together and disposed of by this common judgment.

3. Brief facts as have been narrated in the above writ petitions with a view to find out as to whether the Petitioners are entitled to reliefs as prayed for and to appreciate the legal contentions raised are as follow:

On 5.8.2006 at about 2.30 P.M. the Petitioner (in W.P.(C) No. 3214 of 2010) while going along with other three children through the Mangalajodi (Katia Sahi)

level crossing in between Kalupadaghat and Bhusandpur in the district of Khurda, Puri-Ahmedabad Express came from another track and dashed against four children. In the said accident, three children expired on the spot and the Petitioner in W.P.(C) No. 3214 of 2010 sustained severe injuries in her person. The Petitioner in W.P.(C) No. 3214 of 2010 appeared before the District Medical Board, Khurda for determination of percentage of disability. The Medical Board assessed the disability at 85% as per Annexure-1.

4. It is the case of the Petitioners in all the writ petitions that while the aforesaid children were crossing the level crossing, which is an unmanned level crossing, as their houses are situated on the both the sides of the railway line and railway line has been constructed in the middle of the village Mangalajodi, the accident occurred. Besides the villagers of Mangalajodi, everyday about thousands of people are going through the said unmanned level crossing to either side. The said level crossing is a busy level crossing without having any check gate and guard, for which several accidents had occurred there in the past. Annexure-2 is the particulars of 24 number of accidents, which had occurred in the past. In spite of several complaints by the public, the Railway authorities have neither appointed a guard nor put a check gate nor taken sufficient precautionary measures to avoid frequent accidents, for which number of accidents have occurred in the past, which is within the knowledge of the Railway authorities. The Petitioners in W.P.(C) 1456 of 2008 have lost their daughter Kamini Behera in the said accident, whose age was 12 years and she was studying in Class-VII. After the said accident, the train remained and the Railway police and other Railway authorities conducted their enquiries and found that the accident occurred while the said children were standing on the railway line and were looking the goods train. Against the said accident, an U.D. Case was registered in the Court of the Sub-Divisional Magistrate, Khurda, copies of the said F.I.R., Final Report and original certified copies of the Inquest Report and Post Mortem Report, Dead Body chalan of Kamini Behera and Final Report in U.D.G.R. Case No. 86/2006 are annexed herewith as Annexures-3 to 7. There was also paper publication for the said accident in the local dailies, i.e., The Samaja and The Sambad dated 6.8.2006, xerox copies of which are annexed as Annexure-8 series. The father of Guri Behera along with his brother Ram Behera whose only daughter expired, filed a joint petition before the Divisional Railway Manager claiming suitable compensation by their letter dated 17.10.2006, but till date the Railway authorities have not intimated the Petitioners either by rejecting or granting compensation to them. The copy of the said letter is filed herewith as Annexure-9.

5. It is the further case of the Petitioners that all the children were minor and while they were passing through the railway track they stopped going when they found the goods train was passing on a track. Due to the sound of goods train they could not hear the sound of other train and for that they could not be conscious about Puri-Ahmedabad Express, which was coming on other track and caused accident for no fault of the children. In the Final Form it has been stated

that when the 4 children were looking at the goods train standing on the line being the inhabitants of the nearby village, they faced the accident by another train, i.e., Puri-Ahmedabad Express. u/s 11 of the Railways Act, 1989 the Central Government is empowered to execute all necessary works for convenient running of the trains in the country. u/s 18 of the Railways Act, 1989 that corresponds to Section 13 of the Railways Act, 1890 for the said convenient running of the train the authorities may construct suitable gates, chains, bars etc. at the level crossing. The aim and object of the legislation is to protect the living beings who are supposed to be affected by the running of the trains and for that the Parliament authorizes the Railway authorities to work in a responsible manner with a view to see that the persons who will be crossing the Railway crossing either to reach residences or other places shall not be affected. The Railways would work in crossing a foot way on level, as to the mode of working their railway, as to the rate of speed, and signaling and whistling and other ordinary precautions in the working of a railway to do every thing which is reasonably necessary to secure the safety of persons who have to cross the railways by means of the foot way.

6. It is the further case of the Petitioners that a level crossing is on the one hand is a dangerous spot in view of the possible movement of trains and on the other hand it is an invitation to the passersby crossing the railway line through the said level crossing. This is a public level crossing and not merely one by private accommodation. Therefore, it is stated by them that it is the legal duty of the Railways to assure the reasonable safety. The most obvious way of doing it is to provide gates or chain barriers or to post a watchman who should close the same shortly before train passes. But, failure to do so is not by itself an act of negligence provided that the Railway had taken other steps sufficient in those circumstances to caution effectively a passerby of average alertness of prudence. It is stated that at a reasonable distance of either side prominently written boards can be fixed asking the road users to be aware of trains will be passing through railway tracks. If the train in either side is visible from near the caution-board or within a short distance of crossing, this should be sufficient because a diligent road user could look round and see the train. On the other hand, if there is bend in the track or there are trees and bushes in between or the road on the either side of crossing is very far below, the level of the railway tracks or for any other similar reasons the railway track is not visible beyond a short distance, then even the certain boards are useless. In the present case the railway track was not visible from the spot of accident for which the accident occurred on the fateful day. The accident occurred at the particular level crossing is not for the first time, but on number of occasions accidents occurred due to the aforesaid reasons.

7. Petitioners placed reliance upon the decision of the Assam High Court in *Swarnalata Barua v. Union of India and Ors.* AIR 1963 Assam 117, wherein it is held by the said High Court that there is an obligation on the part of the Railway Company or Administration to ensure that whenever a train passes over a

thoroughfare adequate warning should be given to the public of the passing of the train at the time they pass, so that accident may be avoided. The said duty need not necessarily be a statutory duty. It is implied and inherent in the functions to be discharged by the Railway Administration in the matter of running their railways. It is not disputed that had the Railway Administration taken the precautionary measure either by putting a railway gate for keeping it closed at the time the train was due to pass or putting some other obstruction which could have prevented the public from passing over the level crossing that would be the information and notice to the public that the train will pass through the railway track, then accident of this kind that had happened in this case would not have occurred.

8. It is the further case of the Petitioners that soon after such accident occurred, after receiving notice u/s 113 as per the Railways Act, 1989 an enquiry must have been conducted u/s 114 or 115 of the Railways Act, 1989. If such report could have been called for by the competent authority of the Railways, the same would have disclosed the negligence on the part of the Railway authorities, which had resulted the accident.

9. It is the further case of the Petitioners that due to the negligence of the Railway authorities the accident occurred and three innocent children died. Therefore, the Railway administration should have come forward to compensate the Petitioners for their irreparable loss suffered on account of the death of their children. Further, it is stated that the road traffic accidents Special Courts and special provisions have been created by the legislature to help the distressed people who have become victims by granting just and reasonable compensation. In the present case, small children have expired due to train accident, but in the circumstance, had it been by a road traffic accident, the parents would have been granted with the compensation under the provisions of the M.V. Act.

10. The Petitioners placed reliance upon the judgment of the Apex Court in N.K.V. Bros. (P) Ltd. Vs. M. Karumai Ammal and Others, , wherein it is observed that Road accidents are one of the top killers in our country, specially when truck and bus drivers operate nocturnally. Accidents Tribunals must take special care to see that innocent victims do not suffer and drivers and owners do not escape liability merely because of some doubt here or some obscurity there.

11. The Petitioners further placed reliance upon Section 124 of the Railway Act read with the Railway Accidents and Untoward Incidents (Compensation) Rules, 1990, whereunder no fault liability of the passenger who expires in a railway accident has been fixed at Rs. 4.00 lakh. The said facility should also be extended to the accident victims who lost lives or became disabled on account of the Railway accident in the level crossing due to the negligence of the Railway Administration, particularly when level crossing is a place where the public are allowed to cross the railway track.

12. Reliance has also been placed on Rudul Sah Vs. State of Bihar and Another,

wherein the Apex Court observed that in appropriate cases, the Court discharging constitutional duties can pass orders of payment of money in the nature of compensation consequent upon deprivation of a fundamental rights to life and liberty of a Petitioner as State must repair the damage done by its officers to the Petitioner's right.

13. Learned Counsel also placed reliance upon the decision in Smt. Kalawati and Others Vs. State of Himachal Pradesh and Another, and also in the case of Kumari Seemu alias Seema Vs. Himachal Pradesh State Electricity Board and Others, , wherein the aforesaid High Court ruled that the writ Court can grant relief to the Petitioners claiming damages for the injuries arising out of the accident occurred due to the negligence of the State authorities like the Electricity Board. In the case of Smt. Kumari Vs. State of Tamil Nadu and others, , the Apex Court overruling the decision of the High Court of Tamil Nadu observed that the writ jurisdiction under Article 226 of the Constitution of India can be invoked by the Writ Court for awarding compensation to a victim, who suffered due to negligence of the State or its functionaries. In that case six years" old child had fallen down in the uncovered sewerage tank. The High Court refused to entertain the claim of compensation in a writ petition under Article 226 of the Constitution, but the Apex Court directed the State to pay compensation. In the case of Parikhita Behera and Another Vs. The Divisional Railway Manager, South Eastern Railway and Others, this Court also took the same view that jurisdiction under Articles 226 and 227 of the Constitution can be invoked and direction for payment of compensation can be awarded in favour of the claimants, if there was deliberate act of negligence on the part of the statutory authorities, namely, the Railway Administration.

14. Therefore, it is pleaded by the Petitioners" counsel that the accident occurred on account of the negligence on the part of the railway authorities for not putting gates, bars and not appointing watchman on that unmanned level crossing and not taking sufficient precautionary measures. The accident occurred due to deliberate act of negligence on the part of the railway administration. Therefore, the Petitioners are entitled to compensation claimed in these writ petitions.

15. A common counter affidavit has been filed on behalf of the opposite parties. It is stated therein that the writ petitions are not maintainable both on facts and in law as they involve disputed questions of facts, which cannot be adjudicated by this Court in writ jurisdiction. It is further stated that writ is not maintainable in law, as no fault can be attributed to the Railways for the alleged death and injury caused to the children due to the said accident. Certain background facts of the case are stated briefly in the counter, which are as follows:

16. Howrah-Vishakhapatnam main line runs in between two locations of a single village named Mangalajodi under Tangi Police Station situated in Khurda district of Orissa. There is an unmanned level crossing existing at KM 494/27-29 ub the UP direction and 494/30-28 in DOWN direction for movement of the villagers from one side to the other. As per the provisions contained in Indian Railways

Permanent Way Manual, the said unmanned level crossing has been provided with (1) Stop Board, (2) Caution Board (3) Speed Braker Board, (4) Speed Brakers. The said level crossing also complies with clear visibility towards both sides. The said level crossing till date does not qualify for manning as yet as per the latest Railway Board Guidelines. The copy of the said guidelines is annexed to the counter as Annexure-A/1.

17. It is stated that the Train Vehicle Unit in respect of the level crossing is less than 6000 and there is also no restricted visibility from both the sides i.e. less than 800 meters for the road users. The level crossing is equipped with all kinds of safety provisions as per the norms of the Railway Administration. Without using level crossing for passage at random railway lines elsewhere is being trespassed for which the said unfortunate incident has occurred. On 5.10.2006 Down Train No. 208-B/KIT-BBS. DMU passenger train left Kaluparaghat Station at 15.29 hours and Train No. 8403 Puri-Adi Express left Bhusandpur Station at 15.30 hours. While DMU passenger train was passing over Down line near Mangalajodi village under Tangi Police Station of Khurda District, four children aged 8, 6, 5 and 3 years respectively were standing on the UP line Railway track which is about 100 meters away from the level crossing, the same parallel Train No. 8403 Puri-Ahmaddabad Express dashed the children on the UP line track for which three children died on the spot and one female child of three years escaped narrowly injured. In this connection, the Divisional Transportation Inspector (Planning), East Coast Railway, Khurda Road conducted an enquiry and submitted his report, which reveals that the mishap has taken place due to carelessness of their guardians in allowing their children to trespass the Railway track at KM 495/1 violating the provisions of Article 147 of Railway Act, 1989. Hence the Railway Administration is no way responsible for this tragic incident and it is not liable to pay compensation as claimed by them and, therefore, this Court need not award compensation. The sketch of level crossing at the site of accident is annexed as Annexure-B/1.

18. It is further stated that on investigation it came to light that on 5.8.2006 all the four children were standing in UP Line track shouting and gesticulating towards the running of the Down train DMU 208/B. They were ignorant of running of UP train No. 8403 Express and also failed to attend the continuous whistling and the sound of the express train due to whistling and running sound of Down Train No. 208/B DMU to which they were looking to. Besides, it was not safe to stop the high speed train running over the section to avoid the accident which might invite another major mishap. The fact finding is annexed as Annexure-C/1.

19. Further, it is stated that there being violation of Section 147 of the Railways Act, 1989, the Railway Administration cannot be held responsible for the said mishap. The allegation of the Petitioners that the incident occurred due to unmanned level crossing is not correct. It is reiterated that the accident has occurred at about a distance of 100 meters towards Vishakhapanam end from

the existing unmanned level crossing which is equipped with all the safety measures as per the Railway norms. It is also stated that the unfortunate incident has taken place due to carelessness of the children and their guardian/ Petitioners for trespassing the Railway track on violation of Article 147 of the Railway Act.

20. Learned Counsel for the opposite parties placing reliance in Union of India (UOI) Vs. United India Insurance Co. Ltd. and Others, , and Sajida Begum v. DRM 2004 (Supp.) OLR 914, contended that u/s 18 of the Railway Act there is no statutory obligation on the part of the Railway Administration to fence throughout the Railway line including the level crossing unless the Central Government so requires them to do. There are serious questions of disputed facts including the place of incident as well as respective negligence, the case does not merit consideration under Article 266 of the Constitution of India in view of the fact that in the present case the level crossing does not qualify to be a manned one nor the accident has occurred at the level crossing. Therefore, learned Counsel would urge that the negligence cannot be attributed to the Railway Administration for the said unfortunate incident. In support of his contention, he placed reliance upon the decision S.D.O. Grid Corporation of Orissa Ltd. and Others Vs. Timudu Oram, , and contended insofar as W.P.(C) No. 3214 of 2010 is concerned, the same is grossly barred by limitation as the same has been filed in the year, 2010 whereas the alleged incident occurred in the year 2006.

21. With reference to the aforesaid rival legal contentions raised at the Bar, the questions that fall for consideration by this Court are as follow:

(i) Whether the writ petitions are maintainable in law?

(ii) Whether the accident occurred on account of negligence on the part of the Railway Administration by not providing sufficient protection at the level crossing and without deploying guard or putting check gate as required u/s 18 of the Railway Act, 1989?

(iii) Whether on account of not providing safeguard to the level crossing by the Railway Administration, the Petitioners are entitled to compensation as claimed?

(iv) What order?

22. To answer the above points, we have carefully examined the facts and rival legal contentions urged in the above writ petitions. As can be seen from the provisions of Section 18 of the Railway Act, 1989, the Railway Administration has the statutory obligation to provide sufficient safeguards to the level crossing by putting railway check gate and keeping it closed at the time when train is due to pass at the level crossing area. In the instant case, had the Railway Administration taken the precautionary measure either by putting a railway gate and keeping it closed at the time the train was due to pass, or put up some other obstruction which could prevent the public from passing over the level crossing

giving them information and notice of the approaching train, the accident of the kind that had happened in this case could have been avoided. After receiving notice u/s 113 from the Petitioners as per the Railways Act, 1989, an enquiry must have been conducted by the Railway Authorities under Sections 114 and 115 of the Railways Act, 1989. If such report would have been produced, then it could have disclosed whether there is negligence on the part of the Railway Administration on account of which the accident took place resulting in death of three poor children and severe injury to a minor girl. Therefore, the said enquiry report as required u/s 113 of the Railways Act having not been produced, this Court draws an adverse inference against the Railways that there is negligence on the part of the Railway Administration in not taking sufficient precautionary measures by posting guard or keeping the railway gate closed at the time while the train was due to pass through that level crossing. Non-compliance with the aforesaid statutory obligations by the Railway Administration, we reject the contentions urged by the learned Counsel for the Railways that there are serious questions of disputed facts and due to carelessness on the part of the children and their guardians the alleged accident occurred on the fateful day resulting in death of three poor children and severe injury to the minor girl caused. For the above reasons, we hold that the writ petitions are maintainable in law. Further, the Apex Court in *N.K.V Brothers*" case (supra) upon which reliance is placed by the learned Counsel for the Petitioners made certain observations, the relevant portion of which is extracted as hereunder:

Road accidents are one of the top killers in our country, specially when truck and bus drivers operate nocturnally. This proverbial recklessness often persuades the Courts, as has been observed by us earlier in other cases, to draw an initial presumption in several cases based on the doctrine of *res ipsa loquitur*. Accidents Tribunals must take special care to see that innocent victims do not suffer and drivers and owners do not escape liability merely because of some doubt here or some obscurity there. Save in plain cases, culpability must be inferred from the circumstances where it is fairly reasonable. The Court should not succumb to niceties, technicalities and mystic maybes. We are emphasizing this aspect because we are often distressed by transport operators getting away with thanks to judicial laxity, despite the fact that they do not exercise sufficient disciplinary control over the drivers in the matter of careful driving. The heavy economic impact of culpable driving of public transport must bring owner and driver to their responsibility to their neighbour. Indeed, the State must seriously consider no fault liability by legislation. A second aspect which pains us is the inadequacy of the compensation or undue parcimony practiced by tribunals. We must remember that judicial tribunals are State organs and Article 41 of the Constitution lays the jurisprudential foundation for state relief against accidental disablement of citizens. There is no justification for niggardliness in compensation. A third factor which is harrowing is the enormous delay in disposal of accident cases resulting in compensation, even if awarded, being postponed by several years. The States must appoint sufficient number of

tribunals and the High Courts should insist upon quick disposal so that the trauma and tragedy already sustained may not be magnified by the injustice of delayed justice. Many States are unjustly indifferent in this regard.

23. Further, the High Court of Assam in Swarnalata Barua's case (supra) has held that there is an obligation on the part of the Railway Administration to ensure that whenever a railway passes over a thoroughfare adequate warning should be given to the public about passing of the train at the time they pass so that accidents may be avoided. This duty need not necessarily be a statutory duty. It is implied and inherent in the functions to be discharged by the Railway Administration in the matter of running their railways. It is not disputed that had the Railway Administration taken the precaution of either putting up of a railway gate and keeping it closed at the time the train was due to pass or put up some other obstruction which could prevent the public from passing over the level crossing giving them information and notice of the approaching train, the accident of the kind that happened in this case could not have happened.

24. Having answered point Nos. 1 and 2 in favour of the Petitioners, and against the Railway Administration, we are required to answer point No. 3 with regard to compensation in favour of the Petitioners with the following reliefs.

25. u/s 124 of the Railway Act read with the Railway Accidents and Untoward Incidents (Compensation) Rules, 1990, the no fault liability of the passenger who expires in a railway accident has been fixed at Rs. 4.00 lakh. In the instant case, the victims lost their lives or became disabled in the said accident due to the negligence on the part of the Railway Administration in putting gates at the level crossing is placed or public are allowed to cross the railway line without providing precautionary measures as indicated above. Further, the Apex Court in Rahul Sah's case (supra) has observed that in appropriate cases, the Court discharging Constitutional duties can pass orders for payment of money in the nature of compensation. Consequent upon deprivation of the fundamental right to life and liberty of a Petitioner the State must repair the damage done by its officers to the Petitioner's right.

26. Further, in Kalawati's case (supra) and in Kumari Seema alias Seema's case (supra), the High Court of Himachal Pradesh ruled that writ Court can grant relief to the Petitioners claiming damages for the injuries arising out of negligence of the State authorities like the Electricity Board. In the case of Smt. Kumari's case (supra), the apex Court overruling the decision of the High Court of Tamil Nadu observed that the writ jurisdiction under Article 226 of the Constitution can be invoked for awarding compensation to a victim, who suffered due to negligence of the State or its functionaries. The same view has been taken by this Court in Parikhita Behera's case (supra), wherein it is observed that jurisdiction under Articles 226 and 227 of the Constitution can be invoked and direction for payment of compensation can be given if there is deliberate act of negligence on the part of the Railway Administration.

27. In this regard, the undisputed fact is that in the said accident three children died and one sustained severe injuries. u/s 124 of the Railway Act read with the Railway Accidents and Untoward Incidents (Compensation) Rules, 1990, no fault liability of the passenger who expires in a railway accident has been fixed at Rs. 4.00 lakh. The same amount can be awarded to the Petitioners for the reason that there cannot be any discrimination between passenger and non-passenger who died in railway accident.

28. It will be useful to refer to the judgment of the Supreme Court in the case of Priya Vasant Kalgutkar v. Murad Shaikh and Ors. (2009) SCC 54, wherein the Supreme Court considered the case of a minor aged 9 years who met with an accident and suffered 10% permanent disability and after examining the provisions u/s 163A and Schedule-II of the M.V. Act, 1988, observed that the compensation for injuries suffered by a person in a motor vehicular accident can be determined either on the basis of actual damages suffered or upon application of structured formula. In the said judgment at paragraph-7, the Supreme Court has referred to the case of Lata Wadhwa and Others Vs. State of Bihar and Others, . In the said case, compensation awarded in respect of the minor children was divided into two groups, i.e., the first group between the age group of 5 to 10 years and the second group between the age group of 10 to 15 years. In the case of children between the age group of 5 to 10 years, a uniform sum of Rs. 50,000/- has been held to be payable by way of compensation, to which the conventional figure of Rs. 25,000/- is to be added and as such to the heirs of the 14 children, a consolidated sum of Rs. 75,000/- each, has been awarded. So far as the children in the age group of 10 to 15 years are concerned, there are 10 such children who died on the fateful day and having found their contribution to the family at Rs. 12,000/- per annum, 11 multiplier has been applied, particularly, depending upon the age of father and then the conventional compensation of Rs. 25,000/- has been added to each case and consequently, the heirs of each of the deceased above 10 years of age, has been granted compensation to the tune of Rs. 1,57,000/-. After referring to the case of Taff Vale Railway Co. v. Jenkins (1911) All ER Rep 160 (HL), it has been observed that in the case of Lata Wadhwa (supra) no iota of material was produced to enable the learned Judge to arrive at a just compensation in such case. Therefore, he determined the same on an approximation on the basis of the submission of the learned Sr. Counsel appearing for TISCO that compensation determined for the children of all age groups could be doubled, as in his view also, the determination made is grossly inadequate. On the basis of the said submission made in the said case it was directed that the compensation amount for the children between the age group of 5 to 10 years should be three times. In other words, it should be Rs. 1.5 lakh, to which the conventional figure of Rs. 50,000/- should be added and thus the total amount in each case would be Rs. 2.00 lakh. In so far as children between the age group of 10 to 15 years are concerned, they are all students of Class VI to X and are children of employees of TISCO. Having regard to the facts of the said case, the contribution of Rs.

12,000/- per annum was on the lower side and, therefore, the contribution should be Rs. 24,000/- and instead of 11 multiplier, the appropriate multiplier would be 15 which is worked out to Rs. 3.60 lakh to which an additional sum of Rs. 50,000/- has to be added, thus making the total amount payable at Rs. 4.10 lakh for each of the claimants of the aforesaid deceased children. Keeping the aforesaid criteria followed in awarding the compensation in view, though Section 124 of the Railways Act, 1989 read with the Railway Accidents and Untoward Incidents (Compensation) Rules, 1990 provides for a compensation for no fault liability to the passenger who expires in railway accident of Rs. 4,00,000/-, considering the facts situation of the case and keeping in view the future prospect of the deceased children and prospective loss of future earning which would have benefited the parents, we deem it appropriate to award Rs. 3.50 lakh to the legal representatives of each one of the deceased children.

29. In the instant case, the disability certificate (Annexure-1) dated 01.09.2008 issued in favour of Petitioner-Guri Behera in W.P.(C) No. 3214 of 2010 by the District Medical Board of Khurda discloses that Petitioner Guri Behera sustained "Traumatic Bronchial Plexus Injury (Rt) causing placid Paralysis of (Rt) hand" on her person. It is further certified that she suffers from 85% permanent physical disability. In this view of the matter, the Petitioner throughout her life has to suffer. More so, placid paralysis of right hand indicates that she requires assistance throughout her life and she has to suffer from mental agony as she has lost ability of using right hand. There will be loss of enjoyment of her marital status on account of such disability. She has lost amenity of using her right hand on account of which she will be suffering from mental agony and she requires continuous medical treatment. She will not be in a position to use her right hand for doing any work even for taking bath. Taking all these aforesaid aspects into consideration, the Petitioner-claimant is entitled to compensation of Rs. 5.00 lakh under the aforesaid heads. However in case of death, compensation of Rs. 4.00 lakh from all heads to each of the claimant-Petitioners would be just and proper.

30. It is worthwhile to extract the relevant paragraphs from the judgment of Karnataka High Court in the case of K. Narasimha Murthy Vs. The Manager, Oriental Insurance Company Limited and Another, , wherein the Division Bench in an appeal preferred by the claimant u/s 173 of the M.V. Act, 1988 succinctly laid down the legal principle after extracting the relevant paragraphs from the decision of the appeal cases in (1922) 2 AC 242, (1880) 5 App Case 25 (1963) 2 All ER 625, (1965) 1 All ER 563, ILR 1987 Karn 1399, (170) AC 1, (1874) 4 QBD 406 (1970) 114 Sol Jo 193, (1969) 3 ALL ER 1528 and referring to Mc Gregor on Damages (14th Edition) in support of our conclusion for determination of the compensation for personal injury both for pecuniary and non-pecuniary losses in favour of the injured Petitioners, which reads as under:

Para-18. Viscount Dunedin, in *Amiralty Comrs v. S.S. (1922) 2 AC 242*, Valeria has observed thus:

The true method of expression, I think, is that in calculating damages you are to

consider what is the pecuniary consideration which will make good to the sufferer, as far as money can do so, the loss which he has suffered as the natural result of the wrong done to him

Para-19. Lord Blackburn in *Livingstone v. Rawyards Coal Co.* (1880) 5 App Case 25, has observed thus:

Where any injury is to be compensated by damages, in settling the sum of money to be given...you should as nearly as possible get at that sum of money which will, put the person who has been injured...in the same position as he would have been in if he had not sustained the wrong.

Para-21. Lord Morris in his memorable speech in *H. West and Sons* (1963) 2 All ER 625, point out this aspect in the following words:

Money may be awarded so that some thing tangible may be procured to replace of like nature which has been destroyed or lost. But the money cannot renew a physical frame that has been scattered and shattered. All the Judges and Courts can do it to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. By common assent must be reasonable and must be assessed with moderation. Further more, it is eminently desirable that so far as possible comparative injuries should be compensated by comparable awards.

Para-22. In the above case, Their Lordships of the House of Lords, observed that the bodily injury is to be treated as a deprivation which entitles Plaintiff to the damage and that the amount of damages varies according to the gravity of the injury. Their Lordships emphasized that in personal injury cases the Court should not award merely token damages but they should grant substantial amount which could be regarded as adequate compensation.

Para-23. In *Wards* (1965) 1 ALL ER, speaking for the Court of Appeal in England, Lord Denning while dealing with the question of awarding compensation for personal injury laid down three basic principles:

Firstly, assessability. In cases of grave injury, where the body is wrecked or brain destroyed, it is very difficult to assess a fair compensation in money, so difficult that the award must basically be a conventional figure, derived from experience or from awards in comparable cases. Secondly, uniformity in awards so that similar decisions may be given in similar cases, otherwise, there will be great dissatisfaction in the community and much criticism of the administration of justice. Thirdly, predictability. Parties should be able to predict with some measure of accuracy the sum which is likely to be awarded in a particular case, for by this means cases can be settled peaceable and not brought to Court, a thing very much to the public good.

Para-25. In *Basavaraj Vs. Shekhar and Others*, , a Division Bench of this Court held:

If the original position cannot be restored - as indeed in personal injury or fatal accident cases it cannot obviously be - the law must endeavour to give a fair equivalent in money, so far as money can be an equivalent and so make good the damage.

Para-26. "Therefore, the general principle which should govern the assessment of damages in personal injury cases is that the Court should award to injured person such a sum of money as will, put him in the same position as he would have been in if he had not sustained the injuries. But, it is manifest that no award of money can possibly compensate an injured man and renew a shattered human frame."

Para-27. Lord Morris of Borthy Gest in *Parry v. Cleaver* (1970) AC 1 said;

To compensate in money for pain and for physical consequences is invariably difficult but...no other process can be devised than that of making a monetary assessment.

Para-28. The necessity that the damages should be full and adequate was stressed by the Court of Queen's Bench in *Fair v. London and North Western rly. Co.* (1869) 21 LT 326. In *Ruston v. National Coal Board* (1953) 1 All ER 314, Singleton LJ said;

Every member of this Court is anxious to do all he can to ensure that the damages are adequate for the injury suffered, so far as they can be compensation for an injury, and to help the parties and others to arrive at a fair and just figure.

Para-29. Field, J. said in *Phillips v. South Western Railway Co.* held:

You cannot put the Plaintiff back again into his original position, but you must bring your reasonable common sense to bear, and you must always recollect that this is the only occasion on which compensation can be given. (The Plaintiff) can never sue again for it. You have, therefore, now to give him compensation, once and for all. He has done no wrong; he has suffered a wrong at the hands of the Defendants and you must take care to give him full fair compensation for that which he has suffered.

Para-33. It is well settled principle that in granting compensation for personal injury, the injured has to be compensated (1) for pain and suffering; (2) for loss of amenities; (3) shortened expectation of life if any; (4) loss of earnings or loss of earning capacity or in some cases for both; and (5) medical treatment and other special damages. In personal injury actions the two main elements are personal loss and pecuniary loss. Chief Justice Cockburn in *Fair v. London and North Western Railway Co.* distinguished the above two aspects thus:

In assessing the compensation the jury should take into account two things, first, the pecuniary loss the Plaintiff sustained by accident secondly, the injury he sustains in his person, or his physical capacity of enjoying life. When they come

to the consideration of the pecuniary loss they have to take into account not only his present loss, but his incapacity to earn a future improved income.

Para-34. Mc Gregor on Damages (14th Edition) para 1157, referring to the heads of damages in personal injury actions states:

The person physically injured may recover both for his pecuniary losses and his non-pecuniary losses. Of these the pecuniary losses themselves comprise two separate items, viz., the loss of earnings and other gains which the Plaintiff would have made had he not been injured and the medical and other expenses to which he is put as a result of the injury, and the Courts have subdivided the non-pecuniary losses into three categories, viz., pain and suffering, loss of amenities of life and loss of expectation of life.

Para-35. Besides, the Court is well advised to remember that the measure of damages in all these cases should be such as to enable even a tortfeasor to say that he had amply atoned for his misadventure. The observation of Lord Devlin that the proper approach to the problem or to adopt a test as to what contemporary society would deem to be fair sum, such as would allow the wrongdoer to "hold up his head among his neighbours and say with their approval that he has done the fair thing," is quite apposite to be kept in mind by the Court in assessing compensation in personal injury cases.

Para-42. Lord Reid in Baker V. Willoughby said:

A man is not compensated for the physical injury; he is compensated for the loss which he suffers as a result of that injury. His loss is not in having a stiff leg; it is in his inability to lead a full life, his inability to enjoy those amenities which depend on freedom of movement and his inability to earn as much as he used to earn or could have earned....

31. In view of the above, each of the claimant is entitled to compensation for the death of his child in the accident. Hence non-grant of the compensation to the Petitioner-claimant by the railway administration is not sustainable in law. Hence we answer the point No. 3 in affirmative by awarding compensation of Rs. 3.50 lakhs to each one of the Petitioners whose child died in the railway accident and Rs. 5.00 lakh to the injured claimant. The Petitioners are also entitled to interest " 7% per annum on the compensation amount from the date of claim made with the opposite parties till realization. The same shall be computed and disbursed to the claimant-Petitioners within four weeks from the date of receipt of the certified copy of this judgment.

32. The writ petition are allowed to the aforesaid extent.