

THE MANAGING DIRECTOR, KERALA TOURISM
DEVELOPMENT CORPORATION LTD.

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v.

DEEPTI SINGH & ORS.

(Civil Appeal No. 6038 of 2015)

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MARCH 15, 2019

**[DR. DHANANJAYA Y CHANDRACHUD AND
HEMANT GUPTA, JJ.]**

Consumer Protection – Deficiency of service – First complainant had booked accommodation at a hotel for a family holiday – First complainant's spouse sank into the swimming pool of the hotel and later died – FIR was registered – Also, a complaint was filed before the National Consumer Disputes Redressal Commission ('NCDRC') – NCDRC held that there was a deficiency of service on the part of the management of the hotel, primarily for the reason that the lifeguard on duty was also assigned the task of a Bartender and assessed the compensation in the amount of Rs.62,50,000/- – On appeal, held: A hotel which provides a swimming pool for its guests owes a duty of care – Allowing or designating a lifeguard to perform the duties of a Bartender was a clear deviation from the duty of care – The appellant could have reasonably foreseen that there could be potential harm caused by the absence of a dedicated lifeguard – The imposition of such a duty upon the appellant can be considered to be just, fair and reasonable – In the instant case, there was a breach of duty of care by the appellant – Insofar as damages are concerned, taking into account, the nature of the business, the prospects for future earnings, the loss of companionship for a spouse and of the guidance and support for the children, the assessment of compensation in the amount of Rs.62,50,000/- by the NCDRC was faultless.

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The first complainant had booked accommodation at a Hotel for a family holiday. Spouse of the first complainant entered the swimming pool with his brother. All of sudden, he became unconscious and sank into the pool. It was alleged that a foreigner who was in the vicinity lifted him out of water. Later, spouse of the first complainant died. An FIR was registered and

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A thereafter a complaint was filed before the NCDRC. The NCDRC held that there was a deficiency of service on the part of the management of the hotel. Appellant has filed this appeal against the order of the NCDRC.

Disposing of the appeals, the Court

B HELD: 1. Existence of a duty of care

C In the instant case, the deceased and the complainant were guests in the hotel run by the appellant. Since the facility of a swimming pool was available for use by the guests of the hotel, there was a close and proximate relationship between the management involving the maintenance of safe conditions in the pool and guests of the hotel using the pool. A hotel which provides a swimming pool for its guests owes a duty of care. The duty of care arises from the fact that unless the pool is properly maintained and supervised by trained personnel, it is likely to become a potential source of hazard and danger. Every guest who enters the pool may not have the same level of proficiency as a swimmer. The management of the hotel can reasonably foresee the consequence which may arise if the pool and its facilities are not properly maintained. The observance of safety requires good physical facilities but in addition, human supervision over those who use the pool. Allowing or designating a lifeguard to perform the duties of a Bartender is a clear deviation from the duty of care. Mixing drinks does not augur well in preserving the safety of swimmers. The appellant could have reasonably foreseen that there could be potential harm caused by the absence of a dedicated lifeguard. The imposition of such a duty upon the appellant can be considered to be just, fair and reasonable. The failure to satisfy this duty of care would amount to a deficiency of service on the part of the hotel management. [Para 15] [234-B-E]

G 2. Breach of duty

H In the present case, it is an admitted position of the fact that the lifeguard on duty was also functioning as the Bartender, and that a foreigner was the first one to notice the deceased drowning in the swimming pool. The breach of the duty of care lies in the fact that while the hotel had made the facility of a

swimming pool available for its guests, it ought to have assigned
a lifeguard who would perform his duties only in that capacity.
The reasoning of the NCDRC to the effect that a lifeguard on
duty should not be distracted by virtue of being assigned other
duties, is eminently fair and proper. Hence, there is no difficulty
in holding that there was a breach of the duty of care owed by the
appellant. [Paras 19, 20] [236-E-F, G]

3. Consequential Damages

That leaves this Court with the question of damages.
Appeals have been filed against the decision both by the KTDC
as well as by the original complainants. The deceased was 35
years old. He was a partner in a firm engaged in the business of
trading in consumer goods and office automation along with two
other persons. The income tax return for the assessment year
2005-06 indicated that he had a gross income of Rs.1,91,000/-
The NCDRC has justifiably borne in mind the fact that the
deceased had ample future prospects. Material was produced
on the record to indicate that the deceased was carrying on
business and also had agricultural income. The young children
have been deprived of the support and affection of their father.
Their mother has lost the companionship of a spouse. The nature
of the loss is incapable of being fully compensated in monetary
terms. Therefore, taking into account the social status of the
parties, the income of the deceased, the nature of the business,
the prospects for future earnings, the loss of companionship for
a spouse and of the guidance and support for the children, the
assessment of compensation in the amount of Rs.62,50,000/- by
the NCDRC cannot be faulted. [Paras 21 and 24][237-A;
238-D-G]

Poonam Verma v. Aswin Patel (1996) 4 SCC 332 :
[1996] 2 Suppl. SCR 671; *Rajkot Municipal
Corporation v. Manjulben Jaynatilal Nakum* (1997) 9
SCC 552 : [1997] 1 SCR 304; *India Tourism
Development Corporation Limited v. Miss Susan Leigh
Beer* 2014 SCC Online Del 3376 – relied on.

Caparo Industries plc v. Dickman (1990) 2 AC 605;
BNM on her own and on behalf of Others v. National

A *University of Singapore* [2014] 2 SLR 258 ; *Reeves v. Commissioner of Police* (2000) 1 A.C. 360 – referred to.

Winfield & Jolowicz on Torts 19th Edition, 2014 pg 144 – referred to.

B **Case Law Reference**

[1996] 2 Suppl. SCR 671 relied on Para 8

[1997] 1 SCR 304 relied on Para 9

C CIVIL APPELLATE JURISDICTION: Civil Appeal No.6038 of 2015.

From the Judgment and Order dated 28.04.2015 of the National Consumer Disputes Redressal Commission, New Delhi in Consumer Complaint No.89 of 2006

D With
Civil Appeal No.8000 of 2016.

E U.R. Lalit, Sr. Adv., Gopal Sankar Narayan, E.M.S. Anam, M.S. Vishnu Sankar, Ms. Ashivarya Kane, Ms. Gayatri Verma, Santosh Kumar, Madhurendra Sharma, V. Sushant Gupta, Mushtaq Ahmad, Advs. for the Appellant.

U.R. Lalit, Sr. Adv., Ranbir Singh Yadav, Puran Mal Saini, Ms. Anzu K. Varkey, Pati Raj Yadav, E.M.S. Anam, Advs. for the Respondents.

F The Judgment of the Court was delivered by
DR DHANANJAYA Y CHANDRACHUD, J.

1. The Appeals are admitted.

2. These appeals arise from the judgment of the National Consumer Disputes Redressal Commission¹ dated 28 April 2015.

G 3. A consumer complaint in regard to an alleged deficiency of service of the Kerala Tourism Development Corporation Ltd.² was instituted by Ms Deepti Singh for and on behalf of herself and her two minor children. The complainants had booked accommodation at Hotel

¹ “National Commission”

H ² “KTDC”

Samudra at Kovalam for a family holiday. On 21 March 2006 between 6.30 and 7 p.m., Satyendra Pratap Singh, the spouse of the first complainant and father of the two minor children entered the swimming pool of the hotel with his brother. Other guests of the hotel were present in the pool at that time. All of a sudden, Satyendra Pratap Singh became unconscious and sank into the pool. It was alleged by the complainants that on witnessing the incident, a foreigner who was in the vicinity in the pool lifted him out of the water. The incident is not in dispute. However, according to KTDC, the lifeguard on duty also jumped into the swimming pool. The victim was pulled out of the water and was taken to hospital. He died at 9.30 p.m. on the same day.

4 A First Information Report³ was lodged at about 2 p.m. on 22 March 2006 at the Medical College Police Station. Eventually, a complaint was filed before the NCDRC. The NCDRC has held that there was a deficiency of service on the part of the management of the hotel, primarily for the reason that the lifeguard on duty had also been assigned the task of being a Bartender. The NCDRC placed reliance on safety guidelines for water sports issued by the National Institute of Water Sports, Ministry of Tourism, Government of India. Insofar as they are material and as extracted in the impugned order of the NCDRC, the instructions read as follows:

“Pool Lifeguard:

“Scope: The regulations contained below are applicable for lifeguarding at swimming pool, Water Park and Lake front. The stipulations are being framed to ensure that the people/ participants enjoy swimming/water borne activities and are free from fear of safety and security;

Life Guarding Instructions:

Duties should not exceed 4 hours at a time.

Area under observation should not exceed 50 meters. More than, one observation post must be provided for longer/bigger swimming pools or water parks.

Life guard on active duty should not be distracted while on duty. No other job shall be assigned to while they are on pool duty.

³ “FIR”

- A Lifeguard should be familiar with standard communication signals.”
(Emphasis supplied)

The NCDRC held that assigning a lifeguard with an additional duty of attending to the Bar was liable to distract his attention, since he may not be able to keep a close watch on the guests swimming in the pool. Moreover, while attending to his duties as a Bartender, the employee would necessarily have to leave the pool, even for a short period of time, to attend to guests outside the pool.

5. Mr Gopal Sankarnarayanan, learned Counsel appearing on behalf of the appellant, highlighted two facets: Firstly, he urged that appellant disputes the factual position that the deceased was lifted out of the water by another guest who was using the pool. According to the appellant, the lifeguard on duty also assisted in doing this exercise. Secondly, it is inexplicable as to how a 35 year old able-bodied individual suddenly drowned in the pool. On these grounds, learned Counsel submitted that the order of the NCDRC needs to be revisited in the present appeal.

6. On the other hand, Mr U R Lalit, learned Senior Counsel appearing on behalf of the respondents submitted :

- E (i) The finding of fact by the NCDRC that there was a breach of the duty of care is based on cogent material on the record and does not warrant interference in appeal; and

(ii) As a matter of fact, the complainants before the NCDRC are entitled to an enhancement of the compensation awarded in their appeal. The deceased was a businessman with agricultural income, in addition. There were excellent future prospects for the enhancement of his income. His family has sustained a serious tragedy consequent on his death. Hence, the compensation which has been awarded should be enhanced.

7. It is an admitted position that initially, it was a guest who noticed that the deceased was drowning. There is a dispute on whether the deceased was pulled out of the pool only by the foreigner, as the complainants contend, or both by the foreigner and the life guard, as was contended by the Management. The issue before the court is whether there was negligence on the part of the appellant arising from a breach of the duty of care it owed the deceased.

8. In **Poonam Verma v Aswin Patel**⁴, a two judge Bench of this Court elucidated on the elements of the tort of negligence. Justice S Saghir Ahmad held thus: A

“14. Negligence as a tort is the breach of a duty caused by omission to do something which a reasonable man would do, or doing something which a prudent and reasonable man would not do.” B

The Court listed the following elements which constitute ‘negligence’:

- “15. ... (1) a legal duty to exercise due care;
- (2) breach of the duty; and C
- (3) consequential damages.”

9. In **Rajkot Municipal Corporation v Manjulben Jayantilal Nakum**⁵ (“**Rajkot Municipal Corporation**”), a two judge bench of this Court characterized the tort of negligence as “careless conduct in commission or omission of an act”. Justice Ramaswamy opined thus: D

“12... The elements of tort of negligence consist in — (a) duty of care; (b) duty is owed to the plaintiff; (c) the duty has been carelessly breached. Negligence does not entail liability unless the law exacts a duty in the given circumstances to observe care. Duty is an obligation recognised by law to avoid conduct fraught with unreasonable risk of damage to others. The question whether duty exists in a particular situation involves determination of law. Negligence would in such acts and omissions involve an unreasonable risk of harm to others. The breach of duty causes damage and how much is the damage should be comprehended by the defendant. Remoteness is relevant and compensation on proof thereof requires consideration. The element of carelessness in the breach of the duty and those duties towards the plaintiff are important components in the tort of negligence. Negligence would mean careless conduct in commission or omission of an act connoting duty, breach and the damage thereby suffered by the person to whom the plaintiff owes. Duty of care is, therefore, crucial to understand the nature and scope of the tort of negligence.” E
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⁴(1996) 4 SCC 332

⁵(1997) 9 SCC 552

A 10. The ingredients of the tort of negligence are: (i) existence of a duty of care; (ii) a breach of the duty through action or omission; and (iii) damages arising as a consequence of the breach.

11. We shall now determine if these elements have been satisfied in the present case.

B 12 (i) **Existence of a duty of care**

In **Caparo Industries plc v Dickman**⁶, the House of Lords observed that three ingredients are necessary for the existence of a duty of care: (i) foreseeability of the damage; (ii) proximity of relationship between the parties; and (iii) whether it is ‘just, fair and reasonable’ that the law should impose a duty of care. Lord Bridge stated thus:

C “What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of “proximity” or “neighbourhood” and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other.”

D 13. In **Rajkot Municipal Corporation**(supra), this Court, relied on Michael. A. Jonas’s treatise⁷ on the Law of Torts and observed thus:

E “33... as a tort, negligence consists of a legal duty to take care and breach of that duty by the defendant causes damage to the plaintiff. Duty determines whether the type of loss suffered by the plaintiff in the particular way in which it occurred can ever be actionable. Breach of duty is concerned with the standard of care that ought to have been adopted in the circumstances, and whether the defendant’s conduct fell below that standard, i.e., whether he was careless. The division of negligence into duty, breach and consequent damage is convenient for the purpose of exposition but it can be confusing because the issues will often overlap. He has elaborated the general principles, viz., the neighbourhood principle as laid down in *Donoghue v. Stevenson* and has stated at p. 27 that the result would seem to be that factors which formerly might have been considered at the second stage of Lord

H ⁶[1990] 2 AC 605
⁷4th Edition, (1995).

Wilberforce's test, policy considerations which ought to "negative, A
or to reduce or to limit the scope of the duty", should be taken into
account at an earlier point when deciding whether a relationship
of proximity between plaintiff and defendant exists. The second
stage of the test will apply only rarely, i.e., in a limited category of B
cases where, notwithstanding that a case of negligence is made
out on the proximity basis, public policy requires that there should
be no liability. **This new approach represents a shift of
emphasis rather than a new substantive test for the
existence of a duty of care. In future, rather than starting
from a prima facie assumption that where a defendant's
carelessness causes foreseeable damage, a duty of care will C
exist, subject to policy considerations which may negative
such a duty. The courts will determine the duty issue on a
case-by-case basis, looking in particular at the nature of
the relationship between parties to determine whether it
is sufficiently proximate. That question is of an intensely D
pragmatic character, well suited for gradual development
but requiring most careful analysis. The following
requirements must be satisfied before a duty of care is held
to exist:**

- (i) Foreseeability of the damage; E
- (ii) a sufficiently proximate relationship between the parties; and
- (iii) even where (i) and (ii) are satisfied it must be just and reasonable to impose such a duty."

(Emphasis supplied) F

14. In **India Tourism Development Corporation Limited v Miss Susan Leigh Beer**⁸, the respondent had slipped into a swimming pool maintained by the appellant on account of the growth of algae on the tiles of the swimming pool and sustained serious injuries. A Division Bench of the Delhi High Court held that the appellant did owe a duty of G
care to the respondent. It observed as follows:

"80...Guests at the swimming pool are closely and directly affected by acts or omissions of those responsible for the maintenance of

⁸ 2014 SCC OnLine Del 3376

A a pool; proximity of the respondent to appellant thus existed in this case. It is reasonably foreseeable that algale growth on the floor of the pool is likely to make the floor slippery, thus likely to injure guests at the pool.”

15. In the case before us, the deceased and the complainant were guests in the hotel run by the appellant. Since the facility of a swimming pool was available for use by the guests of the hotel, there was a close and proximate relationship between the management involving the maintenance of safe conditions in the pool and guests of the hotel using the pool. A hotel which provides a swimming pool for its guests owes a duty of care. The duty of care arises from the fact that unless the pool is properly maintained and supervised by trained personnel, it is likely to become a potential source of hazard and danger. Every guest who enters the pool may not have the same level of proficiency as a swimmer. The management of the hotel can reasonably foresee the consequence which may arise if the pool and its facilities are not properly maintained. The observance of safety requires good physical facilities but in addition, human supervision over those who use the pool. Allowing or designating a life guard to perform the duties of a Bartender is a clear deviation from the duty of care. Mixing drinks does not augur well in preserving the safety of swimmers. The appellant could have reasonably foreseen that there could be potential harm caused by the absence of a dedicated lifeguard. The imposition of such a duty upon the appellant can be considered to be just, fair and reasonable. The failure to satisfy this duty of care would amount to a deficiency of service on the part of the hotel management.

F 16 (ii) **Breach of duty**

In **Winfield & Jolowicz on Torts**⁹, it has been observed that the following conditions must be satisfied in order to prove a breach of the duty of care:

G “The process of determining whether there has been a breach of duty involves three steps. These steps are often not neatly separated from each other, but it is essential to distinguish between them if one is to understand properly this area of the law. First, it is necessary to ascertain the qualities of the reasonable person.

⁹19th edition, 2014, pg 144

This is a question of law. Secondly, it must be asked how much care the reasonable person, given the qualities attributed to him, would have taken in the circumstances. The factors that are permissible to take into account in this regard are prescribed by the law, but the amount of care that the reasonable person would have taken given those factors is a question of fact. Thirdly, it must be determined whether the defendant took less care of the claimant's interests than the reasonable person would have taken. This is a question of fact. If the defendant took less care than the reasonable person would have taken, the defendant will be found to have acted negligently, and the breach element of the tort of negligence will be satisfied."

17. The safety norms for water sports prescribed by the National Institute of Water Sports in the Ministry of Tourism of the Government of India cast an obligation upon the person or entity which provides a swimming pool in a hotel to appoint a lifeguard for the pool. The lifeguard should not be given any other duties which would distract her from the work of a lifeguard. The role of a lifeguard has been succinctly set out by the National Commission thus:

"We need to keep in mind that the lifeguard is not an ordinary swimmer. As per the norms laid down in the above referred regulation, he should be able to swim 100 meter in two minutes without resting, by way of crawl or breast stroke; he should be able to dive 08 inch deep and bring up a 5 Kg. weight to the poolside/bank and he should be able to tread without moving the legs for minimum 01 minute. The person who get appointed as a lifeguard needs to possess a valid Lifesaving Technique Certification from the agencies like National Pool and Water Parks and Association and Safety Council. Such certification is granted after a two day Revalidation course to confirm that he meets the stipulated physical fitness and rescue standards."

18. The Court of Appeal in Singapore, in **BNM on her own behalf and on behalf of others v National University of Singapore**¹⁰, dealt with a case where the plaintiff's husband drowned while swimming in a pool owned by the National University of Singapore. The deceased

¹⁰[2014] 2 SLR 258

A got into difficulties while swimming and his friend pulled him out before the lifeguards came to the rescue. The court held:

B “48...A finding of negligence would depend on a number of factors in determining whether the difficulties of a swimmer in the water should have been apparent to the lifeguard on duty had he performed his duties diligently. The view of the lifeguard would be particularly material in this assessment and that would in turn depend on a number of factors such as the size of the pool, the number of swimmers in the pool and the available lighting, *ie*, whether it was day or night. Other relevant considerations would include whether there were shouts for help by the swimmer in distress or other users of the pool, whether there was unusual splashing, whether the swimmer was struggling or motionless in the pool or **whether there were other distractions which the lifeguard was required to attend to**. There is no inflexible rule that the lifeguard is entitled to a certain amount of time to react before which an inference of negligence can be drawn. What is clear is that the longer it takes for a lifeguard to detect a swimmer in distress in the water, the more likely an inference of negligence would be drawn. The lapse of time before reacting is only one factor for consideration...”

E (Emphasis supplied)

F 19. In the present case, it is an admitted position of fact that the lifeguard on duty was also functioning as the Bartender, and that a foreigner was the first one to notice the deceased drowning in the swimming pool. The breach of the duty of care lies in the fact that while the hotel had made the facility of a swimming pool available for its guests, it ought to have assigned a lifeguard who would perform his duties only in that capacity. The reasoning of the NCDRC to the effect that a lifeguard on duty should not be distracted by virtue of being assigned other duties, is eminently fair and proper.

G 20. Moreover, the hotel did not adduce any evidence of the lifeguard in the present case who would have been the best person to make a disclosure of facts which were to his knowledge. The Managing Director, who appeared as a witness, was not present at the time of the incident. His version was hearsay evidence. Hence, we find no difficulty in holding that there was a breach of the duty of care owed by the appellant.

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21 (iii) **Consequential Damages**

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The third limb would require us to analyze whether the death of the deceased was caused by a breach of the duty and was not a remote and unforeseeable damage. Mr Gopal Sankarnarayanan, learned Counsel for the appellant contended that the death of the deceased was not due to the absence of the lifeguard and that a healthy 35-year-old man could not have drowned without any cause. Before we get to the particular facts of the case, it is important to elucidate on the concept of causation in the law of torts. In **Reeves v Commissioner of Police**¹¹, Lord Hobhouse opined thus:

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“My Lords, causation as discussed in the authorities has been complicated both by conflicting statements about whether causation is a question of fact or of law or, even, “common sense” and by the use of metaphor and Latin terminology, e.g., *causa sine qua non*, *causa causans*, *novus actus* and *volenti*, which in themselves provide little enlightenment and are not consistently used.

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At one level causation is purely a question of fact...Any disputed question of causation (factual or legal) will involve a number of factual events or conditions which satisfy the “but for” test. A process of evaluation and selection has then to take place. It may, for example, be necessary to distinguish between what factually are necessary and sufficient causes...Thus certain causes will be discarded as insignificant and one cause may be selected as the cause. It is at this stage that legal concepts may enter in, either in a way that is analogous to the factual assessment...or, in a more specifically legal manner, in the attribution of responsibility (bearing in mind that responsibility may not be exclusive). In the law of tort it is the attribution of responsibility to humans that is the relevant legal consideration.”

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22. In the case before us, the post-mortem report indicates the following:

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“No injury was present on the body.

Brain was congested and oedematous. Air passages were congested and contained blood stained fluid. Lungs were crepitant

¹¹[2000] 1 A.C. 360

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A and voluminous exuding copious amount of frothy blood stained fluid on sectioning...

OPINION AS TO CAUSE OF DEATH: **“Postmortem appearances are consistent with death due to Drowning.”**
(Emphasis supplied)

B The death of the deceased was due to drowning. Significantly, there was no evidence of the presence of alcohol in the body of the deceased. The death was due to drowning. Considering the delay in the response by the life guard who was preoccupied with bartending duties, the drowning of the deceased was a direct consequence of negligence.

C 23. On the above facts, we are of the view that the finding of a deficiency of service which was arrived at by the NCDRC was correct and was sustainable with reference to the material on the record. There is no element of perversity or any failure to take material circumstances into account in arriving at the decision.

D 24. That leaves this Court with the question of damages. Appeals have been filed against the decision both by the KTDC as well as by the original complainants. The deceased was 35 years old. He was a partner in a firm engaged in the business of trading in consumer goods and office automation along with two other persons. The income tax return
E for the assessment year 2005-06 indicated that he had a gross income of Rs.1,91,000/- The NCDRC has justifiably borne in mind the fact that the deceased had ample future prospects. Material was produced on the record to indicate that the deceased was carrying on business and also had agricultural income. The young children have been deprived of the support and affection of their father. Their mother has lost the
F companionship of a spouse. The nature of the loss is incapable of being fully compensated in monetary terms. In our view, taking into account the social status of the parties, the income of the deceased, the nature of the business, the prospects for future earnings, the loss of companionship for a spouse and of the guidance and support for the children, the
G assessment of compensation in the amount of Rs.62,50,000/- by the NCDRC cannot be faulted.

25. The NCDRC directed that the compensation should be paid within a period of six weeks from its decision, failing which it would carry interest at the rate of 9 per cent per annum with effect from six

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weeks from the date of the judgment. We find no justification for the A
NCDRC to deprive the complainants of the benefit of interest from
the date of filing of the complaint until the date of the decision. We,
accordingly, modify the order of the NCDRC by directing that the
amount which has been awarded by the NCDRC shall carry interest at
the rate of 9% p.m. from the date of the institution of the consumer B
complaint till the date of payment. The amount which has been deposited
in this Court in pursuance of the interim order passed in these proceedings
is permitted to be withdrawn by the respondents. The balance, in terms
of the present direction, shall be paid over by the KTDC to the
complainants within a period of four months from the date of this order.

26. Civil appeal No. 6038 of 2015 shall stand dismissed and Civil C
Appeal No. 8000 of 2016 shall stand allowed to the extent indicated in
the judgment. There shall be no order as to costs.