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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Decided on: 25.11.2019

+ CM APPL. 21502/2016 & CM APPL. 31196/2018 in MAC.APP.
472/2016

NATIONAL INSURANCE CO LTD Appellant

versus

AKIM SCHWARZ & ANR Respondents

+ MAC.APP. 316/2017

AKIM SCHWARZ Appellant

versus

NATIONAL INSURANCE CO LTD Respondent

Through: Mr. Pradeep Gaur and Mr. Kishore
Rawat, Advocates for insurance
company.

Mr. Sunil Malhotra and Mr. B.S.
Randhawa, Advocates for Akim
Schwarz.

CORAM:

HON'BLE MR. JUSTICE NAJMI WAZIRI

NAJMI WAZIRI, J (Oral)

1. This appeal impugns the award of compensation dated 19.02.2016 passed by the learned MACT in MACP No. 130/10/07 on the ground that the compensation awarded to the claimant is on the higher side.

Facts:

2. On 31.05.2016, the appellant/insurer had admitted its liability to indemnify the claimant. In terms of Ex. PW5/A the minimum wage applicable to a skilled worker in Federal Republic Germany between 2006 and 2011 was Euro 2306/- per month. The same has been taken into consideration by the learned Tribunal and the compensation towards 'loss of future income' was calculated on this basis. The impugned order reads as under:-

“42.The petitioner has deposed that he was not working at the time of accident. Hence the income of the petitioner can be taken as minimum wages at the time of accident. In order to prove the minimum rates of wages in Germany, the petitioner has examined Smt. Selvi Ganesh, Legal Advisor of the German Embassy as PW5. She proved the letter dated 03.11.2011 issued by Sh. Ulrich Meinecke, Counsellor, Social and Labour Affairs, Vocational Education and Training as Ex.PW5/A which shows the rates of minimum wages of a skilled worker in June 2006 as 2036 Euro. The petitioner has filed on record the certificate Ex.PW4-/A2 issued by Sabrina Schmidt Koshella, Counsellor and Consul, Head of Legal and Consular Affairs, Embassy of Federal Republic of Germany which shows the conversion rates of euro on the day of accident as 58.96 INR. The income of the petitioner at the time of accident thus comes to Rs.1,20,042.56/- which may be rounded as of Rs.1,20,043/- per month or Rs.14,40,516/- per annum(i.e.58.96x2036).”

Unemployment Dole:

3. The claimant/injured was unemployed since 31.05.2000. The insurer contends that because the claimant was receiving only Euro 400/- per month as unemployment allowance from the government of Federal Republic Germany, therefore only ought to have been considered as his monthly income. The said argument is untenable because what is to be seen is the extent of the loss of skill of the injured. The claimant was a skilled person. Employment in an economy is subject to market forces and the same cannot be held against an individual who is unable to find employment despite his certified skills. What is given by the Government is only the substance amount. The accident has rendered the skilled workman incapable of utilizing his skills for earning his livelihood. Insofar as he has been disabled apropos his training for the vocation of Skilled Tool Mechanic, due compensation would have to be award to the injured.

Skilled Workman

4. The Training Certificate has been issued by M/s DMW Schwarze Pvt. Ltd. & Com., to the effect that, the claimant had worked with the said company from 01.08.1889 till 14.06.1993 as an 'Apprentice Toolmaker'. He met all their requisite standards as per the Chamber of Commerce, which would be applicable for activities by a toolmaker. In other words, the skill of the claimant as toolmaker had duly been tested and certified by the then employer M/s DMW Schwarze Pvt. Ltd. & Com. There is another affidavit of the said company to the effect that the claimant was working with it from 01.06.1997 to 31.05.2000 and that he had carried out his task to the company's full satisfaction apropos in the Tools and Repair Department and that he had also taken an in-house training in "Try Out Press for Action".

5. The sequitor to the above is that i) the skilled workman would be employable on the basis of his skill certification and ii) coupled with the fact that he had a work experience. Whether he was employed or not, at the time of the accident would be a matter depending upon the economy of the country, his personal circumstances, etc. He may have come to India for a holiday but since his skill as a workman got affected because of the irreversible debilitation on account of the accident, he would need to be compensated for the loss which he would suffer on account of the said disability in carrying out duties of the vocation for which he is qualified.

Compensation to be based on Minimum Wages

6. The learned counsel for the appellant submits that the minimum wages would not be applicable in this case because what the claimant was earning an unemployment allowance of only 400 Euros. Therefore, his loss would only be to the extent of such allowance and the compensations should so correspond. However, PW-5, Mrs. Selvi Ganesh, the Legal Advisor to German Embassy in Delhi, had proven the letter issued by Exhibit PW-5/A that shows the minimum wages of a skilled worker in Germany was Euro 2036/- as mentioned in the said document.

7. Therefore, the appellant's argument is specious and is rejected, because what is to be kept in mind is that unemployment allowance is a dole given by a Government to its citizens for supporting their sustenance, depending upon its social welfare policy. It does not tantamount to payment of minimum wages of the beneficiary/recipient of such allowance/dole. A qualified medical doctor or engineer or a lawyer who may be incapacitated in a motor accident or may not have been working at the relevant time would not be given an un-employment dole equivalent to the amount which

she/he would have been earning prior to such incapacitation. Such professional may have chosen to stay away from professional practice and if in that duration he meets an accident, it would not mean that such person who was on unemployment dole, would be entitled to only the dole compensation. The degree of skill incapacitation has to be seen and not the financial condition of the individual concerned. Therefore, the aforesaid argument too is rejected.

8. The learned counsel for the insurance company refers to the affidavit of the claimant wherein he has himself admitted that he was not employed between 2003 and 2006 and he was otherwise touring in South Asia, therefore, he cannot be compensated from the basis of minimum wages.

“14. That the deponent visited frequently to India and Nepal during the period from March 2003 to Dec 2006. However, as during the said period deponent was not under continuous employment so, for proper assessment of deponent earning capacity, on deponent's request through his Advocate Mr. B. S.Randhawa, the Embassy of Federal Republic of Germany, New Delhi vide letter dated 03.11.2011 has confirmed the monthly minimum wage rate of skilled worker (Tool Mechanic) in Germany for the month of June 2006 as 2036/- Euros and year 2011 as 2307/- Euros.”

9. The Court is of the view that non-employment or voluntarily not being in employment due to market exigencies or optional vacation by an individual cannot be the basis for calculation of ‘loss of earnings’.

10. The insurer contends that the awarded amount is on the higher side and should be reduced. The argument is bland, it is untenable and is rejected. The insurer next contends that high living standards as applicable to the claimant a foreign national, should not be applicable in the present

case. However, this argument is no longer valid in view of the dicta of the Supreme Court in *United India Insurance Co. Ltd. and Ors. vs. Patricia Jean Mahajan and Ors.*, (2002) 6 SCC 281.

Extent of Functional Disability:

11. The insurer further contends that 80% permanent physical disability of the claimant had never been established and his functional disability also remains undetermined. The Court would note that the PW-6, Dr. Sunil Tuli, the Consultant Orthopedic at Orthonova Hospital, New Delhi, had deposed that the injured was admitted to the hospital apropos his injury from 15th to 26th January 2007 for a fractured acetabulum right hip. He also stated that the injured has suffered permanent disability upto 80% apropos his full body and that he would not be able to sit down because sitting would involve movement of his hip, resultantly he would not be able to work properly. It was opined that resultantly his earning capacity from work which involved movement his hip, was affected 100%. He would need a hip replacement. Dr. Tuli also stated that he examined the claimant on 28.11.2011 and found that his disability confirms to the opinion given by the German doctor in her deposition. His deposition reads as under:

*“PW6 Dr. Sunil Tuli S/o Sh. Roshan Lai Tuli R/o 15, DDA Flats,
Shivalik
Road, Panchsheel park. New Delhi-17
OnSA
I am consultant Orthopaedic surgeon at Orthonova Hospital, C-
5/29,
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S.D.A Oppt. IIT Gate New Delhi. I have operated upon Mr. Akim Schwarz for fracture hip and left hand for a grade-IV injury on 15.01.2007 till 26.01.2007. During this duration he was operated upon for his hip and left hand. He was discharged on 29.01.2007. He was again admitted on 17.02.2007 till 18.02.2007. He was re-operated on his left hand and reconstruction was tried on his hand. The treatment given by me in North point hospital and its bills are already exhibited as PW4/A (colly) (28 sheets) are correct. The petitioner brought medical report by Dr. Antonious dated 15.02.2011 and a disability certificate. I have thoroughly read the medical report of petitioner and disability certificate which are already EX.PW4/K and Ex.PW4/J. He has 80% permanent disability to whole body. He is a skilled tool mechanic and has to work with his hands. He needs to sit down also and work at times because of the involvement of his hip and hand he will not be able to execute his work properly. The disability amounts to almost 80% work capacity wise and earning capacity wise it was almost 100%. I examined him on 28.11.2011 and I found that his disability conforms to the opinion given by the German Doctor. He needs a hip /replacement and further reconstruction of his hand to enable him to earn his livelihood. The cost to the surgery including hospitalisation and drugs and surgeons fee would be approximately Rs. 3,16,500/-. The provisional estimate dated 09.12.2011 is being attached which is Ex.PW6/A.

XXXXXXXXX by Sh. Rakesh Talwar, counsel for respondent no. 2, I am summoned witness. I have my visiting card to show that I am consultant at Orthonova hospital, the same is Ex.PW6/RA. The estimate of the treatment for surgery for hip replacement and hand surgery was got prepared by me from Orthonova hospital where I do said surgeries. It is wrong to suggest that Ex.PW6/A is false document. Ex.PW4/0 is a discharge summary. It is wrong to suggest that discharge summary and bills discharge summary. It is wrong to suggest that discharge summary and bills are forged and fabricated documents. It is correct that in India the board is constituted by a Govt. Hospital to assess the disability

sustained. It is correct that petitioner did not obtain disability certificate from any of the Govt. Hospital in Delhi. I do not know whether payment was made in respect of the bill dated 29.01.2007. I have mentioned in my statement about the profession of the injured on the basis of his statement. It is wrong to suggest that petitioner did not suffered disability to the extent of 80% of the whole body. It is further wrong to suggest that earning capacity of the petitioner has not been affected to the extent of 100% due to the disability. It is wrong to suggest that I am deposing falsely.”

12. The opinion of the German doctor is recorded in the document, which the learned Tribunal refers to as “opinion of a surgeon for determination of the disability”. The claimant was admitted to the Accidental Surgical Clinic of Medical Center Bielefeld, Germany from 05.05.2007 to 12.05.2007. PMMA chain was inserted in his left hand. On 08.05.2007, the claimant’s fistula was excised at the left wrist. The impugned order records it as under:

“.....the petitioner has filed on record the translated copy of Opinion of a surgeon for determination of the disability which shows that the petitioner was admitted in Accidental Surgical Clinic of Medical Center Bielefeld from 5.5.2007 and was discharged on 12.5.2007 and on 08.5.2007 the fistula excised, at the left hand wrist of the fixator distant externally and a PMMA Chain was inserted”.

Loss of Future Prospects:

13. The learned counsel for the claimant submits that compensation for loss of future prospect has not been granted. In terms of dicta of the Supreme Court in **National Insurance Co. Ltd. vs. Pranay Sethi & Ors.**, (2017) 16 SCC 680 as well as **Parminder Singh vs. New India Assurance Co. Ltd. & Ors.**, (2019) SCC OnLine SC 802, the same would be payable.

The claimant has suffered 80% full body disability. The learned counsel refers to a certificate issued by the attending medical official in Germany which recorded that the disability level which was 80% as on 19.06.2011 had reduced to 70% on 04.09.2012. It is argued that since there was reduction in disability level, the lesser disability ought to have been considered. The Court finds merit in the said argument and, accordingly, the disability level is reduced from 80% to 70%. What is important to be considered is whether despite 70% full body physical disability the injured would be able to carry out the duties for which he was qualified i.e. whether he would be able to carry out assignments of a skilled tool mechanic. The deposition of Dr. Sunil Tuli (PW6) is instructive in this regard, he has opined that the injured had suffered a permanent disability of 80% apropos his full body and he will not be able to execute his work properly and that he would need a hip replacement. Subsequently, the opinion of the German doctor too has been taken into consideration by the learned Tribunal.

14. The learned counsel for the appellant refers to the dicta of the Supreme Court in *Patricia Jean Mahajan (supra)* to contend that in the present case the multiplier should be reduced when the multiplicand is high. The Court is of the view that the aforesaid reliance is misplaced because in terms of *National Insurance Co. Ltd. v. Pranay Sethi & Ors* (2017) 16 SCC 680, multiplier apropos age of the injured and/or deceased has to be taken into consideration.

15. In *Raj Kumar vs. Ajay Kumar IV* (2010) ACJ 815, it was held that the degree of loss and consequent assessment of compensation should be realistic as to whether the injured would be able to earn anything at all, despite the injuries. The Court is of the view that the learned Tribunal has

assessed the disability on the basis of the said principles, it calls for no review or interference. Apropos claimant's contention that compensation towards 'future prospects' have not been granted, the learned counsel for the appellant submits that 'future prospects' is already built into the compensation awarded. The appellant's contention has merely to be stated to be rejected because what is to be taken into consideration is not the quantum of the compensation which a person get towards loss of earning, but also the prospective loss in future due to enhancement in earnings. Loss of future prospects takes into consideration many aspects factors, including the likely increase in earnings of the individual on account of his/her experience in the vocation, acquisition of greater efficiency, better time management and higher/better technical qualification over time, etc. A person always hopes and expects that she/ he will do better in future. This hope and aspiration cannot be denied to any individual. These factors will need to be kept in mind and as well as the settled law in ***Pranay Sethi (supra)*** and in ***Parminder Singh v. New India Assurance Co. Ltd. & Ors*** 2019 SCC OnLine SC 802, for grant of compensation for 'loss of future prospects'.

16. In ***Parminder Singh (supra)***, it was a case of paraplegic. He was awarded 50% towards 'loss of future prospects'. In the present case what would be assessed is the minimum wage for a skilled person, notified in Federal Republic of Germany.

17. The learned Tribunal assessed the compensation payable to the claimant on the basis of the aforesaid minimum wages converted into Indian Rupees @Rs.58.96 per Euro, after deducting the 400 Euros therefrom, it was rounded off toRs.1,20,043/- per month. The relevant tax slab for AY 2006-07 was applied: Total income Rs.14,40,516/- less tax Rs.3,42,155/-. The

post tax income was Rs.10,98,361/-, of which only 80% was assessed as functional loss resulting in loss of equivalent earning capacity. A multiplier of 16 was applied since the claimant was 34 years of age.

18. However, as discussed hereinabove, although the claimant was first was assessed as 80% physically disabled, later reduced to 70% physical disability, he would nevertheless be unable to carry out the functions of a skilled workman. Therefore, his functional disability has to be and is considered as 100%.

19. Thus the amount payable to the claimant for loss of warning capacity and loss of future prospects shall be:

I.

100% of the post tax 'loss of earning capacity' i.e. Rs.10,98,361/- + 50% [(loss of future prospects) Rs.5,49,180.5 less income tax @30% i.e. Rs.1,64,754.15 = Rs.384,426.35)]
= Rs.14,82,787.35 x 16 (multiplier) = Rs.2,37,24,597.60

II.

Add to this the already awarded non-pecuniary compensation towards: Disfigurement of Body Rs.100,000/-; Loss of Marriage Prospects Rs.100,000/-; Future Treatment 3,16,500/-; Medical expenses already incurred Rs.166,535/-; Attendant Charges Rs.20,000/- , Pain and Suffering Rs.200,000/-, Loss of Amenities of life Rs.50,000/- ; Conveyance and Special Diet Rs.50,000/-.

20. The excess amount, as may be, shall be deposited before the learned Tribunal, within three weeks from the date of receipt of copy of this order, to be disbursed to the beneficiary of the Award, in terms of the scheme of disbursement specified therein.

Deduction of Income Tax in India:

21. The claimant contends that the taxes should not be deducted in India because ultimately the awarded amount would be assessed to tax in the country where the claimant is ordinarily a resident. The said argument is untenable because withholding taxes are levied in the remitter country where the revenue is generated. It will be open to the assessee for avoidance of double taxation or set-off, in case of such treaty of India and country of his place of residence or regular tax assessment. In any case, no such argument was raised before the learned Tribunal nor were any supporting documents placed on record by the claimant. Therefore, taxes as applicable on the said amount in India shall be deducted.

22. Lastly, the claimant submits that the rate of exchange on which the amount was assessed has altered significantly and the monies be released at the earliest so that the claimant can utilize the same optimally. Especially in view of the fact, that the debilitating accident occurred over 13 years ago. The Court would note that the assessment was made on the basis of monies which were otherwise receivable by the injured in Euros. The claim would therefore have to be made on the basis of Euros after deduction of the monthly dole of 400 Euros. The rate of exchange of Euros at the time of 56.84 and presently it is over Rs. 88/-. Once the compensation in Euros is assessed, the same would be paid to the claimant. The insurance company has deposited the compensation amount in Indian Rupees at the conversion rate in terms of the award. The claimant has not sought modification of the same i.e. the monies should be assessed and paid only in Euros. Therefore, the assessment of the monies in Indian Rupees cannot be altered.

23. Details of the respondent-claimant's address and Bank Account has been furnished in an Annexure (A-316) as:

Account No. IBAN DE20 41262501 64038403 00, BIC/Swift: GENODEM1AHL, address: Volksbank e.G, Munsterstr. 34, 48231 Warendorf, Germany. The Bank may verify this before remittance.

24. The amount already deposited shall be released directly into the Bank account of the claimant in terms of this order. The details of the bank account of the claimant in Germany, alongwith photocopies of his passport and affidavit to the aforesaid effect in support of the said detail shall be filed with an advance copy to the learned counsel for the insurance company.

25. The statutory amount shall be returned to the insurance company alongwith corresponding interest accrued thereon.

26. The appeal is disposed of in the above terms.

NAJMI WAZIRI, J

NOVEMBER 25, 2019

AB/KK/RW/kb