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

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Decided on: 14.01.2021

+ MAC.APP. 491/2013 & CM APPL. 13731/2020

MS BERSHADSKA TETYANA & ORS Appellants

versus

MR SURENDER SINGH & ORSRespondents

+ MAC.APP. 492/2013

BAJAJ ALLIANZ GENERAL INSURANCE CO LTD (INSURER)
.... Appellant

versus

MS BERSHADSKA TETYANA & ORS.Respondents

Through: Ms. Neha Garg, Mr. Nitin Garg and Mr.
Mahender Yadav, Advocates for claimants.

Mr. Devansh Gupta, Advocate for Insurance
Company.

CORAM:

HON'BLE MR. JUSTICE NAJMI WAZIRI

NAJMI WAZIRI, J. (ORAL)

1. The claimants' appeal: MAC. APP. 491/2013, impugns part of the award of compensation dated 21.03.2013 passed by the learned MACT in the claim petition numbered MACT No. 85/11/10. The claimants are the widow and two sons of Mr. Mykhailo Ivanovych Bershadskyi, who

suffered fatal injuries in a road accident on 01.06.2008. He was taking out his luggage from a bus bearing registration no. DL1 PC0624, opposite Departure Gate No.3, Terminal-2, IGI Airport, New Delhi, when another bus bearing no. DL1 PB 7962, struck the bus of the deceased from the rear side with immense force, causing the deceased suffered multiple grievous injuries. He was rushed to Indian Spinal Injuries Centre but succumbed to injuries on the way. A post-mortem report was filed.

2. The bus was driven by R-1 in MAC. APP. 491/2013, in a rash and negligent manner; it was moving at a high speed and in total contravention of traffic rules and regulations. The accident occurred due to the complete negligence of R-1 and no fault was attributed to the deceased. He was homeward bound: preparing to take a flight to his native city, Kiev, Ukraine. His date of birth being 28.07.1951, he was 56 years young. He is stated to have been the Head of Board of a joint stock company called MAVT. He was also a Physical Person Entrepreneur ('PPE'). He was drawing a salary from the former, while from the latter, he was earning on the basis of his experience and profile as a former army-man in the Ukrainian army.
3. PW1 Satish Kumar, a helper for M/s Panicker Travels, which owned the bus from which the deceased was taking out his luggage, had deposed as an eye witness to the fatal accident in terms of the above. He deposed that he and two-three foreigners also had sustained injuries. His deposition withstood the cross-examination on behalf of the insurer of vehicle. PW2 the son of the deceased deposed about the earning of their father and promise he held for future earnings as a PPE. He had filed

certified copies of financial records, business agreements, educational qualifications and certificates, extending to 157 different documents, including the FIR, Chargesheet and Post Mortem Report, in support of the claim.

4. The insurer has questioned the admissibility of the financial documents and have contended the nature of evidence. Both these contentions were rejected by the impugned order on the ground that the signature of the translator of the original Ukrainian documents were apostilled by the Embassy of India, in Kiev (Kyiv). The original documents were produced during the trial proceedings. The insurer took copies of the same to have them verified. However, nothing came of it. The claimants' documents/exhibits were accepted in evidence on the basis of the reasoning contained in paras 91 to 116 of the award. After discussing the law on the admissibility of documents and apostilled translated version of the same, the learned Tribunal noted:

“116. Insurance company has not led any evidence to show that the translation is incorrect. Insurance company has not shown that these documents are forged and fabricated. This is inspite of an application by insurance company for adjournment for verification with the help of some honest and prudent agency and tax consultant in Ukraine for this purpose.”

5. The court finds no reason to alter or interfere with the same.
6. The claimants have sought, compensation, inter alia, for loss of earnings, on the basis of the annual income of the deceased. The award is impugned on the methodology of the computation adopted for computation of loss of income.

7. As mentioned above, the earnings of the deceased was from two sources:
- (i) his salary from the JSC-MAVT and (ii) his earnings as a PPE. The earnings from the former were based on a Certificate issued by the joint stock company MAVT, which reads as under:

Державна
Траст

not sworn nor certified
translation into English

Joint Stock Company
MAVT

28/2A Grushevsky St., off.43, Kiev, 01024, Ukraine
tel.: +380442783873, tel./fax: +380442784390
email: mavt@mail.ru

(146) 2

Certificate
about gross payroll, deducted insurance contributions and income tax

issued to: **Berhadsky, Mykhailo Ilyanovich**
(last name, first name, middle name)

position held in the post: **Head of the Board**

company: **Joint Stock Company "MAVT", USREOU code 24264146**
(name of company, establishment or organization)

identification number: **1883611236**

Payroll year	Payroll month	Number of scheduled workdays or calendar days (without official holidays and days-off)	Gross payroll (income), cash security, UAH	Payroll (income) from which insurance contributions are paid, UAH	Insurance contributions paid by insurance payer to social insurance funds, UAH			Tax deducted, UAH
					Superannuation fund	Temporary disability	Unemployment	
2008	January	15	5204.88	5204.88	394.10	52.05	0.00	757.31
2008	February	21	6000.00	6000.00	120.00	60.00	0.00	873.00
2008	March	23	6000.00	6000.00	120.00	60.00	0.00	873.00
2008	April	21	6017.47	6017.47	120.35	60.18	0.00	875.54
2008	May	19	3346.19	3346.19	66.92	33.46	0.00	486.87
2008	June	-	0.00	0.00	0.00	0.00	0.00	0.00
2008	July	-	0.00	0.00	0.00	0.00	0.00	0.00
2008	August	-	0.00	0.00	0.00	0.00	0.00	0.00
2008	September	-	0.00	0.00	0.00	0.00	0.00	0.00
2008	October	-	0.00	0.00	0.00	0.00	0.00	0.00
2008	November	-	0.00	0.00	0.00	0.00	0.00	0.00
2008	December	-	0.00	0.00	0.00	0.00	0.00	0.00
	Total	96	20568.54	20568.54	531.37	265.69	0.00	3868.72

Average daily pay (income) **276.76 UAH**
Head of the Board, JSC "MAVT" (SIGNED) **A.M. Berhadsky** (full name)

ROUND SEAL: Kiev, Ukraine
Joint-Stock Company
MAVT
Identification code 24264146

Executed by V.Y. Diba, tel. 278 43 00

06 May 2010
GSP

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8. The learned counsel for the appellants submits that the impugned order

has erred in adopting earnings for 150 days whereas the work earnings were only for 96 days, as can be seen from the third column (“Number of Scheduled Workdays”). The computation should have been extended for the whole year to assess the annual loss of income. The said contention is logical and correct. First the annual earnings have to be assessed, then the proportionate loss to the claimant has to be computed.

9. The aforesaid Certificate shows that the gross earnings of the deceased for 96 days were UAH26,568.54. The net income for this period comes to UAH22702.82, after deducting UAH3865.72 paid towards taxes and insurance contribution. The average daily earning is UAH236.49 (22702.82 divided by 96 days). Albeit, the average daily gross income as mentioned in the certificate above is UAH276.76, this includes payable taxes and insurance premium. The annual income would be UAH 86,328.85 (236.49 x 356). Applying the then prevailing UAH/INR conversion rate of 6.6603, the annual earnings from the JSC-MAVT would be Rs.5,74,909.44/-, instead of Rs. 3,58,649/- as computed in the impugned award.
10. For his earnings as a PPE, the annual income has been computed as Rs.66,41,011/- (UAH999,504 x 6.6603) on the following ‘quarterly earnings’:

“Therefore, in the four quarters before his death the income of the deceased was 62,620 UAH + 62,559 UAH + 62,559 UAH + 62,559 UAH + 62,559 UAH + 1,86,850 UAH + 2,77,750 UAH + 2,22,048 UAH totalling 9,99,504 UAH.”

(PDF p. 68, para 122)

11. The claimants contend that the aforesaid total is erroneous and is not borne out from the record. The claimants’ computation is as under:

INCOME AS PHYSICAL PERSON ENTREPRENEUR

3rd Quarter of 2007 (01.07.2007 to 30.09.2007)

DATE	AMOUNT	EXHIBIT	PAGE No. (LCR)
16.07.2007	62,620 UAH	PW2/117	574
14.08.2007	62,559 UAH	PW2/119	580
17.09.2007	62,559 UAH	PW2/121	586
TOTAL (A)	1,87,738 UAH		

Tax Deposited in 3rd Quarter (01.7.2007 to 30.9.2007)

DATE	TAX	EXHIBIT	PAGE NO. (LCR)
20.07.2007	400 UAH	PW2/99	506

4th Quarter of 2007 (01.10.2007 to 31.12.2007)

DATE	AMOUNT	EXHIBIT	PAGE No. (LCR)
26.10.2007	62,559 UAH	PW2/123	592
15.11.2007	62,559 UAH	PW2/125	598
13.12.2007	1,86,850 UAH	PW2./127	604
TOTAL (B)	3,11,968 UAH		

Tax Deposited in 4th Quarter (01.10.2007 to 31.12.2007)

DATE	TAX	EXHIBIT	PAGE NO. (LCR)
04.10.2007	600 UAH	PW2/103	516
11.12.2007	200 UAH	PW2/105	522
28.12.2007	400 UAH	PW2/127	528
TOTAL	1200 UAH		

1st Quarter of 2008 (01.01.2008 to 31.03.2008)

DATE	AMOUNT	EXHIBIT	Page No. (LCR)
22.01.2008	2,77,750 UAH	PW2/129	610
29.01.2008	2,22,048 UAH	PW2/131	616
Total (C)	4,99,798 UAH		

Tax Deposited in 1st Quarter of 2008 (01.01.2008 to 31.03.2008)

DATE	TAX	EXHIBIT	Page No. (LCR)
12.03.2008	1800 UAH	PW2/111	544
TOTAL	1800 UAH		

Computation as per the impugned award:

1. Total annual income as per MACT (A+B+C): UAH999,504/-
- 2) Total annual income after deducting tax:
 $999,504 - 2,400 = \text{UAH } 997,104/-$
- 3) Total income in Indian Rupees: $\text{UAH}997,104 \times 6.6603 = \text{Rs.}66,41,011/-$

Computation as per the claimants:

Income per month: UAH: 997,104 divided by 9 months = UAH 1,10,789.33
Total annual income = $1,10,789.33 \times 12 \text{ months} = \text{UAH } 1,329,472/-$
Total income in India Rupees: $\text{UAH}1,329,468 \times 6.6603 = \text{Rs.}88,54,682.36/-$

12. The impugned order has added the earnings of only 9 months. For a full year, the monthly average income in UAH should have been determined and then multiplied by 12 and thereafter by the prevalent INR conversion rate (6.6603), as has been demonstrated by the claimants. Their aforesaid computation of annual income is logical, correct and a fair method of assessment. The aforesaid computation of Rs.88,54,682.36 is accepted.
13. The deceased was 56 years old, therefore, a multiplier of 9 is applicable.
14. Compensation towards 'loss of future prospects' was denied as the impugned order relied upon the dicta of the Supreme Court in *Sarla Varma v. Delhi Transport Corporation*, (2009) 6 SCC 121. However, in terms of *National Insurance Co. Ltd. v. Pranay Sethi & Ors.* (2017) 16 SCC 680, compensation towards 'loss of future prospects' ought to have been granted at the rate of 10%.
15. The learned counsel for the insurer submits that the claimants were not dependant on the deceased; that the two sons have attained majority and as the records have shown, they are earning on their own. It is further

contended that the widow has also been earning a fair amount.

16. The learned counsel for the appellants submits that the claimant-widow was not earning more than 650 UAH per month which translates to approximately Rs.4,329/- (at current exchange rate of 2.59 the said amount translates to Rs.1,684/-). Surely the said amount cannot be said to be sufficient for her to take care of her needs. She was getting this money from the PPE only because she was the spouse of the 'physical person entrepreneur' – the deceased. With his demise the goodwill and expertise of the physical person was lost and the enterprise ceased. She has claimed no other source of revenue. However, the insurer has argued that since she was a businesswoman and there was no proof of dependency, either apropos her or the sons, only loss of estate ought to be awarded. But as discussed above, she has disclosed her lone source of income of about Rs.4,329/- (UAD660 per month). Even this insufficient emolument would cease from the PPE upon the demise of her husband. The insurer has shown no other source of income to her. Therefore, her dependency clearly stands established. Accordingly, compensation would have to be paid for 'loss of financial dependency' and not for 'loss of estate'. Apropos the two sons who had attained the age of majority, no dependency has been shown. In the circumstances, there would be 50% deduction towards 'personal expenses' of the deceased.
17. There could be no deduction of monies received by the deceased from travel insurance policies purchased by him from his own resources. The impugned order has referred to the dicta of the Supreme Court in *Helen*

C. Rebello v. State of Maharashtra (1999) 1 SCC 90 and *United India Insurance Co. v. Patricia Jean Mahajan* (2002) 6 SCC281 as under:

“192. In the case of Hellen C. Rebello (Supra) following para was quoted from the case of Parry v. Cleaver (1969) 1 All England Report 555:-

"As regards monies coming to the plaintiff under a contract of insurance, I think that the real and substantial reason for disregarding them is that the plaintiff has bought them and that it would be unjust and unreasonable to hold that the money which he prudently spent on premiums and the benefit from it should enure to the benefit of the tortfeasor. Here again I think that the explanation that this is too remote is artificial and unreal. Why should the plaintiff be left worse off than if he had never insured? In that case he would have got the benefit of the premium money; if he had not spent it he would have had it in his possession at the time of the accident grossed up at compound interest."

193. Further para 20 of the judgment reads as under:-

"20. Many invest through this policy for a variety of reasons, maybe, to secure the sum for himself as forced saving, maybe, as in India, for deduction towards his income tax liability, to secure loan by himself in case needed on a meagre interest for building his residence

or to secure a sum in case of happening of the said contingencies etc. He enters into this contract with an open eye, as an act of wisdom, of course, not towards gain to the tortfeasor. The English Court expressing concern on this aspect in the aforesaid decision recorded: "Why should the plaintiff be left worse off than if he had never insured." Thus, the interpretation of deduction of life insurance would result into gain to the wrongdoer in proportion to the higher scale of premium paid by the insured for no contribution of his and loss to the claimant in proportion to the higher scale of premium paid, as he would have received the compensation amount without payment of any premium."

194. It is further held in the case of Helen C. Rebello (Supra) that any amount received or receivable not only on account of the accidental death but which would have come to the claimant 'otherwise could not be construed to be the "Pecuniary Advantage" liable for deduction. It is further held in the said judgment that an amount of loss and gain of one contract cannot be made applicable to the loss and gain of another contract and an amount receivable under a statute cannot have any correlation with an amount earned by an individual. It is further held in Para 35 as under:-

"35. The insured (deceased) contributes his own money for which he receives the amount which has no

correlation to the compensation computed as against the tortfeasor for his negligence on account of the accident. As aforesaid, the amount receivable as compensation under the Act is on account of the injury or death without making any contribution towards it, then how can the fruits of an amount received through contributions of the insured be deducted out of the amount receivable under the Motor Vehicles Act. The amount under this Act he receives without any contribution. As we have said, the compensation payable under the Motor Vehicles Act is statutory while the amount receivable under the life insurance policy is contractual."

18. The impugned award concludes that the benefit of insurance policies shall not be deducted from the compensation payable to the LRs of the deceased, because the MACT awarded compensation is a statutory compensation, payable only in motor accident claims, while the monetary benefit under insurance policies is given to the LRs of a deceased for any accidental injury including road traffic accidents. Therefore, the contractual benefits with the insurance company cannot be for the benefit of the tortfeasor, whose negligent act resulted in the death of the deceased. The reasoning does not call for any interference.
19. In terms of *United India Insurance Co. Ltd. v. Satinder Kaur @ Satwinder Kaur & Ors.*, Civil Appeal No. 2705 of 2020, no compensation is payable for 'loss of love and affection'. Therefore, the

Rs.25,000/- awarded by the learned Tribunal on this count shall be deducted. However, for loss of consortium Rs.40,000/- shall would be paid to each claimant.

20. In view of the above, the amount payable to the widow of the deceased shall be: Rs.88,54,682.36 (from PPE) + Rs.5,74,909.44/- (from JSC-MAVT) = 9,42,95,91/- x 9 (multiplier) = Rs.8,48,66,326.2 + 10% (towards loss of future prospects) = 9,33,52,958.82 less 50% (deduction towards personal expenses) = Rs.4,66,76,479.41

21. Additionally, for loss of Consortium Rs.40,000/- [+10% enhancement after three years of *Pranay Sethi (2017) supra*] x 3 claimants = Rs.1,32,000/- and Rs.15,000/- (+10% enhancement after three years of *Pranay Sethi supra*) each, shall be paid towards funeral expenses and loss of estate = Rs.33,000/-.

22. Let the aforesaid amount along with interest @ 9% p.a. from the date of filing of the claim petition deposited before the learned Tribunal, in four weeks from the date of receipt of copy of this order, to be released to the widow of the deceased and only the loss of consortium of Rs.44,000/- + Rs.5,500/- (proportionate share of loss of estate) each, to the two sons.

23. The appeals, along with pending application, are disposed-off in terms of the above.

NAJMI WAZIRI, J

JANUARY 14, 2021
AB/RW