

Court No. - 33**Reserved****A.F.R.****Case :- FIRST APPEAL FROM ORDER No. - 1659 of 2004****Appellant :- National Insurance Co Ltd****Respondent :- Rajbeer @ Rajkumar @ Raju and another****Counsel for Appellant :- Mr. S.K. Mehrotra, Advocate****Counsel for Respondent :- Mr. A.A. Ansari, Advocate****Hon'ble J.J. Munir,J.**

1. This is an appeal by the Insurance Company under Section 30 of the Workmen's Compensation Act, 1923 (now renamed as 'Employee's Compensation Act, 1923') (for short, 'the Act of 1923') questioning an award of the Workmen Compensation Commissioner, Saharanpur dated 15.04.2004 passed in W.C.A No.16 of 2002, awarding compensation to the claimant in an injury case.

2. The claimant-respondent is one Rajbeer @ Rajkumar @ Raju, who will hereinafter be called 'the claimant'. According to the claimant, he was employed as a driver with a certain M/s. Krishna Food Industries, K.G. Gramodyog Sansthan, Dehradun Road, Saharanpur. M/s. Krishna Food Industries, who are opposite party No.1 to the workmen's compensation case and respondent No.2 to this appeal, shall hereinafter be called 'the owners'.

3. On 06.07.2001, the claimant was driving the employers' truck, an LPT-709, bearing Registration No. UP-11E-3770 on the Roorkee-Haridwar Road. He was proceeding from Rishikesh to Saharanpur. The claimant was carrying a consignment of goods for delivery to a certain consignee. As the truck reached near the Kauliyar Crossing on the Roorkee-Haridwar Highway, there was a head-on collision between the claimant's truck and a U.P. Roadways bus proceeding towards

Rishikesh. The accident resulted in grievous injuries to the claimant. He was conveyed from the site of accident to the Government Hospital, Haridwar by the Police. The claimant had suffered a fracture to his right lower limb. On the following day i.e. 07.07.2001, the claimant's family members took him for treatment to Dr. Himanshu of Saharanpur, who had to put an iron rod in the claimant's right lower limb. He remained admitted to Dr. Himanshu's Nursing Home/ Hospital for 18 days, and, thereafter remained bed-ridden for three months continuously on account of the iron rod implanted into his right lower limb. The claimant says that he can walk, but cannot drive. In fact, he cannot do any heavy work. According to the claimant's case, he has become handicapped and unfit to do a driver's job. At the time of the accident, he was in receipt of a salary of Rs.4000/- per month, besides Rs.50/- per day towards his diet allowance. He was aged 32 years back then. The ill-fated truck that the claimant was driving is insured with the National Insurance Company Ltd., Branch Office-I, Meerut through its Manager. The said Insurance Company, who are opposite party No.2 to the workmen's compensation case and the appellant here, shall hereinafter be called 'the insurers'.

4. The owners and the insurers after putting in appearance filed separate written statements. The owners in their written statement admitted the fact that the claimant was employed with them on 6th July, 2001 as a driver. They have also admitted the factum of accident. However, the owners have denied that the claimant was in receipt of a salary of Rs.4000/- per month and Rs.50/- towards a daily diet allowance. Instead, it is the owner's case that the claimant was employed on a daily-wage of Rs.80/-. It is also their case that the ill-fated vehicle on the date of the accident was covered by a valid and effective

insurance policy issued by the insurers, and, therefore, the liability to pay compensation, if any, would be that of the insurers.

5. The insurers filed their written statement generally denying the allegations in the claim. It was pleaded that the particulars of the driving licence and the insurance policy have not been disclosed by the claimant. It is their case that in the absence of the aforesaid facts, it is difficult to plead to this part of the claim. The insurers also say that regarding the income, age, injury, disability and the accident, no documentary evidence has been filed on behalf of the claimant.

6. In his rejoinder, the claimant has disputed the stand of the owners and the insurers and reiterated his case.

7. Upon the pleadings of parties, the Workmen's Compensation Commissioner framed the following issues (translated into English from Hindi):

"(1) Whether the claimant has made an application seeking exemption from paying court-fee?

(2) Whether on account of the accident dated 07.07.2001 (*sic*), the claimant has suffered a loss to his earning capacity? If yes, its effect?

(3) Whether the loss in earning capacity certified by the Chief Medical Officer *vide* his certificate dated 02.01.2003 is referable to the accident dated 07.07.2001 (*sic*)?

(4) What was the claimant's age and income at the time of the accident?

(5) Whether the claimant is entitled to compensation and penalty?"

8. In support of the claim, the claimant filed a copy of the check FIR giving rise to Crime No.247 of 2001, under Sections 279 and 304 IPC, Police Station Jwalapur, District Haridwar, a photocopy of the claimant's driving licence valid from

01.12.1995 to 30.11.1998, a copy of the injury report dated 07.07.2001, a copy of the notice of claim served through the learned Counsel upon the owners and the insurers along with a copy of the postal receipt and the acknowledgment, a copy of the certificate dated 02.01.2003 issued by the Chief Medical Officer, Saharanpur certifying a loss of 20% earning capacity. There is then on record a further certificate dated 02.05.2003 issued by the Chief Medical Officer, Saharanpur on a direction made by the Compensation Commissioner, which evaluates the claimant and certifies the fact that he is no longer fit to drive a vehicle.

9. The claimant examined himself as a witness in support of his case, where at the end of his examination-in-chief he was cross-examined both by the owners and the insurers.

10. In support of the owners' case, Vipin Kumar testified in the witness-box and was cross-examined on behalf of the claimant. Yameen son of Mohd. Yaseen was also examined as a witness on behalf of the owners.

11. Issue No.1 was decided by the Compensation Commissioner with the remark that no application seeking exemption from payment of court-fee has been made, but on 05.03.2004, the claimant had sought some time to make an application for the purpose. The issue, in the opinion of this Court, is a non-issue, which ought not have been framed. The finding is equally inconsequential. In the present case, it must be said that there is no issue raised about deficiency in the court-fee paid and no ground in that regard has been raised or a question framed.

12. Issue No.2 was decided by the Compensation Commissioner holding that the driver was employed with the

owners, a fact that the owners have admitted. It has further been held that on 07.07.2001 (*sic*) while driving the owners' vehicle and in the course of employment, the claimant met with a motor accident, resulting in fracture to his right lower limb, which has led, according to the Chief Medical Officer, to the loss of earning capacity by 20%. It has also been opined that the claimant is found unfit to work as a driver.

13. In answering Issue No.3, all that the Compensation Commissioner has remarked is that it has been made clear, while answering Issue No.2 that the owners have admitted the fact, that the claimant while in their employment met with an accident, leading to injuries that caused a fracture to his right lower limb.

14. Issue No.4 has been decided by the Compensation Commissioner holding that the claimant is entitled to compensation worked out on a monthly salary of Rs.2700/-, which is in accord with the minimum wages in force at the time.

15. Issue No.5 has been decided holding that the claimant has been found unfit to work as a driver and after consideration of authority on the point, the Compensation Commissioner has opined that this disability for the claimant would lead to the inference of a 100% functional disability.

16. The Compensation Commissioner, on the basis of the claimant's age being 32 years at the time of the accident and his income Rs.2700/- per month, has determined for the claimant a compensation of Rs.3,30,237/-, which the insurers have been held liable to make good. The compensation has been ordered to be paid within 30 days through a bank draft to be deposited in Court, failing which the award would carry simple interest @ 10% per *annum* payable by the insurers.

17. Aggrieved by the Compensation Commissioner's award, the insurers have preferred this appeal.

18. This appeal was admitted to hearing on 05.07.2004 by a Division Bench of this Court in terms of the following order:

"विपक्ष पक्ष को नोटिस जारी हो तथा यह अपील मेमो आफ अपील पर लिखे सारभूत प्रश्नों पर विचारार्थ स्वीकृत की जाती है।

इसी बीच अपीलकर्ता ने जो भी पैसा अधीनस्थ न्यायालय में जमा किया है, उसका $\frac{1}{4}$ भाग दावेदार बिना प्रतिभू के व $\frac{1}{4}$ भाग प्रतिभू देने पर उठा सकता है। बाकी पैसा किसी राष्ट्रीय कृत बैंक के आवर्ती खाते में (Recurring fixed deposit) जमा कर दिया जाय।"

19. When the appeal came up for hearing before this Court on 19.10.2022, the insurers were present, but no one appeared on behalf of the claimant. Accordingly, after hearing the insurers, judgment was reserved on 19.10.2022. It was heard earlier as well and judgment reserved, but it was noticed by this Court that the order admitting the appeal had not formulated any substantial question of law, a mandatory requirement of the statute. Instead, the order of admission merely referred to the substantial questions formulated at the foot of the memorandum of appeal. This, this Court thought, was not in compliance with the requirements of the statute, where the Court is required to formulate the substantial question(s) of law that arise(s) for consideration. Accordingly, this appeal was posted for further hearing and it was on 26.04.2023, when the following substantial questions of law were framed in the presence of the learned Counsel for the insurers, Mr. S.K. Mehrotra and Mr. A.A. Ansari, learned Counsel, who appeared for the claimant:

1. Whether in the absence of any evidence regarding incapacity of the claimant in doing any kind of work, the Employees Compensation Commissioner could infer

100% loss of earning capacity for the purpose of calculating compensation?

2. Whether in the face of an admission of the claimant's that he was getting a total of Rs. 2,000/- per month towards salary, the finding of the Employees Compensation Commissioner in holding his wages to be Rs 2,700/- per month as prescribed for the Government Drivers is perverse?

20. On 08.05.2023, after hearing the learned Counsel for the insurers and the claimant, judgment was reserved.

21. Heard Mr. S.K. Mehrotra, learned Counsel for the insurers and Mr. A. A. Ansari, learned Counsel appearing for the claimant and perused the record.

22. Mr. Mehrotra has argued, so far as the first substantial question of law is concerned, that the Compensation Commissioner has opined on the evidence that the claimant was employed as a driver on the ill-fated truck and had sustained a fracture to his leg in the accident. The Chief Medical Officer has issued a certificate, upon which the Compensation Commissioner has relied, holding that the claimant would have suffered a 20% loss in his earning capacity. He has emphasized that the 20% loss in the claimant's earning capacity, certified by the Chief Medical Officer, has been construed in manifest error by the Compensation Commissioner to be a 100% loss, without taking into account the statement dated 11.05.2002 apparently made before the insurers, thumb marked by the claimant and filed along with the list of papers before the Compensation Commissioner, which reads:

"मैं चल फिर सकता हूँ, कोई भारी कार्य नहीं कर सकता हूँ।"

23. According to Mr. Mehrotra, the Commissioner has committed an illegality in construing the loss of 20% in earning

capacity or 20% impairment certified by the C.M.O. as 100% loss in earning capacity. Mr. Mehrotra has submitted that in determining the loss of earning capacity, the Commissioner has to bear in mind 'all work', which the workman was capable of performing at the time of the accident. According to the learned Counsel for the insurers, functional disability cannot be construed as 100% because the physical disability, found on medical opinion, is a small percentage, may be of a permanent nature, which renders the workman incapable of performing the particular work that he was doing before the accident. In determining the percentage of permanent disability, the learned Counsel would submit that the Commissioner must bear in mind whether the workman is capable of performing any other work; not just the work that he was hitherto doing. Mr. Mehrotra in support of his contention has placed reliance upon the authority of the Supreme Court in **ICICI Lombard General Insurance Company Limited v. Ajay Kumar Mohanty and another, (2018) 3 SCC 686**. He has placed reliance upon the decision of the Supreme Court in **Raj Kumar v. Ajay Kumar and another, (2011) 1 SCC 343** as well as their Lordships' authority in **National Insurance Co. Ltd. v. Mubasir Ahmed and another, (2007) 2 SCC 349**. Mr. Mehrotra has further buttressed his contention on the foot of the authority of the Supreme Court in **Oriental Insurance Company Limited v. Mohd. Nasir and another, (2009) 6 SCC 280**. He has also reposed faith in the holding of a Full Bench of the Karnataka High Court in **Shivalinga Shivanagowda Patil v. Erappa Basappa Bhavihala, 2003 SCC OnLine Kar 772**.

24. On the other hand, Mr. Ansari, appearing for the claimant, says that the position of the law appears to be settled that if in consequence of the injury sustained, which is of a permanent

nature, the workman is rendered incapable of doing the work that he was hitherto doing, his disability must be regarded as 100% functional.

25. Before this Court proceeds to look into the law governing the subject that has given rise to the first substantial question, it is essential to look into some essential evidence in the backdrop of which the substantial question has arisen. It has to be appreciated that in a matter involving something like a compensation claim by a workman for an injury that he says has given him a permanent disability, and consequent loss of income, the substantial question under reference for its answer would bear some nexus to what the case of the parties is. A substantial question cannot be answered divorced from facts, an absolute expression of academic opinion. It is for this reason that the various high authorities, on which reliance has been placed by Mr. Mehrotra and some others as well, which this Court would notice during the course of this judgment, refer to facts like the percentage and character of permanent disability certified and the nature of the workman's job. It is bearing in mind those principles that this Court considers it imperative to look into some vital evidence that would have material bearing on a correct answer to the substantial question under consideration.

26. This Court finds that there are not one but two medical certificates about the disability sustained by the claimant on record. The first is a certificate dated 02.01.2003 issued by the Chief Medical Officer, Saharanpur, based on a medical examination of the claimant done by Dr. A. Nagaich, District Medical Officer, Saharanpur, a senior orthopedic surgeon. This document bears Ex. No. W2. It was exhibited before the Compensation Commissioner on 12.03.2004. This certificate is

rather quaintly worded regarding medical opinion about the physical disability that the claimant had suffered:

“इनकी आख्या के आधार पर इनके दायें टांग 20% (20 प्रतिशत) की अर्जन छमता में हानि है।”

27. The Compensation Commissioner seems to have taken into consideration this certificate, and perhaps, fairly construed the rather oddly expressed opinion by the Chief Medical Officer as a certification of the fact that there was a 20% permanent disability sustained by the claimant to his right lower limb (leg).

28. It appears that the Compensation Commissioner through a letter dated 13th March, 2003 inquired of the Chief Medical Officer about the fact if the claimant would be able to function as a driver in consequence of the injury sustained in the accident. Apparently, this inquiry was most relevant to the issue and rightly addressed by the Compensation Commissioner, who issued the memo dated 13.03.2003 to the Chief Medical Officer, Saharanpur. In answer, the claimant was re-examined by Dr. Nagaich, Orthopedic Surgeon, on whose opinion the earlier certificate, Ex. W2 was based, and on the re-examination done by Dr. Nagaich, the Chief Medical Officer, Saharanpur issued another certificate dated 02.05.2003 addressed to the Compensation Commissioner, bearing the claimant's thumb impression of course, where the opinion expressed is that the claimant is unfit to drive a vehicle. It would be of profit to quote the contents of the certificate dated 02.05.2003 issued by the Chief Medical Officer, Saharanpur, which has been exhibited before the Compensation Commissioner as Ex. W1, also on 12.03.2004. The material part of the certificate aforesaid reads:

"आपके पत्र संख्या: 2059/डब्लू0 सी0 ए0 / 16 / 02 दिनांक 13-3-2003 के सन्दर्भ में आपके द्वारा श्री राजवीर उर्फ राजू पुत्र श्री सुल्हर सिंह निवासी-ग्राम-कांकरकुई थाना-रामपुर मनिहारान जिला-सहारनपुर का पुनः परीक्षण करके इस आशय की स्पष्ट आख्या वांछित है कि क्या श्री राजवीर सिंह ड्राइवर कार्य करने योग्य है अथवा नहीं। इसकी जांच वरिष्ठ अस्थि रोग विशेषज्ञ डा 0 ए0 नगायच जिला चिकित्सालय सहारनपुर से कराई गई. उनकी आख्या दिनांक: 15-2-2003 द्वारा श्री राजवीर सिंह वाहन चलाने में अयोग्य हैं।"

29. The Compensation Commissioner has taken note of the medical certificate dated Ex. W1 to found his opinion that the claimant has been rendered unfit to do the job of a driver, which he was undertaking and the fact, therefore, entitles him to compensation for a 100% loss of earning capacity. The Compensation Commissioner has placed reliance for his conclusions upon the authority of the Orissa High Court in **New India Assurance Co. Ltd. v. Sudarsan Samal and another, 1994 SCC OnLine Ori 373**, the holding of the Karnataka High Court in **K.P. Hanumantha Gowda and another v. Devaraju and another, 1995 SCC OnLine Kar 170**, and, particularly, the decision of the Supreme Court in **Pratap Narain Singh Deo v. Srinivas Sabata and another, (1976) 1 SCC 289**.

30. In **Mubasir Ahmed (supra)**, upon which Mr. Mehrotra has placed emphatic reliance, it has been observed:

"8. Loss of earning capacity is, therefore, not a substitute for percentage of the physical disablement. It is one of the factors taken into account. In the instant case the doctor who examined the claimant also noted about the functional disablement. In other words, the doctor had taken note of the relevant factors relating to loss of earning capacity. Without indicating any reason or basis the High Court held that there was 100% loss of earning capacity. Since no basis was indicated in support of the conclusion, same cannot be maintained. Therefore, we set aside that part of the High Court's order and restore that of the Commissioner, in view of the fact situation. Coming to the question of liability to pay

interest, Section 4-A(3) deals with that question. The provision has been quoted above."

31. It would be noticed that in **Mubasir Ahmed**, the doctor, who re-examined the various claimants sustaining injuries during the course of employment, had opined distinctly about the percentage of permanent disability, functional disability and loss of earning capacity, and in each case, the loss of earning capacity was assessed as 80%. The permanent disability and the functional disability was assessed at different percentages for the three claimants involved in the batch of three appeals arising from three different claim petitions. The Compensation Commissioner had apparently judged the loss of earning capacity below 100%, but on appeal to the High Court, the loss of earning capacity was estimated as 100%. The remarks of their Lordships came in the backdrop of the fact that there were no reasons indicated by the High Court to hold a 100% loss of earning capacity for the claimants. As would be presently shown, that is not the case here.

32. The Compensation Commissioner in this case has regarded it a case of 100% loss of earning capacity based on the provisions of Section 4(1)(c)(ii) of the Act of 1923, where in case of injuries not specified in Schedule-I of the Act of 1923, the percentage of compensation payable in case of permanent total disablement has to be determined proportionate to the loss of earning capacity, to borrow the words of the statute. Particularly, the Compensation Commissioner has gone by the law that the loss of earning capacity has to be assessed by a qualified medical practitioner. The certificate, Ex. W1 in this case, has been issued by the C.M.O. on the report of Dr. Nagaich, a qualified orthopedic surgeon, who has specifically opined that the claimant is no longer fit to drive a vehicle. The

Compensation Commissioner has further inferred a 100% loss of earning capacity going by the principle laid down by high authority, which says that if the workman suffers injury of a kind that leads to permanent disablement and incapacitates him from performing all kind of work that he was capable of performing, the disablement is total. The principle has been laid down in the context of workmen, such as drivers or carpenters, that would squarely apply to the case here. In this connection, reference may be made to the decision of the Supreme Court in **Pratap Narain Singh Deo** (*supra*), where a three Judge Bench of their Lordships of the Supreme Court has observed:

"5. The expression "total disablement" has been defined in Section 2(1)(e) of the Act as follows:

"(1) 'total disablement' means such disablement whether of a temporary or permanent nature, as incapacitates workman for all work which he was capable of performing at the time of the accident resulting in such disablement."

It has not been disputed before us that the injury was of such a nature as to cause permanent disablement to the respondent, and the question for consideration is whether the disablement incapacitated the respondent for all work which he was capable of performing at the time of the accident. The Commissioner has examined the question and recorded his finding as follows:

"The injured workman in this case is carpenter by profession By loss of the left hand above the elbow, he has evidently been rendered unfit for the work of carpenter as the work of carpentry cannot be done by one hand only."

This is obviously a reasonable and correct finding. Counsel for the appellant has not been able to assail it on any ground and it does not require to be corrected in this appeal. There is also no justification for the other argument which has been advanced with reference to Item 3 of Part II of Schedule 1, because it was not the appellant's case before the Commissioner that amputation of the arm was from 8" from tip of acromion to less than 4 below the tip of olecranon. A new case cannot therefore be allowed to be set up on facts which have not been

admitted or established.”

33. In view of the aforesaid facts and the settled position of the law, this Court is afraid that the authority in **Mubasir Ahmed** would be of little assistance to the insurers.

34. The next decision that has been pressed in aid on behalf of the insurers is **Mohd. Nasir** (*supra*). Mr. Mehrotra has drawn the Court's attention to the following observations of their Lordships in **Mohd. Nasir**:

“**14.** A question has been raised as to whether the percentage of loss of earning capacity and the physical disability shall be the same. A question has furthermore been raised as regards the applicability of the multiplier specified in the Second Schedule appended to the 1988 Act on the premise that the same would not be applicable in respect of the claim petition which is filed under Section 166 of the Act.

15. Before adverting to the questions raised before us, we may notice the statutory provisions contained in the 1923 Act and the 1988 Act.

23. Both the 1923 Act and the 1988 Act are beneficent legislation insofar as they provide for payment of compensation to the workmen employed by the employers and/or by use of motor vehicle by the owner thereof and/or the insurer to the claimants suffering permanent disability. The amount of compensation is to be determined in terms of the provisions of the respective Acts. Whereas in terms of the 1923 Act, the Commissioner who is a quasi-judicial authority, is bound to apply the principles and the factors laid down in the Act for the purpose of determining the compensation, Section 168 of the 1988 Act enjoins the Tribunal to make an award determining the amount of compensation which appears to be just.

24. Both the Acts aim at providing for expeditious relief to the victims of accident. In these cases, the accidents took place by reason of use of motor vehicles. Both the statutes are beneficial ones for the workmen as also the third parties. The benefits thereof are available only to the persons specified under the Act besides under the contract of insurance. The statutes, therefore, deserve liberal construction. The legislative intent contained therein is required

to be interpreted with a view to give effect thereto.

25. With the aforementioned backdrop, we may analyse the contentions raised before us by the learned counsel for the parties.

26. Both the statutes provide for the mode and manner in which the percentage of loss of earning capacity is required to be calculated. They provide that the amount of compensation in cases of this nature would be directly relatable to the percentage of physical disability suffered by the injured vis-à-vis the injuries specified in the First Schedule of the 1923 Act. Indisputably where injuries are specified in the First Schedule, the mode and manner provided for the purpose of calculating the amount of compensation would be applicable.

27. The statutes provide for the determination of the extent of physical disability suffered by a qualified medical practitioner so as to enable him to assess the loss of earning capacity. Explanation 1 appended to clause (c) of sub-section (1) of Section 4 provides that where there are more injuries than one, the aggregate amount of compensation has to be taken but the same should not exceed the amount which would have been payable in case of permanent total disablement. It is also beyond any doubt or dispute that while determining the amount of loss of earning capacity, the Tribunal or the High Court must record reasons for arriving at their conclusion.

28. The 1923 Act would also be applicable to the claims applications arising out of the use of motor vehicles in terms of the provisions of the 1988 Act for the purpose of determination of the amount of compensation where the victim of the accident suffers from disability in the cases coming within the purview thereof. The note appended to the Second Schedule of the 1988 Act raises a legal fiction, stating that "injuries deemed to result in permanent total disablement/permanent partial disablement and percentage of loss of earning capacity shall be as per Schedule I under the Workmen's Compensation Act, 1923". Permanent disability, therefore, for certain purposes have been correlated with functional disability.

29. As to what, therefore, in our opinion, would be relevant is to find out the nature of injuries and as to whether the same falls within the purview of Part I or Part II thereof. We have

noticed hereinbefore that whereas Part I specifies the injuries which would deem to result in permanent total disablement, Part II specifies injuries which would be deemed to result in permanent partial disablement.

30. The distinction between the "permanent total disablement" and "permanent partial disablement" is that whereas in the former it is 100% disablement, in the latter it is only the disablement to the extent specified in the Schedule. Similar terms have been used in clauses (a) and (b) of Para 5 of the Second Schedule of the Motor Vehicles Act. It, by reference, incorporates the provisions of the First Schedule to the 1923 Act. Indisputably, therefore, the Note appended thereto would not only be applicable to the cases falling under the 1923 Act but apply to the cases which fall under the 1988 Act as well.

31. Our attention, however, has been drawn to a decision of this Court in *National Insurance Co. Ltd. v. Mubasir Ahmed* [(2007) 2 SCC 349 : (2007) 1 SCC (L&S) 643] , wherein it was held: (SCC p. 354, para 8)

"8. Loss of earning capacity is, therefore, not a substitute for percentage of the physical disablement. It is one of the factors taken into account. In the instant case the doctor who examined the claimant also noted about the functional disablement. In other words, the doctor had taken note of the relevant factors relating to loss of earning capacity. Without indicating any reason or basis the High Court held that there was 100% loss of earning capacity. Since no basis was indicated in support of the conclusion, same cannot be maintained. Therefore, we set aside that part of the High Court's order and restore that of the Commissioner, in view of the fact situation. Coming to the question of liability to pay interest, Section 4-A(3) deals with that question. The provision has been quoted above."

32. In determining the amount of compensation, several factors are required to be taken into consideration having regard to the Note. Functional disability, thus, has a direct relationship with the loss of limb."

35. This Court may say that there can be no cavil about the principles for the determination of permanent total disablement and permanent partial disablement or the functional disability

and the proportionate loss of earning capacity adumbrated. Does the determination in this case falls foul of the ratio on one or the other principle in **Mohd. Nasir**? We do not think so. **Mohd. Nasir** was again a case where a batch of appeals was considered by their Lordships and the one involving Mohd. Nasir's claim bears closest on the facts here. The facts in **Mohd. Nasir** can best be recapitulated in the words of their Lordships that figure in Paragraph Nos.3 and 4 of the report thus:

"3. The first respondent in this appeal was the driver of a truck bearing Registration No. UP 21 9636. Respondent 2 was its owner. An accident took place on 2-10-2004 wherein the first respondent suffered an injury in his right leg besides others. He filed an application for award of compensation in terms of the provisions of the 1923 Act before the Commissioner for Workmen's Compensation, Moradabad claiming a sum of Rs 1,50,000 with interest.

4. The Commissioner opined that although the workmen had suffered 15% disability but loss of his earning capacity was 100%. Noticing that he was aged about 35 years and his salary was Rs 3200 per month, a sum of Rs 3,78,355.20 was awarded with interest at the rate of 12% per annum from the date of accident till payment. The High Court dismissed the appeal in limine."

36. In answering the issues arising before their Lordships in **Mohd. Nasir**, it was held:

"33. Mohd. Nasir was a driver. A driver of a vehicle must be able to make use of both his feet. It was the case of the claimant that he would not be in a position to drive the vehicle and furthermore would not be able to do any other work. He was incapable of taking load on his body. It, however, appears that in his cross-examination, he categorically stated that only the Chief Medical Officer had checked him in his office. No disability certificate had been granted. He admitted that he had not suffered any permanent disability. He, even according to the Chief Medical Officer who had not been examined, suffered only 15% disability.

34. The Tribunal has arrived at the following findings:

"On p. 16, the original of disability certificate, the prescription of medicine, x-ray report of Sarvodaya and of Mohan X-Rays have been produced which reveal the fracture of right leg. CMO Certificate O/M 9/2003 dated 21-3-2005 has also been produced which is alleged to be false by the Insurance Company. I have perused them carefully which bears the signature of Deputy CMO officer of the Disability Board, Moradabad had it shown that the applicant had appeared before them for medical check-up and whose examination was done by Senior Orthopaedics Surgeon Dr. R.K. Singh. On the basis of recommendation of Dr. Bansal operation was done on 2-10-2004, the applicant walked with the help of support and is not competent to drive the heavy motor vehicle. The said certificate was issued with recommendation that after six months his condition is to be reviewed.

That document was filed on 29-3-2005. Insurance Company has stated that the doctor who has issued the disability certificate has not been produced in the court. But looking into the aftermath situation the plea of Insurance Company that the said certificate is forged and the same has not been issued by any MBBS doctor, carries no force."

35. The learned Tribunal had held that there has been a 15% disability but then there was nothing to show that Mohd. Nasir suffered 100% loss of earning capacity. The Commissioner has applied 197-06 as the relevant factor, his age being 35. He, therefore, proceeded on the basis that it was a case of permanent total disablement. However, his income was taken to be at Rs 1920 per month. There is nothing on record to show that the qualified medical practitioner opined that there was a permanent and complete loss of use of his right leg or that he became totally unfit to work as a driver. In that situation, the High Court, in our opinion, was not correct in determining the loss of income at 100%."

(emphasis by Court)

37. The principle that is then laid down in **Mohd. Nasir** is in the backdrop of evidence that was very different than the one that obtains in this case. Mohd. Nasir had in his cross-

examination said that he was examined by the Chief Medical Officer in his office and the only opinion expressed by the C.M.O. was that Nasir had suffered 15% disability. It was a case where no evidence was produced to show that a qualified medical practitioner had opined the claimant to have suffered a permanent and complete loss of the use of his right leg or that he had become totally unfit to function as a driver. By contrast, in the present case, Ex. W1 would show that the certificate by the C.M.O. had been issued based on the opinion of a qualified orthopedic surgeon Dr. Nagaich, who had twice examined the claimant. The certificate says in categorical terms that the claimant had become unfit to drive, in the doctor's opinion. Therefore, the principles laid down in **Mohd. Nasir** would be of little assistance to the insurers. Needless to say that the cases involved in the other appeals, that form part of the batch, relate to workmen of a different kind, such as a cleaner, a casual labourer etc., in whose case the percentage of permanent total disablement and the proportionate loss of earning capacity would work out differently.

38. The next case, on which the learned Counsel for the insurers has placed reliance is **Raj Kumar v. Ajay Kumar** (*supra*). He has drawn the attention of this Court to the following remarks in **Raj Kumar**:

"**25.** The Tribunal has proceeded on the basis that the permanent disability of the injured claimant was 45% and the loss of his future earning capacity was also 45%. The Tribunal overlooked the fact that the disability certificate referred to 45% disability with reference to the left lower limb and not in regard to the entire body. The said extent of permanent disability of the limb could not be considered to be the functional disability of the body nor could it be assumed to result in a corresponding extent of loss of earning capacity, as the disability would not have prevented him from carrying on his avocation

as a cheese vendor, though it might impede in his smooth functioning. Normally, the absence of clear and sufficient evidence would have necessitated remand of the case for further evidence on this aspect. However, instead of remanding the matter for a finding on this issue, at this distance of time after nearly two decades, on the facts and circumstances, to do complete justice, we propose to assess the permanent functional disability of the body as 25% and the loss of future earning capacity as 20%."

39. This Court may say that the remarks of their Lordships, on which Mr. Mehrotra has placed much reliance, come in the context of very different facts. The facts there would show that the claim was one in the context of a man, who was a cheese vendor, suffering a 45% permanent disability to his left lower limb. The disability was not opined as one that would affect his entire body, reducing his earning capacity to the same extent. As would appear from the facts in that case, there is no remark suggesting that the qualified medical practitioner, who had certified the 45% permanent disablement, had also assessed the loss of earning capacity as envisaged by Section 4(1)(c)(ii) of the Act of 1923. The case here is absolutely different, again for the two reasons that this Court noticed earlier. The first is that upon a specific inquiry by the Compensation Commissioner, the C.M.O., on the basis of a report submitted by a qualified orthopedic surgeon, has opined that the claimant would not be able to drive a vehicle in future; and, secondly, the principle that applies is that if the workman concerned is rendered unfit to do the specific kind of job that he was doing before the accident on account of a smaller percentage of permanent total disablement, it would result in 100% loss of earning capacity. This is particularly true in case of workmen like drivers or carpenters, for whom a small percentage of permanent physical disability may extinguish their capacity to

undertake their avocation. The decision in **Raj Kumar** relied upon by Mr. Mehrotra would, therefore, not be of much assistance to the insurers either.

40. The next authority called in aid by the learned Counsel for the insurers is the decision of a three Judge Bench of the Supreme Court in **Ajay Kumar Mohanty** (*supra*). In **Ajay Kumar Mohanty**, it has been observed:

“8. In arriving at the quantification of compensation, we must be guided by the well-settled principle that compensation can be granted both on account of permanent disability as well as loss of future earnings, because one head relates to the impairment of the person's capacity and the other to the sphere of pain and suffering on account of loss of enjoyment of life by the person himself.”

41. There is no quarrel about the principle in **Ajay Kumar Mohanty**, but the holding in that case, where the Court had found the disability not of a permanent nature, would have no application here. There was very different kind of evidence in that case regarding a doctor manipulating the medical certificate, otherwise signed by four doctors, rendering the evidence about permanent disablement unreliable. So far as the principle in **Ajay Kumar Mohanty** is concerned, upon which Mr. Mehrotra has placed reliance, this Court fails to see how it would further the insurers' case.

42. Learned Counsel for the insurers has in the last placed reliance upon the Full Bench decision of the Karnataka High Court in **Shivalinga Shivanagowda Patil** (*supra*) and invited the Court's attention to the following observations:

“23. Now the words employed in Section 2(1) make it clear that in order to determine the total disablement, whether of a temporary or permanent nature, what is to be seen is whether the injury complained of incapacitates a workman for all

work which he was capable of performing at the time of the accident resulting in such disablement. Therefore, it is clear the question is not whether the workman is incapacitated to do the work which he was doing before the accident. Even though he was doing a particular work if he was capable of performing other work at that point of time, the question is whether after the accident even though he is disabled from performing the work which he was performing before the accident whether he is able to perform the other work which he was capable of performing before the accident. In that view of the matter, it is not possible to accept the contention that once it is shown that the injured is not capable of doing the work which he was performing before the accident, it amounts to total disablement."

43. On the foot of the aforesaid remarks of the Full Bench, Mr. Mehrotra says that unless the workman showed by evidence that not only he was incapable of doing a driver's job on account of the permanent total or partial disablement suffered, he is also incapacitated from doing any other work that he was capable of performing earlier, an inference of total loss of earning capacity cannot be drawn. No doubt, the Full Bench in **Shivalinga Shivanagowda Patil** has answered Question No. (iii) in the manner urged by Mr. Mehrotra, but this Court is not inclined to go by the opinion of the Full Bench of the Karnataka High Court for reason that there is higher authority expressing opinion to the contrary. The foremost is the decision of the Supreme Court in **Pratap Narain Singh Deo**, to which we have made allusion. Following the decision in **Pratap Narain Singh Deo**, the Supreme Court in **K. Janardhan v. United India Insurance Company Limited and another, (2008) 8 SCC 518** held in the case of a tanker driver, who had suffered amputation of his right leg from the knee:

"5. The learned counsel for the appellant has raised only one argument during the course of the hearing. He has submitted that the appellant claimant being a tanker driver, the loss of his right leg ipso facto meant a total disablement as

understood in terms of Section 2(1)(1) of the Workmen's Compensation Act and as such the appellant was entitled to have his compensation computed on that basis. In support of this plea, the learned counsel has placed reliance on *Pratap Narain Singh Deo v. Srinivas Sabata* [(1976) 1 SCC 289 : 1976 SCC (L&S) 52] . The cited case pertained to a carpenter who had suffered an amputation of his left arm from the elbow and this Court held that this amounted to a total disability as the injury was of such a nature that the claimant had been disabled from all work which he was capable of performing at the time of the accident. It was observed as under : (SCC p. 291, para 5)

"5. The expression "total disablement" has been defined in Section 2(1)(1) of the Act as follows:

'2. (1)(1) "total disablement" means such disablement, whether of a temporary or permanent nature, as incapacitates a workman for all work which he was capable of performing at the time of the accident resulting in such disablement;'

It has not been disputed before us that the injury was of such a nature as to cause permanent disablement to the respondent, and the question for consideration is whether the disablement incapacitated the respondent for all work which he was capable of performing at the time of the accident. The Commissioner has examined the question and recorded his finding as follows:

'The injured workman in this case is carpenter by profession... By loss of the left hand above the elbow, he has evidently been rendered unfit for the work of carpenter as the work of carpentry cannot be done by one hand only.'

This is obviously a reasonable and correct finding. Counsel for the appellant has not been able to assail it on any ground and it does not require to be corrected in this appeal. There is also no justification for the other argument which has been advanced with reference to Item 3 of Part II of Schedule 1, because it was not the appellant's case before the Commissioner that amputation of the arm was from 8" from tip of acromion to less than 4½" below the tip of olecranon. A new case cannot therefore be allowed to be set up on facts which have not been admitted or established."

6. Applying the ratio of the cited judgment to the facts of the present case we are of the opinion that the appellant herein has also suffered a 100% disability and incapacity in earning his keep as a tanker driver as his right leg had been amputated from the knee. Additionally, a perusal of Sections 8 and 9 of the Motor Vehicles Act, 1988 would show that the appellant would now be disqualified from even getting a driving licence."

44. In S. Suresh v. Oriental Insurance Company Limited and another, (2010) 13 SCC 777, again the case of a driver, who had suffered amputation of his right leg below the knee, it was held:

"7. The correctness of the impugned judgment is questioned mainly on the ground that the claimant being a lorry driver, the loss of his right leg ipso facto meant a "total disablement" as understood in terms of Section 2(1)(1) of the Act and as such the compensation payable to the claimant had to be computed on that basis.

8. In support of the plea, reliance is placed on a four-Judge Bench decision of this Court in *Pratap Narain Singh Deo v. Srinivas Sabata* [(1976) 1 SCC 289 : 1976 SCC (L&S) 52] . In that case, a carpenter had suffered amputation of his left arm from the elbow. This Court held that this amounted to a total disability as the injury was of such a nature that the *claimant had been disabled from all work which he was capable of performing at the time of the accident*. It was observed as under: (SCC p. 291, para 5)

"5. The expression 'total disablement' has been defined in Section 2(1)(1) of the Act as follows:

'2. (1)(1) "total disablement" means such disablement, whether of a temporary or permanent nature, as incapacitates a workman for all work which he was capable of performing at the time of the accident resulting in such disablement:'

It has not been disputed before us that the injury was of such a nature as to cause permanent disablement to the respondent, and the question for consideration is whether the disablement incapacitated the respondent for all work which he was capable of performing at the time of the accident. The Commissioner has

examined the question and recorded his finding as follows:

'The injured workman in this case is carpenter by profession... By loss of the left hand above the elbow, he has evidently been rendered unfit for the work of carpenter as the work of carpentry cannot be done by one hand only.'

This is obviously a reasonable and correct finding."

In our view, the ratio of the said judgment is squarely applicable to the facts at hand.

9. We are of the opinion that on account of amputation of his right leg below the knee, he is rendered unfit for the work of a driver, which he was performing at the time of the accident resulting in the said disablement. Therefore, he has lost 100% of his earning capacity as a lorry driver, more so, when he is disqualified from even getting a driving licence under the Motor Vehicles Act, 1988."

45. In the very recent authority of their Lordships in *Arjun s/o Ramanna alias Ramu v. IFFCO Tokio General Insurance Company Limited and another*, (2022) 5 SCC 706, where the driver of a goods carrier on account of the motor accident suffered amputation of the right upper limb above the wrist joint, it was held:

"6. The impugned judgment [*Iffco Tokio General Insurance Co. Ltd. v. Arjun*, 2018 SCC OnLine Kar 3922] of the High Court proceeds on the accepted position that the appellant was employed as a driver to drive an auto-rickshaw used for carrying goods. The only ground on which the High Court reduced the compensation was that the appellant did not suffer from total disablement. Therefore, the Commissioner for workmen's compensation committed an error by taking the disability at 100%. The first respondent cannot dispute its liability to pay compensation as the High Court has held the said respondent liable. The first respondent has not challenged the impugned judgment. Therefore, the argument that the appellant did not possess a driving licence to drive a commercial goods vehicle is not open to the first respondent.

7. The only question which is required to be decided is whether the appellant suffered from total disablement, which is defined in clause (1) of sub-section (1) of Section (2) of the said Act.

8. On the issue of disability, what is relevant is the statement of Dr Laxmi Narayanana, who examined the appellant for making an assessment of disability:

"3. When presented he had a crush injury of right forearm with fractured ends of radius and ulna and triple nerve injury of the right forearm and guillotine amputation with stump reconstruction was done on 19-2-2009 and was further managed by me since then with follow-up treatment over a period of time.

4. *On examination today, all the external injuries were found healed up and the amputated stump is also healed up with blunting of the stump due to which there is functional loss of 100% of right upper limb wherein he cannot perform any of the activities with the upper limb on right side. Further, I state that he cannot perform the job of driver for ever due to amputation of his right upper limb.*

5. In view of this on verifying the records and on examination I am of the opinion that PPD is of 40% with subsequent loss in earnings".

(emphasis supplied)

9. What the doctor has stated in Para 5 is his opinion as regards the percentage of disability. But in Para 4, the doctor has clearly stated that the appellant has suffered from functional loss of 100% of the right upper limb and cannot perform the job of a driver forever due to amputation of his right upper limb.

10. x x x

11. There is no dispute that the appellant suffered from disablement of permanent nature. The disablement has incapacitated him from doing the work which he was capable of doing. The said work was of driving a vehicle. Therefore, the learned Commissioner for Workmen's Compensation was right in holding that the disability of the appellant will have to be treated as 100% disability. Hence, the case of the appellant will be covered by the definition of "total disablement".

46. In view of the above conspectus of the law, it seems that in the case of workmen dedicated to a specific kind of a job like a driver, a carpenter or may be a tailor, an injury causing whatever percentage of permanent disablement, if it prevents the workman from doing the job that he had been doing before the accident, would entitle him to claim 100% loss of earning capacity under Section 4(1)(c)(ii) of the Act of 1923.

47. Substantial Question of Law No. 1 is answered in the **affirmative** in terms of the above remarks.

48. So far as the second substantial question of law is concerned, the admission about the claimant's salary being Rs.2000/- per month comes from a thumb marked statement or a letter dated 11.05.2002 given to the owners by the claimant and filed as a document *vide* list of papers dated 12.03.2004. During his examination-in-chief, the claimant has stood firm by the fact that he was in receipt of a salary of Rs.4000/- per month, besides Rs.50/- towards diet allowance. In his cross-examination, upon the signed statement or the letter carrying the so called admission being shown to the claimant, he has denied his thumb impression on the document. Therefore, in the face of the said evidence, the Compensation Commissioner concluding that the claimant's wages have to be determined in accordance with those payable to a driver as notified under the Minimum Wages Act, 1948, can hardly be flawed. The further reasoning of the Compensation Commissioner that if they wished to prove the claimant's salary/ wages below that claimed by him, it was open to them to produce the salary register, which they did not do. Given this evidence, it is opined that there is no admission by the claimant that he was in receipt of a salary of Rs.2000/- per month, contrary to which the Compensation Commissioner might be said to have held.

49. The second substantial question of law is, accordingly, answered in the **negative**.

50. In the result, there is no force in this appeal, which stands **dismissed with costs**.

51. The interim stay order passed in this appeal is hereby vacated.

Order Date :- 06.11.2023
Anoop

(J.J. Munir, J.)