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

Date of Decision: August 12, 2016

+ **FAO 317/2016 & C.M.25006/2016**

THE NEW INDIA ASSURANCE CO LTD Appellant
Through: Mr. J.P. N Shahi, Advocate

versus

VIRENDER & ANR Respondents
Through: Nemo

CORAM:

HON'BLE MR. JUSTICE SUNIL GAUR

% **JUDGMENT**
(ORAL)

Impugned order of 13th May, 2016 directs payment of compensation of ₹2,12,650/- with interest on the ground of the injuries suffered by the respondent-claimant. The medical certificate on record reveals that upon total hip replacement of the right hip due to *united fractures, shaft femur (L)*, the permanent disability has been assessed at 70%. On account of medical bills, compensation granted is ₹2,12,650/-. The challenge to the impugned order in this appeal on behalf of the appellant-insurer is on the ground that the functional disability is infact 35% and this has not been taken into consideration and that the compensation of ₹2 lacs odd towards medical bills is unjustified. To

submit so, reliance has been placed upon Supreme Court's decision in *Raj Kumar v. Ajay Kumar and Another* (2011) 1 SCC 343. It is also contended that the plea qua the disability certificate could not have been taken in the written statement because the disability certificate is of 11th February, 2016.

Upon hearing and on perusal of impugned order and the material on record, I find that no basis has been laid for arriving at a conclusion that the functional disability is 35%. Pertinently, it is not even the stand of appellant-insurer in the written statement before the trial court that the functional disability is 35%. Similarly, in the written statement, there is a bald denial of respondent-claimant spending ₹6 lacs on the medical treatment.

To say the least, mere denial is not sufficient. It is not the case of appellant-insurer that the medical bills placed on record by the respondent-claimant are forged, fabricated or bogus.

During the course of hearing, appellant's counsel had submitted that neither issues were framed nor any evidence was led. Taking into consideration the stand of the appellant-insurer in the written statement, I find that there was no requirement of putting this case to rigmarole of trial by framing the issues or allowing the leading of any evidence in this case.

The appellant ought to have obtained expert opinion certifying that the functional disability is 35%. In the absence of any such proof, this plea cannot be accepted. Reliance placed upon Supreme Court's decision in *Raj Kumar (supra)* to put the burden on the Motor Accident Claims Tribunal to assess the functional disability is of no assistance to the case

in hand because the cited decision deals with the case under *the Motor Vehicles Act, 1988*. However, the effect of permanent disability on the earning capacity of the injured has to be seen and quantified in terms of money. The illustration given in paragraph No.14 in *Raj Kumar (supra)* throws light as to how the impact of permanent disability can be seen.

In the light of the decision in *Raj Kumar (supra)*, this Court has gone through the impugned order, copy of the written statement of appellant filed before the learned Commissioner and the Disability Certificate and finds that the respondent-injured was working as a Cleaner on the tanker-truck when he had sustained the injuries leading to total hip replacement of right hip due to *united fracture of shaft femur (L)*.

In the absence of expert opinion forthcoming from the appellant regarding the extent of functional disability, this Court is left with no option except to take a judicial notice of the fact that the tanker-truck cleaner would be seriously handicapped in doing the cleaning work on the tanker-truck and the extent of functional disability would be no less than permanent disability as reflected in the disability certificate. Thus, finding no substance, this appeal and the application are dismissed with a rider that the question of mode of assessment of functional disability is left open to be considered in a appropriate case.

(SUNIL GAUR)
JUDGE

AUGUST 12, 2016

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