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

% *Judgment delivered on: 10th May, 2018*

+ **FAO 259/2013**

M/S NEW INDIA ASSURANCE CO. LTD. Appellant
Through: Mr. D. D. Singh and Ms. Seerat Deep
Singh, Advocates.

Versus

MOHD. AJMER & ANR. Respondents
Through: Mr. R. K. Nain, Advocate.

CORAM:
HON'BLE MR. JUSTICE NAJMI WAZIRI

NAJMI WAZIRI, J (Oral)

1. This appeal impugns an order dated 25.04.2013 passed by the Commissioner, Employee's Compensation, awarding compensation of Rs.9,45,888/- alongwith interest @ 12 % *per annum* from the date of accident till the date of realization, alongwith Rs.88,400/- as medical expenditure to the injured/employee – respondent No.1, i.e. driver of respondent No. 2 on account of functional disability assessed as 100%. The vehicle driven by the injured person was owned by respondent No.2 and insured with the appellant. The Disability Certificate (Ex. AW1/4) relied upon by respondent No.1 was issued by a hospital of the Government of Delhi, which certifies that respondent No. 1 suffers from physical disability in his right lower limb to the extent of 30%. A corollary, therefore, would be that he suffers from a functional disability of 100% apropos driving a

motor vehicle. It is another matter though, he may be able to drive a vehicle especially fashioned for disabled persons such as himself. However, he has been incapacitated from being employed as a commercial driver. The learned counsel for the appellant relies upon the judgment of the Supreme Court in ***Raj Kumar vs. Ajay Kumar & Anr., 2011 ACJ 1***, which held that:-

“13. We may now summarise the principles discussed above:

- (i) All injuries (or permanent disabilities arising from injuries), do not result in loss of earning capacity.*
- (ii) The percentage of permanent disability with reference to the whole body of a person, cannot be assumed to be the percentage of loss of earning capacity. To put it differently, the percentage of loss of earning capacity is not the same as the percentage of permanent disability (except in a few cases, where the Tribunal on the basis of evidence, concludes that percentage of loss of earning capacity is the same as percentage of permanent disability).*
- (iii) The doctor who treated an injured-claimant or who examined him subsequently to assess the extent of his permanent disability can give evidence only in regard the extent of permanent disability. The loss of earning capacity is something that will have to be assessed by the Tribunal with reference to the evidence in entirety.*
- (iv) The same permanent disability may result in different percentages of loss of earning capacity in different persons, depending upon the nature of profession, occupation or job, age, education and other factors.*

14. The assessment of loss of future earnings is explained below with reference to the following illustrations:

Illustration `A': The injured, a workman, was aged 30 years and earning Rs.3000/- per month at the time of accident. As per Doctor's evidence, the permanent disability of the limb as a consequence of the injury was 60% and the consequential permanent disability to the person was quantified at 30%. The loss of earning capacity is however assessed by the Tribunal as 15% on the basis of evidence, because the claimant is continued in employment, but in a lower grade. Calculation of compensation will be as follows:

- a) Annual income before the accident : Rs.36,000/-
- b) Loss of future earning per annum (15%
of the prior annual income) : Rs. 5400/-
- c) Multiplier applicable with reference
to age : 17
- d) Loss of future earnings : (5400 x 17) : Rs. 91,800/-

Illustration `B': The injured was a driver aged 30 years, earning Rs.3000/- per month. His hand is amputated and his permanent disability is assessed at 60%. He was terminated from his job as he could no longer drive. His chances of getting any other employment was bleak and even if he got any job, the salary was likely to be a pittance. The Tribunal therefore assessed his loss of future earning capacity as 75%. Calculation of compensation will be as follows:

- a) Annual income prior to the accident : Rs.36,000/-
- b) Loss of future earning per annum (75%
of the prior annual income) : Rs.27000/-
- c) Multiplier applicable with reference
to age : 17
- d) Loss of future earnings : (27000 x 17) : Rs. 4,59,000/-

Illustration `C': The injured was 25 years and a final year Engineering student. As a result of the accident, he was in coma for two months, his right hand was amputated and vision was affected. The permanent disablement was assessed as 70%. As the injured was incapacitated to pursue his chosen career and as he required the assistance of a servant throughout his life, the loss of future earning capacity was also assessed as 70%. The calculation of compensation will be as follows:

- a) *Minimum annual income he would have got if had been employed as an Engineer* : Rs.60,000/-
- b) *Loss of future earning per annum (70% of the expected annual income)* : Rs.42000/-
- c) *Multiplier applicable (25 years)* : 18
- d) *Loss of future earnings : (42000 x 18)* : Rs. 7,56,000/-

[Note: The figures adopted in illustrations (A) and (B) are hypothetical. The figures in Illustration (C) however are based on actuals taken from the decision in Arvind Kumar Mishra (supra)].

2. He also relies upon the judgment of the Supreme Court in ***National Insurance Co. Ltd. Vs. Mubasir Ahmed & Anr. (2007) 2 SCC 349.***

3. ***Raj Kumar*** (supra) lays down that what is to be examined is the functional disability or loss of earning capacity in relation to the assessed physical disability. Such assessment would have to be done by the Commissioner, with reference to the nature of work, occupation, profession, age, education and other factors and the evidence in entirety. In the present case, the physical disability is of 30% in the right lower limb would render him incapacitated either to accelerate the vehicle or to apply brakes. Owing to the nature of motor vehicles manufactured in India, these functions are

carried out by a motor vehicle driver by the right leg. However, employee's right leg having been permanently impaired for performing such vital driving actions, his functional disability would be assessed as 100% apropos the vocation of a driver. There is hardly any likelihood that anybody would employ him as a motor vehicle driver. Resultantly, his loss of earning capacity would have to be assessed as 100%.

4. The learned counsel for the respondent relies upon the judgment of the Supreme Court in **Mohan Soni vs. Ram Avtar & Ors., 2102 ACJ 583**, which held that:-

“7. On hearing counsel for the parties and on going through the materials on record, we are of the view that both the Tribunal and the High Court were in error in pegging down the disability of the appellant to 50% with reference to Schedule 1 of the Workmen's Compensation Act, 1923. In the context of loss of future earning, any physical disability resulting from an accident has to be judged with reference to the nature of work being performed by the person suffering the disability. This is the basic premise and once that is grasped, it clearly follows that the same injury or loss may affect two different persons in different ways. Take the case of a marginal farmer who does his cultivation work himself and ploughs his land with his own two hands; or the puller of a cycle-rickshaw, one of the main means of transport in hundreds of small towns all over the country. The loss of one of the legs either to the marginal farmer or the cycle-rickshaw-puller would be the end of the road insofar as their earning capacity is concerned. But in case of a person engaged in some kind of desk work in an office, the loss of a leg may not have the same effect. The loss of a leg (or for that matter the loss of any limb) to anyone is bound to have very traumatic effects on one's personal, family or social life but the loss of one of the legs to a person working in the office would not interfere with his work/earning capacity in the same degree as in the case of a marginal farmer or a cycle-rickshaw-puller.

8. *The question of loss of earning capacity resulting from amputation of one the legs in the case of a tanker driver was considered by this Court in K. Janardhan v. United India Insurance Company Limited and another, (2008) 8 SCC 518. In that case, a tanker driver suffered serious injuries in a motor accident and as a result, his right leg was amputated upto the knee joint. He made a claim under the Workmen's Compensation Act, 1923. The Commissioner for Workmen's Compensation held that disability suffered by him as a result of the loss of the leg was 100% and awarded compensation to him on that basis. In appeal, the High Court, like in the present case, referred to the Schedule to the Workmen's Compensation Act, 1923 and held that the loss of a leg on amputation amounted to reduction in the earning capacity by 60% and, accordingly, reduced the compensation awarded to the tanker driver. This Court set aside the High Court judgment and held that the tanker driver had suffered 100% disability and incapacity in earning his keep as a tanker driver as his right leg was amputated from the knee and, accordingly, restored the order passed by the Commissioner of Workmen's Compensation. In K. Janardhan this Court also referred to and relied upon an earlier decision of the Court in Pratap Narain Singh Deo v. Srinivas Sabata (1976) 1 SCC 289, in which a carpenter who suffered an amputation of his left arm from the elbow was held to have suffered complete loss of his earning capacity."*

(emphasis supplied)

5. Furthermore, this Court has taken a similar view in:-

- (i) ***Reliance General Insurance Co. Ltd. vs. Bikramjit Singh & Anr.*** (FAO No. 24204/2016), decided on 01.05.2018; wherein it was held that:-

“ The appellant’s argument is untenable because what has to be examined is whether the physical disability results in such a disability that would render the injured party unable to discharge functions of employment which he/she was doing earlier i.e. the degree of functional disability would form the basis for assessing compensation. The driver has 31% physical disability in the right lower limb and that would obviously render him unable to drive a motor vehicle or a goods carrier as the right leg is used primarily for acceleration and applying the brake, the two most important aspects of a motor vehicle in motion.

If there is an impairment to such a degree, then it would compromise the safe driving of the vehicle, therefore, it could well be determined as 100% functional disability. Hence, 31% disability in the right leg can easily be equated as 100% disability for a driving.

Since, there was a doubt about the extent of disability suffered by the claimant, the Commissioner, Employees’ Compensation had referred the case for ascertainment of the disability to the Medical Board of Aruna Asaf Ali Hospital, Delhi, a government owned and run hospital. The said Medical Board comprising three doctors, by a Certificate dated 13.09.2013, Exhibit AW1/2, has certified that the claimant’s case was of proximal femur (right) resulting in physical disability of 31% in the right lower limb.

Keeping this Certificate in mind, the impugned order relied upon the judgment of this Court in **National Insurance Co. vs. Hari Om & Anr.**, 2011 LLR-428 that loss of earning capacity of the driver was assessed as 100% even though his physical disability was only 20% - 25%. Similarly, in **National Insurance Co. Ltd. vs. Shri Ranjit Singh@ Rana & Anr.** FAO No. 246/2007 delivered on 26.11.2009 again considered the physical disability of 15% as 100% functional disability. In the present case, however, the disability is 31% in the right lower limb which obviously would

compromise safe driving of any motor vehicle. The employment of a driver suffering from such a severe physical disability is a too remote, indeed almost negligible. Therefore, would have to be treated as a 100% functional disability entitling the claimant to the award which has been granted.”

- (ii) **Raj Kumar vs. M/s Ashok Kumar & Bros. & Anr.** (FAO No. 498/2016), decided on 19.04.2017, which held that:-

*“7. The appellant is present in person in view of the directions of a learned Single Judge of this Court dated 15.12.2016. It is seen that the appellant is walking with a stick and the left lower limb is in such a condition that obviously appellant will be no longer be able to perform the duty of a driver. Though, the medical certificate may only call the disability as 23% disability, really the disability is 100% because appellant cannot perform the duty of a driver, and this is so held by the Supreme Court in the case of **Pratap Narain Singh Deo (supra)** referred to above.”*

6. In view of the aforesaid discussion, this Court does not find any infirmity in the impugned order. The appeal is without merits and is accordingly dismissed.

NAJMI WAZIRI, J.

MAY 10, 2018

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