



2024: DHC: 429



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

% **Judgment reserved on : 01 December 2023**

**Judgment pronounced on : 22 January 2024**

+ **FAO 17/2021 & CM APPL. 1170/2021**

**NEW INDIA ASSURANCE CO. LTD. .... Appellant**

**Through: Mr. Salil Paul with Mr. Sahil Paul, Adv.**

**versus**

**MOHARMAN & ANR. .... Respondents**

**Through: Mr. R. K. Nain, Mr. Daksh Nain and Mr. Chandan Prajapati, Adv. for R-1.**

**Ms. Hetu Arora Sethi, ASC, GNCTD with Ms. Kavita Nailwali, Adv. for Commissioner.**

+ **FAO 21/2021 & CM APPL. 1454/2021**

**NEW INDIA ASSURANCE CO LTD .... Appellant**

**Through: Mr. Salil Paul with Mr. Sahil Paul, Adv.**

**versus**

**PUSHKIN TIWARI & ANR. .... Respondents**

**Through: Mr. R. K. Nain, Mr. Daksh Nain and Mr. Chandan Prajapati, Adv. for R-1.**

+ **FAO 305/2022 & CM APPL. 51551/2022, CM APPL. 51553/2022**

**NEW INDIA ASSURANCE CO. LTD .... Appellant**

**Through: Mr. Salil Paul with Mr. Sahil Paul, Adv.**

**versus**

**FURKAN @ MOHD. FURKAN & ANR. .... Respondents**

**Through: Mr. R. K. Nain, Mr. Daksh Nain and Mr. Chandan Prajapati, Adv. for R-1.**



**CORAM:**  
**HON'BLE MR. JUSTICE DHARMESH SHARMA**

**J U D G M E N T**

1. This common judgment shall decide the above-noted three separate appeals preferred by the appellant/Insurance company, each instituted under Section 30 of the Employee's Compensation Act, 1923<sup>1</sup> challenging the award of compensation to each of the injured workman/respondent No.1/claimants assuming 100% loss of earning capacity. The facts of the above-noted appeals present some-what similar facts raising a substantial question of law about determination of the amount of compensation in the face of apparent contradictions between the medical evidence and the assumption of loss of earning capacity by the Commissioner, Employee's Compensation, Delhi<sup>2</sup>. In order to avoid any confusion, this Court would briefly delve into the factual circumstances of each of the aforesaid appeals.

**FAO 17/2021**

2. Shorn of unnecessary details, it is an admitted fact that the truck bearing No. HR55-P-9692 was registered in the name of respondent No.2 / registered owner, that met with an accident on 08.11.2017 at about 07.00 a.m. in the morning within the jurisdiction of PS Delhi Gate, District Aligarh, Uttar Pradesh near Talashpur, Aligarh bypass, as a result of which, both driver and respondent No.1, who claimed to be a cleaner deployed on the truck, sustained grievous injuries.

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<sup>1</sup> Act

<sup>2</sup> Commissioner



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3. Respondent No.1 instituted an application for compensation under the Act on 17.05.2018 and claimed that he was employed as a cleaner on the ill-fated truck drawing wages @ Rs. 10,000/- per month plus Rs. 200/- per day as food allowance. He claimed that he was 22 years of age and injuries sustained in the accident has rendered him in no position to gain any employment as a driver or cleaner and claimed 100% disability with regard to the earning capacity. Admittedly, the ill-fated truck was insured with the appellant/ insurance company and there is no dispute that respondent No.1 was employed with respondent No.2, and that the driver possessed a valid driving licence.

4. Suffice to state that the learned Commissioner passed the impugned order dated 14.08.2020 holding that respondent No.1 was entitled to compensation for the injuries sustained during the course of his employment. Although, the Medical Board of Aruna Asaf Ali Hospital, Delhi assessed his disability to the extent of 20% with regard to injury on his 'left lower limb', the learned Commissioner relying on the decisions in **Pratap Narain Singh v. Srinivasa Sabata**<sup>3</sup>, **National Insurance Company v. Pappu & Anr.**<sup>4</sup> and **Rayapati Venkateswar Rao v. Mantai Sambasiva Rao & Anr.**<sup>5</sup>, assessed the disability @ 100% loss of earning capacity, and accordingly, applying the relevant factor of 22 years *viz.*, 221.37 as per Schedule IV to the Act and calculating the loss of earning capacity at 60% of the assumed wages @ Rs. 8000/- per month, awarded a total compensation of Rs. 10,62,576/- (221.37 x 8000 x 60) with interest @ 12% per annum

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<sup>3</sup> (1976) 1 SCC 289

<sup>4</sup> 2009 SCC Online Del 3536

<sup>5</sup> 2001 ACJ 2105



from the date of accident i.e. 08.11.2017, till its deposit in favour of the claimant with the office of the Commissioner.

### **FAO 21/2021**

5. In the instant appeal, the claim was instituted by the driver/respondent No.1 of the same ill- fated truck bearing registration No. HR-55-P-9692, who sought compensation in respect of injuries sustained in the same accident on 08.11.2017. He claimed that he was 30 years of age and had been drawing wages @ 12,000/- per month and in addition, getting Rs.300/- per day as food allowance for being employed with respondent no. 2/registered owner, and he also claimed to be 100% disabled for the purpose of his employment as a driver. At the cost of repetition, the ill-fated truck was insured with the appellant/insurance company and there was raised no dispute that there was an existing relationship of employer and employee between the claimant/respondent No.1 and respondent No.2 and that the injuries were sustained during the course of such employment.

6. The learned Commissioner vide the impugned order dated 11.08.2020 *inter alia* held that although the Medical Board of Aruna Asaf Ali Hospital, Delhi had assessed his disability to the extent of 18% in respect of injury to 'right lower limb', relying on the decisions by the Delhi High Court in **New India Assurance Company Ltd. v. Mohd. Ajmer<sup>6</sup>** and **Reliance General Insurance Co. Ltd. v. Bikramjit Singh<sup>7</sup>**, loss of earning capacity was assessed at 100%. Applying the relevant factor of 30 years i.e., 207.98 as per Schedule

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<sup>6</sup> 2018 SCC Online 9158

<sup>7</sup> FAO No. 24204/2016 decided on 01.05.2018



IV to the Act and assuming the wages to be @ Rs. 8,000/- per month and thereby assessing the damages to the extent of 60%, a total sum of Rs. 9,98,304/- was awarded  $(207.98 \times 8000 \times 60)$  with penalty of Rs.

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2,49,576/- in terms of Section 4A(3) (b) of the Act to be payable within 30 days from the date of pronouncement.

### **FAO 305/2022**

7. In this case, a different vehicle was involved in the accident bearing registration No. UA-07M-8987 owned by respondent No.2/ registered owner and admittedly insured with the appellant/Insurance Company. Again shorn of unnecessary details, this unfortunate accident occurred when respondent No.1, who was a cleaner on the truck and was fixing the front tyre of the truck which had got burst, by affixing/installing the jack, which gave away and the respondent No.1 got caught up underneath the truck and sustaining injuries on his both legs.

8. A claim petition was filed by respondent No.1 on 15.11.2016 seeking compensation, but the claim petition unfortunately shuttled between different jurisdiction and led to protracted litigation, and eventually the impugned order dated 03.08.2022 was passed by the learned Commissioner rendering a finding that respondent No.1/claimant was employed as a driver with respondent No.2 and he suffered injuries during the course of his employment and although the Medical Board of Aruna Asaf Ali Hospital, Delhi assessed his disability at 39% with regard to injury on 'left lower limb', it was held that the respondent No.1/claimant would not be in a position to do any



physical work commensurating with duties as a driver and loss of earning capacity was assessed to be 100%.

9. Suffice to state that some decisions by the Apex Court as well as the High Court of Delhi were referred to by the learned Commissioner and taking relevant factors and the age to be 45 years i.e.; 169.44 as per Schedule IV to the Act, and assuming wages @ Rs. 8,000/- per month and assessing it at 60%, a total compensation of Rs. 8,13,312/- was awarded besides interest @ 12% per annum under Section 4A of the Act from the date of accident i.e., 02.01.2015 till its realization.

10. It goes without saying that notices of the present appeals have been served upon the respondents and they have put appearance and the present appeals are opposed.

#### **LEGAL SUBMISSIONS MADE AT THE BAR:**

11. Learned counsel for the appellant/insurance company, alluding to Section 4 (1) (c) (ii) of the Act, which provides for the manner in which the compensation has to be assessed, has vehemently urged that the said provision has been completely overlooked by the learned Commissioner and there was no assessment as to the loss of earning capacity by a qualified medical practitioner. Reliance has been placed on the decisions in **National Insurance Co. Ltd. v. Mubasir Ahmed & Anr.**<sup>8</sup>, **Oriental Insurance Co. Ltd. v. Mohd. Nasir & Anr.**<sup>9</sup> and **Raj Kumar v. Ajay Kumar & Anr.**<sup>10</sup>

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<sup>8</sup> (2007) 2 SCC 349

<sup>9</sup> (2009) 6 SCC 280

<sup>10</sup> (2011) 1 SCC 343



12. *Per contra*, learned counsel for the respondent vehemently urged that the learned Commissioner had rightly found that the claimants/respondent No.1 had suffered permanent disability, which have rendered the injured workmen/claimants incapable of gaining any employment as a driver, and therefore, loss of earning capacity @100% was rightly assessed. Learned counsel for the respondent placed reliance on the decisions in **Pratap Narain Singh Deo v. Srinias Sabta & Anr.**<sup>11</sup>, **National Insurance Co. Ltd. v. Ranjit Singh @ Rana & Anr.**<sup>12</sup>, **National Insurance Company Ltd. v. Hari Om**<sup>13</sup>, **Mohan Soni v. Ram Avtar Tomar & Ors.**<sup>14</sup>, **New India Assurance Co. Ltd. v. Mohd. Ajmer**<sup>15</sup>, **North East Karnataka Road Transport Corporation v. Sujatha**<sup>16</sup> and **Chanappa Nagappa Muchalagoda v. Divisional Manager, New India Insurance Company Limited**<sup>17</sup>.

#### **ANALYSIS AND DECISION:**

13. I have given my thoughtful consideration to the detailed submissions advanced by learned counsels for the rival parties at the Bar. I have gone through the record of each of the aforesaid three appeals. I have also meticulously gone through the case-laws settled at Bar.

14. At the outset, it must be stated that an appeal preferred under Section 13 against the order of the Commissioner is not like a regular

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<sup>11</sup> (1976) 1 SCC 289

<sup>12</sup> 2009 SCC OnLine Del 3826

<sup>13</sup> 2011 SCC OnLine Del 328

<sup>14</sup> (2012) 2 SCC 267

<sup>15</sup> 2018 SCC OnLine Del 9158

<sup>16</sup> (2019) 11 SCC 514

<sup>17</sup> (2020) 1 SCC 796



first appeal in the nature of Section 96 of the CPC and the appellate jurisdiction of this Court is only to examine the substantial questions of law arising in the matter<sup>18</sup>. It must be stated first that on the face of it, except for the issue of the functional disability of each of the claimants having been assumed/taken/considered at 100% loss of earning capacity in contradiction to the medical certificate with regard to physical disability, there are canvassed no other issues.

### **PROPOSITION OF LAW**

15. Therefore, let us **first examine** as to what ‘**substantial question**’ of law is involved. In order to decide whether the given set of facts and circumstances involve substantial question of law, it would first be expedient to refer to Section 4 of the Act, which provides as follows:

**“4. Amount of compensation.—**(1) Subject to the provisions of this Act, the amount of compensation shall be as follows, namely:—

(a) .....not relevant;

(b) where permanent total disablement results from the injury

an amount equal to <sup>2</sup>[sixty per cent.] of the monthly wages of the injured <sup>3</sup>[employee] multiplied by the relevant factor;

or

an amount of <sup>6</sup>[one lakh and forty thousand rupees], whichever is more:

<sup>1</sup>[Provided that the Central Government may, by notification in the Official Gazette, from time to time, enhance the amount of compensation mentioned in clauses (a) and (b);]

*Explanation I.*—For the purposes of clause (a) and clause (b), “relevant factor”, in relation to <sup>2</sup> [an employee] means the factor specified in the second column of Schedule IV against the

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<sup>18</sup> North East Karnataka Road Transport Corpn. v. Sujatha, (2019) 11 SCC 514).



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entry in the first column of that Schedule specifying the number of years which are the same as the completed years of the age of the <sup>3</sup>[employee] on his last birthday immediately preceding the date on which the compensation fell due.

<sup>4</sup>[\* \* \* \*]

(a) .....not relevant;

(b) where permanent total disablement results from the injury

an amount equal to <sup>5</sup>[sixty per cent.] of the monthly wages of the injured <sup>3</sup>[employee] multiplied by the relevant factor;

or

an amount of <sup>6</sup>[one lakh and forty thousand rupees], whichever is more:

(c) where permanent partial disablement results from the injury

(i) in the case of an injury specified in Part II of Schedule I, such percentage of the compensation which would have been payable in the case of permanent total disablement as is specified therein as being the percentage of the loss of earning capacity caused by that injury; and

(ii) in the case of an injury not specified in Schedule I, such percentage of the compensation payable in the case of permanent total disablement as is proportionate to the loss of earning capacity (as assessed by the qualified medical practitioner) permanently caused by the injury;

*Explanation I.*—Where more injuries than one are caused by the same accident, the amount of compensation payable under this head shall be aggregated but not so in any case as to exceed the amount which would have been payable if permanent total disablement had resulted from the injuries.

*Explanation II.*—In assessing the loss of earning capacity for the purposes of sub-clause (ii), the qualified medical practitioner shall have due regard to the percentages of loss of



earning capacity in relation to different injuries specified in Schedule I;

(d) where temporary disablement, whether total or partial results from the injury

a half-monthly payment of the sum equivalent to twenty-five per cent. of monthly wages of the <sup>3</sup>[employee], to be paid in accordance with the provisions of sub-section (2).

<sup>5</sup>[(2A) The employee shall be reimbursed the actual medical expenditure incurred by him for treatment of injuries caused during the course of employment.]”

16. At this juncture, it is pertinent to indicate that each of these appeals are ones pertaining to the category vide section 4(1)(c)(ii)) of the Act. It would further be relevant to refer to Section 2(g) of the Act which *inter alia* defines ‘partial disablement’ apart from Section 2(l) of the Act, which defines ‘total disablement’ as under:

“2(g) “partial disablement” means, where the disablement is of a temporary nature, such disablement as reduces the earning capacity of a 2 [employee] in any employment in which he was engaged at the time of the accident resulting in the disablement, and, where the disablement is of a permanent nature, such disablement as reduces his earning capacity in every employment which he was capable of undertaking at that time: provided that every injury specified 3 [in Part II of Schedule I] shall be deemed to result in permanent partial disablement;

2(l) “total disablement” means such disablement, whether of a temporary or permanent nature, as incapacitates a2 [employee] for all work which he was capable of performing at the time of the accident resulting in such disablement:”

17. A careful perusal of the aforesaid provisions read with Parts-I and II of Schedule-I vis-à-vis Section 2(g) and (l) of the Act would show that where “permanent partial disability” is claimed, vide Explanation II to Section 4(c) of the Act, the medical practitioner shall have due *regard to the percentages of loss of earning capacity in*



*relation to different injuries specified in the Schedule-I for the purposes of assessment of loss of earning capacity. Further, whereas Part-I specifies the injuries which would be deemed to result in 'permanent total disablement', Part-II specifies injuries which would be deemed to result in 'permanent partial disablement'. The distinction is very thin, but real to the effect that while permanent disablement is 100% disablement, permanent partial disablement is only the disablement to the extent specified in the schedule.*

18. It may be stated at the outset that the three cases before us do not involve amputation of any bodily limbs, and evidently in FAO 17/2021, the claimant vide medical certificate dated 01.11.2018 (Annexure-A/8) is shown to have suffered fracture of both bones of his left leg, where disability has been opined to be 20% physical impairment in relation to left lower limb. Likewise, in FAO 21/2021, the claimant vide medical certificate dated 03.01.2020 (Annexure-A/8) was found to be in complete injury leg fracture of fibula (Rt.), which has been held to be a permanent physical impairment of their right lower limb. For that matter, even in FAO 305/2012, certificate dated 18.05.2017 (Annexure-A/6) is a case of fracture of SOF (Lt.) plating, opined to be 30% permanent physical impairment in relation to his left lower limb. Evidently, the aforesaid nature of injuries are not specified in Schedule-I of the Act, and thus, the determination or assessment of loss of earning capacity is to be provided by a qualified medical practitioner, as engaged in terms of section 2(l) of the Act<sup>19</sup>.

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<sup>19</sup> (i) "qualified medical practitioner" means any person registered <sup>12</sup>\* \* \* under any <sup>13</sup>[Central Act, Provincial Act or an Act of the Legislature of a <sup>14</sup>[State]] providing for the maintenance of a



19. At first blush, it is evident that in each of the disability certificates introduced in evidence during the course of inquiry before the learned Commissioner(s), no assessment has been made with regard to the loss of earning capacity of the workman concerned. The disability certificate is issued on a cyclostyled proforma, thereby filling up the blanks and expressing **the percentage of permanent functional disability/impairment** in respect of bodily limb concerned. Each certificate describes the nature of injury and provides that the disability is “*not likely to improve*” by specifically striking off the sentence “*likely to improve*” and in each case there is no recommendation for re-assessment of the disability in future.

20. All said and done, there is no finality attached to the decision of the Medical Practitioner as to his/her decision with regard to the percentage of the permanent functional disability. Such findings are neither conclusive in nature nor the same is binding in any manner. Such disability certificates are mere expression of an opinion by an expert and not based on any objective parameters. Such reports are not preceded with any detailed inquiry into the nature of work that was being performed by the workman. Hence, this Court has no hesitation in rejecting the plea by the learned counsels for the appellants/Insurance Company that in the absence of finding by a qualified medical practitioner, there could not have been any independent assumptions on the part of the learned Commissioner.

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register of medical practitioners, or, in any area where no such last-mentioned Act is in force, any person declared by the State Government, by notification in the Official Gazette, to be a qualified medical practitioner for the purposes of this Act;



21. The above-noted provisions of the Act have come to be interpreted in umpteen number of matters by the Apex Court as also by various High Courts, including our High Court. In the cited case of ***Mohd. Nasir (supra)***, the claimant/workman was working as a cleaner on a truck, which met with an accident and he suffered permanent partial disability in the nature of injuries to his right leg. The Commissioner opined that although workman had suffered 50% disability, the loss of his earning capacity was 100%. The cited case was in fact a common decision rendered on three other SLPs. The second case was one where the injured was a casual labour employed for loading and unloading and although his physical disability was assessed at 40%, the functional loss of earning capacity was assessed to be 80%. The third case also involved two victims who were engaged for loading and unloading of goods wherein the physical disability was assessed at 40% for each but the loss of earning capacity was assessed at 80% and 100% respectively; and the fourth case was one where the victim was a driver of the offending vehicle aged about 65 years, who was a practicing advocate, and his permanent disability was assessed at 50% and loss of earning capacity was assessed at 50%.

22. The Supreme Court while referring to earlier case in ***Mubasir Ahmed (supra)*** quoted the following observations in law with approval :

“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



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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.”

23. In view of the said observation, the Supreme Court in the case of ***Mohd. Nasir (supra)*** held as follows:

“16. 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.

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 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. The Tribunal has arrived at the following findings:

“On page 16 original of disability certificate, the prescription of medicine, X-Ray report of Sarvodaya and of Mohan X-Rays have been produced which reveals the fracture of right leg. CMO certificate No O/M 9.2003 dated 21.3.2005 has also been produced which is alleged to be false by Insurance Company. I have perused them carefully which bears signature of Deputy CMO of Disability Board, Moradabad had shown that the applicant had appeared before them for medical check up and whose examination was done by senior orthopaedic surgeon Dr. R.K. Singh on the basis of recommendation of Dr. Bansal operation was done on 2.10.2004. **The applicant walks with the help of the support and is not competent to drive 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 29.33.2005. Insurance Company has stated the doctor who has issued 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.”

17. The learned Tribunal had held that there has been a 15% disability but then there was nothing to show that he suffered 100% loss of earning capacity. The Commissioner has applied the 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. 1,920/- 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%.

In *Ramprasad Balmiki v. Anil Kumar Jain & Ors.*, IV (2008) ACC 1(SC)=(2008) 9 SCC 492, wherein upon referring to the evidence of the Doctor who did not say that any permanent disability had been caused, this Court held:

“Be that as it may, the High Court, in our opinion, correctly proceeded on the assumption that the extent of permanent disability suffered by the appellant is only 40% and not 100%.”

We, therefore, are of the opinion that the extent of disability should have been determined at 15% and not 100%. The appeal is allowed to the aforementioned extent.”

**{Bold emphasized and contrasted with sentences in italics}**

24. In the cited case of *Raj Kumar (supra)*, the victim sustained fracture of both bones of left leg and fracture of left radius and admittedly remained under prolonged medical treatment. Although the medical certificate provided that permanent disability had been suffered to the extent of 45%, the tribunal assessed the loss of earning capacity to be 100%. It is in the said context that the following observations of law, that remained untampered till today, were made which read as under:



“12. Therefore, the Tribunal has to first decide whether there is any permanent disability and, if so, the extent of such permanent disability. This means that the Tribunal should consider and decide with reference to the evidence:

- (i) whether the disablement is permanent or temporary;
- (ii) if the disablement is permanent, whether it is permanent total disablement or permanent partial disablement;
- (iii) if the disablement percentage is expressed with reference to any specific limb, then the effect of such disablement of the limb on the functioning of the entire body, that is, the permanent disability suffered by the person.

If the Tribunal concludes that there is no permanent disability then there is no question of proceeding further and determining the loss of future earning capacity. But if the Tribunal concludes that there is permanent disability then it will proceed to ascertain its extent. After the Tribunal ascertains the actual extent of permanent disability of the claimant based on the medical evidence, it has to determine whether such permanent disability has affected or will affect his earning capacity.

13. Ascertainment of the effect of the permanent disability on the actual earning capacity involves three steps. The Tribunal has to **first ascertain what activities the claimant could carry on in spite of the permanent disability and what he could not do as a result of the permanent disability** (this is also relevant for awarding compensation under the head of loss of amenities of life). The **second step is to ascertain his avocation, profession and nature of work before the accident, as also his age.** The **third step** is to find out whether (i) the claimant is totally **disabled from earning any kind of livelihood, or (ii) whether in spite of the permanent disability, the claimant could still effectively carry on the activities and functions, which he was earlier carrying on, or (iii) whether he was prevented or restricted from discharging his previous activities and functions, but could carry on some other or lesser scale of activities and functions so that he continues to earn or can continue to earn his livelihood.”**

{bold portions emphasized}

25. The principles laid down in *Raj Kumar (supra)* that were summarised are as follows:

“19. 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 the percentage of loss of earning capacity is the same as the 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 to 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.”

26. It is pertinent to mention here that the dictum in the aforesaid two cases, heavily relied upon by the learned counsel for the appellants, were rendered by two Hon'ble Judges i.e., the Division Bench of the Supreme Court. On the other hand, learned counsel for the respondent/claimant referred to a decision in ***Pratap Narain Singh Deo (supra)***, which was given by a Constitutional Bench consisting of five judges of the Supreme Court, wherein the Court decided a matter in which the victim was working as a carpenter who met with an accident and the injuries sustained resulted in amputation of his left arm from the elbow. The injury was held to be 'total disablement' within the meaning of Section 2(l) of the Act and it was observed that the amputation of left hand above the elbow has rendered the workman 'unfit' for performing the work as a carpenter as the work of



carpentry cannot be done with one hand only and the decision to adjudge 100% loss of earning capacity was upheld.

27. In the case of **Ranjit Singh @ Rana (supra)**, the victim was a driver by profession and he sustained permanent disability to the extent of 50% while the Commissioner assessed the loss of earning capacity to the extent of 100%. This Court relying on the decision in the case of **State of Gujarat v. Rajendra Khodabhai Deshdia & Anr.**<sup>20</sup>, **Pratap Narain Singh Deo (supra)**, **Rayapati Venkateswar Rao (supra)** and **G. Anjaneyulu v. Alla Seshi Reddy & Anr.**<sup>21</sup> upheld the decision by the learned Commissioner to the effect that *“the operation of right leg had been impaired that would render the workman not in a position to drive any heavy vehicle like truck/bus and therefore, functional disability has been correctly assessed @ 100%”*.

28. In the case of **Hari Om (supra)**, the workman was employed as a driver, who sustained injuries in the nature of Compound Fracture Shaft Femur Rt. with Communicated Intra-articular Fracture Rt. Knee of upper and of Tibia and Fibula with large degloving injury Lt. leg with fracture base of Rt. 1st Metatarsal with fracture of lateral nasal bone with multiple lacerated wounds. Although the medical disability was assessed as 30% permanent in nature, the loss of earning capacity assessed as 100% by the Commissioner was upheld.

29. In **Mohan Soni (supra)**, the victim was earning his livelihood as a cart puller and the accident resulted in amputation of his left leg

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<sup>20</sup> 1991 ACJ 638

<sup>21</sup> 2002 ACJ 1392



below the knee. The Supreme Court did not approve the decision of the Tribunal and the High Court limiting the loss of earning capacity to 50% merely because the victim was a cart puller and the observations referred to in the above judgment of **Raj Kumar (supra)** were cited with approval and the functional disability was held to be as high as 100% but in no case less than 90%. **What is to be underlined** is that it was observed by the Supreme Court that “*the estimation of functional disability and its effect on nature of work being performed by the victim suffering from such disability may be different and affect two different persons in different ways*”. It was also observed that “*while estimating functional disability, the Court should refrain from considering hypothetical factors like possibility of change of vocation or adoption of another means of livelihood*”. It was held that “*scaling down of compensation could only be done when some tangible evidence is on the record and not otherwise*”.

30. The decision in **Mohd. Ajmer (supra)** is one where the victim was a driver and although the physical disability in his right lower limb was medically assessed to be 30%, the functional disability was held to be 100%. This Court referred to a decision by the Supreme Court in **Mohan Soni (supra)** wherein it was held that “*in the context of loss of future earning, any physical disability resulting from an incident has to be judged with reference to the nature of work being performed by a 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*”. This



Court also referred to the decision in *Bikramjit Singh (supra)*, wherein it was observed as under:

“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 AW 1/2 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. v. Hari Om*, 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. v. Shri Ranjit Singh* @ Rana 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 v. Ashok Kumar & Bros.* (FAO No. 498/2016), decided on 19.04.2017, which held that:-

“7.The appellant is present in person in view of the



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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.”  
**{bold portions emphasized}**

31. The aforesaid evolvement of compensatory jurisprudence over the years settles the issue as to the assessment of loss of earning capacity. However, I shall lastly refer to the decision in ***Chanappa Nagappa Muchalagoda (supra)*** wherein, the workman was a driver of heavy vehicle aged about 33 years, who suffered from serious injuries to his right leg in the nature of an anterior cruciate ligament and a collateral ligament tear and was subjected to plastic surgery that resulted in permanent disability, which was medically opined to be 37%. The Supreme Court referred to with approval, the decision in ***Raj Kumar (supra)*** and some other decisions, and affirmed the judgment of the High Court on assessing the functional disability of the appellant as 100%.

32. To sum up, while considering the case of ‘permanent partial disablement’, where disability is expressed with reference to any specific limb of the body, the Tribunal is enjoined upon to consider the effect of such disablement of the limb on the functioning of the entire body. In doing so, the Tribunal is to first ascertain all the activities that the claimant was performing prior to suffering of the disability and how such activities being performed by the claimant are



effected subsequent to sustaining the disability. The bottom line is that loss of earning capacity is a crucial aspect which has to be determined by the Tribunal on appreciation of the evidence led on the record in its entirety.

33. In view of the aforesaid proposition of law, coming to the instant matters, let us deal with each of the appeal separately.

### **FAO 17/2021 &**

34. In the instant matter, it was proven on the record that respondent No.1/workman was 22 years of age and was employed as a Cleaner by the registered owner of the truck. Learned Commissioner decided the claim with regard to disability suffered as under:

“23. It is stated by the claimant that he was cleaner by profession and now in this situation, he is not in the position to take his profession of cleaner and he has lost 100% of his earning capacity. He got injury enabling thereby he is no more in a position to do which he was doing prior to the accident. Hence, his disability should be assessed as 100%. In his medical Disability Certificate, his injury has been shown ‘Left Lower limb’. In this regard, the question as to reduction in earning capacity was argued by the both parties. Finding the nature of work, it should be accepted that it is a case of 100% loss of earning capacity and in this regard the Ld. Counsel for the claimant has relied on the ruling of the Hon’ble Supreme Court of India – *Pratap Narain Singh vs. Srinivasa Sabata* cited at 1976 ACJ 141 whereby the Apex Court has held that the workman was no more in a position to do that work which he was doing hence the disablement was assessed 100%. The Ld. Counsel of the claimant has drawn my attention and has placed the judgment of Hon’ble High Court of Delhi in the case titled as *National Insurance Co. vs. Pappu & Anr.*, FAO 289/2004 – Pappu was working as cleaner and in the case partial physical disablement he was held entitled for 100% loss of earning capacity and another judgment of Hon’ble High Court Andhra Pradesh in the case titled as *Rayapati Venkateswara Rao vs. Mantai Sambasiva Rao & Anr.*, cited at II (2001) ACC 300, decided by Hon’ble High Court of Kerala per Hon’ble Mr. Justice N.V. Ramana, the applicant was employed as cleaner on the truck and he was entitled for 100% loss of earning capacity.



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24. In view of above mentioned facts, judgment and the claimant submitted that he was a cleaner and after the injury he is not in the position to take his profession of cleaner and he got injury enabling thereby he is no more in a position to do the work which he was doing prior to the accident and he has lost 100% earning capacity. Hence, I hold the applicant lost his earning capacity as cleaner and the lost in it is 100%. In the given wage, age and loss of earning capacity the applicant/claimant is entitled to compensation as under:

- i) Relevant factor of 22 years: 221.37
- ii) 60% of wages @ Rs.8000/-pm: Rs.4800/-
- iii) Amount of compensation  
**221.37 x 8000 x 60 : Rs.10,62,576/-**  
**100"**

25. As per the provisions of section 4A(3)(a) of the Act, the claimant has also been made entitled to interest @ 12% per annum on the principal amount of compensation from one month after the date of accident i.e. 08.11.2017 till its deposition in favour of the Commissioner Employee's Compensation, North District."

35. The aforesaid findings rendered by the learned Commissioner have to be appreciated in the backdrop of the testimony of respondent No.1/workman, who was examined on 09.05.2019 and his uncontroverted and unrebutted deposition in the affidavit filed in evidence Ex.AW-1/1 to the effect that the accident resulted in grievous injuries all over his body especially on both his legs and that he would not be able to work as cleaner; and that any possibility of his becoming a driver in future was ruled out. The injured workman/claimant in his cross examination was not prodded about any possibility of disability getting healed or that his bodily limb getting fully functional in the remainder of his life. The veracity of his deposition that suffering permanent disability would render him incapable of securing any other employment connected with motor transport or otherwise was not questioned. Therefore, this Court is



unable to find any flaw in the ultimate decision by the learned Commissioner reckoning the loss of earning capacity at 100%.

36. Hence, the present appeal is bereft of any merits and the same is dismissed with costs of Rs.50,000/- that be paid to respondent no. 1/claimant within two months failing which the appellant/Insurance company shall be liable to pay the same with interest @ 15% p.a., from the date of this judgment till realisation.

### **FAO 21/2021**

37. In the instant matter, the respondent No.1/driver of the ill-fated truck was about 30 years of age. There was no issue that the accident occurred during the course of his employment and the issue of disability was dealt with the learned Commissioner in the following manner:

“17. In the claim application the applicant/claimant has stated that he was drawing wages @ Rs 12,000/- per month plus Rs. 300/- per day as food allowance. The respondent no. 1 employer has stated that he was not being paid that amount as worked out by the claimant but he was being paid @ Rs. 16,000/- per month including all allowances. But as per maximum limit prescribed - under the 'Act' for the purpose of compensating, at that particular point of time, the wages can maximally be taken as Rs. 8,000/- per month. His wage is thus taken Rs. 8000/- per month. The claimant has further stated that he was 30 years old at the time of accident. For the purpose of his assessment of his disablement, he was directed to face Medical Board of Aruna Asaf Ali Hospital, Delhi and the medical board has assessed him 18% permanent disabled. In his medical Disability Certificate, his injury has been shown 'Right Lower Limb'. The documents and the Medical Certificate show that the applicant/claimant has certain injuries in his leg and it is upto 18%. Now the issue is whether he can be allowed to take driving in that physical condition of his body. He claims that he may not be allowed to drive a heavy vehicle. In the given situation, given that position of his leg, he may not be permitted to hold a licence to drive a heavy vehicle. The counsel for the applicant has placed reliance on the ruling by the Hon'ble High Court of Delhi in



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F.A.O. No. 259/2013 New India Assurance company Ltd. Vs. Mohd. Ajmer. In the said judgment, the Hon'ble High Court (by Hon'ble Justice Najmi Waziri) has relied on the judgments of the Hon'ble Supreme Court and this High Court. A portion of the judgment which may be directly applicable on the case herein is reproduced as under:-

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

(i) *Reliance General Insurance Co., Ltd. v. Bikramjit Singh* (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. v. Hari Om, 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. v. Shri Ranjit Singh Rana 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*



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*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 v. Ashok Kumar & Bros. (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."*

*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."*

18. In view of above mentioned facts, judgements and the claimant submitted that he was a driver and after this injury he was no more in a position to drive a vehicle and He also submitted that the applicant was driver by profession & he had got injury enabling thereby he is no more in a position to do the same which he was doing prior to the accident, I hold he lost his earning capacity as driver and the loss in it is 100%. In the given wage, age and loss of earning capacity the applicant/claimant is entitled to compensation as under:

|                                  |          |                        |
|----------------------------------|----------|------------------------|
| i) Relevant factor of 30 years   | :        | 207.98                 |
| ii) 60% of wages @ Rs. 8000/- pm | :        | Rs. 4800/-             |
| iii) Amount of compensation      |          |                        |
| <b><u>207.98 X 8000 X 60</u></b> |          |                        |
| <b>100</b>                       | <b>:</b> | <b>Rs. 9,98,304/-"</b> |

38. The aforesaid observations have to be read and appreciated in the backdrop of the categorical testimony of respondent No.1/driver that the permanent partial disability has rendered him completely 'unfit' for seeking employment as a driver. In his cross-examination



except for a bald suggestion by the Authorised Representative (AR) of the respondent/insurance company that he had not suffered 100% loss of earning capacity and was not prodded about the nature, extent and functional handicap due to such injury, there is no gainsaying that a workman/driver driving a HMV or even for that matter a LMV (Transport), has to be fully bodily fit. The role of both legs in driving heavy vehicles is very crucial that needs prompt use of both legs for the purposes of putting appropriate pressure on the brakes, accelerator as well as the clutch. The fact of the matter is that respondent No.1/workman has no prospect of getting any future employment as a driver.

39. Before parting with this appeal, it would be expedient to address a new issue raised by the learned counsel for the appellant/Insurance company in the appeal which was not raised before the learned MACT to the effect that the driving licence of the respondent No.1/claimant has since been renewed by the Etawah Transport Department, Government of Uttar Pradesh, and computerized print outs of the same has been shown during the course of arguments evidencing that it was printed on 28.11.2023 at 11.32.31 AM, which evidently shows that he has been granted a driving license having validity of Non-Transport (NT) from 29.11.2012 to 28.11.2032 and for hazardous transport for the period 21.07.2022 to 20.07.2027. This aspect was never prodded about in the cross examination of respondent no.1/claimant. No evidence was produced that the workman has secured some employment and this Court cannot assume without tangible evidence that the workman has secured another



gainful employment as a driver and/or running or driving a HMV/LMV.

40. Be that as it may, this Court cannot take cognizance of this fact, for which this Court is inclined to concur with the reasons advanced by Rajasthan High Court in the case of **National Insurance Company Limited v. Rakesh Kumar Saini &Anr.**<sup>22</sup>, whereby similar plea was rejected holding as under:-

“...Merely by the factum of renewal of license, it could not have been inferred that the claimant was able to drive the vehicle. License may have been renewed for various reasons. One may be able to drive the vehicle for short duration but he is still unable to drive it for longer duration due to the injuries sustained in the accident. Thus by merely renewal of the license nothing can be inferred and no dent is caused in the finding recorded by the Commissioner, Workmen’s Compensation.”

41. In view of the foregoing discussions, the present appeal is also bereft of any merits and the same is accordingly dismissed with costs of Rs.50,000/- that be paid to respondent no. 1/claimant within two months failing which the appellant/Insurance company shall be liable to pay the same with interest @ 15% p.a., from the date of this judgment till realisation.

### **FAO 305/2022**

42. The respondent No.1/workman in the instant matter was evidently employed as a cleaner and there was no dispute that he suffered ‘permanent partial disablement’ during the course of his employment. Learned Commissioner in the impugned judgment-cum-

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<sup>22</sup> S.B. Civil Misc. Appeal No. 1534/2002 dated 21.07.2011



award dealt with the aspect of disability suffered for the purpose of assessment of compensation as under:

**“Relief:**

In the claim application the claimant has stated that he was getting wages Rs. 8,000/- per month plus Rs. 200/- per day as food allowance. But as per maximum limit prescribed at that particular point of time, his wages can be taken Rs. 8,000/- per month and accordingly he wage is taken as Rs. 8,000/- per month. In the claim application, he has further stated that he was 45 years old at the time of accident. He was got himself physically examined and Medical Board of Aruna Asaf Ali Hospital, Delhi. The Medical Board has assessed him 38% permanent disabled. In his medical Disability Certificate, his injury has been shown ‘Left Lower Limb’. The documents and the Medical Certificate show that the claimant may not be able to do any physical work of the nature. In this regard, the question as to reduction in earning capacity was argued by both the parties. Ld. Counsel for the claimant argued that the as the workman was a driver by his occupation which he was doing prior to the accident, after the accident he is no more in a position to continue with his occupation this be so this is a case of 100% loss of earning capacity. Finding the nature work, it should be accepted that it is case of 100% disablement and in this regard the Ld. Counsel for the claimant has relied on the ruling of the Hon’ble Supreme Court of India – *Pratap Narain Singh vs. Srinivasa Sabata* cited at 1976 ACJ 141 whereby the Apex Court has held that the workman was no more in a position do take up and do that work which he was doing hence the disablement was assessed 100%. Similarly he has relied on the judgment by the Hon’ble Supreme Court in *Mohan Soni vs. Ram Avtar & Ors.*, 2102 ACJ 583, which holds that the occupation must be considered while considering the disability. The main operative portion of the judgment is read as under:-

*“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 Hon'ble High Court of Delhi in a judgment in New India Assurance Co. Ltd. Vs. Mohd. Ajmer – FAO 259 of 2013 it has been ruled that a driver with injury in his leg having disablement to the extent of 30% is certainly a case of 100% loss of earning capacity. This is because of the reason that he is no more capable to drive a transport vehicle.

12. Keeping that in view I hold that the loss of earning capacity of the claimant is total and accordingly he is entitled to compensation. In the given wage, age and loss of earning capacity the applicant/claimant is entitled to compensation as under:

- i) Relevant factor of 45 years : 169.44
- ii) 60% of wages @ Rs. 8000/pm : Rs.4800/-
- iii) Amount of compensation  
**169.44 X 8000 X 60 : Rs.8,13,312/-**  
**100”**

43. Without any further ado, respondent No.1/workman was about 49 years of age at the time of examination before the Court on 15.03.2022. His testimony that he has suffered 100% disability despite the medical certificate opining disability to be 38% with regard to left lower limb and his deposition too is uncontroverted and unrebutted and except for a bald suggestion that he was capable of doing work, nothing was asked or prodded during his cross-examination. There was no suggestion that the nature of injuries were as such which would allow him to seek a better employment elsewhere.

44. In any case, it was a categorical deposition of respondent no. 1/claimant that he was employed in the transport business for more than 25 years, which was not controverted in any manner. It does not need divine eyes to appreciate that the nature of duties assigned to a cleaner are not only multifarious but also random, which *inter alia* involves cleaning the body of the truck from outside and inside, changing tyres while bending on knees as well as lying on the ground,



loading and unloading of goods, mounting on or an jumping out of the truck, fixing the tarpaulin and assisting drivers on directions so on and so forth.

45. The respondent No.1/workman is manifestly incapable of joining the same occupation at the age around 49 years and could only carry on some other or lesser scale of activities and functions so as to earn his livelihood. At the cost of repetition, it is the functional disability that has to be considered in ascertaining the loss of earning capacity, and mere fact that there is a possibility of change of occupation or vocation or adoption to earn his livelihood by digging some other kind of work should not weigh in the mind of this Court.

46. In view of the foregoing discussions, the instant appeal is dismissed too with costs of Rs.50,000/- that be paid to respondent No. 1/claimant within two months failing which the appellant/Insurance company shall be liable to pay the same with interest @ 15% p.a., from the date of this judgment till realisation

47. All the pending applications in each of the three appeals are accordingly disposed of.

48. Hence, the entire compensation, if not already released, be paid to each of the respondents with up to date interest forthwith.

**DHARMESH SHARMA, J.**

**JANUARY 22, 2024**

*Sadique/ck*