



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

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

Judgment pronounced on : 22 January 2024

+ **FAO 161/2021 & CM APPL. 21602/2021, CM APPL. 21604/2021, CM APPL. 21605/2021, CM APPL. 21673/2021**

NEW INDIA ASSURANCE COMPANY LIMITED

..... Appellant

Through: Appearance not given.
versus

SH. WASEEM & 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 is an appeal preferred under Section 30 of the Employees Compensation Act¹ by the appellant/insurance company assailing the impugned judgment dated 27.08.2019 passed by the learned Commissioner, Employee's Compensation (South)² whereby the claimant/respondent No.1 has been awarded total compensation of Rs. 8,28,096/- payable with interest @ 12% per annum within 30 days in case No. CEC/SD/I/65/2018/2986.

2. Shorn of unnecessary details, it is stated that the respondent no.1/claimant was employed as driver on truck bearing No. HR-38X-6878 which met with an accident when the same was being driven by

¹ Act, 1923

² Commissioner



him on 29.03.2018 resulting in injuries to his left leg. The ill-fated truck was evidently insured with the appellant/insurance company and respondent no. 1/claimant was admittedly holding a valid driving licence. Further, respondent No.2 was in agreement with the fact that the injuries sustained by respondent no. 1 were during the course of employment.

3. The claim petition was allowed by the learned Commissioner vide impugned judgment/award, which is assailed in the present appeal primarily on the grounds that the learned Commissioner erroneously considered the physical disability @ 22% in relation to 'left lower limb' of the respondent No.1/claimant as 100% functional disability and drawing perverse assumptions that respondent no. 1/claimant would be unable to perform his duties as driver. The appellant/ insurance company has relied on proposition of law laid down in the case of **Pradeep Mahta v. National Insurance Co. Ltd. & Anr.**³ and **Reliance General Insurance Co. Ltd. v. Manoj Singh @ Manoj Chandra Wanshi & Anr.**⁴ It was canvassed that the respondent No.1/claimant/injured has made considerable improvements in his working capacity and has otherwise been quite healthy, and therefore, disability could not have been assessed at 100%.

ANALYSIS: APPRECIATION OF FACTS & LAW:

4. I have given my thoughtful consideration to the submissions made by the learned counsel for the rival parties. I have also gone

³ FAO 216 of 2017 dated 16.02.2018 by Delhi High Court

⁴ FAO 425 of 2016 dated 02.09.2019



through the relevant record of the case including the digitized lower Court record.

5. It is relevant to take note that learned Commissioner based on the pleadings of the parties, framed the following issues for consideration:

- “1. Whether there exists employee-employer relationship between Respondent No. 1?
2. Whether the applicant suffered injury in the course of the said employment?
3. If, yes, what relief and what direction is to be passed?”

6. The learned Commissioner conjointly decided the issues No. 1 and 2 and the operative portion of the order in so far as it decides issue No.2 reads as under:-

“11. In view of above discussion it is proved from the statement of Respondent No. 1, documents placed on record regarding treatment of applicant and as no negativity has come out from the cross examination of the applicant and witness done by counsel for respondent no.2, therefore, it is proved that applicant was employed by Respondent No. 1 as a driver and he met with an accident in the course of his employment on 29/03/2018 resulting thereby his left leg was operated and rod was fitted in his left leg and due to this he is unable to perform his duty as a driver which he was doing before the accident as such he has lost his 100% earning capacity. I'm not in agreement with the assessment done by Aruna Asaf Ali Govt. Hospital Delhi wherein Medical Board assessed 22% only permanent disability. While Ld. Counsel for applicant argued that respondent has become 100% disable for permanent and unable to perform his duty as driver which he was doing before the accident. **In this regard Ld. Counsel relied upon the judgement of Hon'ble Supreme Court of India in case titled as Partpa Narayan Singh Deo V/s Srinivas Sabata and another cited in 1976 ACJ 141. The relevant portion of judgment reproduced as under:-**

"It has not been deputed (sic. disputed) before us that the injury was of such nature as to cause permanent disablement to the respondent, and the question of consideration is that whether the disablement has 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 findings as follow.

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

12. In this case the applicant was driver by profession and he was injured rendering him unable to do which he was doing prior to the accident hence the loss of earning capacity is 100%. The above judgement is completely applicable here as applicant is unable to perform his duty as a driver which he was doing prior to the accident Hence, I am not considering medical certificate report issued by Aruna Asaf Ali Hospital Delhi and accordingly hold that applicant has become permanently 100 % disable and entitled for 100% injury compensation.

Ld. counsel for petitioner Mr. R.K. Nain also argued that the principles of Evidence Act are not applicable in the proceedings before the Commissioner and it is not incumbent on the part of the applicant to get his case proved beyond doubt. In this regard he relied upon the judgement of Hon'ble Supreme Court of India in case titled as Maghar Singh V/s Jaswant Singh cited at 1997 ACJ 517 wherein Hon'ble Court held that.

"Workmen's Compensation Act, 1923 Section 3(1) and 2(n)- Accident arising out of and in the course of the Employment-Workman-Claimant sustained injury which resulted in loss of both hands just above the wrist resulting in permanent disability with 100% functional loss while he was operating toka machine-Respondent contended that the Claimant was not his Employee-Claimant did not possess any letter of appointment are any documentary evidence for payments received by him for the work done-Evidence that the machine which the Claimant was operating was that of Respondent-Respondent had taken Claimant to the Hospital after the injury and had signed the bed head ticket-whether the Claimant was a workman under the Respondent and the accident arose out of and in the course of Employment-Held yes.

13. In other judgement of Hon'ble Supreme Court of India in the matter in Mohan Soni V/s. Ram Avtar & Ors., 2102 ACJ 583 on which Counsel for Petitioner relied. In this case tanker driver met with an accident resulting thereby he suffered serious injury in a motor accident and as a result, his right leg was amputated up to the knee joint. He made a claim under the Workman Compensation Act, 1923. The Commissioner 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 Hon'ble High Court, like in the present case referred to the scheduled to the Workman Compensation Act, 1923 and held that the loss of a leg on amputation amounted to reduction in the earning capacity by the 60% and accordingly reduced the Compensation awarded to the tanker driver. Hon'ble Supreme Court in this case set aside the High Court Judgement 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 knee and accordingly restored the order passed by the Commissioner Workmen Compensation.

On the other side Ld. Counsel of the Respondent No. 2, also filed written submission on record wherein he argued that in this case neither the accident took place within the jurisdiction of this Authority nor the injured Claimant is residing within the jurisdiction of this Authority. Hence the Authority does not have the Jurisdiction to try and entertain the Claim of Claimant. Respondent No. 2, had admitted to the extent that vehicle in question bearing no. HR-38-X-6878 was insured with Respondent No. 2, vide policy no. 31270531170100000220 valid from 28.06.2017 to 27.06.2018 issued in the name of Saleem S/o Sh. Sultan Khan. Further Ld. Counsel argued that there is no FIR or information to police regarding this accident there is possibility that Applicant deliberately not disclosed fact regarding the report to police, there is possibility that he had filed the case under Motor Vehicle Act, 1998 and possibility to get the compensation from both the forums. It is further argued that there is no photographs on driving license which is exhibited AW-1/3. This fact shows that the Claimant has placed the fabricated driving license and he was not holding the Driving License. Hence he was not a driver on alleged vehicle on the day of accident. Further Ld. Counsel argued that date of birth of applicant as shown in Aadhar card is correct. As per Aadhar card date of birth of Applicant is 01.01.1974 show the aged of Claimant/Applicant at the time of alleged accident was 44 years 2 month and 28 days. Further Ld. Counsel argued that as per disability certificate issued by Aruna Asaf Ali Govt. Hospital Delhi, Applicant become 22% disabled permanent (physical impairment) in relation to his left lower limb. But Applicant never got any treatment from Aruna Asaf Ali Govt. Hospital Delhi. Thus the Ld. Counsel put question mark on disability certificate issued by Aruna Asaf Ali Govt. Hospital Delhi. Further Ld. Counsel relied upon the judgement mentioned bellow on disability issue.

1. National Insurance Company Ltd., Vs. Mubasir Ahmed &
Anr. II(2007) ACC 374 (SC)



2. Pal Raj Vs. Divisional Controller., NEKRTC, II (2010) ACC 915 (SC)
 3. Oriental Insurance Company Ltd., Vs. Mohd. Nasir & Anr. IV (2009) ACC (SC)
 4. New India Assurance Company Ltd., Vs. Narayan Basu & Anr. FMA 610/2012 with CAN No. 8372 of 2014 decided on 09.04.2015, by Hon'ble High Court of Calcutta.
- Finally Ld. Counsel for R-2 argued that Respondent No. 2, Insurance Company is not statutory liable to pay compensation to Applicant.

14. I have gone through the pleadings on party on document available on records and various Judgements cited by both the parties. The main issue in this case is this that Applicant Mr. Waseem was employed as a driver with Respondent No. 1, on which vehicle bearing no. HR-38-X-6878 truck on 29.03.2018 when he was occupational trip he met with an accident out of and during the course of employment resulting thereby he sustained injuries all over his body specially on his left leg and during the treatment rod was fitted in his left leg and due to this he was unable to move, climb or perform duty of driver which he was performing before accident. To prove his case Applicant examined himself and Sh. Rashid Ali, who had taken him for treatment to AIIMS Trauma Centre Delhi after the accident, who deposed clearly that Waseem Applicant mate with an accident while he was on duty with vehicle in question. And he was employed with Saleem Respondent No. 1 on the day of accident and in this accident Applicant sustained injuries on his leg arms and head. In cross examination done by Respondent No. 2, nothing has come out which goes against the Claimant. Further Respondent No. 2, Insurance Company did not lead any evidence to prove contents of his case. Thus Respondent No. 2, to fail to prove his case. On the basis or material available on record it is proved that on the day of accident Applicant was in the employment of Respondent No. 1 as a driver and further objection of Respondent No. 2 regarding jurisdiction to entertain this claim by this Authority because Respondent No. 2 had issued Insurance Policy in favour of Respondent No. 2 who reside in Delhi as per address mention on policy certificate no. 31270531170100000220 valid from 28.06.2017 to 27.06.2018 and additional premium was paid to Respondent No. 2 to cover all the risk and liability as per policy certificate. In these circumstances objection of Respondent no. 2 Insurance Company on the issue on jurisdiction to entertain this Authority is not considerable.

15. In view of above discussion I have come to conclusion that the judgement relied by the Ld. Counsel for petitioner to access



disability of Applicant is in favour of Applicant and accordingly the assessment done by Aruna Asaf Ali Govt. Hospital reaching conclusion 22% in this case is not appear correct in the light of various judgement of the Court as cited above because being the driver after the accident rod was fitted in his left leg would be unable to perform his duty as driver which he was performing post to accident. The argument adduced by Ld. Counsel for , Respondent No. 2, are not fit to considered and further the judgement on which Ld. Counsel relied are also not completely applicable in this case.

16. Accordingly I hold that employee and employer relationship has been proved as discussed above and applicant is entitled to receive injury compensation from the Respondent No. 1 owner of the vehicle, since vehicle in question was insured with Respondent No. 1 New India Assurance Company Limited hence Respondent no.2 is liable to indemnify to applicant. 17. Accordingly issue no.1 and No.2 are decided in favour of Applicant

17. Accordingly issue no.1 and No.2 are decided in favour of Applicant.

Issue No.3

For calculation of injury compensation age of petitioner as on accident was 44 years on the basis of date of birth of Applicant i.e. 01.01.1974, as per his Aadhar Card and relevant factor 172.52 and 60% of wages of Rs. 8,000/- (Rs. 4,800/-)as restricted by Govt. of India on 31.05.2010. Accordingly calculation was calculated as under:

$$172.52 \times 4,800/- = \text{Rs. } 8,28,096/-$$

Since in view of above calculation Applicant is entitled to received Rs. 8,28,096/- from the Respondent No. 1. Since vehicle in question was insured on the day of accident with Respondent No. 2, New India Assurance Company Ltd., is liable to indemnify to claimant. Further Respondents fail to deposit compensation after 30 days from the date of accident with this Authority hence Respondent is also liable to pay 12% interest per annum on awarded amount with effect from 29.04.2018. In regard penalty as prayed by Claimant I do not file any justified arguments to impose penalty upon Respondents hence same is not considered.

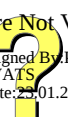
18. Accordingly Respondent No. 2, The New India Assurance Company Ltd., is directed to deposit Rs. 8,28,096/- with 12% interest per annum with effect from 29.04.2018 within 30 days from the date of order, failing which same shall be recovered as per provision of the Act.”



7. It is pertinent to indicate that the arguments in the instant matter were addressed alongwith connected matters viz. **FAO 17/2021** titled '**New India Assurance Co. Ltd. v. Moharman & Anr.**'; **FAO 21/2021** titled '**New India Assurance Co. Ltd. v. Pushkin Tiwari & Anr.**'; and, **FAO 305/2022** titled '**New India Assurance Co. Ltd. v. Furkan @ Mohd. Furkan & Anr.**' besides **FAO 172/2021** titled '**New India Assurance Co. Ltd. Vs. Sanjay Kumar Dass @ Sanjay Kumar Singh & Anr.**' wherein the same substantial question of law has been raised, thereby challenging the impugned judgment-cum-award passed by learned Commissioner, Employees' Compensation awarding compensation holding 100% loss of earning capacity for the injuries sustained in the accident by respondent no.1/claimant workman. The above-noted first three FAOs have been decided vide common judgment of even date. This Court has dealt with the entire chronology of the case-law cited at the Bar in the common judgment in FAOs 17/2021, 21/2021 and 305/2022. Therefore, this Court would do no further than to cut and paste the relevant portions of the discussion on the proposition of law in the present matter, except in so far as distinguishable from the facts of this matter, which go as under:

PASSAGES BORROWED FROM FAOs 17/2012, 21/2021 & 305/2022 FOR THE SAKE OF CONVENIENCE:

8. At the outset, it must be stated that an appeal preferred under Section 13 against the order of the learned Commissioner is not like a regular 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 matter⁵. 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 @ 100% loss of earning in contradiction to the medical certificate with regard to physical disability, there are canvassed no other issues.

PROPOSITION OF LAW

9. 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 ²[sixty per cent.] of the monthly wages of the injured ³[employee] multiplied by the relevant factor;

or

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

¹[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 ² [an employee] means the factor specified in the second column of Schedule IV against the 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 ³[employee] on his last birthday immediately preceding the date on which the compensation fell due.

⁵ North East Karnataka Road Transport Corpn. v. Sujatha, (2019) 11 SCC 514).



⁴[* * * *]

- (a)not relevant;
 (b) where permanent total disablement results from the injury

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

or

an amount of ⁶[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

a half-monthly payment of the sum equivalent to twenty-five



total or partial results
from the injury

per cent. of monthly wages of
the ³[employee], to be paid in
accordance with the provisions
of sub-section (2).

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

10. At this juncture, it is pertinent to indicate that each of the appeals are ones that pertain 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:”

11. 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.*

12. 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 learned 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 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%**.



13. 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 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.”

14. 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 29.3.2005. 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}

15. 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 learned 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}

16. 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.”

17. 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 Constitution 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(I) of the Act and it was observed that amputation of the left hand above the elbow has rendered the workman ‘unfit’ for performing work as a carpenter, as carpentry work cannot be done with one hand only and the decision to adjudge 100% loss of earning capacity was upheld.

18. 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 learned 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.**⁶, **Pratap Narain Singh Deo (supra)**, **Rayapati Venkateswar Rao v. Mantai Sambasiva Rao & Anr.**⁷ and **G. Anjaneyulu v. Alla Seshi Reddy & Anr.**⁸, 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%*”.

19. 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

⁶ 1991 ACJ 638

⁷ 2001 ACJ 2105

⁸ 2002 ACJ 1392



bone with multiple lacerated wounds. Although medical disability was assessed as 30% permanent in nature, the loss of earning capacity assessed as 100% by the learned Commissioner was upheld.

20. In **Mohan Soni (supra)**, the victim was earning his livelihood as a cart puller and the accident resulted in amputation of his left leg below the knee. The Supreme Court did not approve the decision of the learned Tribunal and the High Court limited the loss of earning capacity to 50% merely because the victim was a cart puller. The observations referred to in the above judgment in the case 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”*.

21. The decision in **Mohd. Ajmer (supra)** is one where the victim was a driver and although 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 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}

22. The aforesaid evolvement of compensatory jurisprudence over the years settles the issue of assessment of loss of earning capacity. However, I shall lastly refer to 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 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%.

DECISION:

23. In view of the aforesaid proposition of law, reverting back to the instant matter, evidently respondent No.1/claimant suffered



disability in the nature of permanent functional disability of his left Tibia, the inner and typically larger of the two bones between the knee and the ankle. It is a weight bearing bone and a crucial one for applying pressure. There could hardly be any doubt that the amputation of left leg *per se* is a permanent 'partial' disability. The testimony of respondent No.1/claimant remains uncontroverted and unrebutted that he was employed as a driver.

24. At the cost of repetition, respondent No.1/claimant was holding a valid driving licence. The possibility of respondent No.1/claimant gaining employment as a driver in future is completely ruled out. The functional disability is total and he would not be able to secure employment as a driver. There is no gainsaying that the Court cannot venture into the realm of hypothetical considerations so as to hold that respondent No.1/claimant could get an artificial foot or prosthetic so as to seek employment again as a driver.

25. Anyhow, first things first, the present appeal on the face of it is barred by limitation. CM APPL. 21604/ 2021 is an application moved on behalf of the appellant/Insurance Company seeking condonation of delay of 471 days in filing the instant appeal whereas CM APPL. 21673/2021 is an application seeking condonation of 65 days delay in re-filing the present appeal. The long and short of the applications are that though the impugned judgment-cum-award was passed on 27.08.2019, it is acknowledged that the certified copies of the same were made available on 06.09.2019. A *lame* excuse is taken that the file was with the empanelled advocate, who sought some clarification from the Transport Authority and it was confirmed on 27.02.2020 that



the injured No.1 has renewed his driving licence on 27.02.2020. The fact of the matter is that the appeal period had expired long before the advent of Covid-19 pandemic, which we all know led to lockdown from 01.04.2020. Even if that long is condoned, there is no sufficient cause explained so as to condone the delay of 65 days in re-filing the appeal.

26. For the sake of convenience, even if taking a liberal view, the said applications are allowed, the grievance of the appellant/Insurance Company on merits is also on a shaky foundation. Merely, because the driving licence has been renewed for the period 27.02.2020 to 26.02.2025 does not lead to an inference that the respondent No.1/claimant is capable of securing an employment as a driver. The disability is with regard to functional motor disability of the left tibia, which is crucial bone in the leg, and which needs to be applied with full potential for driving transport vehicle in the nature of application of adequate foot pressure on the clutch and that by all means is a permanent partial as well functional disability. This Court, therefore, does not find any blemish in the learned Commissioner assessing the loss of earning capacity to be 100%.

27. Accordingly, the present appeal is dismissed with costs of Rs.50,000/- which would be paid to respondent No.1/claimant within 30 days from today for enduring this unnecessary litigation, failing which, the same shall be payable with the interest @ 15% per annum from the date of this judgment till realisation.



28. All the pending applications also stand disposed of. The amount of compensation shall be released to respondent no.1/claimant workman, if not already released, forthwith.

DHARMESH SHARMA, J.

JANUARY 22, 2024

Sadique/ck