



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

% **Judgment reserved on : 01 December 2023**  
**Judgment pronounced on : 22 January 2024**

+ **FAO 172/2021 &CM APPL. 26093/2021 (stay)**

**THE NATIONAL INSURANCE CO. LTD. .... Appellant**  
**Through: Ms. Rakhi Dubey, Adv.**

**versus**

**SANJAY KUMAR DASS @ SANJAY KUMAR SINGH &**  
**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 appeal is preferred by the appellant/insurance company instituted under Section 30 of the Employee's Compensation Act, 1923<sup>1</sup> assailing the judgment/award dated 01.02.2021 passed by the learned Commissioner, Employee's Compensation<sup>2</sup> in case No. ECI/74/NW/18/170 dated 01.02.2021, thereby allowing the claim for compensation of respondent no. 1/workman/injured claimant.

2. Shorn of unnecessary details, the claimant filed a claim petition on 13.07.2018 under Section 22 of the Act stating that he was employed as first driver on vehicle bearing registration No. PB-07-AS-5659, which was owned by respondent No.1 (respondent No.2 in

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<sup>1</sup>Act

<sup>2</sup>Commissioner



the present appeal) and it was claimed that on 14.11.2016, he was on a business trip deployed with the said vehicle as its first driver accompanied by a second driver from New Sabzi Mandi Azadpur, Delhi to Siliguri *via* Purnia with a consignment loaded with apples and at 8.30 a.m., and when the truck reached Islampur Bus Stand, West Bengal, there was a traffic jam and he deboarded the vehicle, so as to see as to how much probable time it would take for the traffic jam to wither away and on coming back when he attempted to get on board the truck, which was being driven at a slow speed, he slipped and fell down and his left foot was caught underneath the tyres of the vehicle and his left foot was terribly crushed.

3. The truck was evidently insured with the appellant/insurance company. There was no issue that both drivers were having valid driving licenses during the relevant time. The learned Commissioner rendered a finding that the injuries were sustained during the course of employment and although disability certificate provided that he had suffered 40% permanent disability, it was assessed to be 100% earning capacity and assuming his wages to be Rs. 4800/- per month, and applying multiplier of 189.56 for the claimant being 30 years of age, total compensation of Rs. 9,10,080/- was awarded payable with interest @ 12% per annum after 30 days from the date of accident till realization. At the same time, the financial liability to pay the compensation was fastened upon the appellant/insurance company arraigned as respondent No.2. Further, penalty under Section 4A (3) (b) of Act was also assessed and apart from realization of actual expenditure of Rs.1,61,778.98/- incurred on medical treatment of



respondent no. 1/claimant, the appellant/insurance company was also directed to deposit Rs. 4,55,040/- within 30days as penalty.

4. The aforesaid judgment/award has been assailed in the present appeal primarily on the ground that the learned Commissioner overlooked the mandatory provision of Section 24 of the Act before awarding compensation; and that the loss of earning capacity was wrongly assessed at 100% besides the facts that there was no requirement of having first driver on the vehicle; and that even otherwise no evidence of the second driver was brought on the record that the injuries were suffered in the manner as deposed about by the respondent No.1/claimant.

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

- “i) Whether Employee-Employer relationship exists between parties?
- ii) Whether accident resulting into injury to claimant is caused out of and during the course of employment if so what amount of injury compensation the claimant is entitled to?
- iii) Relief, if any?
- iv) Whether penalty is imposable u/s 4A (3) of the Act and if so, the quantum thereof?”

6. Suffice to state that both the issue Nos. 1 and 2 were decided in favour of the claimant/respondent No.1, which are not assailed in the present matter. However, since the quantum of compensation is assailed, it would be relevant to reproduce the reasoning accorded by the learned Commissioner on issue Nos. 3 and 4, which goes as under:

“13. On the other side Ld. Counsel for respondent no. 2 submitted oral submission that claimant failed to prove his case by way of not filing any documentary evidence which prove employee



employer relationship, accident caused out of and in the course of employment with respondent no 1 and accordingly relied upon his pleadings. Further Ld. Counsel for Respondent No 2 in cross examination of claimant had asked that the accident was occurred due to negligence of claimant but same could not proved, hence it prima facie proved that response No. 2 insurance company has accepted that accident was occurred of the claimant. Further after the accident when claim petition has been filed before this Authority by the claimant then it was onus upon the respondent No 2 to get survey of the accident to report factual position of the case to this Authority but same could not be done. Further the objection of the respondent No 2 that name of the claimant is defer as alleged in claim i.e. Sanjay Kumar Dass alias Sanjay Kumar Singh but this objection was also not proved by the respondent no 2, hence objection raised by respondent no 2 in this case are not considerable. Therefore considering the pleadings of the parties and judgment placed on record by the counsel for claimant in absence of any evidence lead by respondent as not prefer to appear in the proceedings to prove his case and to cross examine claimant and his witness produced in the case, the judgements relied in this case by the claimant are completely applicable as such the case of the claimant is proved. Hence, issue no 1 is decided in the favour of claimant and against the respondents.

**Issue No 2 & 3-** Since detailed discussion has been given regarding accident of claimant and issue no 1, respondent did not appear various notices hence he was proceeded ex-parte then contents of claimant is not denied. Therefore it is proved that accident of claimant was occurred out of and in the course of his employment with respondent no 1 resulting thereby his left leg was amputated and as per disability certificate bearing certificate No. 12 dated 25/02/2017 he was assessed 40 % permanent disabled in regard of traumatic amputation of left foot, but in my view which supported by Hon'ble Delhi High Court titled as National Insurance Co. Ld& Anr v/s Sh. Hari Om, claimant after amputation of his left foot he become 100 % disable for his job as a driver which he was performing before the accident. As such I Hold that claimant become 100 % disabled and lost 100 % earning capacity as a driver. In view of this claimant is entitled for compensation as per provision of the act. Accordingly for calculation of compensation age of claimant 38 Yrs on the basis of DOB 10/05/1978 and relevant factor 189.56 and 60 % of Rs. 8000/- (which comes Rs 4800/-) as restricted under the act by GOI. Accordingly, injury compensation is calculated as under:

$$\text{Rs. } 4800 \times 189.56 = \text{Rs. } 9,10,080/-$$



**14.** In view of above calculation claimant is entitled to receive Rs. 9,10,080/- compensation along with 12% interest after 30 days from the accident till its realisation from Respondent No. 1, since despite having knowledge of accident respondent did not pay compensation to the claimant as per Section 4(A) of the Act. Further as per section 4(2A) of the Act the employee shall be reimbursed the actual medical expenditure incurred by him for treatment of injuries caused during the course of employment. According to this provision claimant is also entitled to receive actual medical expenditure incurred on his treatment of injuries caused during the course of employment. Accordingly, to this provision claimant is also entitled to receive actual medical expenditure incurred on his treatment, regarding this claimant has submitted details of medical bill Ex. AW1/1 regarding this claimant has submitted details of medical bill Ex. AW1/1 amounting Rs. 1,61,778.98/-(colly page 3 to 26). In view of this Respondent No. 1 is liable to pay injury compensation amounting Rs. 9,10,080/-along with 12% interest after 30 days from accident till its realisation and actual expenditure Rs. 1,61,778.98/- incurred on his treatment to claimant, since vehicle in question was insured with Respondent no 2 on the day of accident hence respondent no 2 is liable to indemnify to claimant on behalf of respondent no1.

**Issue No. 4-** As per section 4A (3)(b) –(issue of penalty).

Despite having knowledge of accident respondent no.1 Sh. Raj Singh s/o Sh. Malkiat Singh AW/488, Sanjay Gandhi Transport Nagar, Delhi-110042, did not pay injury compensation to the claimant as per the act even after filing case before Commissioner Compensation respondent No. 1 Neither appeared nor filed any defence/reply in the matter despite receipt of many notices from the Commissioner Employees Compensation. It shows that respondent no 1 deliberately neither paid compensation to the claimant nor attended proceedings before Commissioner as such he is liable to pay 50 % penalty of awarded amount under section 4A(3)(b) of the Act.

**15.** In view of above discussion respondent no. 2, M/s National Insurance Co. Ltd. is directed to deposit Rs. 9,10,080/-along with 12% interest after 30 days from accident till its realisation and actual expenditure of Rs. 1,61,778.98/- incurred on treatment of claimant, within 30 days from the date of order by way of Demand Draft/Cheque in favour of Commissioner Employees Compensation, failing which same shall be recovered as per provision of the Act. Accordingly Respondent No 1 is also directed to deposit Rs. 4,55,040/-, within 30 days from the date of order by way of Demand Draft/cheque in favour of Commissioner



Employees Compensation, failing which same shall be recovered as per provision of the Act.”

### **ANALYSIS AND DECISION:**

7. Having bestowed my thoughtful consideration to the submissions made by the learned counsels for the parties at the Bar, and on perusal of the record, firstly, it must be indicated 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 as **New India Assurance Co. Ltd. Vs. Pushkin Tiwari & Anr.**; and, **FAO 305/2022** titled **New India Assurance Co. Ltd. v. Furkan @ Mohd. Furkan & Anr.**, besides **FAO 161/2021** titled **New India Assurance Co. Ltd. v. Sh. Waseem & Anr.**, wherein the same substantial question of law has been raised thereby challenging the impugned judgment-cum-award passed by learned Commissioner, Employees’ Compensation in awarding compensation holding 100% loss of earning capacity for the injuries sustained in the accident. The first three of the above noted FAOs have been decided vide a common judgment and 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, which go as under:

### **PROPOSITION OF LAW DISCUSSED IN FAOs 17/2021, 21/2021 and 305/2022 AND APPLICABLE TO THE INSTANT APPEAL**



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 matter<sup>3</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 @ 100% loss of earning, which is 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, in the given set of facts and circumstances, there is a 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);]

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<sup>3</sup>North East Karnataka Road Transport Corpn. v. Sujatha, (2019) 11 SCC 514).



*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 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.]”

10. At this juncture, it is pertinent to indicate that each of the appeals pertains 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. It may be stated at the outset that the instant matter does not pertain to amputation of any bodily limbs. Evidently, the injuries suffered in this case by respondent no. 1/claimant are of such a nature that are specified in Part -II to Schedule-I of the Act. Thus, there was no mandate of determination or assessment of loss earning capacity is to be provided by a qualified medical practitioner, as engaged in terms of section 2(1) of the Act<sup>4</sup>.

13. At first blush, it is evident that the disability certificates introduced in evidence during the course of inquiry before the learned Commissioner(s) show no assessment has been made with regarding 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**

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<sup>4</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 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;



**disability/impairment** in respect of bodily limb concerned. Each certificate describes the nature of injury and states that the disability is “*not likely to improve*” by specifically striking off the sentence “*likely to improve*” and that in each case there is no recommendation for re-assessment of the disability in future.

14. All said and done, there is no finality attached to the decision of the Medical Practitioner regarding 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 other relevant objective parameters. In other words, these reports are not preceded with any detailed inquiry into the nature of the work that was being performed by the workman. Hence, this Court has no hesitation in rejecting the plea by the learned counsels for the appellant/Insurance Company that, in the absence of finding by a qualified medical practitioner, there could not have been an independent assumption on the part of the learned Commissioner as to the loss of earning capacity.

15. The above-noted provisions of the Act have been interpreted in umpteen number of matters by the Apex Court as well as 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 involved an injured casual laborer 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. 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%**.

16. 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.”

17. 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}**

18. In the cited case of *Raj Kumar (supra)*, the victim sustained fracture of both bones of the left leg and a fracture of the left radius and admittedly remained under prolonged medical treatment. Although the medical certificate stated 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, which have remained untampered till today, were made and read as follows:

“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}**

19. 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.”

20. It is pertinent to mention here that the dictum in the aforesaid two cases, heavily relied upon by the learned counsel for the appellant, was 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, met with an accident, and sustained injuries resulting in the amputation of his left arm from the elbow. The injury was held to be ‘total disablement’ within the meaning of Section 2(1) of the Act. It was observed that the amputation of the left hand above the elbow 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.

21. In the case of ***Ranjit Singh @ Rana (supra)***, the victim was a driver by profession and 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.***<sup>5</sup>, ***Pratap Narain Singh Deo (supra)***, ***Rayapati Venkateswar***

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<sup>5</sup>1991 ACJ 638



**Rao v. Mantai Sambasiva Rao & Anr.**<sup>6</sup> and **G. Anjaneyulu v. Alla Seshi Reddy & Anr.**<sup>7</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%*”.

22. In the case of ***Hari Om (supra)***, the workman was employed as a driver and 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 learned Commissioner was upheld.

23. 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 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 above in this 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*”

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<sup>6</sup>2001 ACJ 2105

<sup>7</sup>2002 ACJ 1392



*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”.*

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

25. The aforesaid evolvement of compensatory jurisprudence over the years settles the issue regarding 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. He was subjected to plastic surgery that resulted in permanent disability, which was medically opined to be 37%. The Supreme Court referred with approval to 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%.

26. At the cost of repetition, respondent No.1/claimant suffered 40% disability, as per the medical certificate, in the nature of traumatic amputation of left foot. There could be no *iota* of doubt that the amputation of left foot *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.

27. 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 gain-saying that the Court cannot venture into the realm of injuries getting healed or respondent No.1/claimant getting an artificial foot or prosthetic so as to seek employment again as a driver.

28. In view of the afore-going discussion, the present appeal is bereft of any merits. The same 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 day of this judgment till realisation.

29. The pending application also stands disposed of.

**DHARMESH SHARMA, J.**

**JANUARY 22, 2024**

*Sadique/ck*