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

% **Judgment reserved on : 18 March 2025**
Judgment pronounced on : 24 March 2025

\+ **FAO 209/2021 & CM APPL. 29987/2021**

NATIONAL INSURANCE CO. LTD .....Appellant
Through: Mr. Yuvraj Sharma, Proxy Counsel for Mr. Pankaj Seth, Adv.

versus

MD. SAFAT & ORS .....Respondents
Through: Mr. R.K. Nain and Mr. Chandan Prajapati, Advs. for R-1
Mr. Rakesh Kumar Pant, Adv. for R-2
Mr. D.M. Sharma, Adv. for R-3

\+ **FAO 255/2021 & CM APPL. 40659/2021**

RAJVEER SINGH .....Appellant
Through: Mr. D.M. Sharma, Adv.

versus

MOHD. SAFAT AND ANR .....Respondents
Through: Mr. R.K. Nain and Mr. Chandan Prajapati, Advs. for R-1
Mr. Rakesh Kumar Pant, Adv. for R-2
Mr. Yuvraj Sharma, Proxy Counsel for Mr. Pankaj Seth, Adv. for R-3/Insurance Company.

CORAM:
HON'BLE MR. JUSTICE DHARMESH SHARMA

J U D G M E N T

DHARMESH SHARMA, J.

1. This common judgment shall decide the afore-noted two appeals which have been preferred by the appellant/insurance company and the

registered owner of the offending bus bearing No. UP-32-Z-1506 whereby they have assailed the order/judgment dated 28.04.2021 passed by the learned Commissioner, Employee's Compensation, whereby the claim for compensation filed by the respondent No.1/injured/employee was allowed granting him a total compensation of Rs. 9,09,888/- payable with interest @ 12% p.a. w.e.f. 23.10.2013 till its realization, which liability was fastened on the shoulders of the appellant/insurance company besides additionally directing the respondent No.3/Sh. Satyekam Shashtri, the registered owner of the vehicle to pay an additional penalty of Rs. 4,54,944/- in terms of Section 4(A)(3)(b) of the Employee's Compensation Act, 1923[1]. It is also pertinent to mention that the appellant/Insurance Company has been granted the right to recover the amount of compensation of Rs. 9,09,888/- with interest from the respondent No.3/appellant/registered owner of the vehicle.

FACTUAL MATRIX:

2. Shorn off unnecessary details, admittedly, respondent No.3/appellant who has since died and is represented through his legal heir-Rajbeer was the registered owner of the vehicle in question, which was claimed to have been handed over for management and business purposes to one Mr. Imran Qureshi and respondent No.1 was employed as a driver, who lodged a claim under Section 22 of the E.C. Act to the effect that on 23.09.2013, he had gone on a business trip to Saharanpur

[1] E. C. Act

and on his way back, one of the tyre got punctured and he mounted on to the tool box to bring down an additional tyre placed in the tool box of the vehicle; and when he was on the top of it and was struggling to have the additional tyre offloaded from the tool box, the jack stemmed to leverage the vehicle got de-affixed and due to sudden heavy jerk, he slipped and fell from the tool box down on the surface and sustained grievous injury on his left hand.

3. Suffice to state that respondent No.1/claimant/employee was medically treated and suffered permanent impairment in relation to the left upper limb to the extent of 20% in terms of the certificate dated 12.07.2017 issued by Aruna Asaf Ali Hospital, Delhi. Respondent No.1/claimant/ employee agitated that due to a permanent disability, he had become 100% disabled for the purpose of employment as a driver.

4. Needless to state that the vehicle was insured for third party risk including its driver with respondent No.2/appellant/insurance company for the relevant period. During the course of the inquiry before the learned Commissioner, Employee's Compensation neither Imran Qureshi/respondent No.1, nor respondent No.3/registered owner appeared despite due service of summons and were proceeded *ex-parte*.

5. Learned Tribunal framed the following issues for adjudication:-

> (i) Whether injury was caused in the course of the employment?
> (ii) If yes, what amount of relief and what directions are necessary in this regard?

6. It is borne out from the record that the respondent/claimant/ employee examined himself by filing his affidavit (Ex.AW1/A) in his evidence and proving the relevant document viz., Disability Certificate, copy of Medical Treatment Documents, etc. and he was also cross-examined by the learned counsel for respondent No.2/appellant/ insurance company. The claimant also adduced one more witness namely Sh. Masha Allah, who corroborated his evidence.

7. Suffice to state that the learned Commissioner, answered Issue No.1 in favour of the respondent No.1/claimant/employee to the effect that the injuries were sustained by him during the course of his employment and assessed his wages @ Rs.8,000/- per month, plus Rs. 150/- per day as food allowance, and finding that he was 38 years of age as per the documents placed on the record besides considering that there was reduction of earning capacity of the respondent/claimant he would be unsuitable to be employed as a driver, assumed the loss of earning capacity to be 100%, and accordingly, the compensation was calculated as under:-

i) Relevant factor of 38 years	:	189.56
ii) 60% of wages @ RS. 8000/- pm	:	Rs. 4800/-
iii) Amount of compensation		
$\frac{189.5.6 \times 4800}{100}$	**:**	**Rs.9,09,888/-**

8. Further, respondent No.1/claimant/employee was also made entitled to interest as per Section 4(A) of the E.C. Act @ 12% p.a., as evidently there was a delay on the part of the employer in giving immediate compensation to the respondent No.1/claimant/employee,

and resultantly respondent No.3/appellant was also made liable to pay penalty in terms of Section 4(A)(3)(b) of the E.C. Act.

9. The primary ground for challenge of the impugned award dated 28.04.2021 by the appellant/insurance company is with regard to the assessment of loss of earning capacity of the respondent No.1/claimant/employee @ 100% despite there being a disability certificate evidencing that he had suffered permanent disability to the extent of 20%.

10. Insofar as the appellant/legal heir of the registered owner is concerned, in FAO No. 255/2021, the primary ground of challenge is that an additional premium had been charged by respondent No.2/insurance company from the registered owner and therefore the directions by the learned Commissioner, Employee's Compensation not only to pay penalty by the respondent No.3/appellant, but also awarding recovery rights to the appellant/insurance company was flawed in law.

ANALYSIS AND DECISION:

11. I have given my thoughtful consideration to the submissions advanced by the learned counsels for the parties at the Bar. I have also perused the relevant record of the case.

TERRITORIAL JURISDICTION:

12. **First things first**, the objection raised by the learned counsel for the appellant/legal heir of the deceased registered owner that the learned Commissioner, Employee's Compensation had no territorial jurisdiction, as not only the driver and respondent No.1, besides

respondent No.3 were resident of Uttar Pradesh, but even the accident occurred at Saharanpur, Uttar Pradesh, is only noted to be rejected.

13. It is well settled by a catena of decisions that the E.C. Act is a beneficial act and for the fact that the insurer company has its branch office and also its Regional Office in Delhi, no prejudice occurred if the matter has been inquired and decided by the learned Commissioner, Employee's Compensation in Delhi. Reference in this regard can be drawn to the decision in the case of **Mantoo Sarkar v. Oriental Insurance Company Ltd.**[2]. It is pertinent to mention that a similar decision was made by this Court in the case of **Faim @ Fahim v. Commissioner Employees Compensation** *vide* judgment dated 11.11.2022[3], as well as **New India Assurance Co. Ltd. v. Shyam Sunder**[4], wherein a similar view was taken.

PERMANENT DISABILITY/LOSS OF EARNING CAPACITY:

14. Secondly, as regards the issue of reckoning loss of earning capacity at 100% is concerned, indeed the permanent disability of the respondent No.1/claimant/employee has been assessed at 20% in relation to the left upper limb *vide* certificate dated 12.07.2017. However, considering that the respondent No.1/claimant/employee was admittedly employed as a driver, there is no denying the fact he has been rendered unsuitable for driving a heavy commercial vehicle, and thus, his disability has to be reckoned at 100%.

[2] (2009) 2 SCC 244
[3] CM (M) 42/2021
[4] 2022 SCC OnLine Del 3020

15. The aforesaid view is supported by a catena of decisions propounding the law on the subject. Avoiding a long academic discussion on the subject, reference can be invited to decision by this Court in the cases of **New India Assurance v. Moharman; New India Assurance v. Pushkin Tiwari and New India Assurance v. Furkan**[5], which were decided by the common judgment by the undersigned in which FAO No. 21/2021 and FAO 305/2022, the claimants were the drivers of the ill-fated motor vehicles, who suffered permanent disability to the extent of 80% in respect to the right lower limb and 38% again in respect to injury on left lower limb respectively. The undersigned examined the relevant provision of the E.C. Act and it would be expedient to reproduce the relevant observations:-

> 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 [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: |

[5] 2024 SCC OnLine Del 430

[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.

[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 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 [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.]"

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[6].

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

[6] (i) "qualified medical practitioner" means any person registered [12]* * * under any [13][Central Act, Provincial Act or an Act of the Legislature of a [14][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;

proforma, thereby filling up the blanks and expressing **the percentage of permanent functional disability/impairement** 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.

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 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**.[7], ***Pratap Narain Singh Deo (supra)***, ***Rayapati Venkateswar Rao (supra)*** 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%"***.

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 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"*.

[7] 1991 ACJ 638
[8] 2002 ACJ 1392

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 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."

16. In view of the above discussion on the proposition of law, reverting to the instant matter, as per the disability certificate, respondent No.1/claimant/employee is now about 45 years of age suffered scaphoid fracture on his left hand which resultantly led to constant pain, stiffness and weakness of the left upper limb. The said injury is permanent non-progresses but never going to be healed. The injury shall not allow respondent no. 1/claimant/employee to handle the steering wheels of any heavy or light commercial vehicle. Thus, this Court has no hesitation in holding that although respondent No.1/claimant/employee suffered permanent disability to the extent of 20% in relation to his "left upper limb", he had been rendered incapable of gaining any employment as a driver, and therefore, loss of earning capacity has been rightly reckoned @ 100% by the learned Commissioner, Employee's Compensation, which does not warrant any interference.

IMPOSITION OF PENALTY & RECOVERY RIGHTS:

17. As regards, the penalty imposed upon the appellant/registered owner, it would be pertinent to reproduce the provisions of Section 3 and 4A of the E.C. Act which reads as under:-

> "4A. Compensation to be paid when due and penalty for default.-
> (1) Compensation under section 4 shall be paid as soon as it falls due.
> (2) In cases where the employer does not accept the liability for compensation to the extent claimed, he shall be bound to make provisional payment based on the extent of liability which he accepts, and, such payment shall be deposited with the Commissioner or made to the *[employee], as the case may be, without prejudice to the right of the*[employee] to make any further claim.
> (3) Where any employer is in default in paying the compensation due under this Act within one month from the date it fell due, the Commissioner shall—
> (a) direct that the employer shall, in addition to the amount of the arrears, pay simple interest thereon at the rate of twelve per cent. per annum or at such higher rate not exceeding the maximum of the lending rates of any scheduled bank as may be specified by the Central Government, by notification in the Official Gazette, on the amount due; and
> (b) if, in his opinion, there is no justification for the delay, direct that the employer shall, in addition to the amount of the arrears and interest thereon, pay a further sum not exceeding fifty per cent, of such amount by way of penalty:
> Provided that an order for the payment of penalty shall not be passed under clause (b) without giving a reasonable opportunity to the employer to show cause why it should not be passed.
> Explanation.--For the purposes of this sub-section, "scheduled bank" means a bank for the time being included in the Second Schedule to the Reserve Bank of India Act, 1934 (2 of 1934).
> (3A) The interest and the penalty payable under sub-section (3) shall be paid to the *[employee] or his dependant, as the case may be."

18. A bare perusal of the aforesaid provision would show that where the employer does not accept his liability to pay compensation to the

employee, he is bound to assess compensation provisionally to the extent he deems fit with the Commissioner and failure to do so would invite penalty under subsection (3) to section 4A. Evidently, the said provision was not complied with by the respondent No3/registered owner in providing immediate financial relief to respondent No.1/claimant/employee. However, it is pertinent to mention here that the learned Commissioner *vide* impugned award dated 28.04.2021 acknowledged the fact that the vehicle was not only insured for third party risk but additional premium had also been charged and paid by respondent No.3/registered owner under the E.C. Act. The issue arises whether the recovery rights granted to the appellant/insurance Company and also the imposition of penalty upon the registered owner can be sustained in law?

19. The aforesaid issue is no *res integra.* It is well settled that where the additional premium has been paid covering the risk to the workman/ employee under the E.C. Act, the Insurer shall be liable to bear the liability for payment of compensation to the workman in terms of Section 3[9] and Section 4-A (3)(a) of the E.C. Act including interest thereupon.

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[9] **3. Employer's liability for compensation**.- (1) If personal injury is caused to a *[employee] by accident arising out of and in the course of his employment, his employer shall be liable to pay compensation in accordance with the provisions of this Chapter:
Provided that the employer shall not be so liable –
(a) in respect of any injury which does not result in the total or partial disablement of the *[employee] for a period exceeding three days;
(b) in respect of any injury, not resulting in death or permanent total disablement caused by an accident which is directly attributable to—

(i) the *[employee] having been at the time thereof under the influence of drink or drugs, or (ii) the wilful disobedience of the *[employee] to an order expressly given, or to a rule expressly framed, for the purpose of securing the safety of *[employees], or
(iii) the wilful removal or disregard by the *[employee] of any safety guard or other device which he knew to have been provided for the purpose of securing the safety of *[employee], (c) Omitted by Act 5 of 1929.
(2) If an *[employee] employed in any employment specified in Part A of Schedule III contracts any disease specified therein as an occupational disease peculiar to that employment, or if a *[employee], whilst in the service of an employer in whose service he has been employed for a continuous period of not less than six months (which period shall not include a period of service under any other employer in the same kind of employment) in any employment specified in Part B of Schedule III, contracts any disease specified therein as an occupational disease peculiar to that employment, or if a *[employee] whilst in the service of one or more employers in any employment specified in Part C of Schedule III for such continuous period as the Central Government may specify in respect of each such employment, contracts any disease specified therein as an occupational disease peculiar to that employment, the contracting of the disease shall be deemed to be an injury by accident within the meaning of this section and, unless the contrary is proved, the accident shall be deemed to have arisen out of, and in the course of, the employment:
Provided that if it is proved,--
(a) that an *[employee] whilst in the service of one or more employers in any employment specified in Part C of Schedule III has contracted a disease specified therein as an occupational disease peculiar to that employment during a continuous period which is less than the period specified under this sub-section for that employment; and
(b) that the disease has arisen out of and in the course of the employment, the contracting of such disease shall be deemed to be an injury by accident within the meaning of this section:
Provided further that if it is proved that a *[employee] who having served under any employer in any employment specified in Part B of Schedule III or who having served under one or more employers in any employment specified in Part C of that Schedule, for a continuous period specified under this subsection for that employment and he has after the cessation of such service contracted any disease specified in the said Part B or the said Part C, as the case may be, as an occupational disease peculiar to the employment and that such disease arose out of the employment, the contracting of the disease shall be deemed to be an injury by accident within the meaning of this section.
(2A) If a *[employee] employed in any employment specified in Part C of Schedule III contracts any occupational disease peculiar to that employment, the contracting whereof is deemed to be an injury by accident within the meaning of this section, and such employment was under more than one employer, all such employers shall be liable for the payment of the compensation in such proportion as the Commissioner may, in the circumstances, deem just.
(3) The Central Government or the State Government, after giving, by notification in the Official Gazette, not less than three months' notice of its intention so to do, may, by a like notification, add any description of employment to the employments specified in Schedule III and shall specify in the case of employments so added the diseases which shall be deemed for the purposes of this section to be occupational diseases peculiar to those employments respectively, and thereupon the provisions of sub-section (2) shall apply, 4 in the case of a notification by the Central Government, within the territories to which this Act extends or, in case of a notification by the State Government, within the State as if such diseases had been declared by this Act to be occupational diseases peculiar to those employments.

20. In the case of **Ved Prakash Garg v. Premi Devi**[10] the Supreme Court examined the issue to the effect- "*whether where an employee receives a personal injury in a motor accident arising out of and in the course of his employment while working on the motor vehicle of the employer, whether the insurance company, which has insured the employer-owner of the vehicle against third-party accident claims under Motor Vehicles Act, 1988 (hereinafter referred to as 'the Motor Vehicles Act') and against claims for compensation arising out of proceedings under the Workmen's Compensation Act, 1923 (hereinafter referred to as 'the Compensation Act') in connection with such motor accidents, is liable to meet the awards of Workmen's Commissioner imposing penalty and interest against the insured employer under Section 4-A(3) of the Compensation Act*".

21. It would be apposite to refer the observations made by the Supreme Court answering the aforesaid question, which go as under:

> **"13.** The question posed for our consideration is required to be resolved in the light of the aforesaid statutory schemes of the two interacting Acts. It is not in dispute and cannot be disputed that the respondent-insurance companies concerned will be statutorily as well as contractually liable to make good the claims for

(4) Save as provided by sub-sections (2), (2A)] and (3) no compensation shall be payable to a *[employee] in respect of any disease unless the disease is directly attributable to a specific injury by accident arising out of and in the course of his employment.
(5) Nothing herein contained shall be deemed to confer any right to compensation on a *[employee] in respect of any injury if he has instituted in a Civil Court a suit for damages in respect of the injury against the employer or any other person; and no suit for damages shall be maintainable by a *[employee] in any Court of law in respect of any injury—
(a) if he has instituted a claim to compensation in respect of the injury before a Commissioner; or
(b) if an agreement has been come to between the *[employee] and his employer providing for the payment of compensation in respect of the injury in accordance with the provisions of this Act.

[10] (1997) 8 SCC 1

compensation arising out of the employers' liability computed as per the provisions of the Compensation Act. The short question is whether the phrase "liability arising under the Compensation Act" as employed by the proviso to sub-section (1) of Section 147 of the Motor Vehicles Act and as found in proviso to clause (*i*) of sub-section (1) of Section II of the insurance policy, would cover only the principal amount of compensation as computed by the Workmen's Commissioner under the Compensation Act and made payable by the insured employer or whether it could also include interest and penalty as imposed on the insured employer under contingencies contemplated by Section 4-A(3)(*a*) and (*b*) of the Compensation Act.

14. On a conjoint operation of the relevant schemes of the aforesaid twin Acts, in our view, there is no escape from the conclusion that the insurance companies will be liable to make good not only the principal amounts of compensation payable by insured employers but also interest thereon, if ordered by the Commissioner to be paid by the insured employers. Reason for this conclusion is obvious. As we have noted earlier the liability to pay compensation under the Workmen's Compensation Act gets foisted on the employer provided it is shown that the workman concerned suffered from personal injury, fatal or otherwise, by any motor accident arising out of and in the course of his employment. Such an accident is also covered by the statutory coverage contemplated by Section 147 of the Motor Vehicles Act read with the identical provisions under the very contracts of insurance reflected by the policy which would make the insurance company liable to cover all such claims for compensation for which statutory liability is imposed on the employer under Section 3 read with Section 4-A of the Compensation Act. All these provisions represent a well-knit scheme for computing the statutory liability of the employers in cases of such accidents to their workmen. As we have seen earlier while discussing the scheme of Section 4-A of the Compensation Act the legislative intent is clearly discernible that once compensation falls due and within one month it is not paid by the employer then as per Section 4-A(3)(*a*) interest at the permissible rate gets added to the said principal amount of compensation as the claimants would stand deprived of their legally due compensation for a period beyond one month which is statutorily granted to the employer concerned to make good his liability for the benefit of the claimants whose breadwinner might have either been seriously injured or might have lost his life. Thus so far as interest is concerned

it is almost automatic once default, on the part of the employer in paying the compensation due, takes place beyond the permissible limit of one month. No element of penalty is involved therein. It is a statutory elongation of the liability of the employer to make good the principal amount of compensation within permissible time-limit during which interest may not run but otherwise liability of paying interest on delayed compensation will ipso facto follow. Even though the Commissioner under these circumstances can impose a further liability on the employer under circumstances and within limits contemplated by Section 4-A(3)(*a*) still the liability to pay interest on the principal amount under the said provision remains a part and parcel of the statutory liability which is legally liable to be discharged by the insured employer. Consequently such imposition of interest on the principal amount would certainly partake the character of the legal liability of the insured employer to pay the compensation amount with due interest as imposed upon him under the Compensation Act. Thus the principal amount as well as the interest made payable thereon would remain part and parcel of the legal liability of the insured to be discharged under the Compensation Act and not dehors it. It, therefore, cannot be said by the insurance company that when it is statutorily and even contractually liable to reimburse the employer qua his statutory liability to pay compensation to the claimants in case of such motor accidents to his workmen, the interest on the principal amount which almost automatically gets foisted upon him once the compensation amount is not paid within one month from the date it fell due, would not be a part of the insured liability of the employer. No question of justification by the insured employer for the delay in such circumstances would arise for consideration. It is of course true that one month's period as contemplated under Section 4-A(3) may start running for the purpose of attracting interest under sub-clause (*a*) thereof in case where provisional payment has to be made by the insured employer as per Section 4-A(2) of the Compensation Act from the date such provisional payment becomes due. But when the employer does not accept his liability as a whole under circumstances enumerated by us earlier then Section 4-A(2) would not get attracted and one month's period would start running from the date on which due compensation payable by the employer is adjudicated upon by the Commissioner and in either case the Commissioner would be justified in directing payment of interest in such contingencies not only from the date of the award but also from the date of the accident concerned. Such an order passed by the

Commissioner would remain perfectly justified on the scheme of Section 4-A(3)(*a*) of the Compensation Act. But similar consequence will not follow in case where additional amount is added to the principal amount of compensation by way of penalty to be levied on the employer under circumstances contemplated by Section 4-A(3)(*b*) of the Compensation Act after issuing show-cause notice to the employer concerned who will have reasonable opportunity to show cause why on account of some justification on his part for the delay in payment of the compensation amount he is not liable for this penalty. However, if ultimately, the Commissioner after giving reasonable opportunity to the employer to show cause takes the view that there is no justification for such delay on the part of the insured employer and because of his unjustified delay and due to his own personal fault he is held responsible for the delay, then the penalty would get imposed on him. That would add a further sum up to 50% on the principal amount by way of penalty to be made good by the defaulting employer. So far as this penalty amount is concerned it cannot be said that it automatically flows from the main liability incurred by the insured employer under the Workmen's Compensation Act. To that extent such penalty amount as imposed upon the insured employer would get out of the sweep of the term "liability incurred" by the insured employer as contemplated by the proviso to Section 147(1)(*b*) of the Motor Vehicles Act as well as by the terms of the insurance policy found in provisos (*b*) and (*c*) to sub-section (1) of Section II thereof. On the aforesaid interpretation of these two statutory schemes, therefore, the conclusion becomes inevitable that when an employee suffers from a motor accident injury while on duty on the motor vehicle belonging to the insured employer, the claim for compensation payable under the Compensation Act along with interest thereon, if any, as imposed by the Commissioner, Sections 3 and 4-A(3)(*a*) of the Compensation Act will have to be made good by the insurance company jointly with the insured employer. But so far as the amount of penalty imposed on the insured employer under contingencies contemplated by Section 4-A(3)(*b*) is concerned as that is on account of personal fault of the insured not backed up by any justifiable cause, the insurance company cannot be made liable to reimburse that part of the penalty amount imposed on the employer. The latter because of his own fault and negligence will have to bear the entire burden of the said penalty amount with proportionate interest thereon if imposed by the Workmen's Commissioner."

22. In the light of the aforesaid proposition of law, reverting to the instant matter, the impugned order/judgment dated 28.04.2021 insofar it has accorded recovery rights to the appellant/insurance company for payment of compensation under Section 3 read with Section 4A(3) cannot be sustained in law. In short, appellant/insurance company has not been able to prove a violation of any terms and conditions of the policy of insurance, and therefore, the appellant/insurance company remains liable to make payment of total compensation of Rs. 9,09,888/- payable with interest @ 12% per annum w.e.f. 23.10.2013 till its realization.

23. However, insofar as the payment of penalty under Section 4 A(3)(b) of the E.C. Act is concerned, that liability is to be borne by the appellant/registered owner (since deceased), and therefore, his legal heirs to the extent of estate left behind by the deceased in the sum of Rs. 4,54,944/-. The said penalty which is imposed upon the appellant/ registered owner for his own default in not making payment of compensation to the employee within the stipulated period, cannot be fastened upon the appellant/insurance company.

24. In view of the above discussion, FAO No. 209/2021 filed on behalf of the appellant/insurance company is hereby dismissed.

25. However, FAO No. 255/2021 filed by the appellant/registered owner, now represented through his legal heirs, is hereby partly allowed to the extent that the Insurer, which is the appellant in FAO No.

209/2021 shall not be entitled to recovery rights for an amount of Rs.9,09,888/- with interest from the registered owner. At the same time, the appellant in FAO No. 255/2021 shall be liable to pay compensation in the nature of additional penalty imposed under Section 4A(3)(b) of the E.C. Act to the respondent No.1/claimant/ employee.

26. In view of the above, the amount of compensation deposited by the appellant/insurance company as well as the appellant/registered owner with the Commissioner shall be released to the respondent No.1/ claimant/employee with accrued interest forthwith.

27. Both the appeals along with pending applications stand disposed of.

DHARMESH SHARMA, J.

MARCH 24, 2025
SP/Sadiq