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IN THE HIGH COURT OF DELHI AT NEW DELHI

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FAO 514/2012

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19th May, 2014

NEW INDIA ASSURANCE CO. LTD. Appellant
Through: Ms. Shivali Bansal, Adv.

VERSUS

BABBU MIYAN & ANR. Respondents
Through: Ms. Pratima N.Chauhan, Adv. for R-
1 & 2.

Mr. Aditya Sharda, Adv. for R-3.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. This first appeal is filed under Section 30 of the Employee's Compensation Act, 1923 impugning the judgment of the Commissioner dated 8.11.2012 by which the Commissioner allowed the claim petition which was filed by respondent nos.1 and 2, parents of the deceased Ubed.

2. The facts as pleaded by the respondent nos.1 and 2 before the Commissioner were that the deceased Ubed was employed as a cleaner on the vehicle bearing no. UP-22C-9785- Tata Truck owned by the respondent

no.3 herein/employer. It was pleaded that on 28.8.2006 Ubed died in an accident arising out of and during the course of employment while performing his duty as a cleaner of the truck. On 28.8.2006 the incident is said to have occurred at Saw Mill near Bamanpuri gate, Rampur at about 3.45 p.m. When the driver (respondent no.1/father) asked Ubed to help in reversing the truck, in the process of reversing the vehicle, a live electric came in contact with the hand of Ubed sitting in the said truck, and which resulted in his death.

3. The only point which is really argued with force before me by the appellant is that though the respondent no.3 denied the employment of the deceased Ubed with him, the Commissioner in a very cursory manner concluded on the existence of relationship of employer and employee. It is argued that in a case such as the present where no FIR is registered and there is no proof of employment of the deceased Ubed, a self-serving affidavit of respondent no.1/father, and who was himself the driver of the truck, cannot lead to discharge of onus of existence of relationship between employer and employee. Appellant, in this regard, is supported by the respondent no.3 who appears through counsel in this Court.

4. On this aspect of relationship of employer and employee, the Commissioner, in my opinion, has committed a gross perversity leading to arising of a substantial question of law under Section 30 of the Act. The only observations of the Commissioner in this regard of the relationship of employer and employee are contained in para dealing with issue no. 1 (a) and (b) of the impugned judgment which reads as under:-

ISSUE NO. 1

- a) In the claim application it has been stated that the deceased Shri Ubed son of the Shri babbu Miyan, a Workman, was employed as a cleaner on vehicle bearing no. UP-22C-9785-Tata Truck owned by Respondent No. 1 and on 28-8-2006 received personal injuries arising out of an accident out of and during the course of employment resulting thereby he died. Shri Ubed was on his occupational duty as cleaner on vehicle bearing no. UP-22C-9785-Tata Truck on the instructions and directions of respondent no. 1 for their trade and business. On 28-8-2006 when the said vehicle was got unloaded at Saw Mill, near Bamanpuri gate, Rampur at about 3:45 p.m., it was to be got out-sheded and another vehicle was blocking the way of this vehicle. The driver of this vehicle instructed the cleaner to get the another vehicle which was coming on way to this vehicle should be got out form the lane and the deceased was employed. He was asked to facilitate the back movement of the said truck and when he was doing so a live electric wire came in contact with the said truck and the cleaner was doing so while keeping its window open and when he was handling the window all of a sudden the current passed in the body and he was electrocuted and collapsed. He

died on the spot and his dead body was taken to his native village and last rites were done there. The vehicle bearing no. UP-22C-9785-Tata Truck was owned by the Respondent No. 1 at the time of the accident and it was insured with the Respondent no.2. the applicants are dependants of the deceased being his parents. The vehicle used to ply between Rampur and Delhi and there was a contract with a Teak Ply company from Rampur to Delhi for carriage of the goods and Parchoon goods from a transport company form Delhi to Rampur. Newspaper clipping having coverage of the death of the deceased Ubed. The report of the investigation conducted by the insurance company.

- b) The counsel for the applicant has also referred a judgment and the relevant portions of the said judgment is as under:-

For appreciation of evidence, this court has been provided a guiding principle by the Hon'ble Supreme Court by a judgment by 3 Judges in the case titled as Mackinnon Mackenzie and co. (P) Ltd. Versus Lbrahim Mahmmmed Issak-1969(2) S.C.C. 607. The relevant portion of the judgment is reproduced as under:-

“6. In the case of death caused by accident the burden of proof rests upon the workman to prove that the accident arose out of employment as well as in the course of employment. But this does not mean that a workman who comes to Court must necessarily prove it by direct evidence. Although the onus of proving that the injury by accident arose both out of and in the course of employment rests upon the applicant these essentials may be inferred when the facts proved justify the inference. On the one hand the commissioner must not surmise, conjecture or guess; on the other hand, he may draw an inference form the proved facts so long as it is a legitimate inference. It is of course impossible to lay down any rule as to the degree of proof sufficient to justify an inference being drawn, but the evidence must be such as would induce a

reasonable man to draw it. Lord Birkenhead L.C. in Lancaster Vs. Blackwell Colliery Co. Ltd., observed:-

“If the facts which are proved give rise to conflicting inferences of equal degrees of probability so that the choice between them is a mere matter of conjecture, then, of course, the applicant fails to prove his case, because it is plain that the onus in these matters is upon the applicant. But where the known facts are not equally consistent, where there is ground for comparing and balancing probabilities as to their respective value, and where a reasonable man might hold that the more probable conclusion is that for which the applicant contends, then the Arbitrator is justified in drawing an inference in his favour.” Given the facts, the pleading in the claim application, the testimony and cross examination of the claimant, news in the newspaper stating that the deceased was facilitating the backward movement of the truck, the report of the police stating the death due to electrocution. In addition to all this, the report of the investigator of the insurance company also confirms the facts of occurrence of incident. I, therefore, hold that the death was caused due to the work engagement of the deceased on the truck and hazards emerged out therefrom and thus I hold that the accident was caused out of and during the course of employment.

The issue of jurisdiction has already been decided by this court vide order dated 20.5.2010.”

5. The reading of the aforesaid para shows that there is no finding in the impugned order of the existence of the relationship between employer and employee in a satisfactory manner and in fact the impugned judgment leaps over the issue without the necessary discussion on the issue.

6. No doubt counsel for respondent nos.1 and 2 is right in arguing that FIR need not be filed in all cases, however whether or not existence of FIR is required as an aspect to determine existence of relationship between employer and employee will have to be seen in the facts of each case. Also, and in the facts of the present case, respondent no.1 is admitted to be the driver of the vehicle in question and the deceased was his son. Therefore in my opinion in the facts of this case there is no proof on record of the employment including of an FIR which necessarily would have been lodged by the police in case of death of a person coming into contact with a live electric wire. I do not find on preponderance of possibilities that the respondents no. 1 and 2 have proved that the respondent no.3 herein was the employer of the deceased Ubed.

7. I cannot agree with the arguments urged by the counsel for the respondent nos.1 and 2 that a newspaper report was there which reported the incident and employment of Ubed with respondent no.3. The employment is not proved because a newspaper report is no evidence in the eyes of law for proving employment.

8. In view of the above, the appeal is allowed, and the impugned judgment of the Commissioner dated 8.11.2012 is set aside. In case the

respondents nos.1 and 2 have already been paid the compensation amount before the Commissioner, then in that case the appellant will be at liberty to recover back the amount in accordance with law.

At this stage, it is noted that there is an order of the Commissioner in the file of the trial Court record dated 24.12.2012, and which shows that compensation has been disbursed to the respondents, and accordingly it is ordered that what is received by the respondents can be recovered by the appellant in accordance with law.

Parties are left to bear their own costs.

MAY 19, 2014
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VALMIKI J. MEHTA, J.