

+THE HON'BLE SRI JUSTICE T. SUNIL CHOWDARY

CIVIL MISCELLANEOUS APPEAL No.4179 OF 2004

JUDGMENT:

This appeal is filed under Section 30 of the Workmen's Compensation Act, 1923 (the Act), challenging the order dated 30.4.2004 in W.C. Case No.19 of 2003 passed by the Commissioner for Workmen's Compensation and Assistant Commissioner of Labour, Kadapa, wherein and whereby an amount of Rs.1,26,157/- was awarded towards compensation to the applicant as against the claim of Rs.4,00,000/-.

2. For the sake of convenience, the parties to this appeal will hereinafter be referred to as they are arrayed before the learned Commissioner.

3. The facts leading to filing of the present appeal are briefly as follows: Tarikonda Venkataiah @ Venkata Ramana (the applicant) was engaged as cleaner-cum-second driver on lorry bearing No.AP 16V 1219 belongs to opposite party No.1. On 21.1.2002 the applicant was proceeding on the lorry from Kurnool to Hyderabad as cleaner-cum-second driver. When the lorry reached Jellapur bus stop, the driver of the lorry had driven the same in a rash and negligent manner and dashed against three vehicles: (1) lorry bearing No.AP 02U 3299, (2) auto bearing No.AP 22 9181, and (3) lorry bearing No.AP 02T 8577 consecutively. The accident occurred due to rash and negligent driving of the driver of the lorry bearing No.AP 16V 1219 against whom the Station House Officer, Manapadu Police Station registered a case in Crime No.6 of 2002 under Sections 337 and 338 IPC. In the said accident, the applicant sustained grievous injuries on various parts of the body and took treatment as inpatient in Government Hospital, Kurnool and S.V.R.R.G.H. Hospital, Tirupati for a long time. By the

time of the accident, the applicant was aged about 30 years and used to earn Rs.3,500/- per month as cleaner-cum-second driver on the lorry. Due to the injuries, the applicant became disabled to attend duty as a lorry driver. The lorry bearing No.AP 16V 1219, which belongs to opposite party No.1, was insured with opposite party No.2 with effect from 05.7.2001 to 04.7.2002; therefore, opposite party Nos.1 and 2 are jointly and severally liable to pay compensation of Rs.4,00,000/-.

4. Opposite party No.1 did not file counter. Opposite party No.2 filed counter denying all the averments made in the application including the manner of the accident, *inter alia*, contending that by the time of the accident, the applicant was not working as an employee under opposite party No.1; therefore, the present application is not maintainable under the Act. The applicant is not entitled for compensation unless he proves that the driver of the crime vehicle was having valid and effective driving licence as on the date of the accident. The quantum of compensation claimed by the applicant is highly excessive and exorbitant. Hence, the application is liable to be dismissed.

5. Basing on the rival contentions, the Commissioner framed the following issues:

- (1) Whether the applicant was a workmen as per the provisions of the Workmen's Compensation Act, 1923, and he met with an accident arising out of and in the course of his employment resulting into permanent disability?
- (2) What was the age of the injured applicant at the time of the accident?
- (3) What were the wages paid to the injured applicant at the time of accident?
- (4) What is the loss of earning capacity suffered and disability of permanent nature?
- (5) What is the amount of compensation payable to the injured applicant?

(6) What are liable to pay the compensation?

6. During the course of enquiry, on behalf of the applicant, A.Ws.1 and 2 were examined and Exs.A1 to A8 were marked. On behalf of opposite parties, no oral or documentary evidence was adduced.

7. On appraising the oral, documentary evidence and other material available on record, the learned Commissioner arrived at the conclusion that the applicant sustained injuries out of and in course of employment and awarded an amount of Rs.1,26,157/- towards compensation as against the claim of Rs.4,00,000/-. Feeling aggrieved by the order of the learned Commissioner, opposite party No.2 preferred the present appeal.

8. The contention of the learned counsel for the opposite party No.2 is three fold:

- i. the application is not maintainable under the Act as there was no employer-employee relationship between opposite party No.1 and the applicant;
- ii. the learned Commissioner has not considered the testimony of A.W.2 in right perspective and awarded compensation on assumptions and presumptions;
- iii. the learned Commissioner having arrived at the conclusion that the driver of the crime vehicle was not having driving licence to drive heavy vehicle ought not to have fastened the liability on opposite party No.2.

Per contra, learned counsel for the applicant submitted that the learned Commissioner rightly considered the material available on record and arrived at the conclusion that the driver of the crime vehicle was having valid and effective driving licence as on the date of the accident. He further submitted that basing on the evidence of A.W.2 and Ex.A4 disability certificate, the learned Commissioner assessed the loss of earning capacity of the applicant as 50%. He also submitted that there are no grounds much less valid grounds to interfere with well-considered order of the learned Commissioner.

9. In view of the rival contentions made by the learned counsel for the parties, the points that arise for consideration in this appeal are as follows:

- (1) Whether there is employer-employee relationship between opposite party No.1 and the applicant as on the date of the accident?
- (2) Whether the learned committed any error while assessing the loss of earning capacity of the applicant as 50%?
- (3) Whether opposite party No.1 had violated the terms and conditions of the policy so as to absolve the liability of opposite party No.2?

Point No.1:

10. As rightly pointed out by the learned counsel for opposite party No.2, the application under Sections 10 and 22 of the Act is not maintainable unless there was a relationship of employer and employee between opposite party No.1 and the applicant by the date of the accident.

11. To substantiate the case, the applicant examined himself as A.W.1 and got marked Exs.A1 to A8. As seen from the testimony of A.W.1, opposite party No.1 engaged him on the lorry bearing No.AP 16V 1219 as cleaner-cum-driver. As per the testimony of A.W.1, on 12.1.2002, he was proceeding to Hyderabad from Kurnool on the lorry bearing No.AP 16V 1219 as cleaner-cum-second driver. When the lorry reached Jellapur bus stop, the driver of the lorry had driven the same in a rash and negligent manner and dashed against three motor vehicles viz., lorry, auto and lorry. In the cross-examination of A.W.1, nothing is elicited to shake his testimony so far as the relationship of employee and employer between him and opposite party No.1 is concerned. A perusal of Ex.A1 (First Information Report) reveals that on the date of the accident, the applicant was travelling in the lorry as cleaner-cum-driver. The complaint was lodged by the auto driver, whose auto was dashed by the driver of the crime vehicle. In the complaint, the auto driver described the applicant as driver-cum-

cleaner on the crime vehicle. If it is not true, there is no necessity for the auto driver to mention the name of the applicant and his employment on the crime vehicle. As per the recitals of Ex.A2 charge sheet also, by the time of the accident, the applicant was travelling in the lorry as cleaner-cum-second driver. A perusal of Ex.A8 reveals that the applicant was having driving licence to drive light motor vehicle. The oral testimony of A.W.1 is fully supported by the recitals of Exs.A1 F.I.R., and A2 charge sheet, so far as employee-employer relationship between him and opposite party No.1 is concerned. Opposite party No.2 has not adduced rebuttal evidence to demolish the stand taken by the applicant. Learned Commissioner has considered oral and documentary evidence available on record and arrived at the conclusion that by the time of the accident the applicant was working as cleaner-cum-driver on the lorry, which belongs to opposite party No.1. I am fully agreeing with the finding recorded by the learned Commissioner on that aspect. Accordingly, point No.1 is answered in favour of applicant and against opposite party No.2.

Point No.2:

12. The oral testimony of A.W.1 coupled with Ex.A3 would certificate, Ex.A4 disability certificate and Ex.A5 X-ray clearly reveals that the applicant had sustained injuries in a road accident that occurred on 21.1.2002 at Jellapur bus stop. Basing on the oral and documentary evidence available on record, this court can safely arrive at a conclusion that the applicant sustained injuries out of and in course of employment.

13. As per the testimony of A.W.2 (Dr.G.Venkata Subbaiah), the applicant sustained fractures. His testimony further reveals that the applicant sustained fracture to left fore arm. In the cross-examination of A.W.1, nothing is elicited to shake his testimony so far as sustaining of fractures by the applicant is concerned. As per the recitals of Ex.A4,

the applicant sustained 50% functional disability. It is needless to say that the functional disability cannot be equated with loss of earning capacity in each and every case. Admittedly, the applicant is a licensed driver. The applicant cannot drive the vehicle like any other person in view of 50% functional disability. It is a common knowledge that no owner of vehicle will engage a person, who was suffering with 50% functional disability, to drive the vehicle. Undoubtedly the earning capacity of the applicant was reduced to a maximum extent in view of 50% functional disability. No doubt, the applicant can attend some other work and earn something. It is not even the case of the applicant that he is unable to do any work. Learned Commissioner has considered the testimony of A.Ws.1 and 2 and recitals of Ex.A4 disability certificate and arrived at the conclusion that 50% functional disability incurred by the applicant affects his earning capacity to the extent of 50%. The finding recorded by the learned Commissioner is justified. There are no grounds much less valid grounds to upset the said finding recorded by the learned Commissioner.

14. By the time of the accident, the deceased was aged about 29 years; therefore, the Tribunal has taken the factor 209.92. As per the testimony of P.W.1, he used to earn Rs.3,500/- per month. Except self-served testimony of A.W.1, there is no other evidence to substantiate the income of the applicant. In the absence of any documentary evidence, there is no other option for the learned Commissioner except to determine the wages of the applicant basing on orders and notifications issued by the Government from time to time under the Minimum Wages Act. The learned Commissioner fixed wage of the applicant as Rs.2,003.25 ps basing on G.O.Ms.No.81, dated 29.3.2002. The compensation for which the applicant entitled is as follows:

$$209.92 \times 60/100 \times 50/100 \times \text{Rs.}2,003.25 = \text{Rs.}1,26,157/-$$

There are no grounds much less valid grounds to interfere with the quantum of compensation awarded by the learned Commissioner. Hence, this point is answered in favour of the applicant and against opposite party No.2.

Point No.3:

15. The predominant contention of learned counsel for opposite party No.2 is that learned Commissioner having arrived at the conclusion that the driver of the lorry was not having valid and effective driving licence ought not to have fastened the liability on opposite party No.2. A perusal of the record reveals that one Subba Reddy drove the vehicle at the time of unfortunate accident. Ex.A8 is driving licence of the applicant. Opposite party No.2 has not taken specific plea in the counter that the driver of the crime vehicle was not having driving licence to drive heavy vehicle. There is no material on record to establish whether the vehicle involved in the accident is a light motor vehicle or heavy vehicle. Opposite party No.2 has not taken any steps to examine the officials of concerned Road Transport Authority to establish that by the time of the accident, the driver of the crime vehicle was not having valid and effective driving licence. In the absence of positive evidence, it is not possible to arrive at a conclusion that driver of the crime vehicle was having valid and effective driving licence or not. I have scanned entire order passed by the learned Commissioner. The learned Commissioner has not given any finding that the driver of the lorry was not having valid and effective driving licence as on the date of the accident. In the absence of evidence much less legally admissible evidence, it may not be possible for this court to arrive at a conclusion that the driver of the lorry was not having valid and effective driving licence, basing on the oral submissions made by the learned counsel for opposite party No.2. The material placed before the learned Commissioner falls short to establish that

opposite party No.1 had violated the terms and conditions of the policy so as to absolve the liability of opposite party No.2.

16. It is an admitted fact that lorry bearing No.AP 16V 1219, which belongs to opposite party No.1, was insured with opposite party No.2 with effect from 05.7.2001 to 04.7.2002; therefore, opposite party No.2 has to indemnify the liability of opposite party No.1. The opposite party Nos.1 and 2 are jointly and severally liable to pay compensation to the applicant. There are no grounds much less valid grounds to interfere with the well-considered order of the learned Commissioner. The appeal lacks merits and *bona fides*. Accordingly, point No.3 is answered against the opposite No.2.

17. In the result, the appeal is dismissed. There shall be no order as to costs. Miscellaneous petitions, if any, pending in this appeal shall stand closed.

T.SUNIL CHOWDARY, J.

Date: 11.9.2015.

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