

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

CIVIL MISCELLANEOUS APPEAL No.138 of 2008

-

JUDGMENT:-

This Appeal under Section 30 of the Employees' Compensation Act, 1923 ('the Act', for brevity) by the appellants/opposite parties 2 and 3 is directed against the order dated 26.12.2007 of the learned Commissioner for Workmen's Compensation and the Assistant Commissioner of Labour, Warangal - I passed in W.C.No.18 of 2005.

2. I have heard the submissions of the learned counsel for the appellants/opposite parties 2 and 3 ('the insurer', for brevity) and the learned counsel for the respondents 1 to 4/applicants ('the applicants', for brevity). The fifth respondent, who is the first opposite party/employer of the deceased, is stated to be not a necessary party. I have perused the material record.

3. The basic facts that lead to the filing of this appeal, in brief, are as follows:-

3.1 The applicants, who are the brothers and the parents of the deceased-Burra @ Borra Raju, had filed the case under the provisions of the Act against the opposite parties 1 to 3 claiming compensation for the loss sustained by them on account of the untimely death of the said deceased due to his involvement in an accident that had occurred out of and during the course of his employment as a driver on the lorry bearing registration no.AP 36 V 3410 belonging to the first opposite party/employer, which is insured with opposite parties 2 and 3/insurer.

3.2 The first opposite party had filed a counter admitting the ownership of the lorry and the employment of the deceased under him as driver on the said lorry and also the manner of the accident in which the deceased had died, but, had *inter alia* urged that the lorry was insured under a valid policy with the insurance company of the opposite parties 2 and 3 and that therefore, the opposite parties 2 and 3 are only liable to pay the compensation that may be awarded to the applicants.

3.3 The third opposite party had filed a counter on behalf of the opposite parties 2 and 3 and had resisted the claim on various grounds.

3.4 At trial, the mother of the deceased – Borra Prameela was examined as PW1. Further, Barla Sadaiah – an eyewitness to the incident was examined as PW2. Exhibits A1 to A6 were marked on the side of the applicants. On behalf of the opposite parties, no oral evidence was adduced. However, the copy of insurance policy is marked as exhibit B1.

3.5 On merits, the learned Commissioner had allowed the petition and had awarded a compensation of Rs.4,36,940/- to the applicants recoverable jointly and severally from the opposite parties 1 to 3. The learned Commissioner had directed the opposite parties to deposit the same by way of demand draft in favour of the Commissioner for Workmen's Compensation and the Deputy Commissioner of Labour, Warangal within a period of thirty days from the date of receipt of a copy of his order. In the order, it was also further held that on failure of the opposite parties to so deposit the amount, they shall be liable to pay interest at the rate of 6% per annum on the compensation amount from the date of accident till the date of deposit of the amount in view of provision under Section 4-A (3) of the Act. Feeling aggrieved of the said orders, the opposite parties 2 and 3/insurer had preferred this appeal.

4. The learned counsel for the insurer had contended as follows: -

The entire documentary evidence would go to show that the deceased is the cleaner on the lorry. But, the learned Commissioner had erred in concluding that the deceased was the driver of the lorry. The Commissioner was not correct in determining the wage of the deceased at the rate of Rs.4,000/- per month when the minimum wage was specified in G.O.Ms.No.30. The learned Commissioner grossly erred in concluding that the deceased was the driver and that his wage was Rs.4,000/- per month by not looking into the provisions of the Act and the terms contained in G.O.Ms.No.30. The learned Commissioner, in any view of the matter, ought to have taken the monthly salary of the deceased at Rs.2,429/- per month while computing the compensation and ought to have restricted the compensation amount to Rs.2,65,332/-. Therefore, the compensation of Rs.4,36,940/- determined and awarded by the learned Commissioner is not correct and the same is liable to be scaled down.

5. Per contra, the learned counsel for the applicants, while supporting the order of

the learned Commissioner had contended as follows: 'The Commissioner after taking into consideration the pleadings of both the parties had discussed at length the oral and documentary evidence and had further considered the legal position, which is applicable to the case on hand, and had then answered all the five issues framed by him in favour of the applicants after recording cogent and valid reasons in support of his said findings. When the Commissioner had recorded a finding of fact accepting the case of the applicants on all the aspects of the matter and when no substantial question of law is involved, the appeal is not maintainable. All the contentions which are now raised by the insurer were adverted to and considered appropriately by the learned Commissioner before awarding compensation which is just and fair. The insurer is not entitled to again raise the self-same contentions before this Court. The appeal is liable to be dismissed.'

6. In view of the above rival contentions, the points that arise for determination in this appeal are:-

1. **Whether the deceased was employed as a driver on the lorry bearing registration no.AP 36 V 3410 of the first opposite party? Whether the deceased was only a cleaner on the said lorry as contended by the insurer?**
2. **Whether the wage of the deceased ought to have been determined at Rs.2,429/- for the purpose of computing the compensation? And, if so, whether the compensation is liable to be scaled down to Rs.2,65,332/, as contended by the insurer?**
3. **To what relief?**

7. POINTS:

7.1 The applicants had stated in their claim application that the deceased was employed as a driver on the lorry bearing registration no.AP 36 V 3410 belonging to the first opposite party and that he had worked for two years till his death, as a driver on the lorry of the first opposite party and that his death had occasioned out of and during the course of his employment as a driver on the lorry belonging to the first opposite party. According to them, on the first information report lodged by another driver on 04.02.2005 with the Station House Officer, Laveru Police Station, a case in crime number 9 of 2005 was registered. Thus, the specific case of the applicants is that the deceased was working as a driver on the lorry of the first opposite party at the time of his death. The first opposite party had filed a counter admitting the ownership of the lorry and also the employment of the deceased as a driver on the lorry belonging to him. The insurance company, in its counter, while totally denying the averments in the application of the applicants, had *inter alia* denied the

occurrence of the accident and the alleged involvement of the deceased in the accident in *toto*. In-fact, it has put the applicants to strict proof of the case pleaded by them by not admitting that the deceased was employed as a driver on the lorry of the first opposite party and was being paid a monthly wage of Rs.5,000/- at the time of accident. The insurer had further pleaded in its counter that it is not aware of the criminal proceedings that were initiated. It is specifically pleaded by the insurer in the counter that as seen from the copies of first information report and the charge-sheet, the deceased was only working as a cleaner at the time of the alleged accident, but, he was actually driving the lorry when it was involved in the accident and as such, it is not liable to pay any compensation.

7.2. A reading of the pleadings of the insurance company would show that it has no personal knowledge about the employment of the deceased under the first opposite party, but, its contention that the deceased was only a cleaner on the lorry but, not a driver, is based on the contents of the first information report and the charge-sheet. PW1 is the mother of the deceased. She had deposed in line with the pleadings of the applicants. In her evidence, the certified copies of the First Information Report, the Inquest Report of the deceased, the Postmortem Report of the deceased and the charge-sheet were exhibited as exhibits A1 to A4. The original driving license of the deceased was marked as exhibit A5. She had asserted in her cross-examination that the deceased was working as a driver on the lorry but, admitted that she did not file any document to show that her son worked as a driver but, had denied the suggestion that the deceased was working as a cleaner on the lorry at the time of accident. PW2 is said to be an eye-witness to the accident. This witness had categorically deposed that the deceased was driving the lorry of the first opposite party at the time of accident. The controversy whether the deceased was employed as a cleaner or a driver apart, the fact that the deceased was driving the lorry at the time of accident is not in dispute. The insurer did not adduce any evidence in rebuttal. Therefore, the oral evidence on the side of the applicants has remained unrefuted. Though the contents of exhibits A1 and A4 on a perusal would show that the deceased was only a cleaner on the lorry the fact remains that he was driving the lorry at the time of accident. Nonetheless, PW2, the first informant, in his evidence, had also stated that the deceased is employed as a driver on the lorry though in his information it was mentioned that the deceased was a cleaner. Further, during the course of cross-examination when he was confronted with the contents of the First Information Report he had admitted that it was mentioned therein that the deceased

was a cleaner. However, he had denied the suggestion that the first opposite party was not paying the wage of Rs.5,000/- per month to the deceased and that the deceased was not working as the driver on the lorry of the first opposite party. Nevertheless, the deceased was also having a valid driving license which authorized him to drive a lorry. The said fact is evident from exhibit A5, his driving license. Having regard to the fact that the deceased was driving the lorry at the time of accident, the learned Commissioner, having accepted the employment of the deceased as a driver on the lorry of the first opposite party, had determined the compensation on that basis. As rightly contended by the learned counsel for the applicants, the employers may wrongly show the employment of the workers as cleaners, but, may extract the work of drivers from them to enable them to pay lesser wages and for other reasons better known to them and that therefore, the real fact that the first opposite party was utilizing the services of the deceased as a driver has to be taken into consideration, as was done by the learned Commissioner. Therefore, considering the facts that the deceased was discharging the duties as a driver and that he was holding a valid and effective driving license to drive the lorry at the time of accident, this Court is inclined to hold that the learned Commissioner is justified in considering the deceased as a driver while determining and awarding compensation.

-

8. Dealing with the contentions of the insurance company that the learned Commissioner ought not to have taken the wage of the deceased at Rs.4,000/- per month and that the learned Commissioner ought to have taken only Rs.2,429/- per month as the wage of the deceased in view of the provisions of the Act and the terms contained in G.O.Ms.No.30, what is to be noted is that the applicants had pleaded that the deceased was drawing Rs.5,000/- per month and had further asserted the said fact in the evidence on their side. The first opposite party had also stated in his counter that he was paying Rs.5,000/- per month to the deceased. In support of his contention, learned counsel for the insurer placed reliance on the decision in **United India Insurance Company Limited Vs. Vaggu Balaram and others**, wherein, this Court, in the absence of any documentary evidence relating to the wage of the deceased, expressed that this Court does not wish to rely on the oral evidence and the minimum wage fixed under the Minimum Wages Act has to be taken as the salary of the deceased. The facts of the case disclose that the said finding was

recorded having regard to the facts peculiar to that case. There is no hard and fast rule that the oral evidence of the applicants in every case cannot be relied upon in regard to the wage of the deceased. In the case on hand, admittedly the first opposite party is not maintaining any accounts and was not issuing any receipts for the wages being paid, but, he had stated in his counter that he was paying Rs.5,000/- per month as a wage to the deceased. The learned Commissioner, having regard to the amended provision of the Act, had restricted the wage of the deceased to Rs.4,000/- per month while determining the compensation. Be it noted that the learned counsel for the insurer, while placing reliance on explanation 2 of Section 4 of the Act, had contended that if only it is established that the wage is more than Rs.4,000/-, the restricted wage of Rs.4,000/- should be taken into consideration and that in the case on hand, the terms of G.O.Ms.No.30 are applicable and that as per the terms of the said G.O., the wage ought to have been fixed at Rs.2,429/- only. Section 4 of the Act reads as follows:-

4. Amount of compensation.—

-

(1) Subject to the provisions of this Act, the amount of compensation shall be as follows, namely:—

(a) Where death results from the injury an amount equal to ²[fifty per cent.] of the monthly wages of the deceased workman multiplied by the relevant factor; or an amount of ¹₂[eighty thousand rupees]], whichever is more;

(b) Where total permanent disablement results from the injury an amount equal to ³[sixty per cent.] of the monthly wages of the injured workman multiplied by the relevant factor; or an amount of ⁴₅[ninety thousand rupees]], whichever is more;

Explanation 1:- For the purposes of clause (a) and clause (b) "relevant factor" in relation to a workman 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 workman on his last birthday immediately preceding the date on which the compensation fell due.

Explanation II:- Where the monthly wages of a workman exceed ⁶[four thousand rupees], his monthly wages for the purposes of clause (a) and clause (b) shall be deemed to be ⁷[four thousand rupees] only;

-

{Reproduced Verbatim}

Reverting to the facts of the case on hand, as there is sufficient evidence brought on record that the wage of the deceased at the relevant time was exceeding Rs.4,000/- per month, the learned Commissioner, in the well considered view of this Court, is justified in taking the wage of the deceased at Rs.4,000/- per month as the explanation to Section 4 of the Act extracted *supra* clearly mandates that where the monthly wage of a workman exceeds Rs.4,000/- per month, for the purpose of determining the compensation, it shall be deemed to be Rs.4,000/- per month only is squarely attracted. Since the deceased was actually discharging duties as a driver on a lorry, the wage as determined by the learned Commissioner need not be disturbed.

9. Since this Court found on facts and evidence brought on record that the deceased was discharging duties as a driver at the time of accident and that the learned Commissioner is justified in holding that the deceased was a driver and that his wage was Rs.4,000/-, it follows that the compensation as determined by the learned Commissioner is just and fair and needs no interference. The points are accordingly answered.

10. Having regard to the reasons, this Court finds that the impugned order does not suffer from any infirmity calling for interference. Therefore, the appeal which lacks merit is liable to be dismissed.

11. In the result, the appeal is dismissed. There shall be no order as to costs.

Miscellaneous petitions pending, if any, in this appeal shall stand dismissed.

M. Seetharama Murthi, J

14th September, 2015

Bvv