

HON'BLE SRI JUSTICE A. RAJASHEKER REDDY

Civil Miscellaneous Appeal No.436 of 2005

Date: 30-01-2015

Between:

United India Insurance Company Limited,
represented by its Branch Manager, Hyderabad

.. Appellant

AND

P. Balaiah and 2 others

.. Respondents

HON'BLE SRI JUSTICE A. RAJASHEKER REDDY

Civil Miscellaneous Appeal No.436 of 2005

ORDER:

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This appeal is filed by the Insurance company under Section 30 of the Workmen's Compensation Act against the order dated 19-02-2005 in W.C.No.40 of 2002 passed by the Commissioner for Workmen's Compensation and Assistant Commissioner of Labour-IV at Hyderabad, awarding compensation of Rs.2,40,802/- in favour of the claimants against the Opposite Parties 1 and 2 therein/appellants herein.

2. The facts leading to the appeal are that one S. Veerasham, who is driver of auto bearing No.AP-23-T-9403 and employee of the Opposite Party No.1/1st

respondent herein-owner of the crime vehicle, was driving the said auto rickshaw from Rangampet towards Medak town and at about 5.00 P.M. when the auto reached near outskirts of Machavaram village, the driver lost his control over the said auto and dashed against a tree by the side of the road resulting in the driver of the vehicle and some of the passengers sustained injuries and the driver was shifted to Gandhi Hospital, Secunderabad for treatment where he succumbed to injuries on 30-09-2001. The police at Medak (Rural) registered a case in Crime No.105 of 2001 under Section 337 and 304 A IPC and the driver died in the accident which arose out of and during the course of employment under the Opposite Party No.1. The deceased was drawing an amount of Rs.3,500/- per month as wages as an employee under the 1st respondent/ Opposite Party No.1 and the said auto rickshaw was insured with the appellant herein/Opposite party No.2 as on the date of the incident. The claimants have filed W.C. case against both the Opposite Parties claiming compensation of Rs.3,00,000/-. The Commissioner for Workmen's Compensation, after considering both oral and documentary evidence i.e. Ex.A.1 to A.6 and D.1 and D.2, awarded compensation of Rs.2,40,802/- in favour of the claimants payable by Opposite Parties being the employer and the insurer of the vehicle. Aggrieved by the said order, the present appeal is filed by the Opposite Party No.2-insurer of the crime vehicle on the following substantial questions of law:

1. Whether the Commissioner is justified in deciding the employee and employer relationship of the deceased Veerasham and the Opposite Party No.1 basing on the driving licence (Ex.A.5) of one P. Veeraiah, who was no way concerned with the above case?
2. Whether the Commissioner is justified in fixing the liability against the appellant insurance company in the absence of insurance policy and without considering the pleadings, oral and documentary evidence of the appellant-insurance company including Ex.D.1 premium register copy for February, 2001, which shows that the premium was not collected on Cover Note No.43691 filed by the respondents 2 and 3 herein covering the auto bearing No AP-23-T-9403?
3. Whether the Commissioner is justified in passing the order against the appellant in the absence of insurance policy on the Auto bearing No.AP-23-T-9403?

3. Learned standing counsel for the appellant contends that Ex.A.5-driving licence pertains to one P. Veeraiah, whereas the name of the deceased workman is Sunnam Veerasam, as such, the Commissioner for Workmen's Compensation grossly erred in awarding compensation basing on Ex.A.5, observing that the deceased workman had valid driving licence, which is totally erroneous. He also contends that as there is no valid insurance policy in respect of auto bearing No. AP-23-T-9403, the fixing of liability on the appellant based on non-existent insurance policy is also erroneous.

4. Learned counsel for the respondents 2 and 3 contended that the appeal is not maintainable as no substantial questions of law is involved. He also contends that the plea raised herein regarding genuineness of Ex.A.5-driving licence was not raised before the Commissioner. In support of his contention, he relied on **Divisional Manager, New India Assurance Co. Ltd., v. Hara Prasad Tripathy and another.**

5. First of all, in order to examine substantial questions of law, there should be some factual foundations before the Commissioner. In the present case, the appellant-insurer neither asserted the same in the counter affidavit nor cross-examined the applicant on that aspect. Even the evidence on behalf of the appellant-insurer also does not indicate about such assertion. The appellant-insurer has not put forward such plea before the Commissioner, as such, without having any factual foundation of such claim, the appellant-insurer cannot raise the same herein.

6. Insofar as the relationship of employee and employer between the deceased driver and the Opposite Party No.1, the Commissioner considering Ex.A.7-copy of registration certificate issued by the Additional Registering Authority, Siddipet, Medak District in favour of the first opposite party for registration of his auto bearing No.AP-23-T-9403 to show that the first opposite party was the owner and employer of the auto and the charge sheet filed by the police confirming the employment of the deceased driver under the first opposite party, held that the deceased was working as driver of auto under the employment of the first opposite party and that the accident occurred arose out of and during the employment under the first opposite party.

Insofar as subsistence of the insurance policy is concerned, the Commissioner for Workmen's Compensation has categorically considered the evidence of RW.1, who stated that Ex.D.1-cover note did not contain/reflect the details of cover note claimed by the claimants as the vehicle was not insured and he accepted that he has filed records only for one month. RW.1 stated in his cross-examination that for registering any vehicle insurance coverage is a must and he further stated that the regional office maintained the serial number of cover note, but he did not produce any such record to show that the serial number on the cover note claimed by the applicant was not tallying with the serial number of cover note they have issued during the relevant month. The Commissioner, relying on **Shaikh Israj and Rekha and others (2004 ACJ 724)** in respect of genuineness of cover note, held that the Opposite Party No.1 obtained insurance coverage by obtaining cover note and he has to be indemnified by the Opposite Party No.2. It was also held that the insurance company cannot escape from its liability to pay the amount once a cover note is issued. In the present case, though RW.1 denied the cover note, no steps have been taken to prove that the cover note relied on by the claimants was fabricated and except denying the cover note, RW.1 did not produce any material on that aspect. Having gone through the order under challenge, I am of the view that the Commissioner for Workmen's Compensation, after discussing the oral and documentary evidence, came to the conclusion that the Opposite Parties 1 and 2 are jointly and severally liable to pay the compensation to the dependants of the deceased in the light of existence of Ex.A.3-cover note as on date of the accident.

Insofar as fixation of liability is concerned, the Commissioner took the age of the deceased driver as 35 years in the light of Ex.A.7 driving licence of the deceased driver and relying on the minimum wages fixed by the Government of A.P. for public transport employees vide G.O.Ms.No.30 LET & F (Lab.II), dated 27-07-2000 published in A.P. Gazette on 27-07-2000, wherein the basic wage payable to an Auto rickshaw driver is fixed at Rs.1,874/- together with VDA payable as notified by the Commissioner of Labour from time to time was Rs.560/-, the Commissioner taken the wages of the deceased driver at 2,434/- and awarded compensation of Rs.2,39,822/- fixing the liability on the appellant-insurer and the owner of the vehicle jointly and severally.

Insofar as the genuineness of Ex.A.5 driving licence is concerned, on a careful perusal of the order under challenge, it appears that the plea raised by the appellant-insurer regarding genuineness of Ex.A.5-driving licence stating that it was issued in the name of one P. Veeraiah, but not in the name of the deceased driver S. Veerasam was never raised before the Commissioner, but for the first time it was raised in the appeal. The learned counsel for the respondents 2 and 3 herein stated that the appellant insurer never raised such a plea before the Commissioner and that in the absence of specific plea before the Commissioner, the same cannot be raised herein. In support of this contention, he relied on **Divisional Manager, New India Assurance Co. Ltd., v. Hara Prasad Tripathy and another**, wherein it is held as follows:

“.....In this Court, a petition under Order 41, Rule 27 of the Code of Civil Procedure, has been filed by the appellant for accepting the certified copy of the driving licence bearing No. 1173/93 which was stated to be the driving licence as per the seizure list in the connected O. P. Case. Banking upon the said certified copy of the driving licence it is contended that the said driving licence relates to one James Mastin Khuna and not to the present respondent No. 1. It is, therefore, contended that since there was no valid driving licence, the Insurance Company should not be saddled with the liability.

The claimant-respondent No. 1 has filed objection to the admissibility of the additional evidence. Respondent No. 1 has contended that since the appellant had not taken a specific plea regarding the absence of driving licence, it should not be permitted to raise such a contention for the first time in appeal. It is further contended that the certified copy of the driving licence produced in this Court does not relate to the claimant-respondent No. 1 and, in fact, the xerox copy of the driving licence of the claimant-respondent No. 1 had been filed before the Commissioner for Workmen's Compensation, which had not been challenged by the Insurance Company at that stage.

The Insurance Company is claiming exemption from liability on the ground of exclusionary clause contained in the policy of insurance. Since it is depending upon an exclusionary clause, it was obligatory on the part of the Insurance Company to raise such a question before the Commissioner for Workmen's Compensation. A perusal of the written statement filed by the Insurance Company before the Commissioner for Workmen's Compensation, indicates that no such plea had been raised in the written statement regarding the lack of driving licence. The claimant was examined as a witness. In his examination-in-chief, he has categorically stated that he had a valid driving licence, xerox copy of which had been produced by him in Court. Though he was cross-examined at length by the Insurance Company, not a single question was put to him challenging such statement or the genuineness of the xerox copy of the driving licence produced by him. In the absence of any specific plea in the written statement and in the absence of even a faint challenge to the un rebutted evidence of the claimant himself on this aspect, the Commissioner for Workmen's Compensation came to the conclusion that the claimant had a driving licence and the Insurance Company was liable to pay the compensation. Such a finding is essentially a finding of fact which cannot be challenged for the

first time in an appeal under Section 30 of the Workmen's Compensation Act. Whether the xerox copy of the driving licence produced before the Commissioner for Workmen's Compensation was genuine or not being a question of fact and, more so, in the absence of any specific plea by the Insurance Company regarding the lack of driving licence, the appellant cannot be permitted to raise such a question in the present appeal and that too by adducing additional evidence. The evidence sought to be adduced under Order 41, Rule 27, C. P. C. was easily available to the appellant even at the stage of trial and in the absence of any explanation, the document produced for the first time in this Court cannot be admitted into evidence. However, as already indicated, in the absence of any specific plea on this point, the appellant cannot be permitted to adduce any evidence to fill up the lacuna in its case at this stage. As is well known, an appeal under Section 20 of the Workmen's Compensation Act is maintainable only on substantial questions of law. The scope of an appeal under Section 30 of the Act is akin to a second appeal under Section 100 of the Code of Civil Procedure. As is well settled, in a second appeal the appellant is not ordinarily permitted to raise questions of fact and similarly, in the present appeal the appellant cannot be permitted to raise a question of fact particularly in the absence of any specific plea on this aspect.....”

The facts in the above case and the facts in the instant case are almost similar in nature with regard to absence of specific plea in respect of fake driving licence holding by the deceased driver. In the present case, the appellant-insurer did not raise such a plea before the Commissioner, but for the first time, it was raised before this Court, and therefore, in the absence of such a specific plea before the Commissioner, it can be safely concluded that the appellant-insurer cannot be permitted to raise such a plea herein.

Further, this Court in **National Insurance Co. Ltd., v. Rajala Lakshmi (died) and others** held as follows:

".....when it is asserted by the owner as well as the applicant that the driver was having valid driving licence as on the date of the accident, it is for the insurance company to prove that there was no valid driving licence and that in the event of failure of the insurance company to establish the said fact, it can be safely concluded that the driver was having valid driving licence as on the date of accident and the insurance company can be made liable under the Workmen's Compensation Act as there is evidence to the effect that the deceased was under the employment of the owner of the vehicle as on the date of accident....."

A careful perusal of the order under challenge shows the Commissioner discussed not only the evidence of RW.1 but also the evidence of the applicants elaborately and held that the owner of the vehicle insured the auto rickshaw with the appellant-insurer and came to a right conclusion making the

appellant-insurer and the owner of the vehicle liable to pay compensation to the claimants/respondents 2 and 3 herein and these are all findings of fact and this court will not interfere as the appeal lies only on the substantial question of law. Hence, no substantial questions of law are involved in the appeal, as the appeal is liable to be dismissed.

Accordingly, the Civil Miscellaneous Appeal is dismissed. No costs. As a sequel thereto, miscellaneous petitions, if any, pending shall stand closed.

A. RAJASHEKER REDDY, J

Date: 30-01-2015

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