IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO.927 OF 2017

The National Insurance Co. Ltd. ... Appellant

Vs.

Shri Shivaji Ganpat Chavan & Ors. … Respondents

Mr.Amol Gatne for the Appellant

CORAM: Mrs.MRIDULA BHATKAR, J.
DATED: AUGUST 31, 2017

P.C. :

1. This appeal is directed against the judgement and award dated 17.2.2011 passed by the learned Commissioner for Workmen's Compensation Act & Judge, 2nd Labour Court, Pune, under the Workmen's Compensation Act, thereby directing the opponents i.e., the appellant, to pay jointly and severally compensation of Rs.1,93,594/- to the applicant alongwith interest @ 12% from the date of the accident i.e., 10.4.2004.

2. None present for the respondents, though served. Earlier, by order dated 14.6.2017, this Court while issuing notices, had mentioned that the endeavour will be made to dispose of the First Appeal at the stage of admission. Thus, the parties are given

notice that the matter will be heard finally at the stage of admission itself.

3. This being an appeal under the Workmen's Compensation Act, is a second appeal and hence, to be treated as Second Appeal and accordingly, substantial question of law is formulated as under:

> “Whether the Commissioner under the Workmen's Compensation Act has failed to appreciate that presumption u/s 114 of the Evidence Act is rebuttable and hence, the financial liability imposed on the appellant is erroneous and excessive?

4. A Claim Application was preferred under section 22 of the Workmen's Compensation Act, 1923 against the opponent No.1, the owner of vehicle No.MH-12-AQ-9780 and opponent No.2, the insurance company. It is the case of the applicant/claimant that he was employed with opponent No.1 as a driver since 15 years prior to the date of the accident and he was earning approximately Rs.5,600/- per month. On 10.4.2004, when he was driving the dumper No.MH-12-AQ-9780 loaded with crushed stones, he tried

to avoid a dash to one two wheeler rider, lost his control over the dumper and the dumper toppled down. The claimant suffered many injuries and was treated in Rakshak hospital. He was admitted from 1.4.2004 till 5.5.2004 as an indoor patient. He had to spend Rs.3 lakhs for medical treatment. He sustained one fracture to his right shoulder and one to forearm. His injuries were sustained on his abdomen and bladder. One kidney was ruptured and it was removed. Thus, he had suffered 40% disability. So, he filed the claim application. The insurance company appeared in the matter and filed a written statement. The employer i.e., the opponent No.1 also appeared. He filed his written statement at exhibit 10 and disowned any relationship of employer-employee between the applicant and him. The insurance company filed written statement at exhibit 20 and denied all the claims. The Commissioner for Workmen's Compensation had directed both the opponents to pay jointly and severally compensation of Rs.193,594- with interest @ 12% p.a. from the date of the accident. Being aggrieved with the said award, the insurance company has filed this appeal.

5. Mr.Gatne, the learned Counsel for the Insurance Company, has submitted that the order passed by the learned Judge / Commissioner for Workmen's Compensation granting compensation to the original claimant is illegal and is to be set aside. He has submitted that the learned Judge has accepted the evidence on wrong assumptions that the evidence produced by the applicant is sufficient to prove that the vehicle i.e., the dumper No.MH 12 AQ 9780 was insured with the appellant insurance company. The learned Counsel while commenting on the evidence has argued that the insurance policy of the impugned vehicle was never produced before the learned Commissioner for Workmen's Compensation. In that case, the learned Commissioner should have rejected the application and should not have held that appellant insurance company liable to pay compensation. He submitted that only cover note was produced by the claimant disclosing the name of the insurance company is not a sound evidence. The learned Counsel has further submitted that though the cover note of the insurance, which is obtained from the RTO office is a public document, the learned Judge failed to appreciate that the presumption u/s 114 of the Evidence Act is always rebuttable. He relied on the contentions raised in the

written statement submitted by the appellant insurance company to that effect. In support of his submissions, he relied on the judgments in **United India Insurance Company vs. Zaverben Harilal Dedhia**[1]**.**

6. Mr.Gatne has further submitted that the insurance company has in fact put up other defences also which ought to have been considered by the learned trial Judge. He submitted that the claimant could not prove employer-employee relationship between him and the original opponent No.1, the owner of the vehicle. He submitted that the owner in his written statement, has refused that the claimant was working with him as a driver with his vehicle. The claimant did not produce any documentary evidence to prove the fact of employment. The claim of the original claimant that he has sustained 40% disability is doubtful and thus, the amount of compensation is also exhorbitant and the insurance company is not liable to pay.

7. In the case of **United Indian Insurance Company** (supra), a learned Single Judge of this Court has discussed the evidentiary value of the presumption as to the entries of RTO record. In the

1 2009 (1) Mh.L.J. 212

said case, all positive evidence of the administrative officer of the insurance company was tendered, who has stated that the truck involved in the accident was not insured with the appellant insurance company. Moreover, in the said case, a witness from the RTO was examined, who was cross-examined and material admissions were sought from him with the entries in the RTO records were made only on the basis of ATForm submitted by the owner, without verifying the insurance policy. In the present case, the insurance company did not tender any evidence on the point of denial of the insurance. Moreover, no such admissions are sought in respect of the cover note where it was mentioned that *vide* Cover Note No.6303883 the impugned the vehicle i.e., the dumper was insured with National Insurance Company for the period from 31.8.2003 to 30.8.2004 and the accident took place within the policy period i.e., on 10.4.2004. It was necessary for the appellant insurance company to lead evidence that the vehicle was not insured with the appellant but it was insured with some other insurance company, i.e., United India Insurance Company. The submission of the learned Counsel that the presumption u/s 114 of the Evidence Act is rebuttable is correct, however, in the present case, there is no evidence or any such cross-examination to rebut that presumption. There is no admission in the cross-examination that the cross checking about the truthfulness of the contents of the cover note is required to be done with the insurance company. Under such circumstances, the submissions made by the learned Counsel cannot be accepted.

8. In the case of proof of fact of employer-employee relationship in the application made for compensation under the Workmen's Compensation Act, where the claimant is working as a driver and where the relationship is denied by the owner of the vehicle, then, it cannot be said that the owner has discharged his burden and the claimant has to prove direct proof of fact of his employment.

9. Mere denial of employer-employee relationship by the owner of a driver cannot absolve him from the liability. If the Indian scenario and the reality is taken into account, then, the higher degree of proof cannot be saddled on the driver to prove this fact. Generally, in India, the drivers are not given any salary certificate when it is a private employment. However, the fact that the claimant was found with the vehicle of which the opponent is the owner is a very strong circumstance to believe and accept the

case of the claimant that he was employed as a driver at the time of the accident with the owner of the vehicle unless other explanation is given by the owner about the custody or entrustment of the claimant. Thus, when entrustment is not explained, then, the case of the claimant is to be accepted.

10. In the beginning, I have mentioned about the nature of the injuries sustained by the claimant. He is a driver and his one kidney is removed. He suffered two fractures to his right arm i.e., one to his shoulder and one to his fore arm and thus, 40% disability is given, cannot be doubted.

11. Under such circumstances, the appeal is dismissed.

(MRIDULA BHATKAR, J.)