

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO. 772 OF 2014

Mr. Jilesingh Sardar Singh & Anr. .. Appellants
vs.
Vikas Carriers Pvt. Ltd. & Anr. .. Respondents

Mr. T. J. Mendon for Appellants.
Ms Poonam Mital for Respondent No. 2.

CORAM : M. S. SONAK, J.

Date of Reserving the Judgment : 23 March 2017

Date of Pronouncing the Judgment : 11 April 2017

JUDGMENT :-

- 1] Heard Mr. Mendon for the appellants and Ms Mital for the respondent no. 2.
- 2] The respondent no. 1 is served but not represented.
- 3] This appeal raises the following substantial questions of law :
 - (a) Whether the finding recorded by the Commissioner that there was no employee – employer relationship between deceased Omprakash Jilesingh and Vikas Carriers Pvt. Ltd. (VCPL) is vitiated by perversity ?
 - (b) Whether the Commissioner failed to appreciate the concept of 'onus of proof' and 'adverse inferences' in recording a finding that there was no employer employee relationship made out between the parties?
- 4] The brief facts are as follows :
 - (A) On 24 October 2005 the truck bearing Registration No. HR-

38-K-6678 (said truck) was parked near Jay Durga Wear House, Pagotegaon, Navi Mumbai;

(B) Another truck dashed the said truck, thereby killing Omprakash, who was sitting on the cleaner's side in the said truck which was parked. The truck which gave the dash, fled from the scene and its whereabouts, registration details etc. are unknown. The driver of the parked said truck, in which, Omprakash was seated and died, was one Vijendra Singh.

(C) There is no dispute whatsoever and in fact, it is admitted by the employer VCPL that Vijendra Singh was employed as driver by it to drive the said truck.

(D) VCPL has however denied that the deceased Omprakash was its employee. In the written statement filed by VCPL before the Commissioner this is what is stated in paragraphs numbered (1) and (2) :

*"1. With reference to Para 1 of the application the opposite party states that the deceased was never employed in their establishment in any capacity. There is no employer-employee relationship with the deceased. The opposite party states that as per the police record, the alleged incident cannot be brought within the purview of the definition of accident. The alleged incident is not occurred arising out of and in the course of employment with the opposite party. **The opposite party state that the driver employed by them, might have taken the deceased, along with him to accompany for the assignment. The opposite party states that the deceased is cousin brother of the driver and hence has become hostile.** The opposite party states that as admitted by the applicants the alleged incident took place at Uran, Navi Mumbai and therefore this Hon'ble Court has no jurisdiction to try and entertain the present application.*

2. With reference to Para 2 of the application the opposite

party denies that the deceased died, while in the court of employment with them. The opposite party further states that in absence of employer – employee relationship, the age of the deceased has no relevance. The opposite party states that they have never paid single penny to the deceased as salary. The opposite party put the applicants to the strict proof to prove the same.”

[Emphasis supplied]

(E) In the context of territorial jurisdiction of the Commissioner, VCPL, in its written statement, at paragraph numbered (6) has stated as follows :

*“6. With reference to the statements made in the affidavit, the opposite party states that they have verified the address of the applicants. The opposite party states that the applicants have given false address to file the application before this Hon'ble Court in Mumbai. **The opposite party states that from the documents an inference can be drawn that Shri Vajinder Singh has become hostile, only to help his cousin brother and his relatives.** The opposite party states that the incident involved can not be brought within the purview of accident by any stretch of imagination.”*

[Emphasis supplied]

(F) There is no dispute as regards the factum of the accident which took place on 24 October 2005 and the death of Omprakash, whilst seated in the said truck at Pagotegaon, Navi Mumbai. FIR about the incident and the police papers produced on record bear out this fact, which, even otherwise was never disputed.

(G) The parents of Omprakash lodged the claim before the Commissioner, alleging that Omprakash was employed as a cleaner by VCPL and since the accident has arisen out of and in the course of his employment, VCPL was liable to pay compensation. The Oriental Insurance Company Limited was also impleaded as a party, since, the said truck was insured by the said Insurance

Company at the time of the accident.

(H) VCPL filed written statement as aforesaid denying liability, mainly on the ground that there was no employer-employee relationship.

(I) Shri Jilesingh, father of deceased Omprakash examined himself in the proceedings before the Commissioner and was cross-examined by the opposite parties. Similarly, Prashant Salian, Executive Manager of VCPL examined himself and was cross-examined on behalf of the applicants and opponent no. 2 i.e. the Insurance Company.

(J) The Commissioner, by impugned order dated 30 May 2012 dismissed the claim application on the ground that the applicants were unable to establish that there was any employer-employee relationship between the parties on the date of the accident.

(K) Aggrieved, parents of deceased Omprakash have appealed against the impugned judgment and order dated 30 May 2012 made by the Commissioner for Workmens Compensation.

5] Mr. Mendon, learned counsel for the appellants submits that the opponent no. 1 in its written statement, had clearly admitted that the driver employed by them, might have taken deceased to accompany him for the assignment. If this is the position, then, the opponent no. 2 was required to examine the driver in order to establish that the opponent no. 1 had no nexus whatsoever with the deceased Omprakash. He submits that the Commissioner, in such a situation, was required to draw adverse inference against the opponent no. 1 and not against the applicants. He submits that the

admission in the written statement of the opponent no. 1 with deceased Omprakash might have been engaged by the driver employed by the opponent no. 11, who is, nothing but the agent of opponent no. 1, has been completely ignored by the Commissioner. He submits that ignoring such vital piece of evidence, in the form of admission, constitutes perversity. On this ground, Mr. Mendon submits that the impugned order is liable to be reversed and the appellants claim application, is liable to be allowed in its entirety. Mr. Mendon relies upon the following decisions in support of the Appeal :

- (I) *Mohammed Anis Mohd. Elyea Khan vs. Litiza & Co. & Anr.*¹**
- (II) *Manju Sarkar & Ors. vs. Mabish Miah & Ors.*² and**
- (III) *National Insurance Co. Ltd. vs. Rattani & Ors.***

6] Mr. Mendon also refers to the statutory definitions of the term 'employee' and 'employer' as appear in the Employees Compensation Act, 1923 and on basis of the same, submits that in the facts of the present case, the employer-employee relationship was totally established and the applicants claim was therefore liable to be allowed.

7] Ms Mital, learned counsel for the Insurance Company however submitted that in this case there was no evidence whatsoever to establish the employer-employee relationship. She submits that unless this relationship was established, the claim under the Employees Compensation Act, 1923 was not maintainable. She submits that the appellants were required to examine the driver Vijendra Singh and non examination on their part invites an adverse inference against them. She submits that

1 2001 ACJ 2057 (Bombay)

2 2014 ACJ 1927 (Supreme Court)

this is not a case of a claim under the Motor Vehicles Act, 1988, in order to hold the Insurance Company liable for the claim arising out of the accident to the motor vehicle which was insured by them. For these reasons, she submits that there is no case made out to interfere with the impugned judgment and order made by the Commissioner. She relies upon the decision of Punjab and Haryana High Court, in the case of ***Oriental Insurance Co. Ltd. vs. Jaswinder Singh***³, in support of her contentions.

8] The rival contentions now fall for determination.

9] The Employees Compensation Act, 1923, formerly known as the Workmens Compensation Act, 1923 is an enactment to provide for the payment of compensation by certain employers to their employees for injury caused to them by accident arising out of and in the course of their employment. This enactment also enables the dependents of a deceased employee, where, the death arises out of an accident arising out of and in the course of his employment.

10] Section 2 (dd) of the said Act defines the expression 'employee' to *inter alia* mean a person who is recorded as driver, helper, mechanic, cleaner or in any other capacity in connection with the motor vehicle. Section 2(e) of the said Act defines the expression 'employer' to includes any body of persons whether incorporated or not and any managing agent of an employer and the legal representative of a deceased employer and when, the service of an employee are temporarily lent or let on hire to another person by the person with whom the employee has entered into a contract of service of apprenticeship, means such other person while the employee is working for him.

3 2009 II CLR 355

11] In the normal course, the burden establishing the existence of an employer-employee relationship, will be upon the employee who raises the claim on the basis of an employment injury or upon the dependents, in case of the death of such employee. However, the concept of burden of proof, also, involves the concept of onus of proof. Upon discharge of initial onus by an employee or his dependents as the case may be, the onus, shifts upon the putative employer to place on record proper material or proper evidence to rebut the claim. Thus, whilst burden of proof may remain static, the onus of proof shifts depending upon the material on record placed in the course of evidence.

12] In the present case, the appellants, who are the parents of the deceased Omprakash, have asserted on oath that deceased Omprakash was employed as a cleaner with VCPL. Further, there is no dispute that the death of Omprakash took place whilst he was in the said truck, admittedly one from amongst the fleet of trucks owned by VCPL. There is also no dispute that on the fateful day i.e. on 24 October 2005, the said truck, was out on an assignment of transportation, which is, the normal business activity of VCPL. The accident, in which Omprakash died, arose when another unknown truck dashed against the said truck in which Omprakash was seated on the cleaner's side. The said truck was parked along the road side, whilst out on an assignment of VCPL.

13] The VCPL, in its written statement, no doubt denied the employer-employee relationship by stating that they had never employed the deceased Omprakash as a cleaner or for that matter in any other capacity. However, such denial, in the facts and circumstances of the present case, cannot be said to be absolute.

This is because the VCPL, in its written statement, had itself stated at paragraph (1) that *'the driver employed by them, might have taken the deceased, along with him to accompany for the assignment'*. This is relevant because this means that there is at least some semblance of an admission that the deceased Omprakash was not a complete stranger but, the driver employed by the VCPL, i.e. Vijendra Singh might have, taken deceased Omprakash along with him to accompany him, for the assignment.

14] Though, such a statement, cannot be regarded as a statement admitting existence of any fulfilled employer-employee relationship, such a statement which was in fact repeated by Prashant Salian, Executive Manager of the VCPL, in the course of his evidence, when considered along with other attendant circumstances, was sufficient for the onus to shift upon VCPL. In such a situation, it was for the VCPL to have examined the driver Vijendra Singh, who would have been the best person to throw light in the matter. The VCPL, by merely stating that Vijendra Singh might turn out to be hostile, could not have avoided examining Vijendra Singh, in a situation where the death of Omprakash has taken place in the said truck owned by the VCPL, and when said truck was admittedly on an assignment of VCPL.

15] In fact, the Commissioner, has also stated that the evidence of driver Vijendra Singh would have been the best evidence available. However, the Commissioner, has drawn an adverse inference against the appellants for not examining Vijendra Singh and on the said basis, rejected the claim of the appellants. As noted earlier, the VCPL in its written statement, had conceded that the driver employed by them, might have taken the deceased along with him on the assignment. This position is reiterated by Prashant

Salian, the Executive Manager of VCPL, in the course of his deposition before the Commissioner. In this case, admittedly, Omprakash died, whilst seated on the cleaner's side of the said truck. There is no dispute whatsoever that the said truck is one from amongst the fleet of trucks owned by VCPL. There is also no dispute that on the fateful day, the said truck was out on an assignment for VCPL. All this material, though not full proof of the existence of any employer-employee relationship between the parties, was at least sufficient for the onus to shift upon the VCPL. The least that was expected of VCPL was to examine the driver Vijendra Singh, who was admittedly the employee of VCPL.

16] In the matter of this nature, the Commissioner, ought to have taken a more pragmatic approach. The appellants, who hail from Punjab, are the parents of deceased Omprakash. Their son, had come to Mumbai in search of employment and secure employment in Mumbai. To fault the aged parents for not having examined Vijendra Singh, the driver of the said truck and to draw adverse inference against them, was not a proper approach in the facts and circumstances of the present case. Rather, it was the duty of VCPL to have examined the driver Vijendra Singh, who was admittedly, their employee and was admittedly in the truck on 24 October 2005 on the date of the unfortunate accident, which resulted in the demise of the appellants' 31 years old son Omprakash. Such examination of the driver Vijendra Singh, was both necessary as well as easily feasible for VCPL, since admittedly, driver Vijendra Singh was in VCPL's employment. Such examination was necessary, taking into consideration the aforesaid attendant circumstances surrounding the demise of Omprakash. The Commissioner in such circumstances, ought to have drawn adverse inference against VCPL for not examining driver Vijendra

Singh, rather than drawing adverse inference against the appellants, as has been done in the impugned judgment and order.

17] The VCPL is a transport company, which is engaged in transportation of goods over long distances. Normally, the drivers who ply upon such long distances are accompanied by cleaner or other support attendants. In some instances, the cleaner may be a direct employee of the transport company and in other cases, the driver employed by the transport company is given an authority to engage the services of such cleaner or attendant. For this purpose, consolidated salary is paid to the driver, so as to include the wages payable to such cleaner or attendant. The VCPL, in this case, having admitted that the deceased Omprakash might have been engaged by the driver to accompany him on the assignment, was required to at least examine the driver Vijendra Singh, who would be in the best position to disclose the existence, if any, of such arrangement between the VCPL, the driver and deceased Omprakash. It was for the VCPL to have examined their driver Vijendra Singh and the non examination warrants the drawal of adverse inference against the VCPL and not against the appellants as held by the Commissioner in the impugned judgment and order.

18] In *Mohammed Khan* (supra), the Division Bench of this Court was called upon to decide the matter where the employer employee relationship was denied in case of a cleaner, engaged on a truck. The transport company, had stated that it had not employed any person as a cleaner but the driver was paid lumpsum by voucher and out of that amount, the driver was to select somebody to work as a cleaner with him. In this context, the Division Bench held that the driver ought to have been regarded as an authorized agent of the company to employ a cleaner. This would therefore

clearly make the cleaner who was employed only for that trip for the duration thereof an employee of the company of the truck. Since the driver was not examined by the company, an adverse inference was drawn against the company. The relevant observations in paragraphs 3 to 9, read thus :

“3. While denying the contract of employment and, therefore, any relationship with the claimant as a workman, the respondent No. 1 company mentioned that for the employment of cleaner on the truck to help the driver, the driver was paid a lump sum by voucher and out of that amount driver was to select somebody to work as a cleaner with him on the truck.

4. This aspect of the matter should have been given importance as also result of the implication should have been carried to its logical conclusion. The said authority given to the driver to select his own cleaner as his companion on the truck for a trip and that having been done under the authority given by the owner of the truck, the action of the driver, should be viewed as an agent of the owner of the truck.

5. Once this aspect of the agency is understood, obviously, the driver is authorised agent of owner to employ a cleaner. The relationship was established for the duration of the contract of service as a cleaner. This would, therefore clearly, make the cleaner who has been employed only for that trip for the duration thereof an employee of the owner. The cleaner, that is, the applicant has clearly stated that he was so employed by the driver of the vehicle. The voucher that has been produced before the trial Court shows that the payment of the cleaner has been made by the driver.

6. Obviously, therefore, in the aforesaid background the witnesses who have been examined on behalf of the company will have no personal knowledge at all and the driver of the truck only will have personal knowledge of the same. The driver being out of the employment of the company - respondent No. 1, it was the duty of the

company to call him and examine to disclose the case of the applicant. The Commissioner on the contrary has taken a view that it was for the cleaner to examine the driver. This approach is totally incorrect.

7. When the owner of the vehicle and its witnesses, for want of any personal knowledge, have repeated the contention raised in the written statement obviously will not help the company.

8. While Civil litigations are being decided, the applicant having personal knowledge has deposed to the entire nature of transaction, which is also borne out from the record produced by the company, and as such get support, the same has to be accepted in face of the deposition of a witness of the company who has no personal knowledge.

9. Obviously, therefore, since the approach of the trial Court which has been found incorrect by us, we will have to allow the appeal and the order will have to be set aside."

[Emphasis supplied]

19] In the FIR lodged after the accident, the statement of the driver was recorded. The Commissioner, has completely ignored the FIR and the statements accompanying the same. Although, ordinarily, allegation made in the FIR is not admissible in evidence, reference can be made to the case of *Rattani* (supra), where the Hon'ble Supreme Court has held that even though ordinarily an allegation made in the FIR would not be admissible in evidence *per se* but, as the allegation made in the FIR had been made a part of the claim petition, there is no doubt whatsoever that the Tribunal and consequently the Appellate Courts would be entitled to look into the same. In the same case, the Hon'ble Supreme Court, has made observations on the aspect of burden of proof. The relevant observations in paragraphs 7 and 13, read thus :

“7. We are not oblivious of the fact that ordinarily an allegation made in the first information would not be admissible in evidence per se but as the allegation made in the first information report had been made a part of the claim petition, there is no doubt whatsoever that Tribunal and consequently the appellate courts would be entitled to look into the same.

13. The question as to whether burden of proof has been discharged by a party to the lis or not would depend upon the facts and circumstances of the case. If the facts are admitted or, if otherwise, sufficient materials have been brought on record so as to enable a court to arrive at a definite conclusion, it is idle to contend that the party on whom the burden of proof lay would still be liable to produce direct evidence to establish that the deceased and the injured passengers were gratuitous passengers.

As indicated hereinbefore, the first information report as such may or may not be taken into consideration for the purpose of arriving at a finding in regard to the question raised by the appellant herein, but, when the first information report itself has been made a part of the claim petition, there cannot be any doubt whatsoever that the same can be looked into for the aforementioned purpose.”

20] The Commissioner, in the impugned judgment, seems to have held against the appellants because the material on record suggests that the said truck, in which, the deceased Omprakash was seated on the cleaner's side was parked by the road side and it is some other truck, which hit this parked truck and thereafter fled. The Commissioner, observed that in the absence of details and whereabouts of the other truck, it is not possible to fix any liability upon the Insurance Company, which had insured the said truck, in which, Omprakash died, whilst seated on the cleaner's side. This is again, a completely incorrect approach. The circumstance that said truck was found parked by the side of the road and it is some other truck, whose details are not known, which dashed against the said truck, resulting in the death of deceased Omprakash, is not at

all a circumstance which was required to be held against the appellants. Even, such an accident, is certainly an accident which arises out of and in the course of employment of the cleaner. The Insurance Company, which insured the truck, *inter alia* for any liability arising under the Employees Compensation Act, 1923 is certainly liable to indemnify the owner in matter of such a liability.

21] Though not, directly relevant, reference can be made to the decision of the Karnataka High Court in the case of **Smt. Saraswathi Bai & Ors. vs. The Regional Director, E.S.I.**⁴, which is a decision in the context of the provisions contained in section 51A of the Employees State Insurance Act, 1948. In that case, the employee concerned, died within the factory premises. In such circumstances, it was held that the onus of establishing that the death did not arise out of and in the course of his employment, had shifted upon the employer. Since, such onus was not discharged by the employer, it was held that the dependents of the deceased were entitled to the benefits under the beneficial legislation.

22] The decision of the Punjab and Harayana High Court in the case of *Jaswinder Singh* (supra) is distinguishable on facts. In the said case, there was a very categoric denial of the existence of employer-employee relationship. Besides, the claimant, who stepped into the witness box, failed to establish that he was indeed the employee. Except for his own self serving statement, there was no other evidence to establish that he was indeed the employee. Further, even this self serving statement was completely exposed in the course of cross-examination. Such circumstances offer no parallel to the facts and circumstances of the case with which we are presently concerned. Accordingly, the decision in *Jaswinder*

4 ILR 2003 Karnataka 3814

Singh (supra) is of no assistance to the respondent – Insurance Company.

23] There is material on record that deceased Omprakash was earning Rs.4,000/- per month. In any case, this is a reasonable inference which is required to be drawn in the facts and circumstances of the present case. Omprakash was a cleaner and it is reasonable to proceed on the basis that in a place like Mumbai, he must have been earning at least Rs.4,000/- per month, particularly since, VCPL was engaged in transportation business. In ***Minu Rout & Anr. vs. Satya Pradyumna Mohapatra & Ors.***⁵, in a case where the dependents had pleaded and deposed that the salary of the deceased was Rs.5,000/- per month, the Hon'ble Supreme Court, has held that the salary of the deceased, who was a driver, should have been taken as Rs.6,000/- per month by taking judicial notice of the fact that the job of a driver is a skilled job. The observations in paragraph 20, read thus :

“20. The Tribunal ought to have taken the salary of the deceased driver at Rs.6000 by taking judicial notice of the fact that the post of a driver is a skilled job. Though the claim of the appellants is Rs.5000 as monthly salary of the deceased for the purpose of determining the loss of dependency, the actual entitlement of the salary of the deceased should have been taken at Rs.6000 per month by the Tribunal for awarding just and reasonable compensation, which is the statutory duty of the Tribunal and the appellate court. In view of the law laid down by this Court in Santosh Devi v. National Insurance Co. Ltd. [(2012) 6 SCC 421] 30% of the future”

[Emphasis supplied]

24] There is material on record which establishes that deceased Omprakash was 31 years of age at the time of his death. This

⁵ (2013) 10 SCC 695

means that in terms of section 4(1)(a) of the Employees Compensation Act, 1923, the relevant factor as specified in Schedule IV would be 203.85. There is no clear evidence on record as to whether the deceased had completed the age of 30 years and was running 31 or whether he had completed the age of 31 years and was running 32. For this reason, the relevant factor is taken as 203.85. Section 4(1)(a) provides that where death results from an injury the compensation payable shall be an amount equal to fifty percent of the monthly wages of the deceased, which in the present case, can be taken as Rs.2,000/-, since, the monthly wages of the deceased was Rs.4,000/- multiplied by the relevant factor. The compensation amount therefore comes to Rs.4,07,700/-. The respondents are jointly and severally liable to pay compensation of Rs.4,07,700/- to the appellants along with interest thereon at the rate of twelve percent per annum from the date of claim petition i.e. 2 May 2006 till the date of effective payment. This is not a fit case for imposition of any penalty upon the respondents.

25] Upon cumulative consideration of facts, circumstances and the position in law, this Appeal deserves to be allowed. The Appeal is accordingly allowed. The impugned judgment and order dated 30 May 2012 is set aside. The respondents are jointly and severally directed to pay the amount of Rs.4,07,700/- together with interest thereon at the rate of twelve percent per annum from the date of the claim petition i.e. 2 May 2006 till the date of actual payment. The respondent no. 2 – Insurance Company is directed to pay the said amount in equal proportions to the two appellants by way of demand drafts drawn in their respective names within a period of four weeks from today. In the alternate, respondent no. 2 – Insurance Company may deposit the amount before the Commissioner, within a period of four weeks from today and the

Commissioner shall thereafter pay the said amount to the two appellants by means of a demand drafts drawn in their names.

26] In the facts and circumstances of the present case, there shall be no order for payment of any penalty or costs.

(M. S. SONAK, J.)

Chandka