

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **FAO No. 101/2017**

% **17th May, 2017**

SEEMA & ORS. Appellants

Through: Mr. S.N.Parashar, Advocate.

versus

OM PAL SINGH & ORS. Respondents

Through: R-1 in person.

Mr. Shoumik Mazumdar,
Advocate.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. This first appeal under Section 30 of the Employee's Compensation Act, 1923 is filed by the appellants/claimants against the judgment of the Employee's Compensation Commissioner dated 7.3.2016 by which the claim petition filed by the appellants/claimants has been dismissed.

2. The facts of the case are that the deceased Sh. Ashok Tyagi was employed by the respondent no.1 herein as a driver for his bus bearing registration no.U.P-14 AT-0961. The bus used to ply on the prescribed route between Vivekanand Nagar and Ram Parasth at

Ghaziabad in U.P. In the claim petition the appellants/claimants pleaded that at night on 11.3.2014 the deceased Sh. Ashok Tyagi when he had gone to the CNG pump i.e for filling of CNG in the bus, the deceased Sh. Ashok Tyagi was kidnapped by four unknown persons and an FIR No. 234/2014 was registered with Police Station Kavi Nagar, Ghaziabad. Since the dead body of Sh. Ashok Tyagi was found within the jurisdiction of Police Station Etamadpur, Agra, U.P another FIR No.107/2014 was registered at the concerned police station in Agra within whose jurisdiction the dead body was found. It was pleaded by the appellants/claimants that the death of the deceased took place on account of an accident arising out of and in the course of employment, and therefore, the appellants/claimants are entitled to succeed in the claim filed before the Employee's Compensation Commissioner under the Employee's Compensation Act.

3. The claim petition was contested by the insurance company, and which is the respondent no.2 herein.

4. By the impugned judgment, the Employee's Compensation Commissioner has held that the deceased did not die in an accident arising out of and in the course of employment because the bus was not plying on the prescribed route and after completing of the route was being driven at night to Noida, as shown by the statement of

one Sh. Krishan Kumar Tyagi to the police which was investigating the FIR and the criminal case which was pending. The Employee's Compensation Commissioner has concluded by making the following observations that the deceased did not die out of and during the course of employment:-

“11. Oral arguments were also heard on behalf of both the parties. I have very carefully gone through the material available on record and my findings on the above issues are as under:-

Issue No.i & ii

- a) The claimants in their claim application have stated that deceased Sh. Ashok Tyagi, S/o, Shri Jugmender Tyagi was employed with the respondent as driver on his bus No. U.P-14 AT-0961 for the last several years and the said bus was plying between Vivekanand Nagar and Ram Parasth at Ghaziabad. On the unfortunate night of 11.03.2014, said Ashok Tyagi was kidnapped by four unknown persons while he had gone to CNG pump and FIR No. 234/2014 was registered with PS Kavi Nagar, Ghaziabad and on finding of the dead body of Shri Ashok Tyagi, FIR No. 107/14 under section 302/201/120-B I.P.C was registered in Police Station Etamadpur, Agra, U.P. Claimants further submitted that it was reported to them that Shri Ashok Tyagi was murdered and his dead body was linked with the case FIR No.234/14 and the culprits were nabbed by the police. The postmortem report of deceased Ashok Tyagi and the insurance policy of the said bus was also found in the records of the police. Claimants further submitted that the death of Shri Ashok Tyagi occurred during the course and in the employment of the respondent no.1 and the said vehicle was insured with respondent No.2. She was cross examined by the Counsels of respondents. During cross examination she admitted that the bus in question was being plied from Vivekanand Ghaziabad to Ramprastha, Ghaziabad. She also admitted that the route on which the bus in question was being used to ply by her deceased husband was not covered under the route of the said bus.
- b) Further, the bus was parked at stand after the duty hours and in the morning before commencement of duty but was not found by him as stated by Sh. Ompal Singh, owner of the bus vide complaint dated 13.03.2014 given by him to SHO Kavi Nagar, Ghaziabad.
- c) The said bus was being plied on unauthorized route as admitted by claimant during her cross examination. Also the same has been admitted by Sh. Ompal Singh, respondent No.1 in his affidavit.
- d) The insurance M/s New India Assurance Co. Ltd. respondent no.2 submitted that limitations as to use the policy covers use only under a permit within the meaning of Motor Vehicle Act 1988 or such a

carriage falling under sub-section(3) of Section 88 of M.V.Act, 1988. The policy does not cover use for (a) organizing racing (b) pace making (c) reliability trials (d) speed testing (e) use whist drawing a trailer except the towing (other than for reward) of any one disabled mechanically propelled vehicle.

- e) The statement given to police, PS Kavi Nagar by Sh. Krishan Kumar Tyagi R/o Village Rawan @ Bada Gaon, PS Khekra, Distt. Baghpat, U.P that on 11/12-03.2014 at about 10.00 O'clock he came Mainpuri to meet the son of his Tau Ashok Tyagi, who was working as driver on Bus No.UP-14-AT-0961 and the bus used to be parked in the night opposite to Swedeshi Polytech. In day time because of on duty he cannot meet him. At about 1.00 AM or 1.30 AM he saw that the bus on which Ashok Tyagi was working as driver, was coming out from CNG pump and he given hand signal to stop the bus and he saw that Ram Pal @ Pappu who was known to Ashok Tyagi, was driving the bus in question. When he asked Rampal about Ashok Tyagi then he said that he is seating behind in the bus. He further stated that when he went inside the bus and saw that Ashok Tyagi was under the influence of intoxication and three other people were seating alongwith him. Ashok Tyagi said to him that they are going to NOIDA and he will meet him tomorrow at home and left. Then he also left to Mainpuri and after that information about his murder was received." (underlining added)

5. The issue before this Court is that whether the deceased can be said to have died on account of an accident arising out of and in the course of employment. At the outset I would like to refer to the ratio of the judgment delivered by this Court in the case of ***ICICI Lombard General Insurance Co. Ltd. Vs. Smt. Sonia & Ors. 2014 (1) RLR 546*** wherein this Court has held that when a driver of a vehicle during the course of performance of his duties is attacked by persons which results in the death of the employee, then such death is an accident arising out of and in the course of employment. The relevant paras of the judgment in the case of ***ICICI Lombard General Insurance Co. Ltd. (supra)*** showing the facts and the conclusion with

respect to the death arising out of and in the course of employment are contained in paras 2,5,9 and 13 and which paras read as under:-

“2. The facts as pleaded in the claim petition were that the deceased Sh. Rakesh Yadav was employed with Gopi Chand, respondent no.1 before the Commissioner (respondent no.7 herein), to drive the vehicle TATA 407 No. UP-17-C-0540. The salary of the employee Rakesh Yadav was Rs.4500/- and a daily allowance of Rs.50/- per day. It was pleaded in the claim petition that on 1.5.2008 in the morning owner/Sh. Gopi Chand insisted that deceased employee drive the vehicle for supplying of milk to certain areas and which the deceased refused because he knew that there was a dispute between Gopi Chand and certain persons in the area and thus a mishappening may occur. However, on being compelled, the deceased Rakesh Yadav took the vehicle for supply of the milk. During the performance of his duty, at Maujpur; Delhi, at about 7.20 a.m, the deceased Rakesh Yadav was attacked by one Vikram and his two sons as they were having grudge for milk not being supplied. As a result of beating, the deceased Rakesh Yadav received multiple injuries and he was declared dead when brought to the G.T.B.Hospital. An FIR under Section 302/34 IPC bearing no. 178/2008 was registered with the police station Seelampur, Delhi where the accused persons are facing trial. It was pleaded that the beating of the deceased employee Rakesh Yadav took place when he was on duty i.e the accident arose out of and in the course of employment, and therefore the dependants were entitled to compensation under the Act.

5. The appellant-insurance company was respondent no.2 before the Commissioner. It filed its written statement inter alia pleading that the death of the deceased employee Sh. Rakesh Yadav did not arise out of and in the course of employment and that the deceased was not having a valid driving licence. It is also argued in tandem with the case of the employer Gopi Chand that since there was no relationship of employer and employee between Rakesh Yadav and Gopi Chand the claim petition was bound to be dismissed.

9. Before me, on behalf of the appellant-insurance company, it was firstly argued that once there was no relationship of employer and employee the appellant-insurance company cannot be fastened any liability. Secondly, it was argued that the death in the present case was a murder under Section 302 IPC and therefore, the incident cannot be an accident arising out of and in the course of employment. Thirdly and finally, it is argued that since the deceased did not have a valid driving licence, no liability can be fastened on to the appellant-insurance company. Reliance in support of this third argument is placed upon the judgment of the Supreme Court in the case of **National Insurance Company Limited Vs. Vidhyadhar Mahariwala & Ors. 2008 (12) SCC 701**. Counsel for the dependants/claimants/respondent nos. 1 to 6 in this Court refuted the arguments urged on behalf of the appellant and prayed for dismissal of the appeal.

13. The second argument urged on behalf of the appellant also has no merit because the expression ‘arising out of and in the course of employment’ is wide enough for taking into its fold a death of employee who is attacked while performing the duties of a driver. In the present case, the applicants before the Commissioner have sufficiently discharged their onus of proof by filing of their own affidavits as also the documents in the criminal case including the FIR which was registered that deceased Rakesh Yadav was in fact attacked by the accused Vikram and his two sons which caused serious injuries to the deceased Rakesh Yadav who was declared as brought dead at G.T.B hospital. Therefore, the accident in this case, being the murder of the deceased, clearly arises out of and in the course of employment. The expression ‘arising out of and in the course of employment’ does not mean that there has to be death only because of driving of the vehicle. Accordingly, I reject the second argument which is urged on behalf of the insurance company.” (underlining added)

6. Therefore, if there takes place a murder of an employee while he is performing his duties, then it has to be held that the death has arisen out of and in the course of employment.

7. In the present case, no doubt the bus had completed its normal duties of the day of plying between Vivekanand Nagar and Ram Parasth at Ghaziabad in U.P, however it is proved by the appellants/claimants as per their affidavit by way of evidence, and which is duly supported by the written statement of the respondent no.1/employer as also his affidavit by way of evidence alongwith the FIR registered by the respondent no.1/employer Ex.PW1/4, that, the bus in question belonging to the respondent no.1/employer was stolen when the deceased had taken the bus to the CNG pump and which has to be necessarily in the course of duties for filling in CNG in the bus. The respondent no.1/employer did not dispute para 2 of the claim

petition, and which para states that the deceased had gone to the CNG station. The duties of a driver does not necessarily end with the day itself because if the driver is to remain in the bus and he has thereafter to fill CNG in the bus then the factum of filling CNG is necessarily a duty which is being performed by the employee as an employee of the employer/respondent no.1/owner of the vehicle. The fact with respect to the deceased being in the vehicle in question which was coming out of the CNG station and which was driven by some other person and that there were also some other persons in the bus, is proved from the statement of Sh. Krishan Kumar Tyagi given to the police during investigation, and which statement has been referred to by the Employee's Compensation Commissioner although for a different purpose of the bus not being driven on the normal route. A reading of the statement of Sh. Krishan Kumar Tyagi shows that he was a relative of the deceased and that when he saw the bus coming out of the CNG pump Sh. Ashok Tyagi was in an inebriated condition and the bus was driven by one Sh. Rampal and in the bus there were also some other person whom Sh. Krishan Kumar Tyagi could not identify. Therefore, the conclusion which has to be arrived at is that the deceased Sh. Ashok Tyagi was in the subject bus owned by his employer and which was coming out of the CNG pump i.e it had gone for filling of the

CNG in the bus and which was hence being driven during the course of duties. Merely because the deceased was not driving the bus at that relevant point of time would not mean that the bus was not being driven for the purpose of filling CNG and which was part of the duties of the deceased Sh. Ashok Tyagi as the driver of the bus. Also the factum of murder of Sh. Ashok Tyagi is not a disputed fact in the present case and with respect to which FIR No. 107/2014 is registered under Sections 302/201/120-B IPC at Police Station Etamadpur, Agra, UP. In my opinion, therefore the murder took place of the deceased Sh. Ashok Tyagi while the deceased was acting on his duties i.e the accident arose out of and in the course of employment. Merely the fact that the bus was being taken to Noida, and which is not the normal route, and the bus was driven at night, cannot mean that the deceased was not performing his duties, inasmuch as, CNG was in fact to be filled in the bus and which becomes clear from the fact that the bus was coming out of the CNG pump.

8. I may note that there is no dispute that the bus in question was insured under policy no. 32160031120100013450 with the validity period of 23.3.2013 to 22.3.2014. The driving licence of the deceased Sh. Ashok Tyagi was duly proved as Ex.PW1/5.

9. Accordingly, the impugned judgment dated 7.3.2016 is set aside and it is held that the accident being the death of the deceased Sh. Ashok Tyagi arose out of and in the course of employment i.e the murder of the deceased took place while the deceased Sh. Ashok Tyagi was performing his duties of filling CNG in the bus of the respondent no.1/employer.

10. The matter is now remanded to the concerned Employee's Compensation Commissioner to calculate the compensation in accordance with the provision of the Employee's Compensation Act.

11. Parties are directed to appear before the Employee's Compensation Commissioner on 5.6.2017. Trial court record be sent back to the concerned Employee's Compensation Commissioner alongwith the copy of the present judgment.

MAY 17, 2017/ib/Ak

VALMIKI J. MEHTA, J