

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

+ **FAO No.258/2016 and C.M. No.21146/2016(stay)**

% **31st October, 2017**

UNITED INDIA INSURANCE CO. LTD. Appellant

Through: Mr. Pankaj Seth, Advocate.

versus

RAJENDER SINGH & ANR. Respondents

Through: Mr. R.K. Nain, Advocate for
respondent no.1.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not? **YES**

VALMIKI J. MEHTA, J (ORAL)

1. This first appeal under Section 30 of the Employee's Compensation Act, 1923 (hereinafter referred to as 'the Act') is filed by the appellant/insurance company, respondent no.2 in the proceedings before the Employee's Compensation Commissioner, impugning the judgment of the Employee's Compensation Commissioner dated 16.3.2016 which has allowed the claim petition filed by the respondent no.1 herein, and granted compensation of Rs.8,24,265/- along with interest after 30 days of the date of accident.

2. The facts of the case are that respondent no.1/claimant pleaded that he was employed as a driver on the vehicle bearing no. HR-38H-8008 (1090-Eicher) owned by the respondent no.2. It was pleaded that on 25.4.2011 the respondent no.1/claimant received injuries during the course of his duties as an employee i.e there was an accident arising out of and in the course of employment, because, the respondent no.1/claimant is pleaded to have come back to the factory of the owner/respondent no.2 at Kosi, Mathura and when he was cleaning the vehicle and removing the tarpaulin from the top of the cabin of the truck, his foot slipped and he fell down on the road. When he fell down from the height, there was a pipe studded in the ground which penetrated in his lower limb below the knee and resultantly the respondent no.1 suffered grievous injuries. It was pleaded that respondent no.1/claimant was taken to Hindu Rao Hospital, Delhi and he remained admitted from 26.4.2011 to 11.7.2011. Respondent no.1/claimant pleaded that thereafter he was taken to Deen Dayal Upadhyay Hospital, Delhi where plastic surgery was done and treatment given from 29.10.2011 to 4.11.2011. Hence the subject claim petition was filed inasmuch as it was pleaded that the

vehicle was insured with the appellant/insurance company having a clause for payment under the Act. Respondent no.1/claimant pleaded that he was earning wages of Rs.7,000/- per month besides Rs.100/- per day as food allowance.

3. The alleged employer, respondent no.2 herein and respondent no.1 before the Employee's Compensation Commissioner below, filed its written statement denying that the respondent no.1/claimant was ever employed as a driver of the subject vehicle. It was therefore prayed that the claim petition be dismissed. Appellant herein, respondent no.2 before the Employee's Compensation Commissioner, filed its written statement and pleaded that the respondent no.1/claimant was never the employee of the respondent no.2 and that the claim petition has been filed to extract money from the appellant/insurance company. There was however no denial by the appellant/insurance company that the vehicle was insured under an insurance policy issued by the appellant/insurance company for the period from 25.4.2011 to 24.4.2012.

4. After pleadings were complete, the Employee's Compensation Commissioner framed the following issues:-

- i. Whether the employer-employee relationship exists between the parties on the day of the accident?
- ii. Whether the accident occurred out of and during the course of employment with respondent no.1?
- iii. If so, what relief and what directions are necessary in this regard?"

5. Respondent no.1/claimant led evidence and filed various documents to prove his case including the treatment documents and the disability certificate. Appellant/insurance company filed its affidavit by way of evidence along with the relevant documents. Employee's Compensation Commissioner by the impugned judgment has held that there existed a relationship of employer and employee between the respondent no.2 and respondent no.1 herein, by holding that the statement of the respondent no.1 is sufficient to discharge the onus of proof of the existence of relationship of employer and employee. It was therefore held by the Employee's Compensation Commissioner that accident had happened during the course of employment. The relevant discussion of the Employee's Compensation Commissioner in the impugned judgment reads as under:-

"ISSUE NO.1 & 2

The case of the applicant is that he was employed as a driver on the vehicle bearing no.HR-38H-8008 (1090-Eicher) owned by respondent no.1 and on 25.04.2011, he received personal injury by an accident arising

out of and during the course of employment. On 25.04.2011 the applicant was on duty on the vehicle and tiles were carried to Badarpur, Delhi by the said vehicle. He had got the vehicle unloaded at Badarpur and thereafter as usual an empty truck had again reached the factory premises. He returned to the factory to load tiles again and when he had got the vehicle cleaned and after doing that he was taking the tarpaulin off loaded from the top of the cabin of the truck and while doing so his foot slipped and he fell down on the road. When he fell down from the height there was a pipe studded in the ground which penetrated in his lower limb below knee and he sustained grievous injury due to that. He came out for medication but in the meantime he became unconscious and remained lying on the road throughout night. In the morning when he was seen by the by-passers he told them to call his brother immediately and the same was done by the people nearby. With the help of his brother he was taken to Hindu Rao Hospital, Delhi and he remained admitted from a period 26.04.2011 to 11.07.2011 after discharge from Hindu Rao Hospital he took treatment for some time. But the position remained aggravated and thereafter he was taken to Deen Dayal Upadhyay Hospital, Delhi where plastic surgery was also conducted and treatment was given during the period of 29.10.2011 to 04.11.2011 in that hospital. The applicant has incurred heavy expenditure on his treatment. After this accident applicant cannot work comfortably and his leg shortened. His earning capacity has been totally reduced due to restricted movement and he became incapable of driving a vehicle.

The stand taken by respondent no.1/employer-owner of the vehicle in his written statement is that the applicant Sh. Rajender Singh has not approached the court with clean hands and he has suppressed the material facts as also there is no cause of action. He has not filed any document to prove his employment on vehicle bearing No.HR-38H-8008. It is stated that the vehicle was insured with United India Insurance Co. Ltd. and if any liability is on the insurance company. On merit it has been stated that the vehicle was insured on the date of alleged accident on 25.04.2011. It has been stated that the facts about wages are wrong and as no proof of age has been given hence that is not true. No notice has been given under Section 10 of the E.C. Act. It has been stated that the claim application be dismissed with cost in favour of respondent No.1.

Respondent no.2 has filed their response in their written statement. In the written statement filed by them it has been stated that this is a close proximity case and the claimant has colluded with respondent No.1. It has further been stated that no proof has been filed by respondent No.1 owner of the vehicle about the proof of relationship with the workman (wrongly written deceased) and about his salary and his work. The claim filed by the applicant is false, fabricated and concocted with malafide intention to extort money from the insurance company. On facts there was denial simplicitor. However, it was admitted that the vehicle bearing No.HR-

38H-8008 was insured with respondent no.2-United India Insurance Company Limited vide policy No.0406033111P000054795 for the period 25.04.2011 to 24.04.2012 and an additional premium was charged by respondent No.2 from respondent No.1.

According to the respondent no.1, there is no documentary evidence to show the appointment of the applicant with respondent No.1 on their vehicle bearing No. HR-38H-8008. There is no appointment letter produce by the petitioner and the respondent no.1 also failed to produce any document or evidence as who was driving the above vehicle no.HR-38H-8008 on the date of accident and in absence of same from respondent no.1 an adverse inference is drawn that the petitioner was actually assigned duty on the vehicle on 25.04.2011 when he met with an accident. I have heard the counsel for the parties in detail.

The counsel for the applicant has raised a question of burden of proof. It has been argued by him that in the cases under the Workmen's Compensation Act, 1923 now Employee's Compensation Act the onus of proof cannot be equated with that of the cases under Criminal Courts of law and also Civil Courts. He has drawn my attention towards a case titled as Mackinnon Mackenzie and Co. (P) Ltd. Versus Ibrahim Mahmmmed Issak- 1969(2) S.C.C. 607 decided by the Hon'ble Supreme Court of India (3 Judges Bench). In the said case it has been ruled that these cases are not tried keeping in view the strict rules of Evidence Act. The relevant portion of the judgment is reproduced as under:-

"If the facts which are proved give rise to conflicting inferences of equal degrees; of probability so that the choice between them is a mere matter of conjecture, then of course, the applicant fails to prove his case, because it is plain that the onus in these matters is upon the applicant. But where the known facts are not equally consistent, where there is ground for comparing and balancing probabilities as to their respective value, and where a reasonable man might hold that the more probable conclusion is that for which the applicant contends then the arbitrator is justified in drawing an inference in his favour."

The ruling shows that the provisions of Evidence Act are not applicable in the proceedings under the E.C. Act. It has been further ruled that the claimant has to prove his case but it does not mean that it needs to be proved by 'direct evidence'.

The counsel for the applicant also relied on the judgment of the Hon'ble Supreme Court of India in a case titled as Maghar Singh vs. Jaswant Singh has ruled that the strict proof beyond doubt is not required in the case under 'Act'. The relevant extracted portion of the said judgment is as under:- Maghar Singh / Jaswant Singh- 1997 ACJ 517-

".....there is also no reason to believe that the appellant would wrongly point a finger at the respondent as his employer..... It is not unusual for the employer not to issue a letter of appointment or make entries in the register regarding payment of salary to avoid certain

legal consequences, we have, therefore, no difficulty in concluding that.....he was employed.....and he suffered injuries while working.....”

There is claim of the applicant that he was employed with respondent No.1 on their vehicle bearing No.HR-38H-8008. He has given his evidence. Though his evidence are not documentary evidence or direct evidence. But evidence is there. In the cases of the death of driver or other workmen on the Transport vehicles the burden of proof has to be taken in the context of Section 106 of the Evidence Act. The said Section is read as under:-

“106. Burden of proving fact especially within knowledge.

When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.”

The situation has been discussed in detail in the case titled as Mackinnon Mackenzie and Co Pvt. Ltd. Cited 1969 ACJ 419- The relevant extracted portion of the judgment is reproduced as under:-

“In other words the argument was that there was no evidence to establish that the death of the workman was caused not only by the disease but the disease as well as the employment. The difficulty in the present case is that the Appellant has not produced the necessary material to show that the workman was an indoor patient in the hospital from December 2 to his death on the 10th December and what his condition was during that period. Under Section 230 of the British Merchant Shipping Act, 1894 it is obligatory on the master of the ship to make such entries in the Log Book, the medical treatment given to ailing workman. In the present case, the Log Book is produced. The entries in that book indicate that on December 2, 1961 the deceased was admitted to the hospital, as he was suffering from hopatomagally and basal pulmonary congestion. This entry was made on December 3, 1961. The case of the Appellant is that the workman was in the hospital as an indoor patient from December 2, to 10. In the Log Book however, the only entry made after the one mentioned is regarding his death, which occurred on December 10, 1961. As to what happened between 2nd December and 10th December is not indicated by any entry in the Log Book. There is no entry to that effect in the Log Book, nor does the Log Book indicate what treatment he was given during the said period. It was said that the Appellant produced a special medical report of the surgeon of the ship before the Commissioner but it was objected on behalf of the Respondent presumably on the ground of want of necessary proof. There was however, no attempt on the part of the Appellant to prove that report in a legal manner. The result, therefore, is that there is no evidence to establish that the workman was lying in the ship's hospital as an indoor patient from December 2 to 10. The High Court has taken the view that the Appellant had special knowledge as to whether the workman was an indoor patient

lying in the ship's hospital during the above mentioned period or whether he was asked to carry out his duties and since the Appellant produced no evidence an adverse inference should be drawn against the Appellant. The High Court observed that there was no evidence to establish that after December 2, 1961 that the workman was not asked to work but was in the hospital right upto the date of his death. In the absence of necessary evidence which the appellant could and should have led in the case the High Court drew the inference that the death of the workman arose out of and in the course of his employment. In our opinion the High Court was right in holding that in circumstances of this case a duty was imposed on the appellant to lead evidence which was within special knowledge and in the absence of such evidence an adverse inference should be drawn against the appellant. ”

Taking the above judgment of the Hon'ble Supreme Court of India I am of the view that the respondent could have and should have brought the evidence to show as to who was posted on the truck on that particular day as driver if the applicant was not and someone else was posted as driver. He failed to do that. Nor he brought any evidence from any of his office/employee to show to this court as to persons posted on the vehicle for its operation. They have failed to do so. In the given situation, adverse inference be taken against in view of the principle laid in the case of *Machinnon Mackenjeee vs. Ritta Fernandes* (supra). The insurance company which was duty bound to investigate the matter has also failed to bring any contra evidence.

Hence the said issues are decided in favour of the applicant and against the respondents.”

6. No doubt, an appeal under Section 30 of the Act lies only when there is a substantial question of law, however, in my opinion, the facts of the present case show that a substantial question of law arises inasmuch as it cannot be held by a reasonable person in the facts of the present case that the respondent no.1/claimant was employed as a driver with the respondent no.2. The reasons are stated hereinafter.

7. Supreme Court in the judgment in the case of *Machinnon Mackenzie & Co. Pvt. Ltd. Vs. Ibrahim Mahmmud Issak 1969 A.C.J. 422*, and which judgment has also been relied by the Employee's Compensation Commissioner, as regards the onus of proof and drawing inference from the facts on record observed as under:-

“6. In the case of death caused by accident the burden of proof rests upon the workman to prove that the accident arose out of employment as well as in the course of employment. But this does not mean that a workman who comes to Court for roll of must necessarily prove it by direct evidence. Although the onus of proving that the injury by accident arose both out of and in the course of employment rests upon the applicant these essentials may be inferred when the facts proved justify the inference. On the one hand the Commissioner must not surmise, conjecture or guess; on the other hand, he may draw an inference from the proved facts so long as it is a legitimate Inference. It is of course Impossible to lay down any rule as to the degree of proof which is sufficient to justify an inference being drawn, but the evidence must be such as would Induce a reasonable man to draw it. Lord Birkenhead, L.C., in *Lancaster v. Blackwell Colliery Company, Ltd.*, observed:

“If the facts which are proved give rise to conflicting inferences of equal degrees; of probability so that the choice between them is a mere matter of conjecture, then of course, the applicant falls to prove his case, because it is plain that the onus in these matters is upon the applicant. But where the known facts are not equally consistent, where there is ground for comparing and balancing probabilities as to their respective value, and where a reasonable man might hold that the more probable conclusion is that for which the applicant contends then the arbitrator is justified in drawing an inference in his favour.” (underlining added)

8. It is therefore seen that the Employee's Compensation Commissioner cannot arrive at a finding which no reasonable person can. No doubt, in this country Courts do not insist on a written contract of employment between an owner of a vehicle and the driver

employed before it is held that there is a relationship of employer and employee, however, whether there is a relationship of employer and employee and that the same is established on record, depends on the facts of each case. Where a person is alleged to have been an employee/driver and when he is found as per evidence to be driving the vehicle at the time of the accident, then ordinarily courts will take the driver to be the employee because there is no reason why a stranger/person who would be driving the vehicle of an owner, and it is not the position that the vehicle was stolen when it was being driven and it met with an accident. Similar would be the position with a person when he is appointed as a co-driver or a cleaner on a truck and who is found in the vehicle at the time of the accident. However the present is not a case where there is an accident of the vehicle and the respondent no.1/claimant was found to be driving the vehicle at the time of the accident. Not only the accident is alleged to have happened not because of an accident involving the vehicle but it is only because of a fall of the respondent no.1/claimant from the truck while removing the tarpaulin from the vehicle. Even the respondent no.2 has denied that the respondent no.1 was ever employed as an employee

and the Employee's Compensation Commissioner has wrongly drawn adverse inference and put burden of proof against the respondent no.2 because the respondent no.2 cannot be asked to prove the negative that the respondent no.1/claimant was not his employee. Also adverse inference could have been drawn against the respondent no. 2 deliberately if it was required to produce any particular record but the respondent no.2 deliberately did not comply with such direction, but that is not so in this case. Therefore in the facts of the present case a mere self-serving statement cannot be held to be discharge of onus of proof of existence of relationship of employer and employee.

9. Though counsel for the respondent no.1/claimant argued that onus of proof is discharged that respondent no.1/claimant was an employee of the respondent no.2, however, I cannot agree because discharge of onus of proof depend upon facts of each case and that whereas in certain cases oral statements taken along with other evidence and circumstances can be taken as discharge of onus of proof but in some other cases it cannot be that an oral statement can be taken as discharge of onus of proof. As already stated above, besides the fact that the respondent no.2 denied that respondent no.1/claimant was

ever appointed as an employee in the present case, it is seen that there is no accident involving the vehicle and the respondent no.1/claimant was found to be a driver of the vehicle at the time of the accident.

10. In view of the aforesaid discussion, impugned judgment of the Employee's Compensation Commissioner dated 16.3.2016 is set aside. It is held that Employee's Compensation Commissioner has committed a complete illegality and perversity in the facts of the present case in holding the respondent no.1/claimant to be an employee of the respondent no.2. The respondent no.1/claimant has already received 50% of the compensation and the balance amount is lying with the Employee's Compensation Commissioner in the form of an FDR. The balance amount of compensation lying of the appellant/insurance company with the Employee's Compensation Commissioner be released to the appellant/insurance company along with accrued interest. Appellant/insurance company can always in accordance with law seek restitution from the respondent no.1/claimant for the 50% of the awarded compensation already received by the respondent no.1/claimant.

11. Appeal is accordingly allowed in terms of aforesaid observations, leaving the parties to bear their own costs.

OCTOBER 31, 2017
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VALMIKI J. MEHTA, J

