

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

+ **FAO No. 594/2016**

% **25th April, 2017**

SBI GENERAL INSURANCE CO. LTD. Appellant

Through: Mr. Aman Shukla, Adv.

versus

MAHASHIR @ MEHAR SINGH & ANR. Respondents

Through: Ms. Pratima N. Chauhan, Adv.
for R-1.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

CM Nos. 46954/2016 (delay in re-filing) and 46956/2016 (delay)

For the reasons stated in the applications delays in filing and re-filing the appeal are condoned.

CMs stand disposed of.

FAO No. 594/2016 & CM No. 46952/2016 (stay)

1. This first appeal under Section 30 of the Employee's Compensation Act, 1923 is filed by the appellant/insurance company impugning the judgment of the Employees Compensation Commissioner dated 4.7.2016, by which the Employees Compensation Commissioner has allowed the claim petition filed by the respondent

no.1/claimant and awarded compensation of Rs. 9,88,560/- along with interest as per Section 4A of the Employee's Compensation Act.

2. The facts of the case are that the respondent no.1/claimant was working as a Driver with the respondent no.2 herein on Vehicle No.HR-55-J-7995-Truck (10 Tyres). On 20.1.2015, the respondent no.1 received grievous injuries arising out of and during the course of employment inasmuch as, at around 10:00 AM on 20.1.2015 while driving the truck, another truck which was passing from the opposite direction, from this other truck something very heavy was hurdled upon the respondent no.1's truck and the front glass of the truck was broken. When the respondent no.1 got down from the truck to enquire about the damage done he fell down and his wrist bone got detached from the bone lock of the left hand. Respondent no.1 remained there for 2-3 hours and a passerby took the respondent no.1 on his motorcycle to Badanpur, Indira Colony, Bahadurpur Road, Burahanpur (M.P.) where operation of his hand was done by one Dr. Subodh Borle, M.S. (Ortho). Operation lasted for six hours. It is pleaded by the respondent no.1 that as a result of the accident he has become incapable of performing his duties of a driver, and therefore, he is 100% disabled for the purpose of employment as a driver. The subject claim petition was therefore filed.

3. The appellant, and who was the respondent no.2 before the Employees Compensation Commissioner, denied the claim of the respondent no.1 by pleading that there was no relationship of employer and employee, and also that there was no accident as alleged.

4. Respondent no.2 herein/employer appeared before the Employees Compensation Commissioner and he admitted the factum of relationship of employer and employee, happening of the accident, as also drawing of salary by the respondent no.1 at Rs.8000/- per month besides Rs. 200/- per day as food allowance.

5. The Employees Compensation Commissioner has allowed the claim petition by observing as under:-

6. "The applicant filed his evidence by way of affidavit alongwith the documents-Copy of Original medical treatment documents, Copy of Original medical treatment bills of (Rs.4,511/-). Copy of Insurance Policy of the vehicle, copy of Certificate of Registration of the vehicle, copy of National Permit for Public Carriers of the vehicle and copy of Certificate Fitness of the vehicle. Copy of Authorization Certificate of N.P.(Goods) of the vehicle. Copy of Screen Report of Vehicle from Registering Authority Cum-R.T.A., Gurgaon. Copy of Election Identity Card of the applicant-Sh. Mahashir verified all the documents are suggestive of the factum of employment and accident. He was cross-examined by the counsel for the respondent No.2. Evidence was also adduced on behalf of the respondent/insurance company. The said witness was cross examined by the counsel of applicant.

7. The matter was fixed for arguments and arguments were heard.

8. After going through the pleadings of the parties, evidence brought forth by them and arguments advanced by them, my findings are as under:-
The case of the applicant is that he was employed as a driver with respondent no.1 for the last about 4-5 years and he was posted as a driver on vehicle bearing no.HR-55-J-7995-Truck (10 Tyres). On 20-01-2015 he received grievous injuries arising out of the and during the course of employment. On 20-01-2015, the applicant was coming from Hyderabad to Binaula Sirki, where he loaded the goods and started his journey again

towards Hansi, District Jhajhar, Haryana. The applicant is the first driver accompanied with second driver Shri Mukesh. On 20-01-2015 near about 10:00 AM, while driving, a truck passed by from opposite direction. An object was thrown on the front glass of this by a driver of another vehicle and the applicant got down to check whether there was any much damage to the vehicle. When he was getting down he fell down from the truck and he sustained grievous injury which has rendered him disabled and due to that he has become permanently disabled. Respondent No.1 after issue of summon appeared and he filed his written statement. IN his written statement he stated that the applicant was posted on his truck and he sustained injury while on duty on the truck. It has further been stated that he is not entitled to injury compensation from him as the vehicle being insured, the insurance company be directed to pay. Apart from the version of employer, the applicant has filed prescription slip issued by Dr. Subodh Borele, M.S.(ORTHO), Burhanpur (M.P.). He has also filed chemist bills from Burhanpur. **I have seen that that the applicant is resident of Aligarh. He has taken treatment at Burhanpur. Had he not sustained any injury he would not have preferred to go to M.P.**

He has narrated the history of his trips. The counsel for applicant in the given situation has relied on the judgment by the Hon'ble Supreme Court in the case titled as

Maghar Singh Vs. Jaswant Singh Maghar Singh vs. Jaswant Singh-1997 ACJ 517

“..There is also the evidence showing the Respondent having taken the Appellant to the hospital after he sustained the injuries which is a factor which could not have been overlooked. There is also no reason to believe that the Appellant would wrongly point a finger at the Respondent as his employer.”

Given the above facts, I am of the view that injury to the applicant has been caused out of and during the course of his employment with respondent No.1 on his truck bearing No.HR-55-J-7995. Hence the said issue is decided in favour of the applicant and against the respondents.

Next comes as to what amount of injury compensation, the applicant/claimant is entitled to?

In the claim petition it has been stated that he was drawing wages @ Rs.8,000/- plus Rs.200/- as food allowances. In the written statement filed by Respondent No.1/employer it has been stated that the employ was being paid Rs.8000/- per month as monthly wages and Rs.200/- per day as food allowances. But as per the provision the applicant can be maximum allowed Rs.8000/- per month. IN the claim application it has been stated that he was aged 29 years. As per election identity card his age has been shown 22 years as on 01.01.2006 meaning thereby the applicant was aged 31 years. Hence his age taken 31 years. The applicant was medically examined and his physical assessment as per medical (Aruna Asif Ali Hospital) is assessed partial permanent. But as the applicant was driver and after his permanent partial disablement.

In the given age and wage the applicant is entitled to compensation as under:-

$$\frac{205.95 \times 8000 \times 60}{100 \times 100} = \text{Rs.}9,88,560/-$$

9. The applicant is also entitled to interest from the date 30 days after the accident as per Section 4A till the date of deposit. The respondent is directed to deposit the above amount of compensation along with interest with this court within 30 days from the date of this order failing which the same shall be recovered by way of land revenue.” (emphasis added)

6. An appeal under Section 30 of the Employee's Compensation Act only lies if a substantial question of law arises. Re-appraising of evidence is not a substantial question of law. If two views are possible out of the evidence led and the Employees Compensation Commissioner takes one view, no substantial question of law arises. The relevant portions of the impugned judgment reproduced above, show that the Employees Compensation Commissioner has committed no illegality or perversity in allowing the claim petition as per the evidence available on record. It has been rightly held by the Employees Compensation Commissioner that accident had occurred, treatment was given, operation was done and that there was a relationship of employer and employee. The Employees Compensation Commissioner has rightly noted that the respondent no. 1 was a resident of Aligarh in U.P. and thus the fact that he took treatment at and was operated in M.P. showed that the accident actually took place.

7. (i) Learned counsel for the appellant, very strenuously argued that the respondent no.1 did not have the valid driving license and hence the claim petition was bound to be dismissed. It is however seen

that in the written statement filed by the appellant before the Employees Compensation Commissioner no such defence, and which is factual in nature, is taken. Once no such defence was taken obviously the Employees Compensation Commissioner has not decided this aspect. Not taking of a defence and thereafter arguing the said issue for the first time in this Court does not raise any substantial question of law under Section 30 of the Employee's Compensation Act.

(ii) The learned counsel for the appellant then argued that appellant had filed an application in the court below for seeking details as regards the driving license etc, and these documents were not provided, and therefore, the claim petition has been wrongly allowed inasmuch as, in the affidavit by way of evidence appellant had pleaded that the vehicle was used in contravention of the provisions of Sections 3 and 181 of the Motor Vehicles Act, 1988 and also in violation of the terms of the policy. However, in my opinion, an affidavit by way of evidence cannot be beyond pleadings and once there are no pleadings of there being no valid driving license, then no amount of evidence can be looked into on a plea which was not put forth. Also, if this issue was argued before the Employees Compensation Commissioner and the Employees Compensation Commissioner did not decide this aspect then the appellant had to file an application for review of the judgment of the Employees

Compensation Commissioner arguing that this aspect was argued before the Employees Compensation Commissioner but was not decided by him. This filing of a correction by review application is mandatory in view of the judgment of the Supreme Court in the case of *State of Maharashtra Vs. Ramdas Shrinivas Nayak and Another* (1982) 2 SCC 463 and which states that the record of the court below is final, unless, if there is alleged to exist a wrong factual conclusion not supported by the record of the Court below, then the person who alleges the wrong factual conclusion must approach the same court at the earliest for correction of the Court record. In the present case, the appellant has not approached the Employees Compensation Commissioner at the earliest urging that appellant had raised a plea before the Employees Compensation Commissioner of the respondent no.1 not having the valid driving license and that Employees Compensation Commissioner has however not decided this issue. Therefore, neither as per the pleadings of the appellant or the impugned judgment it is seen that appellant contended that compensation was not payable allegedly on the ground that the respondent no.1 did not have a valid driving license.

8. No substantial question of law arises. Dismissed.

APRIL 25, 2017/ib

VALMIKI J. MEHTA, J