

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD**

FIRST APPAL NO. 2958 OF 2017

WITH

CIVIL APPLICATION NO. 4172 OF 2017

United India Insurance Company Ltd.
Through its Branch manager,
Opp. Gorakshan, Latur.

Through its –
Authorised Signatory
Manager (Legal Hub), at Aurangabad. **APPELLANT**
(Original Respondent No. 1)

VERSUS

1. Kerba s/o Shamrao Godse,
Age; 41 years, Occu; Before accident
driver,
R/o; Sona Nagar, Latur,
Taluka and District; Latur.

RESPONDENT
(Original Applicant)

2. Shamrao s/o Daji Godse,
Age; Major, Occu; Business,
R/o; Sham Nagar, Sakhara,
Taluka and District; Latur.

RESPONDENT
(Original Respondent No. 2)

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Shri. V.R. Mundada, Advocate for Appellant
Shri. F.K. Patel, Advocate for Respondent No. 1
Shri A.G. Vasmatkar, Advocate for Respondent No. 2
.....

WITH
CIVIL APPLICATION NO. 9361 OF 2017
IN
FIRST APPEAL (STAMP) NO. 6515 OF 2017

Kerba s/o Shamrao Godse,
Age; 35 years, Occu; Before accident driver,
R/o; Sona Nagar, Latur,
Taluka and District; Latur.

APPLICANT
(Original Applicant)

VERSUS

1. United India Insurance Company Ltd.
Through its Branch manager,
Opp. Gorakshan, Latur.

Through its –
Authorised Signatory
Manager (Legal Hub), at Aurangabad. **RESPONDENT**
(Orig. Respondent No. 1)

2. Shamrao s/o Daji Godse,
Age; Major, Occu; Business,
R/o; Sham Nagar, Sakhara,
Taluka and District; Latur.

RESPONDENT
(Original Respondent No. 2)

CORAM : SUNIL K. KOTWAL, J.

Date of Reserving Judgment : 23.10.2018

Date of Pronouncing Judgment : 01.11.2018

J U D G M E N T :

This appeal is directed by the United India Insurance Company Ltd. against the judgment and award passed by the Commissioner for Employees Compensation and Judge, Labour Court at Latur, in WCA No. 58 of 2011 where the compensation of

Rs. 5,08,296/- with interest @ 12% per annum from the date of accident was awarded against Original Respondent No. 1 Insurance Company and respondent No. 2 Employer of the Claimant. Penalty of Rs. 2,54,148/- and award for medical expenses for Rs. 40,178/- was also passed against Respondent No. 2, the Employer of the Claimant.

2. Facts in brief, which lead to the institution of this appeal, are that the Claimant Kerba Shamrao Godse was employed by Respondent No. 2 as driver for his Tata Indica Car bearing registration No. MH-12-CH-4153. The Claimant was paid monthly salary of Rs. 4,500/-. Respondent No. 2 used to run business of transportation of passengers by the said Car. On 3.2.2011 at about 6.30 p.m., when the Claimant was proceeding towards Sakhara by the above said car, at Harangul Station at about 7.00 p.m., his car overturned and in the accident the Claimant sustained compound fracture to his Right Radius Ulna Bone and other injuries. The Claimant was operated and treated at Planet Critical Care Center from 3.2.2011 to 18.2.2011 and Dr. Datar (PW 3) inserted rod in the right hand of the Claimant. Due to accidental injuries, the Claimant sustained permanent disablement and he lost his earning capacity to the extent of 100% as driver. He is not able to work as driver in future on account of restricted movements to his right hand. According to the Claimant, he is 28 years old person and therefore

he is entitled to compensation and medical expenses to the extent of Rs. 5, 38,296/- and interest thereon @ 12% per annum from the date of accident till the realization of that amount. Despite service of notice to both respondents, no compensation was paid to him therefore, the claim petition for compensation under Employees Compensation Act arose.

3. Only respondent No. 1 Insurance Company opposed the claim petition by denying the Employee and Employer relationship in between the Claimant and Respondent No. 2. According to respondent No. 1, the owner of the Car committed breach of conditions of the policy of the insurance by carrying passengers for commercial purpose by the above said Tata Indica Car. Respondent No. 1 has denied permanent disablement due to accidental injuries to the Claimant and the claim of the compensation. According to Respondent No. 1, at the time of accident the Claimant did not hold effective and valid driving license.

4. By filing Written Statement (Exh. 10), respondent No. 2 admitted his relationship with Claimant as the Employer and Employee. According to Respondent No. 2, the Car was insured with Respondent No. 1 Insurance Company and the Insurance Company is liable to pay compensation to the Claimant.

5. Heard Shri. V.R. Mundada, learned counsel for Appellant, Shri. F.K. Patel, learned counsel for Respondent No. 1 and Shri A.G. Vasmatkar, learned counsel for Respondent No. 2.

6. Learned counsel for Appellant submits that the Claimant is the son of Respondent No. 2 and therefore, the Claimant cannot prove the relationship with Respondent No. 2 as the Employer and Employee. His next submission is that the Car was registered as private Car therefore, it cannot be used for carrying passengers for commercial purpose. By using the Car for transportation of passengers for commercial purpose, Respondent No. 2 has committed breach of conditions of policy of the insurance.

7. Next submission of the learned counsel for Appellant is that in above said accident the Claimant sustained 40% permanent disability and the Commissioner has erroneously held that the Claimant sustained 100% loss of earning capacity. He submits that no documentary evidence is placed on record to prove monthly income of the Claimant. Even Respondent No. 2 did not enter witness box to prove his relationship with Claimant as Employer and Employee. He prays for dismissal of the claim petition.

8. Learned counsel for appellant placed reliance on **“Gottumukkala Appala Narasimha Raju & Ors vs National**

Insurance Co. Ltd. & Anr.” [AIR 2007 SC 2907], “New India Assurance Co. Ltd. Vs T. Narasimha Murthy Raju & Anr.” [2006 STPL 6483 AP], “Assistant Engineer, 132, K.V. GSS vs Shri Ram Niwas” [2012 STPL 378 Rajasthan], “Pillai vs Vasukutty” [2003 STPL 448 Kerala], “New India Assurance Co. Ltd. Vs Sreedharan” [1995 STPL 822 Kerala].

9. Learned counsel for Claimant submits that when Respondent No. 2 has admitted his relationship with Claimant as Employer and Employee, the oral evidence of Respondent No. 2 is not necessary. The learned counsel for the Claimant has pointed out that the Landlord of the Claimant is examined, who has proved that the Claimant resides separate from his father. He submits that the salary certificate (Exh. 62) is sufficient to prove that the monthly salary of the Claimant was 4,000/- per month. His next submission is that by examining the Medical Officer (PW 3), the Claimant has proved permanent disablement due to accidental injury and 100% loss of earning capacity as driver.

10. The learned counsel for Respondents placed reliance on **“Smt. T.S. Shylaja vs Oriental Insurance Co. and Anr.” [AIR 2014 SC 893], “New India Assurance Company Ltd. Vs Chandrakala @ Sangita Wd/o. Rajendra Dahiphale and Ors.” [First Appeal No. 105 of 2015 decided on 10.12.2015], “Pratap**

Narain Singh Deo vs Srinivas Sabata” [1976 (1) SCC 289], “S. Suresh vs Oriental Insurance Co. Ltd. & Anr.” [2010 (13) SCC 777], Shaikh Salim Ramzan vs Ashok Beniram Kothawade & Anr.” [2011 (2) ALL MR 301].

11. At the out set, I must make it clear that as the appeal is filed under Section 30 of the Employees Compensation Act, proviso to this Section provides that no appeal shall lie against any order unless a substantial question of law is involved in the appeal. In the case at hand, after hearing learned counsel for both parties a substantial question of law to be framed in this appeal is that, “Whether the admission of respondent No. 2 Employer regarding his relationship with the Claimant as Employer and Employee is sufficient to establish that the Claimant is Employee of Respondent No. 2 within the meaning of Section 2 (1) (dd) (ii) (c) of the Employees Compensation Act ?” (hereinafter referred to as “EC Act”). Under Section 2 (1) (dd) (ii) (c) of EC Act the employee means, “a person recruited as driver, helper, mechanic, cleaner or in any other capacity in connection with a motor vehicle”.

12. In the case at hand, the appellant is only Insurance Company of the motor vehicle involved in the accident. Therefore, it has no part in establishing relationship in between the Claimant and Respondent No. 2 as the Employer and Employee. Such type of

relationship is within the knowledge of only the Claimant and Respondent No. 2. When Respondent No. 2 admits his relationship with the Claimant as Employer and Employee and when this admission is corroborated by the Salary Certificate (Exh. 62) issued by Respondent No. 2 Shamrao Godse, no independent evidence is required to establish the relationship in between the Claimant and Respondent No. 2 as Employer and Employee. Otherwise also Respondent No. 2 Shamrao Godse stepped in witness box and deposed that since 2010 he employed his son Kerba Godse as driver and his salary is Rs. 4,000/- per month. Despite searching cross-examination of this witness by the learned counsel for Insurance Company, nothing could be elicited to disbelieve his version. When the Claimant Kerba Godse (PW 1) consistently deposed before the Commissioner regarding his employment as driver of Respondent No. 2, except denial of suggestion put up by the learned counsel for Respondent No. 1 Insurance Company, nothing is brought on record to disbelieve his version regarding his employment. The case of **“Gottumukkala Appala Narasimha Raju & Ors vs National Insurance Co. Ltd. & Anr.”** [supra] is distinguishable on facts because in that case, though the wife of the deceased used to live separate prior to the accident on account of dispute with her husband, the Claimants claimed that the wife was the Employer of her deceased husband.

13. Considering such peculiar situation, the Apex Court held that though it may be possible that the husband is employed under the wife, but, while arriving at a conclusion that when a dispute has been raised by other side, the over all situation should have been taken into consideration. The fact, which speaks for itself shows that the owner of the tractor joined hands with the Claimant for laying claim only against the insurer. The claim was not bonafide.

14. Thus, under these peculiar circumstances, the Apex Court held that in that particular case the relation of husband and wife as Employer and Employee cannot be accepted. However, in the case at hand, it is not the case of Respondent No. 1 that despite strained relations with father, the Claimant claimed that he worked as driver of Respondent No. 2. On the other hand, as rightly pointed by the learned counsel for the Claimant, this court in **“New India Assurance Company Ltd. Vs Chandrakala @ Sangita Wd/o. Rajendra Dahiphale and Ors.”** (supra) held that Employer and Employee relationship can be established even between the close relatives.

15. On behalf of claimant, Balaji Ronge (PW 2) deposed before the Court that since last six years claimant resides in one room of his house at Latur as his tenant. Though from his cross-examination, it emerges that written agreement of tenancy is not

executed in between him and claimant, that alone cannot be ground to disbelieve his version. Even in the cross-examination of this witness, it has been brought on record that the rent of the said room was Rs.1500/- per month. I do not find any reason to disbelieve the testimony of this witness to hold that claimant used to reside separate from his father at Latur in rented room.

16. Accordingly, I hold that even on the basis of clear admission of respondent No. 2 in his written statement, together with his own evidence before the Commissioner and evidence of Landlord (PW 2) is sufficient to establish the relationship as Employer and Employee in between the Respondent No. 2 and the Claimant. I answer above question of law in affirmative.

17. The Driving License (Exh. 65) placed on record shows that the date of birth of the Claimant is 17.03.1982 and the license is renewed up to 26.01.2029 to drive light motor vehicle. The date of accident is 3.2.2011. Thus, on the date of accident the Claimant was 28 years old and he was holding valid driving license to drive car.

18. On the basis of certified copy of the spot panchanama (Exh. 11), FIR (Exh. 10) lodged by the Claimant together with his own oral evidence, the Claimant has duly proved the occurrence of the motor vehicular accident dated 3.2.2011 while driving the above

said Car in due course of employment as a driver. The police documents indicate that at the time of accident, the Claimant was alone driving the Car and he was not carrying any passenger with him. Therefore, there cannot be any breach of the condition of the policy of the insurance. The policy of the insurance also indicates that it was valid from 6.4.2010 till 5.4.2011. Thus, on the date of accident i.e. on 3.2.2011 the Car used by the Claimant was duly and validly insured with Respondent No. 1 Insurance Company. This policy of the insurance for private Car liability also covers the risk of the driver. The schedule of the premium also shows that premium for employee under the Workmen Compensation Act is paid by the owner of the Car. Therefore, the policy of the insurance covers the risk of the claimant even under Workmen Compensation Act.

19. Now the question arises whether due to accidental injuries sustained by the Claimant, he suffered permanent "total disablement" within meaning of E.C. Act, which resulted into 100 % loss of his earning capacity. The learned counsel for the appellant has drawn my attention towards the judgments of the Single Judges of the High Courts of Andhra Pradesh, Rajasthan and Kerala on the point of permanent disablement. The learned counsel for the Claimant has placed on record land mark judgment of **"Pratap Narain Singh Deo vs Srinivas Sabata" [1976 (1) SCC 289]** (supra), in this case the Apex Court observed that :

“The expression “total disablement” has been defined in Section 2 (1) of the Act as follows : 1) “total disablement” means such disablement, whether of a temporary or permanent nature, as incapacitates workman for all work which he was capable of performing at the time of the accident resulting in such disablement”. It has not been disputed before us that the injury was of such a nature as to cause permanent disablement to the respondent and true question for consideration is whether the disablement incapacitated the respondent for all work which he was capable of performing at the time of the accident. The Commissioner has examined the question and recorded his finding as follows :

The injured workman in this case is carpenter by profession..., By loss of the left hand above the elbow, he has evidently been rendered unfit for the work of carpenter as he work of carpentry cannot be done by one hand only.”

This finding was accepted by Supreme Court as reasonable.

20. The same view was reiterated by the Apex Court in “**S. Suresh vs Oriental Insurance Co. Ltd. & Anr.**” (supra) and by our High Court in **Shaikh Salim Ramzan vs Ashok Beniram Kothawade & Anr.**” (supra). Therefore, if it is proved by the Claimant that due to the injuries sustained in above said accident, he has become incapable to drive car, which he was capable of driving at the time of accident, then claimant can prove that due to accidental injuries he sustained total disablement. Due to such total disablement, under Section 4 (1) (b) of the Employees Compensation Act, he would be entitled to compensation amount

equal to 60% of monthly wages multiplied by relevant factors.

21. By examining Dr. Datar (PW 3), the Claimant has brought on record that the Claimant was admitted in Planat Hospital on 3.2.2011 and he was discharged on 18.2.2011. Dr. Datar (PW 3) operated the Claimant for Compound Fracture on Right Ulna Bone. The rod was inserted in the Right Ulna. Dr. Datar (PW 3) has proved disability certificate (Exh. 67) which shows that the Claimant sustained 45% permanent disability. This witness has also proved the certificate (Exh. 68) to show that the Claimant has lost 100% earning capacity as driver. Dr. Datar (PW 3) clarified that the Claimant is disabled by right hand in doing strenuous work, heavy weight lifting, twisting right hand. Nothing could be elicited in the cross-examination of this witness to disbelieve his medical opinion regarding the loss of earning capacity of the Claimant as driver. Thus, on the basis of evidence of Dr. Datar, which is corroborated by the injury certificate (Exh. 67) and loss of earning capacity certificate (Exh. 68) the Claimant has proved that due to injuries sustained in the above said motor vehicular accident he has become totally disabled person within the meaning of Employees Compensation Act.

22. As the Claimant has sustained total disablement due to accident which occurred during the course of his employment under

Section 4 (1) (b) of the EC Act. he is entitled to compensation equal to 60% of his monthly wages multiplied by the relevant factors. In view of the Schedule IV of the EC Act, as the Claimant is 28 years old, the relevant factor applicable is 211.79. Thus, 60% of monthly wages of the Claimant i.e. amount of Rs.2400/- is to be multiplied by relevant factor 211.79 while determining the compensation amount payable to the Claimant. Thus, the Claimant is entitled to compensation of Rs. $2400 \times 211.79 = 5,08,296/-$.

23. As Respondent No. 2 did not deposit this compensation amount within one month with the Commissioner from the date of accident, the Claimant is also entitled to simple interest on this compensation amount @ 12% per annum after one month from the date of accident. Respondent Nos. 1 and 2 are jointly and severally liable to pay this compensation amount with interest thereon to the Claimant. Under Section 4A of the EC Act, the Claimant is also entitled to penalty from the Employer to the extent of 50% of the amount of compensation (i.e. Rs. 2,54,148/-) as despite services of notice to Respondent No. 2, he did not deposit compensation amount with the Commissioner, when it falls due on the date of accident as per Section 3 (1) of EC Act.

24. Thus, I hold that the judgment and award passed by the Commissioner in WC No. 58 of 2011 is correct and proper subject to

modification that 12% interest on compensation amount shall be payable one month after the date of accident till the date of depositing compensation amount with the Commissioner. The Claimant is also entitled to medical expenses of Rs. 40,178/- from the Employer as calculated by the Commissioner which is not disputed by Respondent no. 2. It follows that this appeal fails and deserves to be dismissed. Accordingly, First Appeal No. 2958 of 2017 is dismissed. However, award passed by the Commissioner under the Employees Compensation Act in WCA No. 58 of 2011 be modified to make 12% interest payable one month after the date of accident till the deposit of the compensation amount with the Commissioner. Parties to bear their respective costs of the appeal.

(SUNIL K. KOTWAL)
JUDGE

mahajansb/