

HONOURABLE SRI JUSTICE N. BALAYOGI

CIVIL MISCELLANEOUS APPEAL No. 660 OF 2010

JUDGMENT:

1. The appellant/National Insurance Company Limited preferred this appeal aggrieved by the Award and decree dated 31.10.2009 passed in WC.No.20 of 2008 whereby the learned Commissioner for Workmen's Compensation and Deputy Commissioner of Labour, Eluru found that the first respondent/Applicant was the driver on the lorry bearing No. AP 37 W 9789 belonging to the second respondent/OP.1; that on account of injuries sustained in the accident occurred on 31.5.2008, he became permanent disabled which arose out of and during the course of his employment; that he (AW.1) lost earning capacity to the tune of 40% and awarded compensation of Rs.1,95,696/- against the appellant/OP.2 and second respondent/OP.1 jointly and severally, which shall be deposited by way of demand draft drawn in favour of Commissioner for Workmen's Compensation and Joint Commissioner of Labour, Eluru within thirty days from the date of receipt of Award. It was further ordered that if the appellant & second respondent/OPs. 1 and 2 failed to deposit the amount as directed, in view of Section 4(A) of the WC Act 1923, they shall be liable for 50% penalty on the above compensation amount together with simple interest.

2. The case of the first respondent/applicant is that: he was working as driver on the lorry bearing No. AP 37W 9789 of second respondent/OP.1 on a monthly salary of Rs.6000/- and was aged 32 years. On 31.5.2008, as per the instructions of the owner/OP.1, respondent No.2 herein, he (applicant) started at Eluru on lorry bearing No.AP 37 W 9789 for unloading the Neem (Nimma kayalu) at Calcutta and when the said lorry reached near Tern Distilleries, Tallapalem village, Kasimkota Mandal, Visakhapatnam District at about 4.00 AM on 1.6.2008, one lorry bearing No.AP 31 U 4343 which was going in front of the applicant's lorry stopped suddenly without giving signals, as a result of which, the applicant dashed the front lorry and thereby both the lorries fell on down side of the road.

3. In the said accident, the first respondent/applicant sustained compounding fractures on both bones of the right leg and also sustained grievous injuries on all vital parts of the body. Immediately, the first respondent/applicant was shifted to Anakapalli private hospital and after first aid, he was admitted in Mahalakshmi Hospital, Eluru for better treatment, whereat he undergone surgery to the right leg and steel rod was inserted.

4. Respondent No.2/OP.1 is the owner and appellant/OP.2 is the insurer of the offending lorry and both are liable to pay the compensation.

5. In the counter filed before the Tribunal, the appellant/OP.2 denied the averments made in the claim petition and contended that there is no relationship of employee and employer between the first respondent/applicant and second respondent/owner.

6. Based on the aforesaid pleadings and after hearing both sides, the Commissioner framed the following issues for settlement .

1. Whether the applicant sustained permanent partial disability due to accident aroused during the course of employment ?
2. If so, what compensation the applicant is entitled to and who is liable to pay ?

7. In order to prove the respective claims, on behalf of the first respondent/applicant, A.Ws.1 and 2 were examined and Exs.A.1 to A.7 were got marked. On behalf of the appellant/OP.2 and second respondent/OP.1, R.W.1 was examined and Exs.R.1 and R.2 were got marked.

8. Now the point that arises for determination is:

“Whether the order of the Commissioner suffers from legal infirmities warranting interference ?”

The main contention of the appellant/Insurance Company is that there is no employee and employer relationship between the first respondent/applicant and second respondent/owner and that

he (the applicant) did not file any document to establish the said relationship.

Per contra, the first respondent/applicant contended that he was the driver of the second respondent/owner/OP.1 on her lorry bearing No.AP 37W 9789 which was involved in the accident and hence he was the 'workman' under the WC Act.

8. The first respondent/applicant himself was examined as A.W.1 besides examining A.W.2, the doctor who treated him. The consistent evidence of A.W.1 is that he was working as driver on the lorry bearing No. AP 37 W 9789 which belongs to second respondent/OP.1. While so, on 31.5.2008, as per the instructions of the owner/OP.1, respondent No.2 herein, after loading Neem, he (applicant) started at Eluru on lorry bearing No.AP 37 W 9789 for unloading the Neem (Nimma kayalu) at Calcutta and when the said lorry reached near Tern Distellaries, Tallapalem village, Kasimkota Mandal, Visakhapatnam district at about 4.00 AM on 1.6.2008, one lorry bearing No.AP 31 U 4343 which was going in front of the applicant's lorry stopped suddenly without giving signals, as a result of which, the applicant's lorry dashed the lorry in front of it and thereby both lorries fell on down side of the road.

9. Ex.A.1 is the copy of FIR submitted on 2.6.2008 at 15.00 hours with regard to the accident occurred at 4.00 hours on 1.6.2008 by Maragani Nagaraju, the cleaner of lorry bearing registration No.AP 37W 9789 wherein he clearly asserted that

while AW.1 was driving the lorry, and when it reached Tern Distilleries, Tallapalem Village, Kasimkota Mandal, Visakhapatnam District at about 4.00 AM of 1.6.2008, one lorry bearing No.AP 31U 4343 was going ahead of their of lorry, which was stopped suddenly without signals; thereby the applicant dashed the said front lorry, as a result of which, both the lorries fell on down side of the road.

10. The Investigating Officer after thorough investigation filed charge sheet under Ex.A.7 against applicant-Shaik Jilani stating that A.W.1/applicant drove the lorry in rash and negligent manner with high speed and created terror among the public with his rash driving and dashed the foregoing lorry bearing No. AP 31U 4343 from its behind as a result both the vehicles fell on road side ditch.

11. The Motor Vehicle Inspector who inspected the vehicles issued Ex.A.3 MVI report wherein it was specifically asserted that on 4.6.2008 at 4.00 AM he inspected the offending lorry bearing No.AP37W 9789 and opined that the accident occurred not due to any mechanical defect of the vehicle.

12. Ex.A.2 is the driving licence issued to AW.1 on 3.4.1997, which was valid upto 08.12.2011, whereas the accident occurred on 1.6.2008. On verification of Ex.R.2-driving licence extract of the applicant issued by the Additional Licencing

Authority, Eluru, it was found that the applicant renewed his driving licence even after the accident, according to which, his driving licence in respect of non-transport (LMV) vehicle is valid upto 02.04.2017 and in respect of transport vehicle (HTV & LMV) is valid upto 08.12.2011.

13. The learned Commissioner having considered the oral evidence of A.W.1 and documentary evidence at Exs.A.1,A.2 and A.3 came to the right conclusion that the accident occurred due to the rash and negligent driving of A.W.1, who was the driver of lorry bearing No. AP 37 W 9789 as on the date of accident. In the absence of rebuttal evidence to Exs.A.1 to A.3 and the evidence of A.W.1 supported by documentary evidence at Ex.A.3, makes it clear that the second respondent herein was the owner and first respondent/claimant was working driver on lorry bearing No.AP 37W 9789.

14. The Senior Assistant of the appellant-Insurance Company was examined as R.W.1. The pleading and contention of the appellant is that there is no employee and employer relationship between A.W.1 and second respondent/owner. Coming to the evidence of R.W.1 , he admitted Ex.A.2, but there is no whisper about the master and servant/employee and employer relationship in his entire evidence.

15. With regard to the injuries, there is evidence of A.W.1, who deposed that he sustained compounding fracture on both bones of the right leg and also grievous injuries on all vital parts of his body. Immediately after the accident, he was shifted to Anakapalli private hospital and after first aid, he was admitted in Mahalakshmi Hospital, Eluru whereat Dr.A.V.R.Mohan, M.S.Ortho conducted operation to his right leg and inserted steel rod. The said doctor was examined as A.W.2 who corroborated the evidence of A.W.1. A.W.2 deposed that A.W.1 sustained fracture to right leg with limp. He conducted surgery to A.W.1. He deposed that with difficulty, A.W.1 can climb into the cabin and perform the driver duty. Ex.A.6 is the wound certificate issued by A.W.2 wherein he specifically stated that A.W.1 sustained compounding fracture to both bones of right leg. He conducted operation to the right leg and inserted steel rod. During the cross examination, A.W.2 admitted that there is no shortening of right lower limb found to AW.1 and that before issuing disability certificate, they made personal observation in their chamber and that they did not put AW.1 in actual practice of his profession. Further his evidence is that he was the Member in the District Medical Board, Eluru and on 14.3.2008 he issued the disability certificate-Ex.A.5 by assessing the disability of A.W.1 at 40% on account of the deformity due to the fracture to both bones of right leg with limp. A.W.1 deposed that due to the injuries sustained in the accident, he lost his earning capacity and became permanent

disabled. According to A.W.1, he is not fit for driving any vehicle, whereas, A.W.2 deposed contrary that A.W.1 can perform the duty of driver.

16. The evidence of A.W.2, supported by Wound Certificate-Ex.A.6 and driving licence Ex.A.2 clinches that with difficulty, A.W.1 can climb into the cabin and perform the duty of driver. Subsequent to the accident, RTA also renewed the driving licence of A.W.1. The doctor A.W.2 accordingly assessed the loss of earning capacity of A.W.1 at 40%. The RTA certified that the injured A.W.1 is competent to obtain the driving licence to drive the vehicle and accordingly issued the same. Therefore, it is not the Commissioner or the respondents (Opposite Parties) to question the action of the RTA in issuing Ex.A.2 driving licence after the accident.

17. In the circumstances, the learned Commissioner having considered the oral evidence of A.Ws. 1 and 2 and Exs.A.2, 5 & 6 came to the right conclusion that the disability sustained by A.W.,1 is 40%.

18. In Ex.A.2, the age of A.W.1/applicant was recorded as 32 years as on the date of accident. As per his age, the relevant multiplier applicable is 203.85.

19. Though A.W.1 deposed that he was earning Rs.6,000/- per month as salary from the second respondent, he could not examine the second respondent nor produced salary certificate in proof of his income as Rs.6,000/- per month. In the absence of convincing evidence, the learned Commissioner considered the minimum wages payable to the category of workmen as driver as per G.O.Ms.No.82 dated 22.11.2006 as on the date of accident as Rs.4,650.25 per month which is limited to Rs.4,000/- per month. By applying the relevant factor, the learned Commissioner assessed the compensation payable to A.W.1/applicant to the extent of 40% disability at Rs.1,95,696/- ($60/100 \times \text{monthly wages} \times \text{age factor} \times \text{loss of earning capacity} = 60/100 \times 4000 \times 203.85 \times 40/100 = \text{Rs.1,95,686/-}$).

20. Ex.A.4/Ex.R.1 is the Insurance Policy which was in force from 19.07.2007 to 18.07.2008 where the accident occurred on 31.5.2008. The second respondent/OP.1 was the employer and appellant/Insurance Company/OP.2 was the insurer of the offending vehicle bearing No.AP 37W 9789. By virtue of Ex.A.4/Ex.R.1, the insurer and insured (Ops. 1 and 2) are liable to pay the compensation to A.W.1 jointly and severally.

21. The learned Commissioner while awarding Rs.1,95,696/- directed the Insurance Company and the

owner/employer (Ops 1 and 2) to deposit the said amount jointly and severally towards the compensation payable to first respondent/applicant by way of Demand Draft drawn in favour of Commissioner for Workmen Compensation and Joint Commissioner of Labour, Eluru within thirty days from the date of receipt of Award copy.

The Commissioner further observed that in view of Section 4(A) of the Workmen Compensation Act, 1923, if the employer/OP.1 and insurer/OP.2 failed to deposit the amount, they shall be liable to pay 50% penalty on the above compensation amount together with simple interest on the amounts of compensation and penalty.

22. With regard to the above observation, it is made clear that the Insurance Company is exonerated from paying penalty and it is only the owner/insured/R.2 herein is liable to pay penalty.

23. Having regard to the discussion made hereinabove, I am of the considered view that the Tribunal having considered the oral and documentary evidence made available on record, came to the right conclusion that the first respondent/applicant was working as driver on the lorry bearing No.AP 97 W 9789 belonging to the second respondent/owner and accordingly held that there is employee and employer relationship. It was further observed that

the accident occurred during the course and out of the employment. The evidence of A.W.1 corroborated by the evidence of A.W.2 and supported by documentary evidence at Exs.A.5 and 6 would establish that the applicant/A.W.1 suffered 40% disability, which was clear from the renewal of driving licence. In view of the master and servant relationship, the second respondent/employer is liable to pay the compensation to the first respondent/employee/AW.1. However, by virtue of Ex.A4/Ex.R.1 insurance policy, the appellant and second respondent (Ops 1 and 2) are jointly and severally liable to pay the compensation.

Accordingly the second respondent/owner and appellant/Insurance Company shall jointly and severally deposit Rs.1,95,696/- towards compensation payable to the injured/AW.1 by way of Demand Draft drawn in favour of Commissioner for Workmen Compensation and Joint Commissioner of Labour, Eluru within thirty days from the date of receipt of a copy of this order, if not already paid/deposited. It is made clear that in case of failure to deposit as directed, in view of Section 4(A) of the WC Act, the owner/employer/R.2 herein is liable to pay penalty as discussed supra.

24. In the result, the appeal is dismissed with costs confirming the Award and decree dated 31.10.2009 passed in

WC.No.20 of 2008 whereby the Commissioner for Workmen's Compensation and Deputy Commissioner of Labour, Eluru.

25. Miscellaneous petitions pending consideration if any in the Criminal Petition shall stand closed in consequence.

JUSTICE N. BALAYOGI

DATED 1st May , 2018.
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