

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

(Proceedings conducted through Video Conferencing)

FAO No.2916 of 2020(O&M)

Date of decision: 19.11.2020

Royal Sundaram General Insurance Co. Ltd.Appellant

VERSUS

Yahuda Khan and anotherRespondents

CORAM: HON'BLE MRS. JUSTICE REKHA MITTAL

Present: Mr. D.K. Prajapati, Advocate for the appellant.

REKHA MITTAL, J.

CM No.9883-CII of 2020

Heard.

Allowed as prayed for.

Annexure A-4 is taken on record subject to just exceptions.

Disposed of accordingly.

FAO No.2916 of 2020

Challenge in the present appeal has been directed against award dated 30.06.2020 passed by the Commissioner under the Employees Compensation Act, 1923 (in short 'the Act').

Yahuda Khan claimed compensation in respect of injuries sustained by him during the course of employment as a driver of Swift Dzire No.HR-38-V-3161, owned by Mohammad Badruddin on the fateful day of 21.07.2017.

The Tribunal awarded compensation to the tune of Rs.8,28,890- detailed hereunder:-

Compensation	Rs.7,51,056-
Medical charges	Rs.69,834-
Expenses	Rs.8000-

The insurance company (appellant herein) was directed to deposit the aforesaid amount with interest at the rate of 12% per annum from the date of accident till the date of deposit.

Feeling aggrieved against the award, instant appeal has been filed by Royal Sundaram General Insurance Company Ltd. with whom the aforesaid vehicle was insured by its registered owner.

Counsel for the appellant has assailed the award primarily on three counts. It is argued with vehemence that there was no relationship of employer and employee between Mohammad Badruddin (insured) and Yahuda Khan - claimant, therefore, findings of the Tribunal on issues No.1 to 3 cannot be allowed to sustain. To bring home his contention, he would argue that Yahuda Khan appeared in the witness box but failed to produce any documentary evidence in respect of his employment or payment of salary etc by Mohammad Badruddin. The testimony of claimant does not get support from an independent witness when otherwise the same has been sufficiently rebutted by Mohammad Badruddin RW-1. In support of his contention, he has relied upon judgment of this Court **Oriental Insurance Co. Ltd. Vs. Jaswinder Singh 2009(1) RCR (Civil) 404.**

The second submission made by counsel is that the claimant examined Dr. Pankaj Aggarwal, Ortho Surgeon, Civil Hospital, Gurugram who produced disability certificate Ex.PW-1. It is argued that as per disability certificate, the claimant suffered disability to the extent of 44% but the Tribunal has wrongly considered disability to the tune of 100% for

awarding compensation. In addition, it is argued that Dr. Pankaj Aggarwal, in cross examination, had stated that disability can be reduced 2-3% by physiotherapy. It is further argued that in the face of medical evidence, the Tribunal has misdirected itself by allowing compensation on the basis of 100% disability.

Another submission made by counsel is that the vehicle was insured as commercial vehicle – passenger carrying but Badruddin did not produce permit and as such the insurance company should be allowed right of recovery against the insured after payment of compensation to the claimant, if affirmed. For this purpose, reliance has been placed upon judgment of Hon'ble the Supreme Court **Amrit Paul Singh and another Vs. Tata AIG General Insurance Company Ltd and others, 2018 (7) Supreme Court Cases 558.**

I have heard counsel for the appellant, perused the paper-book and the judgments cited at bar.

Indisputably, Mohammad Badruddin, owner of the vehicle in question denied relationship of employer and employee between him and the claimant. Yahuda Khan appeared in the witness box and tendered into evidence his duly sworn affidavit Ex.PW1/A by way of examination in chief. He was subjected to cross examination at the behest of A.R. of the insurance company. Perusal of the cross examination of the claimant leaves no manner of doubt that claimant was driving the Swift Dzire car at the time of occurrence. Counsel for the insurance company suggested to the witness that this accident had occurred due to his negligence. Meaning thereby that it has been sufficiently proved on record that Yahuda Khan was driving the vehicle at the time of accident. It was suggested to the

claimant that at the time of accident, the vehicle was engaged by Uber company and its driver was Tofik son of late Shabuddin. Neither Mohammad Badruddin nor the insurance company bothered to examine said Tofik to prove that he was the driver of the car in question on the day of accident. Mohammad Badruddin owner of the car appeared in the witness box and tendered into evidence his affidavit annexed as Annexure A-1. In first para of the affidavit, he had deposed that he engaged driver Tofik son of late Shabuddin and second driver was Badsha Khan. He has further deposed that the car was taken away by Badsha Khan to village Khukaban, Rajpur without his instructions at the call of Abdul Wahid maternal uncle of Badsha Khan. He has further deposed that Yahuda Khan son of Islam Khan is son of Abdul Wahid's real uncle who was driving the car at the time of accident. No such fact was put to Yahuda Khan during his cross examination in order to seek his explanation in this regard. As a matter of fact, Yahuda Khan was never cross examined by counsel for Mohammad Badruddin either to challenge his claim of being driver of the ill-fated car on the day of accident or he came to drive the car in the circumstances sought to be explained by Mohammad Badruddin. Not only this, testimony of Mohammad Badruddin is not worthy of credence and reliance as he had candidly admitted in cross examination that he had appeared as a witness on the asking of insurance company. Taking into consideration the aforesaid discussion, testimony of Yahuda Khan invites primacy viz-a-viz what had been stated by Mohammad Badruddin when otherwise the alleged drivers engaged by Mohammad Badruddin were not examined by either of the respondents before the Tribunal. Much stress has been laid by counsel for the appellant that Yahuda Khan had not

produced any records with regard to his engagement as a driver or payment of salary etc. Mohammad Badruddin had not produced any record even with regard to engagement of Tofik or Badsha Khan as drivers on his car. It has nowhere been stated by Mohammad Badruddin that he had been maintaining any such records, therefore, it was not expected from Yahuda Khan to forge the records for the purpose of present case. The appellant cannot derive any advantage to its contention from the judgment in **Jaswinder Singh's case (supra)** decided in view of the peculiar facts and circumstances of the given case. In the said case, it has been noticed by the Court that respondent No.1 therein admitted that he was relative of respondent No.2 at the time of accident and both of them were going to attend a marriage. In view of this admission of respondent No.1 and denial of relationship of master and servant between the respondents by respondent No.2 and taking other facts in consideration, this Court arrived at a conclusion that it cannot be said that accident occurred while respondent No.6 was driving the vehicle during course of employment with respondent No.2. On the contrary, in the instant case, it is an admitted position of the case that claimant was driving the car in question at the time of accident and sustained injuries. As a cumulative effect of the aforesaid discussion, first contention raised by the appellant is devoid of merit and accordingly rejected.

This brings the Court to the aspect of allowing compensation by considering disability to the tune of 100%. In view of findings recorded hereinbefore, the claimant was a driver on car owned by the insured. No doubt, he has suffered disability to the extent of 44% with the findings, quoted thus:-

"Post traumatic operated case of fracture left Patella with restricted movements of left knee by 60% = 18% with partial loss of stability 35%. Hence he has the permanent disability to the extent of 44% (Fourty Four Percent)."

As has been noticed hereinbefore, Dr. Pankaj Aggarwal, Orthopedic, Civil Hospital, Gurugram appeared in the witness box. He was one of the members of the Medical Board that issued disability certificate Ex.PW-1. In the concluding line of his cross examination, he had stated to the following effect:-

"It is wrong to suggest that claimant can drive the vehicle with this disability."

Taking into consideration the medical opinion, the claimant would no longer be competent to drive the car or pursue his profession as a driver. Hon'ble the Supreme Court in **Pratap Narain Singh Deo Vs. Shrinivas Sabata and another, AIR 1976 SC 222** had allowed 100% compensation to a workman who sustained injuries resulting in amputation of left hand above elbow with the observations that since the work of carpentry cannot be done with one hand disablement is held, total and not partial. When the case is examined in the light of enunciation laid down in **Pratap Narain Singh Deo's case** (supra) by a Constitutional Bench, I find it difficult to interfere in findings of the Tribunal assessing disability to the extent of 100% for computing compensation.

Perusal of award does not indicate that the insurance company ever raised an issue with regard to its entitlement to enforce recovery rights against the insured for want of producing permit of the vehicle in question. Counsel for the appellant has not pointed out any materials on record to

prove that the insurance company ever called upon the insured to produce permit of the vehicle in question. This apart, there is no provision in the Act that creates a statutory defence in favour of the insurer akin to Section 149 of the Motor Vehicles Act, 1988. In the given scenario, insurance company cannot derive any advantage to its contention from the judgment in Amrit Paul Singh and another case (supra) rendered by Hon'ble the Supreme Court while dealing with the provisions of the Motor Vehicles Act, 1988.

No other point has been raised.

For the foregoing reasons, finding no merit, the appeal fails and is accordingly dismissed in limine.

NOVEMBER 19, 2020		(REKHA MITTAL)
‘D. Gulati’		JUDGE
Whether speaking/reasoned	:	yes/no
Whether reportable	:	yes/no