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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 20.04.2022

CORAM

THE HONOURABLE MS. JUSTICE P.T.ASHA

C.M.A. No.2152 of 2019 and
C.M.P.No.8737 of 2019

1.M/s. United India Insurance
Company Limited,
No.70, N.S.C.Bose road, III Floor,
Sowcarpet,
Chennai - 600079

... Appellant/ II Opp. Party.

Vs

1. Thiru. G.Durairasu ... I Respondent/ I Applicant.

2.Thiru, Xavier Selvakumar ... II Respondent/ II Applicant.

PRAYER: Petition filed under Section 30 of the Employees Compensation Act, 1923, as against the Final Award dated 7th September. 2018, (received on 17.01.2019), passed by the learned Commissioner for Employees Compensation (Joint Commissioner of Labour-I), at Chennai, in E.C.No.73 of 2009.

For Petitioner : M/s.J.Michael Visuvasam

For Respondents : Mr.S.Tamil Maran [R.1]
: No appearance - R2

JUDGEMENT

The above Civil Miscellaneous Appeal is filed by the insurance company which was arrayed as the 2nd Opposite Party and respondents 1 and 2 herein were arrayed as applicant and 1st Opposite party respectively in the workmen's Compensation Petition before the Commissioner for employees compensation (Joint Commissioner of Labour-I) at Chennai in EC.No.73 of 2009. The appeal has been admitted on the following question of law:-

"Whether the finding of the learned Joint Commissioner that the first respondent was employed under the second respondent can be sustained, when there was a categorical admission made by the first respondent himself in cross examination, that he



was hiring the Auto rickshaw from the first respondent?"

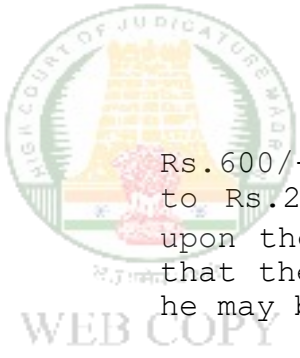
The brief facts which are required to be considered for disposing of the above appeal is as follows:-

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2. The 1st respondent/ applicant had filed the above Employees Compensation Petition for the injuries said to have been sustained by him while he was working under the 2nd Respondent/ 1st Opposite Party as an Auto Driver. He would submit that while in such employment, on 27.06.2008 when he was driving the auto bearing Registration No.TN-05-R-3108 and plying passengers, a tractor lorry coming from behind hit the auto. The passengers had jumped out but however the 1st respondent/ applicant had got trapped in the auto and had sustained injuries. Therefore, he had claimed a sum of Rs.5,00,000/- from the 2nd Respondent/ 1st Opposite Party as his principal employer and the Appellant/2nd Opposite Party as the insurer of the auto.

3. The 1st Opposite Party though served with a notice had remained ex parte. The 2nd Opposite Party had filed their counter denying the employer employee relationship and further submitted that the 1st respondent/applicant was not possessed with a valid license to drive the auto and also that the permit in respect of the vehicle had not been renewed. Therefore, they have contended that they are not liable to indemnify the 1st Opposite Party. The parties had gone to trial and after the recording of evidence and when the matter was posted for arguments the 1st Opposite Party had taken out an application to set aside an ex parte order. In his application filed in support of the said petition, the 1st Opposite Party had contended that the 1st respondent/applicant was employed under him.

4. The 2nd respondent/insurance company had filed a counter opposing the same but since the applicant had given his no objection the Court had proceeded to allow the said I.A. No.113 of 2013. The 2nd respondent/insurance company would contend that the order has been passed without serving any notice on them. After I.A.No. 113 of 2013 was ordered, the 1st Opposite Party had filed a counter in which the 1st Opposite Party has voluntarily stated that the 1st respondent/applicant was an employee under him on a daily wage to hire his autorickshaw bearing Registration No.TN-05-R-3018 and would also submit that he had met with an accident while he was driving the above autorickshaw. The 1st Opposite Party has also contended that the 1st respondent/claimant used to give a sum of Rs.500/- to



Rs.600/- as daily collections, out of which a sum of Rs. 150/- to Rs.200/- was paid to the 1st respondent/applicant depending upon the daily collections. The 1st Opposite Party would submit that the vehicle is covered by an insurance policy and therefore he may be exonerated.

5. After the counter is filed by the 1st opposite party, the 2nd opposite party/insurance company has filed an additional counter in which they had categorically stated that the signature of the 1st Opposite Party found in the vakalat, counter, affidavit and in the RC book differ from each other and therefore they had contended that the very application is suspicious. They had contended that the application has been moved only with the sole intent of overcoming the admission made by the petitioner in his cross examination. Be that as it may, the Commissioner proceeded to allow the above petition stating that the 1st opposite party has admitted that the petitioner/1st respondent was in his employment and awarded a sum of Rs.2,80,282/-. Challenging the said order the appellant/insurance company is before this Court.

6. Mr. Micheal Visuvasam appearing on behalf of the Insurance company would contend that the petitioner/applicant as P.W.1 in his initial cross examination on 10.10.2012 has clearly and categorically stated that he used to hire the auto from the 1st opposite party and for that he would pay a sum of Rs.200/- as a daily hire charges. He has further gone on to state that if in a day he earns Rs.500/- he would pay Rs.200/- to the 1st opposite party and take the remaining amount. In his cross examination he has clearly and categorically stated as follow:

"சேவியர் வெல்வகுமாரிடம் Hire- க்கு தான் நான் வாகனத்தை ஒட்டி வந்தேன்."

7. However he would submit that after the recording of evidence and when the matter was posted for arguments. an application was moved as if it was being moved by the 1st Opposite Party. The counsel would submit that suspicion shrouds the application as it is rather strange that the 1st Opposite Party who had refused to appear despite the notice from the Court and notice from the 2nd Opposite Party, has after the admission of the petitioner as P.W.1 has come forward and stated that the 1st respondent/applicant has employed under him and that he had sustained injuries while he was plying passengers.



8. The learned counsel would contend that a mere perusal of the signatures shown in the RC book (which is an official document) and the signature in the counter statement, affidavit and vakalat differ. Each and everyone of the signatures are clearly different from one and another. He would submit that the very authenticity of the counter is suspect. He would submit that once the deposition has been made, the witness cannot retract the same by such means.

9. He would further submit that the 1st Opposite Party who had rushed to file the application to set aside the ex parte order and the counter had not cared to step into the witness box and adduce evidence which itself is suspicious. He would submit that none of these factors have been considered by the Commissioner and the Commissioner simply relied upon the counter that was filed by the 1st opposite party which has not been proved by letting in evidence. Therefore the award has to be set aside. Another suspicious circumstance that has been highlighted by the learned counsel was that the FIR has been filed after a period of 82 days and in this FIR there is no mention about the auto having hit the Tractor Lorry. He would submit that the entire conduct of the petitioner appears to be fraudulent and manipulative. He would also question the award that has been passed.

10. The learned counsel for the appellant/ 2nd Opposite Party would rely upon the Judgment reported in (2006) 2 SCC 641 - National Insurance Company Limited Vs. Mastan and Another the question involved in that was :

" Whether an insurer, while defending an action initiated under the Workmen's Compensation Act, 1923 (for short "the 1923 Act) is precluded from raising any defence as envisaged in under sub-section (2) of Section 149 of the Motor Vehicles Act, 1988 (for short "the 1988 Act') is the question involved in these appeals.

11. The learned Judges had considered the Full Bench judgment of the High Court of Karnataka reported in 2004 AIR Kant HCR 2287 (FB) - Smt. Kavitha Dilip Patil and Ors. V. Ananda Ghanu Patil and Another where the issue was regarding the restriction of defence available to the insurance company in terms of Section 149(2) having application on the proceedings on the Workmen's Compensation Act. The Full Bench had answered as follows:



It was also held that

12. Ultimately the Hon'ble Supreme Court had answered as follows:

13. Per Contra, Mr. S.Tamil Maran had submitted that the Commissioner has rightly considered the subsequent evidence and the counter of the 1st Opposite Party in which it is categorically admitted that the petitioner was an employee under him and had passed the award. This cannot be sought to be set



aside as it is purely a question of re-appreciating evidence. He would further submit that there is no question of law involved and therefore the appeal has to be dismissed.

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14. Heard the arguments of both the counsels.

15. The petitioner is entitled to compensation under the Employees Compensation Act, earlier known as the Workmen's Compensation Act, if the injury or the death has occurred in the course or out of his employment. Therefore, the injury or the death must have a direct nexus to the employment. In the instant case, the petitioner had come forward to contend in his claim petition that he was employed by the 1st Opposite Party. However, the claim statement is silent about the details of the auto that is entrusted always to the petitioner by the 1st Opposite Party. However, the claim statement would state that on 27.06.2008 he was plying the auto bearing Registration No.TN-05-R-3108.

16. The 1st Opposite Party after entering appearance and filing counter would correct this anomaly. In the counter he would submit as follows " the claimant was employed by me on daily wages to hire my auto rickshaw bearing registration no. TN 05 R 1318". Therefore, this statement would indicate that the 1st Opposite Party owns an auto rickshaw which is being driven for hire by one of his employees. In this regard, the affidavit that is filed by the 1st Opposite Party in support of the application to set aside the ex parte decree i.e., I.A.No.113 of 2013 would make interesting reading. In his sworn affidavit the 1st Opposite Party would state as follows;

"Since I am also an auto driver and fully engaged in my work I could not be present for the above claim case. Therefore, myself was called absent and set ex parte "

17. Similarly, in the counter affidavit in I.A.No.227 of 2013 the 1st Opposite Party would once again reiterate as follows in para 3:

" Since I am also an Auto driver and fully engaged in any work"

Further in para 4 he has stated as follows:

"4. I submit that the 2nd Opposite Party stated the Application the notice taken to me in the earlier but the same was returned, as stated in the



Application the 2nd Opposite Party sent to wrong address is caused for returned the post. In myself have right to protect herein as am a mere Auto driver and no necessity to made collusion with Applicant as state in the Application filed by the 2nd Opposite Party."

18. Therefore, from the reading of the affidavit and the counter affidavit it is seen that the 1st Opposite Party is himself an Auto driver, but however does not provide any details about the auto that he drives or whether he owns several autos. However, considering his statement in paragraph 4 of his counter affidavit mentioned (supra) the chances of the 1st Opposite Party owning several auto rickshaws appears improbable. Further, the manner in which the 1st Opposite Party has been brought into the case and taking note of the varying signatures in each of the documents, the presence of the 1st Opposite Party is highly suspicious and appears to have been made with the sole intent of somehow getting over the admission of the petitioner that he was not an employee of the 1st Opposite Party but that he takes the vehicle on hire from the 1st Opposite Party. It is rather strange that the 1st Opposite Party who had shown so much enthusiasm to file the application for setting aside the ex parte decree and thereafter his counter has not chosen to present himself for oral examination particularly when the insurance company had raised the plea of fraud.

19. Further without getting into the box, the statement made by the 1st Opposite Party in his counter affidavit cannot be taken note of since the same has been rebutted in a reply affidavit filed by the 2nd respondent/insurance company. Therefore, it is for the 2nd respondent to prove the contents of his counter. The fact that the petitioner/applicant has once again submitted himself for oral examination and that the 1st 1st Opposite Party has cross examined him compels this Court to come to the conclusion that all is not right with the entry of the 1st Opposite Party and the filing of the so called counter particularly when the petitioner/applicant has earlier categorically admitted that he is not an employee of the 1st Opposite Party but that he takes the vehicle on hire and for that he gives a sum of Rs.200/- a day as hire charges to the 1st Opposite Party.

20. The Tribunal has simply relied upon the un-substantiated statement in the counter of the 1st respondent overlooking the admission of P.W.1. Therefore, it is clearly evident that the petitioner/applicant herein is not an employee under the 1st



Opposite Party, therefore, he is not entitled to the compensation. It is an established rule of law that fraud vitiates all proceedings, in the instant case, a perusal of the signatures in each of the affidavits, counters etc., indicates that these signatures have not been affixed by the same person who has affixed the signatures on the Ex.A.9 = C2 (RC Book). The Tribunal has also not considered the long delay in filing the FIR. Another strange factor that stands out in the instant case is that the petitioner/applicant who claims to have taken passengers in his autorickshaw on the said date would state that in the impact the passengers in his auto rickshaw had jumped out of the auto and only he had injured. The accident is said to have occurred when the Tractor Lorry hit the auto from behind which means that it must be the passengers who would have first sustained injuries and only thereafter the driver who sits in front of them would have felt the impact, this is another strange factor in the instant case. Be that as it may, since the petitioner in his cross examination has admitted that he is not an employee of the 1st Opposite Party, the claim petition has to definitely be rejected and the question of law is answered in favour of the appellant/insurance company.

21. In fine, the above Civil Miscellaneous Appeal is allowed and the order passed by the Commissioner for Employees Compensation (Joint Commissioner of Labour-I), at Chennai is set aside. No costs. Consequently, the connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar(CS-VI)

//True copy//

Sub Assistant Registrar

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To

1. Commissioner for Employees Compensation
(Joint Commissioner of Labour-I), Chennai.

2.The Section Office,
V.R.Section,
High Court, Madras.

+1cc to Mr.J.Michael Visuvasam, Advocate SR.No.27022

C.M.A. No.2152 of 2019 and
C.M.P.No.8737 of 2019

CA(CO)
GMY(06/06/2022)