IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 4TH DAY OF SEPTEMBER 2019

BEFORE

THE HON'BLE MR. JUSTICE B. VEERAPPA

MISCELLANEOUS FIRST APPEAL NO.6823/2016 (WC)

SANDEEP B.N.

v/s.

NEW INDIA ASSURANCE CO. LTD.,

JUDGMENT

Claimant-driver filed the present appeal against the judgment and award dated 02.08.2016 passed by the Commissioner for Employee's Compensation/Tribunal made in E.C.A.No.4/2014 dismissing the claim petition filed by the claimant under the provision of Section 22 of the Employee's Compensation Act, 1923 (' the Act ' for short).

2. It is the case of the appellant/claimant that he was working as a driver in a maxi cab bearing registration No.KA-03- D-5331 under the second respondent on monthly salary of Rs.8,000/-.It is further contended that on 05.08.2013, when he was proceeding as a driver in maxi cab at Lingasugur to Gulbarga Gulbarga Road near Thinthini bridge, Lingasugur Raichur, due to high speed, he lost control over the vehicle and the vehicle turtled on the road side ditch. As a result, the claimant sustained grievous injuries and other occupants also sustained minor injuries.He was shifted to Government Hospital, wherein he took first aid and thereafter, he he was was referred to Mallige Medical Centre, Bengaluru, wherein he was treated as inpatient.The claimant was diagnosed in the the said hospital as he sustained trochanteric fracture of left femur and injuries to other parts of the body.He has spent nearly a sum of Rs.1,50,000/towards medical and nourishment expenses.

3. It is further the case of the claimant that due to the said accident, he sustained injuries and he is unable to work and lead normal life.He is unable to continue his profession.The accident occurred arising out of and during the course of employment under second respondent.The jurisdictional police registered a criminal case in Crime No.170/2013 for the offences punishable under the provision of Sections 279, 337 and 338 of IPC against the driver of the maxi cab.He further contended that first respondent being insurer and second respondent being owner of the offending vehicle were jointly and severally liable liable to pay the compensation to the claimant.Accordingly, sought for awarding compensation of Rs.8,00,000/-.

4. In response to the notice issued by the Commissioner for Employee's Compensation/Tribunal, second respondent failed to appear before the Tribunal and he was placed exparte.

5. First respondent Insurance Company filed objections and contended that the claimant and second respondent are none other than the brothers.There is no employer and employee relationship between them.Hence the claim petition is not maintainable.The manner of the accident and also the injuries sustained by the claimant are also denied.It further contended that the liability is subject to the terms and conditions of the policy, such as holding of valid and effective driving licence, RC, FC and permit etc. It is further contended that the offending vehicle is a passenger vehicle and owner has to carry only passenger and not suppose to use for other purposes other than carrying passengers. But, at the time of the accident, owner of the vehicle

used the maxi cab for carrying question papers of K.P.S.C. and therefore, there is violation of terms of conditions of the policy and sought for dismissal of the claim petition.

6. Based on the aforesaid pleadings, the Tribunal framed the following issues:

1. Whether the petitioner proves that during the course of employment under the respondent No.2, the alleged accident was taken place, when he was driving the Maxicab bearing No. KA.03/D.5331 and in the said accident, he sustained injuries as alleged?

2. Whether the petitioner is entitled for compensation?If so, how much and from whom?

3. What Order? "

1. In order to prove the case of the claimant, the claimant has examined PW.1 and an Orthopedic Surgeon as PW.2 and got marked documents Ex.P1 to Ex.P11. First respondent examined its Administrative Officer as RW.1 and got marked documents Ex.R1 to Ex.R5.

8. The Commissioner for Employee's Compensation/Tribunal considering both oral and documentary evidence on record has recorded the finding that the claimant has failed to prove that the accident arising out of and in the course of the employment, when he was driving the maxi cab bearing Registration No. KA-03- D-5331 and he sustained injuries and he is not entitled to any compensation.Accordingly, the Commissioner for Employee's Compensation/Tribunal by the impugned judgment and award dated 02.08.2016 dismissed the petition.Hence, the present appeal is filed by the claimant.

9. This Court while admitting the appeal on 10.07.2019 has framed the following substantial questions of law for determination:

1. Whether the Commissioner for Workmen's Compensation is justified in dismissing the claim petition holding that there is no employer and employee relationship between the appellant and respondent No.2, ignoring both the oral and documentary evidence on record?

2. Whether the Commissioner for Workmen's Compensation is justified in dismissing the claim petition on the ground of negligence on the part of the claimant in view of the provisions of Section 3 of the Employee's Compensation Act, 1923, in the facts and circumstances of the present case?

10. I have heard learned Counsel for the parties to the lis.

11. Sri Shripad V.Shastri, learned Counsel for the claimant contended that the Tribunal has erred in dismissing the claim petition mainly on the ground that it is negligence on the part of the driver while driving the vehicle and the jurisdictional police have registered the case against him.That is not the ground to deny the compensation in view of the provision of Section 3 of the Act. He further contended that the Tribunal has erred in holding that merely because claimant was brother of second respondent and was working as driver there is no employer and employee relationship between the appellant and second respondent.He further contended that under the Act, there is no prohibition for the employer to employ the brother as a driver. He further contended that the Tribunal further erred in holding that the vehicle in question was shown as passenger carrying vehicle.Second respondent was carrying question papers at the relevant point of time.Therefore, there is violation of terms and conditions of the policy.Therefore, he sought to contend that the impugned judgment and award cannot be sustained and liable to be set aside and sought for allowing of the appeal.

12. In support of his contentions, learned Counsel for the claimant relied upon the following judgments:

(i) The Oriental Insurance Company Limited Vs. Hanumant & Another [2005 (4) KCCR 2320]

(ii) Manohar Bhimappa More Vs. Mahadev Bhimappa More [2006 ACJ 850]

(iii) United India Insurance Co. Ltd. Belgaum Vs. Prakash Shankar Gurav and Another [ILR 2006 KAR 1036]

13. Per contra, Sri C.R.Ravishankar, learned Counsel for Insurance Company sought to justify the impugned judgment and award passed by the Commissioner for Employee's Compensation/Tribunal and contended that the claimant has not produced any material documents to prove the relationship of claimant and second respondent as employer and employee, as second respondent is the own brother of the claimant. Therefore, the Tribunal is justified in dismissing the claim petition.He further contended that the maxi cab meant for carrying only passenger.Carrying question papers of K.P.S.C. along with inmates amounts to goods.Therefore, the Tribunal is justified in dismissing the claim petition.

14. I have given my anxious consideration to the arguments advanced by the learned Counsel for the parties and perused the entire material on record including the original records carefully.

15. It is the specific case of the claimant/driver that he was working under second respondent as a driver in maxi cab bearing number KA-03- D-5331 on the date of accident and he was drawing monthly salary of Rs.8,000/-.On 05.08.2013 arising out of and in the course of employment, when the driver was carrying the officers along with question papers of K.P.S.C. the accident occurred and he sustained grievous injuries. Accordingly to him, he has spent a sum of Rs.1,50,000/-towards medical and nourishment expenses.Due to the accident, he could not lead normal life and unable to continue his profession.

16. It is also not in dispute that the jurisdictional police have registered a criminal case in Crime No.170/2013 for the offences punishable under the provisions of Sections 279, 337 and 338 of IPC against the driver of the maxi cab.Second respondent owner of the maxi cab has not filed any objections.However, the Tribunal proceeded to dismiss the claim petition mainly on three grounds:

(i) Accident occurred due to rash and negligent driving of the driver of the maxi cab.

(ii) Claimant has not proved his relationship of employer and employee between the claimant and second respondent;

(iii) Maxi cab was used for carrying goods i.e. carrying question papers as on the date of the accident.Therefore, there is violation of the terms and conditions of the policy.

17. So far as the findings on negligence recorded by the Tribunal, it is not a ground to dismiss the claim petition in view of the provision of Section 3 of the Act which depicts that personal injuries caused in the accident arising out of and in the course of his employment, his employer shall be liable to pay compensation in accordance with the provisions of Chapter II of the Act.

18. While considering the provision to determine the compensation under Section 3 of the Act, it requires to establish the following points:

(a) That the accident must arise out of and in the course of workman's employment;

(b) There must be causal connection between the injury and the accident and work done in the course of employment; &

(c) Workman has to say that while doing a part of his duty or incidental thereto it has resulted in an accident.

19. It is necessary that the workman must be actually working at the time of the injury or the accident. Therefore, the three factors that there must by injury, which must be caused in an accident and it must be caused in the course of and out of the employment must be established.The expression " arising out of employment " means that there must be casual relationship between the accident and the employment.If the accident has occurred on account of the risk which is an incident of employment, it has to be held that the accident has arisen out of the employment.The words " out of employment " is not limited to mere nature of the employment, but it (arising out of employment) applies to its nature, its conditions and obligations and its incidents.An accident which occurs on account of risk, which is an incident of employment, then the claim for compensation can succeed provided the workman has not exposed himself to an added peril by his own imprudent act.

20. Admittedly, in the present case, it is not in dispute that the claimant was working as a driver under the second respondent and accident has arisen out of and in the course of employment, as is evidenced from the complaint and F.I.R. Ex.P1, charge sheet Ex.P2 and IMV report Ex.P5, Ex.R3 copy of the policy of the offending vehicle which was issued to cover the risk of passengers clearly indicates that second respondent is the owner of the vehicle on the date of the accident and the Tribunal is not justified in dismissing the claim petition on the ground of negligence.

21. The Tribunal further proceeded to dismiss the claim petition on the ground that there is no relationship of employer and employee as the claimant is the brother of second respondent.Under the provisions of the Act, it is not prohibited that a brother cannot be appointed as a driver in the vehicle owned by the other brother.

22. The learned Single Judge of this Court while considering the provisions of Section 2 (1) (m) of the Act, in case of the Oriental Insurance Co. Ltd. Vs. Hanumant & Another [2005 (4) KCCR 2320] para 2 held as under:

" 2. The contention of the insurer that there exists no relationship of employer and employee since the first respondent (driver) happens to be the son of the owner of the jeep (respondent No.2), therefore, there cannot be a relationship of employer and employee is an untenable argument.It is not uncommon amongst the business family to engage their own kith and kin on employment for doing the business or commercial activity.

Merely because in such a situation no wages are paid in cash is also not a ground to infer absence of a legal relationship of employer and employee, since there would always be consideration in kind computable in terms of money for the services rendered.The parties would not go for documentation of the contract nor create any documentary material to prove payment of wages in view of the peculiar family relationship.Therefore, the fact that the first respondent and second respondent are father and son, is not a ground in law to infer the absence of the relationship of employer and employee under the Workmen's Compensation Act. "

23. Another judgment of the learned Single Judge in the case of Manohar Bhimappa More Vs. Mahadev Bhimappa More [2006 ACJ 850] at para 3 held as under:

" 3. On thorough consideration of the facts, the view taken by the Workmen's compensation Commissioner is bad in law.After all the tractor-trailer is meant to be used for agriculture purpose and it requires employment of people.In the rural lifestyle, it is not uncommon to find the practice of oral appointment for specific purpose and time.Many a time, the persons in the family would be employed for doing the work instead of employing strangers.The fact that the injured is the brother and the guarantor for repayment of the loan is not a valid reason to hold that he was not a workman employed in connection with the tractor-trailer.The member of the family so employed cannot be considered as a workman in law only when he is the registered owner of the vehicle.

Hence there is no inhibition in law for employment of member of the family in connection with the tractor-trailer.In view of the peculiar family relationship it is absurd to insist on documentary proof of appointment and the payment of wages by cash as the only mode of consideration for proof of employment. "

24. In view of the aforesaid reasons, contention of the learned Counsel for the Insurance Company that the relationship between the claimant and second respondent is not proved cannot be accepted in view of the F.I.R and complaint, Ex.R3 policy in respect of the offending vehicle which clearly indicates that second respondent is the owner of the vehicle and Ex.R1 clearly depicts that accident arising out of and in the course of employment, when the claimant was working as a driver under the second respondent.

25. So far as the contention that at the time of accident, the said maxi cab was used as carriage of goods.Carriage of question papers of K.P.S.C. meant goods and there is violation of the terms of the conditions of the policy cannot be accepted for the simple reason that as Ex.P1 clearly depicts that the accident occurred, when the vehicle was moving from Lingasugur to Gulbarga road along with officers of the K.P.S.C. with question papers cannot be construed as goods. It must be construed as personal luggage of the officers carrying on the question papers of K.P.S.C.

26. It is not the case of the Insurance Company that the maxi cab was carrying only goods.Bundle of question papers amounts to goods.It is undisputed fact that the maxi cab was carrying the officers of K.P.S.C., with some question papers cannot amount to goods.There is no definition of goods under the Act. Even if we refer to the provision of Section 2 (13) of the Motor Vehicles Act, 1988, " goods " includes livestock, and anything (other than equipment ordinarily used with the vehicle) carried by a vehicle except living persons but does not include luggage or personal effects carried in a motor car or in a trailer attached to a motor car or the personal luggage of the passengers travelling in the vehicle.

27. Admittedly, in the present case, passenger/officers of K.P.S.C. were carrying on some question papers of K.P.S.C. does not amount to goods. Inspite of the same, the Tribunal proceeded to dismiss the claim petition, the same cannot be sustained.

28. It is relevant to consider the provision of Section 2 (13) goods of the Indian Motor Vehicles Act, 1988.This Court in the case of the United India Insurance Company Ltd. vs.Smt.Lalithabai and Others [ILR 2007 KAR 1585] at paras 6 and 8 held as under:

" 6. In the light of the aforesaid submissions made by the learned Counsel for the parties, the short point that arises for consideration is whether it can be said that in the instant case, what was carried by the deceased comes within the expression " goods ".This takes us at first to have a look at the definition of " goods " as contained in Section 2 (13) of the Motor Vehicles Act, 1988 (for short ' Act ').The said Section reads thus:

" goods " includes live-stock, and anything (other than equipment ordinarily used with the vehicle) carried by a vehicle except living persons, but does not include luggage or personal effects carried in a motor car or in a trailer attached to a motor car or the personal luggage of passengers travelling in the vehicle; 8. Therefore, in the instant case, carrying of one or two bags by deceased cannot be construed as carrying of " goods ". Since the Insurance cover note produced at Exhibit P- 4 goes to indicate that the vehicle in question was a goods vehicle, the liability fastened on the Insurance Company by the MACT is unsustainable in law, particularly, in the light of the decision of the Ap Court in the case of National Insurance Co. Ltd. v.Bommithi Subbhayamma and Others.The question of appellant-Insurance Company being saddled with the liability will not arise, as such, the finding of the MACT in this regard will have to be set aside and it will be the owner of the vehicle i.e., the respondent No. 7, who will have to satisfy the award passed by the MACT. "

29. For the reasons stated above, the first substantial question of law framed in the present appeal has to be held in the negative holding that the Commissioner for Employee's Compensation/Tribunal is not justified in dismissing the claim petition on the ground that there is no employer and employee relationship between the appellant and second respondent by ignoring both oral and documentary evidence on record.

30. Accordingly, Second substantial question of law is answered in the negative holding that the Tribunal is not justified in dismissing the claim petition on the ground of negligence on the part of the claimant, in view of the provision of Section 3 of the Act.

31. In view of the aforesaid conclusion reached by this Court negating the contentions raised by the learned Counsel for the Insurance Company, the matter requires to be reconsidered by the Commissioner for Employee's Compensation/Tribunal and decided the matter on merits in accordance with law.

32. Resultantly, the appeal filed by the claimant/driver is allowed.The impugned judgment and award dated 02.08.2016 passed by the Commissioner for Employee's Compensation/Tribunal made in E.C.A.No.4/2014 is hereby set aside.The matter is remanded to the Tribunal for fresh consideration on merits of the case after providing sufficient opportunity to both the parties and to pass appropriate judgment and award in accordance with law.

Ordered accordingly.