

(1998) 03 OHC CK 0021
In the Orissa High Court
Case No : M.A. No. 441 of 1996

Divisional Manager, New India Assurance Co. Ltd. APPELLANT
Vs
Hara Prasad Tripathy and Another RESPONDENT

Date of Decision : 11-03-1998

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100
Workmens Compensation Act, 1923 — Section 30

Citation : (1999) 2 LLJ 1356

Hon'ble Judges : P.K. Misra, J

Bench : Single Bench

Advocate : M. Singha, for the Appellant; B.N. Rath, M.K. Pande, A.K. Dash, P.K. Nayak and K.C. Patnaik, for the Respondent

Judgement

P.K. Misra, J.—The Insurance Company has filed this appeal u/s 30 of the Workmen's Compensation Act, challenging the award of the Asst. Labour Commissioner-cum-Commissioner for Workmen's Compensation, Bhubaneswar, in W.C. Case No. 157 of 1993 awarding a sum of Rs. 64,071/- in favour of present respondent No. 1.

2. Respondent No. 1 was the driver under respondent No. 2 in respect of a Mini Truck bearing registration No. OR-07-8796, on April 29, 1993, while respondent No. 1 was driving the said vehicle, the vehicle capsized as a result of which respondent No. 1 sustained injuries. Claim application was filed claiming Rs. 1,00,000/- as compensation.

The owner, respondent No. 2, in his written statement while admitting about the employment of respondent No. 1 and the accident claim that liability, if any, should be met by the present appellant as the vehicle had been validly insured with the Insurance Company.

The present appellant had denied the allegations made in the application.

3. The Commissioner for Workmen's Compensation held that the present

respondent No. 1 was a workman under respondent No. 2 and had sustained injury in the accident arising out of and in course of employment. It was further held that the claimant was entitled to a sum of Rs. 64,071/- and as the vehicle had been validly insured with the Insurance Company at the relevant time, the liability should be discharged by the Insurance Company. Challenging the aforesaid award, the present appeal has been filed.

4. In the present appeal the learned counsel for the appellant first contended that since the injured-claimant did not have valid driving licence at the time of accident, the Insurance Company is not liable to pay the compensation amount. It has been further contended that even assuming that the Insurance Company is liable, the amount fixed by the Commissioner for Workmen's Compensation is not sustainable as there is no acceptable evidence on record regarding the loss of earning capacity of the claimant.

5. In this Court, a petition under Order 41, Rule 27 of the Code of Civil Procedure, has been filed by the appellant for accepting the certified copy of the driving licence bearing No. 1173/93 which was stated to be the driving licence as per the seizure list in the connected O.P. Case. Banking upon the said certified copy of the driving licence it is contended that the said driving licence relates to one James Mastin Khuna and not to the present respondent No. 1. It is, therefore, contended that since there was no valid driving licence, the Insurance Company should not be saddled with the liability.

6. The claimant-respondent No. 1 has filed objection to the admissibility of the additional evidence. Respondent No. 1 has contended that since the appellant had not taken a specific plea regarding the absence of driving licence, it should not be permitted to raise such a contention for the first time in appeal. It is further contended that the certified copy of the driving licence produced in this Court does not relate to the claimant-respondent No. 1 and, in fact, the xerox copy of the driving licence of the claimant-respondent No. 1 had been filed before the Commissioner for Workmen's Compensation, which had not been challenged by the Insurance Company at that stage.

7. The Insurance Company is claiming exemption from liability on the ground of exclusionary clause contained in the policy of insurance. Since it is depending upon an exclusionary clause, it was obligatory on the part of the Insurance Company to raise such a question before the Commissioner for Workmen's Compensation. A perusal of the written statement filed by the Insurance Company before the Commissioner for Workmen's Compensation, indicates that no such plea had been raised in the written statement regarding the lack of driving licence. The claimant was examined as a witness. In his examination-in-chief, he has categorically stated that he had a valid driving licence, xerox copy of which had been produced by him in Court. Though he was cross-examined at length by the Insurance Company, not a single question was put to him challenging such statement or the genuineness of the xerox copy of the driving licence produced by him. In the absence of any specific plea in the written

statement and in the absence of even a faint challenge to the un rebutted evidence of the claimant himself on this aspect, the Commissioner for Workmen's Compensation came to the conclusion that the claimant had a driving licence and the Insurance Company was liable to pay the compensation. Such a finding is essentially a finding of fact which cannot be challenged for the first time in an appeal u/s 30 of the Workmen's Compensation Act. Whether the xerox copy of the driving licence produced before the Commissioner for Workmen's Compensation was genuine or not being a question of fact and, more so, in the absence of any specific plea by the Insurance Company regarding the lack of driving licence, the appellant cannot be permitted to raise such a question in the present appeal and that too by adducing additional evidence. The evidence sought to be adduced under Order 41, Rule 27, C.P.C. was easily available to the appellant even at the stage of trial and in the absence of any explanation, the document produced for the first time in this Court cannot be admitted into evidence. However, as already indicated, in the absence of any specific plea on this point, the appellant cannot be permitted to adduce any evidence to fill up the lacuna in its case at this stage. As is well known, an appeal u/s 20 of the Workmen's Compensation Act is maintainable only on substantial questions of law. The scope of an appeal u/s 30 of the Act is akin to a second appeal u/s 100 of the Code of Civil Procedure. As is well settled, in a second appeal the appellant is not ordinarily permitted to raise questions of fact and similarly, in the present appeal the appellant cannot be permitted to raise a question of fact particularly in the absence of any specific plea on this aspect.

8. In course of hearing of the present appeal it transpires that the owner of the vehicle had made a claim before the very same Insurance Company for damages caused to the vehicle itself and order had been passed by the District Consumer Disputes Redressal Forum directing the Insurance Company to pay the amount to the owner. A true copy of the said order has been produced in Court by respondent No. 2 along with an affidavit. In the said affidavit it has been indicated that the owner has received the amount from the Insurance Company as per the order passed in CD. Case No. 140 of 1995 by producing the driving licence bearing No. 1639/BBSR, in the name of Haraprasad Tripathy, the present respondent No. 1. As already indicated, a xerox copy of the said driving licence bearing No. 1639 had been produced by the claimant-respondent No. 1 before the Commissioner for Workmen's Compensation. The certified copy of the driving licence bearing No. 1171/93 does not relate to the present respondent No. 1. Merely because it was indicated in the seizure list, it cannot be said that the said driving licence related to the present claimant-respondent No. 1. In other words, on the face of the xerox copy of the driving licence in the name of the present respondent No. 1 and the admitted fact that the owner of the vehicle has been given compensation by the very same Insurance Company on the basis of the said driving licence, admission of certified copy of the driving licence standing in the name of James Mastin Khuna would not be of any assistance to the present appellant.

Thus in any view of the matter, the first contention raised by the appellant cannot be sustained.

9. Prima facie, the second contention raised by the learned counsel for the appellant appears to have some substance. It has been contended that there is no clear evidence on record indicating about the loss of earning capacity of claimant- respondent No. 1. The claimant had produced certain documents such as, the discharge ticket from M.K.C.G. Medical College Hospital and the original certificate from the treating physician and other medical papers. However, no doctor had been examined to prove the loss of earning capacity. Ordinarily, in such a situation the matter would have been remanded to the Commissioner for Workmen's Compensation for further enquiry to enable the parties to adduce relevant evidence in the matter. However, since the accident had taken place in April 1993, about five years back, the matter would be further delayed if it is remanded to the Commissioner for Workmen's Compensation at this stage. To avoid such a situation, the counsel for the claimant-respondent No. 1 has suggested that the appeal may be finally disposed of by this Court in the spirit of Lok Adalat by reducing the compensation amount if necessary. Though the learned counsel for the appellant submitted that the matter may be remanded to the lower Court, I am of the opinion that the appeal should be finally disposed of in the manner suggested by the counsel for respondent No. 1. A fair idea regarding the nature of injuries can be had by perusing the various documents on record. The amount of compensation has already been deposited in this Court by the appellant and the said amount has been kept in a fixed deposit. Having regard to the nature of injuries as seen from the documents and the statement of the claimant himself, had all the materials on record, I am of the opinion that interest of justice would be served by reducing the quantum of compensation to Rs. 50,000/-and directing that the said amount along with the accrued interest on the entire deposited amount should be paid to the claimant-respondent No. 1 and the balance amount of Rs. 14,071/- should be refunded to the Insurance Company.

10. Accordingly, the appeal is allowed in part. The appellant is directed to pay a sum of Rs. 50,000/- to the claimant-respondent No. 1 along with the accrued interest on the entire deposited amount and the balance amount of Rs. 14,071/- may be refunded to the appellant. The aforesaid exercise should be completed by the High Court registry within a period of two months. There will be no order as to costs.