

(1998) 02 OHC CK 0011

In the Orissa High Court

Case No : M.A. No"s. 161 and 162 of 1993

Divisional Manager, Oriental Insurance Co. Ltd.

APPELLANT

Vs

S.H. Mehar Singh and Another

RESPONDENT

Date of Decision : 02-02-1998

Acts Referred:

Employees Compensation Act, 1923 — Section 30
Motor Vehicles Act, 1988 — Section 149

Citation : (1998) 2 ACC 349 : (2000) ACJ 120 : (1998) 85 CLT 766

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

Bench : Single Bench

Advocate : M. Sinha and B. Singh, for the Appellant; Basant Kumar Mishra, N.K. Mohanty and Ajodhyanath Sahoo, for the Respondent

Final Decision : Dismissed

Judgement

P.K. Tripathy, J.—These are the two appeals u/s 30 of the Workmen's Compensation Act, 1923 (in short "the Act") against the common judgment dated 26.12.1992 awarding compensation in favour of the respective respondents in both the appeals by the Deputy Labour Commissioner and Commissioner for Workmen's Compensation, Cuttack (in short, "the Commissioner"). Both appeals were heard analogously and the result shall be abided by this common judgment.

2. Facts relevant for this case are stated thus:

On 15.2.1991, truck bearing registration No. WMK 9838 met with an accident on the national highway within the jurisdiction of Dharmasala P.S. in the district of Cuttack. Late Sahib Singh aged about 22 years was the driver of that truck and late Raghubir Singh, aged about 22 years was the helper. Parents of the driver filed Work-men's Compensation Case No. 533-D/91 and the widowed mother of the helper filed Workmen's Compensation Case No. 522-D/91 respectively claiming compensation of Rs. 2,50,000 and Rs. 2,00,000. The owner of the truck who was opposite party No. 1 in both the cases is respondent No. 3 in M.A. No.

161 of 1993 and respondent No. 2 in M.A. No. 162 of 1993. In M.A. No. 161 of 1993, the order awarding compensation in favour of the parents of the driver has been challenged whereas in M.A. No. 162 of 1993 the order awarding compensation in favour of the mother of the helper has been challenged.

3. The owner of the truck on 27.2.1992 filed a counter admitting the employment and accident, but made bald denial to the other contentions relating to death due to accident while under the employment and about the age of the deceased persons, etc. However, he stated that the truck being covered by insurance policy No. 315101/ 13/1051/MV/I 173/1991 of the Oriental Insurance Co. Ltd. which was valid up to 20.5.1991, the liability to pay the compensation, if any, lies with the insurer, i.e., the appellant. The appellant as opposite party No. 2 filed written statement in between 10.4.92 and 20.7.1992 denying the death due to accident, employment, wage and age of the deceased driver and helper. The appellant also denied the fact that the truck was insured with it on the ground that the Divisional Office had not been able to trace the policy in its office for want of policy number.

4. On consent of the parties, hearing of the cases was taken up analogously. Claimants in the cases 533-D and 522-D were respectively examined as PWs 1 and 2 and an independent witness to the accident as PW 3. The opposite party No. 1/ owner of the truck was examined as OPW 1. Relevant documents, viz., post-mortem reports, copy of the registration certificate of the vehicle, driving licence of the deceased driver, copy of F.I.R., seizure list and final report in Dharmasala P.S. Case-No. 60 of 1991 filed in the cases were accepted as documentary evidence. The opposite party No. 2, the appellant, did not adduce any evidence. Argument was heard on 25.9.1992 and judgment was delivered, after two adjournments, on 26.12.1992.

5. The Commissioner formulated four issues, viz.:

- (i) Whether the deceased persons were the workmen?
- (ii) Whether the accident and death occurred out of and in the course of employment?
- (iii) Whether compensation is payable and if so what amount? and
- (iv) Whether the applicants are entitled to get the compensation?

Taking into consideration the factual and legal pleas taken by the parties and after making assessment of evidence on record, the Commissioner answered all the issues in favour of the claimants. Accordingly, he awarded compensation of Rs. 88,748 in favour of the parents of the driver and Rs. 79,873 to the widowed mother of the helper.

6. Neither in the appeal memo nor during the course of hearing, correctness of the findings in the impugned judgment that the deceased driver and helper were the workmen; that the accident and death occurred out of and in the course of

employment; that both the deceased persons were aged about 22 years by the date of accident and the death; that the claimants, i.e., their legal heirs are entitled to receive the compensation awarded and the factum of computation of the compensation by determining the monthly wage and the multiplier was disputed. It reveals from the ground set forth in the appeal memo, the challenge to the impugned judgment revolves round the plea that in the absence of production and proof of the original insurance policy, the Commissioner should not have decided that the appellant as the insurer is liable to pay the compensation awarded. It is further stated that the premium amount paid through the cheque by the insured for renewal of the policy was dishonoured by the Allahabad Bank and for that reason the renewed policy was cancelled in May, 1990.

7. At the time of the hearing Mr. M. Sinha, learned counsel appearing for the appellant pressed into service the aforesaid grounds and inter alia argued to remand the case for further evidence. Mr. Basant Kumar Mishra, learned counsel appearing for the claimants/respondents advanced argument resisting the prayer for remand and repelling the other contention, besides supporting the impugned judgment.

8. In view of the above narrated facts and circumstances, the question for determination is limited as to whether it is the opposite party No. 1 (owner of the truck) or the opposite party No. 2 (the appellant) who is to pay the awarded compensation. It reveals from the Commissioner's record that in the claim petition the claimants mentioned that the truck in question was covered by an insurance policy issued by the appellant company. In his written statement dated 27.2.92, the owner of the truck, opposite party No. 1, mentioned about the policy number and stated about the liability of the appellant to pay the compensation, if any. The appellant through its counsel appeared before the Commissioner between 27.2.1992 and 10.4.1992 and filed the written statement by 20.7.1992. In its written statement, all that has been pleaded by the appellant regarding the insurance is that due to want of policy number it was not in a position to admit that the truck was insured. It was further stated that the Divisional Office had not then received confirmation letter from the policy issuing branch and after receipt of such communication, it would file the additional written statement. It is thus apparent from the aforesaid contention in para 4 of the written statement of the appellant that it did not make a specific denial regarding the truck being covered by an insurance policy. On the other hand, the appellant took a fence-sitting plea neither admitting nor denying specifically about the truck being covered by an insurance policy. Be that as it may, at the stage of recording evidence before the Commissioner the claimants relied upon documents which include a seizure list in Dharmasala P.S. Case No. 60 of 1991 wherein the certificate of insurance policy relating to this truck having been issued by the appellant company and being valid till 20.5.1991 was seized being produced by the owner, i.e., the opposite party No. 1. During the course of the cross-examination of PWs 1 to 3 or even of the owner of the truck as OPW 1

though the appellant fully participated, but did not put any question suggesting that the truck was not insured with the appellant company or that due to bouncing of the cheque, the certificate of insurance policy which had been issued was cancelled and, therefore, the appellant had no liability. It further appears from the order-sheet maintained by the Commissioner that on 18.8.1992, the evidence of PWs 1 to 3 and OPW 1 were recorded besides the documentary evidence which were accepted in evidence and the case was adjourned to 27.8.1992 for defence evidence (i.e., evidence by the opposite parties). On that date, the appellant did not take any steps. However, the Commissioner suo motu adjourned the case to 25.9.1992 for the same purpose. On that date, a copy of the R.C.C. filed by the opposite party No. 1 was accepted on record. Opposite party No. 2/appellant did not adduce any evidence, thus argument was heard and the case was posted for judgment to 30.10.1992. On the latter date the judgment being not ready, it was adjourned to 5.12.1992. On that date also for the self-same reason the case was adjourned to 26.12.1992 when the impugned judgment was pronounced. On the existence of these facts which are apparent on the face of the record contention of the appellant that it was not granted sufficient opportunity to adduce evidence is not acceptable. Mr. Sinha had in fact not replied to these facts situation. Mr. Mishra with due emphasis to the aforesaid circumstance argued that when the appellant has not adduced any evidence though proper and sufficient opportunity was afforded, the prayer for remand with a view to afford another opportunity to the appellant to adduce further evidence is not sustainable either legally or factually. In support of that they relied upon the case of Jamuna Chand Vs. Ganesh Prasad Gupta and Others, . In the case of Jamuna Chand, this court has held that "the power to remand should not be exercised to fill up the lacunae in a case". For the aforesaid reasons and the ratio the prayer for remand of the case as prayed for by the appellant is devoid of consideration. In the case of New India Assurance Co. Ltd., this court held that:

(5) Sub-section (2) of Section 96 of the old Act, corresponding to Section 149(2) of the new Act, sets out the grounds on which the insurer may defend the action and raise a positive-defence. The only significant change in Section 149(2) vis-a-vis Section 96 (2) is that u/s 149(2) insurer cannot repudiate its liability on ground of cancellation of policy. The other grounds, namely, breach of one of the specified conditions of the policy, which condition is one of those enumerated, and/or policy being void on account of non-disclosure of a material fact or a false representation of a fact are available to be raised as defence. When a defence is raised, the insurer is required to adduce material to substantiate it. It having failed to do so in the instant case, without any explanation as to the cause of failure, I do not accept the prayer for permission to adduce additional evidence. On the materials on record, the insurer has not established breach of specified condition of the policy relating to user of the vehicle not allowed by the permit. Adequate material in that regard is absent. In that view of the matter, the plea that there was breach of specified condition relating to user not allowed by the

permit, cannot be accepted.

In the case of United India Insurance Co. Ltd. v. Ashok Kumar Rout 1995 (2) TAC 548, while refusing to accept additional evidence in the appellate forum this court has held that:

(4) From a perusal of order passed by the Tribunal and with reference to the records, I find that adequate opportunity was granted to the insurer. It was represented by the counsel who participated in the proceedings. Though there is mention in the written objection filed before the Tribunal about policy being taken subsequent to accident, there was no reference to the proposal form. No material whatsoever was adduced before the Tribunal on that aspect. Though in the written statement filed by the insurer, it has been stated in para 5 that policy covers risk from 3.30 p.m. of 12.3.1988 till 11.3.1989, original proposal form was not filed before the Tribunal. No reason has been indicated as to why it was not so done. It is not known as to whether this was the application for proposal form submitted by the insured. Had this document been brought before the Tribunal, the insured would have got an opportunity to throw light on the alleged omission to mention about the accident. That having not been done, I find no scope for accepting prayer for proposal form being accepted as additional evidence. The position would have been different, had that been done. Therefore, I do not consider this to be a fit case for accepting prayer that proposal form be considered as additional evidence...

In view of the above facts and circumstance, there is no justification for affording any further opportunity to the appellant to adduce additional evidence. The evidence in the lower court being sufficient to hold that the truck in question was duly covered by an insurance policy as noted in the seizure list and in the written statement of opposite party No. 1 which was valid up to 20.5.1991 and when there is no evidence worth the name to contradict or falsify the same, the order of the Commissioner directing the appellant to pay the compensation cannot be interfered with. If the facts stated by the appellant are true then he may seek redress in proper forum regarding recovery of such money from the opposite party No. 1 and this court has nothing to say in that matter. During the course of hearing, argument was advanced and citations were relied upon relating to cancellation of an insurance policy certificate, meaning of the term "insurance" and the extent of obligation of the insured and insurer, etc. Since the appellant has failed to prove that the truck was not validly insured or that the certificate of insurance of the renewed policy had been cancelled due to bouncing of the cheque, such questions raised and citations relied upon are of no relevance in this case and accordingly not dealt with.

9. In the result, the appeals are dismissed with costs of contested scale.