

(2016) 02 KAR CK 0295
In the Karnataka High Court
Case No : M.F.A. No. 10685/2007 (WC)

The Divisional Manager National Insurance Co. Ltd.

APPELLANT

Vs

Mallikarjun and Others

RESPONDENT

Date of Decision : 22-02-2016

Acts Referred:

Employees Compensation Act, 1923 — Section 2(1)(n)

Citation : (2016) AAC 1328 : (2016) 2 AirKarR 511 : (2016) 3 KCCR 2684

Hon'ble Judges : B. Manohar, J.

Bench : Single Bench

Advocate : Hema L.K., Advocate, for the Appellant; Sudheer Kulkarni, Advocate, for the Respondent

Final Decision : Allowed

Judgement

B. Manohar, J.—1. This appeal has been filed by the appellant-insurance company challenging the judgment and order dated 31.05.2007 made in WCA/CR/No.36/2006 passed by the Labour Officer and Commissioner for Workmen's Compensation, Gulbarga (hereinafter referred to as WCC) fastening the liability on the appellant to compensate the claimant.

2. The first respondent herein filed a claim petition contending that, he was working as a hamali in a Tom Tom Auto bearing registration No. KA-32/A-2442 belonged to the second respondent herein. On 04.09.2005, as per the instructions of owner of the vehicle, for the purpose of loading and unloading the goods, while the claimant was proceeding in front of Shivalingeshwar Temple, Savalgi Village, due to rash and negligent driving of the said Tom Tom Auto driven by the first respondent, the vehicle turned turtle. Due to the impact, the claimant had sustained grievous injuries to his left thigh, right hand, left knee and other parts of the body. Immediately after the accident, he was shifted to Dr. P.G. Shah, hospital and he was inpatient there from 04.09.2005 to 20.09.2005 and had undergone surgery. He had spent more than Rs. 75,000/- towards medical expenditure. In view of fracture of left thigh, right hand and left knee, he

cannot do the work of loading and unloading. The accident occurred during the course and out of employment. As on the date of accident the insurance policy is in existence and sought for compensation of Rs. 4,50,000/-.

3. In pursuance of the notice issued by the WCC, the rider as well as the owner of Tom Tom auto filed the written statement admitting that the claimant was working as a hamali in the Tom Tom Auto and the owner is paying him salary of Rs. 3,000/- per month and batta of Rs. 30/- per day. Since the vehicle is covered by the insurance policy, the 3rd respondent-insurance company has to compensate the claimant and sought for dismissal of the claim petition as against respondent Nos. 1 and 2.

4. The third respondent/insurance company has filed the written statement denying the entire allegations made in the claim petition and also disputed the relationship of master and servant between the claimant and owner of the vehicle. Further no document has been produced to establish that the owner was paying him salary of Rs. 3,000/- p.m. and batta of Rs. 30/- per day. The specific defense taken by the 3rd respondent is that in the complaint lodged on 8-9-2005, the claimant himself admitted that while he was travelling in the said Tom Tom auto, the accident had occurred. Further, the driver of the Tom Tom auto did not possess the valid and effective Driving License as on the date of the accident and sought for dismissal of the claim petition as against the 3rd respondent.

5. On the basis of pleadings of the parties, the WCC framed necessary issues. The claimant, in order to prove his case examined himself as P.W.1 and examined the Doctor who issued the disability certificate as P.W.2 and got marked the documents as Ex. P1 to Ex. P9. On behalf of the respondent-Insurance Company, one of the officers of the Insurer was examined as R.W. 1 and got the insurance policy as Ex. R1.

6. The WCC, after appreciating the oral and documentary evidence let in by the parties and taking into consideration the arguments addressed by the learned counsel for the parties held that due to the rash and negligent driving of the Tom Tom goods auto, the accident had occurred. The claimant has lead evidence to show that he was working as hamali in the said Tom Tom goods auto. The accident occurred during the course and out of employment. Hence, the claimant is entitled for compensation. Taking the income of the claimant as Rs. 3,000/- p.m., taking 60% thereof, considering the disability to an extent of 30% and applying the relevant factor of 207.98, since the claimant was aged about 30 years, the WCC awarded a sum of Rs. 1,12,309/- with interest at the rate of 12% p.a. Since the Tom Tom goods auto was covered by insurance policy and premium has been paid for one employee, the WCC fastened the liability on the Insurance Company to compensate the claimant. The appellant-Insurance Company being aggrieved by the said judgment and order passed by the WCC, filed this appeal.

7. Smt. Hema L.K., learned counsel appearing for the appellant contended that the judgment and order passed by the WCC is contrary to law. Though the appellant has taken a specific contention that there is no relationship of master and servant between the claimant and the owner of the offending Tom Tom goods auto, without examining the documents produced by the appellant, the WCC, solely on the basis of self-serving statement of the claimant held that the claimant was working as a hamali in the said Tom Tom goods auto and he is entitled for compensation under the Workmen's Compensation Act. It is incumbent upon the claimant to prove that he is a workman within the meaning of Section 2(1)(n) of the Employees Compensation Act, 1923. Further, the 3rd respondent herein has to prove that he was paying salary to the claimant. In the present case, the owner has not produced any document to show that he was paying salary to the claimant. Except self-assertion in the evidence, no document has been produced. On the other hand, the complaint was lodged before the jurisdictional police on 8-9-2005 whereas the accident occurred on 4-9-2005. Apart from that, the claimant has clearly admitted that while he was proceeding towards temple for preparing sweets, he stopped the Tom Tom goods auto and travelled in it sitting next to the driver and the vehicle met with an accident due to the rash and negligent driving of the driver of the said vehicle. The complaint lodged before the police clearly discloses that there is no relationship of master and servant between the claimant and the owner of the vehicle. The WCC without examining the evidence available on record mechanically passed the order and the same cannot be sustained in the eye of law. Hence, sought for setting aside the same by allowing this appeal.

8. On the other hand, Sri. Sudheer Kulkarni, learned counsel appearing for respondent No. 1/claimant argued in support of the judgment and order passed by the WCC and contended that sufficient material has been produced before the WCC to prove that he was working as a hamali in the Tom Tom goods auto. Further, the driver as well as owner of the Tom Tom goods auto have supported the case of the claimant. On the other hand, the Insurance Company has failed to dispel the evidence let in by the claimant. The WCC taking into consideration the income, age and disability as assessed by the Doctor has awarded just and fair compensation and hence sought for dismissal of the appeal.

9. I have carefully considered the arguments addressed by the learned counsel for the parties and perused the judgment and order and oral and documentary evidence.

10. The records clearly disclose that the claimant has sustained injuries in the road traffic accident occurred on 4-9-2005. The case of the claimant is that he was working as a hamali in the Tom Tom goods auto. While he was proceeding in the said goods auto for the purpose of loading and unloading the goods, due to the rash and negligent driving of the Tom Tom goods auto, the auto turned turtle. Hence, the claimant sustained injuries and sought for compensation. The case of the appellant-Insurance Company is that the claimant is not a workman

and there is no relationship of master and servant between him and the owner of the vehicle. Immediately after the accident, he was taken to the hospital and in the hospital he has disclosed that he sustained injuries in the road traffic accident. The MLC register was also not sent to the jurisdictional police. Only on 8-9-2005, the complaint has been lodged before the jurisdictional police and thereafter, spot mahazar was conducted on 12-09-2005. The Motor Vehicle Inspector inspected the vehicle on 24-09-2005. The records further disclose that immediately after the accident, the claimant was admitted to Dr. P.G. Shah Hospital and he was inpatient there from 4-9-2005 to 20-9-2005. He had undergone operation. While he was admitted in the hospital, the claimant has disclosed that he sustained injuries due to the road traffic accident occurred on 4-9-2005. But, only on 8-9-2005, in consultation with his brother a complaint has been lodged. Thereafter, the police have proceeded with the matter. In the complaint, the claimant has clearly admitted that on 4-9-2005, at about 10.00 p.m. while he was proceeding towards Shivalingeshwara Temple for the purpose of preparing sweets, a Tom Tom goods auto came and he requested the driver of the said auto to stop the vehicle and he sat next to the driver. However, the driver of the said auto drove the vehicle in a rash and negligent manner inspite of the request made by him, due to which, the vehicle turned turtle and the claimant sustained injuries. Some persons shifted him to P.G. Shah hospital. In the FIR, it was clearly mentioned that while he was travelling in a goods auto, the goods auto turned turtle and he sustained injuries and this statement of the claimant was forwarded by his brother to the jurisdictional police. Except oral assertion, no document has been produced to show that the claimant was working as a hamali in the Tom Tom goods auto. Though the driver as well as the owner of the Tom Tom goods auto have admitted that the claimant was working as hamali in the vehicle in question, no document has been produced. The complaint filed before the jurisdictional police is the very first document. In the said document, the claimant has clearly mentioned that the accident occurred while he was travelling in the Tom Tom goods auto towards Shivalingeshwara Temple for the purpose of preparing sweets, the accident had occurred and now he cannot turn round and say that he was working as a hamali in the said vehicle. The Hon''ble Supreme Court in the case of ORIENTAL INSURANCE COMPANY LIMITED v. PREMALATA SHUKLA AND OTHERS reported in , (2007) 13 SCC 476 held that if the contents have been proved, the question of reliance thereupon only upon a part thereof and not upon the rest, on the technical ground that the same had not been proved in accordance with law, would not arise. In the instant case, the claimant having lodged the complaint before the jurisdictional police that the accident occurred while he was travelling in the Tom Tom goods auto towards Shivalingeshwara Temple for the purpose of preparing sweets, and he sustained injuries in the said road traffic accident, now he cannot turn round and say that he was travelling in the said Tom Tom goods auto for loading and unloading the goods as he was working as a hamali in the said vehicle. The Commissioner without critically examining the oral and documentary evidence adduced by the parties came to the conclusion that the claimant was

working as a hamali in the said vehicle. The WCC has lost sight of the complaint made by the claimant on 8-9-2005 and also FIR filed on 11-01-2006. While admitting in the hospital, the claimant has mentioned that he sustained injuries due to the road traffic accident. Hence, the judgment and order passed by the WCC cannot be sustained. Accordingly, I pass the following:

ORDER

The appeal is allowed. The judgment and order dated 31-05-2007 made in WCA/CR/36/2006 passed by the Labour Officer and Commissioner for Workmen's Compensation is set aside and the claim petition filed by the first respondent/claimant is dismissed.

The amount in deposit is directed to be refunded to the appellant.