

(2001) 07 KAR CK 0029
In the Karnataka High Court

United India Insurance Company Limited	APPELLANT
Vs	
Sridharagadde Basappa and Another	RESPONDENT

Date of Decision : 02-07-2001

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100

Citation : (2002) 2 ACC 614 : (2001) 4 KCCR 182 SN

Hon'ble Judges : Manjula Chellur, J

Bench : Single Bench

Judgement

Manjula Chellur, J.—This appeal is filed by the Insurance Company challenging the award in WC/SR.340/97 dated 16.7.1988 on the file of Commissioner for Workmen"s Compensation, Bellary.

2. In brief the facts that led to the filing of this appeal are as under:

The first respondent was the petitioner before the W.C. Court. He filed an application claiming compensation alleging that he sustained injuries in a motor accident while working as a loader in the lorry belonging to the second respondent herein and the said lorry met with an accident on 24.6.1997 and the first respondent sustained injuries. Therefore, according to him he is entitled for compensation towards permanent disability.

3. This was contested by the second respondent herein who was the employer contending that the petitioner-claimant was not his employee and he was not paying any wages to him. In other words employer denied the relationship of employer and employee. The appellant herein denied its liability to pay compensation in the absence of relationship of employer and employee between the first and second respondent herein. The appellant further contended that the records would amply establish the fact that the first respondent was only a passenger in the lorry and not an employee under the second respondent. With these objections the appellant and the second respondent before the Commissioner for Workmen"s Compensation sought for dismissal of the claim

petition.

4. On the basis of the above pleadings 6 issues were raised. The claimant was examined and got marked Exs. P1 to P6. No oral evidence was let in on behalf of the respondents, but Ex. R1 copy of the policy was marked. The Commissioner for Workmen's Compensation after perusing the entire evidence on record has come to conclusion that the claimant was a loader in the lorry belonging to the second respondent, and therefore, he was entitled for compensation. Ultimately he held that the appellant herein had to pay Rs. 58,400/- as compensation. Aggrieved by the said order the present appeal is filed.

5. The learned Counsel for the appellant contended that the appeal is maintainable as the question involved in this appeal pertains to a question of law. The learned Counsel for the first respondent submitted that the very appeal is not maintainable, as there is no substantive question of law involved in the case.

6. The learned Counsel for the appellant relied upon a decision reported in *Oriental Insurance Co. Ltd. v. Vasantha Pitambar and Anr.* : (1999)IIILLJ442Kant which reads as under:

Per contra, the learned Counsel for the respondent has strenuously argued that this is purely a question of fact which was decided by the Commissioner on the basis of evidence let in by the parties. Therefore, this Court cannot interfere with the findings of the Commissioner. The question whether it arose out of and in the course of employment is a substantial question of law and this has to be decided by the Appellate Court depending on the contentions raised by the parties therein. It is incumbent on the claimant to establish that the injuries sustained by him arose both out of and in the course of the employment to come within the Workmen's Compensation Act. Therefore, it is now necessary to find out as to whether the Commissioner has correctly come to the conclusion that the injuries sustained by the claimant arose out of and in the course of his employment. However, the learned Counsel for the respondent has drawn my attention to the decision *Mackinnon Mackenzie and Co. Pvt. Ltd. v. Ibrahim Mahmmud Issak* 1969 ACJ 422 (SC), wherein Their Lordships have held:

The words "in the course of the employment" mean "in the course of the work which the workman is employed to do and which is incidental to it". The words "arising out of employment" are understood to mean that "during the course of the employment, injury has resulted from some risk incidental to the duties of the service, which, unless engaged in the duty owing to the master, it is reasonable to believe the workman would not otherwise have suffered". There must be a casual relationship between the accident and employment.... If the accident had occurred on account of a risk which is an incident of the employment, the claim for compensation must succeed, unless of course the workman has exposed himself to an added peril by his own imprudent act".

7. He has further relied upon a decision reported in *New India Assurance Co. Ltd. Vs. Kartika Jena and Others*, which reads as under:

In view of the latter contention of the Counsel for claimant-respondent, before considering the appeal on merit, the scope of an appeal u/s 30 of the Act at the instance of the Insurance Company is to be ascertained. The learned Counsel for the claimant-respondent pleaded that the right of an Insurance Company to avoid the liability flows from the provisions contained in Sections 147 and 149 of the Motor Vehicles Act. It is submitted that even though there is no specific provision in the Workmen's Compensation Act regarding the liability of the Insurance Company, the principle available under the provisions of Sections 147 and 149 of the Motor Vehicles Act should be made applicable to all proceedings including the proceedings under the Workmen's Compensation Act. The learned Counsel has relied upon the decision of the Karnataka High Court in *United India Insurance Company Limited, Bangalore Vs. Venkataraju and Another*, wherein it was held that in an appeal u/s 30 of the Workmen's Compensation Act, the insurer of a motor vehicle can raise contentions basing on provisions contained in Sections 147 and 149 of the Motor Vehicles Act and cannot challenge the decision of the Commissioner for Workmen's Compensation on other grounds. Such contention of the Counsel for the claimant-respondent though prima facie attractive cannot be accepted in view of the specific decision of this Court in *National Insurance Co. Ltd. Vs. Sudarsan Bhuyan and Another*. It has been observed that there being no provision under the Workmen's Compensation Act like Section 110-C(2-A) of the Motor Vehicles Act (which corresponds to Section 170 of the Motor Vehicles Act, 1988), the insurer when noticed by the Commissioner can contest the claim on all available grounds. In the absence of any other decision of a larger Bench of this Court or of the Apex Court, I am bound by the aforesaid decision of this Court. Such preliminary objection raised by the Counsel for the claimant-respondent No. 1 that cannot be accepted.

8. He has further relied upon the decision reported in *Hyderabad Steel Tubes Pvt. Ltd. Vs. Aktar Begum and Others*, which reads as under:

Para 6: We are not inclined to agree with any of the submissions of the learned Counsel Sub-section (1) of Section 30 of Workmen's Compensation Act specifies in what respects appeal is allowed to the High Court against the orders of the Commissioner. The first proviso to Sub-section (1) says, "no appeal shall lie against any order unless a substantial question of law is involved in the appeal". Could it, be said that no substantial question of law had arisen in A.A.O. No. 833 of 1981 decided by the learned Single Judge? We are of the definite view that the appeal had thrown open a substantial question of law, namely whether on the evidence, the conclusion reached by the Commissioner was unreasonable?

Para 7: The Commissioner, basing on the evidence of Krishan Singh Panwar, RW1 rejected the claim of the legal representatives of the deceased workman. Rw. 1's testimony was to the effect that he did not ask the deceased to work on the crane and at about 5 p.m. on 20.9.1977 when he was taking his usual rounds, he saw the deceased Muneeruddin lying on the ground. As against this version the evidence of S. Gopal, AW2, a Fitter in the very same company, was to the effect

that on 20.9.1977 the Supervisor, RW1 directed Muneeruddin (deceased) to work on the crane and while working on the crane Muneeruddin died due to electric shock and fell down from a height of 24 feet at a distance of about 3 feet from the place where he, AW 2, was working and as a result of which the deceased sustained injuries on the chest and head. On what basis the evidence of a direct eyewitness like AW2 could be discarded, we fail to comprehend. The evidence of AW2 was corroborated by the post-mortem certificate, Ex. R1. This document was brushed aside by the Commissioner by merely saying that it showed some injuries. It is impossible to believe the version of the Supervisor, RW1 that without any cause whatsoever the body of Muneeruddin was found lying on the floor. It is, therefore, very clear that the Commissioner has misdirected himself totally while considering the evidence on record. The relevant aspects, which ought to have been taken into account were ignored by the Commissioner, namely the version of AW2 as to the deceased falling from the crane and the injuries found on the dead body of the deceased as disclosed by the post-mortem certificate, Ex. R1. The only reasonable conclusion that can be drawn from the evidence on record is that the death of Muneeruddin was the result of fall from the crane in the course of employment. No other conclusion is legally possible in the particular circumstances. The Commissioner's decision, in our considered view, was not only not correct, but was so unreasonable that no reasonable authority could ever have come to it.

9. He has further relied upon a decision reported in *R. Nallayan Vs. Chinna Irusan*, which reads as under:

The phrase "substantial question of law" as used in the proviso to Section 30(1) of the Workmen's Compensation Act, must be given a wider construction that is to be attributed to it u/s 110 of the CPC. When such a wider construction is given, I am of the opinion that the finding of the Commissioner for Workmen's Compensation that the applicant is a worker cannot be said to be a mere question of fact and not a question of law. It is not a mere sufficiency or insufficiency of the evidence placed before the Commissioner. It is a total lack of appreciation of the evidence placed before the Commissioner since the order does not refer to Ex. B2 or the oral evidence. Therefore, I am of the opinion that the right of the appellant to file this appeal when he is aggrieved over the order passed by the Commissioner for Workmen's Compensation cannot be curtailed or deprived to him on the ground that the finding of the Commissioner is a question of fact and not question of law. But, at the same time, I wish to observe that the appeal need not be allowed on that ground. I am of the opinion that it is a fit case in which, a direction has to be given to the Commissioner for Workmen's Compensation to consider the oral and documentary evidence placed before him and then give a specific finding on both the points raised before him for adjudication and then decide the matter afresh.

10. The Learned Counsel for the appellant further relied upon a decision reported in *Sunkamma v. H. Ramayya Reddy and Ors.* ILR 2000 Kar. 192, at Head Note

"A" which reads as under:

Civil Procedure Code, 1908 (Central Act No. 5 of 1908)--Section 100--Concurrent findings of fact--Scope of High Court to interfere--High Court can interfere with concurrent findings of fact in cases where it is found that the Courts below have ignored the weighty evidence and other circumstances and allowed the judgments to be influenced by inconsequential matters and have not considered the relevant evidence or where the approach to the matter is essentially erroneous and have failed to draw proper inferences from the proved facts and to apply law in proper perspective.

11. He further relied upon a decision reported in *Smt. N. Savithramma and Ors. v. Dr. B.N. Sheshadri* ILR 1999 Kar. 4336, at para 12 which reads as under:

What is sought to be done in this case is to find out whether the findings rendered by the Courts below is prima facie perverse and the resultant effect of the discussion of the Courts below is correctly given. Even otherwise u/s 103 of the CPC this Court can find out the factual mistake done by the Court below and set right the same. In fact nobody can be avaricious to deprive another man's particular property under the guise of boundaries shall prevail. The maxim cannot be misused to take advantage and grab the property of others especially the property belong to public body.

12. The Learned Counsel for the first respondent relied upon a decision reported in *New India Assurance Co. Ltd. Vs. Raja Naika and another*, which reads as under:

When a "Policy of Insurance" issued under Chapter XI by the insurer covers the liability of a person for death or bodily injury of his employee arising in the use of a motor vehicle in a public place to compensation required to be paid under the W.C. Act, action for recovery of compensation for death or bodily injury of such employee could be taken by instituting a proceeding before the Workmen's Compensation Commissioner under the W.C. Act because of the Act. If a proceeding is taken for recovery of compensation impleading Section 149 of the M.V. Act by instituting an action (claim) therefore before the Commissioner under the W.C. Act, could the insurer defend such action on grounds other than those available to him under Sub-section (2) of Section 149 of the M.V. Act. We find it difficult to think that the insurer can defend such action taken under the W.C. Act on grounds other than those made available to him under Sub-section (2) of Section 149 of the M.V. Act because having regard to the "Policy of Insurance" required to be compulsorily taken by the insured and issued by the insurer under the statute to cover certain risks covered by the policy could be defended by the insurer. Scope of defence of the insurer in an action brought by an employee or his employer under the W.C. Act cannot, therefore, be other than what is impleaded as required under Sub-sections (1) and (2) of Section 149 of the M.V. Act to make him liable to satisfy the judgment or award to be made by the Commissioner. An argument advanced on behalf of the insurer that a reference

to "Claims Tribunal" in the explanation found in Section 149 of the Act should make us hold that limiting of grounds of defence of the insurer. Under Sub-section (2) of Section 149 of the M.V. Act should apply only when the action taken is before a Claims Tribunal, does not appeal to us since the Court referred to in Sub-section (2) of Section 149 is wide enough to take within its ambit "Commissioner" under the W.C. Act inasmuch as in the provision in the M.V. Act of 1939 corresponding to Section 149 of the M.V. Act of 1988, there was nomination of "Claims Tribunal" at all and yet defences to be taken before the Claims Tribunal by the insurer under the M.V. Act of 1939 were those limited by that provision. Hence, when the insurer in a proceeding under the W.C. Act cannot defend an action for fixation of the liability of an employer for payment of compensation to his employee for his death or bodily injury on grounds other than those permitted by statute under Sub-section (2) of Section 149 of the M.V. Act, it must follow as a necessary corollary that no appeal by an insurer u/s 30(1) of the W.C. Act against an award made by the Commissioner could lie on grounds other than those specified under Sub-section (2) of Section 149 of the M.V. Act, subject to further condition that such grounds involve substantial questions of law required to be considered in appeal.

13. He has further relied upon a decision reported in K.P. Haumantha Gowda and Anr. v. Devaraju and Anr. 2 (1995) ACC 486 : 1996 ACJ 102, at paras 5 and 6 which reads as under:

Para 5 : The appeals are filed jointly by the owner as also the Insurance Company. The owner had remained *exparte* before the Commissioner despite notice. He did not file any statement. He did not cross-examine the claimants or the doctor. In other words, the owner admitted the gravity of the injury sustained, the status of the claimants, the monthly wages claimed by them, the total disablement pleaded and the total compensation claimed. Nothing is stated in the grounds of appeals before this Court as to why the owner did not appear before the Commissioner and contest the claim. As such the owner, who is appellant No. 1 herein, cannot challenge any of the findings entered by the Commissioner on the basis of the evidence tendered. Therefore, this Court need not consider any of the contentions urged on behalf of the owner in these appeals insofar as it relates to the findings of fact entered by the Commissioner.

Para 6: This Court has time and again stated that the Insurance Company cannot dispute the quantum of compensation awarded by the Commissioner for Workmen's Compensation, invoking the said principle applicable in a motor accident claim. Further the grounds of appeals urged before this Court do not show that challenge against the award is on any of the permitted grounds u/s 149 of the Motor Vehicles Act, 1988. As such, the challenge of insurer against the quantum of compensation made by the Commissioner has to fail.

14. He has further relied upon a decision reported in Oriental Insurance Co. Ltd. Vs. Mohammed Haneef, which reads as under:

Learned Counsel for the respondent raised a preliminary objection regarding the maintainability of the appeal. According to him, the essence of the attack made by the appellant relates to the quantum of compensation awarded and, therefore, the insurer is not entitled to challenge the same by filing the appeal. He relied on the decision of this Hon"ble Court in *New India Assurance Co. Ltd. Vs. Raja Naika and another*, . The reasoning therein is that the policy of insurance is issued under the Motor Vehicles Act and Section 149 of the said Act, restricts the grounds of contention of the insurer in a proceeding claiming compensation. Section 146 of the M.V. Act that no motor vehicle shall be plied in a public place unless it is insured. Therefore, the liability of the insurer has directly arisen out of the Motor Vehicles Act. If the proceedings for compensation are initiated under the Motor Vehicles Act with respect to the liability created under the insurance policy then Section 149(2) will step in and prevent the insurer from urging any contention other than those mentioned therein. Therefore, it cannot be said that, if proceedings are initiated under the Workmen"s Compensation Act, 1923, with respect to the same liability under the very same policy, the insurer has unbridled right to urge all contentions. The restriction placed by virtue of Section 149(2) is on the rights of the insurer of the policy referred to u/s 146 and that restriction should apply irrespective of the Forum. Hence, the preliminary objection of the learned Counsel for the respondent should be upheld.

15. He has further relied upon a decision reported in *United India Insurance Co. Ltd. Vs. Sri Allabax Nahna Sab*, , which reads as under:

Workmen"s Compensation Act, 1923, Section 4-A(3)(b) and Motor Vehicles Act, 1939, Section 95 (Section 147 of 1988 Act)--Motor Insurance--Penalty--Liability of Insurance Company--Whether the Insurance Company is liable for the penalty imposed against the employer and for the interest on the penalty--Held: no penalty is imposed for fault or default of the insured employer to pay compensation within the time permissible.

16. He has further relied upon a decision reported in *Shankarayya and Another Vs. United India Insurance Co. Ltd. and Another*, which reads as under:

Para 4: It clearly shows that the Insurance Company when impleaded as a party by the Court can be permitted to contest the proceedings on merits only if the conditions precedent mentioned in the section are found to be satisfied and for that purpose the insurance company has to obtain order in writing from the Tribunal and which should be a reasoned order by the Tribunal. Unless that procedure is followed, the Insurance Company cannot have a wider defence on merits than what is available to it by way of statutory defence. It is true that the claimants themselves had joined respondent No. 1, Insurance Company in the claim petition but that was done with a view to thrust the statutory liability on the Insurance Company on account of the contract of insurance. That was not an order of the Court itself permitting the Insurance Company which was impleaded to avail of a larger defence on merits on being satisfied on the aforesaid two

conditions mentioned in Section 170. Consequently, it must be held that on the facts of the present case, the respondent No. 1, Insurance Company was not entitled to file an appeal on merits of the claim, which was awarded by the Tribunal.

Para 5: It was not disputed before us that respondent No. 1, Insurance Company on account of contract of insurance is liable to comply with the entire award amount of compensation. That precisely is the reason why the insured has not thought it fit to challenge the compensation in these proceedings. Under these circumstances, respondent No. 1, Insurance Company will have to satisfy the entire award amount as directed by the Tribunal. If any part of the said amount remains still unpaid, the said balance amount shall be deposited by the respondent No. 1 in the Tribunal within eight weeks from the receipt of the copy of this order at its end. Office shall send a copy of this order to respondent No. 1, Insurance Company.

17. He has further relied upon a decision reported in New India Assurance Co. Ltd. Vs. R. Shridhara and another, which reads as under:

Before us the only contention advanced for the appellant by Mr. Suryanarayana Rao was that the Insurance Company was not liable to pay the compensation awarded in terms of the policy as there was no lis between the company and the workman, and therefore, there was no liability to make good the amount. But, however, he fairly conceded that the first respondent manufacturer had taken out group insurance covering his 4 employees in the establishment and liability if arose only in favour of the assured manufacturer employer. He made available to the Court the statement of objections filed by the Insurance Company before the Commissioner. We found that no specific plea was taken which could be said to be similar to the contention advanced before this Court. Therefore, the Commissioner went by the admitted fact that the first respondent was covered by group insurance policy under which the insurer was liable to make good to the extent of Rs. 25,000/- in respect of any miscellaneous accident suffered by the employees in the manufacturing unit which the insured wanted to pay and we have no doubt about it. Then the liability of the Insurance Company to pay under that policy cannot be disputed. That the Insurance Company has different types of policies including the one under the provisions of the Workmen's Compensation Act, is not a defence to absolve itself from paying under the miscellaneous group insurance as in the instant case. That will be helping technical defence, which this Court will not countenance. In any event, as long as it is clarified that there is no dual liability of the Insurance Company to the insured as well as the workman, Insurance Company cannot make a grievance of making payment to the workman.

18. The Learned Counsel for the respondent further relied upon a decision reported in United India Insurance Company Limited, Bangalore Vs. Chandamma and Others, , which reads as under:

Motor Vehicles Act, 1988 (Central Act No. 59 of 1988)--Section 149--Insured owner using the vehicle as "Stage Carriage" when it had permit only to run as "Contract Carriage"--Liability of the insurer--Held: Using the offending vehicle in breach of a permit conditions does not absolve the insurer from paying compensation awarded nor such a "Plea" is available to the insurer u/s 149(2).

19. He has further relied upon a decision reported in New India Assurance Company Vs. Shri Satpal Singh and Others, which reads as under:

Under the new Act an insurance policy covering third party risk is not required to exclude gratuitous passengers in a vehicle no matter that the vehicle is of any type or class. Hence the decisions rendered under the old Act vis-a-vis, gratuitous passengers are of no avail while considering the liability of the Insurance Co. in respect of any accident which occurred or would occur after the new Act came into force.

20. The Learned Counsel for the appellant relying on the decision of this Court reported in argued that whether the accident arose out of and in the course of employment is a substantial question of law, and therefore, finding of the Commissioner on this very question is maintainable u/s 30(1) of the W.C. Act.

21. The Learned Counsel for the respondents submitted that no doubt whether the accident arose out of and in the course of employment is a substantial question of law, but before proceeding to decide that question, one has to look into the provisions of Motor Vehicles Act, in particular Section 149(2) of Motor Vehicles Act.

22. According to the Learned Counsel for the appellant insurer, the contents of FIR would indicate that the injured was proceeding as a gratuitous passenger in the offending vehicle in search of job and he was not an employee under the employer i.e. the owner of the lorry. Therefore, according to him the finding of the learned Commissioner that this injured was an employee under the insured, was a wrong finding.

23. As against this the Learned Counsel for the respondent submitted that unless and until the insurer has grounds of defence u/s 149(2) of M.V. Act, this question cannot be entertained.

24. In view of the above submissions, the point that would arise for Court's consideration is:

Whether the present appeal is maintainable and deserves to be allowed?

25. In order to claim compensation under Workmen's Compensation Act, it is incumbent on the injured claimant or the dependants of the deceased to establish that the injuries or the death occurred out of and in the course of employment. The word "arising out of employment" definitely means during the course of employment, the death or injury must have occurred from some risk incidental to the job with which the injured or the deceased was connected to.

Unless the injury has resulted from some sort of risk incidental to the duty of the injury while on duty, it cannot be called as arising out of employment. The word "in the course of employment" would mean in the course of the job which the employee was employed to do and happens to be incidental to it. It must be an incident of employment. Therefore, there has to be relationship between the injury and the employment in which the injured or the deceased are engaged as the case may be.

26. In other words to sustain a claim petition under Workmen's Compensation Act, the claimant in this case has to establish that he sustained the injury in question out of and during the course of his employment. According to the appellant herein the claimant injured was not at all a workman under the insured i.e., the owner of the lorry.

27. The question would be whether this Court can go into such a question?

28. Admittedly, what is substantial question of law is not at all defined under the W.C. Act. We find similar word being used in CPC vide Section 100.

29. According to the Learned Counsel for the first respondent whether the injured was an employee under the insured and whether the incident in question is the one out of and in the course of employment is purely a question of fact and the same cannot be gone into in this case. When once the relationship between the injured and the employer is admitted, it is a matter of decision i.e., what exactly would be just and proper compensation to be paid? The foundation for a claim under W.C. Act is the relationship of master and servant. We cannot apply the principles applicable to gratuitous passengers in motor vehicles as relied on by the learned Counsel for the respondent as the claimant in this case has specifically chosen the Forum as W.C. Court i.e., to say that the injured specifically contends that he was an employee under the insured. When once the insurer takes the defence that the injury sustained by the claimant was not during the course of employment or an incident arising out of employment, the Tribunal has to go into that question because it goes to the very root of the foundation upon which a claim under Workmen's Compensation can be made. In a given case where the High Court finds a finding of the fact arrived at by the Court below by ignoring the ample evidence and other circumstances and has come to erroneous conclusion so as to apply law in proper prospective, the High Court can interfere with such finding.

30. In the present case the appeal is filed not questioning the quantum of compensation but questioning the finding of the Court below with regard to the relationship of the insured and the claimant. According to the claimant he was a loader in the lorry bearing No. OR-06 2836 and on the date of accident i.e., on 24.6.97 they were proceeding from Moka to Bellary and the said lorry met with an accident near Sangankal village as it dashed against the roadside tree. The first respondent before the Commissioner is no other than the owner of the lorry in question. The second respondent before the Commissioner is the insurer who

is the appellant herein. The first respondent has taken a specific contention that the injured was not a loader working under him on a daily payment of Rs. 75/-. The second respondent appellant took specific contention that there was no relationship between the owner of the lorry and the claimant injured.

31. The claimant in support of his case has relied upon Exs. PI to P5. The case was registered against the driver of the lorry in Cr. No. 112/97. Based on the oral statement of the claimant inspite of the serious contention raised by the insured and the insurer regarding the relationship between the insured and the injured, the Commissioner has come to conclusion that the first respondent herein was a loader as on the date of accident in question. It was pointed out by the learned Counsel for the appellant that in the very FIR, the earliest document which came into existence immediately after the accident, the relationship of the injured and the insured is not given. Therefore, the Commissioner was wrong in awarding compensation.

32. On perusal of Ex. PI it is noticed that the complaint was lodged at about 8 p.m. on 26.6.1997 by the injured himself. The alleged accident has occurred on 24.6.1997. Admittedly, the vehicle is insured with the appellant herein by the owner of the lorry. In this complaint of the injured, the injured says that he was doing coolie work at Dasaranagenahalli and on that day he along with his wife was proceeding from Moka to Bellary for coolie work at Bellary. He further says the driver of the lorry in question due to his negligence caused the accident and he is not aware of the name and address of the lorry driver, but he would recognise him if shown to him. If he was really working under the owner of the lorry he would have stated with regard to his occupation as loader in his complaint. He would have described the name of the employer and so also the name and address of the driver. If he was proceeding in the lorry as loader as contended by him, why his wife has accompanied him is not explained. The Commissioner ought to have looked into this document which was relied upon by the claimant himself. Before proceeding to award compensation the Commissioner ought to be satisfied himself that there was relationship of employer and employee between the insured and the claimant. So far as this particular finding is concerned, it would go to the very root of the claim of the claimant. Therefore, definitely it is substantial question that has to be gone into by the Appellate Court as contended by the learned Counsel for the appellant.

33. Under these circumstances, the finding of the Tribunal that he was a loader under the insured and the accident in question arose out of and in the course of employment is an erroneous finding. The Commissioner has brushed aside immense material available on record and has given much weight to the oral evidence of the claimant which is quite contrary to his own statement in the FIR. That apart the Commissioner was wrong in saying that the insurer failed to establish the fact that there was no relationship between the insured and the claimant. Definitely they could not produce any documents for establishing this negative aspect. Even otherwise as stated above the very documents relied upon

by the claimant would establish that he was not a loader under the insured.

34. Accordingly, the judgment and award of the Tribunal deserve to be set aside.

35. Hence the appeal is allowed setting aside the judgment and award of the W.C. Commissioner in W.C. SR 340/97 dated 16.7.1998. No order as to costs. The amount in deposit, if any, be paid to the appellant.