* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **FAO Nos.262/2012 &381/2012**

% **30th April, 2014**

1. **FAO No.262/2012**

ORIENTAL INSURANCE COMPANY LTD. ..... Appellant
Through: Ms. Manjusha Wadhwa, Advocate.

Versus

SMT. SUGIA DEVI AND ANR. ..... Respondents
Through: Ms. Pratima N. Chauhan, Advocate.

2. **FAO No.381/2012**

ORIENTAL INSURANCE COMPANY LTD. ..... Appellant
Through: Ms. Manjusha Wadhwa, Advocate.

Versus

TULSI DEVI & ANR. ..... Respondents
Through: Ms. Pratima N. Chauhan, Advocate.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

FAO No.262/2012

1. This first appeal is filed under Section 30 of the Employee's Compensation Act, 1923 (hereinafter referred to as 'the Act') impugning

the judgment of the Commissioner dated 30.4.2012 which has allowed the claim petition filed by the respondent no.1. The claim petition was filed by the respondent no.1 on account of death of Sh. Biresh Manjhi, her son in an accident on 15.4.2011 while driving the truck bearing no. RJ 14 GC-1623 belonging to the respondent no.2 herein. The accident of the deceased Biresh Manjhi took place in the course of and arising out of employment and hence the claim under the Act.

2. The facts of the case are that the deceased Sh. Brijesh Manjhi was working as a cleaner on the truck bearing No. RJ 14 GC-1623. On 15.4.2011, Sh. Biresh Manjhi was on an occupational trip with the truck loaded with the consignment of cloth. When the truck reached under the jurisdiction of police station Sabarkantha, Gujrat at around 8.30 P.M. there was an accident whereby the vehicle lost balance and the truck turned turtle. The cleaner Sh. Biresh Manjhi was ejected from the cabin and was caught underneath the vehicle resulting in his death on the spot. The body of the deceased was taken to the Government hospital at Modasa and after the post mortem the dead body was handed over. The vehicle was insured with the appellant herein. The deceased was 19

years at the time of his death and was earning Rs.5,500/- per month plus Rs.100/- per day as food allowance.

3. The respondent no.2 herein, the employer filed its/his written statement before the Commissioner admitting that Sh. Biresh Manjhi was employed as a cleaner on his vehicle/truck bearing No. RJ 14 GC-1623. The factum of the accident on 19.4.2011 was not denied as also the fact that Sh. Biresh Manjhi died as a result of the accident. The subject vehicle was insured with the appellant for the period from 2.3.2011 to 1.3.2012 and additional premium was paid for the coverage under the Act.

4. The appellant filed its written statement and pleaded that the claim was not maintainable allegedly because no documents such as a FIR, DD entry number etc were filed to prove that the accident took place on 15.4.2011 of the insured truck.

5. The case was fixed for evidence of the parties and the respondent no.1 relied upon the documents prepared by the police pertaining to the accident which was got through the RTI Act, 2005 from the Senior Civil Court at Modasa. Another letter received from the police sub-Inspector that the entire set of documents has been filed with the court. The documents filed include the FIR with respect to accident.

6. The appellant, who was the respondent no.2 before the Commissioner, when the case was fixed for its evidence filed a copy of the letter issued by the employer/respondent no.2 herein to its investigator wherein the employer states that the deceased Sh. Biresh Manjhi was employed not by the respondent no.2 herein but was employed by the driver and payment was made by the driver.

7. Before I turn to the arguments urged on behalf of the appellant, it is necessary to note that under Section 30 of the Act, an appeal lies only on a substantial question of law. If there is no substantial question of law, appeal under Section 30 will not be entertained. Issues of appreciation of evidence, and conclusions derived therefrom in the opinion of this Court cannot amount to substantial question of law if out of two possible/plausible views the commissioner takes one view on the appreciation of evidence on preponderance of probabilities, that does not result in arising a substantial question of law.

8. The Commissioner has observed that the discrepancy exists as to whether the deceased Sh. Biresh Manjhi was the employee of the respondent no.2 herein or of the driver, however the issue should be answered in favour of the respondent no.1 herein/claimant. There were two separate statements of the employer/respondent no.2. First

statement was the statement in the written statement admitting the employment but subsequently a different statement was made to the investigator of the appellant-company that the deceased was not the employee of respondent no.2 but of the driver. According to the Commissioner the second statement had been made to avoid his own liability by the employer. Consequently, the Commissioner preferred the statement made in the written statement of the employment of Sh. Biresh Manjhi by the respondent no.2 herein in preference to the statement made by the respondent no.2 herein to the investigator of the appellant-company. This conclusion therefore is based on appreciation of evidence, and once two views are possible from evidence and the Commissioner takes one possible and plausible view, there does not arise any substantial question of law under Section 30 of the Act.

9. Learned counsel for the appellant strenuously urged before this Court the following arguments:-

(i) The claim petition had to be dismissed because respondent no.1 had to discharge the onus with respect to the accident and which the respondent no.1 failed to discharge because the respondent no.1 did not come into the witness box and no opportunity was granted to the appellant to cross-examine the respondent no.1.

(ii) Commissioner has wrongly taken the daily food allowance of Rs.100/- for determining the wages for calculation of damages and which action of the Commissioner is violative of the law as per the judgments passed by the High Courts of Madhya Pradesh and Andhra Pradesh in the cases of ***Smt. Shakuntala and Ors. Vs. Kanna Dangi and Ors. 2007 ACJ 2486*** and ***New India Assurance Co. Ltd. Vs. Kotam Appa Rao and Anr. 1997 ACJ 529.*** It is argued that these judgments show that daily food allowance is a special expenditure which is excluded by virtue of the definition of 'wages' contained in Section 2(m) of the Act.

10. Both the arguments urged on behalf of the appellant are without any substance whatsoever and are rejected for the reasons contained hereinafter.

11.(i) Firstly, it is required to be noted that neither in the grounds of appeal before this Court and nor before the Commissioner any grievance was raised or prayer was made by the appellant-insurance company that the appellant-insurance company be allowed to cross-examine the respondent no.1. Once that is so, I fail to understand how appellant can orally for the first time argue in this Court during final arguments that it was not allowed to cross-examine the respondent no.1.

Once there is no application which was filed before the Commissioner for seeking cross-examination or examination of the respondent no.1, it is not permissible for the appellant to argue before this Court that the appellant is prejudiced on account of non-examination of the respondent no.1. In any case, the issue as regards non-applicability of strict provisions of CPC and Evidence Act to proceedings before the Commissioner is no longer *res integra* and which has been decided by the Supreme Court in the case of ***Om Parkash Batish Vs. Ranjit Kaur @ Ranbir Kaur & Ors. (2008) 12 SCC 212*** that strict provisions of CPC and Evidence Act do not apply to proceedings before the Commissioner.

(ii) Secondly, the issues essentially to be decided by the Commissioner are with respect to existence of relationship of employer and employee and happening of the accident and which aspects stood proved or established by filing of the FIR as also the admission of the respondent no.1 of the employment of the deceased Sh. Biresh Manjhi with the employer/respondent no.2 herein. Therefore, in my opinion, considering that strict provisions of CPC and Evidence Act are not applicable to the proceedings before the Commissioner, it was not necessary for the respondent no.1 to have stepped into the witness box once the necessary aspects were otherwise established on record and if

the appellant wanted to examine the claimant it was for it to make such prayer/application and which admittedly it did not and hence no grievance can now be raised.

12. So far as the second argument that food allowance of Rs.100/- per day should not be taken for determining the amount of wages for the purpose of calculation of damages is concerned, the argument is misconceived for various reasons. The first reason is that the legislature by means of Act 45 of 2009 has specifically introduced Section 4(1B) of the Act, and the object of this was to do away with the factual disputes with respect to rate of wages or whether the wages have been proved or not proved before the Commissioner once the wages are below the minimum wage figure. This new provision of Section 4(1B) provides that the notification of the Central Government specifying the figure of monthly wages is the figure to be taken for the purpose of calculation of compensation/damages under Section 4 of the Act. The monthly rates which are fixed in official gazette of the Central Government are the minimum wages with one another object of law that a claimant should not be deprived of compensation which is calculated on minimum wage basis. It could not be disputed before me on behalf of the appellant that the figure of Rs.8,000/- taken by the Commissioner

in the impugned judgment is the minimum wages figure as per the notification of the Central Government in the official gazette and therefore when the figure of Rs.8,000/- taken by the Commissioner is the figure of minimum wages, then, there is no illegality by the Commissioner in taking this figure of Rs.8,000/- as the wage for the purpose of calculation of damages in view of Section 4(1B) of the Act. The argument of daily food allowance to be excluded from wages would have been relevant if as a result thereof issue was for taking of the wages above the figure of minimum wages and not when the wage amount/figure for calculation of compensation is taken as the minimum wage figure as per the notification of government.

13(i). Reliance placed upon by the appellant on the judgment in the case of ***Smt. Shakuntala and Ors. (supra)*** is misconceived because a subsequent judgment of the Madhya Pradesh High Court in the case of ***Basantabai and Anr. Vs. Shamim Bee and Anr. 2012 ACJ 1858*** refers to this earlier judgment in the case of ***Smt. Shakuntala and Ors. (supra)*** to hold that as per the judgment in the case of ***Smt. Shakuntala and Ors. (supra)*** actually daily food allowance has to be included in the expression 'wages'. So far as the judgment of Andhra Pradesh High Court in the case of ***New India Assurance Co. Ltd.(supra)*** is concerned,

I respectfully disagree with the same inasmuch as, in my opinion, food allowance is not specifically excluded on a literal interpretation of the definition of 'wages' as found under Section 2(m) of the Act.

(ii) In any case, this issue of the applicability of the judgments cited by the appellant is really rendered academic because these judgments have been rendered on the definition of wages prior to introduction of Section 4(1B), and now by this provision brought in by the amending Act 45 of 2009, it is the minimum wage figure which is taken to be the figure for the purpose of calculation of damages. Once that figure of minimum wages has been taken by the Commissioner for calculation of damages, the issue as to whether daily food allowance is or is not included becomes immaterial because only the consolidated figure of minimum wages is/ has been taken by the Commissioner as per the notification of the Central Government for calculation of compensation payable under the Act.

14. In view of the above, there is no merit in the appeal, and the same is therefore dismissed with costs of Rs.15,000/- and which costs shall be paid within six weeks from today.

+ FAO No.381/2012

15. In this appeal, same issues were urged as in FAO No.262/2012 on behalf of the appellant-insurance company, and since they have already been dealt with in the above judgment in FAO No.262/2012, these issues will also stand answered against the appellant. Also, I may note that an additional factor for dismissing the appeal in this case is that admittedly the appellant-insurance company in spite of opportunity being given to lead evidence did not lead any evidence whatsoever and this aspect is noted in the last line of para 5 of the impugned judgment of the Commissioner. Therefore, both the arguments urged with respect to inclusion of the food allowance and respondent no.1 herein/claimant having been failed to prove the case are without any merit and are accordingly rejected.

16. This appeal is also therefore dismissed with costs of Rs.15,000/- to be payable within six weeks from today.

APRIL 30, 2014 **VALMIKI J. MEHTA, J.**
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