HONOURABLE SRI JUSTICE N. BALAYOGI

M.A.C.M.A.No. 485 OF 2009

<u>JUDGMENT</u>:

1. The appellant/United Insurance Company preferred this appeal aggrieved by the Award and decree dated 18.03.2002 passed in OP.No. 2059 of 1999 on the file of learned Chairman, Motor Vehicle Accident Claims Tribunal-cum-II Additional District Judge, at Visakhapatnam, whereby compensation of Rs.1,92,420/- with interest at 9% per annum from the date of petition till the date of realization was awarded in favour of the first respondent/claimant and the appellant-United India Insurance Company Limited and third respondent-National Insurance Company Limited were directed to deposit the compensation amount jointly and severally within thirty days from the date of the Award and on such deposit, the first respondent/claimant was directed to withdraw Rs.50,000/- and remaining amount shall be kept in Fixed Deposit in the Vysya bank for a period of two years.

2. The contention of the appellant-United Insurance Company limited is that the Tribunal erred in fixing the liability at 50% on it when found negligence on the part of the oil tanker, particularly when there is no negligence on the part of the fourth respondent/auto owner and P.W.1 specifically pleaded and deposed the rashness and negligence on the part of the driver of the oil tanker.

3. The case of the first respondent/claimant in brief is that: on 21.09.1998 when the auto bearing registration No. AHQ 7605

belonging to the fourth respondent herein, insured with the appellant-United India Insurance Company Limited reached Mosque near Zoo park, one Gas tanker lorry bearing registration No. BR 16G 5679, belonging to second respondent herein, insured with third respondent-National Insurance Company Limited, being driven in rash and negligent manner, dashed the auto, as a result of which, the first respondent who was travelling in the said auto suffered grievous multiple injuries to her right leg, left hand and sustained other injuries all over the body. Immediately she was shifted to K.G. Hospital, from there, she was shifted to City Poly Clinic, Visakha Health Services (Pvt) Limited, Visakhapatnam, whereat she was operated by Dr.Lanka Ramarao and incurred expenditure of Rs.1,25,000/- for treatment. She requires another operation. She was aged 39 years as on the date of accident and used to earn Rs.3,000/- to Rs.4,000/- per month by selling milk. On account of the accident, she lost her earnings.

4. The second respondent-Owner of the oil tanker remained ex parte before the Tribunal. The third respondent-National Insurance Company, fourth respondent-owner of the auto and the appellant-United India Insurance Company filed their separate counter affidavits denying the averments of the first respondent-claimant made in the claim petition.

5. The Tribunal having considered the pleadings of the respective parties and heard the learned Counsel on either side, framed the following issues for settlement.

1. Whether the accident occurred due to the rash and negligent driving of the offending vehicle by its driver and resulted in injuries to the victim ?
2. If so, whether the petitioner is entitled for compensation ? If so, to what amount ?
3. Which of the respondents is liable to pay compensation ?
4. To what relief ?

6. In support of the respective cases, the first respondent-claimant was examined herself as P.W.1 besides examining P.W.2 and got marked Exs. A.1 to A.9. On behalf of the appellant-United India Insurance Company Limited and respondents 2 to 4, none were examined, however, Ex.B.1 policy was got marked.

7. Now the point that arises for determination is:

" Whether the findings and consequential Award of the Tribunal suffer from any legal infirmities warranting interference ?"

The only contention of the learned Counsel for the appellant-United India Insurance Company Limited is that though the evidence of P.W.1 and documentary evidence at Ex.A.1 clearly clinches that the accident occurred due to rash and negligent driving of the driver of the oil tanker of the second respondent, which was insured with third respondent-National Insurance Company limited, the finding of 50% liability against the appellant is without based on any oral or documentary evidence. The finding of the Tribunal that the accident was due to collusion is not at all the case of the claimant or based on material on record, whereas the first respondent/claimant contended that as she sustained injuries and lost income on account of the motor vehicle accident, she is entitled to compensation.

8. The first respondent/claimant herself was examined as P.W.1. Her clinching evidence is that on 21.09.1998 when she was waiting for city bus at Yendada junction, auto bearing No. AHQ 7605 belonging to the fourth respondent herein and insured with the appellant-United India Insurance Company Limited came there and the first respondent/claimant and two others boarded the said auto to go to Jagadamba junction and when the said auto reached the Mosque, near Zoo park, one gas tanker-lorry bearing No. BR 16G 5679 belonging to the second respondent and insured with third respondent, being driven in rash and negligent manner by its driver dashed against the said auto in which the claimant was travelling. In the accident, the claimant sustained grievous multiple injuries to her right leg, left hand and other injuries all over the body. The two other persons travelling in the said auto died on the spot.

9. Ex.A.1 is the FIR submitted by the driver of the said auto wherein he clearly stated with regard to boarding of P.W.1 and other persons in the auto. There is no allegation in Ex.A.1 FIR with regard to rash and negligence on the part of the auto driver. Further there is no whisper of alleged collusion of the two vehicles.

10. It is the clinching evidence of P.W.1 that when the auto bearing No. AHQ 7605 reached Mosque near Zoo park, the lorry bearing No. BR 16G 5679 came in opposite direction and being driven in rash and negligent manner, dashed against the said auto. In the accident, she sustained grievous injuries and two other

persons travelled along with her in the said auto died on the spot. It is also her evidence that the police registered a case against the driver of the lorry-gas tanker and the said case ended in conviction.

11. During the cross examination, she admitted that the auto owner and insurer of the auto were added as parties to the petition. She has not specifically claimed compensation from each of the respondents. A suggestion was put to P.W.1 that the accident was due to rash and negligent driving of the auto driver, which was denied. In the cross examination by National Insurance Company, she admitted that the accident occurred due to negligence on the part of the driver of the gas tanker-lorry, that the police registered a case against the driver of the gas tanker and that she did not know whether United India Insurance Company Limited (appellant herein) is liable to pay compensation. So her evidence itself clinches the issue that the accident was due to negligence on the part of the driver of the gas tanker bearing No. BR 16G 5679. The evidence of P.W.1 read with Ex.A.1 FIR and Ex.A.2 MVI report well established that the accident was not due to any mechanical defect of either of the auto or the gas tanker and it is due to rash and negligence on the part of the driver of the gas tanker.

12. In the FIR, Ex.A.1, there is a clear assertion that at the time of accident, the driver of the auto drove the auto on the left side of the road. At that time, the oil tanker, came in opposite direction and during the course of overtaking the RTC bus, the oil tanker dashed the auto on its left side. There is no whisper either in

Ex,.A.1 or in the evidence of P.W.1 or at least in the complaint about collusion. I do not know as to how the Tribunal came to the conclusion '*since there is collusion of auto and offending vehicle, I direct both the Insurance Companies i.e. United Insurance Company and National Insurance Company Limited are liable equally to pay compensation*'. This conclusion is not supported by any oral or documentary evidence. There is no reasoning given by the Tribunal for reaching such conclusion in its Award about the said collusion. Therefore the finding of the Tribunal and conclusion thereon that since the accident was due to the collusion of auto and gas tanker, both Insurance Companies are equally liable to pay compensation is illegal and untenable and warrants inference. Therefore the Award of the Tribunal requires to be modified to the said extent.

13. Pertinently, the appellant-United India Insurance Company is not questioning the quantum of compensation. Though the owner and insurer of the gas tanker were added as parties, they did not choose to come on record to contest the matter.

14. In the facts and circumstances discussed hereinabove, I am of the considered opinion that the finding of the Tribunal to the effect that the appellant-United India Insurance Company and third respondent-National Insurance Company are equally liable to pay compensation is perverse and illegal, and the same is required to be set aside and is accordingly set aside.

15. Accordingly the appeal is allowed with costs while setting aside the Award and Decree dated 18.03.2002 passed in

OP.No. 2059 of 1999 on the file of learned Chairman, Motor Vehicle Accident Claims Tribunal-cum-II Additional District Judge, at Visakhapatnam to the extent of fixing 50% liability on the appellant-United India Insurance Company Limited and confirming other findings of the Tribunal.

16. Consequently, it is hereby held that respondents 2 and 3-- owner and insurer of the lorry-gas tanker bearing No.BR 16G 5679 are jointly and severally liable to pay the compensation to the first respondent-claimant. Accordingly, they are directed to deposit the compensation amount of Rs.1,92,420/- as awarded by the Tribunal with interest at 9% per annum from the date of petition i.e. 22.9.1999 till the date of realization, if not already deposited or paid, within thirty days from the date of receipt of a copy of this judgment.

17. On such deposit being made, the first respondent/claimant is permitted to withdraw the same.

18. Advocate fee is fixed at Rs.2,500/-.

19. Miscellaneous petitions pending consideration if any in the appeal shall stand closed in consequence.

JUSTICE N. BALAYOGI

Dated 5th June, 2018.
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