Reserved Judgment

IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

A.O. No.818 of 2006.

Shri Kamal Kumar Arora S/O Late Shri N.C.Arora R/O 49/1 Teg Bahadur Road, Dehradun.

… Appellant.

Vs.

Shri Kunwar Singh Manwal and two others.

…Respondents.

Mr. Arvind Vashisth, Advocate, learned counsel for the appellant.
Mr. Lokendra Dobhal, Advocate, learned counsel for the respondent no.1 and 2.
Mr. V.K.Kohli, Senior Advocate with Ms. Vandana Singh, Advocate, learned counsel for the respondent No. 3- Insurance Company.

WITH

A.O. No. 528 of 2006

The Oriental Insurance Company Limited.

… Appellant.

Vs.

Shri Kamal Kumar Arora and others.

…Respondents.

Mr. V.K.Kohli, Senior Advocate with Ms. Vandana Singh, Advocate, learned counsel for the appellant- Insurance Company.
Mr. Arvind Vashisth, Advocate, with Ms. Monika Pant learned counsel for the respondent no.1.
Mr. Lokendra Dobhal, Advocate, learned counsel for the respondent no.2&3.
Mr. Ramji Srivastava, Advocate, learned counsel for the respondent no. 4-U.P.S.R.T.C.

Date December 31, 2012.

Hon'ble B.S.Verma, J.

Since both the appeals under Section 173 of the Motor Vehicles Act, 1988 (*for short the Act*) have arisen out of the same judgment and award dated 4-7-2006 passed by the Motor Accident Claims Tribunal/District Judge, Dehradun (*for short the Tribunal*) passed in Motor Accident Claim Petition No. 47 of 2004, Kamal Kumar Arora Vs. Shri Kunwar Singh Manral and others, therefore, for

the sake of convenience, they are being decided by this common judgment.

2. By the impugned award, the claim petition was allowed against the respondent no.1 and U.P.S.R.T.C.- the respondent no.4 in A.O. No. 528 of 2006 and compensation of Rs. 12,20,000/- was awarded in favour of the claimant along with simple interest @ 6% per annum, as mentioned in the impugned award. A.O. No. 818 of 2006 has been filed by the claimant for enhancement of compensation, while A.O. No. 528 of 2006 has been preferred by the Insurance Company.

3. Brief facts giving rise to the present appeal are that the claimant Kamal Kumar Arora moved a claim petition under Section 166 of the Act for compensation of Rs. 1,01,22,000/- on account of injuries sustained by him in a motor vehicle accident, which took place near Birla Yamaha Factory on Hardwar-Dehradun motor road on 20-9-2003 at about 12-30 p.m., alleging therein that the claimant is aged 43 years of age and is a contractor earning Rs. 25,000/- per month; that on the fateful day, he was returning from Rishikesh to Dehradun by his own Maruti Zen Car No. UP-07C-3712 and at about 12-30 p.m. the offending bus No. U.P. 07G-9474 belonging to Sri Kunwar Singh Manwal and engaged under contract agreement with U.P.S.R.T.C., which was being driven rashly and negligently by its driver hit the Maruti Car with the result the claimant suffered grievous injuries on different parts of his body and he was trapped in the car; that several persons arrived at the place of accident and pulled him out by cutting a portion of the car. One Yashpal Singh Gill, who also reached there in his own vehicle, took the injured to Bhardwaj Hospital at Rishikesh, where he was given first aid and was referred to Dehradun. The injured was admitted in C.M.I. Hospital and from there he was referred to Delhi and was got admitted in Apollo Hospital, where he was hospitalised for about 70 days. The injured had undergone operation and due to the injuries suffered by him his vision power was also

reduced and unfortunately, he was caught by Deep Vein Thrombosis (*for short DVT*) and thus he became 100% permanently disabled, which ultimately compelled him to close down and sell his two firms.

4. Report of the motor accident in question was lodged on 12-1-2004 with the police. The case of the claimant is that he had already spent about Rs.10 lakhs on his treatment and since the treatment is still continuing, he would have to incur further expenses of about 10-00 Lakhs on his treatment. The claimant also claimed an amount of 80,000/- on account of loss of salary of his wife, who attended on the injured in the hospital and remained absent from her duty without pay. The claimant had to incur further expenses on nutritious diet in the hospital. The claimant has claimed amounts of Rs. 1,01,22,000/- on different counts by filing the claim petition against the owner, driver, insurer and the U.P.S.R.T.C.

5. The claim petition was contested by the owner and driver of the offending bus by filing their written statement inter alia on the ground that the bus in question ws duly insured with the Oriental Insurance Company the O.P.No.3 and that the driver of the bus-O.P.No.2 was having a valid driving licence on the fateful day. Both of them have admitted the factum of accident but contended that the accident occurred due to rash and negligent driving of Maruti Car by the injured him and it was the Maruti Car which hit against the bus when the injured turned the car towards extreme right near the place of accident.

6. Insurance Company-O.P.No. 3 also filed its written statement and denied that the driver of the bus was not having a valid driving licence and also pleaded that the claimant was driving the car without having a valid driving licence. Since the offending bus was

being driven under contract agreement of O.P.No.4-U.P.S.R.T.C., therefore, the O.P. NO. 4 is liable for compensation, if any.

7. The O.P.No. 4-UPSRTC also filed its written statement and admitted that the offending bus was its contract agreement. It was asserted that since the owner offending bus was duly insured, therefore, the liability if any rests upon the insurance company.

8. On the pleadings of the parties, the learned Tribunal framed following Issues:-

"1. Whether the claimant while driving his own Maruti Zen Car No. UP-07C-3712 from Rishikesh to Dehradun on 20-9-2003 reached near Birla Yamha Factory at about 12.30 P.M. (day time), Bus No. UP-07G-9474 driven by its driver rashly and negligently hit the Maruti car of the claimant resulting into serious injuries to the claimant?

2. Whether this accident took place due to the rash and negligent driving by the claimant of his own vehicle as alleged in the written statement of the O.P. Nos. 1 and 2?

3. Whether this claim petition is bad for non-joinder of driver, owner and insurer of the aforesaid Maruti Car?

4. Whether the driver of the Bus aforesaid was not holding a driving licence at the time of accident?

5. Whether the claimant is entitled for any compensation, if so, how much and from which party?

9. Before the learned Tribunal, on behalf of the claimant both documentary as well as oral evidence was led. The claimant examined himself as P.W.1, Mr. Dinesh Bhatt as P.W.2, Sanjay Kukreti as P.W.3, Yashpal Singh Gill as P.W.4, Dev Dutt Sharma as P.W.5, Manoj Rajput as P.W.6, Dr. A.P.Saxena as P.W.7 and Sanjay

Dhingra as P.W.8. On behalf of the O.P.Nos. 1 and 2only photocopy of driving licence of O.P. No. 2 was filed but no oral evience was led.

10. On behalf of O.P. No.3- Insurance Company no evidence was led before the Tribunal to substantiate its case. O.P. No. 4 also led both oral and documentary evidence in the case.

11. The learned Tribunal after considering the evidence of the parties and hearing both the parties took Issue Nos. 1 and 2 together for decision. After a detailed discussion of the evidence led by the parties from page nos. 4 to 13, it has been held that that the motor accident in question was the result of contributory negligence of the driver of the offending bus as well as the claimant-injured who was driving his Maruti Zen Car on the fateful day in equal share. It was also held that the claimant had subsequently added in the claim petition that due to development of DVT disease he became permanently disabled and also observed that there is no evidence to hold that due to accident, the claimant became permanently disabled. The learned Tribunal on Issue No. 3 has held that the insurance company has not advanced any argument regarding the non-joinder of the driver, owner and insurer of the Maruti Zen Car. Moreover, the injured-claimant, who is owner of the said car was himself driving the vehicle on the fateful day and it has been held that the plea raised by the insurance company is fully misconceived. On Issue NO. 4, it has been held that the driving of the offending bus was having a valid driving licence. On Issue No.5, the learned Tribunal after discussing the entire evidence led by the parties came to the conclusion that the claimant is entitled to compensation of Rs. 12,20,000/- along with 6% simple interest per annum thereon w.e.f. 22-2-2006 till the date of payment and cost of Rs. 2,000/-. It has also been held that since there was contributory negligence in equal share, the claimant is entitled to half of the compensation. It has also been held that since the bus in question was duly insured with the Insurance Company, therefore, the

compensation would be payable by the Oriental Insurance Company. Ultimately the claim petition has been dismissed against the driver and the U.P.S.R.T.C. but has been decreed against the owner of the insurer. The Insurance Company has been directed to pay half of the compensation amount and interest thereon as directed by the Tribunal along with cost of Rs. 2,000/-. The learned Tribunal by order dated 4-7-2006 has decreed the claim petition accordingly, which gave rise to the present appeal.

12. Aggrieved by the impugned award, both the insurance company as well as the claimant has preferred the present appeal. The claimant has preferred the appeal for enhancement of compensation, while the Insurance Company is aggrieved by the quantum of compensation.

13. I have heard learned counsel for the parties and perused the entire material placed before this Court including the lower Court Record and the documents filed on behalf of the appellant-claimant under Order 41, Rule 27 C.P.C. as additional evidence, namely, certified copy of confession allegedly made by the driver of the offending bus and the certified copy of order of conviction and sentence dated 8-4-2010 passed by the learned A.C.J.M. II Dehradun.

14. The short controversy involved in these two appeals is whether the finding of the learned Tribunal holding that there has been contributory negligence on the part of the claimant-appellant in equal share is erroneous and whether the Insurance Company-appellant has proved that the driver of the offending bus was not having a valid driving licence, as alleged by the Insurance Company.

15. In this case, the claimant-injured has examined himself as P.W.1 before the learned Tribunal. The case of the claimant is that the

accident in question resulting into grievous injuries to the claimant occurred due to sole negligence on the part of the driver of the offending bus. In the written statement, which has been filed jointly on behalf of the owner and driver of the offending bus, specific stand has been taken that the accident had occurred due to the rash and negligent driving of the Maruti Car by the injured himself and that there was no negligence on the part of the driver of the bus in question. To support the version of the driver and owner of the bus, Nasir Khan conductor of the bus in question has come forward to file his affidavit and he has been examined as D.W.1. Thus, there is ocular testimony of these two witnesses-one is injured himself and the other is conductor of the bus in question.

16. In his statement on oath, the injured has stated that the accident in question had taken place at about 12-20 p.m. on the fateful day. Thus, it is clear that the motor accident in question took place in broad daylight. It has been admitted by the claimant-injured that at the time of accident, there was no other vehicle at the spot and that there is head on collision of the two vehicles. In his affidavit, Nasir Khan (D.W.1) has specifically stated that at the time of motor vehicle accident, he noticed that there was a dead dog lying on the road and in order to avoid it, the injured-claimant all of a sudden turned his car towards wrong side, which ultimately led to the accident in question. P.W.1 in his examination-in-chief has stated that he had seen the bus coming on high speed from about 250 Mt. The learned Tribunal in its judgment while deciding Issue Nos. 1 and 2 has elaborately dealt with the evidence led by the parties on the point of negligence and at page no.9 of the impugned award the learned Tribunal has inter alia observed as under:-

"….As mentioned earlier the claimant in his evidence has accepted that the two vehicles collided face to face. The claimant has also asserted that he noticed the offending vehicle approaching him in a high speed from a distance of 30-10 ft although he has further said

that he slow down his vehicle and took his vehicle at the side of the road but facts remains the same that it was a head on collision. The impact was so strong that the steering wheel of the claimant's veicle struck so hard on the stomach of the claimant that his organ inside the stomach sustained injuries as claimed by the claimant and his vehicle was also severally damaged. The conductor of the bus has alleged that there was some dead dog lying on the road and in order to avoid the dead dog, the claimant went to the wrong side and seeing the claimant on the wrong side bus driver turned his vehicle on another side to avoid the accident but the claimant again returned back and the accident took place."

17. Learned counsel for the claimant-appellant, Mr. Arvind Vashist, Advocate, has contended that in the criminal case, which was registered on police challani report against the driver of the offending bus, the driver had confessed his guilt before the criminal court and ultimately, the A.C.J.M. II, Dehradun by his order dated 8-4-2010 convicted and sentenced the accused Darban Singh in Criminal Case No 6032 of 2009. The certified copies of confession made by the driver Darban Singh and the copy of the order of conviction and sentence have been filed as additional evidence in this appeal.

18. In reply, the learned Senior Advocate Mr. V.K.Kohli, appearing on behalf of the Insurance Company has submitted that the confession recorded in a criminal case cannot be read in evidence, particularly when neither in the confessional statement given in Criminal Case No. 6032 of 2009, name of the complainant has not been disclosed and the verdict of the criminal court has not come on merits after contest. Learned counsel for the Insurance Company further submitted that the confessional statement given before the criminal Court does not have binding effect upon the findings of the Tribunal, where the case has been fully contested from both the side and the doctrine of *res ipsa loquitur* has been fully considered by the

learned Tribunal and the learned Tribunal has rightly held that both the drivers were equally responsible for the accident in question. Learned counsel for the Insurance Company

19. I have pondered over the matter. The driver Darban Singh had appeared before the criminal court on 8-4-2010, while the impugned award had been passed by the learned Tribunal as far back as 4-7-2006. Moreover, the learned Tribunal after considering the ocular testimony of the witnesses referred to above recorded before the Tribunal recorded a finding of fact that had either of the drivers been careful and cautious in driving their respective vehicles, the accident could have been avoided. The finding recorded by the criminal court on confession of the accused in such circumstances would be of no avail to the claimant-appellant, particularly when the award had been given by the learned Tribunal on 4-7-2006 and the driver of the bus had given confessional statement after about 4 years from the date of award. In the facts and circumstances of the case coupled with the fact that there has been head on collision of the two vehicles a, I am unable to hold that the accident had occurred due to sole rashness and negligence on the part of the driver of the bus in question.

20. Having perused the testimony of the aforesaid two witnesses on the point as well as the statements of other witnesses, namely P.W.4, Yashpal Singh and P.W. 6, Manoj Rajput examined by the claimant-injured, I am of the considered view that in the case at hand, the driver of both the two vehicles had ample opportunity to avoid the accident in question. It is admitted to the witnesses that the road was sufficiently wide where the accident had taken place and that there was no other vehicle at that time nearby the place of accident.

21. Learned counsel for the claimant-appellant has submitted that the finding of the learned Tribunal is not justified because it has

not been established that the injured-claimant, who was driving his own Maruti car had been guilty of some act or omission, which had materially contributed to the damage caused. In support of his arguments, learned counsel has placed reliance upon the case of Pramodkumar Rasikbhai Jhaveri Vs. Karmasey Kunvargi Tak and others [(2002)6, S.C.C. 45]. This case law was followed by the Apex Court in a subsequent decision in the case of Usha Rajkhowa and others Vs. Paramount Industries and others [(2009) 14 Supreme Court Cases, 71]

22. I have considered the two case-law. The ratio of the Apex Court judgment cannot be disputed. In the case of Pramodkumar Rasikbhai Jhaveri (supra), the respondents did not contend before the Tribunal that there was contributory negligence on the part of the appellant, the driver of the car. In the case of Usha Rajkhowa (supra), no such finding of "contributory negligence" was recorded by the Tribunal and in the impugned judgment of the High Court it was observed that the learned Tribunal had held that the accident took place due to contributory negligence of the driver of the truck and the Maruti car. In the case at hand, there is specific case of the opposite parties in their written statement that the accident in question occurred due to contributory negligence of the claimant-injured. Moreover, in the case at hand, specific Issue nos. 1 and 2 were framed by the Tribunal on the point of rash and negligence on the pleadings of the rival parties and the learned Tribunal has recorded a categorical finding that both the drivers were equally responsible for the accident. The facts of the case at hand are quite distinct, therefore, the cited case does not help the claimant-appellant.

23. In the facts and circumstances of the case, I am of the view that had either of the two, namely the injured who was driving the Maruti Car in question and the driver of the offending bus, been cautious and careful in driving their respective vehicles, the accident

could have been avoided, therefore, the learned Tribunal has rightly held that there has been contributory negligence on the part of the claimant-injured as well as the driver of the offending bus to the extent of 50% each. I do not find any ground to take a different view on Issue Nos. 1 and 2 on the point of rash and negligent driving from that has been taken by the learned Tribunal. The learned Tribunal has rightly held that there has been contributory negligence in equal share on the part of the injured as well as driver of the offending vehicle.

24. So far as the question whether the driver of the offending bus was having a valid driving licence or not, the learned Tribunal on Issue No. 4 has observed as under:-

"On this issue also no argument was advanced by either of the parties. Photocopy of the driving license of O.P.No. 2 is on record which shows that on the date of accident he was holding a valid driving license.

The issue is decided accordingly."

25. It may be mentioned here that Issue Nos. 3 and 4 were framed by the Tribunal on the pleadings of the Oriental Insurance Company- O.P.No.3. It has been observed by the learned Tribunal that the appellant-Insurance Company had not led any evidence before the Tribunal to substantiate its case. Even before this Court, the appellant-Insurance Company has not adduced any such evidence in appeal, which could show that the driver of the bus in question was not having a valid driving licence on the date of accident. Therefore, the findings recorded by the learned Tribunal on Issue No. 3 and 4 do not call for any interference by this Court in appeal.

26. Learned counsel for the appellant Insurance Company has next submitted that the compensation awarded by the learned Tribunal in favour of the claimant is on higher side, therefore, the compensation

award cannot be said to be fair, just and adequate. Learned counsel for the Insurance Company further contended that the learned Tribunal has committed an error in accepting the medical expenditure bills to the tune of Rs. 8,00 Lakhs because the medical expenses bills were not proved in accordance with law.

27. Before the learned Tribunal, P.W.5, Dev Dutt Sharma, an employee of Apollo Hospital, New Delhi was examined. In his examination-in-chief this witness has proved the original bills, medical reports issued from the hospital. In his cross-examination conducted on behalf of owner and driver of the vehicle, this witness has stated that the from 22nd September 2003 to 8th October 2003, the Apollo Hospital had charged amount of Rs. 4,90,417/- from the claimant and from 8th October to 5th December, further amount of 65,237/- was realised on account of clinical test and purchase of medical bills. Besides, the claimant has filed a number of medical prescription bills of different medical stores. Considering the nature of injuries, period of hospitalisation, different places of treatment, coupled with the fact that the claimant had undergone various types of clinical tests and also considering the fact that none of the opposite parties has denied the veracity of the medical expenses bills filed by the claimant-injured before the learned Tribunal, this Court is of the view that the learned Tribunal has rightly held that the claimant is entitled to an amount of Rs. 8,00,000/- towards medical expenses.

28. From a bare perusal of the impugned award, it is evident that the learned Tribunal has assessed loss of earning of the claimant for a period of two years to the tune of Rs. 2,80,000/-. The Tribunal has also assessed the compensation towards pain, agony and sufferings to the tune of Rs. 1,00,000/-. The Tribunal has also assessed expenses on transportation to the tune of Rs. 20,000/-. Learned Tribunal has also assessed compensation for expenses on attendant to the tune of Rs. 18,000/- in addition to assessment of expenditure on rich diet to

the tune of Rs. 10,000/-, total amounting to Rs. 12,28,000/- and not Rs. 12,20,000/-, which is apparently a calculation mistake. Since the contributory negligence was held to be 50%, therefore, the claimant-appellant is entitled to 50% of the assessed compensation amount of Rs. 12,28,000/- = Rs. 6,14,000/-.

29. Considering all the facts and circumstances of the case, in the case at hand, the amount of Rs. 6,14,000/- would be a just, fair and reasonable amount of compensation to be awarded in favour of the claimant appellant.

30. So far as the interest part is concerned, the learned tribunal has awarded simple interest @ 6% per annum from 22-3-2006 till the date of payment. In my view, this finding is justified and does not call for any interference. The learned Tribunal has also awarded a sum of Rs. 2,000/- as cost of the proceeding.

31. Since the bus in question was duly insured with the Oriental Insurance Company appellant in A.O. No. 528 of 2006, the amount of compensation i.e. Rs. 6,14,000/- along with interest @ 6%, as directed by the learned Tribunal shall be payable by the insurer-appellant.

32. For the reasons and discussion above, both the appeals are devoid of any merit and liable to be dismissed outright subject to aforesaid correction.

33. Both the appeals (A.O. No. 818 of 2006 and A.O. No. 528 of 2006) are dismissed. The findings recorded by the learned Tribunal are upheld. The claimant-appellant Kamal Kumar is entitled to compensation of Rs.6,14,000/-, along with simple interest @ 6% per

annum, as directed by the learned Tribunal w.e.f. 22-3-2006 till the date of payment and cost of Rs. 2,000/- payable by the Oriental Insurance Company Limited.

34. The amount, if any, deposited with this Court be remitted to the Motor Accident Claims Tribunal concerned for being paid to the claimant-injured. Lower court record be returned to the learned Tribunal.

35. Interim order dated 5-9-2006 passed in A.O. No. 528 of 2006 is vacated.

(B.S.Verma,J.)

RCP