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

Date of decision: 27th May, 2015

+ **MAC.APP. 52/2014**

MASTER RIGVED

..... Appellant

Through Mr.Anshuman Bal, Advocate

versus

JAGBIR & ORS.

..... Respondents

Through Ms. Garima Prashad, Advocate
Respondent no. 2 & 3

+ **MAC.APP. 725/2014**

UTTARAKHAND TRANSPORT CORPORATION.... Appellant

Through Ms. Garima Prashad, Advocate

versus

MASTER RIGVED

..... Respondent

Through Mr.Anshuman Bal, Advocate

CORAM:

HON'BLE MR. JUSTICE G.P.MITTAL

G. P. MITTAL, J. (ORAL)

1. These two appeals arise out of the judgment dated 23.09.2013 passed by the Motor Accident Claims Tribunal (the Claims Tribunal) whereby compensation of Rs.4,33,100/- was awarded in favour of Claimant Master Rigved for having suffered injuries of 69%

permanent disability in respect of his right upper limb.

2. For the sake of convenience, Appellant in MAC.APP.725/2014 shall be referred to as Uttarakhand Transport Corporation (UKTC), whereas the Appellant in MAC.APP.52/2014 shall be referred to as the Claimant.
3. On appreciation of evidence, the Claims Tribunal found that there was negligence in the ratio of 25:75 of the Claimant and the bus driver. The compensation awarded by the Claims Tribunal under various heads is extracted hereunder:-

Sl. No.	Compensation under various heads	Awarded by the Claims Tribunal
1.	Medical Expenses	1,88,100/-
2.	Pain, Sufferings & Enjoyment of Life	50,000/-
3.	Special Diet, Attendant & Conveyance Charges	20,000/-
4.	Loss of Studies	25,000/-
5.	Compensation towards Disfigurement	50,000/-
6.	Compensation on account of Disability	79,000/-
7.	Loss of Amenities	21,000/-
	Total	Rs.4,33,100/-

4. It is urged by the learned counsel for the UKTC that the Claims Tribunal having held that there was 25% negligence on the part of the Claimant had erred in making liable the UKTC to pay the entire compensation of Rs.4,33,100/- in favour of the Claimant. The liability of UKTC ought to have been restricted to 75% of the compensation awarded.
5. On the other hand, the learned counsel for the Claimant has submitted that the Claims Tribunal's finding on negligence cannot be sustained. The manner of accident will show that the accident was caused on account of rash and negligent driving of UKTC bus driver. In any case, it is urged that there cannot be any negligence on the part of the Claimant, a three year's child sitting in a bus. It is contended that the compensation awarded towards non-pecuniary damages and on account of permanent disability are on the lower side. It is argued that the Claims Tribunal erred in taking functional disability as 35% as against the permanent disability to the extent of 69%. It is urged that the Claims Tribunal erred in taking notional income of the child to be Rs.15,000/- which was suggested in the year 1994. The child was to grow and eventually to work. His notional income ought to have been taken on the basis of his potential income.

6. While holding negligence in the ratio of 25:75 vis-à-vis injured Claimant and UKTC bus driver, the Claims Tribunal observed as under:-

9. PW1 tendered his affidavit Ex.PW1/A in evidence and stated that on 18.07.2010 at about 8.00 PM, he alongwith his son Master Rigved Anand was going in a bus bearing no. UA 07 K 0278 from Dehradun to Mussorie. It was being driven by the respondent no.1 at a high speed, rashly and negligently. When it reached Mohini Tiraha, Dehradun, it struck against a Tata 407 as a result of which his son sustained injuries i.e. Sids Degloving injury with compound fracture right elbow joint, fracture 2 fingers right hand. He was removed to Combined Medical Institute Dehradun from where he was brought at Max Hospital where he remained till 27.07.2010. He was hospitalised two more times and three operations were conducted. On being cross-examined, he stated that he was sitting on the right side of the bus with Master Rigved Anand at window side. He admitted that the bus was moving in highly congested area. Tata 407 had come from the front side on the single road. He denied that the driver and conductor had asked him to get the hand of his son inside the mirror (sic glass) but despite that he kept flying his hand out of window. He denied that the driver and conductor were not negligent rather his son was negligent.

10. R1W1, R1W2 and R1W3 who were the driver, conductor on duty on the bus have stated that respondent no.1 was driving the bus at a normal speed carefully. The boy who was sitting in the bus had negligently held his hand out of the window. Respondent no.1 had asked him to keep his hand inside bus he did not pay any attention and at the Mohini Tiraha the bus was hit by Tata 407 being driven by its driver rashly and negligently, as a result of which the boy sustained injuries on his hand which was kept outside the window. On being cross-

examined, they denied that the accident had occurred due to the negligence of respondent no.1. Respondent no.1 however, admitted that a criminal case was registered against him and he was arrested.

11. In the instant case, a complaint was given by PW1 to the local police at Dehradun wherein he had alleged that the bus was being driven rashly. The driver i.e. the respondent no.1 was overtaking at the Mohini Tiraha and struck with a Tata 407 resulting injuries on his son. On the MLC, prepared at Max Hospital, Saket, the injuries were opined grievous. On examination, presence of degloving right arm with compound fracture heads of radius and ulna with fracture distal third of humerus with fracture shaft of radius 6/10 cm. approx. flap proximally based with elements of crush injury was found. He was operated and was advised further follow up. During the course of arguments, it was admitted by the respondent no.1 that he was fined by the Court at Dehradun. It is true that no one can be allowed to keep the hand out of the window in the moving bus. RIW1, RIW2 and RIW3 have stated that the boy had kept the hand out of the window. He was asked to keep the hand inside the window but he did not listen. Testimony of PW1 also shows that he was sitting with the boy. So, it was incumbent upon PW1 to ask the boy to keep his hand inside the window as on the single road chances of coming of other vehicle from the other side cannot be ruled out which could result in the accident. In the present case also, the Tempo had come from the opposite side. The bus struck with the Tempo resulting injuries on his hand which was kept out of the window. That being the position, it is a case of contributory negligence. PW1 has stated that the bus was being driven at a fast speed and in a negligent manner. Respondent no.1 was trying to overtake and in that process it struck with a Tempo.

12. In the totality of facts and circumstances, I am of the opinion that the negligence on the part of the claimant and that of respondent no.1 is in the proportion of 25:75.

It has come on record that the bus was under the charge of respondent no.3 and owned by respondent no.2.”

7. It may be noted that the Claimant suffered injury mainly on his right elbow. It is not unusual to keep his/her elbow on the window by a passenger travelling in any bus. A special warning is required to be given to the passengers whenever a bus passes through such a narrow area that there is not even a distance of a few inches from the walls or from the vehicle coming from the opposite direction.
8. Mahesh Kumar, father of the Claimant with regard to the manner of the accident deposed as under:-

“.... The bus was being driven by its driver at a very high speed driven most rashly and negligently. When the bus reached Mohini Tiraha, Dehradun Uttarakhand it hit against a Tata 407 as a result of which my son received grievous injuries whereas other passengers received minor injuries in the accident. The accident was caused due to the negligence of driver of bus no.UA-07K-0278...”

9. In cross-examination Mahesh Kumar PW-1 denied the suggestion that the driver and the conductor had asked him to keep hand of Master Rigved inside glass or that 2-3 passengers also made a similar request to him. Testimony of PW-1 that some other passengers also suffered injuries was not challenged in cross-examination. It does not stand to reason that if on a narrow road or on a single road a passenger is

specifically told by the driver or the conductor to keep his elbow/hand inside the bus, he will still hang it outside. In view of this, I am not inclined to believe the testimony of Jagbir RW-1 and Suresh Kumar RW-3 that father of Master Rigved did not accede to their request to keep the hand of Master Rigved inside the bus. While passing on a single road and negotiating any vehicle coming from the opposite direction, the driver of UKTC bus ought to have been extra cautious to see that any passenger did not suffer any injury because of crossing another vehicle.

10. It is sought to be contended on behalf of UKTC that in fact there was negligence on the part of Tata 407 which came from the opposite direction. Admittedly, no criminal case was registered against the driver of Tata 407 nor UKTC nor its driver Jagbir made any complaint to the police against the driver of Tata 407. In view of this, I am of the considered opinion that it was solely on account of negligence of UKTC driver Jagbir that Master Rigved suffered injuries on his right hand.

COMPENSATION

11. The Claims Tribunal awarded compensation of ₹79,000/- towards

permanent disability in addition to the award of compensation under various heads. It is the compensation of ₹79,000/- which is stated to be exorbitant by UKTC and low by the Claimant.

12. As per the Disability Certified Ex.PW-1/53, the Claimant suffered 69% permanent disability on account of sidesweep degloving injury with compound fracture of right elbow joint. Immediately after the accident, the Claimant was removed to Combined Medical Institute, Dehradun. On the next day he was shifted to Max Institute of Aesthetic & Reconstructive Surgery where exploration with open reduction and internal fixation of fractures with soft tissue approximation under GA was done immediately after admission; wound debridement, split skin grafting and application of vacuum assisted closure (VAC) dressing under GA was done on 21.07.2010. The Claimant was discharged on 27.07.2010. He was readmitted on 28.09.2010 and was discharged on 30.09.2010 and then he was admitted on 25.01.2011 morning and discharged in the evening. Removal of implant (K-wire) was done on 29.09.2010.

13. The Claimant was a little less than three years at the time of the accident in the year 2010. He is now about 8 years. Ultimately, the Claimant has to settle in his life and to earn his livelihood. It will,

therefore, be not appropriate to award the compensation on account of permanent disability and loss of earning capacity merely on the basis of the notional income of a child. The Claimant would grow, obtain appropriate qualification before started working. I tend to take the minimum wages of a Matriculate to compute the loss of earning capacity, i.e. ₹6448/- per month.

14. As far as functional disability is concerned, the Claimant suffered permanent disability to the extent of 69% in his right upper limb. Unfortunately, the Claimant's father did not examine any expert witness to bring positive evidence as to how the disability will impact the Claimant's earning capacity. Taking into consideration that the Claimant's right upper limb, particularly, the elbow was affected, I will take the functional disability to be 50% of 69% i.e. 35%.
15. The future loss of earning capacity therefore will come to ₹4,06,224/- (6448/- x 12 x 15 x 35%).
16. Thus, instead of compensation of ₹79,000/- awarded by the Claims Tribunal towards loss of future earning capacity, this Court awards a compensation of ₹4,06,224/-.
17. The total compensation awarded, therefore, comes to ₹7,60,324/-.

18. The compensation is accordingly enhanced by ₹3,27,224/- which shall carry interest @ 9% per annum as granted by the Claims Tribunal.
19. The enhanced compensation along with interest shall be deposited by the Appellant with the UCO Bank, Delhi High Court Branch, New Delhi within six weeks.
20. The amount so deposited shall be disbursed/held in fixed deposit in terms of the order passed by the Claims Tribunal.
21. Both the appeals are disposed of in above terms.
22. Pending applications, if any, also stand disposed of.
23. Statutory amount, if any, deposited shall be refunded to the Insurance Company on deposit of the enhanced compensation and filing a certificate in this regard.

(G.P. MITTAL)
JUDGE

MAY 27, 2015
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