IN THE HIGH COURT OF TRIPURA
<u>A G A R T A L A</u>

<u>CRP No.27 of 2011</u>

Shri Dulal Chandra Majumder,
son of late Indra Kumar Majumder, resident of Village – Banamalipur (Madhya) near Lal Bahadur Club, P.O. Agartala, P.S. East Agartala, Sub-Division- Agartala, District – West Tripura.

……. Petitioner

– V e r s u s –

1. **Shri Bibek Roy,**
son of Shri Bimal Kanti Roy, resident of Village – Subhas Colony, P.O. Gandhigram, P.S. West Agartala, Sub-Division- Agartala, District – West Tripura

2. **The Oriental Insurance Company Ltd.**
Represented by its Branch Manager, having his office at Ganaraj Chowmuhani, P.O. Agartala, P.S. East Agartala, Sub-Division- Agartala, District – West Tripura

(Insurer of the offending vehicle bearing registration No.TR-01-C-2132, Auto Rickshaw)

……. Respondents

B E F O R E
THE HON'BLE MR. JUSTICE S. TALAPATRA

For the petitioner	:	Mr. Somik Deb, Advocate
For the respondent No.1	:	Mr. D.C. Roy, Advocate
For the respondent No.2	:	None.
Date of hearing	:	10.02.2015
Date of delivery of Judgment & Order	:	**27.04.2015**

Whether fit for reporting :

YES	NO
√	

JUDGMENT & ORDER

The settled position of law is that power to review is created by the statute. It is not an inherent power and such power must be conferred by law either specifically or by necessary implication. The power of review can be exercised for correction of mistake apparent on the face of the records, not for substituting a view. The error contemplated under the rule of review must not be searched, it should be apparent as stated on the face of the record. It must be an error of inadvertence which does not require any longer process of reasoning.

[2] In this backdrop, by this petition filed under Article 227 of the Constitution of India, the legality of the judgment and order dated 26.04.2011 delivered in Civil Misc (Review) 225 of 2009 arising from T.S.(MAC) No.59 of 2008 has been seriously questioned by the petitioner. There is no dispute that the petitioner filed a claim petition under section 166 of the M V Act being Title Suit (MAC) No. 59 of 2008 in the Motor Accident Claims Tribunal, West Tripura, Agartala for compensation as he received incapacitating injuries from the road traffic accident on 04.06.2007 while he was travelling by riding his scooter bearing registration No.TR-01-A-5569, for rash and negligent driving of the auto rickshaw bearing registration No.TR-01-C-2132. As assessed, he received the disability to the extent of 30% for the said accident. The said vehicle bearing No.TR-01-C-2132 (auto rickshaw) was insured by the Oriental Insurance Company Ltd. Agartala at the relevant point of time. The tribunal awarded him a sum of Rs.4, 67, 946/- with interest @6% from 29.01.2008 till realisation. On the face of the said judgment and award 22.10.2009 delivered in T.S.(MAC)59 of 2008 the insurer, the Oriental Insurance Company Ltd., filed a review petition under Order XLVII Rule 1 of the C.P.C. and sub Section 1 of Section 169 of the MV Act for reviewing the said judgment. Primarily on 2(two) grounds. There had been no evidence at all to show that accident occasioned loss of income and there is probability of future loss of income. Since the claimant, the petitioner herein, was in the Government employment, if any loss in the income had occasioned for the said accident the records might have existed and produced. Thus, in absence of the best evidence having not been produced, the tribunal ought to have drawn an adverse inference against the claimant. After hearing the parties, on the face of the stiff resistance offered by the claimant on the ground of maintainability of review and on the right of insurance company to raise such defence in view of Section 149(2) of the MV Act, by the impugned order dated 26.04.2011, it has been observed that:

> **On perusal of the case record of T.S. (MAC) 59 of 2008 as well as the judgment dated 22.10.2009 the admitted position is that the petitioner was a Headmaster under the Department of Education, Government of Tripura at the time of alleged accident. The petitioner never stated that because of his**

> **disability he has lost his service. On the contrary, it appears to me that the petitioner is continuing his service. Since the petitioner is continuing his service and hence apparently it is established that there was no loss of his salary following his alleged disablement and so I find that the is not entitled to get any amount towards his loss of salary (income) following his disability. In other words, the petitioner is not entitled to get Rs.5,99,306/- which was given to him in original judgment dated 22.10.2009 in T.S.(MAC) 59 of 2008. Besides the above observation he is entitled to get 75% of Rs.24,635/-, i.e., Rs.18,476/- as award in the original case with the interest @6% (six per cent) per annum from the date of filing of T.S.(MAC) 59 of 2008, i.e. 29.01.2008 till realisation.**

[3] Premised on such observation the compensation has been reduced to Rs.18,467/- (Rupees Eighteen thousand Four hundred and Sixty Seven) with interest @ 6% per annum from the date of filing of T.S.(MAC) No. 59 of 2008 i.e. 29.01.2008 till realisation.

[4] Mr. Somik Deb, learned counsel appearing for the petitioner has questioned that whether the impugned judgment has been passed within the acknowledged limit of the review jurisdiction or not or whether in the name of reviewing the judgment dated 22.10.2009, the reviewing court has acted as the appellate court in contradistinction to the settled position of law that the review proceeding cannot be converted under any pretext into the appellate proceeding. The review jurisdiction is strictly confined to the ambit of Order XLI Rule 1 of the C.P.C. Mr. Deb, learned counsel has made extreme submission that even if on reappraisal of the evidence, the finding of the original court or tribunal is found to be erroneous, the jurisdiction for review cannot be invoked. He has submitted that while passing the impugned order, the tribunal has exceeded its jurisdiction and wielded the jurisdiction of appeal. Apart that, in view of Section 149(2) of the MV Act, 1988 the insurer does not have any right to raise any defence as regards the quantum. He has urged that the assessment of compensation does not suffer from any irregularity in view of numerous decisions of the apex court in **R.D. Hattangadi vs. Pest Control (India) Pvt. Ltd. and Others,** reported in **(1995) 1 SCC 551**; **Sanjay Batham vs. Munnalal Parihar and Others,** reported in **(2011) 10 SCC 665**, **Sanjay Kumar vs. Ashok Kumar and Another,** reported in **(2014) 5 SCC 330** and **Dinesh Singh vs. Bajaj Allianz General Insurance Company Limited and Another,** reported in **(2014) 9 SCC 241**.

Mr. Deb, learned counsel has substantially relied on a decision of the apex court in **Kalabharati Advertising vs. Hemant Vimalnath Narichania and others,** reported in **(2010) 9 SCC 437** where the apex court has held that in absence of any statutory provision providing for review, entertaining an application for review, even under the garb of clarification/modification/correction is not permissible. Since there is no such provision in the Motor Vehicle Act, 1988 conferring any express power of review, it is manifest now that the review jurisdiction could not have been exercised. Thus, the order of the review so made is ultra vires, illegal and without jurisdiction.

[5] Mr. D.C. Roy, learned counsel appearing for the owner of the offending vehicle has submitted that since the vehicle is insured by the respondent No.2, the review petitioner, whatever the award be made that has to be paid by the insurer as they have bound themselves by the contract of indemnity against liability that arises unless circumvented by the provisions of Section 149(2) of the MV Act. He has however submitted that the loss as assessed by the tribunal while passing the judgment and award disposing the claim petition is wholly unreasonable.

[6] Having situated thus, what appears before this Court is that primarily two questions fall for consideration namely;

> **(i) Whether the tribunal has got the review jurisdiction or not?**
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> **(ii) Whether the impugned judgment and order has been passed within the acknowledged limits of the review jurisdiction or not?**

[7] In view of the decision of **Kalabharati Advertising vs. Hemant Vimalnath Narichania and others** as extracted hereunder, the decision of the Gauhati High Court in **Pranab Dhar vs. Rajesh Deb and another,** reported in **2009 (3) GLT 504** holding that the tribunal has got the review jurisdiction by necessary implication may require to be revisited. In **Kalabharati Advertising vs. Hemant Vimalnath Narichania** it has been enunciated as under:

> **12. It is settled legal proposition that unless the statute/rules so permit, the review application is not maintainable in case of judicial/quasi-judicial orders. In absence of any provision in the Act granting an express power of review, it is manifest that a review could not be made and the order in review, if passed is ultra vires, illegal and without jurisdiction. (vide *Patel Chunibhai Dajibha v. Narayanrao Khanderao Jambekar: AIR 1965 SC 1457* and *Harbhajan Singh v. Karam Singh and Ors. : AIR 1966 SC 641*).**
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> **13. In *Patel Narshi Thakershi v. Shri Pradyuman Singhji Arjunsinghji : AIR 1970 SC 1273; Major Chandra Bhan Singh v. Latafat Ullah Khan: (1979) 1 SCC 321; Kuntesh Gupta(Dr.) v. Hindu Kanya Mahavidhyalaya : AIR 1987 SC 2186; State of Orissa and Ors. v. Commissioner of Land Records and Settlement: (1998) 7 SCC 162* and *Sunita Jain v. Pawan Kumar Jain and Ors. : (2008) 2 SCC 705*, this Court held that the power to *review is not an inherent power. It must be conferred by law either expressly/specifically or by necessary implication* and in the absence of any provision in the Act/Rules, review of an earlier order is impermissible as review is a creation of statute. Jurisdiction of review can be derived only from the statute and thus, any order of review in absence of any statutory provision for the same is nullity being without jurisdiction.**
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> **14. Therefore, in view of the above, the law on the point can be summarised to the effect that in absence of any statutory provision providing for review, entertaining an application for review or under the garb of clarification/modification/correction is not permissible.**

[8] In the considered opinion of this Court the fundamental issue raised in this petition relates to whether the impugned judgment and order has been passed within the acknowledged limit of the review jurisdiction or not even if it is assumed that the tribunal has got the review jurisdiction. This petition can be disposed of without any decision on the question (i) as framed above. It is apparent on the face of the record that in the garb of reviewing the judgment and decision dated 22.10.2009 delivered in Title Suit (MAC) No. 59 of 2008 the tribunal by the impugned order has reappraised the evidence and substituted the finding as stated. The apex court has on numerous occasions deliberated on the same very issue arriving at the consensus overriding the probability of divergence that the review proceeding has to be strictly confined to the provisions of Order XLVII Rule 1 of the C.P.C. In **Union of India vs. Sandur Manganese and Iron Ores Limited and Others,** reported in **(2013) 8 SCC 337,** it has been held by the apex court as under:

> **23. It has been time and again held that the power of review jurisdiction can be exercised for the correction of a mistake and not to substitute a view. In *Parsion Devi and Ors. v. Sumitri Devi and Ors. : (1997) 8 SCC 715,* this Court held as under:**
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>> **"9. Under Order 47 Rule 1 C.P.C a judgment may be open to review inter alia if there is a mistake or an error apparent on the face of the record. An error which is not self-evident and has to be detected by a process of reasoning, can hardly be said to be an error apparent on the face of the record justifying the court to exercise its power of review under Order 47 Rule 1 CPC. In exercise of the jurisdiction under Order 47 Rule 1 CPC it is not permissible for an erroneous decision to be 'reheard and corrected'. A review petition, it must be remembered has a limited purpose and cannot be allowed to be 'an appeal in disguise.' "**

[9] What has been assigned as the gross error apparent on the face of the records is the result of re-appreciation of the evidence inasmuch as it has been held that since the claimant was a government employee and he continued in his service there was no loss of income due to his alleged disability to the extent of 30%. This exercise is entirely impermissible in the review jurisdiction. Hence, the impugned order is interfered with and set aside. But this Court cannot shut its eyes to the reasoning given by the tribunal by way of judgment and award dated 22.10.2009 when the aspect of the employment of the petitioner was not at all considered or totally ignored. There is no evidence that the petitioner has suffered any jeopardy in his employment. Even no specific evidence is brought on record that for such injury the petitioner lost any other prospect. While exercising the supervisory power under Section 227 of the Constitution of India, this Court cannot be oblivious that this jurisdiction has been structured to ensure that no failure of justice is caused. Failure of justice cannot be confined to the interest of the claimant; it is also equally applicable to that of the insurer. The disability certificate showing that the petitioner has suffered 30% of the disability has been issued with validity for 5(five) years and not permanent one, meaning the status of disability is subject to review. But this cannot be denied that the petitioner suffered serious injury and he was hospitalized for a considerable time and he was under treatment of reputed Orthopaedic Surgeon. For purpose of treatment he availed 45 days leave from 04.06.2007 to 20.07.2007 and further, for review treatment, he availed 13 days leave from 20.12.2007 to 02.01.2008. But for the observation of the tribunal in the judgment and award dated 22.10.2009 that the treatment the petitioner availed in the Apollo Hospital had no connection with the accident, this Court does not have any difficulty to hold that the leave that the petitioner availed for 13 days cannot be accounted for in relation to the accident. But what is surprising is that for pain and suffering only Rs.5,000 has been accounted for in the compensation. But in absence of any evidence relating to the loss of income, the loss as assessed by the tribunal based on the salary of the petitioner is again unsustainable. Hence, this Court to obviate failure of justice holds that the petitioner is entitled to the compensation in the manner as undernoted:

(i) the salary of 45 days against the leave for treatment of the petitioner	:	Rs.22,701/-
(ii) cost of the treatment	:	Rs.17,635/- rounded at Rs.18,000/-
(iii) for pain and suffering	:	Rs.1,50,000/-
(iv) the loss of amenities	:	Rs.1,00,000/-

Total Rs.2,90,701/-

Total Rs.2,90,701/- rounded at Rs.2,91,000/- (Rupees Two lacs Ninety One thousand). The petitioner is entitled get the compensation with interest @6% w.e.f. 29.01.2008 till realisation. The respondent No.2, the Oriental Insurance Company Ltd. is directed to pay the said amount within a period of one month from today, else the said award shall carry interest @9% till realisation. If any amount had been paid to the petitioner in any form or under any proceeding for the damage/injuries the petitioner has suffered, the said amount shall be deducted at the time of making payment.

With this observation, this petition stands allowed to the extent as indicated above.

There shall be no order as to costs.

JUDGE

Sujay