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**(2004) 01 GAU CK 0040**  
**In the Gauhati High Court**  
**Case No : MFA (WC) No. 09 of 2003**

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| National Insurance Co. Ltd. | Vs | APPELLANT  |
| Nani Gopal Roy and Another  |    | RESPONDENT |

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**Date of Decision :** 30-01-2004

**Acts Referred:**

Motor Vehicles Act, 1988 — Section 149(2)  
Workmens Compensation Act, 1923 — Section 30, 4

**Citation :** (2004) 2 GLR 391 : (2005) GLT 377 Supp

**Hon'ble Judges :** T. Vaiphei, J

**Bench :** Single Bench

**Advocate :** B. Bhattacharjee, for the Appellant; P.R. Barman, for the Respondent

**Final Decision :** Dismissed

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## Judgement

T. Vaiphei, J.—I have heard Mr. B. Bhattacharjee, learned counsel for the appellant and Mr. P. R. Barman, learned counsel for the respondents.

2. This appeal u/s 30 of the Workmen's Compensation Act, 1923 is directed against the Judgment and Award dated 13.8.2003 passed by the learned Commissioner, Workmen's Compensation, West Tripura, Agartala (District Judge) in connection with case No. T.S. (W.C.) 37/2000 in which a sum of Rs. 1,60,000 was awarded to the claimant-respondent with interest at the rate of 9% per annum with effect from 24.8.2000 within a period of two months from the date of passing the impugned Judgment and Award, failing which the rate of interest would be enhanced to 12% per annum.

3. The brief facts of the case may be shortly stated :-

The appellant is a Government of India undertaking carrying on the business of General Insurance having its Divisional Office at Agartala. The claimant respondent is serving as Bus Conductor in the Tripura Road Transport Corporation (hereinafter called "TRTC" for short). On 14.4.2000, when the claimant-respondent was performing his duty as Bus Conductor while opening the Bus

bearing No. TR-01-1399 belonging to the TRTC along with passengers, it met an accident in which the bus suddenly ran off the road and got up-turn with the result that the claimant-respondent along with other passengers of the bus sustained injuries. It is the case of the claimant-respondent that he became unconscious and regained his sense at G. B. Hospital, Agartala and ultimately he was referred to S.S.K.M. Hospital, Kolkata for better treatment. He was treated as indoor patient at S.S.K.M. Hospital, Kolkata with effect from 19.4.2000 to 30.6.2000. The claimant-respondent further claimed that as per the opinion of the Orthopaedic Surgeon of the said hospital he sustained grievous injury on his occipital region and severe haematoma in his scalp and that though he was discharged from the hospital on 30.6.2000, his head and neck were fitted with a traction which is still there. According to the claimant-respondent, on account of this medical treatment he had incurred an expenditure of Rs. 1,50,000 and that he would be requiring a further amount of Rs. 50,000 only for his future medical treatment. The claimant-respondent also asserted that at time of his accident he was 44 years old and was drawing a sum of Rs. 6,125 per month as salary. The claimant-respondent thereafter filed a claim petition before the learned Commissioner, Workmen's Compensation, West Tripura, Agartala for payment of Rs. 4,50,000.

4. The appellant contested the claim and filed a written statement of defence in which it admitted that the claimant-respondent is a Conductor of TRTC and that the accident also took place at the date and time near Dewan bazar as mentioned by the claimant-respondent. However, the appellant took stand that the driver drove the bus under the instruction of the claimant-respondent and the bus met an accident due to rash and negligent driving for which the claimant-respondent was responsible and as such he is not entitled to any compensation. The appellant also contended that since the claimant-respondent did not lose his job and is still in service, he did not suffer from any loss of income. The learned Commissioner after framing issues examined the claimant-respondent alone and one witness produced by the respondent No. 2, i.e., TRTC, in support of their respective claim. After completion of the trial, the learned Commissioner passed the impugned Judgment and Award. Aggrieved by the impugned Judgment and Award, the appellant preferred this appeal.

5. By the order dated 4.11.2003, this Court admitted the appeal without formulating any substantial question of law. It is also not in dispute that at the time of filing, the appellant also did not submit a certificate issued by the learned Commissioner to the effect that he has deposited with him the amount payable under the order appealed against. Since this appeal has been ordered to be heard and disposed of expeditiously with the consent of both the parties, the consideration of the objection made by the learned counsel for the respondents that the appeal is not maintainable without filing the certificate in question is left open. However, in the course of hearing of this appeal, the appellant was allowed to formulate the following substantial question of law, i.e., whether the learned Commissioner has any jurisdiction to award compensation beyond the provision

of Section 4 of the Workmen's Compensation Act, 1923 ?

6. It is vehemently contended by the learned counsel for the appellant that when the claimant-respondent is still in service and earning his salary without any deduction whatsoever, there can be no loss of earning capacity and as such the learned Commissioner grossly erred in law in awarding compensation to the respondent-claimant. It is also contended by him that the compensation amount is calculated by taking into account the age of the claimant, percentage of loss of his earning capacity and his monthly income as per provision of the Workmen's Compensation Act and thereafter multiplied by the relevant factor. On the other hand, Mr. P. R. Barman, learned counsel for the respondent-claimant submits that the appeal is not maintainable inasmuch as the appellant is not a person aggrieved by the impugned Judgment and Award since the ground urged by him in this appeal are the grounds other than those grounds by which the appellant could have been entitled to defend the claim for compensation u/s 149(2) of the Motor Vehicles Act, 1988. It is also contended by him that no substantial question of law is involved in this appeal and that the appeal is also not maintainable since it is not accompanied by a certificate of the learned Commissioner to the effect that the appellant has deposited with him the amount payable under the order appealed against.

7. Before proceeding further it may be necessary to dispose of the contentions of the learned counsel for the appellant that the compensation is not payable to the claimant-respondent because there is no loss of earning capacity when he is still working as Bus Conductor and earning his salary without any deduction. The question whether a workman, who suffered injury in the course of his engagement could be denied compensation on the ground that there has been no loss of earning capacity and that he continued to draw the same wages came up for consideration in a number of cases and it will suffice our purposes if we refer to the case of Assistant Depot Superintendent, Food Corporation of India and Another Vs. Sadhu Charan Behera, In this case, the Hon'ble Orissa High Court after discussing the various decisions of High Courts has observed as under :-

"8. Under the Workmen's Compensation Act, compensation is to be calculated (in the case of disability) not on the basis of "loss of earnings" but on the "loss of earning capacity". Obviously, the two are different and cannot be interchanged. "Loss of earnings" is the cessation of regular income by way of salary or wages, or in a case may even be the difference between the salary or wages earned prior to the accident and the reduced amount earned after the accident. "Loss of earning capacity", however, is the loss of ability to earn though in fact the income may not have been reduced. Therefore, the mere fact that even after an accident the workman is continued in the employment and is paid the regular wages as before will not matter for what is to be seen is not whether he has lost something but whether because of the injury he will be able to earn the same wages in future with another employer ? In other words, whether any other employer will, with his such incapacity or disability, hire his services on the same

wages which he was getting before the accident? Thus, compensation payable under the Act is the resultant loss or earning capacity caused due to the injury. In this view of the matter, the fact whether or not the workman continues to draw the same wages, is not a relevant factor.

9. The question, whether a workman who suffered injury in the course of an employment could be denied compensation on the ground that there has been no loss of earning capacity as he continued to draw the same wages, also came up for consideration before this court in the cases of *Debaki Swain v. Executive Engineer, Electrical Division, Bhawanipatna, Orissa State Electricity Board* 1988 ACJ 836 (Orissa) and *Executive Engineer, Electrical Division Vs. Commissioner for Workmen's Compensation*, wherein it has been held that a workman could not be denied compensation on the ground that he continues to get the same wages as before. The first question posed in this appeal has, therefore, to be answered against the appellant and in favour of the claimant."

I am in respectful agreement with the proposition of law laid down by the Hon"ble Single Judge of the Orissa High Court. Therefore, the aforesaid observation of the Orissa High Court is a complete answer to the contention to the learned counsel for the appellant.

8. On going through the pleadings and submissions of the learned counsel appearing for the rival parties, there can be no dispute that the defences available to insurer u/s 149(2) of the M. V. Act, 1988 (as amended in 1994) are also available to the insurer in Workmen's Compensation Act, 1923. It is also an admitted position that neither the respondent No. 2 nor the appellant herein were granted leave by the learned Commissioner to raise any defence other than the defences available u/s 149(2) of the M. V. Act, 1988 even though both of them contested the proceeding before the learned Commissioner. I am also of the considered view that the substantial question of law proposed to be formulated by the appellant is substantially on the question of the quantum of compensation payable and that these are the grounds other than those by which the appellant can be permitted to defend the claim for compensation u/s 149(2) of the M. V. Act, 1988.

9. To appreciate the position better, I may refer to Section 149(2) of the M. V. Act, 1988 (as emended in 1994) which reads thus :

"149 \*\*\* \*\*\*(2) No sum shall be payable by an insurer under Sub-section (1) in respect of any judgment or award unless, before the commencement of the proceedings in which the judgment or award is given the insurer had notice through the Court or, as the case may be, the Claims Tribunal of the bringing of the proceedings, or in respect of such judgment or award so long as execution is stayed thereon pending an appeal; and an insurer to whom notice of the bringing of any such proceedings is so given shall be entitled to be made a party thereto and to defend the action on any of the following grounds, namely :-

(a) that there has been a breach of a specified condition of the policy, being one of the following conditions, namely :-

(i) a condition excluding the use of the vehicle -

(a) for hire or reward, where the vehicle is on the date of the contract of insurance a vehicle not covered by a permit to pay for hire or reward, or

(b) for organised racing and speed testing, or

(c) for a purpose not allowed by the permit under which the vehicle is used, where the vehicle is a transport vehicle, or

(d) without side car being attached where the vehicle is a motor cycle; of

(ii) a condition excluding driving by a named person or persons or by any person who is not duly licensed, or by any person who has been disqualified for holding or obtaining a driving licence during the period of disqualification; or

(iii) a condition excluding liability for injury caused or contributed to by conditions of war, civil war, riot or civil commotion; or

(b) that the policy is void on the ground that it was obtained by the nondisclosure of a material fact or by a representation of fact which was false in some material particular."

A cursory look at the aforesaid provision shows that the grounds of appeal urged by the appellant do not fall within the ambit of the said provision. As pointed out earlier no permission was sought before or was granted by the learned Commissioner. Workmen's Compensation to raise the defence other than those permitted by Section 149(2) of the M. V. Act, 1988. In that view of the matter, the appellant cannot now be permitted to urge the grounds set forth by him in this appeal.

10. The questions whether the appellant insurer can be permitted to raise any new defence other than the defence provided u/s 149(2) of the M. V. Act, 1988 and whether the appellant can be considered as a "person aggrieved" by the impugned award passed by the learned Commissioner have also come up for consideration in several cases before different High Courts. If any decision is necessary to be cited, we may cite *Oriental Insurance Co. Ltd. Vs. Rafat Rehamath and Others*, wherein the Division Bench of the Karnataka High Court held that in view of the specific bar under the provisions of Section 149(2) of the Motor Vehicles Act, the petitioner is not entitled to contend that a substantial question of law is involved and that the present appeal is maintainable, under the provisions of Section 30 of the Workmen's Compensation Act.

11. For the foregoing reasons this appeal is devoid of merits and is accordingly dismissed. No order as to costs.