

(1956) 02 CAL CK 0026
In the Calcutta High Court

Case No : Appeal from Original Decrees No's. 76 and 113 of 1951

Bir Singh and Another

APPELLANT

Vs

Sm. Hashi Rashi Banerjee and Others

RESPONDENT

Date of Decision : 10-02-1956

Acts Referred:

Evidence Act, 1872 — Section 114
Fatal Accidents Act, 1855 — Section 1
Insurance Act, 1938 — Section 14
Motor Vehicles Act, 1939 — Section 105, 94(1), 95(5)

Citation : AIR 1956 Cal 555 : (1956) 1 CALLT 414

Hon'ble Judges : Rama Prasad Mookerjee, J;P.K. Sarkar, J

Bench : Division Bench

Advocate : Ranajit Kumar Banerjee, Manik Chandra Mitra and Durgesh Prosad Das, for the Appellant; Bhupal Chandra Roy Choudhury and Mihir Kumar Sarkar for Respondents 1 to 4, for the Respondent

Final Decision : Partly Allowed

Judgement

R.P. Mookerjee, J.—One Biswanath Banerjee met with his death in a fatal accident on the Jessore Road due to a collision between a passenger bus and a motor lorry carrying goods, the two coming from opposite directions. Biswanath was travelling in the bus. The plaintiffs respondents are the widow, a minor daughter, and his dependent parents. The Plaintiff claimed under the Fatal Accidents Act (XII of 1855) compensation of Rs. 30,000/-. Originally the suit was brought against four persons who were described as the owners and the drivers of the bus and the lorry" in question as also "Habib Bank Limited", described as the firm with which the lorry had been insured. Defence was filed on behalf of defendant No. 1, the owner of the bus. No appearance was entered on behalf of the two drivers (defendants Nos. 2 and 4) as also defendant No. 3 Amiruddin who was described in the plaint originally as the owner of the lorry.

2. Written statement was filed on behalf of Habib Insurance Company Limited, describing itself as defendant No. 5, though the party named in the plaint was

"Habib Bank Limited". The description of this defendant was subsequently corrected in the plaint. Various defences were raised by the owner of the bus and Habib Insurance Company Limited. The learned Subordinate Judge decreed the plaintiffs' claim against all the defendants, on contest against two and "ex parte" against the remaining three. Habib Insurance Company Limited had stated in their defence that the person recorded in their books as the owner of the lorry was one Abdul Karim and not Amiruddin. Steps were taken thereafter by the plaintiffs to add the said Abdul Karim as defendant No. 6. This added defendant did not enter appearance and the suit was dismissed as against him on the ground that he had been brought on the record after the period of limitation.

3. Two appeals have been preferred to this Court. First Appeal No. 76 of 1951 is by Bir Singh, defendant No. 1, the owner of the bus. First appeal No. 113 of 1951 has been filed by defendant No. 5, Habib Insurance Company Limited, with which concern the lorry had been insured.

4. The owner of the bus has raised grounds relating to the quantum of the compensation and has also prayed for apportionment of the amount assessed as damages as between the persons connected with the bus and with the lorry.

5. In the appeal filed on behalf of Habib Insurance Company Limited, the only point urged is that under the law the Company is not liable to meet the claims for this accident. The quantum of compensation payable could not and has not been raised by this appellant.

6. We shall first take up the appeal by Bir Singh, the owner of the bus.

7. The plaintiffs had made the owner and the driver of the bus as parties defendants Nos. 1 and 2. The bus in question was alleged to have been insured with an insurance company which was not impleaded as it was stated that the notice which was required to be served under the Insurance Act had not been served. It is not necessary for our present purpose to consider the question whether the insurer of the bus is or is not liable. It was further alleged that after the accident both the drivers, viz., defendants Nos. 1 and 2 were sent up for trial on a charge of rash and negligent driving. The driver of the bus was acquitted by the Magistrate in the view that no case of rash and negligent driving had been proved against him.

8. As regards the quantum of the compensation and the apportionment as amongst the different defendants the question was considered under one issue in a general form as to whether the defendants were liable to pay any compensation, and if so, to what extent. It will be necessary for us to consider the prayer of apportionment as also the quantum of compensation as against the different defendants.

9. That the deceased Biswanath was a passenger in the bus has not been questioned before us. That he died as a result of the accident was also admitted in a way and we must hold that that was proved on the evidence conclusively.

10. For a proper appreciation of the defence on behalf of the owner of the bus that he was not either liable at all, or even if liable, not to the same extent as the owner of the lorry, it is necessary to examine the circumstances under which the accident had taken place. We have to find out whether both the vehicles were equally liable and also whether there are materials to differentiate between the negligence of the drivers of the two vehicles. A number of witnesses had been examined on behalf of the plaintiffs to prove the circumstances under which the incident had taken place.

(His Lordship referred to the evidence and proceeded :)

(11-18) The circumstances related above would, therefore, in our view justify the conclusion that as between the two vehicles, the driver of the bus was less negligent. This conclusion will have to be taken into consideration when we decide as to how the compensation money as assessed is to be apportioned between the persons connected with the two offending vehicles.

19. We next proceed to consider the question raised on behalf of Bir Singh, appellant in First Appeal No. 76 of 1951, as regards the quantum of the compensation that should be allowed. The plaintiffs had claimed, as already indicated Rs. 30,000/- and the Court below has decreed the entire claim.

20. The plaintiffs are four in number - the widow, the minor daughter and the two parents of the deceased. It is stated in the plaint that the deceased had set up handlooms in his village home and was also working as a general order supplier from an office maintained in Calcutta. The deceased is alleged to have been earning Rs. 300/- or more on an average per month. The defendants contested the allegations so made. Evidence was led on behalf of the plaintiffs to substantiate the allegations made that the deceased had- rented one room at, 25, Swallow Lane, Calcutta. An employee under the Official Receiver of this Court in whose charge the property is has testified to this fact. The widow & the father of the deceased have examined themselves. The deceased had passed the I.Sc. Examination & was carrying on business; so far as that in his native village is concerned, it was with one Sisir Kumar Bose, plaintiffs' witness No. 6, already referred to. They were carrying on jointly timber and weaving business. Biswanath is stated to have contributed Rs. 1,500/- and Sisir Kumar Rs. 500/- for the business. It is suggested that this joint venture yielded Rs. 150/- per month roughly for Biswanath alone. This was in addition to the income from the business which Biswanath had at 25, Swallow Lane, Calcutta, under the trade Oriental Agency. It should be noted that Sisir had never been to this Calcutta Office. He could give no idea either as to the extent of the business or as to the income which Biswanath derived therefrom. None of the witnesses could produce any accounts or papers to support the income as alleged except a few sheets to which reference will be made later on. Apart from the father and widow of the deceased, a brother of Ms also had been examined as a witness. In the absence of reliable and sufficient documentary evidence, we are required to carefully scrutinise the statements made by the friends and relations.

21. One of the independent witnesses examined is Pran Krishna Ghose, witness No. 10 for the plaintiffs. He was the superintendent of Oriental ? Engineering Company, a concern which manufactured articles and did odd jobs. After the closure of that firm, he started his own concern called the Hindusthan Metal Works at Howrah. Both of these firms were alleged to have had business connections with Biswanath. The latter of the two firms with which this witness was connected has also been sold away. Since 1948 he has been working as the sales representative of another manufacturing concern. He had known Biswanath up-to 1945 when the Howrah business closed down. He used to visit Biswariath in connection with his business with him. He also has not preserved any accounts of the business with which he was concerned when he came into contract with Biswanath.

22. From the trend of the evidence as noticed above, we have to depend upon the father, the brother and the widow of the deceased about the probable income of Biswanath, both as regards the Calcutta firm as also the timber and the hand loom business. One witness had concern with the transactions in the village home, but he had no knowledge of the Calcutta business. The other witnesses can speak only about the extent of the transactions with the Calcutta Firm. On such evidence we may only conclude that he was an earning member of the family, and after the retirement of his father from service, the dependents of Biswanath were maintained out of his income principally. The business concerns which were alleged to yield Rs. 4,000/- or more per year must have maintained proper accounts. Such account books could not be produced, except one stray account book, exhibit H, about the timber business. Some corroboration, however, is available from exhibits 9 and 10 series, including the notices served by the Civil Supplies Department. We cannot say that the plaintiffs have been able to prove that the deceased was actually earning Rs. 4,000/- per annum from the business, although there are sufficient materials to indicate that he had a decent income wherefrom he could maintain himself and his dependants after the retirement of his father from Government service.

23. We may at this stage proceed to consider the principles under which compensation is to be calculated. Such principles may be deduced from some of the decided cases. It is not however possible to lay down direct and complete rules for the assessment of compensation in all cases.

24. It is now well settled that the Court is not to allow damages to the extent of the full amount earned by the deceased as a perfect compensation for the pecuniary injury of the claimant. He is to take a reasonable view and allow a fair compensation. "Rowley v. London North-western Railway" .(1873) 8 Ex. 221 (A).

25. before we proceed to consider the other leading cases on this point, we may quote the words of Lord Wright in "Davies v. Powell Duffryn Associated Collieries Ltd." (1942) AC 601 (B):

"The damages are to be based on the reasonable expectation of pecuniary

benefit or benefits reducible to money value. In assessing the damages, all circumstances which may be legitimately pleaded in diminution of the damages must be considered "Grand Trunk Ry. Co. of Canada v. Jennings" (1888) 13 AC 800 (C). The actual pecuniary loss of each individual entitled to sue can only be ascertained by balancing, on the one hand, the loss to him of the future pecuniary benefit, and, on the other any pecuniary advantage which from whatever source comes to him by reason of the death..... The starting point is the amount of wages the deceased was earning, the ascertainment of which to some extent may depend on the regularity of his employment. Then there is an estimate of how much was required or expended for his own personal and living expenses.

The balance will give a datum or basic figure which will generally be turned into a lump sum by taking a certain number of years' purchase. That sum however, has to be taxed down having due regard to uncertainties, for instance, that the widow might have again married and thus cease to be dependent, and other like matters of speculation[^] and doubt."

26. The Court is required to take into consideration the benefits which might accrue and the loss which is incurred by the claimants on the ground of the death as a result of the accident. If the person claiming damages gets into possession of "a large estate because of the death of his relative who is killed by an accident, there is no loss. The claimant is really a gainer by the event. Whenever a person gets into possession of properties by reason of death in question that fact has to be taken into consideration, "Bradburn v. Great Western Ry. Co." (1874). 10 Ex. 1 (D).

27. In one of the recent decisions in "Nance v. British Columbia Electric Ry. Co. Ltd." 1951 AC 601 (E), the Judicial Committee of the Privy Council took into consideration for calculating the amount of damages (1) expectation of the life of the deceased, regard being had to the age, bodily health and the possibility of premature death, (2) what sums during such expectation of life he would have probably applied to support his wife and children, (3) the present worth of such recurring payments to be calculated as a lump sum compensation to be awarded instead of being spread over a number of years, (4) further deduction of benefit accruing to or for obtaining because of acceleration of interest owing to death, (5) possibility of the wife dying before husband, and (6) possibility of accumulation of savings.

28. Such detailed considerations are seldom made in this country in calculating the amount of compensation payable. It is not possible in this case to assess the amount after taking into account all the details above mentioned - such particulars were not brought out in the evidence.

29. The Fatal Accidents Act, 1855, lays down the heads of the damages to be allowed. In Section 1 of this Act a right is given to the beneficiaries of the deceased to ask for damages proportionate to the loss resulting from such death

to the parties claiming such "damages. This is reparation for the loss caused to the beneficiaries. In Section 2 of the Act there is a second head of the claim which is in the " following form:

"Provided that in any such action or suit, the Executor, Administrator or representative of the deceased may insert a claim for and recover any pecuniary loss to the estate of the deceased occasioned by "such wrongful act, neglect or default, which sum, when recovered, shall be deemed part of the asset of the estate of the deceased."

30. As pointed out by this Court in *Sm. Jeet Kumari Poddar and Others Vs. Chittagong Engineering and Electric Supply Co. Ltd. and Another*, , in certain decisions which had been passed under this Act it had not been always kept clearly in view that damages may be claimed under two heads as indicated above. In the present case, as was in the decision referred to above, there is no claim for damages under the second head.

31. As to how the pecuniary loss sustained by the beneficiaries is to be ascertained was indicated generally in the Bench decision cited above. Generally speaking, however, irrespective of the country where the claim may be preferred, the Court should follow certain broad general principles to determine the amount claimed. The main criteria is the loss of reasonably expected pecuniary benefit. The Court has to consider the probable earnings and future prospects of the deceased himself because on that would depend, to ascertain, the benefit which the beneficiaries might have reasonably expected if the life of the deceased had not been cut short by the accident.

32. We indicate below the considerations which should weigh with the Court in determining the compensation payable - (1) What was the average net stable annual income of the deceased, as also what could be expected to be the future prospects of the deceased so far as the earning capacity was concerned, (2) what are the benefits which the claimants have lost by reason of the death of the person concerned; and for determining the nature of such benefits an attempt is to be made to find out how many members there were in the household the earnings and income from such members and the amount which was contributed by the different persons as also whether the claimants have gained financially by the death, (3) the estimated amount of maintenance of the deceased and (4) considering the age of the deceased and other conditions what would be the present worth of the estimated recurring amount lost to the claimants which is to be compensated.

33. In the evidence as led in the present case, however, all such particulars are not available. Although reference is sometimes made to the observations by Lord Blackburn in "*Livingstone v. Karyards Coal Co.*" (1880) 5 AC 25 (39) (G) that the Court should

"as nearly as possible get at that sum of money which would put the party who has been injured, or who has suffered, in the same position as he would have

been if he had not sustained the wrong for which he is now getting the compensation or reparation"

it is not always possible to arrive at a mathematically accurate figure. Some estimate is to be made particularly when the deceased was carrying on business of the type as indicated in the evidence before us and when the future prospects are to a " certain extent in the lap of destiny and probabilities. From an analysis of the evidence already made we have indicated that a full amount of the claim based upon an income of about Rs. 4,000/-per annum cannot" be supported. The learned Subordinate Judge also had on the evidence come to " the conclusion that Biswanath had not been proved to have had any timber business or to have any substantial profit therefrom. The father of the deceased who retired from Government service in 1943 became entitled to a monthly pension of Rs. 144/-. He had immediately thereafter commuted half of the same for a large, sum payment from Government. His income, therefore had dwindled to about Rs. 707/- per month. The learned Subordinate Judge rightly came to the conclusion that it was not possible for the father to maintain his other dependants, run his own establishment at his native "village and also another for his son at Calcutta. One D. R. Sarkar used to share with the deceased the same room at Swallow Lane from March, 1947. In assessing the compensation payable, the learned Subordinate Judge had no materials before him from which he could justifiably draw the conclusion, as he did, that the deceased was a congressman and after the congress had come into power he would have got better chance of business facilities and to make larger profits than previously. There is no evidence in support of or even a suggestion for such a proposition, and in the circumstances of this case, it is not also justified. The compensation payable is not to be assessed on the estimated gross income of the deceased but on the amount lost by the claimants.

34. The amount of income which can be reasonably expected in the present case to "have been available for the maintenance of the claimants would be nearer the figure of Rs. 1200/- per annum. Considering the age of the deceased as also the ages and the resent condition of the claimants, about sixteen times the annual income would be a reasonable compensation in the circumstances of this case. We assess compensation in round figures -at Rs. 20.000/-.

35. As regards the apportionment of the compensation as between the two sets of defendants represented by the owner and the driver of the bus; on one hand and those of the lorry on the other: the total compensation should on the evidence already discussed be one-third thereof as against the persons connected with the bus and two-thirds as against those connected with the lorry.

36. We have then to consider the defence on behalf of the Habib Insurance Company Ltd., as to whether they are liable for the compensation which is apportioned as against the persons connected with the lorry. We now proceed to discuss-the same. After we have done so, we shall take up-the question of apportioning the amount, which we have held to be payable in favour of the

claimants, as between the latter.

37. For a proper appreciation of the defence raised on behalf of the Habib Insurance Co. Ltd., the insurer of the lorry in question, reference need be made to certain other facts. The admitted facts are that the lorry in question BGJ 1144 had been covered by an insurance policy which was to run from 19-12-1946 to 18-12-1947. This was on a proposal made by one Abdul Karim who described himself as the owner of the lorry on the date of the proposal. From the records of the Motor Vehicles Department we find that this lorry had been registered originally in the name of one Nuruddin Jabbar Ali until 16-12-1946, on which date the authorities recorded the transfer of ownership to the name of Abdul Karim. On 19-5-1947, Abdul Karim transferred the lorry to one Amiruddin Defendant No. 3 in this case.

38. The facts stated above are accepted by both the parties. The point on which the parties differ is this. It is contended on behalf of the Insurance Company that on the transfer by Abdul Karim in favour of Amiruddin the policy of insurance was not available to the latter as the owner of the lorry. The accident in question was on 8-9-1947, i.e., after Abdul Karim had ceased to be covered by the policy.

39. The question for consideration, therefore, is whether there was any cover for insurance on the date of the accident and whether Habib Insurance Co. Ltd., was the insurer on the relevant date.

40. On behalf of the claimants it is contended that under chapter VIII of the Indian Motor Vehicles Act, 1914, for every motor vehicle an insurance policy is to be taken out to cover third party risks, and when the transfer of ownership was being recorded and approved by the Motor Vehicles Department, the pre-existing policy also, in favour of Abdul Karim, had been transferred in favour of Amiruddin to cover third party risks, so far as the lorry was concerned.

41. The specific defence of the Insurance Company is that under the policy the cover would continue to be applicable only if the Insurance Company had agreed to approve of the transfer of owner-ship. There was no evidence, according to them, of such approval of transfer of ownership. On the other hand, the claimants contend that the necessary materials and records which were in the custody and possession of the owner of the lorry and particularly the insurer had not been produced in the case, and the presumption was that in view of the compulsory insurance of third party risks before any motor vehicle could be used, such a transfer of ownership had been approved of by the Insurer. The Regional Transport authority must have had also been satisfied of the existence of an insurance cover when the transfer of ownership was being recorded.

42. The difficulties in this case are enhanced by the fact that neither the original policy issued by Habib Insurance Co., Ltd., nor the Blue Book issued by the Motor Vehicle Department are available. The persons with whom such originals are have not appeared and produced them. We are invited to decide the points in issue on secondary and circumstantial evidence.

43. Before we consider such materials as have been produced we need ascertain what records are required to be maintained by the insurer under the Insurance Act and by the Transport Authorities under the Motor Vehicles Act. We have to advert to- the relevant statutory provisions of the two Acts. ,

44. Under Sub-section (1) of Section 94 of the Motor Vehicles Act (4 of 1939) no person, unless he comes under any one of the exceptions mentioned in sub-Section (2) of that section, is entitled to use or allow any other person to use a motor vehicle,

"Unless there is in force in relation to use of the vehicle by that person or that other person, as the case may be, a policy of insurance complying with the requirements of this Chapter."

45. It is not the case of the Insurer that the present case comes under anyone of the exceptions referred to above Sub-section (2) of Section 94 of the said Act.

46. Chapter IX of the said Act makes it an offence for any person to use or cause or permit any other person to use a motor vehicle which is not covered by an insurance policy against third party risks.

47. Section 95 of the Motor Vehicles Act details the requirements of policies and limits of liability thereunder. Sub-section (5) of Section 95 of the Act provides,

"Notwithstanding anything elsewhere contained in any law, a person issuing a policy of insurance under this section shall be liable to indemnify the person or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of that person or those classes of persons."

48. On behalf of the Insurance Company, it is contended that the policy issued to cover third party risks is a policy of indemnity of the person named in the policy. Or, in other words, it is urged that the concluding words of Sub-section (5) of Section 95 of the Indian Act refer ~to idemnity only of the person or of the classes of persons who are mentioned in the policy.

49. As a corollary to the above contention it is next urged that the insured mentioned in the policy is the only person entitled to the indemnity. On a transfer of the ownership of the vehicle, the new owner is not entitled to the cover. Or, in other words, the accident in the present case having occurred on 8-9-1947, and the recorded owner, according to the Insurance Company, having transferred the ownership on 19-5-1947, it was only the previous owner who was entitled to claim idemnity under the existing policy and not the transferee.

50.. Before we deal with this aspect of the case, we may refer to the provisions contained "in the policy. Unfortunately, the records in "the present case are incomplete. It appears that on the acceptance of a proposal for insurance a "certificate of insurance" is issued by the insurer. The actual policy is issued afterwards. The original policy is issued to the insured. Neither the claimants nor the insurer have been able to produce the original policy, or even a true carbon

copy of the entire policy. The standard form of policy maintained by the Company together with an alleged carbon copy of certain portions of the original Policy have been produced to which reference will be made immediately.

51. Relevant papers relating to the policy covering the motor vehicle BGJ 1144 as" produced are the following:

A proposal form for insurance signed by Abdul Karim. (Exhibit C (1)). The Policy number is noted oil this as also the fact that the insurance is to commence from 19-12-1946, and will remain in force till 18-12-1947.

A copy of a Certificate of Insurance (Exhibit G) as issued by Habib insurance company Limited immediately on 19-12-1946 is produced by the Insurer.

52. Exhibit 6 is an extract from the Register of Motor Vehicles and Certificate of Fitness in respect of the said motor vehicle. The original Register had been brought to Court, marked as exhibit and was returned after a certified copy of the extract marked had been retained in the court records. To mane sure as-to how the entries had been made in the original register we had the original exhibit brought up to this Court. It appears that motor vehicle No. BCJJ 1144 had originally been registered in the name of Nuruddin Jabbar All of Burdwan from 12-10-1946. Although in the said Register there . are columns to indicate the name 01 the Company with whom the vehicle is insured and the period covered by insurance, no entry was made under these heads in the appropriate columns by the Transport Authorities - not only when this vehicle was registered on 12-10-1246, but also when, subsequently the certificate was renewed. The next entry records the transfer of the vehicle to Abdul Karim. The necessary steps for this purpose were taken on 16-10-1946. Even when tins transfer was being recorded and accepted, no entry was made in the appropriate columns giving the name of the insurer or the period covered by the insurance. On 19-5-1947, the transfer in favour of Sk. Amiruddin was recorded. This was initialled by the registering authority on 20-5-1947. There was no entry made in the register, when this transfer also was being recorded, about the insurer and the period of insurance. In the Remarks column, we find a note under the date 21-10-1948.

"No transfer should be allowed. Vice Section P. Burdwan, 37711, dated 20-10-48."

53. This Register with the records were brought to the Court below by the Head Clerk of the Motor Vehicles Department, Burdwan, who was examined as plaintiffs" witness No. 4. He was examined on 25-9-1950. According to him, the vehicle stood registered in the name of Nuruddin Jabbar Ali till 16-12-1946, when it was transferred to Karim. A certificate of transfer was issued to the latter who continued to be the registered owner till 19-5-1947. He further stated that before making every registration the department made sure if the vehicle was insured. He admitted that the periods covered by the insurance were not mentioned in the Register, (Exs. 6 and 6(a)). He could not say definitely if in this particular case of transfer the insurance policy was actually checked. He had no

personal knowledge about exhibits 6 and 6 (a) as also exhibit 7. He could only speak to as to what was usually done by the Department about the checking of an existing cover by insurance,

54. As we have indicated already, u/s 94(1), Motor Vehicles Act, it is incumbent upon every person owning a motor car to keep in force a policy covering third party risks. But the actual policy issued in this case is not available. From the "deposition of the officer examined on behalf of Habib insurance Company Limited (defendants" witness No. 1), a copy purporting to be a certain copy of the terms of the policy appears to have been produced (exhibit D). A blank Commercial Vehicles Policy form ordinarily issued by the. Company was marked as exhibit E. It has been argued on behalf of the Insurance Company that the policy which was actually issued in this particular case is to be ascertained by reading exhibits D and E together. This is not a satisfactory method of proving the terms of the original policy particularly to ascertain whether in this case all the clauses in the printed form were retained unaltered, or some of them had been deleted.

55. Even if it be taken for granted that exhibit B indicates the terms which were actually contained in the policy in this case, there are no materials from which it can be definitely stated that the conditions relating to tile recording of a transfer were not followed.

56. In exhibit E, sec. II paragraph 1 limits the liability to third parties to indemnify the insured and not any other person except those who come under paragraphs 2, 3 and 4. The liability of the Company in respect of any one accident is limited to Rs. 20,000/- and the amount includes the following penultimate paragraph,

"If the Company shall consent to a transfer of interest in this Policy the period during which the interest was in the transferor shall not accrue to the benefit of the transferee." It is alleged that the carbon copy of the entries in the standard form is by indicating the name of the" insured and by filling in the gaps In the form as appearing in exhibit E.

57. The presence of a restrictive clause in the Policy limiting the liability of the Insurer in case the ownership of the vehicle is changed is not against any of the provisions of the Motor Vehicles Act referred to above.

58. On behalf of the insurer it is therefore contended that only if the Company consents to a transfer of the interest in the policy the transferee will become entitled to the cover of indemnity but there is no proof in the present case that the Company ha\$ consented to such a transfer. The Manager of the Insurance Company alleged that Karim had never informed the Company about the transfer or filed an application. He admitted However that there was no clause in the Policy, even as may be reconstructed from the different papers produced by the Company, supporting this part of the case, but reliance is placed on Sub-section 5 of Section 95 of the Motor Vehicles Act." Our principal difficulty is that the

original policy is not before us. When confronted with the question as to whom and when was the original policy delivered, we find that it is alleged that the policy had been delivered on 20-6-1947 (See paragraph G of the written statement) after the transfer by Karim had been effected on the 19-5-1947. This is what was stated in the written statement and the witnesses further admitted that record used to be kept, when policies were made over to the parties. No registers which were being thus maintained were produced by the Insurer. The Manager could not also deny that the policy had been delivered to Amiruddin on the authority of Karim. If the original policy had been delivered to the transferee, it would be reasonable to hold that the Company had been apprised of the change of ownership and had by their conduct consented to the change.

59. There is another circumstance to which reference has also to be made. Clause (a) of Section 14, Insurance Act (IV of 1938), requires every insurer to maintain

"a registrar or record of Policies, in which shall be entered, in respect of every Policy issued by the insurer, the name and address of the Policy-holder, the date when the Policy was effected and a record of any transfer, assignment or nomination of which the insurer has notice."

60. The Insurance Company had filed certain documents on 18-8-1949. The Register of Policies referred to in Section 14, Insurance Act, was not filed. On 12-11-1949 an application was filed by the Plaintiffs for discovery of all Registers and of Policies issued within the year in question. On 9-12-1949 discovery was purported to have been made. Even then the Register of Policies was not disclosed.

61. It cannot but be taken that the Register of Policies was being maintained by the Insurer. If that Register had been produced by the Insurer it would have indicated whether the transfer in the present case had been noted or not and also whether the Policy in question continued to be in force after the transfer and for covering the indemnity for third party risks as against the transferee.

62. It has been seriously contended before us that even if it be held that the onus as to the existence of a tripartite contract is on the Plaintiffs, the learned Subordinate Judge was correct in assuming the existence of such a contract relying upon the presumption u/s 114, Evidence Act.

63. The very principle underlying the stringent provisions in the Motor Vehicles Act for compulsory third party insurance makes it incumbent upon the insurer to maintain proper registers and records which the statute requires them to do. Such provisions are made to ensure sure and easy payment to claimants for compensation under the compulsory cover of insurance or indemnity.

64. What has been produced by the insurer is not the Register of Policies, but an Expiry Register (Exhibit P). The Expiry Register is a chronological record arranged according to the dates of the Calendar year. Under each date are entered the

Policies that would expire on that date. Under the date 18-12-1947, the Policies which had been issued on 19th December of the previous year are entered. There is no column in this register for recording any transfer of ownership or any other fact or particulars relating to the policy. This Register looks like a remembrancer for use by the office of the Insurance Company to issue notices for renewal before the expiry dates as noted in the Policies when issued - such Policies are ordinarily issued for one year at a time.

65. We cannot but hold that the Register of Policies had been kept back by the insurer. Further, the original policy in question was actually delivered on 20-6-1947 after the transfer of ownership had been effected and the insurer did not produce any record as to whom it had been delivered, though it was admitted that such records were maintained and kept. Agreeing with the Court below, we conclude that notice of transfer even if it were required to be given, had been duly given, the transfer to Amiruddin had been assented to and the transferee is entitled to the cover under the policy. This is further strengthened by the presumption that all official acts were duly performed and the Regional Transport Authority would not have registered the transfer unless and until it had been shown to their satisfaction that there was a subsisting policy in respect of the vehicle,

66. The intention of the legislature no doubt was to make as wide a provision, as it was possible, to cover third party risks. But if in spite of such intention of the legislature there be lacuna in the statutory provisions which make it possible for the insurer to escape liability under certain contingencies, the Court is bound to take that into consideration. If the conclusion mentioned above was not reached would the claimant still be entitled to claim the compensation from the insurer?

67. As indicated already the provisions contained in the Indian Act (Motor Vehicles Act, 1939} as under different sub-sections of secs. 95 and S3 are in, material portions not only analogous, but also very often similar to, the provisions in the English Act (The Road Traffic Act, 1934). Sub-section (1) of Section 95 of the Indian Act is taken from Sub-section (1) of Section 36 of the English Act. Sub-section (2) of Section 95 of the former is based upon clause (iii) of Sub-section (6) of Section 3S of the English Act. Sub-sections 4 and 5 of Section 95 of the Indian Act have their counterpart in Sub-sections (5) and (4) respectively of Section 36 of the English Act. Clause (b) of Sub-section (2) of Section 95 of the Indian Act makes -a new provision.

68. It is contended on behalf of the Insurance Company that under Sub-section 5 of Section 85 of the Indian Act the indemnity is available only to the person or persons specified in the policy. It is argued that if under the terms of the policy the indemnity is not available to the transferee from the person who had taken out the policy the insurance does not cover any claim against such transferee. Unfortunately the intention of the legislature to ensure the sure payment of compensation to a third party is in certain cases avoided by the insurer throwing the claims on the financial resources or -the absence thereof of the owner or the

driver of the vehicle. Motor Vehicle policies frequently contain clauses restricting the liability of the Insurer in various ways viz., indemnity aforesaid may be limited by reference to the driver of the vehicle or the purpose for which it is used; certain types of such restrictions were avoided as against third parties by the English Road Traffic Act 1934 (21 and 25 Geo. V C 50). Similar provisions have not been introduced in the Indian Act.

69. The nature of the policy of guarantee depends upon the term* of the contract read along with the provisions of the Act.. Sub-section (5) of Section 95 of the Indian Act seems to provide that the cover is available only to the person who has taken out the policy including one who has become entitled to the benefits under the policy. If there be in the policy "a provision which requires a transfer of ownership of the vehicle to be assented to by the insurer and only on proof of such a fact the cover will enure to the benefit of the transferee_ from the owner who had taken out the policy such a provision will not militate against any of the existing provisions of the Motor Vehicles Act. The law does not make any provision to counteract the effect of such a clause,

70. If such a restrictive clause as regards the rights of a transferee from the previous owner of the motor vehicle is found in a third party insurance policy and no approval of a transfer is obtained from the insurer of the motor vehicle is registered by the Transport Authorities the result is that the vehicle run?, without the cover of a policy. Such user of the vehicle without a cover of insurance merely makes the person using it liable for an offence under Sub-section (1) of Section 94 read with the relevant portions of Chapter IX of the Motor Vehicles Act.

71. We do not overlook the fact that Section 106 of the Motor Vehicles Act casts the duty on the insurer to notify the Registering Authority the cancellation or suspension of a policy once issued. Omission to notify such cancellation or suspension does not under the present statute, keep alive the rights of the third parties to claim the benefits under the third party risk policies.

72. The unsatisfactory state of the law has repeatedly been pointed out by the Courts in England with regard to analogous provisions in the English Act.

73.. in *Tattersall v. Drysdale*" (1935) 2 KB 174 * (H) Goddard J. while interpreting Sub-section 4 of Section 36, which is almost in the same terms as subsec. 5 of , Section 95 of the Indian Act, observed that where- in a motor insurance policy a particular car is specified as the subject of insurance and by a clause in the policy its benefits are extended to the assured when driving another car with the owner's permission, the interest of the assured ceased when he parted with the specified car and the extending clause fell together with rest of the policy.

74. In *Marsh v. Moors* (1949) 2 KB 208 (I) the Court of appeal held that if an uninsured person was permitted to use a car the insured owner remained liable who in his turn would be entitled to cover under the insurance policy. There

were, no doubt, certain special facts to which reference was made about the insured car being driven by an unlicensed driver without the knowledge of the insured, drawing a line of demarcation from the other type of cases where a car was driven by the wife with the insured husband being in the car. See also *Peters v. General Accident, Fire and Life Assurance Corpn.* (1938) 2 All ER 257 (J).

75. If it be taken to have been proved in the present case that there was a clause in the policy requiring the insured to obtain the assent of the insurer of the change of ownership and if we had held that no such assent had been given, it would have been impossible to make the insurer liable for the accident in question which had happened after the transfer had taken place. In view of the decision already made that such a clause has not been proved to have been included in the present case, and also that even if such a clause had appeared, the insurer having failed "to produce the necessary documents which were under the insurance law in their custody, the insurer must be held to be liable to indemnify the owner of the vehicle as on the day that the accident had taken place.

76. This takes us to the other part of the case. We have given our reasons for coming to the conclusion that the total compensation payable in the present case should be assessed at Rs. 20,000/- and not Rs. 30,000/- and that the apportionment of the compensation as between the persons connected with the bus and the lorry should be one-third and two-thirds respectively.

77. We are now required to consider the petitions which have been filed before this Court on behalf of the plaintiffs and the owner of the bus Bir Singh, appellant in P.A. 76 of 1951. Out of the total compensation fixed, the amount payable by the owner and driver of the bus comes up to Rs. 6,666-10-8 paise and the balance of Rs. 13,333-5-4 paise is payable by the owner and the driver of the Lorry which is covered by the policy issued by the Habib Insurance Company, Limited. A petition was filed on 30-4-1954, by the plaintiffs claimants stating that they might be permitted to accept Rs. 4,000/- in full settlement of their claims against Bir Singh, the owner of the bus. It has been stated that Bir Singh, appellant in First Appeal No. 76 of 1951, is an old man who has got no property in West Bengal and it would be difficult to execute the decree against him after he retires from Bengal to the Punjab. The guardian mother has asked for leave to enter into such terms of settlement. A further petition has been filed on 8-2-1956, in which the plaintiffs respondents Nos. 3 and 4 (in First Appeal No. 73 of 1951) viz., the father and the mother of the deceased, have agreed that the total amount payable under the aforesaid terms of settlement may be apportioned in favour of the widow Hashi Rashi Banerjee and minor daughter Dipti Banerjee of the deceased. In view of the terms as contained in the two petitions filed before us, we certify that such terms are in the best interests of the minor and such terms are hereby approved. Although in the petition of compromise Rs. 4,000/- required to be paid was payable in two instalments, it has been reported to us today that Rs. 4,000/- has been paid in cash in one

instalment. It will accordingly be mentioned in the decree that Rs. 4,000/- having been paid, to the plaintiffs Nos. 1 and 2, there will be no further liability under the decree against Bir Singh, defendant No. 1,

78. V/c have directed that Rs. 6,666-10-8 pies was payable by defendants Nos. 1 and 2 jointly. The balance of the amount, viz., Rs. 2,680-10-8 pies will be payable by defendant No. 2 Baktar Singh.

79. The compensation apportioned against, the persons connected with the lorry via: Rs. 13,333-5-1 pies be paid by defendants Nos. 3, 4 and 5.

80. There will be no order for costs in this Court as in the appeal by Bir Singh the total amount of compensation has been reduced and Habib Insurance Company Limited also has been benefited thereby. The costs allowed in the lower Court will be reduced proportionately. As the total amount decreed has been reduced from Rs. 30,000/- to Rs. 20,000/- and such amount has been apportioned as between the two sets of defendants, the costs decreed in the lower Court against the two sets of defendants will be proportionately reduced.

81. The appeals are allowed in part as indicated above. Let one decree be drawn up for the two appeals and the two applications form part of the decree.

82. We do not think that we should leave this case without placing on record the perfunctory manner in which the Registers are maintained by the Regional Transport Authorities - steps should be taken to ensure filling up of all the columns in the Registers and the Authority concerned should record in writing on each occasion whether the Policy covering third party risks subsists or not. If the provisions for the compulsory insurance of third party risks are to be fully elected it is also for consideration whether more comprehensive statutory provisions should not be made. A copy of this judgment may be sent to the Legal Remembrancer West Bengal for his information.

P.K. Sarkar, J.

83. I agree.