

(1962) 11 MP CK 0013
In the Madhya Pradesh High Court
Case No : First Appeal No. 95 of 1960

Gyarsilal Jagannathprasad Mor

APPELLANT

Vs

Pandit Sitacharan Dubey and Others

RESPONDENT

Date of Decision : 15-11-1962

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, Order 18 Rule 2
Motor Vehicles Act, 1939 — Section 95(5), 96, 96(1)

Citation : AIR 1963 MP 164 : (1963) 33 CompCas 667 : (1964) ILR (MP) 91 : (1963) JLJ 336

Hon'ble Judges : P.V. Dixit, C.J.;K.L. Pandey, J

Bench : Division Bench

Advocate : R.D. Saranjame, K.B. Sinha and Ramgopal Kesharwani, for the Appellant; K.A. Chitale, R.S. Dabir, B.L. Seth and A.R. Choubey for Respondent No. 1, A.P. Sen, K.K. Thakur and A.L. Halve, for the Respondent

Final Decision : Dismissed

Judgement

Dixit, C.J.—This judgment will also govern, the disposal of First Appeal No. 96 of 1960.

2. These are two appeals from a judgment of the Additional District Judge of Balaghat giving to the plaintiff-respondent Pandit Sita Charan Dubey a decree for Rs. 30,000/- as damages for injuries caused to him in a motor-car accident.

3. The plaintiff, who on the date of the institution of the suit was about 76 years of age, has been practising as a lawyer since 1902. He became an advocate of the Nagpur High Court in 1936 and practised in that Court till 1956 until the establishment of this Court at Jabalpur. He is now an advocate of this Court and an advocate of the Supreme Court also. He was a member of the Rajya Sabha from 1952 to 1954. His case was that in March, 1956 he was required to go from Nagpur to Baihar in Balaghat district; and that when he was doing the return journey on the morning of 1st April, 1956 in a jeep car, which had been placed at his disposal by a friend of his, he was injured in a collision between the jeep car

and a Ford Touring car which was registered in the name of the defendant-appellant Gyarsilal and which was being driven by the respondent-Amersingh, an employee of Gyarsilal. The plaintiff alleged that the accident occurred when the jeep was negotiating a bend at mile 10.3 on the Ghat section of Baihar-Balaghat road; that the jeep was being driven carefully on the correct side of the road, that is to say, close to the left of the road; that it was proceeding at a speed of about 15 miles per hour and the driver blew the horn before negotiating the bend; that at that time the car driven by Amersingh suddenly came up the hill without any warning and at a great speed; that as it was being driven rashly and negligently on the wrong side of the road, it collided with the jeep car in which he was travelling; and that he was severely injured in this collision and also became unconscious. The plaintiff further stated that in this collision his right hip joint was dislocated and its socket fractured; that he received abrasions on his forehead and left knee; that the upper denture of his teeth was broken and its broken ends entered the gums and upper palate causing profuse bleeding from the mouth; and that he received severe injuries on the chest as well as on the right shoulder and the lower part of the spinal column. According to the plaintiff, one Mr. Trott of the Bharvelli mines of Balaghat happened to arrive in his car at the scene of the accident soon after it occurred. Mr. Trott removed the plaintiff in his own car to Balaghat hospital. He was then taken to the Medical College Hospital, Nagpur, and treated for his injuries. The plaintiff was put in plaster with both his feet suspended in the air by pulleys with weights attached. He had to remain in that condition in the hospital for fourteen days. Thereafter he was removed to his son's residence who was then the Superintendent of the Mental Hospital, Nagpur. He was kept in the same condition for nearly twelve weeks at his son's residence. As to the effect of these injuries on his physical and mental capacity, the plaintiff's allegations in paragraphs 5 and 6 of the plaint are :

"Even in July, 1956 he suffered from acute physical agony and mental shock and distress. For a number of weeks he suffered from giddiness, even while turning his head in bed. While trying to sit he suffered intense pain. His muscles have been rendered stiff and still require continuous massaging. The right leg has become thin and emaciated and is unable to support the weight of the body which compels the use of crutches even now. Owing to non-repair and infirmness of the musculature all about the hip area, he has been warned by the doctors against the risk of the recurrence of displacement and has to move about with great caution and under much pain. There has now occurred obliteration of the joint space resulting in stiffening of the hip joint and osteo artheritic changes have set in causing continuous pain and much restriction of movements. Plaintiff is practically a cripple and is likely to suffer much progressive deterioration of movements in future. His vitality and physical and mental condition have generally been lessened and expectation of life curtailed.

6. Though nearly 78 years of age the plaintiff had been leading an active life and was able to meet fully the physical and mental demands of the profession. As a result of the suffering, his vitality has been considerably reduced, digestion

impaired and almost continuous pain forces him to resort to sleeping drugs. Intermittent periods of palpitation, mental lassitude and depression are preventing concentration and disabling him from taking quick decisions and generally from undertaking the normal activities of his profession. The constant pain in the hip and groin area has not yet yielded to massaging, fomentations, analgesics and diathermy."

The plaintiff claimed that the injuries which he received were due to the negligence of Amarsingh, a driver employed by Gyarsilal to drive his Ford car involved in the accident for which Gyarsilal was vicariously liable as at the time of the accident the car was being used wholly or partly for Gyarsilal's purposes and that the defendant, the Indian Mercantile Insurance Co. Ltd., was also responsible as the Ford car had been insured at the material time with that company against third party risks.

4. The plaintiff estimated the total amount of damages which he was entitled to get for medical expenses, loss of current and future income, and general damages at Rs. 60,000/-. He, however, confined his claim to Rs. 30,000/- and prayed for a decree for that amount. It must be added that the plaintiff had claimed decree against one Fatechand also on the allegation that the Ford Touring Car, though registered in the name of Gyarsilal alone, was in fact owned both by Gyarsilal and Fatechand. During the course of the trial when the plaintiff discovered that Fatechand was not the owner of the car, Fatechand was discharged from the suit on plaintiff's application.

5. In his written-statement, Gyarsilal admitted that the Ford Touring Car belonged to him and was being driven at the time of the accident by Amarsingh. He, however, denied that Amarsingh was in his employment or that at the material time the car was being used by him wholly or partly for his, that is Gyarsilal's, purposes or as an employee of his. In his defence, Gyarsilal further pleaded that the Ford car had been purchased by him from one Dr. Joshi of Balaghat on 31st January 1956; that immediately after purchasing the car he and Dr. Joshi informed the Indian Mercantile Insurance Co. Ltd., with whom the car was insured for third party risks, about the transfer of the car; and that, therefore, the Insurance Company alone was liable to pay damages to the plaintiff. As to the circumstances in which Amarsingh was driving the car at the material time, Gyarsilal pleaded that on a request being made by Amarsingh for the loan of the car as he urgently wanted to see a friend of his at U kwa he had allowed the use of the car to Amarsingh; that he knew that Amarsingh held a driving licence and could efficiently drive the car; that thus the car was being used by Amarsingh at the material time for his own purpose and not for the car owner's purpose; and that the insurance policy issued by the company covered the risk of the car being driven by any person holding a valid licence.

6. While contesting the suit, Amarsingh denied all the allegations made by the plaintiff. He even went to the extent of denying that the plaintiff was a lawyer or was an advocate of the Nagpur High Court or of this Court or of the Supreme

Court or that he was a member of the Rajya Sabha. He denied that he was driving the car or that he was in the employment of Gyarsilal. He, however, admitted that the Ford Touring Car came into collision with the jeep in which the plaintiff was travelling on the Ghat section of Baihar-Balaghat road. But he pleaded that the driver of the jeep car drove the jeep rashly, recklessly, and negligently at a fast speed and on the wrong side of the road and the accident occurred solely due to the negligence of the jeep driver in driving the vehicle. This defendant's version about the accident was put thus in paragraph 18 of his written-statement :

"The collision between the Ford car and the plaintiff's jeep car occurred in the following circumstances. The plaintiff's jeep car was coming down in the Ghat area on the turning where there is steep slope. The plaintiff's driver did not blow the horn and did not also slow down the speed which he ought to have done as he was descending a slope. He had also come at the right side of the road and did not leave any space for a car going up from the opposite side. The Ford car was climbing the Ghat and necessarily was going slowly. The Ford car had kept up to the left, the horn was blown and there would not have been a collision but for the culpably rash and negligent driving of the plaintiff's driver. The defendant submits that the plaintiff's car had no petrol and engine of that car has stopped and car was allowed to roll down the slope and was being incapable of being controlled by the driver. The driving in such a state offends against the rules and was with culpable negligence and the plaintiff himself is responsible for the collision and in any case responsible for contributory negligence." The additional plea of Amarsingh was that on 1st April 1956 he was required to go to Ukwa to see a friend of his and as he wanted to return to Balaghat the same day he made a request to Gyarsilal to lend his car for doing the journey to Ukwa; that Gyarsilal permitted him to take the car and thus at the time of the accident the car was being used for his own purpose and not for the purpose of Gyarsilal; and that the plaintiff had "falsely joined the defendant No. 1 or the defendant No. 2 to this suit without there being any claim whatsoever against them. The defendants Nos. 1 and 2 are absolutely not concerned and the car was being used by this defendant simply for his private purpose."

7. In its defence, the Insurance Company denied all knowledge of the accident or of the injuries received by the plaintiff and put the plaintiff to strict proof of the allegations made by him about the collision and the injuries sustained by him. The Company pleaded that it was never informed by Gyarsilal that he had purchased the Ford Touring Car from Dr. Joshi; that the said car was insured by Dr. Joshi with the Company but the risk under the insurance policy ceased when the car was sold by him; that the policy of insurance did not permit the transfer of the indemnity therein given to any person and the policy was a contract of indemnity in favour of Dr. Joshi alone, the assured therein, and not in favour of his assigns; that the policy of insurance was not assigned by Dr. Joshi to Gyarsilal and even if there was any assignment of the policy it was inoperative; and that the assured being Dr. Joshi, who had ceased to be the owner of the car at the

time of the accident, the Company was in no way liable to pay any damages to the plaintiff.

8. The learned Additional District Judge found that the accident was caused by the negligence of Amarsingh who drove the Ford Car rashly and negligently on the wrong side of the road and contrary to the rules of driving; that the Ford Car was owned by Gyarsilal; that Amarsingh was not in the employment of Gyarsilal as a driver; that in the collision the plaintiff received serious injuries making him cripple for all time; that the plaintiff was entitled to get the amount of damages claimed by him; that both Gyarsilal and Amarsingh were liable to pay this amount as damages to the plaintiff; that the Ford Touring Car was insured with the Indian Mercantile Insurance Company against third party risks; and that, therefore, the Company was bound to satisfy the judgment and decree against Gyarsilal and Amarsingh awarding damages to the plaintiff. The learned Additional District Judge took the view that Gyarsilal had lent the use of his car to Amarsingh; that though at the material time Amarsingh was using the car for his own purpose yet Gyarsilal was liable as the moment Gyarsilal lent the car to Amarsingh "the latter's purpose became defendant No. 1's (Gyarsilal's) purpose"; and that Gyarsilal had rendered himself liable for damages by permitting Amarsingh to use his car. In regard to the liability of the insurance company, the learned trial Judge held that the car was insured by Dr. Joshi with the company; that soon after the car was sold by Dr. Joshi to Gyarsilal, both Dr. Joshi and Gyarsilal informed the company of the sale for the purpose of the assignment of the policy which could be assigned, to Gyarsilal; that the company gave no intimation to the registering authority or to Gyarsilal that the policy had been cancelled and did not even produce the policy, the certificate of insurance and the Register of policies; and that, therefore, it must be taken that the policy had been assigned to Gyarsilal, who then became the insured, and the policy was in force at the time of the accident. On these findings, the plaintiff's claim for Rs. 30,000/- besides costs was decreed against Gyarsilal and Amarsingh with a declaration that the defendant-insurance company was also liable to pay the amount and the decree would be executable against the company. It is against this judgment and decree that both Gyarsilal and the Indian Mercantile Insurance Co. Ltd., Bombay, have filed separately these two appeals.

9. In the appeal preferred by the Insurance Company, Gyarsilal has filed objections under Order 41, Rule 22, CPC against the grounds taken by the company disclaiming its liability for the payment of any amount as damages to the plaintiff and seeking to make Gyarsilal liable for the damages.

10. On the arguments addressed before us, three questions arise for determination, namely first, whether the accident was caused by the negligence of Amarsingh when driving the Ford Touring Car; secondly, whether at the time of the accident Amarsingh was driving the car as the agent of the owner Gyarsilal; and, thirdly, whether the insurance policy held by Dr. Joshi could be transferred to Gyarsilal who purchased the Ford Touring Car from Dr. Joshi, and

whether it could be regarded as having been transferred to Gyarsilal so as to give him the benefit of the cover under the Policy, Before us Shri Saranjame, learned counsel appearing for Gyarsilal, raised no dispute about the injuries received by the plaintiff and the quantum of damages awarded to him. He said that if the injuries received by the plaintiff were caused by the negligent driving of the Ford Touring car, then the amount of Rs. 30,000/- awarded to him could not be regarded as excessive for the pain, suffering and loss which the plaintiff has endured and suffered and which he may suffer in future. In view of the provisions of Section 96(2) of the Motor Vehicles Act, the Insurance Company is clearly not entitled to question the amount of damages awarded to the plaintiff. The defences open to it are limited to "those specified in Sub-section (2) of Section 96 of the Motor Vehicles Act (See British India General Insurance Co. Ltd. Vs. Captain Itbar Singh and Others, .

11. In regard to the question of negligence, the finding of the trial Judge that the accident was due to the negligence of Amarsingh in driving the Ford car is based on the evidence of the plaintiff himself, his nephew Vishnucharan who was travelling with him in the jeep car, and Mr. Trott who arrived at the scene of the accident soon after it occurred. In these appeals, the finding of the lower Court that Amarsingh was driving a Ford car was not, and indeed could not be assailed. Amarsingh has not preferred any appeal against the decision of the learned Additional District Judge.

12-14. (After discussion of evidence His Lordship proceeded :) On the evidence given by the plaintiff, his nephew and Mr. Trott, the conclusion is irresistible that the accident was due to the negligent driving of the Ford car of Amarsingh and that he did not exercise that care which he should have and could have for avoiding the accident. Learned counsel appearing for Gyarsilal did not dispute that if the evidence of the plaintiff, his nephew and Mr. Trott was given effect to, then the conclusion that the collision was due to Amarsingh's negligence in driving must follow. We see no reason to discard the testimony of these three witnesses the effect of which is not destroyed in any way by the wholly improbable and unreliable version of the accident given by Amarsingh and Pesi. The accident being due to the negligence of Amarsingh, it is necessary to see whether Amarsingh owed a duty to the plaintiff to take due care. When negligence is alleged as the basis of an actionable wrong, a necessary ingredient in the conception is the existence of a duty owed by the defendant to the plaintiff to take due care. That Amarsingh owed such a duty cannot be denied. It is axiomatic that when two parties are so moving in relation to one another as to involve a risk of collision, each owes to the other a duty to move with due care no matter whether they both are in control of vehicles, or both are proceeding on foot or whether one is on foot and the other in a moving vehicle. If, as we think, Amarsingh was negligent in driving the Ford car and he owed a duty to the plaintiff to take and exercise due and proper care while driving the car, then he is clearly liable¹ in damages to the plaintiff.

15. On the question whether Gyarsilal can be made responsible for Amarsingh's negligence, the learned trial Judge has held that it has not been proved that Amarsingh was in the employment of Gyarsilal as a driver and that he was driving the car in the course of his duties as a driver, that Amarsingh had borrowed the car from Gyarsilal, and that even if Amarsingh was using the borrowed car for his own purpose Gyarsilal would still be liable for his negligence as on the car being lent by Gyarsilal to Amarsingh, any purpose for which Amarsingh used the car was in effect Gyarsilal's own purpose. Learned counsel for Gyarsilal submitted that on the finding of the trial Court that the car had been lent by Gyarsilal to Amarsingh and that at the material time it was being used by Amarsingh for his own purpose, no liability could be fastened, upon Gyarsilal for Amarsingh's negligence in driving the car as in that case Amarsingh would be in the position of a bailee, and a bailor of a chattel was not liable for the negligence of the bailee in his use of the chattel. To support this contention, reliance was placed on *Bull and Co. v. West African Shipping Agency and Lighterage Co.* AIR 1927 PC 173 and *Dinbai R. Wadia and Others Vs. Farukh Mobedjina and Another*, . We are unable to accept the contention that the position of Amarsingh was that of a bailee. It is no doubt true that the bailor of a chattel is not liable for the negligence of the bailee in his use of the chattel and if the owner of a motor car lends his car to a friend to be used for the friend's purpose, he cannot be made liable for the friend's negligence in using the car (see *Daniels v. Vaux* (1958) 2 KB 203.) The proposition propounded by the learned Additional District Judge that on the car being taken on loan by Amarsingh for his own purpose Amarsingh's purpose became that of Gyarsilal's, is clearly untenable. The finding of the trial Court that the car was lent by Gyarsilal to Amarsingh for being used wholly for Amarsingh's purpose is not justified on the evidence on record. It is true that the plaintiff was not able to produce any evidence to show that Amarsingh was in the employment of Gyarsilal as a driver and that at the time of the accident he was a servant of Gyarsilal. Gyarsilal himself did not give any evidence. Amarsingh no doubt denied that he was in the employment of Gyarsilal and said that he was employed as a manager of the mines belonging to Fatechand Mor. But all this could not furnish any ground for the acceptance by the trial Judge of Amarsingh's story that on the day in question he had borrowed the Ford car from Gyarsilal for his own purpose, when the learned trial Judge had discredited the testimony of Amarsingh as wholly unreliable and interested. The learned Additional District Judge noticed and criticised some of the statements made by Amarsingh and Pesi and concluded therefrom that the "entire statements of these two witnesses must be discarded as worthless." He then inconsistently accepted the statement of Amarsingh by saying : "Plainly the defendant No. 3 (Amarsingh) borrowed the car of near relation i.e. a nephew of his employer defendant No. 2 (Fatechand) and was driving the car when the accident took place." The learned trial Judge rightly found that the "entire" evidence of Amarsingh was worthless, Amarsingh pleaded in his written-statement that the car had been borrowed from Gyarsilal for his own use, that is, for going to Ukwa. He later on altered this version while giving evidence by

saying that Pesi needed a car to take his ailing son to Nagpur and it was for this purpose that he borrowed the car, and that by chance he also accompanied Pesi in the car. The witness could not give any adequate reason for this variation. Amarsingh had no hesitation in saying that some of the statements contained in his written-statement were untrue. In the course of his evidence he made the extraordinary statement that he did not know that the suit was against him or that he had engaged any counsel to defend him. All these statements of Amarsingh only indicate his reckless disregard of truth when he thought it was in Gyarsilal's and in his own interest to make untrue statements. Clearly no reliance can be placed on any statement of Amarsingh who had little respect for the truth. His story that the car was borrowed from Gyarsilal for his own use or for Pesi's use cannot be accepted.

16. If this story of Amarsingh about the car being borrowed is excluded from consideration, as it must be, then the matter of Gyarsilal's responsibility has to be considered only on the facts that at the time of the accident Gyarsilal was the owner of the Ford Touring car and that it was being driven by Amarsingh. These facts are in themselves sufficient to raise a presumption that at the time of the accident, the car was being driven by Amarsingh as an agent or servant of Gyarsilal. It is erroneous to suppose that the owner of a vehicle is only liable for the negligence of the driver if that driver is his servant acting in the course of his employment. The owner is also liable if the driver is his agent, that is to say, if the driver is with the owner's consent driving the car on the owner's business or for the owner's purposes. There is ample authority to support the view that in an action for damages for injury due to a motor-car, proof by plaintiff that the car which caused the accident belonged at the time of the accident to the defendant raises a presumption that the driver of the car was the defendant's servant or agent. This view has been expounded in *Liladhar Chaturbhuj Vs. Harilal Jethabhai*,) after a careful examination of some English authorities including *Barnard v. Sully* (1931) 47 TLR 557. In *Barnard's* case (1931) 47 TLR 557 (supra), it was held that proof of the ownership of vehicle which caused the accident furnished prima facie evidence that the vehicle was at the material time being driven by the defendant, his agent or servant. On the basis of this authority, it has been stated in "Charlesworth on Negligence" (3rd edn. at p. 77) :

"The fact that the defendant is the owner of the motor car in question is evidence that it was being driven by him or his servant or agent at the material time. Such evidence, of course, is not conclusive, but may be rebutted by proving who was actually driving at the time."

Learned counsel for Gyarsilal said that the cases of *Barnard* (1931) 47 TLR 557 (supra) and *Liladhar Chaturbhuj Vs. Harilal Jethabhai*, , were distinguishable on facts. The facts are no doubt different. But those cases clearly establish the principle that in an action for damages on account of injuries sustained in a motor collision, proof by the plaintiff that the car, which caused the accident,

belonged at the material time to the defendant offers prima facie evidence that the driver of the car was the defendant's agent or servant. The presumption that the car was being driven by the owner's servant or agent for the owner's purpose is no doubt a rebuttable presumption. In this case, Amarsingh endeavoured to displace this presumption by saying that the car was borrowed from Gyarsilal for Pesi's use. He set up a story which, as pointed out earlier, must be disbelieved. The presumption, therefore, that at the time of the accident Amarsingh was driving the car belonging to Gyarsilal as his servant or agent stands. If Amarsingh was driving the car -in that capacity, it necessarily follows that the car was being used wholly or partly for the owner's purposes. Gyarsilal is, therefore, liable for Amarsingh's negligence in driving the car.

17. The decisions cited by the learned counsel appearing for Gyarsilal are not in point here. In AIR 1927 PC 173 the principle that was laid down was that when one person lends his servant to another for a particular employment, the servant, for anything done in that particular employment, must be dealt with as the servant of the man to whom he is lent, although he remains the general servant of the person who lent him. Here, there is no question of determining the responsibility of a person lending a servant to another for the negligence of the servant done while in the employment of the borrower. *Dinbai R. Wadia and Others Vs. Farukh Mobedjna and Another*, is clearly distinguishable on facts. Even on the principles laid down in that case, the liability of Gyarsilal for Amarsingh's negligence is clear. In *Dinbai R. Wadia and Others Vs. Farukh Mobedjna and Another*, it has been held that the master is jointly and severally liable for any tort committed by his servant while acting in the course of his employment and that if the owner of a vehicle allows it out on the road in charge of some person, no matter whether he is a servant, his friend or anyone else, and if the vehicle is being used wholly or partly for the owner's purposes, then the owner is liable for the driver's negligence. Here, on the principle stated earlier, it must be held that at the time of the accident Amarsingh was driving the Ford car belonging to Gyarsilal as his agent, and if he was so driving, it must further be held that at the material time the car was being used wholly or partly for the owner's purposes. The concept of agency necessarily involves that the car was being used on behalf of, or for the purposes of, the owner. Therefore, if in this case on the fact that Gyarsilal was the owner of the motor-car at the material time a (presumption arises that Amarsingh was driving the car at the time of the accident as his agent, then the further presumption that at the time of the accident the car was being used wholly or partly for the owner's purposes must also arise; thus Gyarsilal is clearly vicariously liable for the negligence of Amarsingh in driving the vehicle.

18. Turning now to the question whether the Indian Mercantile Insurance Co. Ltd., is liable to pay to the plaintiff the amount of damages decreed against the other two defendants, it must first be, noted that the Ford car in question was originally the property of Dr. Joshi and he was insured with the appellant-company under a policy which admittedly was to expire on 30th June 1956, and

was in force on the day of the accident which was 1st April, 1956. It is in evidence that Dr. Joshi handed over the insurance policy to Gyarsilal when he sold the car and that the policy was thereafter sent to the Company by Gyarsilal with a letter to transfer the policy in his favour. This evidence will be examined later. The certificate of insurance and the policy in original were not produced in the case either by Gyarsilal or by the Insurance Company. In the lower Court, the company no doubt placed on record copies of these documents. But no attempt was made to prove them. In fact, the insurance company gave no evidence at all. It is, however, not disputed now that the policy issued in favour of Dr. Joshi contained clauses about the transfer of the policy in the event of the change or sale of the car by him. The clauses ran thus:

"If the car is disposed of and replaced by another, the policy may be transferred to apply to the new car subject to pro rata adjustment of premium. In the event of the sale of the car the policy may be transferred to the purchaser, provided his proposal is acceptable to the Company."

19. The contention of the plaintiff is that after purchasing the car both Gyarsilal and Dr. Joshi informed the company about the sale of the car and intimated to it to transfer the policy in favour of Gyarsilal and also sent the policy to the Company for that purpose; that in October, 1956 and February, 1957 he himself addressed letters to the insurance company informing the company about the accident and making enquiries as to whether the car was insured with the company by a policy in favour of Dr. Joshi and whether the said policy had been transferred to Gyarsilal and whether the policy was a third party risk policy; that the company did not give any reply either to Gyarsilal or to him and did not even inform the registering authority about the cancellation of the policy as required by Section 105 of the Motor Vehicles Act; that the company tendered no evidence to support the averments made in its written statement and did not even produce the "register of policies" which it was required to maintain under the Insurance Act; that in these circumstances it should be taken that the company impliedly assented to the transfer of the policy in favour of Gyarsilal; and that consequently he was entitled to the benefit of the policy which had been issued by the company in respect of the Ford car which collided with the jeep car.

20. The argument advanced by Shri Thakur, learned counsel appearing for the Insurance Company, was that the policy issued to cover third party risks was a policy of indemnity of the person named in the policy, who was Dr. Joshi; that he was the only person entitled to indemnity by virtue of Section 95 (5) of the Motor Vehicles Act; that if the company had consented to a transfer of the interest in the policy in favour of Gyarsilal he would have become entitled to the cover of indemnity but that there was no proof that the company ever gave its consent to the transfer; and that, in fact, Gyarsilal or Dr. Joshi never informed the company about the sale of the car and Gyarsilal never made a proposal for a new policy and a certificate of insurance being issued in his favour.

21. On this part of the case, the controversy is, therefore, centred round the

question whether the insurance policy held by Dr. Joshi in respect of the Ford car was or was not transferred to Gyarsilal. Now it is quite true that a motor insurance policy is a contract of personal indemnity and the assured cannot claim the insurance amount when he does not suffer any loss or damage. It is clear that where a car insured against damage, third party risks etc., is transferred by the owner to another person, the owner himself retaining no interest in the car, and if subsequently the car is involved in an accident causing damage to it and injuries to others the owner cannot recover from the insurer any amount inasmuch as he cannot be said to have suffered any loss. Again, the purchaser of the car cannot a]so in the absence of an "assignment" of the policy in his favour or a special statutory provision claim the insurance amount from the insurer. Here there is no statutory provision either in the Motor Vehicles Act or in the Insurance Act about the transferee's right under a motor insurance policy. The matter is governed by the clause reproduced earlier. It is, however, important to note that a clause in a motor car insurance policy with regard to the transfer of the policy in the event of the sale of the car to which it relates is really not a clause with regard to the assignment of the policy. Such a policy being a contract of personal indemnity cannot be assigned; when it is transferred, there is only a novation of the contract by which the original assured is released and a new assured is accepted. In this connection, it would be pertinent to refer to the observations of Goddard, J. (as he then was) in *Paters v. General Accident Fire and Life Assurance Corporation Ltd.* (1937) 4 All ER 628. Dealing with the question whether when a motor car insurance policy is transferred by the owner vendor to a purchaser, there is an assignment of the policy, Goddard, J. said :

"I do not think that you can assign a policy of this nature at all. You can assign your right to receive money under it. If an accident has occurred, and you have a right to be indemnified by your insurers, or if your car has been destroyed, so that you have a right to be paid by your insurers, you can assign your right to anybody you choose, subject to the Road Traffic Act. In view of the statutory provisions, I do not think that you can assign away your right so as to prevent the injured person from recovering the money. At any rate, the insurance company would not pay it, because otherwise they might be liable to pay twice over. In all contracts of insurance -- I am not dealing with marine insurance, because different considerations apply in marine insurance, nor am I dealing with life insurance, which is not really insurance in the proper sense of the term at all; I am dealing with burglary, fire, accident, and so forth -- I do not think you can assign (sic) policy so as to make of what is a contract of personal indemnity to A a contract of personal indemnity to B. I hope I have made that clear. You cannot thrust a new assured upon a company against its will. If you do that, you must have a novation. You must have the release of the assured and the acceptance of a new assured." These observations make it very clear that when a question is raised as regards the transfer of a motor insurance policy containing a clause regulating its transfer to the purchaser of the car, then what is to be seen and determined is whether there has been a novation of the contract of personal

"indemnity in terms of the clause. The requisites for the novation of a contract are well known (see Section 62 of the Contract Act). One of the requisites is that there must be agreement of all the parties to the new contract. On the principles generally applicable to the formation of contracts, it cannot be disputed that the consent of parties to a novation may be established by circumstances showing such assent as well as by express words. The question whether there was an agreement to substitute a new contract or not is a question of fact depending on the intention of the parties and one must look to the substance of the matter and not to mere form. The handing over of the policy by the vendor to the purchaser on the sale of a car does not by itself constitute a transfer of the policy to the purchaser.

22. In the present case, the clauses reproduced above plainly show that the transfer of the policy on the sale of the Ford car was not prohibited. The clauses permitted the transfer of the policy to the purchaser of the car, as well as the application by Dr. Joshi of the policy to another car replacing the car sold. Under the clause, the transfer of the policy to Gyarsilal could only be with the consent of Dr. Joshi and only if Gyarsilal's proposal to become the assured was acceptable to the company. The clause nowhere laid down that the acceptance by the company of the proposal of the purchaser to become the assured must be in writing or must be expressed by the issue of a fresh policy and certificate of insurance in favour of that person. Indeed when the clause speaks of the transfer of the policy already effected in favour of the purchaser of the car the question of the issue of a fresh policy cannot arise. The word "proposal" as used in the clause means "proposal about transfer of the policy" and not a proposal which a person makes to an insurance company when he intends to take a policy for the first time. Now, the evidence on record shows that Dr. Joshi handed over the policy to Gyarsilal when he sold the car to him; that he also intimated to the insurance company the sale of the car; and that thereafter Gyarsilal sent the policy to the insurance company with a proposal for the transfer of the policy to him. These facts were deposed to by Dr. Joshi and Vasant, who was in the employment of Gyarsilal, in their examination-in-chief. These witnesses were not cross-examined by the insurance company on these points. It must, therefore, be held that Dr. Joshi was agreeable to the transfer of the policy to Gyarsilal and that Gyarsilal did make a proposal to the insurance company for the transfer of the policy to him. Vasant further said that the insurance company did not return the policy and did not send to Gyarsilal any intimation in reply to Gyarsilal's proposal about the transfer of the policy. If the company was not willing to accept the proposal of Gyarsilal about the transfer of the policy, one would have expected the company to inform Gyarsilal accordingly. The company did not even send any communication to the registering authority about the cancellation of the policy in respect of the Ford car which it should have done u/s 105 of the M. V. Act if it had decided to cancel the policy. The company did not also reply to the letters dated 20th October, 1956, and 21st February, 1957, which the plaintiff addressed to it seeking information about the insurance of the car and the

transfer of the policy to Gyarsilal.

In its written-statement the company admitted the receipt of the plaintiff's letter dated 29th October, 1956, and the subsequent letter of 21st February 1957 and said that no reply was sent to the plaintiff as the company was not liable for the claim made by him. It is no answer for a respectable insurance company to say that no reply was sent to the plaintiff as the company did not consider itself liable for the payment of any damages when u/s 98 of the M. V. Act the company was under an obligation to furnish to the plaintiff the information he needed. The company did not even tender any evidence to support the statement made by it contained in its written-statement and no attempt was made to show by producing and proving the register of policies that Gyarsilal's proposal for transfer was not accepted. It is to be noted that the manager of the insurance company was summoned twice, but he did not appear in the Court to give evidence even after accepting the amount of expenses for coming down to give evidence. In these circumstances, it would be legitimate to treat all this inaction of the company as only indicating that it has accepted the proposal of Gyarsilal for the transfer of the policy. If it had not, the company should have seriously contested the suit and should have led evidence for establishing affirmatively that it had not assented to the transfer of the policy in favour of Gyarsilal.

23. Learned counsel for the company sought to suggest that the company had filed a written-statement denying having received any communication from Gyarsilal about the transfer of the policy and the receipt of the policy and having consented to the transfer proposal; and that, therefore, it was not necessary for the company to lead any evidence. This suggestion is altogether untenable. It is elementary that when parties are at issue on certain statement made in their pleadings, then the matter cannot be decided on pleadings alone and that the parties must produce evidence to support their averments. It was then said that the company had filed a copy of the certificate and policy issued to Dr. Joshi, that these documents did not contain any alteration or endorsement to show that the policy had been transferred to Gyarsilal, and that thus they indicated that until the filing of those documents in the suit the company had not assented to the transfer of the policy. This is only begging the question. The company had to prove aliunde that it had rejected the proposal of Gyarsilal for the transfer of the policy. This, it could have done by showing that after receiving an intimation of Gyarsilal it decided to reject his proposal for transfer and made an endorsement to that effect in the register of policies, and other record. If the company expressly or impliedly assented to the transfer, then the company's failure to make the necessary alterations in the policy cannot alter the fact of the acceptance of the transfer proposal.

Learned counsel's further argument was that u/s 95 (5) of the M. V. Act the company was liable to indemnify only the person named in the policy, who was here Dr. Joshi, and that as the policy did not specify the name of Gyarsilal the company was not liable. Sub-section (5) of Section 95 is as follows --

"(5) 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."

It will be seen that this provision is concerned with the liability of the insurer to indemnify "the person or classes of persons" specified in the policy. It does not deal with the rights of a third party against the insurer. It is Section 96 (1) which deals with the duty of the insurer to satisfy judgments against persons insured in respect of third party risks, and says that when a judgment in respect of a liability covered by a policy u/s 95 (1) (b) is

"obtained against any person insured by the policy, then, notwithstanding that the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy, the insurer shall, subject to the provisions of this section, pay to the person entitled to the benefit of the decree any sum not exceeding the sum assured payable thereunder, as if he were the judgment-debtor in respect of the liability"

It is easy to see that if a policy contains a clause about its transfer to a purchaser of the car to which it relates and the transfer has been assented to by the insurance company, then the transferee would be a person falling in the category of "the person or class of persons specified in the policy in respect of any liability" for the purposes of Sub-section (5) of Section 95 and would also be "any person insured by the policy" for the purposes of Section 96 M. V. Act. That being so, the contention of the appellant-company that it was not liable to pay any amount to the plaintiff as Gyarsilal was not the person specified in the policy cannot be accepted. If, as we think, the company impliedly assented to the transfer and there was a novated contract of indemnity, then clearly Gyarsilal was in effect and in law the person insured by the policy even though his name was not substituted in place of Dr. Joshi.

24. The further argument raised on the appellant-company's behalf was to the effect that the plaintiff had alleged that both Gyarsilal and Fatechand Mor were the owners of the car; that later on the plaintiff was allowed to discharge Fatesingh Mor from the suit and the trial Court held that Gyarsilal was the owner of the new car; and that in doing so the lower Court permitted the plaintiff to set up a new case. We do not think there was any alteration in the plaintiff's case by his applying for the discharge of Fatesingh on learning that he was not the owner of the car. It was also urged that Dr. Joshi, whose name had been specified in the policy, was not made a party to the suit and, therefore, the plaintiff could not make any claim against the company. There is no substance in this contention which overlooks the fact that on the acceptance of the transfer proposal the new assured was Gyarsilal and not Dr. Joshi. It was, therefore, not necessary for the plaintiff to implead Dr. Joshi in the suit. In our view, on the material on record, it must be held that the transfer of the policy to Gyarsilal had been impliedly assented to by the insurance company, and, therefore, Gyarsilal was entitled to

the cover under the policy.

25. Before concluding it would be proper to notice the decisions in *Bir Singh and Another Vs. Sm. Hashi Rashi Banerjee and Others*, and *Madras Motor Insurance Co. Ltd., Madras Vs. Mohamed Mustafa Badsha and Others*, cited by the learned counsel for Gyarsilal. Both these cases deal with the question whether the transferee of a vehicle was entitled to the cover under a motor insurance policy taken out by the transferor. In the Calcutta case it was held that if there be in the policy a provision which requires a transfer of ownership of the vehicles to be assented to by the insurer, 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 if the assent to the transfer is proved. In that case, the learned Judges of the Calcutta High Court regarded the failure of the insurance company to produce the register of policies and the original policy containing a restrictive clause about the transfer of policy and other record to show as to how the policy was dealt with after the sale of the car, as raising the presumption that the insurance company had assented to the transfer. It was also observed therein that this presumption must strengthen by the fact that the Regional Transport Authority had registered the car after it was sold and that he would not have done this unless and until it had been shown to its satisfaction that there was a subsisting policy in respect of the vehicle. The circumstances in which the Calcutta High Court drew the inference of the assent of the insurance company to the transfer of the policy are no different from those in which we have drawn a similar inference in the present case. But we do not find ourselves in agreement with the view expressed by the Calcutta High Court that the registration of a vehicle by the Regional Transport Authority is also an indication of the fact that a subsisting policy in respect of the vehicle registered exists, and that, therefore, it should be taken that the insurer assented to the transfer. Surely, no presumption or adverse inference can be drawn against a party by the conduct of another.

26. As to the *Madras Motor Insurance Co. Ltd., Madras Vs. Mohamed Mustafa Badsha and Others*, , it is sufficient to say that the learned Single Judge of the Madras High Court rested his conclusion that the transferee was entitled to the benefit of the policy held by the transferor mainly on Section 96 (2) M. V. Act. With all due deference to the learned Judge, we do not agree with the line of reasoning adopted by him.

27. For the foregoing reason, our conclusion is that the learned Additional District Judge, Balaghat, rightly gave to the plaintiff a decree for Rs. 30,000/- besides costs and interest against Gyar-silal and Amarsingh and embodied in the decree the direction that the insurance company was liable for the payment of the amount and that the decree would be executable against it. Both these appeals, therefore, fail and are dismissed. The appellant in each case shall pay the costs of the respondent-plaintiff.