

(1969) 11 MP CK 0001

In the Madhya Pradesh High Court

Case No : Miscellaneous First Appeal No. 53 of 1965

Mangilal

APPELLANT

Vs

Parasram and Others

RESPONDENT

Date of Decision : 03-11-1969

Acts Referred:

Motor Vehicles Act, 1939 — Section 110B

Citation : (1970) ACJ 86 : AIR 1971 MP 5 : (1971) ILR (MP) 986 : (1970) JLJ 142 : (1970) 15 MPLJ 1 : (1970) MPLJ 1

Hon'ble Judges : Bishambhar Dayal, C.J; Suraj Bhan Grover, J; Shiv Dayal Shrivastava, J

Bench : Full Bench

Advocate : Y.S. Dharmadhikari, Amicus Curiae, for the Appellant;

Final Decision : Dismissed

Judgement

Shiv Dayal, J.

This is an appeal u/s 110-D of the Motor Vehicles Act, 1939, (hereinafter called the Act), from an award of the Motor Accidents Claims Tribunal, Indore.

On April 26, 1963, at about 4 p. m., Rajendra Kumar, a boy of 7 years, was sitting on the pathway a few yards away from the highway, on the outskirts of village Jamli, where he lived with his father, Parasram (respondent No. 1). The boy was answering the call of nature. In the meantime, a passenger bus, M. P. E. 3564, belonging to Mangilal (appellant) and driven by Kale Khan (respondent No. 2) came on the wrong side of the road and ran over the boy causing severe injuries to him, which resulted in his instantaneous death.

Parasram lodged a claim for Rupees 20,000/- before the Claims Tribunal constituted u/s 110 of the Act against Mangilal, Kale Khan and the Indian Merchantile Insurance Co. Ltd., (respondent No. 3, hereinafter called the insurer) on the allegation that the bus was driven at a high speed and that the accident was due to negligence of the driver, Mangilal and Kale Khan resisted the claim in

a joint written statement. The insurer, with whom the owner was insured against third party risks, also resisted the claim by a separate written statement.

The Tribunal found that Kale Khan was driving the bus as the employee of Mangilal and that he was driving the bus negligently and at an excessive speed and thereby caused the death of Rejendra Kumar. Accordingly he made an award for Rs. 2460/- and costs in favour of the petitioner.

Aggrieved by the award, Mangilal preferred this appeal challenging, inter alia, the finding of the Tribunal on the question of negligence. Initially, Dixit, C. J., sitting singly, heard the appeal and then referred it to the Division Bench of himself and Pandey, J. It appears that a preliminary point was raised whether it was at all necessary to go into the question of negligence in this case and whether the liability of the insurer was not absolute. Dixit, C. J., framed the question in these words:--

"Whether in compensation proceedings under Sections 110-A and 110-B of the Motor Vehicles Act, 1939, (hereinafter referred to as the Act), the Claims Tribunal is required to base its award with regard to payment of just compensation on the finding that the accident of the nature specified in Section 110-A of the Act was a result of negligence on the part of the owner or driver of the vehicle."

He wanted to answer the question in the negative and chose to express his opinion rather elaborately, which will appear from the following narration contained in his own words. After stating the provisions contained in Sections 94, 95(1) and 96(2), he says:--

"No motor vehicle can be used in a public place, unless there is in force in relation to that use of that vehicle a policy of insurance complying with the requirements of Section 95.....These provisions ensure that third parties who suffer on account of the use of the motor vehicle would be able to get compensation for injuries suffered.....The emphasis is on compensation in respect of accidents of the nature specified in Sub-section (1) of Section 110 arising out of the use of the motor vehicles.....The Tribunalis not concerned in any way with accidents arising out of the use of motor vehicles in relation to which there is no insurance policy against third party risks.....The expression "the Claims Tribunal shall specify the amount which shall be paid by the insurer" occurring in Section 110-B.....abundantly shows that in proceedings before the Claims Tribunal it is only the liability of the insurer that is determined and there is no question of determining the liability of any other person for payment of compensationThis liability to pay compensation is independent of any negligence or wrongful act in the use of vehicle. It arises under the terms of insurance contract and by virtue of the provisions of the Motor Vehicles Act referred to earlier. It is well settled that actions for money payable by terms of contract, actions in quasi contract, actions in equity and actions under statute are not actions for damages and are independent of any tortThe total

amount of compensation that an insured person can get is dependent not on the degree of negligence in the use of the vehicle or on the part of the person who has received an injury but is really dependent on the suffering caused to him, the expenses incurred by him in treatment and on the loss of earning capacity after the accident.....Section 110-B does not in terms say that it is only when negligence on the part of the driver is established that compensation can be awarded.....The liability to pay compensation being thus absolute and statutory, all that the claimant, who has right to compensation, has to establish is that the use of the vehicle insured against third party risks resulted in the death of, or injuries to, the person concerned..... u/s 96(2) of the Act, an insurance company.....cannot raise a dispute about the quantum of compensation. It cannot avoid its liability for payment of compensation to a third party on the ground of negligence either on the part of the driver of the vehicle or the person suffering. See *British India General Insurance Co. Ltd. Vs. Captain Itbar Singh and Others*, . If the main contesting party before the Claims Tribunal is the insurance company and it can contest the claim only on the grounds specified in Section 96(2), then it follows that the question of negligence in the use of the vehicle in no way enters in the determination or award of compensation by the Claims Tribunal."

Pandey, J., did not agree with him in this opinion, but they agreed with each other to refer the appeal to a larger Bench. It is thus that this appeal is before us.

It seems to us quite clear that the problem referred is solved as soon as the fundamental concept and incidents of motor vehicles insurance, particularly insurance against third party risks, are first borne in mind and then the provisions of the statute are examined to ascertain their object, purpose and effect.

With the increase in the use of motor vehicles as a means of public and private transport on road, and its potentiality to endanger life and property, a complex form of insurance known as "motor vehicles insurance" became evolved. Initially, motor vehicles insurance was a kind of property insurance for the purpose of indemnifying the owner of the vehicle against loss or damage to it and its accessories through accident. Then arose the necessity of relief against personal injuries to the owner and also the person or property of third parties using the road. Thus came into being the comprehensive policy. In this way, the motor vehicles insurance provided for protection of the owner of the vehicle against loss of three kinds: (1) Against loss or damage to the vehicle and its accessories; (2) against personal injury to the owner; and (3) against loss arising from liability for death or injury caused to third parties or for damage to their property.

Regarding the third species of protection, the insurance policy is a contract of indemnity under which the insurer agrees to reimburse the assured to the extent of the amount of damages which the latter may become liable to pay for the death or injury to a third party, or damages to his property caused in an accident. This is and has always been undoubted law. It is stated in 32 Halsbury

(Simonds) 354:-- "

"In its main features a contract of motor insurance is a contract of indemnity : British Cash and Parcel Conveyors Ltd. v. Lamson Store Service Co. Ltd., 1908-1 KB 1006 1014; Weld Blundell v. Stephens, 1919-1 KB 520 . 529 : 1920 AC 956. This means that, so far as concerns the insurance of the car as an example of property insurance or the insurance of third party liability (whether limited or general) as an example of public liability insurance, the ordinary principles of these classes of insurance are applicable."

It is stated in Preston and Colivaus on Law of Insurance (2nd Edition) at page 4:--

"Indemnity, it has been said, is the controlling principle in insurance Law: Castellain v. Preston, 1883-1 QBD 380 at page 386 and by reference to that principle a great many difficulties arising on insurance contracts can be settled. Except in insurance on life and against accident, the insurer contracts to indemnify the assured for what he may actually lose by the happening of the events upon which the insurer's liability is to arise, and in no circumstances is the assured in theory entitled to make a profit of his loss. 1883-I QBD 380 at p. 386 (supra) and Matthey v. Curling, 1922 AC 180. It is not however on such consideration as public policy or the prevention of crime that the principle of indemnity is based; it derives from the intrinsic nature of the bargain."

At one time, the legality of insurance against third party risks was in doubt. But in Tinline v. White Cross Insurance Association, 1921-3 KB 327 its validity was established. Even so, the third party had no right under the law to obtain the benefit of the insurance. The third party, being not a party to the contract of insurance, had no right to the insurance money either under the common law or in equity. The third party could not sue the insurer directly nor indirectly in the name of the assured, to compel the insurer to pay the insurance money to him. The reason was that under the common law, a stranger to a contract could not sue upon it. In England, the Third Parties (Rights against Insurers) Act, 1930, was enacted to confer on third parties rights against insurer of third party risks in the event of an assured becoming insolvent and certain other events. But this Act could not come to the aid of a person injured by an insolvent whose vehicle was not insured. To meet that situation, the Road Traffic Act, 1930, was enacted. It prohibits the use of a motor vehicle on a road, unless the owner or other person using it takes a policy of insurance or gives security against liability to third parties. Yet another lacuna was detected. The insurer and the insured could, while satisfying the requirements of the compulsory insurance, introduce stipulations in the policy, breach of which would render it void and by this device the insurer could escape liability to third parties. Therefore, the Road Traffic Act, 1934, was passed to prevent the insurer from escaping the liability under the insurance policy by compelling him to satisfy the judgment obtained against the assured, and also by rendering ineffective certain clauses in the policy which may be aimed at avoiding the liability arising under it.

In our country, before July 1, 1946, (on which date Chapter VIII of the Motor Vehicles Act, 1939, came into force) the legal position was the same as obtained in England before 1930. The case of *British India General Insurance Co., Ltd. Vs. Janardan Vishwanath Naik*, serves as an illustration. In that case, a motor bus overturned because of negligent driving of the driver. A passenger in the bus sustained injuries to which he succumbed. The legal representative of the deceased passenger sued the owner, the driver and the insurance company. The person who was driving the bus had obtained it on hire purchase. The claim was dismissed on the ground that the indemnity undertaken by the insurer was for the benefit of the insured but not for the benefit of any passenger, and that the passenger or his legal representative being a stranger to the contract could not sue the insurer for money payable under the policy,

For the sake of brevity, we shall hereinafter use the word "claimant" for "a third party" injured in an accident arising out of a motor accident, or his legal representative, in the case of his death,

The provisions of Chapter VIII of the Act, particularly Sections 94 to 96, were modelled on the English statute to meet social needs for which the three above said Acts were made in England. The objects were: (1) to enable a claimant to recover whatever sum he is in law entitled, despite the inability of the owner or the driver to pay; (2) to prevent the insurer from escaping liability on the ground of breach, on the part of the insured, of any term of the contract; and (3) to entitle the claimant to recover compensation directly from the insurer.

Section 94 makes it imperative that there must be an insurance policy in relation to a motor vehicle before it can be used or allowed to be used in a public place. The law thus created compulsion for insurance against third party risks.

Section 95 lays down the requirements of insurance policies, particularly prescribing the minimum pecuniary limits for which a vehicle must be insured, and also the limits of liability of the insurer.

Section 96 deals with the obligation of the insurer to satisfy a judgment against the insured in respect of third party risks, the limits of such liability and other incidental matters.

Section 97 enacts the rights of third parties against the insurer on insolvency of the insured.

Section 98 casts a duty on a person against whom the claim is made to give information as to insurance.

Section 103 sets out the effect of a certificate of insurance.

Section 96 is a substantive provision which declares the liability of the insurer to pay the claimant directly. It enacts that the insurer is bound to pay to the person entitled to the benefit of a decree against the insured as if the insurer is the judgment-debtor in respect of the liability. To this extent alone the right of the

claimant is enlarged. Secondly, the section prescribes the limit of the insurer's liability which does not exceed the sum assured payable under the policy, as read with Section 95. This point is fully discussed in *Manjula Devi Bhuta v. Manjushri Raba*, 1968 Ace CJ 1 (MP). Where the sum assured is not specified in the insurance policy or the specified sum is less than the sum payable u/s 95(2) of the Act, the maximum liability will be that as laid down in Section 95 (2). But if the sum specified in the insurance policy as payable thereunder, exceeds the sum as fixed u/s 95(2), the maximum liability shall be the sum specified in the policy. Thirdly, it exhaustively enumerates the grounds of defence available to the insurer to avoid his liability to satisfy a judgment against the insured. One thing to be particularly noted is that the provisions of Section 96 relate to the liability of the insurer which arises only when the insured has incurred liability but not independent of it.

It is thus seen from the above provisions that: (1) A claimant is entitled to recover from the insurer the amount of compensation which he is in law entitled to obtain from, the insured, subject to the statutory limits of liability of the insurer. (2) Insurance against third party risks is compulsory which secures payment to the claimant against the insolvency or liquidation of the insured. (3) The insurer cannot escape liability under the policy on the ground that because of breach of any term of the contract on the part of the insured, the claim of third party was not covered, or, otherwise, the insurer is entitled to avoid the policy. But these provisions do not go beyond this. They leave untouched the question what would make the insurer liable to pay the insurance money to the claimant. To put it differently, they lay down when the insurer is liable and to what extent he is liable, but not what makes him liable. We shall leave this topic here for a moment and first turn to the remaining sections of this Chapter,

Sections 110 to 110-F were introduced in the Act by the Motor Vehicles (Amendment) Act (No. 100) of 1956. Prior to their enactment, in every case a claimant had to sue the insured in the Civil Court, and notice had to be given to the insurer if the claimant desired to avail himself of the benefits of Section 96 of the Act. The legislature then decided to substitute the ordinary remedy of a civil suit by a special remedy which is summary in nature. Section 110 provides for the constitution of a Claims Tribunal and confers jurisdiction on it to adjudicate upon claims for compensation in respect of accidents involving death or bodily injuries to persons arising out of the use of motor vehicles. Section 110-A provides for the procedure for setting up a claim for compensation. Section 110-B relates to an award of the Claims Tribunal after giving the parties an opportunity of being heard and after enquiry into the claim. Section 110-C deals with the procedure and powers of the Claims Tribunal. Subject to any rules that may be made in that behalf, the Tribunal may follow such summary procedure as it thinks fit. Section 110-D provides for an appeal from the award made by the Claims Tribunal. Section 110-E provides for recovery from the insurer of compensation money awarded by the Tribunal, as arrears of land revenue. Section 110-F excludes, where a Claims Tribunal has been constituted for any

area, the jurisdiction of the Civil Court to entertain any question relating to any claim for compensation which may be adjudicated upon the Claims Tribunal for that area. The Civil Court is debarred from issuing any injunction in respect of any action taken or to be taken by or before the Claims Tribunal in respect of a claim for compensation

An award u/s 110-B has three components: (1) It determines the amount of compensation which appears to the Tribunal to be just; (2) it specifies the person or persons to whom compensation is to be paid; and (3) it specifies the amount which shall be paid by the insurer. Now, to specify the limit of liability of the insurer, the Tribunal will have to go back, to the substantive provisions contained in Section 96. It is clear that these provisions merely substitute a summary remedy for civil suits and for adjudication of claims before the Motor Accidents Claims Tribunal, instead of the Civil Court, in respect of personal injury in accident arising out of the use of the motor vehicle. These provisions do not lay down the criteria or ingredients of liability which will entitle the claimant to compensation.

From the above resume of all the sections contained in Chapter VIII of the Motor Vehicles Act, it must be said, in short, that Sections 94 to 96 provide for compulsory insurance of a motor vehicle, before it can be used on a public road; lay down the liability of the insurer to pay to the claimant directly, when there is a decree or judgment of the Court and also fix the limits of pecuniary liability of the insurer in certain cases. Sections 110 to 110-F lay down the procedure for enforcement of the substantive rights of the claimant as enlarged and circumscribed by Section 96. As provided in Section 110-B, the Accidents Claims Tribunal shall in its award determine the total amount of compensation and then specify the sum which shall be paid by the insurer. And, by virtue of Section 110-E, the latter sum is recoverable from the insurer as arrears of land revenue. However, the ingredients of the liability of the insurer are nowhere provided in this special statute. Necessarily, therefore, that aspect of the matter will be governed by the general substantive law, which remains untouched by this special law. We have already shown that it is on the contract of indemnity that the insurer is liable to pay compensation only if the insured is liable to pay damages to the claimant. If the insured is not liable, then the insurer is also not liable. In other words, the liability of the insurer depends upon the liability of the insured. Now, the liability, direct or vicarious, of the owner of a motor vehicle involved in an accident resulting in injury to, or death of, a third party, to pay damages arises from the law of, torts. Under that law, negligence of the owner or driver is the sine qua non for, such liability. So was held in *Ram Pertap Vs. General Manager, Punjab Roadways, Ambala*, ; *State of Punjab Vs. V.K. Kalia*, ; *Nesterczuk v. Mortimore* 1969 Acc CJ 204 (Australia H. C.) and *Narottam Dass v. General Manager, Orissa Road Transport Co. Ltd.* 1969 Ace CJ 327 (Orissa).

From the mere statutory requirement of insurance, without which a vehicle cannot be used, there can be no inference of absolute liability, independent of

proof of negligence. We have already stated the object and effect of compulsory insurance.

It is true that the provisions of the Motor Vehicles Act do not lay down affirmatively that negligence must be proved before the insurer is held liable to pay the claimant compensation, but this is because the Act is not intended to substitute the law of torts in its application to the case of an accident,

A flood of light is received In a comparison of the case of an accident in an area for which a Claims Tribunal has not been constituted u/s 110 of the Act, with the case of an accident in an area for which there is a Claims Tribunal. In the former case, the claimant has to obtain a decree for damages against the insured from the Civil Court to be able to recover the amount from the insurer; such a decree can be passed only if the insured is found liable, directly or vicariously, on the ground of negligence, but not otherwise. In the latter case, although the claimant makes a claim before the Tribunal, the substantive law which governs the rights and liabilities of the parties is the same for both the proceedings. It cannot be accepted that in the former case damages cannot be decreed without proof of negligence because the suit is before the civil Court, while in the latter case compensation will be awarded even without proof of negligence merely because the proceeding is before the Tribunal. The same substantive rights and liabilities must govern both the cases, although the procedures may differ.

It is an argument that negligence of the insured is irrelevant in a claim before the Tribunal against the insurer because u/s 96(2) of the Act, the defences open to the insurer are limited to those enumerated in that section. In our view that is not so. The insurer may resist the claim against him in two ways: (1) That the insurer is not liable although the insured may be liable; and (2) that the insurer is not liable because the insured is not liable. Under the first head, the insurer is entitled to escape liability by saying that the policy is void because it was obtained by the insured on a false representation or non-disclosure of a material fact; or that the policy was cancelled before the accident; or that there has been a breach of a specified condition of the policy being one of the conditions enumerated in the section. The insurer is debarred from raising any other ground of defence to avoid his liability, if the insured is found to have incurred the liability. Under the second head, the insurer can plead that there was no negligence on the part of the insured, to show that the insured incurred no liability so that the insurer's liability under the contract of indemnity does not arise. The insurer is entitled to raise all such pleas in defence as the insured can take to show that he (the insured) has not incurred the liability. This the insurer can do, as of right, in the name of the insured, provided that right is reserved in the policy. Section 96(2) has nothing to do with the second head of defences. All that Section 96(2) does is that it debars the insurer from taking up any defence, other than those enumerated in it, to show that the insurer is not liable although the insured has incurred liability. This position is plain enough and is fully supported by the following observations in *British India General Insurance Co.*

Ltd. Vs. Captain Itbar Singh and Others, :--

"The insurer has the right, provided he has reserved it by the policy, to defend the action in the name of the assured and if he does so, all defences open to the assured can then be urged by him and there is no other defence that he claims to be entitled to urge. He can thus avoid all hardship, if any, by providing for a right to defend the action in the name of the assured and this he has full liberty to do."

It is a further argument that the Insured is neither a party to the proceeding before the Claims Tribunal, nor can there be any adjudication against him in the award made by the Tribunal, and, that being so, the question of negligence cannot be tried. As we read the provisions of the Act and the rules made thereunder, we must hold that the insured is a necessary party, that he is bound by the award; and that he is liable to pay the amount of compensation minus that sum which the Tribunal specifies as the share payable by the insurer. The provisions contained in Sections 110 to 110-F enact complete procedure for the trial of claims, and determination of compensation. Under the Madhya Pradesh Motor Accidents Claims Tribunal Rules, 1958, made u/s 111-A of the Act, an application for claim is to be made in, Form A (under Rule 3). The owner, the driver and the insurer have to be impleaded as "opposite party" and notice has to be issued to them under Rule 7. If the opposite party does not appear, the proceedings can be ex parte. The opposite party can file written statement and produce evidence. Similar provisions are made in the Rules made, for instance, in Delhi, Bihar and Bengal.

As already pointed out, in its award the Tribunal determines not only the person or persons to whom compensation shall be paid, but also the amount of compensation to which he or they are entitled. Who is to pay the amount so determined? The insurer is to pay only that much which is separately specified as payable by him. If the insurer is liable to pay the entire amount, then it is the end of the matter. But if the amount specified, which shall be paid by the insurer, is less than the amount of compensation so determined, then necessarily it is the insured who has to pay the balance and no one else conceivably. When the Tribunal is required to determine the amount of compensation, it is not possible, to think that the legislature wanted such determination in vacuo, that is, without contemplating who will pay. And, if the only purpose was to determine such compensation as was payable by the insurer, then the words "determining the amount of compensation which appears to it to be just", in Section 110-B, would be otiose because, then the only requirements of the award would have been (1) to, specify the person or persons to whom compensation shall be paid, and (2) to specify the amount which shall be paid by the insurer.

We have not the slightest doubt, after a close examination of the scheme and the provisions of Chapter VIII, that all claims by third parties against the insured as well as the insurer must be settled by the Claims Tribunal. We will now examine this aspect by another approach. If the Claims Tribunal is not to determine the

liability of the insured, it must necessarily follow that the third party will have to sue the owner in the civil Court for that portion of the compensation money awarded by the Tribunal which the insurer is not liable to pay. Firstly, this will mean multiplicity of proceedings which is contrary to the policy of the law, particularly when it will drive the third party to a second proceeding. The object of introducing the provisions contained in Sections 110 to 110-F was to provide a speedy and summary remedy to the third party. It may be mentioned here that in introducing Bill No. 57 of 1955 of the Motor Vehicles (Amendment) Act No. 100 of 1956 in the Lok Sabha, Shri Lal Bahadur Shastri rendered the following Statement of Objects and Reasons:--

"The State Governments are being empowered to set up tribunals to determine and award damages in cases of accidents involving the death of, or bodily injury to, persons arising out of the use of motor vehicles and also to adjudicate on the liability of the insurer in respect of payment of damages awarded. At present, a Court decree has to be obtained before the obligation of the insurance company to meet the claims can be enforced. The amendment is designed to remove the existing difficulty experienced by persons of limited means in preferring claims on account of injury or death cause by motor vehicles."

[See Gazette of India, Extraordinary, Part II, Section 2, No. 47 dated November 12, 1955, page 565 (626)] Secondly, it will also involve the possibility, even likelihood, of conflicting decisions in the same matter, on the quantum of damages. The civil Court may not only arrive at a different conclusion of the quantum but may even take a different view on the factum of the accident. It cannot be thought that such an anomalous position was contemplated by the Legislature. Above all, if we thought that the language of Section 110-B was of doubtful meaning, the rules of interpretation permitted us to supply words to the section.

Shri Dharmadhikari laid considerable stress on the absence of an express provision in the Act regarding execution of the award made by the Tribunal, so far as the insured is concerned. This has been called a lacuna in some reported decisions. In the Punjab, a rule has been made that Order 21 of the CPC "shall so far as may be apply to proceedings before the Claims Tribunal", and the award can, thus, be executed as if it is a decree of a civil Court. In *K. Gopalakrishnan Vs. Sankara Narayanan and Others*, , it is observed that a claimant can file a suit on the basis of the award against the driver as a debt and such a suit would not be barred by Section 110-F of the Act. In our view, in the absence of an express provision in the Act for execution of the award against the insured (for the total amount of compensation payable to the claimant minus the amount payable by the insurer) and so long as such an express provision is not made, the following rule, which has been restated by the Supreme Court in *Income Tax Officer v. M. K. Mohammed Kunhi*. Civil Appeal No. 1164 of 1966, D/- 11-9-1968 = (reported in AIR 1969 SC 430), must be applied:--

"It is a firmly established rule that an express grant of statutory power carries

with it by necessary implication the authority to use all reasonable means to make such grant effective."

Their Lordships have relied on Sutherland Statutory Construction, and have also quoted Maxwell on Interpretation of Statutes, 11th Edition, at page 350, where it is stated thus:--

"Where an Act confers a jurisdiction, it impliedly also grants the power of doing all such acts, or employing such means, as are essentially necessary to its execution. Cui Jurisdictio data est, ea quoque concessa esse videntur, sine ous Jurisdictio explicari non potuit. Thus, an Act, which empowered justices to require persons to take an oath as special constables, and gave them jurisdiction to inquire into an offence impliedly empowered them to apprehend the persons who unlawfully failed to attend before them for those purposes. Otherwise the jurisdiction could not be effectually exercised. Where an inferior court is empowered to grant an injunction, the power of punishing disobedience to it by commitment is impliedly conveyed by the enactment, for the power would be useless if it could not be enforced.

Where a statute empowers a justice to bind a person over, or to cause him to do something, and the person, in his presence, refuses, the justice has implied authority to commit him to jail till he complies."

Their Lordships have also quoted the following passage from Domat's Civil Law Cushing's Edition, Vol. 1, at page 88:--

"It is the duty of the Judges to apply the law, not only to what appears to be regulated by their express dispositions, but to all the cases where a just application of them may be made and which appear to be comprehended either within the consequences that may be gathered from it."

It is stated in Sutherland Statutory Construction (3rd Edition, Vol. 3, Sections 5401 and 5402):--

"In a number of instances, the Courts have given statutes an extended operation without express or clear authorization from the letter of the statute It will be observed that the effect of the statutes in those cases is closely related to the situations where a statute is extended or restricted by its equity or spirit This rule has become firmly established that an express grant of statutory power carries with it by necessary implication, authority to use all reasonable means to make such grant effective Where a statute confers powers and duties in general terms, all powers and duties incidental and necessary to make such legislation effective are included by implication."

However, it is clear that the question whether proof of negligence is essential or not for an award of compensation, does not depend on whether the award can be enforced by the Tribunal itself or by the civil Court under Order 21, Civil Procedure Code, or otherwise.

The conclusions we have reached so far may now be stated: (1) Under the policy of insurance, the insurer contracts to indemnify the insured against third party risks, in case the insured is found liable to pay damages to a third party. If the insured is liable, then that liability has to be discharged by the insurer under the contract of indemnity, and the insurer cannot be heard to say that because of the breach of any terms of the policy of insurance the policy has become unenforceable. This is subject to the statutory limit of liability of the insurer. (2) On the other hand, if the insured is not liable to pay damages to the claimant, there is no liability of the insurer to pay any compensation, either in law or in equity. The insurance is not of the third party; it is of the insured. There is no privity of contract between the insurer and the third party. (3) Nor is there any statutory liability of the insurer to pay compensation to the claimant merely because of use of the motor vehicle of the insured. There are no provisions in the Motor Vehicles Act to hold the insurer liable to pay to the third party independent of the liability of the insured. (4) The provisions of the Motor Vehicles Act have left wholly untouched the question what makes the insured liable. (5) The essential question what makes the insured liable, directly or vicariously, to pay damages is governed by the general substantive law the law of Torts, under which negligence is the sine qua non for the liability of the owner of the vehicle. (6) Sections 94 to 96 of the Act provide for compulsory insurance, the right of the third party to claim directly from the insurer, limits of liability of the insurer, and the defences open to him to avoid liability even if the insured has incurred liability. (7) Sections 110 to 111-F are only adjective in their character and scope. They provide a remedial machinery as a substitute for the ordinary remedy in a civil Court. Jurisdiction of the civil Court is excluded. (8) The insurer may resist a claim proceeding in two ways: (a) That the insurer is not liable although the insured may be liable; and (b) that the insurer is not liable because the insured is not liable. Section 96(2) limits the defences available to the insurer under the first head, but not under the second. The insurer can, in the name of the insured, raise every such defence, as the insured can raise, including that there was no negligence, provided he has reserved by the policy that right. (9) The claimant has the right to claim compensation not only from the insurer but also from the insured in a claim proceeding under Chapter VIII of the Act. In that case, the insured is bound by the award made u/s 110-B and is liable to pay the total amount of compensation determined in the award which for practical purposes means the total amount minus the amount specified as payable by the insurer. (10) The ultimate result is that there must be a finding of negligence of the insured which makes him liable in torts, before compensation can be awarded to the claimant from the insurer u/s 110-B of the Motor Vehicles Act.

As this appeal itself, not only the question, has been referred to us, we shall now proceed to decide it on merits.

The claimant's case was that Re-Sendra Kumar was sitting on the pathway of the road, to answer the call of nature. The bus came at a high speed and while attempting to bypass a marriage party, which was coming from the opposite

direction, the driver swerved the vehicle which ran over the boy. The boy died instantaneously on the spot. On the other hand, the appellants' case was that the boy came running in front of the bus and thus came under a rear wheel. It is not disputed that he was crushed under the bus and died instantaneously.

We have gone through the evidence of Madanlal (A.W. 2), Ghanshyam (A.W. 3) and Nandkishore (A.W. 4). It is in the evidence of Nandkishore that the width of the road is 24 feet. He says that the bus was running at a high speed. ("Bus fast bahut ja rahi thi"). It is clear from the evidence of these witnesses that the bus ran over the boy, who was crushed under a front wheel, and the driver then lumped out of the bus and ran away. For the opponents, Bhikaji (N.A.W. 1), Manohar (N.A.W. 2), Mohammed (N.A.W. 3) and Kale Khan (N.A.W. 4) were examined. Bhikaji and Manohar have been disbelieved by the trial Court, when they say that they had seen the boy running towards the bus from the front. Mohammed (N.A.W. 3) also stated that the driver swerved the vehicle in order to save a bullock-cart and in that process the front wheel of the vehicle got down from the road. Kale Khan (N.A.W. 4), the driver, stated in cross-examination that he had seen the boy running at a distance of 10 to 20 paces and that the bus came down two feet away from the road and then he saw that the boy was dead. There is no reason not to believe the ocular evidence of the claimant's three witnesses.

Negligence is omission to do something which a reasonable man guided upon those considerations, which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. The standard to determine whether a person has been guilty of negligence is the conduct of a prudent man in the particular circumstances, the amount of care, skill, diligence or the like, varying according to the particular case. The standard of care is that of the hypothetical reasonable man and in applying this standard, it is necessary to ask what in the circumstances a reasonable man could have foreseen. It is stated in Winneld on Tort (VIII Edition) p. 59:--

"In most cases the Courts can apply the standard of care of the reasonable man with some confidence for it is to be assumed that Judges who staff them have the qualities of that creature well in mind."

It must always be remembered that the question for determination is foreseeability, not probability. The more serious the consequence if care is not taken, the greater the degree of care which must be exercised. Time out of mind it has been held that men must use care in driving vehicles on the highway. As said in *Manjula Devi Bhuta* (supra), the criterion is not merely whether the vehicle was on its left side. So also speed is not always the test of negligence. The test is whether the accident could have been averted if the driver had exercised that care and diligence which an ordinary cautious person put in similar circumstances would have done.

There can be no doubt that in an action for negligence, the legal burden of proof

rests on the claimant. But, barring exceptional cases, it may not be possible for the claimant to know what precisely led to the accident. It may peculiarly be within the means of knowledge of the driver or the owner. This hardship to the claimant can be avoided by the application of the maxim "*res ipsa loquitur*" which is not a principle of liability but a rule of evidence. The principle is that there are certain happenings which do not occur normally, unless there is negligence. Therefore, in the case of such happenings, the claimant is entitled to rely, as evidence of negligence, upon the mere happening of such accident. In Clerk and Lindsell on Torts, 12th Edition, at p. 441, Erie C. J.'s classic statement of the circumstances in which the plaintiff is able to do so, is stated:--

"There must be a reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care."

Scott v. London and St. Catherine Docks, (1865) 3 H and C 596. In Page v. Bichards, reported in Tart v. G. W. Chitty and Co. Ltd., 1933-2 KB 453, it has been held that it is evidence of negligence when a pedestrian walking in the road way is struck from behind, neither party knowing more about it. It is also *prima facie* evidence of negligence if a motor van mounts the pavement and strikes bystanders and this will be so even if the immediate cause is a skid of which the driver can offer no reasonable explanation. See Laurie v. Raglan Building Co. Ltd., 1942-1 KB 152 and Watson v. Thomas, 1966-1 WLR 57.

What then must the defendant do to discharge this burden? This question is answered in Winfield on Torts in these words:--

"This is a problem which has given rise to difference of opinion and even now the Law cannot be regarded as settled. Two things however can be said with some confidence: (1) If the defendant shows how the accident actually occurred and the explanation is consistent with the diligence on his part, then he is not liable. (2) Even if he cannot explain the accident, if the defendant shows that there was no lack of reasonable care on his part or on the part of the person for whose negligence he is responsible, then he has again exonerated himself from the liability."

The defendant cannot escape liability merely by providing possible explanations of the accident, some of which at least are consistent with due care on his part. Asquith, L.J., observed in Barkway v. South Wales Transport Co., 1948-2 All ER 460 at p. 471.

"The position as to onus of proof in this case seems to me to be fairly summarised in the following short propositions : (i) If the defendants' omnibus leaves the road and falls down an embankment, and this without more is proved, then *res ipsa loquitur*, there is a presumption that the event is caused by

negligence on the part of the defendants, and the plaintiff succeeds unless the defendants can rebut this presumption, (ii) It is no rebuttal for the defendants to show, against without more, that the immediate cause of the omnibus leaving the road is a tyre-burst, since a tyre-burst per se is a natural event consistent, and equally consistent, with negligence or due diligence on the part of the defendants. When a balance has been tilted one way, you cannot redress it by adding an equal weight to each scale. The depressed scale will remain down."

Winfield adds:--

"This in itself suggests that *res ipsa loquitur* does more than cast provisional burden on the defendant and the suggestion is confirmed by certain remarks of Evershed, M. R., in *Moore v. R. Fox and Sons*, 1956-1 QB 596."

In the case of 1956-1 QB 596 (*supra*), a workman in the employ of the defendants, who were cellulose and bronzing specialists, was killed by an explosion while operating a de-rusting tank. The explosion was due to accumulation of unburnt gas exploded by one of the continuously burning jets, but the reason why the gas accumulated was never determined. It was held: "(1) that the doctrine of *res ipsa loquitur* applied and that the employers had not discharged the onus of proof placed on them merely by showing that the accident was inexplicable; that it was not sufficient to show several hypothetical causes consistent with the absence of negligence and that the accident might have occurred without negligence on their part; but that to discharge the onus they had to go further and either show that they had not been negligent, or give an explanation of the cause of the accident which did not connote negligence by them, (2) alternatively, that the onus of proving negligence had rested on the plaintiff, but that she had discharged the onus by establishing that the explosion would not have occurred if proper care and attention had been applied to the apparatus." We are firmly of the view that, having regard to the local conditions in this country, the principle of 1956-1 QB 596 (*supra*), which is the authority for the view that the defendant in case of *res ipsa loquitur* cannot discharge the burden cast upon him by preferring hypothetical explanations, however plausible, must be applied; and, that any view taken to the contrary in English decisions should not guide the decision of cases in this country. Moreover, it is very difficult, if not impossible to prove by positive evidence the owner's or driver's negligence. We are emphatically of the view that, for the above reasons, as wide an amplitude and as long a rope as possible must be given to the principle *res ipsa loquitur* in its application to the case of a motor accident.

The conclusions to which the latter discussion leads are:-- (1) The standard to determine whether a person has been guilty of negligence is the standard of care which, in the given circumstances, a reasonable man could have foreseen. (2) The test is foreseeability, not probability. (3) The more serious the consequences if care is not taken, the greater is the degree of care which must be exercised. (4) While the initial burden of proof of negligence is on the claimant, barring exceptional cases, the principle "*res ipsa loquitur*" comes into play. It is a rule of

evidence and does more than cast a provisional burden on the defendant. (5) Having regard to the local conditions prevailing in this country, when *res ipsa loquitur* is attracted, it should be given as wide an amplitude and as long a rope as possible in its application to the case of a motor accident. (6) The defendant cannot escape liability merely by preferring hypothetical explanations, however plausible, of the accident.

In the present case, a boy who was sitting on a pathway was run over by the appellants' bus. It is in evidence that the road is 24 feet wide. The usual width of a bus is about 8 feet. The principle *res ipsa loquitur* applies here. The defendant's explanation is that the boy came running from another direction and ran in front of the vehicle. The driver saved him from being run over by the front wheels but the boy could not check himself and came under the rear wheel. There were bullock-carts in front from whom the driver was blowing the horn from a long distance. This story has not been proved, as rightly held by the Tribunal. On the contrary, it is proved by cogent evidence that the boy was run over while he was answering the call of nature on the pathway. How this happened is not known. On the principle *res ipsa loquitur*, therefore, negligence must be found.

The claim was for Rs. 20,000/-. The Tribunal allowed Rs. 2,460/- only, on the basis indicated in its award. The Quantum was not challenged before us, nor do we find anything for which we should interfere in that finding.

We thank Shri Dharmadhikari for his valuable assistance as *amicus curiae*.

The appeal is dismissed. The award of the Tribunal is maintained. Parties shall bear their own costs in this appeal as incurred.