
(1976) 11 GAU CK 0003
In the Gauhati High Court

Mrs. Hira Devi

APPELLANT

Vs

Smt. Bhaba Kanti Das and Others etc. etc.

RESPONDENT

Date of Decision : 03-11-1976

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 151
Motor Vehicles Act, 1988 — Section 110, 95, 96

Citation : AIR 1977 Guw 31

Hon'ble Judges : M. Sadanandaswamy, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

M. Sadanandaswamy, J.—These appeals arise out of the awards passed by the Motor Accident Claims Tribunal, Nowgong in several Claim Cases which were disposed of by a common judgment dated 6-6-1967. These appeals are referred to this Bench since the Division Bench which heard these appeals in the first instance was of the view that there is a difference of opinion expressed in *Assam Corporation v. Binu Ram* AIR 1975 Gau 3 and *Asha Rani Ghose v. Common Wealth Assurance Co. Ltd.*, an unreported decision of this Court in M. A. (F) No. 41 of 1969, disposed of on 21-2-1974 (Gau), the former decision taking the view that an award can be passed against the insurer in respect of liability arising out of injury caused in an accident to a gratuitous passenger, whereas the latter decision took a contrary view.

2. As a consequence of an accident which took place at about 12.30 P. M. on 11-1-1963 in which the bus bearing No. ASX 1092 belonging to the State of Assam and a private Ambassador Cad bearing No. ASR 1053 met with a direct collision. Bihuram Das and his minor son Karuna Kumar Das died and Robin Das, the younger brother of Bihuram Das, was seriously injured. All the three were travelling in the car. The driver of the car also died on the spot. The bus was travelling towards the east, from Jorhat towards Sibsagar. The car was travelling in the opposite direction. The accident took place at a distance of one and a half

miles from the Teok Bus Stand and the impact was with such force that the front portion of the car along with its engine went violently into the front portion of the bus. Due to the impact the car was pushed back to a certain distance. Both the vehicles were found telescoped into each other. The place where the two vehicles were found was towards the northern edge of the tarred road. The tarred road is of the width of about 12 feet with the kutcha portion of about 11 feet on each side. Bihuram was pulled out from inside the car and expired immediately thereafter. Karuna Kumar Das and Robin Das were removed to the hospital. Karuna Kumar Das expired in the hospital at Barbari, Dibrugarh. Robin Das underwent medical treatment in the hospital for his broken right femur (thigh bone), his broken right arm and for other injuries suffered by him in the accident.

3. The widow of Bihuram Das, namely, Smt. Bhaba Kanti Das filed Claim Case No. 3 of 1963 of Gauhati which was later re-numbered as Claim Case No. 11 of 1965 of Nowgong, on her own behalf and on behalf of the surviving minor children of Bihuram Das claiming Rs. 1,74,000/- towards the death of her husband and Rs. 20,000/- towards the death of her son Karuna Kumar Das, thus claiming Rs. 1,94,000/- in all against the State of Assam, the owner of the bus Smt. Hira Devi, the owner of the car and the Commonwealth Assurance Company with which the car was insured. The minor daughters of Bihuram Das attained majority during the pendency of these appeals and they have entered appearance on their own behalf. Robin Das presented the claim petition through his father as his guardian since he was a minor on the date of the accident. His application was registered as Claim Case No. 4 of 1963 of Gauhati which was later renumbered as Claim Case No. 10 of 1965 of Nowgong. He claimed Rs. 45,000/- as compensation for damages suffered by him in consequence of the accident. During the pendency of the Claim Case he attained majority and was brought on record. The Claim Cases were filed at Gauhati before the then existing Tribunal at Gauhati and when they were later transferred to the Tribunal at Nowgong, on the order of the Government, they were given separate numbers at Nowgong.

4. All the opponents contested the claims. On the suggestion of the Learned Counsel for the parties, both the cases were dealt with together by the Tribunal. Common evidence was recorded and a common judgment was rendered on the basis of which the awards were passed. The Tribunal held that both the driver of the bus as well as the driver of the car were negligent and that the accident was due to rash and negligent driving on the part of both of them. It awarded Rs. 33,000/- as compensation to the widow Smt. Bhaba Kanti Das and the children of Bihuram Das towards the pecuniary loss occasioned by his death and another sum of Rs. 10,000/- towards the mental suffering, loss of companionship etc. It further awarded a sum of Rs. 12,000/- as compensation to the widow towards the loss occasioned by the death of her son. It apportioned the liability and directed the State of Assam to pay Rupees 40,000/- and the owner of the car to pay Rs. 15,000/-.

5. The Tribunal awarded a compensation of Rs. 15,000/- to Robin Das and apportioned the liability directing the State of Assam to pay Rs. 8,000/- and the owner of the car to pay the balance of Rs. 7000/-. The Tribunal held that the insurer was not liable.

6. The claimants have presented the appeals M. A. (F) No. 6 of 1968 and M. A. (F) No. 28 of 1967 claiming enhanced compensation and also contending that the insurer also should be made liable under the Motor Vehicles Act to pay compensation. M. A. (F) Nos. 2 and 3 of 1968 are the appeals presented by the State of Assam, urging that the accident was the result of rash and negligent driving on the part of the driver of the car alone and that the State of Assam is not liable to pay any part of the compensation. It is also urged by the State of Assam that in any case, the insurer also should have been made liable. M. A. (F) Nos. 23 of 1967 and 24 of 1967 are the appeals presented by the owner of the car. Her contention is that the accident was due to the rash and negligent driving on the part of the driver of the bus alone and that she is not liable. It is also contended by her that in any case the insurer should have been made liable under the terms of the policy.

7. The first question to be considered is whether the Tribunal was justified in coming to the conclusion that the accident was the result of rash and negligent driving on the part of the driver of the bus as well as the driver of the car. It is in evidence that Bihuram Das and his son were in the front seat of the car by the side of the driver and Robin Das along with a maid servant and one Bulu Das were in the back seat when it collided with the bus. Snapshots were taken of the vehicles on the date of the accident by Mir Hussain, an employee of the State Transport Department who was examined as a witness. The photographs were exhibited and marked as Exts. A and B. They show that the vehicles telescoped into each other face to face and were standing after the collision on the northern portion of the road, the road running east to west with the bus facing east and the car facing west. As the negatives of Exts. A and B were not produced and the person who developed the negatives was not examined, the Tribunal rightly refused to rely on those documents. The sketch Ext. 2 and the index Ext. 3 prepared by the Investigating Police Officer, Sri Debendra Narayan Deka, examined as witness No. 4 for the claimants show that the two vehicles stood facing each other after the collision at the northern side of the road, the bus facing east and the car facing west. These documents also show that the tarred portion of the road measures about 12 feet in width and a portion of it was left on the right side of the bus besides the kutcha portion of the road measuring eleven feet.

8. The Tribunal discarded the evidence of the witnesses Balm Chandra Barua, Tileswar Dutta and Moheswar Bhattacharjee examined on behalf of the State. These three persons claimed to have been among the passengers of the bus at the time of the accident. Ext. C (1) purports to be a complaint written by Balin Chandra Barua in the complaint book Ext. C which is alleged to have been kept in

the bus. The other two witnesses claim to be signatories to Ext. C (1). But the complaint book had not been referred to in the evidence in the Criminal Court when the driver of the bus was being prosecuted. It was neither shown to the Investigating Officer nor seized by the police. Since the complaint book had not seen the light of day till it was first produced before the Tribunal, the Tribunal was justified in not relying on the evidence of these three witnesses. The Tribunal relied on the evidence of the claimants' witnesses and Sri Gopal Chandra Saikia, the Motor Vehicle Expert, as well as the Investigating Officer besides the sketch map Ext. 2 and index Ext. 3 and came to the conclusion that the bus was running on its left side and the car was running on its wrong side i. e., to its right at the moment of the collision. It also relied on the evidence of Aftabuddin Ahmed, a school boy, a witness for the claimants, as well as on the evidence of Robin Das and came to the conclusion that the drivers of both the vehicles were rash and negligent and thereby were responsible for the accident which took place.

9. Aftabuddin Ahmed has stated in his evidence that the accident took place at a little distance from his house, that he was returning home from the side of Sibsagar towards Jorhat by the left side of the Assam Trunk Road, that he saw a State Transport bus proceeding along the road from the side of Teok at a fairly high speed, that a diesel truck came from behind the witness and that he saw both the State Transport bus and the diesel truck cross each other, that immediately thereafter a car was coming along from behind and both the bus and the car came in headlong collision, that the car was pushed back to a distance of three to four fathoms by the bus and then both the vehicles stood after impact partly over the pitched portion and partly on the kutcha portion of the road i. e., on the northern side of the road. According to his evidence, on seeing the accident he ran up closer and cried out and opened the front door of the car and pulled out the driver of the car. The driver was then crying. Next he brought out Bihuram Das who breathed his last while within the arms of the witness. There were six occupants in the car including the driver, He saw some injuries on the driver. He also saw a little boy inside the car who had sustained injuries on his person. He pulled out that boy also. Another occupant of the car had his tooth broken, one girl and yet another person who were inside the car also had received injuries. The witness and others rendered some first aid to the injured. In cross-examination he stated that the car was behind the diesel truck by about thirty feet It was further elicited in cross-examination that the road was dusty, the car did not blow the horn and as the truck went past the State Transport bus there was heavy dust so much so that visibility through the dust was not possible. It is further elicited that the car was going along the road on its left side. In cross-examination a suggestion was made to him that the car was trying to overtake the diesel truck. That suggestion was denied. In answer to another question the witness said that he could not say in which side of the road the State Transport bus was running.

10. Robin Das was another occupant of the car. He is the younger brother of the

deceased Bihuram Das. He has stated in his evidence that he lost consciousness immediately after the accident and regained it four days later and that he was in the hospital for six and half months, being treated for his broken thigh and fracture of his hands. He also suffered injuries to his teeth. He further stated that due to the injuries he sustained in the accident, there is a permanent disability and he has lost full freedom of his hands. According to his evidence, while the car was proceeding and was nearing Teok they saw a diesel truck running ahead of the car towards Jorhat. As the road was dusty, the diesel truck was throwing a lot of dust into the air and at a certain stage the air got very thick with dust and on that account the car slowed down its speed and then the State Transport bus running from the opposite direction dashed against the car with great force and at that moment he lost consciousness and did not know what happened later. In the cross-examination of this witness it is elicited that due to the running of the diesel truck in front of the car, the air was dusty and that was so from a distance of two or three furlongs before the accident took place. It is also elicited that the driver of the car did not blow the horn. A suggestion was made to this witness that the car wanted to overtake the diesel truck. This suggestion was denied by the witness. It was further elicited that after the car had slowed down, since there was no visibility on account of the dust in the air, the occupants of the car lost sight of the diesel truck and the collision took place. He states that he is unable to state how the collision occurred.

11. Bulu Das who was also travelling in the car has been examined as a witness on behalf of the owner of the car. According to his evidence, when the car was nearing Teok bus station a diesel truck was proceeding down ahead of them, that the truck threw a lot of dust into the air and the atmosphere at the place got all dusty and misty and difficult to be seen through and their car was proceeding slowly when the collision took place and the bus pushed back the car after the collision. Both his legs were fractured. He lost consciousness and recovered it the same night while he was in the Jorhat Civil Hospital. According to the evidence of this witness the diesel truck overtook the car at a distance of about half a mile from the place of the accident. He also denied the suggestion in cross-examination that the car tried to overtake the truck. It was elicited from this witness that near about the place where the collision occurred the atmosphere was all milky or cloudy with dust and there was almost no visibility due to the dust. The witness also stated that he knows driving and also possesses a driving licence. It was elicited on behalf of the claimants in cross-examination that when visibility becomes difficult the red lights are to be kept on and the head lights should also be kept on, and that he did not see the head lights of the State Transport bus to have been kept on at the time of the occurrence or immediately before it.

12. Gopal Chandra Saikia, witness No. 2 examined on behalf of the claimants, was the Motor Vehicle expert appointed by the Government of Assam who examined the car as well as the bus on the date of the accident. According to his evidence he found the car in a very bad condition, the radiator broken, head

lights broken, front portion completely broken, battery broken, doors bent, front glass broken, steering wheel broken, both seats front and rear bent, dash board broken, all meters broken, engine and gear box mounting broken, and its body was bent in the middle portion. On the State Transport bus he found the headlights broken, number broken in three places, grill bent, engine chamber broken, right front spring hanger broken, radiator broken, front glass broken, Driver cabin glass broken, the partition wall broken, right first seat broken, all benches had come out of their mounting and the upper class door was bent. According to his opinion the bus must have been travelling at a high speed and the impact of the collision was so great that the car was pushed back to a distance of about 25 cubits from where the collision occurred. He found the front portion of the car telescoped into the front portion of the bus. He found both the vehicles on the northern side of the road. He also deposed to the fact that at a distance of about 25 cubits from the place where the collision took place broken pieces of glass were lying on the right side of the State Transport bus and they were lying on the pitched portion of the road. He also found the track of the vehicles from the right to the left side of the road. He stated that he did not himself take the measurements at the spot, but that the Police Officer took the measurements in his presence. He denied the suggestion made in cross-examination on behalf of the State that the glass pieces were found at a distance of six or eight feet only from the place where the vehicles were found. It was also elicited in cross-examination that in his report he did not note down the place where he found the broken pieces of glass on the road. It may be mentioned that the report prepared by this witness has not been exhibited in the case.

13. Devendra Narayan Deka was the senior P. S. I. It is in his evidence that he prepared the sketch map Ext. 2 and the index Ext. 3 and that he got both the vehicles examined by the Motor Vehicle Expert.

14. Ext. 2 is the sketch map of the scene of the accident. It shows that the middle portion of the road is 12 feet in width and on either side of the tarred road the kutcha portion is of the width of 11 feet. It also shows that the two vehicles were found standing towards the left side of the road as the bus was travelling towards the east. The front portion of both the vehicles were shown stuck together. The body of the bus was slightly inclined towards the north i. e., to its left. The line ML as noted in Ext. 3, index of the map Ext. 2, represents the mark left by the skid of the tyre of the wheel of the bus. The measurement of ML, according to Ext. 3 is 16" 2". X is the spot where the broken iron parts, the frame of the glass, remnants of the wind screen were found lying as well as some engine oil. The fact that the wheels of the bus skidded 16 feet 2 inches shows that the bus must have been travelling at a considerable speed. According to the evidence of the eye-witnesses, the car was pushed back after the collision to a considerable distance. This is also the evidence of the Motor Vehicles Expert. But the evidence of the Motor Vehicles Expert is challenged on the ground that he is speaking to the facts which were noticed by him three years earlier. But he

has spoken with reference to Exts. 2 and 3 and stated in his evidence that the sketch map and the index were prepared in his presence. It is in his evidence that he had also prepared notes of his inspection. It is elicited in cross-examination that he has not mentioned the distance to which the car was pushed back or the distance between the spot where the vehicles were found and the spot where the broken pieces of glass were found. But Exts. 2 and 3 support his evidence. Since the witness has spoken with regard to Exts. 2 and 3 as well as from memory, there is no reason why his evidence should not be relied on. Robin Das was also an occupant of the car. Though he is one of the claimants, his evidence is supported by the evidence of Aftabuddin and Bulu Das, the other eye-witnesses both of whom have denied the suggestion that the car was trying to overtake the truck. Bulu Das was also another inmate of the car. The evidence of all these witnesses shows that just before the accident took place the air was covered with thick dust due to the passing of the diesel truck. According to the evidence of the witnesses examined on behalf of the State also, the accident took place immediately after a diesel truck coming in the opposite direction passed the bus. But according to their evidence another diesel truck had also overtaken the bus. But all the eye-witnesses are agreed that the visibility was very poor due to the dust kicked up by the diesel truck which passed the bus immediately prior to the accident. Since the visibility was very poor, it was the duty of the driver of the bus to stop the bus and wait for the air to clear. It was also the duty of the driver of the car to stop the car and proceed after the air got cleared. It is in the evidence of Bulu Das that the head lights of the bus also were not turned on. Hence the Tribunal was justified in coming to the conclusion that the driver of the bus as well as the driver of the car drove their respective vehicles rashly and negligently and brought about the accident. Though we do not agree with the finding of the Tribunal that the bus was travelling on its left side at the time of the collision, we agree with its finding that both the driver of the bus and the driver of the car were rash and negligent. Because of the mere fact that after the collision the car and the bus were found on the northern edge of the road, it is not correct to assume that the bus was travelling in its left side in view of the evidence of the eye-witnesses referred to above that the car was travelling on its left side prior to the accident. The car was pushed back to a considerable distance after impact. The driver of the car died in the accident. It was the duty of the owner of the bus, namely, the State of Assam to examine the driver of the bus. It is contended on behalf of the State that it was the rash and negligent driving on the part of the driver of the car alone which resulted in the accident. But no explanation is offered as to why the driver of the bus has not been examined. This circumstance leads to the inference that if he had been examined his evidence would not have supported the case of the State.

15. The next question relates to the quantum of compensation. It is urged on behalf of the claimants that Bihuram was drawing a monthly salary of Rs. 650/-, that he was an Assistant Director of Supply in the service of the State of Assam, that the amount of Rs. 200/- per month taken by the Tribunal as the probable

amount he would have spent on his wife and children is too low and that at least half the amount of the salary should have been taken as the amount for the abovesaid purpose. It is in the evidence of Srimati Bhaba Kanti Das that she got some amount by way of Provident Fund standing in the name- of her deceased husband. It is also in her evidence that her deceased husband Bihuram Das owned some landed property. But the amount of the Provident Fund has not been disclosed. There is no evidence as to the value of the property left by Bihuram Das. While calculating the amount of compensation the advantages which accrued to the claimants by the death of the deceased on whom they were depending has to be taken into account. Since the deceased Bihuram Das must have been contributing a part of his salary towards his Provident Fund that part of his salary will have to be taken into account while determining the amount that was spent by him for the family. It has to be determined whether he acquired landed property or not. If he had acquired landed property, he would have spent a part of his salary towards the acquisition of that property as he had no other source of income. It is also urged that Bihuram Das was 41 years of age, that he would retire at the age of 55 years and that he would have earned increments or higher salary on promotion. But there is no evidence to show whether he would have earned increments and when. There is also no evidence to show whether he was eligible for promotion to a post carrying a higher salary. Under these circumstances, the Tribunal was justified in adopting Rs. 200/- per month as the amount which Bihuram Das would have spent on his wife and children out of the salary of Rs. 650/-which he was getting. He had still 14 years of service left. Hence at the rate of Rs. 200/-per month, the loss occasioned to the dependants of Bihuram amounted to Rs. 33,600/-. An amount of Rs. 12,000/- has been awarded as compensation towards the death of the minor son Karuna Kumar Das. He was a boy of 12 years of age. Srimati Bhaba Kanti Das has not spoken anything with regard to what the parents wanted their son to become. There is absolutely no evidence as to whether they intended that he should pursue higher studies or whether his intelligence was above the normal. There is no evidence also about the state of the health of the boy. Under the circumstances we may assume he was a boy of ordinary health and intelligence. There is no reason to interfere with the finding of the Tribunal awarding Rs. 12,000/- towards the death of Karuna Kumar Das. The Tribunal further awarded a sum of Rs. 10,000/-towards the loss of companionship etc. This amount also appears to be reasonable. Thus the total amount payable would be Rupees 55,600/-.

16. It is urged on behalf of the claimants that Bihuram Das would have been entitled to a pension of Rs. 240/- per month according to the rules governing his service conditions and that the Tribunal has not taken this fact into consideration when awarding the compensation. Taking the life expectancy of the deceased to be 65 years, he would have drawn pension for a period of 10 years at the rate of Rs. 240/- per month. If we take Rs. 150/- as the amount which he would have spent for the members of his family per month from his pension over the period

of 10 years, it amounts to Rs. 18,000/-. Hence, taking it into account the amount of Rupees 33,600/- as well as the amount of Rupees 10,000/- and Rs. 18,000/- as the loss of a part of the pension, the total loss to the dependants of Bihuram Das would amount to Rs. 61,600/-. Out of this amount 20 per cent will have to be deducted towards the uncertainties of life. Bihuram Das might not have lived up to the age of 55 years. Deducting 20 per cent., the amount comes to Rupees 49,280/-. A further deduction of ten per cent. on this amount, namely, Rs. 4,928/- will have to be made on account of the claimants getting a lump sum. Thus, an amount of Rs. 44,352/- would be the amount payable to the dependents of Bihuram Das. The Tribunal has not made these deductions. Adding to this amount the amount of Rs. 12,000/- on account of the death of Karuna Kumar Das the amount payable will be Rs. 56,352/-. But the Tribunal has awarded Rs. 55,000/-. It is the practice of this Court not to interfere with the award of the Tribunal unless the amount is found by this Court to be either too high or too low. Hence, we do not like to interfere with the amount of compensation awarded to the dependants of Bihuram Das.

17. Robin Chandra Das was injured at the time of the accident. He suffered a fracture of the right thigh and also suffered injuries to his hands and teeth. There is a permanent disability in both his hands. He was aged about 19 years at the time of the accident. Under these circumstances, we are of the opinion that the amount of Rs. 15,000/- awarded by the Tribunal as compensation is reasonable.

18. It is urged on behalf of the claimants that the Tribunal was in error in not allowing interest on the amount of compensation, relying on the decision in *Swarnalata Dutta Barua and Another Vs. National Transport India Pvt. Ltd. and Another*, In that decision it has been held by this Court that u/s 110CC of the Motor Vehicles Act, simple interest of 6 per cent. per annum was payable to the claimant from the date of the application which had been filed prior to 2-3-1970 i. e., the date of the coming into force of Section 110CC under Act No. 56 of 1969. We respectfully agree with that decision. The claimants are entitled to interest at 6 per cent. per annum from the dates of their respective applications.

19. The next question is whether the claimants were gratuitous passengers in the car and whether they are entitled to claim compensation against the owner of the car. On behalf of the claimants reliance is placed on the decision in *Assam Corporation v. Binu Rani* AIR 1975 Gau 3 (supra) wherein it was held that a gratuitous passenger comes within the meaning of the term "a third party". In that case the plea taken by the insurer was that the claimant was not authorised by the owner to travel in the car, but the Insurance Company was not permitted to take that plea since the owner himself had not taken that plea. In that decision the view expressed was that the Insurance Company was not liable to pay compensation to a third party in terms of Section 96(1) as the liability is not required to be covered by Section 95(2)(b) of the Act As far as this interpretation of Section 95(2)(b) and Section 96(1) are concerned, the same view was expressed by the learned judges who decided *M. A. (F) No. 41 of 1969*. In the

present case in the Insurance policy the following clause is incorporated:

The Company will indemnify the insured in the event of accident caused by or arising out of the use of the Motor Car against all sums including claimant's cost and expenses which the insured shall become legally liable to pay in respect of-

(a) death of or bodily injury to any person but except so far as is necessary to meet the requirements of Section 95 of the Motor Vehicles Act, 1939 the Company shall not be liable where such death or injury arises out of and in the course of the employment of such person by insured.

Hence under the terms of the policy the insurer has undertaken to indemnify the insured against all sums to which the insured shall become liable in respect of death or bodily injury to any person with the exception mentioned therein in respect of an employee of the insured. The term "any person" would not exclude a gratuitous passenger travelling in the car. But in order to fix liability on the insurer, the liability must first be established against the owner of the car. It is only in that case that the liability of the insurer would arise. It is in the evidence of Robin Das that he used to see Teja Ram, the husband of the owner of the car visiting his elder brother at the latter's residence, and that Bihuram brought the car without hire on the date of the accident. He denied the suggestion that they had hired the car. The evidence of Srimati Bhaba Kanti Das does not throw any light as to the circumstances under which the car was being used at the time of the accident by Bihuram Das. It was elicited in her evidence that she does not know whether her husband hired the car or not but that she Had acquaintance with the owner of the car, namely Hira Devi.

20. The decision in M. A. (F) No. 41 of 1969 (Gau) also lays down that the liability with respect to a gratuitous passenger is not required to be covered under Clause (b) of Sub-section (1) of Section 95. The terms of the policy in that case were exactly similar to those of the policy in the present case. But since the policy was not required under the Motor Vehicles Act to cover the case of a gratuitous passenger, it was held that the insurer cannot be made liable for the damages in respect of the gratuitous passenger. The circumstances under which the deceased passenger in that case came to be carried in the vehicle have not been discussed in that case. The deceased passenger in that case was not a passenger on hire. In AIR 1975 Gau 3 (Assam Corporation v. Binu Rani), admittedly, the jeep in which the passenger was travelling at the time of the accident was so travelling in connection with the business of the owner of the jeep. The terms of the policy in that case have not been set out in the decision, but it appears from reading of the judgment that the liability in respect of death or bodily injury to any person with the exception similar to the one contained in the policy in the present case seems to have been present in that policy also. Their Lordships came to the conclusion in that case also that it is not obligatory on the part of the insurer to issue a policy under Clause (b) of Sub-section (1) of Section 95 to cover the case of death or injury to a gratuitous passenger, that is, to a passenger who has not paid any hire as a consideration for travelling in the

vehicle. But in view of the fact that the policy referred to the "death or bodily injury to any person", their Lordships held that the insurer is liable to pay the damages in respect of a gratuitous passenger also. In both the above cases, the question whether, apart from provisions of the Motor Vehicles Act, a gratuitous passenger is entitled to claim damages in respect of bodily injury or death as against the owner of the vehicle in the case of a private vehicle has not been considered.

21. We are of the opinion that the question whether a passenger travelling in a private car neither for hire nor reward can claim damages in respect of injury caused to him while travelling in the vehicle belonging to the owner and whether in the case of death of such a person his legal representatives can claim damages against the owner depends upon the facts and circumstances of each case. There may be cases where such a passenger or his legal representative as the case may be is entitled to claim damages against the owner of the vehicle; but there may also be cases in which, apart from the provisions of the Motor Vehicles Act, such a passenger or his legal representative as the case may be, is not entitled to claim any damages against the owner of the vehicle. In our opinion, the question whether such a passenger can claim damages against the owner of a vehicle in which he was travelling under such circumstances has to be considered in the first instance apart from the provisions of the Motor Vehicles Act. It is only if the court comes to the conclusion that such a passenger can claim damages against the owner of the vehicle, depending on the circumstances under which he came to travel in the vehicle, that the provisions of the policy as in the present case render the insured liable for damages. The next question to be considered in a case where such a passenger can claim damages against the owner of the car under the terms of the policy is whether the damages can be recovered in a proceeding under Chap. IV of the Motor Vehicles Act, or in an independent suit.

22. As stated above, the evidence in this case is unsatisfactory for deciding whether the owner of the vehicle is liable to pay damages in respect of the gratuitous passengers, namely, Bihuram Das and Robin Das. Hence, we are of the opinion that the claimants have not established the liability of the owner to pay damages to them in respect of the death of Bihuram Das and injuries to Robin.

23. Mr. P.G. Barua appearing for the insurer contended that in the case of a gratuitous passenger claiming damages against the owner, even though the policy were to cover the indemnity of the owner in respect of such damages, only a suit would lie and that the Tribunal has no jurisdiction to deal with such a claim. He has relied on the decision of the Supreme Court in *New India Insurance Co. Ltd. Vs. Smt. Shanti Misra, Adult*, (*New India Insurance Co. Ltd. v. Smt. Shanti Misra*) wherein it is held that the amendment of the Motor Vehicles Act by a Central Act deleting Section 110 and inserting Sections 110 to 110F effected only a change of forum, that is a change of Procedural law and not substantial

law. His contention therefore is that in such a case, the Tribunal constituted under the Motor Vehicles Act has no jurisdiction to deal with the claim made on account of the death or bodily injury to a gratuitous passenger. But since we have come to the conclusion that in the present case the liability of the owner has not been established, it is not necessary for us to go into the merits of that contention. As a consequence of our said finding, the question of the liability of the insurer to indemnify the owner in respect of the claim relating to a gratuitous passenger does not also arise.

24. The Tribunal made an apportionment of the quantum of damages as between the owner of the bus, namely the State of Assam, and the owner of the vehicle. The Learned Counsel for the appellant has relied on a decision in 1963 ACC 1 CJ (Madh Pra) (Manjula Devi Bhuta v. Manjusri Raha) in support of his contention that the Tribunal was in error in apportioning the damages. In that case it has been held that a case of contributory negligence arises only where there was an act or omission on the part of the plaintiff which has materially contributed to the damage, the act or omission being of such a nature that it may be properly described as negligence, and that in a case where there has been no contributory negligence on the part of the victim the question of apportionment does not arise. In other words, where a person is injured without any negligence on his part but as a result of the combined negligence of two other persons it is not a case of contributory negligence but a case of what has been described by Pollock as "injury by composite negligence". We are in respectful agreement with this proposition laid down by a Division Bench of the Madhya Pradesh High Court. The Tribunal was therefore in error in apportioning the damages as above stated. This is a case of joint tort-feasors and hence the claimants are entitled to a decree against both the tort-feasors. But in the present case, the liability of the owner of the car has not been established. The claimants are therefore entitled to recover the entire amount of the claim from the owner of the bus, namely the State of Assam. Even though it is a case of joint liability, under the circumstances of the case we have come to the conclusion for the reasons stated already that the owner of the car is not liable to pay any part of the compensation to the claimants. We should not be understood as saying anything which will affect the right of the State, if any, to recover part of the compensation paid by them by virtue of this decision from the owner of the car if they are so entitled.

25. In the result, the Appeals Nos. M. A. (F) 2 and 3 of 1968 are dismissed. The Appeals Nos. M. A. (F) 23 and 24 of 1967 are allowed. The appeals presented by the claimants, M. A. (F) Nos. 28 of 1967 and 6 of 1968, are allowed in part as indicated below.

26. There will be a decree in favour of the appellants in M. A. (F) 28 of 1967, the claimants Bhaba Kanti Das and her daughters for Rs. 55,000/- against the State of Assam only. Since the State has deposited Rs. 20,000/- during the pendency of these appeals, interest shall be paid on that amount of Rs. 20,000/- from the date of their application to the date of deposit at the rate of 6 per cent. per

annum. The balance amount, namely Rs. 35,000/- is payable with interest from the date of their application to the date of realisation at the rate of 6 per cent. per annum.

27. There will be a decree in favour of the appellant in M. A. (F) 6 of 1968, the claimant Robin Das, for Rs. 15,000/- from the respondent, the State of Assam. The amount of Rs. 4,000/- has been deposited by the State during the course of these appeals. Hence the amount of Rs. 4,000/- shall carry interest at the rate of 6 per cent. per annum from the date of the application to the date of deposit. The balance of Rs. 11,000/- is payable with interest at the rate of 6 per cent. per annum from the date of his application before the Tribunal to the date of realisation.

28. Under the circumstances of the appeals, the parties shall bear their own costs in all the appeals.

29. Mr. B.K. Das does not wish to press his application filed u/s 151 of the CPC on 2-11-1976 for amendment of the memorandum of appeal. The same is dismissed as withdrawn. No costs in the application.