

(1972) 04 P&H CK 0035

In the Punjab And Haryana At Chandigarh

Case No : First Appeal From Order No. 41 of 1966

National Insurance Company Ltd.

APPELLANT

Vs

Rani Rai Bajaj and Others

RESPONDENT

Date of Decision : 26-04-1972

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 13, 149, 151

Limitation Act, 1963 — Section 5

Motor Vehicles Act, 1939 — Section 108, 110, 95, 95(1), 95(2)

Citation : AIR 1973 P&H 104

Hon'ble Judges : Rajendra Nath Mittal, J

Bench : Single Bench

Judgement

1. These five appeals will be disposed of by this judgment which have been numbered as F.A.O. Nos. 41, 42, 44, 96 of 1966 and 173 of 1967. All the appeals arise out of one judgment of the Motor Accident Claims Tribunal (hereinafter referred to as "the Tribunal") which was passed in five claim petitions, details of which are given here under. I have also given the number of appeals against each claim in which it has been filed:--

Sr.	No.	1.	2.	3.	4.	5.	Claim application No.
		15/CT of 1964	19/CT of 1964	20/CT of 1964	21/CT of 1964	22/CT of 1964	Name of the Parties
		Rani Bai Bajaj and others. v. Darshan Singh and others. Dewan Manmohan Lal v. Darshan Singh and others Pritam Singh v. Darshan Singh and others. Mathura Dass v. Darshan Singh and others. Shrimathi Bhagwanti and others v. Darshan Singh and others Appeal, if filed with number and the name of the appellant					
		(i) Appeal filed by Rani Bai Bajaj for enhancement of compensation F.A.O.No.96 of 1966. (ii) Appeal filed by National Insurance Company Ltd., F.A.O.No.41 of 1966. No appeal filed. No appeal filed. (i) Appeal filed by Mathura Dass for enhancement of compensation F.A.O. No. 173 of 1967. (ii) Cross appeal by National Insurance Company Ltd., F.A.O. No. 42 of 1966. Appeal filed by National Insurance Company Ltd. F.A.O. NO. 44 of 1966.					

2. The claim applications were made by different persons arising out of the same accident. The facts briefly are that Car No. P.N.E. 7748 belonging to Krishna Roller and Flour Mills Limited (hereinafter referred to as "the Mill") was proceeding on November 21, 1963, from Ludhiana to Delhi. It carried four passengers, namely, Shri Mathura Dass, Dewan Manmohan Lal, Gopal Dass Bajaj, Kishori Lal, besides the driver Pritam Singh. At about 9-15 A.M. the car reached near village Bija. The driver of the car saw some carts loaded with bricks which were coming from the opposite side followed by Truck No.P.N.P. No.6012. The truck while overtaking the carts, collide against the car and on account of the accident, two passengers of the car, namely, Gopal Dass Bajaj and Kishori Lal died and Manmohan Lal, Mathura Dass and Pritam Singh driver received grievous injuries. The car and the truck were also damaged badly. Five applications for claims were filed, the details of which have already been given above. The application given at Serial No.1 above was filed by Rani Bai Bajaj and others for recovery of Rs.75,000/- as heirs of Gopal Dass Bajaj, application at Serial No.2 was filed by Dewan Manmohan Lal for recovery of Rs.1,00,000 application at Serial No.3 was filed by Pritam Singh driver, the recovery of Rs.25,000/- and application at serial No. 4 was filed by Mathura Dass, injured person, for recovery of Rs.50,000/- respectively. Shrimathi Bhagwanti and others mentioned at Serial No.5 filed a claim application for Rs.50,000/- on account of loss suffered by the death of Kishori Lal. In the claim applications, the claimants have alleged the negligence of the driver of the truck, Darshan Singh. The car was insured with National Insurance Company Ltd. (hereinafter referred to as the "National Company") and the truck was insured with South India Insurance Company Ltd. (hereinafter referred to as "the South Company"). The truck was owned by M/s. Moti Ram Darshan Singh and Darshan Singh himself was driving the truck at the time of accident.

3. The claims have been contested by the insurer of the truck, the driver and the owner of the truck and the owner and the insurer of the mill. All of them denied their liabilities for payment of compensation on their part. On the pleadings of the parties, the Tribunal framed the following issues:--

"1. Whether the accident was due to the negligence of Darshan Singh owner and driver of the truck or that of Pritam Singh driver of the car or that of both?

2. What is the quantum of compensation due, if any, and from whom to whom?

3. Relief."

4. The Tribunal after recording the evidence passed awards in favour of Rani Bai Bajaj and others for Rs.16,500/-. Mathura Dass for Rs.4,000/- Shrimathi Bhagwanti and others for Rs.31,500/- and dismissed the two applications--one by Manmohan Lal and the other by Pritam Singh, driver. No appeals have been filed in this Court either by Manmohan Lal or by Pritam Singh. Appeals have been filed by the National Insurance Company against all the three awards given in favour of the above-mentioned persons and two appeals have been filed for

enhancement, one by Rani Bai Bajaj and others and the other by Mathura Dass. The Tribunal while deciding issue No.1 held that the accident took place on account of negligence and rashness of the drivers of both the vehicles. While deciding issue No.2 it is granted an amount of Rs.16,500/- as compensation in favour of Rani Bai Bajaj and others, observing that out of the said amount, Miss Santosh Kumari Bajaj and Miss Sudarshan Kumari Bajaj will each get Rs.3000/- which they would invest in the National Defence Certificates cashable after their marriages and the balance of Rs.10,500/- would be received by Mrs. Rani Bai Bajaj. It was further observed that out of the said amount Rupees 6,000/- would be paid by the South Company and Rs.10,500/- by the National Company. The Tribunal further stated that the National Company would be entitled to recover Rs.2,050/- from Darshan Singh, the owner and the driver of the truck. The Tribunal gave an award of Rs.4,000/- in favour of Mathura Dass to be equally paid by both the Insurance Companies. It, while passing an award of Rs.31,500/- in favour of Shrimathi Bhagwanti will be paid Rs.13,500/- and out of the balance amount, Shrimathi Bhagwanti will invest in the National Defence Certificates a sum of Rs.5,000/- each in the names of her three minor daughters, namely, Usha Rani, Asha Rani and Babby and Rs.3,000/- in the name of her son, Kiran Kumar. It was further observed that out of the total amount of Rs.31,500/-, Rs.12,000/- was to be paid by the South Company and Rs.19,500/- by the National Company. The Tribunal also said that the National Company can recover Rs.13,750/- from Darshan Singh out of the total amount paid towards this claim. The Tribunal also directed that the Insurance Companies should pay the amounts within two months otherwise they would also be liable to pay interest at the rate of 6 percent per annum from the date of award till the date of payment. Five appeals have been filed against the said order, the details of which have already been given above. First, I will deal with the appeals of the National Insurance Company Limited, namely, F.A.O. Nos.41, 42 and 44 of 1966.

F.A.O.Nos. 41, 42, and 44 of 1966.

5. When the learned counsel for the appellants started his arguments, a preliminary objection was raised by the learned counsel for the respondents that the appellant, National Company, has got no right of appeal as it was challenging the whole award on merits which it could not do under the Act. According to the learned counsel for the respondents, the appellant can defend the claims only on certain limited grounds which have been provided by clause (2) of Section 96 of the Motor Vehicles Act, 1939 as it was on November 21, 1963, which shall hereinafter be called "the Act". On this basis, they argue that if the Insurance Company has got no right of defending an action on all the grounds which can be raised by the insured, in the case of an appeal, its rights cannot be enlarged by taking such grounds on which it could not defend the action. In support of his arguments, he has referred to the provisions of sub-clause (2) of Sections 96 and 110-C (2-A) and the various authorities. On the other hand, the learned counsel for the appellants controverts the said position and he submits that he has a right to appeal on all the grounds, which the insured could take as if he has

not filed the appeals in these cases. At this stage, it will be advantageous to reproduce the relevant subsections of Section 95 and 96 of the Motor Vehicles Act, 1939, which are as follows:--

"95 (1) In order to comply with the requirements of this Chapter, a policy of insurance must be a policy which-

(a) is issued by a person who is authorised insurer (or by a co-operative society allowed u/s 108 to transact the business of an insurer), and

(b) insures the person or classes of persons specified in the policy to the extent specified in sub-section (2) against any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of the use of the vehicle in a public place:

... .. Provided that a policy shall not be required:--

(i) to cover liability in respect of the death, arising out of and in the course of his employment, of the employee of a person insured by the policy or in respect of bodily injury sustained by such an employee arising out of and in the course of his employment (other than a liability arising under the Workmen's Compensation Act, 1923) in respect of the death, of, or bodily injury to, any such employee-

(a) engaged in driving the vehicle, or

(b) if it is a public service vehicle, engaged as a conductor of the vehicle, or in examining tickets on the vehicle; or

(c) if it is a goods vehicle, being carried in the vehicle; or

(ii) except where the vehicle is a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, to cover liability in respect of the death of or bodily injury to persons being carried in or upon or entering or mounting or alighting from the vehicle at the time of the occurrence of the event out of which a claim arises, or

(iii) to cover any contractual liability

(2) Subject to the proviso to sub-section (1), a policy of insurance shall cover any liability incurred in respect of any one accident up to the following limits, namely:--

(a) where the vehicle is a goods vehicle a limit of twenty thousand rupees in all, including the liabilities, if any, arising under the Workmen's Compensation Act, 1923, in respect of the death of, or bodily injury to employees (other than the driver), not exceeding six in number, being carried in the vehicle;

(b) where the vehicle is a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment in respect of persons other than passengers carried for hire or reward, a limit of twenty

thousand rupees; and in respect of passengers a limit of twenty thousand rupees in all, and four thousand rupees in respect of an individual passengers if the vehicle is registered to carry not more than six passengers excluding the driver of two thousand rupees in respect of any individual passenger, if the vehicle is registered to carry more than six passengers excluding the driver;

... .. (c) Where the vehicle is a vehicle of any other class the amount of the liability incurred.

(3) XX XX XX (4) XX XX XX (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.

96. Duty of insurers to satisfy judgments against persons insured in respect of third party risks:--

(1) If after a certificate of insurance has been issued under sub-section (4) of Section 95 in favour of person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under clause (b) of sub-section (1) of Section 95 (being a liability covered by the terms of the policy) 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, together with any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.

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

(a) that the policy was cancelled by mutual consent or by virtue of any provision contained therein before the accident giving rise to the liability, and that either the certificate of insurance was surrendered to the insurer or that the person to whom the certificate was issued has made an affidavit stating that the person to whom the certificate was issued has made an affidavit stating that the certificate has been lost or destroyed, or that either before or not later than fourteen days after the happening of the accident the insurer has commenced proceedings for cancellation of the certificate after compliance with the provisions of Section 105; or

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

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

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

(b) for organised racing and speed testing, or

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

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

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

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

(c) that the policy is void on the ground it was obtained by the non-disclosure of a material fact or by a representation of fact which was false in some material particular.

(2-A) Where any such judgment as is referred to in sub-section (1) is obtained from a Court in the State of Jammu and Kashmir or in a reciprocating country and in the case of a foreign judgment is, by virtue of the provisions of Section 13 of the Code of Civil Procedure, 1908, conclusive as to any matter adjudicated upon by it, the insurer (being an insurer registered under the Insurance Act, 1938, and whether or not he is registered under the corresponding law of the reciprocating country) shall be liable to the person entitled to the benefit of the decree in the manner and to the extent specified in sub section (1), as if the judgment were given by a Court of India:

Provided that no sum shall be payable by the insurer in respect of any such judgment unless, before or after the commencement of the proceedings in which the judgment is given, the insurer had notice through the Court concerned of the bringing of the proceedings and the insurer to whom notice is so given is entitled under the corresponding law of the State of Jammu and Kashmir or of the reciprocating country, to be made a party to the proceedings and to define the action on grounds similar to those specified in sub-section (2).

(3)XX XX XX (4) If the amount which an insurer becomes liable under this section to pay in respect of a liability incurred by a person insured by a policy exceeds the amount for which the insurer would apart from the provisions of this section be liable under the policy in respect of that liability, the insurer shall be entitled to recover the excess from that person.

(5)XX XX XX (6) No insurer to whom the notice referred to in sub-section (2) (or

sub-section 2-A) has been given shall be entitled to avoid his liability to any person entitled to the benefit of any such judgment as is referred to in sub-section (1) (or sub-section 2-A) otherwise than in the manner provided for in sub-section (2) (or in the corresponding law of the State of Jammu and Kashmir or of the reciprocating country, as the case may be.)"

6. Mr. Lalit Mohan Suri in support of his contention has relied on various cases, In the first instance, he has referred to British India General Insurance Co. Ltd. Vs. Captain Itbar Singh and Others, , where it has been observed by their Lordships of the Supreme Court that the insurer can take only those defences which are open to him under sub-section (2) of Section 96 of the Motor Vehicles Act, 1939 (hereinafter referred to as "the Act"). The observations of their Lordships of the Supreme Court are as under:--

"Apart from the statute an insurer has no right to be made a party to the action by the injured person against the insured causing the injury. Sub-section (2) of Section 96 however gives him the right to be made a party to the suit and to defend it. The right therefore is created by statute and its content necessarily depends on the provisions of the statute. Sub-section (2) clearly provides that an insurer made a defendant to the action is not entitled to take any defence which is not specified in it. When the grounds of defence have been specified, they cannot be added to. The only manner of avoiding liability provided for in sub-section (2) is through the defences therein mentioned. Therefore, when sub-section (6) talks of avoiding liability in the manner provided in sub-section (2), it necessarily refers to these defences. It cannot be said that in enacting sub-section (2) the legislature was contemplating only those defences which were based on the conditions of the policy."

7. From the above, Mr. Lalit Mohan Suri infers that if the insurer cannot take defences outside sub-section (2) of Section 96 of the Act, the insurer also cannot file an appeal on the grounds which are extraneous to the said sub-section. He then referred to a Division Bench case of Delhi High Court reported as Premier Insurance Co. Ltd., Madras Vs. Swaran Kaur and Others, and a Single Bench case of the Orissa High Court reported as Orissa Co-Operative Insurance Society Ltd. v. Bhagaban Sahu 1971 ACJ 49 (Orissa), where similar observations were made. He also referred to a Division Bench decision of the Delhi High Court reported as New Zealand Insurance Co. Ltd., New Delhi v. Kalu Ram 1967 ACJ 186 (Delhi), where it was held that an appeal by the insurance Company was not maintainable as the pleas raised in the appeal were not open to an insurance Company under sub-section (2) of Section 96 of the Act. Mr. Suri then referred to a Single Bench case of this Court reported as Joginder Nath v. Shanti Devi 1967 ACJ 150 (Punjab), where Mahajan, J., observed that the Insurance Company was not entitled to appeal against the quantum of compensation in view of the clear terms of sub-section (2) of Section 96. His Lordship further observed that an appeal by the Insurance Company on the ground on which it could not content it before the Motor Accidents Claims Tribunal was not competent. On the other

hand, the learned counsel for the appellants, contends that he has got a right to appeal in the present case. He submits that the Insurance Company is denying its liability to pay any amount u/s 96 read with Section 95 of the Act. In case, the insurer is not liable to pay any amount and the compensation has been granted against it, the Insurance Company can challenge its liability to pay in appeal. He has also submitted that the Insurance Company has got a right of appeal even if the defences which he had taken an outside Section 96 of the Act. He has in support of his contention referred to the Indian Mutual General Insurance Society Ltd., Madras v. Kothandian Naidu 1966 ACJ 62(Mad), where it was observed that the Insurance Company was certainly entitled to plead that the grounds upon which is sought to set aside the decree for damage should be independently assessed notwithstanding the failure of the insured to agitate the matter at allow to join the insurer in its appeal. There is no discussion by the learned Judges on the bass of which they reached this conclusion. The learned Counsel for the respondents has, in reply, referred to another case of the Madras High Court reported as Ayesha Begum v. G.Veerappan 1966 ACJ 101 (Mad.), where it has been observed that the Insurance Company could not question the quantum in appeal on the principles as laid down in British India General Insurance Co. Ltd. Vs. Captain Itbar Singh and Others, .

8. I have carefully gone through all these cases and am of the view that the insurance company can defend the cases on the grounds mentioned in sub-section (2) of Section 96. In case, the Insurance Company is aggrieved against the judgment of the trial Court and any matter on which it can defend the suit, it has got a right to file an appeal. In addition to this, if the Insurance Company contests its liability on the ground that the act does not impose any liability on the Insurance Company to pay the decretal matter against it, the Insurance Company still has got a right to file an appeal against that finding of the Tribunal. In the present case, one of the grounds on which the Insurance Company has filed the appeal is that the insurer is not liable to pay the amount in respect of death or bodily injury to the passenger of the car u/s 96 (1) read with clause (b) of Sub-section (1) of Section 95, and the Tribunal has wrongly given an award against it in this case, I am view that the National Company is entitled to file an appeal to the limited extent by which it wants to challenge its liability to pay any amount. The National Company, however, in the appeal is not entitled to challenge the amount of compensation.

9. The learned counsel for the appellants submits that in the case of Rani Bai Bajaj and others, an award of Rs.10,500/- has been given against the appellant out of the total amount of Rs.16,500/-. It has further been ordered that the appellant could recover Rs.2,050/- from Darshan Singh, the owner of the truck. Similarly, in the case of Shrimati Bhagwanti and others, the appellant has been burdened with an amount of Rs.19,500/-, out of total amount of Rupees 31,500/-, and out of the said amount it has been allowed to recover Rs.3,750/- from Darshan Singh. The learned counsel submits that the Tribunal had no right to order an amount of Rs.3,750/- in Shrimati Bhagwanti's case, to be payable by

the appellant, the liability which has been fixed on Darshan Singh. According to him, the appellant was the insurer of the Mill and only he was liable to pay the liabilities which had been created by the award against the Mill. The learned counsel for the respondents, on the other hand, submits that the liability under the award was joint of both the Insurance Companies. He has referred to the observations of the Tribunal under issue No.3 where it held that both the owners of vehicles, Darshan Singh and Krishna Rollers and Flour Mills Private Limited, would be jointly and severally liable for the amount of Rupees 16,500/-. Similarly, same observations were made in the case of Shrimathi Bhagwanti and others where the Tribunal observed as under:--

"I award Shrimati Bhagwanti in her own right and as guardian of minor children Rs.31,500/- as compensation u/s 110-B of the Motor Vehicles Act against Shri Darshan Singh and Krishna Roller and Flour Mills Limited jointly and severally."

From the above facts, the learned counsel for the respondents argues that whole of the amount could be recovered from either of the two parties. The learned counsel for the respondents further argues that the liability of the Insurance Company was also to the same extent which was that of the insured but subject to the maximum limits as provided in the Act and in case the appellant had been given a right to reimburse itself from the owner of the truck, he has been given an additional benefit. Appellants' liability according to Mr. Suri is to the extent of whole of the amount awarded as compensation u/s 95(2)(c). According to him, in the circumstances, the order of the Tribunal is not invalid in any way.

10. Section 110-B of the Act provides that the Tribunal shall make an award determining the amount of compensation which appears it to be just and specifying the person or persons to whom compensation shall be paid; and in making the award the Tribunal shall specify the amount which shall be paid by the insurer. According to the section, the Tribunal has to specify the amount which shall be paid by the insurer. It is the duty of the Tribunal that it shall specify the amount of compensation which the Insurance Company is liable. Still there are other limitations also on the powers of the Tribunal in granting relief against the insurer and one of them is that insurer can be held liable only to the extent, to which the insured is liable. Insurers' liability cannot be more than that of the insured. By amending Act 56 of 1969 (hereinafter referred to as "the Amending Act") the Tribunal has further been given powers to specify the amount payable by owner and driver of the vehicle involved in the accident in addition to that of the insurer, or, all, or, any of them, as the case may be. In view of the provisions of the unamended Act and the amended Act, one thing is clear, that the liability of the Insurance Company is to be fixed by the Tribunal. It is also apparent by reading of Sections 95 and 96, that the Insurance Company cannot be ordered to pay the amount on behalf of the other person than the insured and to recover that amount from that other person. No doubt the liability of an Insurance Company cannot be fixed with the liability of an Insurance Company which has insured a private car is unlimited as provided in clause (c) of

sub-section (2) of Section 95, but the Insurance Company cannot be fixed with the liability of other persons. It is against the provisions of the Act that the Tribunal has ordered in the first instance to the insurer to discharge the liability of the truck-driver and owner and then authorised him to recover it from that person. This is clear from sub-section (4) of Sections 96 wherein it has been provided that if the amount which an insurer becomes liable u/s 96 to pay in respect of a liability incurred by a person insured by a policy exceeds the amount for which the insurer would apart from the provisions of Section 96 be liable under the policy in respect of that liability, the insurer shall be entitled to recover the excess from that person. The section nowhere provides that insurer can be authorized to recover it from persons other than the insured. I leave this matter with these observations as I am going to accept the appeal of the insurer on another ground.

11. The second point which has been raised by the learned counsel for the appellants is that the Company can be made liable for the compensation awarded to the respondents only if any negligence of the insured has been alleged and proved. He has taken me through the application of the respondents filed before the Accident Claims Tribunal and submits that no negligence was alleged therein of the driver of the car but only negligence of the driver of the truck was pleaded. According to the learned counsel in such a case, the Tribunal could not hold that the accident took place on account of negligence of both the drivers. He has relied on some decided cases in support of this proposition. He has drawn my attention to State of Punjab v. V.K.Kalia 1968 ACJ 401 : AIR 1969 Pun 172 wherein Sarkaria, J., observed that for fixing liability in the absence of any specific provisions in the Act, we have to go back to the law of torts, in terms of which it is essential for the claimant to prove that the accident was caused by the negligence of the driver or the owner of the vehicle. It was a case where a claim was filed against the State of Punjab, as the vehicle of the State was not insured. The State in defence, pleaded that the accident was caused by the negligence of the claimant himself who was the Superintendent of Police. An issue was also framed regarding the negligence of the driver of the vehicle who was a constable. The learned Judge came to a conclusion, that the driver was not negligent and the appellant cannot take any benefit from it. The observations of the learned Judge, in my view, also do not help the appellants in any way. He has then referred to Prem Lata v. State of Punjab 1968 ACJ 398 (Punj) wherein Sarkaria, J., observed as follows:--

"In applications for compensation arising out of motor accidents the onus of proving negligence on the part of the driver of the vehicle, rests on the claimants. If one particular type of negligence is alleged in the claim application, the application cannot be allowed to drop that stand and take advantage of the weakness of the defence, or adopt a part of the defence story, and ask the Tribunal to give him relief, on the basis of another kind of negligence."

12. The facts of the above case are also distinguishable from those of the present

case and the observations are of no assistance to him. He has also cited three cases reported as Tukaram Sitaram Gore Vs. State, Harbans Singh v. The State of Rajasthan 1970 ACJ 340 (Raj) and Mohanta Lal Saha v. The State of West Bengal 1968 ACJ 124 (SC), wherein observations were made that mere allegation of high speed did not prove rash and negligence driving. There is no dispute with this proposition and I am in respectful agreement with those observations.

13. When we look to the circumstances of this case, the argument cannot stand. In the first instance, the appellants cannot raise this point before this Court. This point was never urged before the Tribunal. The learned counsel for the appellants submits that it was urged but it was not discussed. No affidavit of the learned counsel of the National Company who argued it before the Tribunal has been filed in this Court. Mr. Suri, learned Counsel for respondents in F.A.O.No. 41 of 1966, on the other hand, urged that this point was never taken before the Tribunal, where he represented the claimant and the whole case was argued in his presence. In these circumstances, the learned counsel for the appellants cannot take this point in this Court.

14. I also feel that in view of the provisions of Section 95 and 96 of the Act, the appellants cannot take this point in this Court. These points could only be taken by the insured and not by the insurer. In view of my finding on the preliminary point, the appellants have got no right of appeal on this ground in this Court. On merits alone, it has no force. The Tribunal after looking into the pleadings framed issue No.1, which also relates to the negligence of the driver of the truck. The issue is as follows:--

"Whether the accident was due to the negligence of Darshan Singh owner and driver of the truck or that of Pritam Singh driver of the car or that of both?"

15. The parties on the basis of the issue led evidence and the Tribunal gave a finding that the driver of the truck was negligent. If both parties understood the case, led the evidence and the Tribunal gave a finding, the appellants now cannot say, that the Tribunal could not decide this matter without pleadings. It has been held in Nagubai Ammal and Others Vs. B. Shama Rao and Others, , that where no specific issue was directed to that question, but the defendants went to trial with full particular knowledge regarding that question and the parties had ample opportunity to adduce evidence thereon and they fully availed themselves of the same, the absence of a specific pleading on the question was mere irregularity, which resulted in no prejudice to them. Applying the above principle to the facts of the present case, I find that the arguments of the learned counsel does not hold good inasmuch as an issue was framed and evidence was led thereon by the parties.

16. The learned counsel for the respondents then argued, that it was a case of composite negligence and not that of contributory negligence. According to him in case of composite negligence, the Tribunal can give compensation against the

owners of the vehicles involved in the accident or their drivers, as the case may be, after looking into evidence. The argument of the learned counsel has some force. In this case, respondents themselves or the deceased did not contribute negligence which was only that of the drivers. In case, accident is on account of the negligence of the drivers of the vehicles involved in the accident and the passengers have suffered injuries, the Tribunal can award the damages against all of them jointly. In support of his argument, he refers to Jagan Nath v. Ved Prakash, (F.A.O.No.179 of 1965) decided by Dhillon, J., on 27-8-1971 (Punj.). The facts of the case before the Hon'ble Judge were that Hans Raj deceased was going on the pillion seat of the scooter which was being driven by Ved Parkash his son. When the scooter reached a crossing, it collided against truck No. PNU 1320, which was alleged to be driven at a very fast speed. The scooter was dragged by the truck on the road for about 50 yards. Ved Parkash and Hans Raj both received injuries. Hans Raj died on account of injuries on the next day in the civil hospital. The allegation was that the accident took place because of rash and negligent driving of the truck by its driver. The Tribunal gave an award in favour of the heirs of the deceased. Jagan Nath, the owner of the truck, and the Life Insurance Corporation filed appeals against the award of the Motor Accident Claims Tribunal. In appeal one of the arguments by the appellants was that the accident took place on account of non-observance of Rules 6 and 7 of the Tenth Schedule of the Motor Vehicles Act and the scooter driver also contributed to the accident. He further contended that the liability of both the drivers should have been fixed and the compensation should have been fixed and the compensation should have been apportioned to the extent of one-third against the scooter driver. On the other hand the argument of the learned counsel for the heirs of the deceased was that it could not be said to be a case of contributory negligence but, at the most, it was a case of composite negligence and the plea of contributory negligence could not be raised against the legal representatives of the deceased. The learned Judge after relying on Manjula Devi Bhuta v. Manjusri Raha 1968 ACJ 1 (Madh Pra) which was a case of composite negligence and not of contributory negligence held that both the drivers were jointly and severally liable for the accident and the rule of apportionment of liability could apply only in the case of contributory negligence, that is, where the injured himself was guilty of negligence. The observations of the Division Bench in Manjula Devi Butta's case 1968 ACJ 1 (Madh Pra), which was a case of composite negligence, were as follows:--

"Where a person is injured without any negligence on his part but as a combined effect of the negligence of two other persons, it is not a case of contributory negligence but it is a case of what is styled as "composite negligence". If due to the negligence of "A" and "B", "Z" has been injured, "Z" can sue both "A" and "B" for the whole damage. There is a clear distinction between "contributory negligence" and, what is termed as "composite negligence". The term "contributory negligence" applies solely to the conduct of a plaintiff. It means that there has been an act or omission on his part, which has materially

contributed to the damage."

17. I am in respectful agreement with the observations in the above two cases. Though this was not argued before the learned Tribunal but keeping in view this aspect of the matter also, I am not inclined to disturb the finding of the Tribunal on the aforesaid contention of the learned counsel or the appellants.

18. The next point which has been raised by the learned counsel for the appellants is that the insurer is not required to cover under the Act the risk of the passenger in the private car. The learned counsel for the respondents urge that no appeal can be filed by the insurer on this ground also. The insurer is liable to pay the amount of compensation awarded in respect of any liability as is required to be covered by a policy under clause (b) of sub-section (1) of Section 95 of the Act. If the insurer is not liable to pay any amount under the above said clause then the question of any plea under Sections 96(2) will not arise. In such circumstances, if the liability is fixed on him, without properly interpreting the provisions of Section 95 and 96 of the Act, the insurer is entitled to file an appeal against that order. The primary question that arises in this case is, whether the insurer of the car is liable to pay the amount of the award given in favour of the legal representatives for the deceased passenger or injured passenger. The matter is clear by reading of clause (b) of sub-section (1) of section 95 and proviso (ii) under that clause. The liability of payment by insurer to such passengers who were considered necessary to be provided for has been specifically given in proviso (ii) of the aforesaid clause(b). The liability of insurer arises in respect of death or bodily injury of passengers who are carried for hire or reward, while being carried in or upon or entering or mounting and alighting from the vehicle at the time of the occurrences of the even out of which the claim arises. The liability of the insurer is only in the case of the passengers who are carried for hire or reward and not in the case of other passengers. If the Legislature wanted to fix the liability of the insurer for other passengers also, it could have done so. As the Act has not provided for such liability, so it is clear that the Legislature never wanted to do so. This matter is not res integra and has been decided by a Full Bench of this Court in *Oriental Fire and General Insurance Co. Ltd. v. Gurdev Kaur* 1967 ACJ 158 : AIR 1967 Pun 486 (FB). In that case, a person while accompanying his goods in a truck, died as a result of injuries. The dependents of the deceased filed an application for compensation u/s 110-A of the Act. An award was passed by the Tribunal in their favour. The question arose whether the insurance Company was liable to satisfy the award by virtue of the provisions of Section 96(1) of the Act. The Full Bench after referring to the provisions of the Act observed as follows:--

"It is clear from the very terms of sub section (1) of Section 96 that the liability of the insured to pay to the person entitled to the benefit of any decree of the Tribunal is in regard to judgment in respect of such liability as is required to be covered by a policy under Clause (b) of sub-section (1) of Section 95, which clause is subject to the two provisos (1) and (ii) in sub-section (1) of the Section.

Apparently if the liability is not covered by clause (b) of sub-section (1) of Section 95, the question of any payment by the insurers pursuant to any judgment by the Tribunal does not arise. Sub-section (2) of Section 96 refers to a sum payable by an insurer under sub-section (1) of that section, and sub-section (6) of the section debars any other defence than those mentioned in sub-section (2). But this only happens when the judgment is in respect of liability as is required to be covered by a policy under clause (b) of sub-section (1) of Section 95. Where no liability is required to be covered by that provision, it is obviously open to the insurer to prove that in a particular case the liability is not required to be covered by that provision, and, when the insurer shows that, it has no liability to pay to the person who is entitled to the benefit of the decree and judgment of the Tribunal. In such as case the question of the other defences under sub-section (2) of Section 96 never arises. On the other side of the respondents reliance in this respect has been placed on *Vanguard Fire & General Insurance Co. Ltd. v Sarla Devi* AIR 1959 Pun 297 and *British India General Insurance Co. Ltd. Vs. Captain Itbar Singh and Others*, , for the proposition that to an insurer no other defence is open except defences under sub-section (2) of Section 96, but in those cases the liability was such as was required to be covered by a policy under clause (b) of sub-section (1) of Section 95, and the policy in fact did so. The consideration that is urged on the side of the insurer in these appeals, therefore, did not and could not possibly arise in those two cases. Here the insurer's contention is that in so far as the three deceased persons as hirers-cum-owners of the goods are concerned, they did not come under Clause (ii) of the proviso to Section 95(1)(b). So the policy was not one that was required to cover liability under clause (b) of sub-section (1) of Section 95. It is open to the insurer to prove that. This is not barred by any provision of Section 96 and in fact, as stated, Section 96 proceeds on the basis that such a policy u/s 95(1)(b) is required."

19. The reading of the aforesaid para makes it clear, that the insurer will be liable to pay for the death or injury of the passenger, if he is covered by proviso (ii) of cl.(b) of sub-section (1) of Section 95. From the Full Bench judgment, it is also clear, that the appeal against the award of the Tribunal was also maintainable on the ground that it was not liable to pay the compensation under clause (ii) of the proviso to Section 95(1)(b) though the defence taken by the insurer was not the same as provided in Section 96(2) of the Act. This judgment was followed by Mahajan, J., in *Unique Motor and General Insurance Co. Ltd. v. Mrs. Krishnan Kishori* 1968 ACJ 318 (Punj). The learned Judge held that there was no provision in the motor Vehicles Act, 1939 requiring an Insurance Company to cover any risk to a person carried on the pillion seat of a motorcycle. It was further held that the Insurance Company was not liable to pay compensation for the death of or injury to a person carried on the pillion seat. The learned counsel for the respondents wanted to distinguish those cases on the ground that their Lordships in those cases were interpreting the specific terms of the insurance policy. I, however, do not agree with him. The above cases also interpret Sections 95 and

96 of the Act. I am bound by the observations of the Full Bench. A Single Bench of Delhi High Court in *Chander Mohan v. D.C. Kapur* 1970 ACJ 121 (Delhi) has also followed *Oriental Fire and General Insurance Company's case* 1967 ACJ 158 : AIR 1967 Pun 486 (FB) and observed as follows:--

"In the case of death of a passenger travelling in a car, the provisions of Section 96(1) are not applicable because liability in respect of a passenger in a car is not required to be covered by a policy u/s 95(1)(b) of the said Act."

20. In view of the aforesaid discussions, I hold that the appellants have got a right to file an appeal with regard to the liability which has been fastened on them because of injury of one of the passengers of the car and death of two of them, as they are not liable to pay the same under the Act. I am also of the view that the decision of the Tribunal fixing the liability of the insurer is not correct. The appellants are not liable to pay the amounts, which the owner of the car is liable to pay on account of death of and injuries to the passengers of the car.

21. Mr. Lalit Mohan Suri, on the other hand, argued that the Insurance Company was liable to pay the amount which has been awarded by the Tribunal against the owner of the car on account of death of Gopal Dass Bajaj and Kishori Lal who were passengers in the car. Similarly, on the same ground, he urges that the Insurance Company was also liable to pay compensation awarded to Mathura Dass. In support of his proposition, he has relied on the same sections, namely, Sections 95 and 96. Under clause (b) of sub-section (1) of Section 95, the policy of the insurance must ensure the person or classes of persons specified in the policy to the extent specified in sub-section (2) against any liability which may be incurred by him or them in respect of the death or bodily injury to any person caused by or arising out of the use of the vehicles in a public place. His contention is that the word used in the said clause is "any person" which has been underlined by me above and which means even the passengers carried in a car. He further argues that if the passengers in a car were not to be included in the word "any person", another exception could be provided as has been done in clause (ii) of the proviso to clause (b) of sub-section (1) of Section 95. He has relied on *Digby v. General Accident, Fire and Life Assurance Corporation Ltd.* (1942) All ER 319, in support of his proposition. In that case, the owner was injured in a collision and she filed a claim against her chauffeur. The claim was allowed to her by the Court. The chauffeur subsequently made a claim against the Insurance Company on the ground that he was entitled to be indemnified against the sum awarded as damages by the court according to the terms of the policy. The House of Lords after taking into consideration the relevant clauses of the policy observed that an authorized driver was entitled to be indemnified against the damages awarded to the policy-holder in her claim against him. On this basis, he urges that if the owner's claim can be satisfied by the insurance as a third party, why not the claim of the passengers where were travelling in the car. In view of the judgment of the Full Bench, by which I am bound, I am unable to follow the view taken by the House of Lords. I am also of the view that the

Insurance Company is not liable for the compensation to be paid to the heirs of the deceased or to the injured persons who were passengers in the car u/s 96 read with Section 95 of the Act. The passengers in a car are not "any person" as has been stated in clause (b) of sub-section (1) of Section 95.

22. Mr. Lalit Mohan Suri then argued that, in the alternative, Gopal Dass Bajaj, Kishori Lal and Mathura Dass were travelling in the car in pursuance of a contract of employment and the Insurance Company is bound to pay the compensation which has been granted on account of the death or bodily injury to those persons. According to his submissions, it was not necessary that the aforesaid persons must be in contract of employment with the owner of the vehicle but they could be in the employment of "any person" whether he was owner of the vehicle or not. He says that the only requirement of the section is that he must be in contract of employment which maybe with any person. In support of this proposition, he relies on Parkash Vati v. The Delhi Dayal Bagh Dairy Ltd. 1967 ACJ 82 (Punj). The facts of that case were distinguishable from those of the present case and the observations made therein do not apply here. The insured or the deceased must be on the vehicle in contract of employment with the owner of the vehicle, otherwise the purpose of the section will wholly be frustrated. Thus the argument of the learned counsel for the respondents does not hold good.

23. The learned counsel for the appellant then argued that Kishori Lal was in employee of the owners of the car and he was travelling in the car in the course of employment. He was entitled to recover damages under the Workmen's Compensation Act against the employer. The claim of the heirs which has been allowed by the Tribunal according to the counsel is not maintainable in view of clause (i) of proviso to clause (b) of sub-section (1) of Section 95. As I have already held that the National Company is not liable to pay the compensation awarded to the respondents on account of death or injury of the passengers in the car, therefore, I do not propose to deal with this point. The relief is being granted to the appellant on the other grounds.

F.A.O. No.96 of 1966.

24. Mr. Lalit Mohan Suri in the abovesaid appeal challenged the order of the Tribunal and submitted that the compensation which has been granted by it is inadequate. According to him, the amount which was being contributed by the deceased for the family expenses was more than Rs.300/- per month as was clear from the statement of Satish Chander and the learned Tribunal has misread his statement. Secondly, he says that the age of the deceased, which has been worked out by the Tribunal, is also not correct. He referred to the statement of Jiwan Lal, A.W. 8 his elder brother, who stated that their mother died at the age of 99 years. According to him, his age should have been fixed at 80 years. He also says that the amount of compensation after the age of 66 years for a period of five years, has been fixed at the rate of Rs.100/- per mensem which has not been correctly assessed. I have considered the arguments of the learned

counsel. I find from the statement of Satish Chander that he was contributing Rs.300/- per mensem for family expenses and in addition to that he was to pay Rupees 50/- each to four of his children. The amount contributed by him according to the said statement comes to Rs.500/- per mensem. I, however, doubt the veracity of the said statement. The deceased must be paying Income Tax and must be spending something over himself. In any case, the amount of Rs.300/- per mensem which has been fixed by the Court is slightly on the lower side. I enhance this amount of Rupees 300 to 400/- per mensem. I do not find any ground to differ from the findings of the Tribunal regarding the age. Jiwan Lal has not given the age of his father which was an important factor for determining the age of the deceased. I am, therefore, of the view that the age of the deceased has been correctly fixed as 75. The contribution of the deceased towards family after the termination of his service has been fixed as Rupees 100/- per mensem for a period of 5 years by the Tribunal. I also affirm the said findings. In view of the enhancement of the contribution by the deceased during the employment towards his family, the appellants are entitled to an additional amount of Rupees 3500/- for 35 months, that is, from November 12, 1963 to October 12, 1966 which amount they can recover from the owners of the truck and the car. The other amounts have been correctly assessed by the Tribunal. Thus the total amount comes to Rs.20,000/- which the appellants are entitled to recover from the owners of the car and that of the truck jointly and severally. The liability of the South Indian Insurance Company shall be Rs.6,000/- as has been fixed by the Tribunal.

F.A.O.No. 173 of 1967 and C.M. No. 3990 of 1967.

25. Mr. C.L.Lakhanpal has filed an application u/s 5 of the Limitation Act read with Sections 149 and 151 of the CPC for condonation of delay in refileing the appeal. The reason which has been given by him in para. 2 of the petition is as follows:--

"After the case was returned to the counsel for the petitioner, it remained pending in the office of his counsel Shri Sohan Lal Gupta without any fault of the petitioner."

26. The reason given above for the extension of period of limitation is not sufficient. There are various cases in which it has been held that the client cannot take benefit of the negligence of the counsel. In this view of the matter, I do not find any reason for extending the period of limitation. Even on merits, I do not find that he has been able to make out any case for enhancement of compensation. Admittedly the appellant was not paying any Income Tax. The Court has fixed his income at the rate of Rs.400/- per mensem and he has been allowed compensation for six months on account of loss of practice. He has further been granted an amount of Rs.1200/- on account of pain and sufferance and Rs.400/- on account of diet, medicine, transport etc. The learned counsel has not been able to bring to my notice from the evidence that he suffered greater loss and incurred more expenses than had been granted to him. In these

circumstances, I dismiss the above mentioned application as well as the appeal.

27. The conclusions of the aforesaid findings are summed up as under:--

(i) I allow F.A.O.No.44 of 1966 and hold that National Company is not liable to pay the amount as ordered by the Tribunal to Shrimati Bhagwanti and others. The South Company will be liable to pay Rupees 12,000.00 out of the total amount of Rs.31,500.00 to them as ordered by the Tribunal. Out of the remaining amount of Rs.19,500.00, the owner of the truck will be liable to pay Rs.3,750.00. The balance amount of Rs. 15,750.00 will be paid by the owner of the car.

(ii) The appeal of Mathura Dass (F.A.O.No.173 of 1967) stands dismissed. The appeal of National Company (F.A.O.No. 42 of 1966) is accepted and it is held that the said Insurance Company is not liable to pay any amount to Mathura Dass. The South Company will be liable to pay Rupees 2,000.00 to Mathura Dass as ordered by the Tribunal. The balance amount of Rupees 2,000.00 will be recoverable by Mathura Dass from the owner of the car.

(iii) I also accept the appeal of Shrimati Rani Bai Bajaj etc. (F.A.O.No.96 of 1966) and enhance the amount of claim from Rs.16,500.00 to Rs.20,000.00. Out of the said amount, the South Company would be liable to pay Rs.6,000.00 as ordered by the Tribunal. Rs. 3,800.00 will be payable by the owner of the truck instead of Rupees 2050.00 which amount was ordered by the Tribunal to be payable by him--the owner of the truck to National Company. The balance amount of Rs.10,200.00 will be paid by the owner of the car.

(iv) The appeal of National Company (F.A.O.No.41 of 1966) is also accepted and it is held that the said Insurance Company will not be liable to pay any amount on account of claim of Shrimati Rani Bai Bajaj and others because of death of Gopal Dass Bajaj.

28. The parties, in the above appeals, are, however, left to bear their own costs.

29. Order accordingly.