APPELLATE CIVIL

Before Bishan Narain and S. B. Capoor, JJ.

THE VANGUARD FIRE & GENERAL INSURANCE CO., LTD.,—*Appellant.*

versus

SARLA DEVI AND OTHERS,—*Respondents*

Regular First Appeal No. 86-D of 1955.

1958

Nov., 27th

Motor Vehicles Act (IV of 1939)—Section 96—Insurer made a party to the suit—Whether can contest the suit on grounds other than those mentioned in Section 96(2)—Section 96—Object and purpose of—Whether violates the principles of natural justice and Articles 14 of the Constitution—Contract of insurance—Nature of—Accident insurance—Clauses of—Third party risk—Liability of the insurer and assured for—Tort—Liability of the master for the acts of his servant—Joint tortfeasors—Whether action can lie against one of them—Damages resulting from death in an accident—How to be determined—Burden of proof—On whom lies—Appellate Court—Whether should interfere with the quantum of damages allowed by the trial Court—Section 95(2)—Liability of Insurer—Extent of—Whether affected by the misuser of the vehicle.

Held, that Section 96(2) of the Motor Vehicles Act, 1939, lays down that the insurers can contest the suit on the grounds specified therein. It is true that this sub-section does not contain any specific mandate or prohibition but the mention of some of the defences in this statutory provision necessarily excludes the other defences, otherwise the legislature need not have mentioned any particular ground of defence at all. This is made absolutely clear by sub-section (6) which does not deal with procedure but with grounds on which the insurer can avoid his liability. It is clear from this provision that the insurers can resist the suit only on those grounds mentioned in sub-clause (2) of section 96 when it exercises its right to be impleaded as a party on receipt of notice from the Court in a suit filed by the injured person against the assured. It cannot defend the suit or the appeal on any other ground nor can it be allowed

to defend the suit or appeal in the name of the assured on the grounds which under Section 96(2) and (6) it is not open to it to defend.

Held, that the object and purpose of Section 96 is only to simplify the procedure for determining the parties' rights in a running down accident. Under general law the injured person could file a suit against the assured and could not implead the insurers. After the decision of this suit the assured got entitled to sue the insurers. These two independent suits arising out of the same accident involved considerable amount of waste of time and money. Under section 96 both the suits are combined in one without affecting in any way the respective rights of the injured person and the insurers qua each other. In this context it cannot be held that Section 96 violates the principles of natural justice.

Held, that Article 14 of the Constitution has nothing to do with the matter. There is no kind of discrimination against insurance companies nor denial of equality before law in a case where third party risk is involved. The purpose of giving facility to an injured party in a running down accident secured in Chapter VIII including section 96 is not a restriction on the rights of the insurers who have been given a right to intervene in the suit filed by the injured person against the assured which right they did not have under general law and by giving them a right to avoid the liability on certain grounds mentioned in the section.

Held, that the contract of insurance in general law like any other contract is an agreement by which one party for consideration furnishes security to the other that he shall not suffer loss or damage by the happening of perils specified in the agreement. In the accident insurance the sum becomes payable to the assured on the happening of any event specified in the contract. Such an insurance may be sub-divided into (a) personal accident insurance, (b) property accident insurance and (c) liability insurance. A policy of motor car insurance serves all these three purposes. Only parties to the insurance can enforce its terms. The primary object of the insurance company is to indemnify the assured and not the third party who is a victim of a running down accident. Such a victim does not

in law or by any fiction of law become a party or privy to the insurance contract. The third party has no interest in the insurance money either before or after it has been paid by the insurer to the assured. The remedy of the victim of the accident is only to enforce it against the assured who is directly or vicariously responsible for the injury. The third person cannot be held to be an assured person simply because the insurer had undertaken under the contract of insurance to idemnify the assured: The contract of insurance being between the insurer and the assured it could not add to or take away the rights of either party to the contract against a third person. It would not entitle the third party to sue the Company nor could the Company sue the third party to enforce the contract of insurance. The injured person had a right to proceed against the assured for damages and in such a suit the insurers could not intervene nor could the plaintiff implead the insurers as defendants on the ground that they were ultimately liable to pay the compensation fixed between the injured and the assured person by virtue of contract between them. The person injured had no redress against the insurers and had no right in respect of the money paid to the assured under the policy. The insurers could not safeguard their interest by intervening in the suit filed by the injured against the assured.

Held, that the master is bound by the acts of the servant even if the act was unauthorised or say prohibited provided the act was within the scope of the service of employment. The principle is that when a servant does an act which he is authorised by his employment to do under certain circumstances and conditions and does it in a manner which is unauthorised and improper even then the employer is liable for the wrongful act of his servant. On this principle it follows therefore that even if Ishwar Dass was authorised to drive the vehicle only up to 9 p.m. the master is liable for his wrongful act if he drove it at 11 p.m. which is admitted in this case.

Held, that where the same damage is caused to a person by two or more wrongdoers those wrongdoers may be either joint or independent tortfeasors. Persons are to be deemed joint tortfeasors within the meaning of this rule whenever they are responsible for the same tort—that is to say whenever the law for any reason imputes the commission of the same wrongful act to two or more persons

at once. This happens in at least three classes of cases—namely agency, vicarious liability and common action. In order to be joint tortfeasors they must in fact or in law, have committed the same wrongful act. The *injuria* as well as the *damnum* must be the same.

Joint wrongdoers are jointly and severally responsible for the whole damage. That is to say, the person injured may sue any one of them separately for the full amount of the loss or he may sue all of them jointly in the same action, and even in this latter case the judgment so obtained against all of them may be executed in full against any one of them.

Held, that there is no quantitive scale of computing compensation for damages resulting from death and Courts of law must in the circumstances of each case exercise their discretion to arrive at a reasonable and fair figure. This task of the Court is to estimate as best it can a capital sum which will represent a fair compensation for the loss of the actual pecuniary benefit which the dependants might reasonably have expected to enjoy if the deceased had not been killed. The usual method of estimating this capital is to determine the amount of wages which the deceased was earning, the ascertainment of which to some extent may depend on the regularity of his employment. Then there is an estimate of how much was required or expended for his own personal and living expenses. The balance will give a datum or basic figure which will generally be turned into a lump sum by taking a certain number of years' purchase. That sum. however, has to be taxed down by having due regard to uncertainties, for instance, that the widow might have again married and thus ceased to be dependent, and other like matters of speculation and doubt. There is no yardstick by which the number of years' purchase can be measured. From this figure deductions have to be made for the pecuniary benefits accruing to the dependents in consequence of the death of the deceased e.g.; previous compensation obtained under other laws etc. It is for the defendants to prove such pecuniary benefits which will accrue to the dependents in consequence of the death of the deceased and it is not for the plaintiff to prove the existence of any such items of deduction

Held, that the appellate Courts should not interfere with the amount of damages assessed by the trial Court in such cases unless it is satisfied that the trial Court had acted upon a wrong principle of law or the amount awarded was so unreasonably high that it must be assumed that the Court had been influenced by some wrong principle of law.

Held, that when the insurance is as a private passenger vehicle, the limit of the liability of the insurance Company is prescribed in Section 95(2)(c) of the Motor Vehicles Act, irrespective of its user and it is co-extensive with the liability of the assured to the injured person. In any case the misuser of the vehicle at the time of the accident will not take the policy of insurance out of the purview of Section 95(2)(c) of the Act.

Regular First Appeal from the decree of the Court of Shri Pritpal Singh, Sub-Judge, Ist Class, Delhi, dated the 9th May, 1955, passing a decree for Rs. 50,000, with costs in favour of the plaintiffs against the defendants.

R. S. NARULA, N. D. BALI and P. C. KHANNA, for Appellant.

A. R. WHIG and KESHAV DAYAL, for Respondents.

JUDGMENT

Bishan Narain, J.

BISHAN NARAIN, J.—Atma Ram died as a result of a running down accident and his widow and minor children (one son aged 4 and a daughter aged 5½ years) filed a suit for the recovery of Rs. 50,000 as compensation under the Fatal Accidents Act against Malik Chand, the owner of the station wagon concerned, and the Vanguard Fire General Insurance Company, Limited, with which the vehicle was insured. The trial Court decreed the claim in full against both the defendants. Malik Chand did not file any appeal against this decree but the Insurance Company has filed this appeal.

The plaintiffs' case is this. Atma Ram aged about 29 when going on a bicycle on 30th of August, 1950, some time between 10 and 11 p.m. was run down by a station wagon DLA: 1952, near the Ice Factory, Chowk Sabzi Mandi, Delhi. In this accident he recived serious injuries. He was immediately removed to the Irwin Hospital where he died of the injuries on the night of 4th and 5th September, 1950. The accident was caused by the rash and negligent driving of Ishwar Dass, Driver of the vehicle which belonged to Malik Chand defendant in whose employment Ishwar Dass was. The vehicle was insured with the appellant Company. It is stated in the plaint that the police had registered a case against Ishwar Dass under Section 279/338, Indian Penal Code, but he was absconding. In para 13 of the plaint it is prayed that a notice be issued to the Insurance Company to which it was entitled under the law as the decree passed in the suit is executable against it as if it was judgment debtor.

Both the defendants contested the suit. They filed separate written statements. Both of them controverted the plaintiffs' case substantially on the same grounds. Malik Chand admitted that Ishwar Dass was in his employment at the time of the accident but pleaded that he was not acting within the scope of his employment at that time and further that in any case the injury was not caused by negligent and rash driving of Ishwar Dass. In the alternative it was pleaded that the deceased was guilty of contributory negligence. He also pleaded that the compensation claimed was highly exaggerated and that in any case the Insurance Company was liable to pay the same. The Insurance Company admitted the Insurance but pleaded that at the time of the accident the

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vehicle was being used to carry goods and therefore, the Company was absolved from liability. It denied negligent and rash driving by the driver and pleaded contributory negligence of the deceased. The amount of compensation claimed was pleaded to be excessive. On these pleadings the trial Court framed the following issues:—

(1) Whether the plaintiffs are the only heirs of the deceased Shri Atma Ram?

(2) Were the injuries caused to Shri Atma Ram caused by rash and negligent driving by Ishwar Dass? And if not, what is its effect?

(3) Was the said Ishwar Dass at the time of injuries working during the course of his employment with defendant No. 1 or within the scope of his duty and whether the defendant No. 1 is liable for that reason?

(4) Was the death of the deceased a direct result of the injuries caused to him by the accident and if not, what is its effect?

(5) To what damages, if any. are the plaintiffs entitled?

(6) Was the deceased guilty of contributory negligence?

(7) Was the vehicle D.L.A. 1952, insured with defendant No. 2 as a private 7 seater vehicle?

(8) Whether the vehicle at the time of accident was being used to carry goods as a public or private carrier? If so, whether defendant No. 2 is not liable for that reason?

(9) Relief.

Issues Nos. 1 to 6 relate to the plaintiffs while issues Nos. 7 and 8 are relevant between the defendants *inter se*.

The trial Court decided issues 1 to 6 in favour of the plaintiffs and issues Nos. 7 and 8 against the Insurance Company. Accordingly a decree for Rs. 50,000 was passed against both the defendants with costs. As I have already stated the Company alone has filed this appeal. It has, however, impleaded Malik Chand as respondent No. 4.

Before the appellant's counsel argued the case the counsel for respondent No. 4 prayed that his client may be transposed as an appellant in the case. This prayer was rejected on the grounds given in a separate order.

Thereafter the learned counsel for the appellant Company started to give the points on which he wanted to challenge the trial Court's findings. Shri A. R. Whig appearing for the respondents (plaintiffs) contended that it was not open to the Insurance Company to contest the suit on grounds other than those mentioned in section 96(2) of the Motor Vehicles Act. This position is not accepted by the appellant. It is, therefore, necessary to start with to consider whether it is open to the Company to rely on grounds other than those mentioned in section 96(2) of the Act.

Now section 96 so far as it is relevant for the present purposes and as it stood at the time of the suit reads:—

> "96. (1) If after a certificate of insurance or a cover note has been issued under sub-section (4) of section 95 in favour of the person by whom a policy has been

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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, e.g., that the insurer may be entitled to avoid or cancel or may have avoided or cancel 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 interests 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; and 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) * * * * * * *.
(b) * * * * * * *.

(c) * * * * * * *
* * * * * * *

96(6) No insurer to whom the notice referred to in sub-section (2) 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) otherwise than in the manner provided for in sub-section (2).

The learned counsel on behalf of the Company argued that the plaintiffs had not raised this plea in the trial Court and that they should not be permitted to do so at this stage. He also urged that there is nothing in section 96(2) which prohibits the Company from raising grounds of defence not specifically mentioned therein. His contention was that in case of doubt a construction on this provision should be put which should be in consonance with the principle of natural justice and this principle favours giving a full opportunity to a defendant to defend the suit and to escape the liability on all grounds open in law to him. Therefore, so said the Company's counsel, section 96(2) should not be so construed as to prohibit defence on grounds which are very material for the disposal of the case. He also argued that if restricted meanings must be given to this statutory provision then it violates Article 14 of the Constitution by denying the Insurance Company an opportunity to defend the suit like any other defendant in civil litigation. Finally it was urged that this Court may allow the Company to defend the appeal in the name and on behalf of Malik Chand.

Before dealing with these contentions it will be convenient to decide the legal rights and liabilities of the parties before these provisions were

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enacted in 1939. The contract of insurance in general law like any other contract is an agreement by which one party for consideration furnishes security to the other that he shall not suffer loss or damage by the happening of perils specified in the agreement. In the accident insurance the sum becomes payable to the assured on the happening of any event specified in the contract. Such an insurance may be sub-divided into (a) personal accident insurance, (b) property accident insurance and (c) liability insurance. A policy of motor car insurance serves all these three purposes. In the present case we are concerned with liability insurance only. Only parties to the insurance can enforce its terms [*Vandepitte* v. *Preferred Insurance Corporation of New York* (1)]. Obviously the primary object of the insurance company is to indemnify the assured and not the third party who is a victim of a running down accident. Such a victim does not in law or by any fiction of Law become a party or privy to the insurance contract. The third party has no interest in the insurance money either before or after it has been paid by the insurer to the assured [*vide In re Harrington Motor Company, Limited* (2)]. The remedy of the victim of the accident is only to enforce it against the assured who is directly or vicariously responsible for the injury. The third person cannot be held to be an assured person simply because the insurer had undertaken under the contract of insurance to indemnify the assured. The legal position has been described in Halsbury's Laws of England, Second Edition, Volume 16, para 879 in these words:—

"The person who has suffered the injury or damage for which the assured is liable

(1) 1933 A.C. 70.
(2) 1928 Chancery Division 105.

> is not a party or privy to the contract of insurance and had not, either at common law or in equity, any right to the money payable under the policy which he could enforce directly against either the insurers or the assured."

The contract of insurance being between the insurer and the assured it could not add to or take away the rights of either party to the contract against a third person. It would not entitle the third party to sue the Company nor could the Company sue the third party to enforce the contract of insurance. The injured person had a right to proceed against the assured for damages and in such a suit the insurers could not intervene nor could the plaintiff implead the insurers as defendants on the ground that they were ultimately liable to pay the compensation fixed between the injured and the assured person by virtue of contract between them. The person injured had no redress against the insurers and had no right in respect of the money paid to the assured under the policy. The insurers could not safeguard their interest by intervening in the suit filed by the injured against the assured [*vide Clover Clayton and Co., Ltd*: v, *Hessler and Company* (1), and *Gowar* v. *Hales* (2)]. The insurers, therefore, having no right to interfere in such proceedings although they had ultimately to foot the bill started inserting a stipulation in the policy enabling them to take over the conduct and control of such proceedings. In spite of this in England the insurers were held to be strangers to such a suit and were not impleaded. In England even under the third party procedure as provided in the rules of the English courts the

(1) (1925) 1 K.B. 1.
(2) (1928) 1 K.B. 191.

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insurers were not impleaded in a litigation between the injured and the assured [*vide Gowar* v. *Hales* (1)]. The consequence of this legal position was that when there was a running down accident the victim had to sue the assured for compensation for the tortious acts of the assured. In this suit it would be open to the assured to avoid the liability on all grounds open to him under the law. After the liability of the assured had thus been fixed the assured became entitled to enforce the contract of insurance by claiming indemnity for the loss sustained by him. In view of this legal position sometimes Courts stayed execution of decrees passed against the assured during the pendency of the suit filed by the assured against the insurers for indemnity under the contract of insurance. In a suit between the assured and the insurers the latter could raise all defences open to them in law under the contract of insurance but any defence peculiar to the dispute between the assured and the injured person would not and could not be relevant in a litigation between the assured and the insurers. It is not necessary to decide in this case whether the insurers could avoid the liability under the contract of insurance on the ground of collusion between the assured and the injured person because this point does not arise here nor has it been argued because both the assured and insurers activity contested the plaintiffs' suit.

This legal position caused hardship both to the Insurers and the injured persons and to mitigate against the harshness of the general law the legislature stepped in both in England and in India. It is not necessary to follow the scope of English statutes as we are governed by the Motor Vehicles Act enacted in India in 1939 and amended from time to time.

(1) (1928) 1 K.B. 191.

Chapter VIII deals with third party risks. Section 94 of the Motor Vehicles Act makes insurance against third party risk compulsory and section 95 lays down requirements of policies and limits of liability which a policy of insurance must comply with. Section 97 lays down that the insurers should be under the same liability to the third party as to the assured in a case when the assured becomes insolvent or bankrupt. Section 96 lays down that the insurers under certain circumstances are under an obligation to pay the amount decreed against the assured in respect of third party risks. It is with this provision that we are now concerned and the relevant portion thereof has been reproduced above.

As I read section 96, it enables the three parties interested in the litigation arising out of a running down accident to be made parties in one suit. It, however, maintains the respective rights and liabilities of one *qua* the others subject to the principles involved in compulsory insurance against third party risks. Section 96(1) makes the insurers liable to pay the amount decreed to the person entitled to the benefit of the decree provided that the insurers had a notice through the Court that a suit had been brought. [Section 96 (2)] : On receipt of such a notice the insurers could defend the suit "on any of the grounds" given in sub-section 2(a), 2(b) and 2(c) of this section. The sub-clause (6) then lays down that on receipt of such a notice the insurers are not entitled to avoid the liability to any person entitled to the benefit of the decree "otherwise than in the manner provided for in sub-section (2)". The ground now is clear to discuss the various contentions of Shri Ranjit Singh Narula raised on behalf of the insurers.

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The first point raised is that the plaintiffs did not rely on section 96 of the Motor Vehicles Act in the trial Court and they are estopped from raising this point now. The learend counsel urges that if reliance had been placed on this provision of law in the trial Court then the insurers would have sought leave from the trial Court to defend the suit in the name of Malik Chand. The contention is wholly devoid of any substance. The plaintiffs never made any representation by conduct or otherwise that section 96 had no application to the case. In fact in para 13 of the plaint the words of section 96(2) have been reproduced. Moreover, without this provision the insurers could not be considered to be a necessary or even proper party to the suit and if section 96 was not present to the mind of the insurers then they would have without any doubt pleaded that in suit to fix tortious liability on Malik Chand the insurers had no interest and no decree could be passed against them. It is obvious to me that the insurers knew that they were impleaded in the suit by virtue of section 96 of the Motor Vehicles Act. In any case I am unable to see how plaintiffs' failure to rely specifically on a statutory provision can enable the appellant to invoke the principle of estoppel. It is well established that there can be no estoppel against a statute. A plea not open to the defendants under a statute cannot become available to them under the principles of estoppel. Obviously no estoppel can be pleaded against the prohibitions enacted by the statute. As a matter of fact the stage for relying on the provisions of section 96 was never reached in the trial Court as the pleas not open to the insurers and now relied upon by them in appeal were open to Malik Chand who was at that stage actively contesting the suit and was denying his liability to pay compensation.

Moreover, the insurers were allowed to cross-examine the plaintiffs' witnesses on all matters and it is not clear how they altered their position to their detriment by the absence of specific reliance on this statutory provision. This provision has become important only when the owner of the vehicle is satisfied with the decree and has not filed any appeal against it. This circumstance alone cannot bring the principle of estoppel in operation between the plaintiffs and the insurers. I have, therefore, no hesitation in rejecting this contention.

The second contention is equally devoid of any substance. It is urged that the plaintiffs had impleaded the insurers as defendants and, therefore, all the pleas open to a defendant are open to them under the provisions of the Code of Civil Procedure. Para 13 of the plaint reads:—

> "That the vehicle No. DLA 1952, was insured by defendant No. 1, with defendant No. 2 against third party risk at the relevant period, hence notice be issued to defendant No. 2 with respect to these proceedings to which they are entitled under the law as the decree passed in the suit is executable against defendant No. 2, as if they were judgment-debtors in the suit and they are also liable as insurers for the costs of the suit and interest accruing due on the amount decreed jointly with defendant No. 1."

In reply the insurers admitted the insurance but in substance denied their liability. On this plea of the plaintiffs, even if the insurers had not been impleaded, it would have been open to them to have applied to be impleaded. If the insurers had

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not wanted to defend the suit then it was open to them to say so in the trial Court. They chose to defend the suit and actively contested it. Therefore, the mere fact that the plaintiffs originally impleaded the Insurance Company cannot possibly affect the position and cannot negative the provisions of section 96 of the Motor Vehicles Act. The impleading of the insurers by the plaintiffs at the time of filing of the plaint cannot negative the effect of section 96 and cannot add to the insurer's rights *qua* third parties. I, therefore, reject this contention.

The next contention relates to construction of the provisions contained in section 96 of the Motor Vehicles Act. It is argued that section 96(2) does not prohibit any defence open to the insurers under general law as defendants though it mentions some of them as illustrations and that subsection (6) deals with "manner" or procedure and imposes no restriction on defences open to the insurers after they have ben impleaded in the suit. I see no force in this contention. Sub-clause (2) lays down that the insurers can contest the suit on the grounds specified therein. It is true that this sub-section does not contain any specific mandate or prohibition but it appears to me that a mention of some of the defences in this statutory provision necessarily excludes other defences, otherwise the legislature need not have mentioned any particular ground of defence at all. This is made absolutely clear by sub-clause (6) which does not deal with procedure but with grounds on which the insurer can avoid his liability. In my opinion it is clear from this provision that the insurers can resist the suit only on those grounds mentioned in sub-clause (2) of section 96 when it exercises its rights to be impleaded as a party on receipt of notice from the Court in

a suit filed by the injured person against the assured. The same view has been taken in *Sarupsingh Mangatsingh* v. *Nilkant Bhaskar* (1), *Royal Insurance Company, Limited* v. *Abdul Mahomed Meherali* (2); *Mustafa Badsha and another* v. *Madras Motor Insurance Co., Limited, Madras* (3); and *Iqbal Singh* v. *P. S. Gill and others* (4), with which I am in respectful agreement. This contention of the appellant, therefore, fails and is rejected.

The learned counsel for the appellant Company then urged that if the Insurance Companies are held under section 96 to be debarred from raising grounds of defence open to the assured when the Company has ultimately to foot the bill then it violates the principles of natural justice and also the principles laid down in Article 14 of the Constitution and, therefore, should be declared to be violative of the Constitution.

Now the object and purpose of section 96 is only to simplify the procedure for determining the parties' rights in a running down accident. Under general law the injured person could file a suit against the assured and could not implead the insurers. After the decision of this suit the assured got entitled to sue the insurers. These two independent suits arising out of the same accident involved considerable amount of waste of time and money. Under section 96 both the suits are combined in one without affecting in any way the respective rights of the injured person and the insurers *qua* each other. In this context I am unable to see how section 96 violates the principles of natural justice.

(1) 1953 Bom. 109.
(2) 1955 Bom. 39.
(3) 1957 Mad. 779.
(4) 1955 Punjab 187 (D.B.).

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In my opinion, Article 14 has nothing to do with the matter. There is no kind of discrimination against insurance companies nor denial of equality before law in a case where third party risk is involved. In view of increase in running down accidents the legislature has made insurance against third party risks compulsory with a view to afford protection to persons other than insured who are injured by such accidents. To advance this purpose and object the legislature prescribed a procedure by which the claim for compenation made by the injured person against the assured and the contractual claim of the assured against the insurers for indemnification could be decided in one suit. The legislature while providing for this expeditious remedy did not choose to change the legal relationship between the parties concerned. Before the enactment of section 96 of the Motor Vehicles Act the insurer could not intervene in the litigation between the injured person and the assured and even after the enactment of 1939 it cannot do so and cannot raise any plea which is relevant only between the injured person and the assured. Under section 96 it is open to the insurers to challenge their liability on certain specific grounds. If those grounds are established then the injured person cannot hold the insurers liable as judgment-debtors even if the assured is held liable to pay compensation because by proof of any of those grounds the insurers can avoid and escape liability. If those grounds are not established then the insurers cannot avoid their liability to pay compensation decreed against the assured. It follows the insurers can avoid liability to pay compensation to the injured person as judgment-debtors on certain grounds mentioned in section 96. The legislature while making the insurers liable as Judgment-debtors permits them to defend the suit although on limited grounds. If the

insurers desire to avoid liability on grounds other than those specified in section 96 then they may take other proceedings in accordance with law against the assured but their liability to pay to the injured party remains intact. Chapter VIII of the Motor Vehicles Act gives the necessary protection to an injured person by laying down that he should not be deprived of compensation on account of some default of the assured unless it is a default mentioned in section 96(2) of the Act. If this was not so provided then the purpose of compulsory insurance against third party risk would be completely defeated. In this context I am unable to see how the principle of equal protection has been denied to the Insurance Company. The purpose of giving facility to an injured party in a running down accident secured in Chapter VIII including section 96 is not a restriction on the rights of the insurers who have been given a right to intervene in the suit filed by the injured person against the assured which right they did not have under general law and by giving them a right to avoid the liability on certain grounds mentioned in the section. I have, therefore, no hesitation in rejecting this contention raised on behalf of the Insurance Company.

Finally it was contended that this Court may in the exercise of its discretion allow the appeal to be argued in the name of Malik Chand also. This is not possible. The counsel wants us to exercise this discretion under section 151, Civil Procedure Code. No specific provision in the Civil Procedure Code nor in any other enactment has been brought to my notice under which such an order can be made. The third party procedure is laid down in the Rules governing English courts but does not prevail in this Court. Even in England in a case like this the insurers could not

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be allowed to defend the suit in the name of the assured before the enactment of 1930 and 1934, Statutes [*vide Gowen* v. *Hales* (1)]. Even in England it was well settled by practice and convention that the jury should not be informed during the litigation that the person liable for tortious acts was insured. Moreover, under the third party procedure it was necessary to take the consent of the party in whose name the suit had to be defended. There is no such consent forthcoming in the present case. In the present case the Policy nor a specimen form thereof has been produced and, therefore, there is no proof that under the Contract between the assured and the insurers, the insurers had a right to defend the suit in the name and on behalf of the defendant. In any case, after the enactment of Motor Vehicles Act it is not possible to permit the insurers to defend the suit or appeal on those grounds which under section 96(2) and 96(6) it is not open to them to defend. Section 151, Civil Procedure Code, cannot be used to nullify or negative a statutory provision of this nature. This contention, therefore, also fails.

It was argued at one stage though not very seriously that section 96(2) had no application to the case as the plaintiffs had not proved that the certificate of insurance was ever issued to the assured. Now this argument involves a question of fact as to whether or not such a certificate had been issued. This plea was never raised in the trial Court and it cannot be allowed to be raised at the appellate stage. Moreover, it is common ground that insurance certificate is issued before the regular insurance policy is issued. This has been so stated by the Branch Manager of the Company when he appeared as a witness in this Court.

(1) (1928) 1 K.B. 191.

The Company admitted in the written statement that the assured was insured against third party risk at the time of the accident in question. It, therefore, follows that the insurance certificate must have been issued with the present case. This argument must also fail.

For all these reasons I hold that the appellant Company cannot defend the suit or the appeal on any grounds not mentioned in section 96(2) of the Motor Vehicles Act, 1939. It is conceded before me and rightly so that if the Company can argue the appeal only on the grounds mentioned in section 96(2) then the appeal must fail as no such ground has been pleaded or exists in the present case. That being so, I would dismiss it with costs on this ground alone.

The case involves substantial amount and the Insurance Company is likely to appeal to the Supreme Court. It will be proper to deal with those arguments which I have held not to be open to the insurers.

Shri R. S. Narula argued seven grounds on which he urged the plaintiffs were not entitled to a decree for Rs. 50,000. These grounds are:—

(1) Identity of the driver has not been established.

(2) Identity of the station wagon has not been established.

(3) Negligence of the driver has not been proved.

(4) There is no evidence that the accident took place in the course of employment *of the* driver.

(5) The suit is not maintainable as the driver who is primarily liable for the accident has not been impleaded.

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(6) The plaintiffs have failed to prove the amount of compensation to which they are entitled.

(7) In any case maximum liability of the insurance company does not exceed Rs. 20,000.

Grounds 1, 2, 5 and 7 were not raised in the trial Court and were raised for the first time in this Court. These grounds are not covered specifically by any issue. Grounds Nos. 3, 4 and 6 are covered by issues Nos. 2, 3 and 5 respectively. No other issue was argued before us and the learned counsel accepted the findings of the trial Court on issues Nos. 1, 4, 6, 7 and 8.

Grounds Nos. 1 and 2 relate to the identity of the driver and the vehicle involved in the accident. These grounds were not raised in the trial Court. Malik Chand produced Jai Bhagwan D.W. 1) and P. D: Sharma (D:W. 2) to show that there was a station wagon belonging to one Sant Singh, which had a permit for a Soda Fountain and its number was DLH 1437. It is argued that the presons who allege that they had seen the accident state that——————the vehicle which was involved in the accident had a Soda fountain installed. It is, therefore, argued that DLH 1437 may well have been responsible for the accident and in view of that possibility the identity of the vehicle and the driver must be held not to have been established beyond reasonable doubt. This contention must be rejected on the short ground that it involves questions of fact which were not raised in the trial Court. The plaintiffs were never called upon to establish the identity of the vehicle and the driver. The plaintiffs objected to the production of such evidence when

Jai Bhagwan (D.W. 1) was examined. It has been repeatedly held by the Privy Council as also by the Courts in India that no evidence in the absence of plea or issue can be considered to be relevant in the case and cannot be taken into consideration in deciding the suit.

In any case it has been conclusively proved on this record that the defendants' vehicle was involved in the accident in question and that at that time Ishwar Dass, the employee of Malik Chand, was driving it. It appears that on 8th of September, 1951, Malik Chand informed the Insurance Company of the accident in writing. This document was produced by the Company and was admitted to be correct by Malik Chand. It is marked as Exhibit D. 2/4. The plaintiffs did not admit it as obviously they did not know about it. At the stage of arguments they admitted it and relied upon it. Thereupon the Company's counsel applied for leave to produce additional evidence presumably to dispute the correctness of recitals made in this document. This leave was refused and the Company's counsel urged before us that the plaintiffs could not use this document in the circumstances. I am unable to accept this contention. It is a document relied upon by the Insurance Company and its contents are accepted to be correct by Malik Chand who executed the document. Between them, therefore, the document is proved and I cannot understand why the plaintiffs cannot rely upon this document to show that the contentions advanced by the defendants have no substance. This document shows that DLA 1952 met with an accident on 30th August, 1950, at about 11 p.m. near Prag Ice Factory and the injured person had been removed to the Irwin Hospital where he had died. It is also stated in this document that the vehicle is in a damaged condition

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and that the driver Ishwar Dass is not available and, therefore, the cause of the accident is not known. These recitals are in accord with the statements of the eye-witnesses that the injuries to Atma Ram were caused in an accident with the Vehicle No. DLA 1952. This is also supported by the Traffic Accident Report made by Abdul Hamid, P.W. 2 wherein the name of the driver as well as the number of the station wagon involved in the accident are given (*vide* Ex. P. 5). The correctness of the recitals in Exhibit P. 5 was not challenged in the trial Court nor before us. For these reasons I have no hesitation in holding that D.L.A. 1952 belonging to Malik Chand and driven by his employee Ishwar Dass was involved in the accident in which Atma Ram was injured and lost his life.

This brings me to the main plea in the case that the accident had not been proved to have been caused by the rash and negligent driving of Ishwar Dass, the driver. The plaintiffs' case on this matter is this. On 30th of August, 1950, at about 10/11 p.m. Atma Ram was coming from the side of Pul Mithai. The vehicle concerned came from the opposite side, i.e., from the side of Clock Tower, Sabzi Mandi. The accident took place near the Ice Factory, Chowk Sabzi Mandi, Delhi. According to them the vehicle was going to collide against a tonga when the driver succeeded in avoiding it and then struck against the cyclist Atma Ram who was coming from the opposite side. Atma Ram fell down injured. The driver did not stop and rode away. Kake Shah (P.W. 5), Puran Dass (P.W. 6) and Mangal Singh (P.W. 8), besides Banarsi Dass and others saw the occurrence. Kake Shah and Pooran Das went to the police station and the former lodged the First Information Report soon after the occurrence

(Ex. P. 1). Shri Shiv Datt, Sub-Inspector, P.W. 1, investigated the case. He went immediately and prepared a plan of the site. (Ex. P. 2). Atma Ram was removed to the Irwin Hospital where on 4th/5th September, 1950 he succumbed to the injuries. Shri Abdul Hamid, Assistant Sub-Inspector, made the Traffic Accident Report on 31st of August, 1950, with a plan (Ex: P. 5).

The learned counsel did not challenge the correctness of the traffic accident report, Exhibit P. 5, in the trial Court nor before us. This report shows that the road on which the accident took place is pucca and was dry at that time. It is 30 feet wide and has 3 feet wide foot-path on both sides. There is no evidence on the record nor is there any suggestion that there was any other traffic on this road at the time of the accident.

The learned counsel for the Company argued that the eye-witnesses should not be believed and the plan Exhibit P. 2 should be rejected as at best it is based on hearsay evidence. The veracity of the eye-witnesses is challenged on the grounds (1) that they have made inconsistent statements and (2) that their statements were discrepant.

The first ground is this. On 25th of August, 1952, Kake Shah (P.W. 5) and Mangal Singh (P.W. 8) at the instance of the Insurance Company signed affidavits (Ex: D. 1 and D. 2/3) stating facts which prove that the cyclist was at fault and the accident was due to his negligence. There is no doubt that if these affidavits are accepted as giving the true version of the accident then the plaintiffs would not be entitled to get compensation from the defendants. These witnesses, however, went back on these statements when they were in the witness box. It is, therefore, necessary to scrutinise the circumstances in which the

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Company secured these affidavits. The suit was filed on 31st of August, 1951. The issues were framed on 19th of March, 1952, and witnesses were ordered to be summoned within a week. The plaintiffs' evidence was to be recorded on 25th of August, 1952. The three eye-witnesses were served sometime in June, 1952, and were to be examined on 25th of August, 1952, in Court (*vide* item No. 17 of the record). On that day plaintiffs' four witnesses other than the eye-witnesses were examined and the case was adjourned to 22nd of December, 1952, for further evidence. When Kake Shah and Mangal Singh were waiting to be examined within the precincts of the Court on 25th of August, 1952, the Insurance Company approached them and procured these affidavits from them. On 22nd of December, 1952, Kake Shah was examined first. He was cross-examined by the counsel then appearing for the Company. He made a statement in conformity with the First Information Report lodged by him and contradicted his affidavit of August, 1952. Later another counsel for the Company appeared and with leave of the Court got the affidavit proved. Then promptly the counsel for the Company applied for prosecution of Kake Shah for perjury in Court. On that day after Kake Shah and Puran Dass had been examined the case was adjourned. The Court on 12th of August, 1953, ordered that the application for prosecution would be decided after the disposal of the suit. Mangal Singh was examined on 3rd of December, 1953. He also made a statement in conformity with the First Information Report and repudiated the affidavit. It is on this material that the Company wants this Court to hold that these witnesses are capable of making conflicting statements and, therefore, should not be believed. I do not agree. The Insurance Company approached the plaintiffs' witnesses on

the day that they had come to Court to give evidence. The Company did not rely on cross-examining them but to get at them outside Court. When Kake Shah stuck to his first statement the Company immediately got an application made for his prosecution and thus by threat tried to influence the third eye-witness who had not yet been examined. I consider this conduct of the Company to be most reprehensible. I would reject the statements contained in the affidavits as they had been obtained clandestinely and not in open Court particularly when they have been repudiated in Court. This conduct had the effect of confusing the witnesses, to say the least. I refuse to disbelieve these witnesses simply on this ground.

It is true that there are slight discrepancies in the statements of the eye-witnesses but they are not material to the case. The witnesses soon after the accident made clear statements which they have repeated in Court also. They are independent and natural witnesses. They have no animus against Malik Chand or the Company. They did not know the deceased nor do they know the plaintiffs. At least there is no evidence to that effect. The discrepancies can be explained on the ground of passage of time and the confusion created in their minds by the Company's conduct. I have carefully gone through their statements and I am of the opinion that these witnesses have given correct version of the accident. Their statements are fully corroborated by the First Information Report made immediately after the accident and by Exhibit P. 2. plan drawn by the investigating officer.

The plan Exhibit P. 2, was sought to be rejected on the ground that the investigating officer made it only according to the statements made by

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the eye-witnesses at that time. This is, however, no ground for rejecting the plan. It appears to me that this is an important document as a version of the accident given by persons who were in no way interested in the culprit or in the victim. There is no reason why the persons present at the time should give wrong information to the Investigating Officer who was then performing his official duties.

The defendants have not produced any evidence to rebut the plaintiffs' evidence. From the evidence of the eye-witnesses, the First Information Report, the plan Exhibit P. 2 and the Traffic Accident Report (Ex: P. 2) it is clear that the injuries to Atma Ram were caused by rash and negligent driving by Ishwar Dass. I, therefore, affirm the decision of the trial Court on this issue.

The next question that requires determination is whether the driver at the time of the accident was driving the vehicle in the course of his employment. Malik Chand has admitted that Ishwar Dass was engaged to drive this vehicle. He refused to come into the witness-box but compelled the plaintiffs to examine him as their witness. This shows that Malik Chand was not willing to be cross-examined by the plaintiffs. On the cross-examination by the Company he stated "my vehicle used to come back in the evening at about 9 o'clock after completion of work in 1950. I have never permitted the driver to take out the vehicle after that time. I had no work to be performed after that hour. On 31st of August, 1950, when I saw the vehicle, there was no Soda Fountain fitted in it. I do not know when the Soda fountain was removed. I never instructed the driver to take out the vehicle in the evening on 30th August, 1950. That vehicle never went out on any

work of mine after 9.30 p.m. on 30th August, 1950: On the basis of this statement it is argued that the driver was not driving the vehicle at about 11 p.m. in the course of his employment. It is difficult to accept the statement of Malik Chand when he states that the driver was not employed to drive the vehicle after 9 p.m. particularly when he had admitted in D. 2/3 that the vehicle at that time was being used with his knowledge and consent. Moreover, Malik Chand has produced no evidence in support of his assertion in Court relating to limitation of time when he could easily have produced such evidence. I agree with the trial court that the limitation by Malik Chand relating to the scope of the driver's employment cannot be accepted to be correct.

Even if this limitation be accepted as correct it does not absolve Malik Chand from liability. It is well established that the master is bound by the acts of the servant even if the act was unauthorised or say prohibited provided the act was within the scope of the service of employment. The principle is that when a servant does an act which he is authorised by his employment to do under certain circumstances and conditions and does it in a manner which is unauthorised and improper even then the employer is liable for the wrongful act of his servant. On this principle it follows therefore, that even if Ishwar Dass was authorised to drive the vehicle only up to 9 p.m. the master is liable for his wrongful act if he drove it at 11 p.m. which is admitted in this case: *Kelly C: B:* in *Bayley* v. *Manchester Railway Company* (1), has observed—

> "Where a servant is acting within the scope of his employment, and in so acting

(1) (1873) L.R. 8 C.P. 148.

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does something negligent or wrongful, the employer is liable even though the acts done may be very reverse of that which the servant was actually directed to do."

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It has been laid down in *Goh Choon Seng* v. *Lee Kim Soo* (1), that where the servant in doing some work which he is appointed to do, but does it in a way which his master had not authorised and would not have authorised had he known of it, the master is nevertheless responsible. It has been held in *Mckeen* v. *Raynor Bros., Ltd, Notingham* (2). that the employer is vicariously liable when a servant acting within the scope of his employment acts wrongfully or negligently even though the acts done may be the very reverse of that which the servant was actually directed to do. The same view has been taken in *London County Council* v. *Cattermoles (Garages) Ltd.* (3). From this principle it follows that Malik Chand having engaged Ishwar Dass to drive the vehicle though within certain time is responsible for his wrongful act if that act is committed outside those hours. In this view of the matter it must be held that this contention also fails.

This brings me to the next contention of the learned counsel that the driver was primarily responsible for his conduct and the suit for damages was not maintainable in his absence, This point was not raised in the trial Court and no case nor any principle was cited before us in support of it for the simple reason that none exists. The legal position is well-established and has never been challenged. It has been described in

(1) (1925) A.C. 550.
(2) (1942) 2 A.E.R. 650.
(3) (1953) 2 A.E.R. 582.

"Salmond on Torts (11th Edition)" in these words:—

> "Where the same damage is caused to a person by two or more wrong doers those wrongdoers may be either joint or independent tortfeasors. Persons are to be deemed joint tortfeasors within the meaning of this rule whenever they are responsible for the same tort—that is to say, whenever the law for any reason imputes the commission of the same wrongful act to two or more persons at once. This happens in at least three classes of cases—namely, agency, vicarious liability and common action, * * * * * *. In order to be joint tortfeasors they must in fact or in law, have committed the same wrongful act. * * * * * *. The *injuria* as well as the *damnum* must be the same.
>
> Joint wrongdoers are jointly and severally responsible for the whole damage. That is to say, the person injured may sue any one of them separately for the full amount of the loss; or he may sue all of them jointly in the same action, and even in this latter case the judgment so obtained against all of them may be executed in full against any one of them."

In section 30 of the same commentary it is then stated:—

> "A master is jointly and severally liable for any tort committed by his servant while acting in the course of his employment. This is by far the most important of the various cases in which vicarious responsibility is recognised by the

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law. The justification for the rule is public policy. Were the master not liable for his servant's torts a vast number of injured persons would be without effective remedy."

This legal position is stated in "Shawcross on Motor Insurance (Second Edition)" thus:—

"Joint tortfeasors, that is, those persons who together incur responsibility in respect of the same wrongful act, whether by way of vicarious responsibility or by way of common action in a wrongful activity were at common law jointly and severally responsible for the whole of the damages sustained by the injured party. At Common Law, this gave the latter the right to choose whether he should seek to make one or all of the joint wrongdoers liable in an action, but once he had obtained judgment against those sued he could not proceed against the others * * * * * * * * * *."

In Brooke v. *Bool* (1), and in *Johson* v. *Hill* (2), the person who was directly and primarily responsible for the damage was not impleaded and the suit was filed by the injured person only against the one who was held to be vicariously liable. In these cases compensation was awarded and the suit did not fail for not impleading the person primarily responsible for the damage. In the former case observations of Scrutton, L. J., in *Re The Koursk* (3), were cited with approval. These observations read:—

"The substantial question in the present case is "What is meant by 'joint tort-feasors'? and one way of answering it

(1) (1928) 2 K.B. 578.
(2) (1945) 2 A.E.R. 272.
(3) 1924 P. 140, 155.

> is: "Is the cause of action against them the same?" Certain classes of persons seem clearly to be 'joint tortfeasors'. The agent who commits a tort within the scope of his employment for his principal, and the principal; the servant who commits a tort in the course of his employment, and his master; two persons who agree on common action, in the course of, and to further which, one of them commits a tort. These seem clearly joint tortfeasors; there is one tort committed by one of them on behalf of, or in concert with another."

Therefore, a decree passed in the present case against Malik Chand in the absence of Ishwar Dass is in accordance with law.

The only question that remains to be determined is the quantum of damages. The case of the Company is that the amount awarded is excessive and that in any case the Company is liable to pay only up to Rs. 20,000.

Under the Fatal Accidents Act (XIII of 1855) damages are recoverable when the death of a person is caused by a wrongful act or neglect. In such a case the damages are assessable proportionate to the loss resulting from such death to the parties who seek to recover the same (Section 1). In such a suit a claim for pecuniary loss to the estate of the deceased (Section 2) occasioned by the wrongful act may be inserted. In the present case we are not concerned with the loss to the estate of the deceased.

Now, there is no quantative scale of computing compensation for damages resulting from death and Courts of Law must in the circumstances of

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each case exercise their discretion to arrive at a reasonable and fair figure. This task of the Court is to estimate as best it can a capital sum which will represent a fair compensation for the loss of the actual pecuniary benefit which the dependants might reasonably have expected to enjoy if the deceased had not been killed. The usual method of estimating this capital has been described by Lord Wright in *Davies* v. *Fowell Duffryn Associated Collieries, Limited* (1), as under:—

> "There is no question here of what may be called sentimental damage, bereavement or pain and suffering. It is a hard matter of pounds, shillings and pence, subject to the element of reasonable future probabilities. The starting point is the amount of wages which the deceased was earning, the ascertainment of which to some extent may depend on the regularity of his employment. Then there is an estimate of how much was required or expended for his own personal and living expenses. The balance will give a datum or basic figure which will generally be turned into a lump sum by taking a certain number of years' purchase. That sum, however, has to be taxed down by having due regard to uncertainties, for instance that the widow might have again married and thus ceased to be dependent, and other like matters of speculation and doubt."

There is obviously no yardstick by which the number of years' purchase can be measured. In

(1) 1941 A.C. 601.

Bir Singh and another v. *Sm. Hashi Rashi Banerjee and others* (1), the judges adopted 16 years' purchase for capitalising the loss. From this figure deductions have to be made for the pecuniary benefits accruing to the dependants in consequence of the death of the deceased, e.g., previous compensation obtained under other laws, etc. In my view it is for the defendants to prove such pecuniary benefits which will accrue to the dependants in consequence of the death of the deceased and it is not for the plaintiffs to prove the existence of any such items of deduction. This principle is not in dispute and the trial Court has in substance adopted this principle in computing damages. In the present case there is no evidence of any such benefit.

Now, Atma Ram was an educated person holding a degree of M.A., of the Punjab University. At the time of his death he was admittedly 29 years old. Sarla Devi, his widow has come into witness box. She has stated that he was in robust health at the time of his death. He was carrying on the business of booksellers and pulishers along with his two brothers in Lahore and then after partition he continued this business by having two shops in Delhi and one in Jullundur. In Lahore, according to the widow, he had an income of four to five thousand rupees per mensem, and had an income of Rs. 3,000 per mensem from the Delhi shops. The trial Court treating the Delhi business as belonging to all the three brothers has taken the income of Atma Ram to be Rs. 1,000 per mensem. Therefore, Atma Ram, before his death, had already become an experienced and successful businessman. The trade he was engaged in cannot in any way be considered as speculative and

(1) 1956 Cal. 555(9).

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in the present set-up of things the trade of book-sellers and publishers has a bright future in this country and it can safely be held that the income of Atma Ram was likely to increase by passage of time rather than go down. His earning capacity was, therefore, likely to improve for some time to come. Therefore, Rs. 1,000 per mensem may safely be taken to be the basic figure. Before his death his daughter was being educated in the Presentation Convent School and his son was too young to be put in school. After his death the daughter had to be removed from that school. Sarala Devi has further stated that Atma Ram's brothers have not been looking after her and that she had been living with her brother. The correctness of this statement was not challenged in her cross-examination nor before us. Out of this income it appears to me that Atma Ram must have been spending Rs. 250 per mensem on himself if not less. Therefore, the family has lost the income of about Rs. 750 per mensem. It comes to Rs. 9,000 per annum and capitalising it at 16 years purchase the damages would be about Rs. 1,44,000. For these reasons, I am of the opinion that the claim of Rs. 50,000 is very much on the low side. In this connection it must not be forgotten that the deceased left two very young children who have still to be educated and the return on Rs. 50,000 at six per cent interest will yield only Rs. 250 p.m. The defendants have not even suggested much less proved any item of deduction from the basic figure of Rs. 1,000 per mensem. The only contention raised on behalf of the Company was that the plaintiff had benefited by the death of Atma Ram inasmuch as they had inherited his business yielding considerable income. Now Sarla Devi, the widow of the deceased, has stated that since the death of her husband his brothers had not looked after her or her children and that

she was living with her brother. No attempt was made in cross-examination to challenge this statement and, therefore, it must be taken that it was accepted to be correct It follows from this statement that his brothers did not acknowledge their liability to maintain the plaintiffs. Assuming that the business is Joint Family property, and there is no such evidence on this record, it cannot be gainsaid that its earning capacity must have been reduced considerably by the premature death of Atma Ram. Here it must be mentioned that the widow had stated in her statement with a view to establish the status of her husband that they had a verified claim of rupees one lakh for the property left in Pakistan. The learned counsel for the Company did not argue that this circumstance should be taken into consideration when assessing compensation. In any case the prospect of realising any amount out of this claim is rather remote and would not help the plaintiffs in maintaining their previous standard of life and in educating the children.

Moreover, the appellate courts should not interfere with the amount of damages assessed by the trial Court in such cases unless it is satisfied that the trial Court had acted upon a wrong principle of law or the amount awarded was so unreasonably high that it must be assumed that the Court had been influenced by some wrong principle of law. (*Vide Owen* v. *Sykes* (1). No such case has been made out in the present case. I, therefore, hold that the amount of Rs. 50,000 awarded to the plaintiffs in the present case is a fair compensation.

The last point that requires consideration is whether the liability of the Company is limited to its Rs. 20,000 irrespective of the amount payable by the assured. As I have already said provisions

(1) (1936) 1 K.B. 192.

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relating to third party risk are given in Chapter VIII of the Motor Vehicles Act. Section 95(2) lays down the limit of liability which must be covered by a policy of insurance. The limit prescribed in cases of insurance of goods vehicles and of vehicles in which passengers are carried for hire is Rs. 20,000 and in other cases under section 95(2)(c) "where the vehicle is a vehicle of any other class the amount of the liability incurred" is the limit. In the present case the liability incurred is Rs. 50,000 and, therefore, the limit of the Insurance Company is also of the same amount. The present vehicle (7 seater station wagon) was insured as a private passenger vehicle. Obviously to such a vehicle the residuary provision contained in section 95(2)(c) applies. The case of the Company, however, is that at the time of the accident the vehicle was being used as a "Soda Water Fountain" and therefore the case is covered by section 95(2)(c). There is no force in this argument. Section 95(2) relates to insurance policy. It has nothing to do with user of a vehicle. When the insurance is as a private passenger vehicle the limit of the liability of the Company is prescribed in section 95(2)(c) irrespective of its user. It is in the evidence of Jai Bhagwan, D.W. 1 that Malik Chand had applied for permission to use the vehicle as "Soda Fountain lorry". This permission was granted on 28th of June, 1950, but as he had not converted the lorry he was granted extension of time and it was for the October/December period that the tax was paid by Malik Chand for a transport vehicle with the sanction of the State Transport Authority. It follows that the soda fountain was fixed in this lorry on or after 1st of October, 1950, as it is clear that without this permit the user of the vehicle as "soda fountain lorry" would be against the law. Malik Chand has denied that his vehicle on 30th of August, 1950, had

been converted for use as "soda fountain lorry". The trial Court under issue No. 8 discussed the evidence and held that the vehicle at the time of the accident was being used as a private vehicle and that the company had failed to prove that at that time it was being used as a goods or transport vehicle. The correctness of this conclusion of the trial Court was not challenged before us and was in fact conceded to be correct at the time when Malik Chand's application to be transposed as an appellant was being argued. Therefore, it must be held that the defendants have failed to prove that at the time of the accident the vehicle was not being used as a private passenger vehicle. In any case the misuser of the vehicle at the time of the accident will not take the policy of insurance out of the purview of section 95(2)(c), of the Motor Vehicles Act. I am, therefore, of the opinion that the liability of the Company is co-extensive with that of Malik Chand, defendant. This contention, therefore, also fails.

No other point was argued before us and the correctness of the decision on issues Nos. 7 and 8 was conceded before us.

For these reasons, I would dismiss this appeal. The plaintiffs are entitled to get the costs of the appeal from the appellant Company.

CAPOOR, J.— I agree.

B.R.T.

APPELLATE CIVIL

Before D. Falshaw and I. D. Dua, JJ.

PREM NATH THROUGH RAM KISHAN MUKHTAR-I-AM,— *Appellant.*

versus

MUSSAMMAT SUNDRA WATI AND OTHERS,—*Respondents*

Regular First Appeal No. 11 of 1951.

1958

Nov., 28th

Transfer of Property Act (IV of 1882)—Sections 2(d) and 54—Sale of minor's property effected under the orders