SUPREME COURT OF INDIA

Gobald Motor Service Ltd.

Vs.

R. M. K. Veluswami

C.A.No.419 of 1957

(K. Subba Rao, Raghubar Dayal and J. R. Mudholkar, JJ.)

14.04.1961

JUDGEMENT

SUBBA RAO, J.:

1. This appeal by certificate is directed against the judgment of the High Court of Judicature at Madras dated January 16, 1953, modifying the decree of the Court of the Subordinate Judge, Dindigul, in O. S. No. 7 of 1948, a suit filed by the respondents for compensation under the provisions of the Fatal Accidents Act (XIII of 1855).

2. The appellant, Gobald Motor Service Ltd. (hereinafter called the Company), was engaged in the business of transporting passengers by bus between Dharapuram and Palni, among other places, in the State of Madras. On September 20, 1947, one of the buses of the Company bearing registration number MDC 2414, left Dharapuram for Palni at about 3 p. m. At a place called Thumbalapatti, between Dharapuram and Palni, one Rajaratnam, along with his brother by name Krishnan, boarded the bus. The bus met with an accident at about 3 miles from Palni as a result of which some of the passengers, including Rajaratnam, sustained injuries. Rajaratnam died of the injuries received in the accident on September 23, 1947. The first plaintiff, his father; the second plaintiff, his widow; and plaintiffs 3 to 7, his sons, instituted O. S. No. 7 of 1948 against the Company in the Court of the Subordinate Judge, Dindigul, for compensation under S. 1 of the Fatal Accidents Act (hereinafter called the Act) for loss of pecuniary benefit sustained by them personally, and under S. 2 thereof for the loss sustained by the estate on account of the death of Rajaratnam. They alleged in the plaint that the driver, who was in charge of the bus, was incompetent and inexperienced, that he was guilty of rash and negligent conduct in the driving of the bus, and that the accident was the result of his incompetence and negligence. The Company in its written-statement denied the said allegations and pleaded that the accident was the result of the central bolt of the left rear spring suddenly giving way that Rajaratnam was also guilty of contributory negligence and that in any event me damages claimed were excessive. The learned subordinate Judge came to the conclusion that there was no proof that the bus was driven at a reckless speed at the scene of the accident, but the fact that the accident occurred on the off-side of the road was itself evidence of his negligence and it had not been rebutted by the defendants. He further held that the driver was not proved to be incompetent. On those findings, he held that the defendants were liable for the negligence of their servant, and he awarded damages as follows:

(1) Plaintiff 1 .. Rs. 3,600 under S. 1 of the Act.

(2) Plaintiffs 2 to 7..Rs. 25,200 under S. 1 of the Act.

(3) Plaintiffs 2 to 7 ..Rs. 6,000 under S. 2 of the Act.

Against the said decree, the defendants preferred an appeal to the High Court and it came to be disposed of by a Division Bench of that Court. The High Court on a review of the entire evidence held that the speed at which the bus was driven was excessive, having regard to the nature of the ground on which the accident happened, that there was negligence on the part of the driver, and that the appellants were liable therefor. But the High Court discounted the plea that the appellants, apart from their being constructively liable for the negligence of the driver, were also negligent in employing Joseph, who was not a competent driver. Both the courts, therefore, concurrently held that the accident occurred on account of the negligence of the driver. On the question of damages, the High Court confirmed the amount of compensation awarded to the plaintiffs 2 to 7 both under Ss. 1 and 2 of the Act, but in regard to the first plaintiff, it reduced the compensation awarded to him from Rs. 3,600 to Rs. 1,000; with this modification, the appeal was dismissed with costs.

3. Learned counsel for the appellants raised before us the following points. (1) The finding of the High Court that the bus was driven at an excessive speed at the place where the accident occurred, based on probabilities, was erroneous. (2) The concurrent finding of the two courts that respondents 2 to 7 would be entitled to damages in a sum of Rs. 25,200 for the loss of pecuniary advantage to them was not based upon any acceptable evidence but only on surmises. (3) The High Court went wrong in awarding damages separately for loss of expectation of life under S. 2 of the Act, as damages under that head had already been taken into consideration in giving compensation to respondents 2 to 7 for the pecuniary loss sustained by them by the death of Rajaratnam.

4. The first question for consideration is whether the accident was due to any negligence on the part of the driver Joseph. A clear picture of the topography and the physical condition of the locality where the accident took place would, to a large extent, help us in deciding the said question. The accident took place at Puliampatti where the road passed over a culvert and then took a sharp bend with a downward gradient. To the east of the road was a drain and that was marked off by 5 stones 2 feet high. At a distance of 20 or 25 feet from the stones, there were trees. The bus after crossing the culvert crashed against the 5th stone with so much force that the latter was uprooted and broken. It next attacked a tamarind tree which was stated to be at a distance of 20 or 25 feet from the stone, and its bark was peeled off and it travelled some more distance before it finally came to rest. The evidence disclosed that some of the passengers were knocked and thrown down within the bus itself and sustained injuries, while Rajaratnam was thrown out of the bus into the ditch at a place 16 1/2 feet south of the tamarind tree. It must be self-evident from the said picture of the accident that the bus must have been driven at a high speed. P. Ws. 3 and 4, two of the passengers in the bus, P. W. 6, a brother of Rajaratnam, who also travelled in the bus, and P. W. 5 who ran a coffee and tea stall at the place of the accident, swore in the witness-box that the bus was being driven at a high speed when the accident happened. Their evidence reinforces the compelling impression of high speed caused by the objective features thrown out by the topography of the place of the accident. On the other hand, on the side of the defendants (appellants herein) D. W. 2, who claimed to have travelled in the bus, deposed that the bus was travelling at the usual speed, but his cross-examination discloses that he was an improvised witness. D. W. 3, who was sitting by the side of the driver, deposed to the same effect but he was an employee of the Company and was obviously interested to support their case. The evidence adduced on the side of the defence is certainly not convincing. An attempt was made to calculate the speed of the bus on the basis of the time given by P. W. 6 as to when Rajaratnam boarded the bus and the time when the bus dashed against the tree, and the

mileage covered between the two points within the said time. On the basis of such a calculation it was contended that the speed would have been less than 15 miles per hour; but it is not possible to deduce the speed from such a calculation, as the witnesses were speaking of the time only approximately and not with reference to any watch. That apart, it cannot be said that the bus maintained an even pace throughout. The High Court, on the basis of the evidence and on broad probabilities, held that the speed at which the bus was driven was excessive, having regard to the nature of the ground on which the accident happened; and having gone through the evidence, we are quite satisfied that the said finding was justified on the material placed before them. It must, therefore, be held that there was negligence on the part of the driver.

5. Apart from the positive evidence, in the present case the accident took place not on the main road, but on the off-side uprooting the stone at the drain and attacking a tamarind tree 25 feet away from the said stone with such a velocity that its bark was peeled off and the bus could stop only after travelling some more distance from the said tree. The said facts give rise to a presumption that the accident was caused by the negligence of the driver. Asquith, L. J., in Barkway v. South Wales Transport, 1948-2 All ER 460 (471) neatly summarizes the principles applicable as to onus of proof in the following short propositions:

"(i) If the defendants omnibus leaves the road and falls down an embankment, and this without more is proved, then res ipsa loquitur, there is a presumption that the event is caused by negligence on the part of the defendants, and the plaintiff succeeds unless the defendants can rebut this presumption. (ii) It is no rebuttal for the defendants to show, again without more, that the immediate cause of the ommibus leaving the road is a tyre-burst, since a tyre-burst per se is a neutral event consistent, and equally consistent, with negligence or due diligence on the part of the defendants. When a balance has been tilted one way, you cannot redress it by adding an equal weight to each scale. The depressed scale will remain down. This is the effect of the decision in Laurie v. Raglan Building Co., 1942-1 KB 152 where not a tyre-burst but a skid was involved. (iii) To displace the presumption, the defendants must go further and prove (or it must emerge from the evidence as a whole) either (a) that the burst itself was due to a specific cause which does not connote negligence on their part but points to its absence as more probable, or (b) if they can point to no such specific cause, that they used all reasonable care in and about the management of their tyres."

The same principles have been restated in Halsbury's Laws of England, Vol 23, at p. 671, paragraph 956, thus:

"An exception to the general rule that the burden of proof of the alleged negligence is in the first instance on the plaintiff occurs wherever the facts already established are such that the proper and natural inference immediately arising from them is that the injury complained of was caused by the defendant's negligence, or where the event charged as negligence 'tells its own story' of negligence on the part of the defendant, the story so told being clear and unambiguous. To these cases the maxim res ipsa loquitur applies. Where the doctrine applies, a presumption of fault is raised against the defendant, which, if he is to succeed in his defence, must be overcome by contrary evidence, the burden on the defendant being to show how the act complained of could reasonably happen without negligence on his part. Where, therefore, there is a duty on the defendant to exercise care, and the circumstances in which the injury complained of happened are such that with the exercise of the requisite care no risk would in the ordinary course of events ensue the burden is in the first instance on the defendant; to disprove his liability. In such a case, if the injurious agency itself and the surrounding circumstances are all entirely within the defendant's control, the inference is that the defendant is liable, and this inference is strengthened if the injurious agency is inanimate."

The said principles directly apply to the present case. Here, the events happened tell their own story and there is a presumption that the accident was caused by negligence on the part of the appellants. But it is said that this presumption was rebutted by proof that the accident was due to the rear central bolt of the bus suddenly giving way. The High Court, after considering the relevant evidence, held that it was not possible to hold that the accident was caused by the break in the bolt. We have gone through the evidence and we do not see any flaw in that conclusion.

6. The scope of the liability of a master for the negligence of his servant has been succinctly stated by Baron Parke in Joel v. Morison, (1834) 6 Car and P. 501: 172 ER 1338 thus:

"The master is only liable where the servant is acting in the course of his employment. If he was going out of his way, against his master's implied commands, when driving on his master's business, he will make his master liable; but if he was going on a frolic of his own, without being at all on his master's business, the master will not be liable."

Again, in Storey v. Ashton, (1869) 4 QB 476 Cockburn L. C. J. says:

"The true rule is that the master is only responsible so long as the servant can be said to be doing the act, in the doing of which he is guilty of negligence, in the course of his employment as servant."

In the same case, Lush, J., said:

"The question in all such cases as the present is whether the servant was doing that which the master employed him to do."

In the present case, admittedly, on account of the negligence of the driver in the course of his employment the said accident happened, and, therefore, the appellants are liable therefor.

7. The next question is whether the courts below were right in awarding compensation of Rs. 25,200 for the pecuniary loss sustained by the respondents 2 to 7 by reason of the death of Rajaratnam, under S. 1 of the Act. Sextion 1 of the Act reads:

"Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, the party who would have been liable if death had not ensued shall be liable to an action or suit for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony or other crime.

Every such action or suit shall be for the benefit of the wife, husband, parent and child, if any, of the person whose death shall have been so caused, and shall be brought by and in the name of the executor administrator or representative of the person deceased; and in every such action the Court may give such damages as it may think proportioned to the loss resulting from such death to the parties respectively, for whom and for whose benefit such action shall be brought; and the amount so recovered, after deducting all costs and expenses, including the costs not recovered from the Defendant, shall be divided amongst the before mentioned parties, or any of them, in such shares as the Court by its judgment or decree shall direct."

This section is in substance a reproduction of the English Fatal Accidents Acts 9 and 10 Vict. Ch. 93, known as the Lord Campbell's Acts. The scope of the corresponding provisions of the English

Fatal Accidents Acts has been discussed by the House of Lords in Davies v. Powell Duffryn Associated Collieries Ltd., 1942 AC 601. There Lord Russell of Killowen stated the general rule at p. 606 thus:

"The general rule which has always prevailed in regard to the assessment of damages under the Fatal Accidents Acts is well settled, namely, that any benefit accruing to a dependant by reason of the relevant death must be taken into account. Under those Acts the balance of loss and gain to a dependant by the death must be ascertained, the position of each dependant being considered separately."

Lord Wright elaborated the theme further thus at p. 611:

"The damages are to be based on the reasonable expectation of pecuniary benefit or benefit reducible to money value. In assessing the damages all circumstances which may be legitimately pleaded in diminution of the damages must be considered . . . . The actual pecuniary loss of each individual entitled to sue can only be ascertained by balancing, on the one hand, the loss to him of the future pecuniary benefit, and, on the other any pecuniary advantage which from whatever source comes to him by reason of the death."

The same principle was restated with force and clarity by Viscount Simon in Nance v. British Columbia Electric Railway Co. Ltd., 195l AC 601. There, the learned Lord was considering the analogous provisions of the British Columbia legislation, and he put the principle thus at p. 614:

"The claim for damages in the present case falls under two separate heads. First, if the deceased had not been killed, but had eked out the full span of life to which in the absence of the accident he could reasonably have looked forward, what sums during that period would he probably have applied out of his income to the maintenance of his wife and family?".

Viscount Simon then proceeded to lay down the mode of estimating the damages under the first head. According to him, at first the deceased man's expectation of life has to be estimated having regard to his age, bodily health and the possibility of premature determination of his life by later accident; secondly, the amount required for the future provision of his wife shall be estimated having regard to the amounts he used to spend on her during his lifetime, and other circumstances; thirdly, the estimated annual sum is multiplied by the number of years of the man's estimated span of life, and the said amount must be discounted so as to arrive at the equivalent in the form of a lump sum payable on his death; fourthly further deductions must be made for the benefit accruing to the widow from the acceleration of her interest in his estate; and, fifthly, further amounts have to be deducted for the possibility of the wife dying earlier if the husband had lived the full span of life; and it should also be taken into account that there is the possibility of the widow remarrying much to the improvement of her financial position. It would be seen from the said mode of estimation that many imponderables enter into the calculation. Therefore, the actual extent of the pecuniary loss to the respondents may depend upon data which cannot be ascertained accurately, but must necessarily be an estimate, or even partly a conjecture. Shortly stated, the general principle is that the pecuniary loss can be ascertained only by balancing on the one hand the loss to the claimants of the future pecuniary benefit and on the other any pecuniary advantage which from whatever source comes to them by reason of the death that is, the balance of loss and gain to a dependant by the death must be ascertained.

8. The burden is certainly on the plaintiffs to establish the extent of their loss. Both the courts below

found, on the evidence, the following facts: (i) The family owned a building worth Rs. 2,00,000/- at Palni, and 120 acres of nanja land worth about Rs.1,000/- per acre.(2) It was engaged in the business of manufacturing Indian patent medicines from drugs and had been running a Siddha Vaidyasalai at Palni for a period of 30 years and had also branches in Colombo and Madras. (3) Rajaratnam studied in the Indian School of Medicine for two years and thereafter set up his own practice as a doctor, having registered himself as a practitioner in 1940. (4) He took over the management of the family Vaidyasalai at Palni. (5) Rajaratnam was earning in addition Rs.200/- to Rs.250 per month in his private practise. (6) He had a status in life, being Muncipal Councillor of Palni and sometimes its Vice-Chairman,and was maintaining a fairly good standard of life and owned motor cars. (7) He was aged 34 years at the time of his death and,therefore, had a reasonably long span of life before him. If the accident had not taken place. On the said findings the High court summarized the position thus:

".....the position is that there is here a man of age 34 carrying on business as a Doctor, with reasonable prospects of improving in his business. He was living in comfort and by his early death plaintiffs 2 to 7 have lost their prospects of education, position in society and even possible provision in their favour. Under the circumstances, the award of Rs. 25,000/- as damages must be accepted as quite reasonable."

When the courts below have, on relevant. material placed before them, ascertained the said amount as damages under the first head, we cannot in second appeal disturb the said finding except for compelling reasons. Assuming that Rajaratnam had not died, he would have spent, having regard to his means and status in life, a minimum of Rs. 250/- on respondents 2 to 7; and his income, as indicated by the evidence, would certainly be more than that amount. The yearly expenditure he had to incur on the members of the family would have been about Rs. 3,000/- and the sum of Rs. 25,200/would represent the said expenditure for just over 8 years

9. In the circumstances, the balance of loss and gain to the dependant by the death of Rajaratnam, in the sense stated by Lord Wright and Viscount Simon, could not be less than Rs. 25,200/-; indeed, having regard to the circumstances of the case, it is a moderate sum; it is rather a conservative estimate. We, therefore, accept that figure as representing the damages for respondents 2 to 7 in respect of their claim under the head of pecuniary loss to them by the death of Rajaratnam.

10. The last contention raises an interesting point. Under S. 2 of the Act the respondents 2 to 7 were awarded Rs. 5,000/as damages for loss of expectation of life. It was contended that this amount should go in reduction of Rs. 25,200/- awarded under S. I of the Act on the ground that otherwise it would be duplication of damages in respect of the same wrong.

11. The second proviso to S.2 of the Act reads:

"Provided that, in any such action or suit, the executor, administrator or representative of the deceased may insert a claim for and recover any pecuniary loss to the estate of the deceased occasioned by such wrongful act, neglect or default, which sum, when recovered, shall be deemed part of the assets of the estate of the deceased."

While S. I of the Act is in substance a reproduction of the English Fatal Accidents Acts. 9 and 10 Vict. Ch. 93, known as the Lord Campbell's Acts, S. 2 thereof corresponds to a provision enacted in England by the Law Reform (Miscellaneous Provision) Act, 1934. The cause at action under S. 1 and that under S. 2 are different. While under S. 1 damages are recoverable for the benefit of the

persons mentioned therein, under S. 2 compensation goes to the benefit of the estate; whereas under S . 1 damages are payable in respect of loss sustained by the persons mentioned therein, under section 2 damages can be claimed inter alia for loss of expectation of life. Though in some cases parties that are entitled to compensation under both the sections may happen to be the same persons, they need not necessarily be so; persons entitled to benefit under S. 1 may be different from those claiming under S. 2. Prima facie as the two claims are to be based upon different causes of action, the claimants, whether the same or different, would be entitled to recover compensation separately under both the heads. But a difficulty may arise where the party claiming compensation under both the heads is the same and the claims under both the heads synchronize in respect of a particular sub-head or in respect of the entire head. In that situation, the question is whether a party would be entitled to recover damages twice over in respect of the same wrong. In England this question came under judicial scrutiny in Rose v. Ford,1937 AC 826. There the question was whether and to what extent deductions would have to be made in giving compensation both under the English Fatal Accidents Acts and the Law Reform (Miscellaneous Provision) Act, 1934. A young woman called Rose was killed in an accident. Her father sued for damages under both the Acts. It was contended that as he got damages for personal loss, he could not be awarded once again compensation for the loss of expectation of life. Though in that case it was held that the father was entitled under both the Acts, Lord Atkin made the following observations, which are appropriate to the present case:

"I should add that I see no difficulty as to the alleged duplication of damages under the Act of 1934 and the Fatal Accidents Acts. If those who benefit under the last mentioned Acts also benefit under the will or intestacy of the deceased personally, their damages under those Acts will be affected. If they do not, there seems no reason why an increase in the deceased's estate in which they take no share should affect the measure of damages to which they are entitled under the Act."

A similar question arose in Feay v. Barnwell, 1938-1 All ER 31. There, Mrs, Feay was killed in an accident and her husband sued for damages under both the Acts. It was held that, as the husband was the claimant under both the Acts, credit should be given in assessing the damages under the Fatal Accidents Acts, for what was given to him under the Law Reform Act, 1934. So too, in Ellis v. Raine, 1939-2 KB 180 where the parents of an infant, who had been negligently killed in an accident, claimed damages under both the Acts, Goddard, L. J., reaffirmed the view that where the parties who would benefit from the damages awarded under the Fatal Accidents Acts were the same as those who would benefit from the damages awarded under the Law Reform Act, the damages under the Fatal Accidents Acts must be reduced by the amount given as loss under the Law Reform Act. Finally the same view has been reaffirmed and restated with clarity in 1942 AC 601. There Lord Macnmillan described the nature of the two heads thus at p. 610:

"The rights of action in the two cases are quite distinct and independent. Under the Law Reform Act the right of action is for the benefit of the deceased's estate; under the Fatal Accidents Acts the right of action is for the benefit of the deceased's dependents. But, inasmuch as the basis of both causes of action may be the same, namely, negligence of a third party which has caused the deceased's death, it was natural to provide that the rights of action should be without prejudice the one to the other. It is quite a different thing to read the provision as meaning that in assessing damages payable to dependants under the Fatal Accidents Acts no account is to be taken of any benefit which the dependants may indirectly obtain from an award under the Law Reform Act through participation in the deceased's estate. . . . . , it is appropriate that any benefit taken indirectly by a dependant by way of participation in an award under the Law Reform Act should be taken into account in estimating the damages awarded to that dependant under the Fatal Accidents Acts."

Lord Wright addressed himself to the same question and answered it at p. 614 thus;

"The injury suffered by the individual from the death cannot be computed without reference to the benefit also accruing from the death to the same individual from whatever source."

The principle in its application to the Indian Act has been clearly and succinctly stated by a Division Bench of the Lahore High Court in Secretary of State v. Gokal Chand, ILR 6 Lah 451: (AIR 1925 Lah 636). In that case, Sir Shadi Lal, C. J., observed at p. 453 (of ILR Lah.) : (at p. 636 of AIR) thus :

"The law contemplates two sorts of damages: the one is the pecuniary loss to the estate of the deceased resulting from the accident; the other is the pecuniary loss sustained by the members of his family through his death. The action for the latter is brought by the legal representatives, not for the estate, but as trustees for the relatives beneficially entitled; while the damages for the loss caused to the estate are claimed on behalf of the estate and when recovered form part of the assets of the estate."

An illustration may clarify the position. X is the income of the estate of the deceased, Y is the Yearly expenditure incurred by him on his dependants (we will ignore the other expenditure incurred by him). X-Y, i. e., Z, is the amount he saves every year. The capitalised value of the income spent on the dependants, subject to relevant deductions, is the pecuniary loss sustained by the members of his family through his death. The capitalised value of his income, subject to relevant deductions, would be the loss caused to the estate by his death. If the claimants under both the heads are,the same, and if they get compensation for the entire loss caused to the estate, they cannot claim again under the head of personal loss the capitalised income that might have been spent on them if the deceased were alive. Conversely, if they got compensation under S. 1 representing the amount that the deceased would have spent on them, if alive, to that extent there should be deduction in their claim under S. 2 of the Act in respect of compensation for the loss caused to the estate. To put it differently, if under S. 1 they got capitalised value of Y, under S. 2 they could get only the capitalised value of Z, for the capitalised value of Y+Z, i.e., X, would be the capitalised value of his entire income.

12. The law on this branch of the subject may be briefly stated thus : The rights of action under Ss. 1 and 2 of the Act are quite distinct and independent. If a person taking benefit under both the sections is the same, he cannot be permitted to recover twice over for the same loss. In awarding damages under both the heads, there shall not be duplication of the same claim, that is, if any part of the compensation representing the loss to the estate goes into the calculation of the personal loss under S. 1 of the Act, that portion shall be excluded in giving compensation under S. 2 and vice versa.

13. In the instant case, under S.1 of the Act both the courts gave compensation to plaintiffs 2 to 7 in a sum of Rs. 25,200/-. This sum was arrived at by taking into consideration, inter alia, the reasonable provision the deceased, if alive, would have made for them. Under S. 2 both the courts awarded damages for the loss to the estate in a sum of Rs. 5,000/-. That figure represents the damages for the mental agony, suffering and loss of expectation of life. There was no duplication in awarding damages under both the heads. No material has been placed before us to enable us to take a different view in regard to the amount of compensation under S. 2 of the Act.

14. The judgment of the High Court is correct and the appeal falls and is dismissed with costs.

Appeal dismissed.