VINDHYA PRADESH HIGH COURT

Union of India through General Manager

Vs

Lalman

First Appeal No. 40 of 1953

(Krishnan, CJ.)

05.11.1953

JUDGMENT

Krishnan, CJ.

1.This is an appeal from the judgment and decree for Rs. 70,000/- passed in favour of the plaintiffs-respondent's by the learned District Judge. Umaria in their suit for compensation under the Fatal Accidents Act of 1855 for the death of Suresh Prasad Pandey, the son of plaintiffs Nos. 1 and 2, husband of plaintiff No. 3 and father of plaintiff No. 4.

2. The points for consideration are the following : Firstly, the principles upon which damages are to be assessed in a suit under the Fatal Accidents Act of 1855. Secondly whether be a fact the deceased was 20 years of age or above, if he was not what legal consequences ensue from Iris driving a transport vehicle, i.e. a motor truck. The possibility of this being an act of contributory negligence will have to be examined. Thirdly, whether there was negligence on the part of the defendant-appellant (a) in the manner of maintaining level crossing, (b) in the conduct of the engine driver before catching sight of the truck and (c) in his reaction after catching sight of it. Fourthly, whether the deceased was guilty of negligence independently of his driving the truck when below 20 years of age. An incidental question is in regard to the costs in the remand proceeding in the lower Court.

3. The facts of the case are the following : The plaintiff No. 1 is a retired employee of the Umaria Coal Mines Company; since then he has been working as a building contractor and also as a commission agent for the supply of foodgrain's to the mines employees. Suresh Prasad Pandey, his son, used to live with his parents and his own wife and child at Umaria. For about a year before his death he used to drive the truck No. VP SL 77, which for sometime past had been registered in his name. On 25-7-1951 at about 10-30 or a few minutes before, the truck came on the railway track just outside the Umaria Station on the side of Chandia, over what is locally called the signal tola level crossing. That road was an unrnetalled and less frequented one. This is an unmanned open level crossing, the Railway having considered the quantity of traffic and the

location being such as not to need a gate or a chain barrier, in charge of an attendant. The users were to be guided by the appearance of the train at a distance or by the signal. It may be noted even here as the common ground that the evidence does not show that there was any board fixed at the crossing cautioning the users against trains. It is also in evidence that corning from the side of Umaria one has to climb up the railway embankment which at places on either side is overgrown with bush vegetation.

4. While Suresh Prasad Pandey was driving into the crossing with his truck containing five labourers and a cleaner, a ballast train was coming towards the Umaria Station. Just at that crossing the engine knocked into the truck splitting it into two pieces, the front part upto the driver's cabin being pushed on to about 300 or 400 feet when the train came to a stop. Suresh Prasad Pandey and a young woman coolie name Munia were in this part of the truck and were killed. Five other's, a cleaner called Chamru, 3 man-coolies, and a second woman coolie, were left behind at the crossing in the back portion of the truck. They received minor injuries. The truck was smashed up.

5. There was the usual inquest and the police investigation followed by an inquiry by the superior railway officers.

6. The plaintiffs and their witnesses, including the five survivors of the accident, make out that there was a two-fold negligence on the defendant's part, the first in regard to the keeping of an open unmanned crossing, and the second in the conduct of the driver going at a speed higher than the 15 mile p.h. limit imposed by the rule, not whistling, and not applying the brakes even after he actually caught sight of the truck. The defendants on their part, averred that in these circumstances an open unmanned crossing was not in itself an act of negligence; secondly, that it was the truck driver, i.e. Suresh Prasad Pandey who drove at a high speed and negligently even after seeing the train coming - probably in the foolish hope that he could somehow get across. This was the main controversy in the lower Court on the liability.

7. In regard to the assessment of damages, on the one hand, the plaintiff took the position that his son was earning Rs. 1000/- a month, out of which he was giving the family Rs. 500/-. He made some deductions and after adding Rs. 4000/- as the price of the truck he claimed Rs. 1,00,000/- with an additional Rs. 100/- as costs of notice. On the other hand, the defendant pleaded that in the event of liability the damages could only be on the footing that the deceased was not earning anything over and above the equivalent of the pay of a truck driver, (say about Rs. 75/- p.m.) as that alone was the useful service he was rendering to the family. So the damages could not exceed the totalized value of a driver's wages minus costs of his up-keep.

8. The learned District Judge held that the defendant was liable, and calculated damages on the assumption that he was earning Rs. 500/- a month and contributing Rs. 250/- to the family, and could be expecting but for this accident to have continued to help his family for 30 years. He totalized this to Rs. 66,000/-, added Rs. 4000/- as the price of the truck and passed a decree for Rs. 70,000/-.

9. From this decision the defendant came up in appeal and began by pointing out a very important fact patent on the record, but not hitherto noticed by the parties and of the lower court itself.

10. The Sworn testimony of the father was that Suresh Prasad Pandey was born on the 7th October 1932. Accordingly, on the date of the accident, i.e. 25-7-1951 he was less than 20 years of age and was therefore debarred by the mandatory provisions of Section 4(2), Motor Vehicles Act from driving a truck. This naturally has the most important consequences on the decision of the suit. Though it was not specifically mentioned in the written statement it was so record. Still the plaintiffs urged that they should have an occasion to rebut this new pleading. Therefore the lower Court was called upon to take evidence, if any was adduced, and to send its finding, firstly on the factum of the age of the dead man, and secondly its legal effect on the plaintiffs' claim. The plaintiffs adduced further evidence. The District Judge's findings were firstly that the age of Suresh Pd. Pandey on the date of the accident, was 18 years 9 months and some days and not 20 years and 2 months as given out during the remanded proceedings by his mother and sought to be corroborated by an entry in what was called the birth and death register of the Umaria Municipality. Secondly, the District Judge held that though Suresh Prasad Pandey was incompetent under Section 4(2), Motor-Vehicles Act to drive a transport vehicle, still the authority having issued a licence, he was not committing any criminal offence nor an act of negligence or rashness.

11. The first finding was objected to by the plaintiffs while the second was objected to by the defendant. These objections were heard along with the appeal.

POINT No. 1. Age of Suresh Prasad Pandey :

12-16. (His Lordship considered the evidence on this point and proceeded).

17. I, therefore, hold that Suresh Prasad, Pandey was born on 7-10-1932. He applied to get a licence early in 1950 and actually got it in June 1950. There he mentions his age as 18 years but he had to do so as otherwise he would have got no licence whatsoever. When he got the licence he was a few months less than 18 years old and could not even have got a licence for an ordinary motor vehicle. On the-date of the accident his licence was good enough for an ordinary motor vehicle, but not a valid one for a transport vehicle which as defined in Section 2(33) includes a goods vehicle.

POINT No. 2. The legal effect of this age.

18. In my opinion the learned District Judge has gone wrong in holding that he had got a licence and therefore his being under age is of no consequence. This is wrong. The evidence of Jawahar Lal Varma, Superintendent of Police of that time is to the effect that he gave a driving licence for a transport vehicle because he did not know the existence of such a bar. This may very well be true but I do not think it makes any difference in the legal position. The licence is a bad licence in view of the mandatory provisions in Section 4, Sub-Section (2), Motor Vehicles Act and cannot

become valid because the licensing authority was sleeping. A criminal offence is different from an act of negligence or rashness; I would hold that a man driving a transport vehicle with a licence of this nature is still guilty of an offence. However, if his act has been the consequence of the ignorance on the part of the licencing authority it may not be proper to impose a punishment. Still the breach of law would be there. The law expressly forbids the driving a transport vehicle by a person below 20 years, because he is considered to be immature of body and mind. If he drives, it is a rash act; in other words he does not care what result may happen to him or to others. Therefore the legal consequence of Suresh Prasad Panday's in competency to drive is that that day he was acting illegally and rashly. This is an act of contributory negligence.

POINT No. 3. Defendant's negligence.

19. This takes us to the question of the defendant's negligence independently of any contributory negligence on the part of the deceased,

> (a) A level crossing is on the one hand a danger spot in view of the possible movement of trains, and on the other is an invitation to the passerby. This is a public crossing and not merely one by private accommodation. Therefore it is the legal duty of the railway to assure reasonable safety. The moist obvious way of doing it is to provide gates or chain barriers and to post a watchman who should close them shortly before the trains pass.

But failure to do so is not by itself an act of negligence provided that the railway bad taken other steps sufficient in those circumstances to caution effectively a passerby of average alertness and prudence. At a reasonable distance on either side, prominently written boards can be affixed, asking the road-users to beware of trains. If the track on either side is visible from near the caution board or within a short distance from the crossing, this would be sufficient because a diligent road-user could look round and see the train. On the other hand, if there is a bend on the track or there are tress or bush in between, or the road on either Side of the crossing is very far below the level of the railway track, or for any other similar reasons the track is not visible beyond a short distance, then even the caution boards are useless. In that case gates are indicated. Similarly boards may be affixed along the railway, say half to three-fourth of a mile in either direction calling upon the engine driver to whistle. A whistle by the driver can supplement, but cannot replace gates or caution boards as a device to protect the users of a crossing.

20. All these aspects of maintaining a level crossing have been considered by the railway authorities in accordance with Section 7, Indian Railways Act and guiding principles have been laid down. In this case however the evidence does not show that caution-board had been affixed on either side of this open unmanned crossing. It is feebly suggested on behalf of the appellant that such boards are fixed as a matter of course and must have been there. I cannot accept this argument because it is a question of fact. It is also suggested that since Suresh Prasad Pandey had been driving this truck on that road very frequently the absence of caution-boards would be of no consequence to him. I do not agree. Even if the car driver knew that there was a crossing the road users should be alerted at the proper moment by the boards or gates; it is not a case for remote knowledge, but one for immediate alertness.

21. As for the visibility on either side, there has been a certain amount of conflicting evidence. The plaintiffs' witnesses tried to make out that there was no visibility beyond a very short distance while the defendant's witnesses assert that there was no obstruction. As far as the bend goes, it is at some distance. But there was obstruction to view by the branches of some trees which the railway authorities cut down soon after the accident. I do not suggest that this was done with any improper intention. It had to be done in any case. But this does show that there was obstruction to view. The non-removal of the obstruction in time is also an act of negligence on the part of the railway. I, therefore, find that there was negligence on the part of the railway in the maintenance of this level crossing. Having opened an unmanned crossing without any barrier, the railway did not take all the necessary steps to safeguard the users.

22. (b) The next point is whether the engine driver's handling his engine, before seeing the truck, was such as to render an accident more probable. This could be in two ways, firstly by his exceeding the speed limit prescribed by the railway authorities for ballast trains and secondly by not whistling when necessary. The second form of negligence has not been brought home. Taking up the former, a ballast train is not to run at a speed higher than 15 miles per hour. The Station Master's papers and evidence show that this train was directed to leave at 9-30 and to return at 10-30 going a distance of 9 miles and unloading some materials there. Obviously this was impossible unless the speed is about 20 miles per hour. The engine driver makes out that he left at about 10 minutes earlier, went at some speed on his outward journey but was returning at a slow speed, as he could reach at 10-30 A.M. The accident itself took place about half a mile from the station a few minutes before 10-30. It is difficult to believe that the driver left 10 minutes earlier or that he had any special reason to go faster on the outward journey than on his return. Giving at least 5 minutes for the work there the average speed of the train was about 20 miles per hour. Most probably this was the speed immediately before the applying of the brakes. The engine was an old one without a speedometer so that a driver cannot know what exactly the speed is unless he counts the telegraphic poles and looks at his watch which, of course, he did not do in this case. So about 20 miles was the mostly likely speed, a slight excess over the prescribed one. But I do not think this made any material difference to the accident. So on the ground of speed only I would not find any negligence on the part of the defendant.

23. (c) The next aspect of the matter is to ascertain whether the engine driver should have averted the accident after catching sight of the truck. It could also be asked whether the truck driver also should not have done so. But I have already found that the truck driver was not of that maturity of mind and body which the law considers necessary and therefore acting rashly in any case. We have the evidence of two batches of witnesses. The engine driver and his companions on the train appearing for the defendant while the survivers of the accident have appeared for the plaintiffs. These are the only first hand witnesses on this matter, the statements of others being necessarily derivable and second hand. The difficulty is that both these batches are keenly partisan. The former are anxious to throw the blame on the truck driver having already made up their minds in the departmental enquiry. On the other hand the truck cleaner and the four coolies were working for the plaintiffs. They were involved in the accident. Therefore they tried to throw the blame

entirely on the railway servants. There is also another reason why the oral evidence on either side is unreliable. An accident of this nature takes place because of a general want of alertness. Therefore their recollection is bound to be coloured by subsequent discussion and promptings.

24. Still, a close examination of the evidence enables us to pick out the independent particulars from which the picture can be reconstructed. When the surveyor came to make the map the engine-driver pointed out the place from which he caught sight of the truck and also the place where he recollected the truck was at that moment which the former noted then and there. The engine was about 120 feet from the crossing while the truck was 40 feet away. I do not suggest this is accurate or altogether beyond doubt, but it is a convenient approximation. The truck had to come 'up' and there were some bush on the track side so that the driver might have lost sight of it as the train advanced. One cannot be sure of this, but this much is certain that when he first caught sight of the truck the engine driver had no call to stop or even to slow down because a truck at that distance is not expected to come on the track. By the time of the collision the train had gone 3 times the distance that the truck had the former moving at about 20 miles, and the latter about 7 or 6 miles, both travelling for 4 or 5 seconds after the driver actually caught sight of the truck. The truck was climbing up on to the track, but had not quite completely in it. In fact only the front portion, about a fourth of its total length, had come on the track. We can infer that the deceased had hoped to get away before the train came in; but had not made allowance for the inevitable slowing during an ascent.

25. While the statements of the railway servants are coloured by their earlier decision that the truck driver alone was at fault, that of the coolies shows either a wanton disregard for truth or a complete want of powers of observations. It is to be remembered that out of 7 persons on the truck 2 were killed outright and five have survived, cleaner Chamru, with practically no injury, and the four other's with slight marks. The truck split up into two parts, the forepart up to and including the driver's cabin being carried away by the engine, the remainder being left behind, not having in fact crossed the track. It was in that forepart that both the deceased were found, the truck driver and a girl coolie Munia. None of the remaining five could possibly have been in the forepart as they were left behind. Surprisingly enough the cleaner and the coolies assert that Munia was sitting in the back part of the truck while Chamru was sitting near the driver; they say that at the time of the accident or immediately after Chamru jumped out and ran away, by some mysterious process Munia happened to be carried away, while others similarly placed were left behind. I have no hesitation in holding that this is false. (His Lordship reviewed the evidence and continued.)

26. I, therefore, find that the defendants were negligent in their manner of maintaining the crossing; but the engine driver was not negligent in his manner of driving either before or after catching sight of the truck.

POINT No. 4 - Negligent driving of the truck.

27. Apart from the truck driver's rashness in driving without a proper licence, it is difficult to say

that he was further negligent in the driving itself. Till on the embankment he could not have seen the train. It is also got likely, in view of the car noises, that he heard the others in his truck. But having seen the train, he seems to have thought of pushing on hoping to pass, before the train arrived.

POINT No. 5 - Data on the damages.

28. By and far the weakest points in the plaintiff's case are the data given by him for assessing the damages. I have already found that the defendants were negligent at least in one important particular. This could make them liable to damages. The truck driver's rash act is no doubt contributory negligence and would mitigate the damages; in the circumstances of this case by half. Even so, it is for the plaintiff to give us acceptable data upon which a totalised money equivalent of the earning power of the deceased had to be calculated. With all respects to the learned District Judge, I note that he has gone quite wrong and has tried to work out a sort of half way house though the plaintiff's evidence was altogether unacceptable. It is, therefore, convenient to examine the general principle for the assessment of damages in a fatal accident case, then apply them to the evidence in this case.

29. The first point to note is that this Act provides for the payment of damages under two headings; firstly for loss to the beneficiaries mentioned there of the bread-winning capacity of the deceased; secondly, the representatives of a deceased, who will in a joint family often be the very relations who are the beneficiaries, may insert a claim for and recover any pecuniary loss to the estate of the deceased occasioned by the wrongful act, neglect or default. The destruction of the truck worth Rs. 4000/- comes under the second heading, and involves no difficulties whatsoever.

30. In assessing the damages under Section 1 Courts should take into account only this net money equivalent of the services rendered by the deceased to the beneficiaries and should not include any solatium for the mental distress or shock. All such accidents are necessarily heartrending and the present case is particularly so; but courts cannot award sentimental damages. In certain circumstances potential income can be taken into account, but it should be the increase that is reasonably likely in the immediate future, and not a remote and speculative possibility. For example if the deceased is actually undergoing a course of training and would certainly have completed it, the increased income possible after the completion can be considered. But even if the court finds that the deceased is generally speaking a person of promise, it cannot assess the damages on the assumption that the promise might be realised.

31. The third principle, is that the courts should at the first instance fix the annual money equivalent of the dead man's earning capacity from the data given by the plaintiff. Vague generalities and mere assertions will not do. If the dead man was actually fetching money into the family, evidence should be given on how much he brought in during a particular period before the accident. If he was merely rendering service the monetary value of the service should be assessed, by finding out from the plaintiffs' evidence how much would have to be paid to replace service of the similar kind and of the same quality. If for example the dead man had been

managing a business without any payment the evidence should show how much would have to be paid to an outsider doing the same management. From some such data the annual value of the dead man's earning can be calculated.

The net value should be extracted from this after deducting his personal maintenance charges.

32. Fourthly, this will have to be multiplied by a factor equal to the expectation of the service. No general rule in this regard has been laid down or can be laid down for the very simple reason that the expectation of life and rendering of the service varies with the age, health of the worker, the nature of the work itself and the uncontrollable factor in life that can be called acts of God. The expectation factor should therefore be fixed in a liberal manner, but at the same time bearing in mind the vicissitudes of human life.

33. Finally, the net annual equivalent of the bread-winning capacity should be multiplied by the expectation factor; after correcting for interest. In other words, the damages should be that amount which if invested securely, will be able to buy the beneficiaries and annuity equal to the net annual value of the dead man's services, for a period during which he could be expected to render them, bearing in mind the ups and downs of human life.

34. One principle of a general nature should also be mentioned. We can take into account only the services legally rendered by the dead man. To emphasise this by an extreme case, courts should not give damages for the income the dead man was bringing to the beneficiaries by cutting purses or committing dacoities. On the face of it this is obvious and almost trite. But there are forms of income got by practising mild illegalities; courts will have to find whether the same income could come into the family, if the illegality is remedied.

35. These principles have been taken from recognised text-books on the subject and reported cases of the High Court some of which can be conveniently quoted here.

- '*South Indian Industrials Ltd v. Alamelu Ammal*'[1],

> "Under the Fatal Accidents Act, the widow of the deceased or the person suing is entitled to compensation for the financial loss sustained by the death. She is not entitled to anything of pain or suffering or anything of the kind, but purely for the financial loss Sustained. That the accident was rather an extra-ordinary one, is wholly irrelevant. The proper way of estimating the loss is to form some estimate of what the value of the continued life of the deceased would have been to the plaintiff and how long it was probable that it would continue. One year's wages is ridiculous in the absence of any evidence that the man was of ill-health or that his earning life was likely to be no more than a year."

One the expectation factor the High Court held that in that one year was too short and "somewhere about 3 years" was the right figure.

- '*Dhan Singh v. Mt Ganesh Bai*[2]',

> "No very definite rule has been laid down as to how many years' income should be allowed as compensation to the heirs of the deceased in a suit under the Act. Everything is to be taken into account, possibility of the earner's death, his age and earning capacity, for calculating the amount of damages."

- '*Stanes Motors Ltd. v. Vincent Peter*'[3],

> "The rule in awarding compensation under the Fatal Accidents Act is that it must be fixed solely with reference to pecuniary loss sustained by the relatives of the deceased in respect of past contributions or in respect of reasonable expectation of future pecuniary benefit from the deceased. Where therefore the mother of the deceased failed to adduce evidence to afford reasonable basis for ascertaining the pecuniary loss sustained by her in consequence of the death of the deceased, her claim for compensation was dismissed." '*Secy of State v. Mt. Ratan Kali*'[4],
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> "No definite rule can be laid down for the mathematical calculation of the amount of compensation that should be decreed upon the basis of the income of the deceased in cases under the Act.

After making allowance for what the deceased would have spent upon himself, his income was estimated at Rs. 40 per mensem. The son of the deceased would be soon able to carry on his business, the position of the family did not suffer and the chances of education of the deceased's children did not lessen, the Court awarded Rs. 3840/- as compensation." - *Meet Kumari v. Chittagong Engineering and Electric Supply Co.*'[5],

> "Under the Act damages are claimable under two heads. Under Section 1 a right has been given to ask for damages proportionate to the loss resulting from death of the deceased to the parties claiming such damages. This is the first head of damages, that is, it is a reparation for the loss caused to the beneficiaries mentioned in the Act. The second head of claim is mentioned in Section 2 of the Act under which a claim for any pecuniary loss to the estate of the deceased occasioned by any wrongful act, neglect or default which caused the death of the deceased can be made."

Further,

> "it is reparation for the loss caused to the beneficiaries mentioned in the Act. There must be a pecuniary loss, actual or expected sustained by the persons claiming. Such pecuniary loss is evidenced by proof of a reasonable expectation of pecuniary benefit. There must be a certain amount of guess-work in estimating such expectation as various factors have to be considered which cannot be expressed arithmetically. At the same time sympathetic damages, or solatium for loss of companionship etc. are not relevant. The main criterion is the loss of reasonably expected pecuniary benefit. At the same time probable earnings and future prospects of the deceased himself are taken into consideration because the extent to which a person can benefit others depends largely on his earning capacity."

36. One point of special significance may be disposed of here. It has been urged on behalf of the defendant that in no event should the damages exceed the 10,000/- rupees limit fixed by Section

82(A), Railways Act. I do not agree. If damages are payable in this case, and further, if application of the principles enumerated above gives a higher figure, Section 82(A), Railways Act is no bar. That section applied only when the death is of a passenger travelling by train, and meeting with an accident. But when somebody other than a passenger is killed in the accident that section has no application.

37. We have to apply these principles to the present case. The plaintiffs aver,

("Paragraph 6 of the plaint.) The late Suresh Prasad Pandey was earning Rs. 1000/- per month and was bearing all the expenses of the family (*****HINDI MATTER*****) and was helping in the health and happiness of all the members. All the plaintiffs depended upon him and in particular plaintiff No. 4 was being brought up in a comfortable style becoming a child of such a high family. Suresh Prasad was giving special attention to the bringing up of his child and had he not been taken away in this accident he would have spent a very large amount for the comfort, health and education of this child. The late Suresh Prasad was giving not less than Rs. 500/- per month towards the plaintiffs' expenses who by his death have been deprived of this amount."

38. As against this the defendant's have pleaded that Suresh Prasad Pandey was doing nothing more than to drive the truck. This was the only service and income he was contributing to the family and its money equivalent is no more than Rs. 75/- per month.

39-43. Let us examine how the present plaintiffs have sought to borne their claim. Two main averments stand out namely that the deceased was earning Rs. 1000/- per month and that the net monthly benefit to the beneficiaries was Rs. 500/-. (His Lordship after perusing evidence in this respect continued.) What we do have is an assertion by the plaintiff that his son was earning Rs. 1000/- per month unsupported by books or data and a parrot-like repetition by witnesses, one or two of whom are even more zealous than the plaintiff. This is altogether useless.

44. The only service that the young man is proved to have given, was to drive the truck owned by his father, mostly in his own business and on two occasions in transporting foodgrains for others. Even out of these one was of the foodgrains his father had contracted to deliver. On the other, we have no details. In the sheer absence of data we cannot accept the wild exaggeration of the plaintiff

and his witnesses. This leaves only the service as a driver. He was not paid for it but to replace that the family would have to employ a driver on about Rs. 70 or Rs. 75/- p.m.

45. The annual monetary equivalent of this service is about Rs. 900/- per year out of which about 35 per cent has to be deducted as personal expenses which would give a net annual value of Rs. 600/-.

46. There is no difficulty about the expectation factor which according to the learned District Judge is 30 years. Considering the vicissitudes of life I think this is slightly high, and reduce it to 25 years but the totalised value will not be 25 times Rs. 600/-, but in view of interest, only 70 per

cent of it. This would bring it to a totalised value of Rs. 10,500/- under this heading.

POINT No. 6. The legality of the earning.

47. It is an unanswerable principle that only income that was being legally earned that can be taken into account. In glaring cases there is no difficulty but the present one is as it were on the border-land. The deceased was driving the transport vehicle in contravention of Section 4, Clause 2. Motor Vehicles Act. It is, therefore, urged on behalf of the defendant-appellant that the money equivalent of this service should not be taken into account. I note, on the other hand, that the earning capacity did not depend on driving the truck. It might as well have been a light car such as a man of 18 years was certainly entitled to drive. Further, had Suresh Prasad Pandey not died he would have been entitled to drive the truck from after 16 months. This is not speculation but a fact. In the special circumstances therefore it is not correct to eliminate the money equivalent of this service on the ground of illegality. Certainly the deceased was not legally competent to drive the truck, but that breach has to be given due weight as an act of rashness on his part justifying a mitigation of damages. It cannot be entered twice over to the disadvantage of the plaintiff.

48. The result of the discussion is that the figure of total assessed damages of Rs. 10,500/- for the services, and Rs. 4000/- for the motor truck, a total of 14,500 rupees.

POINT No. 7 Mitigation by contributory negligence.

49. But in this case there must be a reduction on account of the fact that the truck driver was guilty of contributory negligence. There was negligence on both sides, the defendants' in the manner already described, and the truck driver's as he was driving in spite of a statutory bar in regard to this particular vehicle. It is difficult to find out which of the two was the more immediate or more important cause of the accident. On the one hand, if it had been a car that a man of 18 years could be allowed to drive the accident might not have taken place, he would just have got away before the engine came into the crossing. On the other hand, if the defendants had not been negligent in the maintenance of the crossing, most probably the car would have stopped till the engine passed. This is pure speculation, so we have to be satisfied with finding that both parties were equally responsible for the accident.

50. In a case of joint responsibility of both parties the old English common law seems to have been that no damages could be granted, a doctrine which some jurists described as being uncertain in theory and pernicious in practice. Since 1945 that principle has been replaced in England by the Law Reform (Contributory Negligence) Act, 1945 under which "where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the Court thinks just and equitable having regard to the claimant's share in the responsibility for the damage... (Section 1, Sub-Section (1)). Where damages are recoverable by any person by virtue of the foregoing sub-section subject to such reduction as is therein, mentioned, the Court shall find and record the total damages which would have been

recoverable if the claimant had not been at fault. (Section 1, Sub-Section (2))." No doubt there is no corresponding statute in our country but the basic principle is one of equity, and has to be applied to cases like the present one. It is dangerous to lay down the rule of all-or-nothing in cases where responsibility is divided and can be correctly apportioned.

51. I accordingly award the plaintiffs half the total damages, namely Rs. 7250/-.

POINT No. 8. Apportionment.

52. After deducting the costs payable by the plaintiffs the balance should be divided as follows :

One-sixth each to the father and the mother, and one-third each to the widow and the child.

POINT No. 9. Special costs in the remand proceedings.

53. There is one more question that can be conveniently disposed of here. When the suit was remanded on the special issue it was ordered that the costs of the remand proceeding should be payable by the defendant, irrespective of the result. However, the lower Court, probably by oversight, has not awarded it and it is not worthwhile sending the matter back for an order on such a small issue. I, therefore, order that the defendant-appellant should pay to the plaintiffs-respondents special costs of Rs. 150/- for this remand proceeding.

54. In the result the appeal is allowed in part on the lines noted above. The plaintiffs' measure of success is insignificant he having got about 7 per cent only of his claim. I, therefore, order that subject to adjustment of special costs noted above, he should pay the defendant 50 per cent of his costs and of pleader's fee according to rules in both the courts.

Order accordingly.

Cases Referred.

1AIR 1923 Mad 565
2AIR 1927 Lah 417
3AIR 1936 Mad 247
4AIR 1932 Lah 355
5AIR 1947 Cal 195