

(1972) 12 MAD CK 0010
In the Madras High Court

Engineers International

APPELLANT

Vs

C. Hanumantha Raju and Others
C. Sakkubai and
Others Vs Engineers International and Another

RESPONDENT

Date of Decision : 15-12-1972

Acts Referred:

Citation : (1973) ILR (Mad) 62 : (1978) 87 LW 16 : (1974) 1 MLJ 37

Hon'ble Judges : Palaniswamy, J;Palaniswami, J

Bench : Division Bench

Judgement

Palaniswamy, J.—This appeal arises out of a suit instituted for recovery of damages under the Fatal Accidents Act, 1815. The Union of

India, in the Ministry of Defence, the second defendant, had entrusted, on contract basis, the construction of a Parachute Factory at Avadi with

Messrs. Engineers International, the first defendant, a partnership firm. One Lachi Raju, an Engineer under the service of the Union of India as

Superintendent, Grade I, was at the place of construction and discharging certain duties. On 7th March, 1963, the first defendant firm was erecting

trusses with the help of its employees. 13 trusses were hoisted temporarily before they were to be permanently fixed up. A derrick (a contrivance

for moving or hoisting heavy weights) fell on one of the trusses, with the result that all the trusses fell down. One of the trusses fell on Lachi Raju

causing serious injuries. He was removed to the Military Hospital, Avadi and given treatment. But he expired within half an hour. This suit was

instituted by his parents (plaintiffs 1 and 2), his widow (third plaintiff) and children (plaintiffs 4 and 5) to recover a sum of Rs. 65,000 as damages

mad up of Rs. 5,000 to each of plaintiffs 1 and 2, Rs. 10,000 to each of plaintiffs 3, 4 and 5 and Rs. 25,000 claimed as pecuniary loss suffered by

the estate on account of the death of Lachi Raju. The plaintiffs inter alia alleged that the cause of the accident was due to the negligence of the

employees of the 1st defendant and on account of the failure to take proper and sufficient safety precautions in the process of erecting trusses.

They alleged that Lachi Raju was very affectionate and loving towards his parents, wife and children, that on account of the premature death, they

were deprived of the help which they were receiving from him and that also the estate had lost pecuniary on account of the premature death.

2. The first defendant contended that there was no cause of action against it, as Lachi Raju was not under its employ and that it was also not a part

of the work of Lachi Raju to be present at the spot of accident. It was also contended that there was no negligence on the part of the first

defendant or its employees in the execution of the work and that the plaintiffs are not entitled to recover any damages. The first defendant

contested the correctness of the quantum of the damages also.

3. The Union of India admitted that Lachi Raju was employed in the Military Engineering service and was attached to the Parachute Factory at

Avadi at the time when he met with his death; but liability was denied contending that the first defendant was an independent contractor and that

the Union of India was not liable for any damages for what had happened.

4. The trial Judge found that the first defendant was an independent contractor and that the second defendant, Union of India, was not liable. It

was also found that at the time of the accident, Lachi Raju was on duty in connection with some work that was in progress at the place of accident.

As regards the cause of the accident, the finding of the trial Judge was that it was due to the negligence on the part of the first defendant. On the

question as to the persons entitled to damages, the trial Judge found that plaintiffs 1 and 2, being parents, are not entitled to any relief. The trial

Judge examined the evidence with regard to the income which the deceased was getting by way of salary, the amount which he was spending upon

his wife and children and the probable savings which he would have made, had he lived his normal span of life, and taking all these circumstances

into consideration, the trial Judge fixed a sum of Rs. 10,000 as damages payable to each of the third plaintiff, the widow, and the fifth plaintiff and a

sum of Rs. 9,000 to the fourth plaintiff. The trial Judge further awarded a sum of

Rs. 5,000 as loss to the estate, and in all a decree for Rs. 34,000

was passed with proportionate costs against the first defendant contractor. It is against this decree that the first defendant has preferred this appeal.

Plaintiffs 3, 4 and 5 have filed a Memo. of Cross-objections contending that the Court below should have awarded to them an additional sum of

Rs. 21,000 even though it disallowed the claims of plaintiffs 1 and 2.

5. Mr. Gopalaswami Ayyangar, Counsel for the first defendant-appellant raised the following points for consideration:

(i) The finding of the Court below that Lachi Raju was on duty at the time and place of the accident is erroneous;

(ii) The Court below erred in holding that the accident was due to negligence of the first defendant by applying the principle of *res ipsa loquitur* and

failed to note that the burden lay exclusively upon the plaintiffs to establish that the cause of accident was due to the negligence on the part of the

first defendant; and

(iii) The award of Rs. 5,000 as loss to the estate is wrong, as there is no evidence to show that the estate spent any amount for treatment of the

deceased after the accident.

We shall deal with these contentions seriatim.

6. That the first defendant was an independent contractor which is the finding of the Court below, is not contested. That Lachi Raju met with his

death as a result of the fall of one of the trusses, which were being erected by the first defendant is also not in controversy. The specific case of the

plaintiffs is that the accident took place when Lachi Raju was supervising, in discharge of his duties, the work that was in progress at the Parachute

Factory. The first defendant in its written statement has denied this allegation and stated that Lachi Raju was not supervising the work. On the side

of the plaintiffs, plaintiffs 3 and 1 gave evidence as P.Ws. 1 and 2 respectively. In the nature of things, they cannot be expected to say anything on

the question as to what exact Lachi Raju was doing at the time and place of the accident. The question has to be examined on broad probabilities.

Exhibit B-2 is an office order issued by an officer of the Parachute Factory, Avadi, detailing the various duties of the persons enumerated therein.

One such person is Lachi Raju to whom the work allotted consisted of, ""excavation, columns, lintels and slabs"". Exhibit B-2 also shows that the

responsibilities indicated therein should not be taken as a watertight compartment of work and that over and above the items indicated therein jobs would be assigned either in writing or orally at the factory itself. D.W. 1 a partner of the first defendant firm, gave prevaricating versions in his evidence as to the work which Lachi Raju was attending to at the time of the accident. Even in his examination in chief, he admitted in unambiguous terms that the duty of Lachi Raju was to supervise a part of the construction; but he qualified it by saying that Exhibit B-2 set out the duties to be attended to by him. In his cross-examination, he admitted that he could not definitely say the exact work which Lachi Raju was doing at the time of the accident that all the supervisors in charge of steel erections were there at the spot and that there was also floor concrete work being done at the time. His further significant admission is that the work was an emergency work, that the progress of the work was maintained at a fast pace and that more than one type of work was going on at the site. His further significant admission is that all the concerned officers of the M.E.S. must have been there on duty. D.W. 1 was unable to deny that Lachi Raju was on duty at the time of the accident. The first defendant firm did not controvert the statement contained in Exhibit A-3 the report of the Garrison Engineer that at the time of the accident Lachi Raju was on duty. D.W. 1 admitted that the Engineer in charge would inform him from time to time as to the exact duties allotted to the Engineering Supervisors under his charge (Lachi Raju being one of the Engineering Supervisors). But he pleaded ignorance as to what kind of duty was assigned to Lachi Raju at the time of the accident. It is clear from a perusal of his evidence that he does not want to speak out the whole truth by pretending ignorance of relevant facts. Having regard to his significant admissions that several kinds of work were in progress at the time of the accident, as the work was an emergency one, and that all the officers concerned of the M.E.S. should be on duty at that time we are clearly of the opinion that at the time of the accident Lachi Raju was on duty in connection with some work in progress at the place where the accident took place.

7. The next question is whether the plaintiffs have established satisfactorily that the cause of the accident was due to the negligence on the part of

the first defendant. The case of the plaintiffs as put forward in the plaint is that the first defendant failed to take sufficient safety precautions, in the

carrying out of the work and that as a result of such negligence, the trusses fell down. No doubt, this allegation is denied by the first defendant. The

initial burden lies upon the plaintiffs to establish that the accident was due to the negligence on the part of the first defendant. As we have already

pointed out, the only two witnesses examined on the side of the plaintiffs, were plaintiffs 1 and 3, and in the nature of things they could not be

expected to say anything about the circumstances under which the accident took place, as they were not expected to be at the spot and as a

matter of fact they were not at the spot at the time of the accident. The question as to whether the plaintiffs have discharged the burden has to be

examined on a conspectus of the entire circumstances appearing from the evidence. It is the common case of all the parties that the work that was

being executed by the first defendant at the time of the accident was erection of trusses, that the number of trusses to be erected was 13 and that

all the 13 trusses were temporarily fixed before they were to be permanently erected. It is also the common case of all the parties that derricks

were used in connection with the erection. It is also the common case of all the parties that all the 13 trusses fell down and one of them fell on

Lachi Raju. It is not the defence of the first defendant that in the process of fixing the trusses permanently, some trusses are likely to fall down and

that, therefore, the falling of trusses on Lachi Raju was not due to negligence. The admissions of D.W. 1 in this connection have to be noted. He is

unable to say how the accident took place. He is not a qualified Engineer. He claims to be only an experienced, contractor. Whenever a truss is

hoisted a derrick would be used. A derrick would be supported by a number of ropes on all sides. The derrick would be shifted from place to

place for hosting trusses. After the accident, D.W. 1 saw the place and found the derrick having fallen down over the trusses. Even if one of the

trusses falls, all the others will fall. Before the trusses are permanently fixed, they would be temporarily fixed with bellies (meaning wooden poles).

Normally two or three or four purlins would be tied temporarily by means of bellies before they are fixed with steel purlins. Strong purlins would be

used to permanently fix the trusses. In addition to the foregoing admissions, the further admission of D.W. 1 was that in the instant case the 13

trusses were not fixed with bellies. He is unable to say the number of trusses fixed with bellies as he admittedly was not supervising the work. His

further significant admission is that he cannot say definitely the exact work which was being carried on at the time of the accident. According to his

admissions, the trusses should be fixed with bellies before they are permanently fixed, Admittedly, all the 13 trusses, which fell down were not fixed

with bellies. D.W. 1 offered no explanation for this serious omission, All that emerges from his evidence is that he knows nothing about the cause

of the accident and that the fact remains that all the 13 trusses fell down.

The question in these circumstances, is whether it is reasonable to infer that the plaintiffs have made out a prima facie case of negligence on the part

of the first defendant. As the falling of trusses is not, according to the first defendant, a common inevitable feature in the process of permanent fixing

up and as all the 13 trusses had admittedly fallen down, there arises a presumption that the falling was due to negligence. Asquith, L.J. in *Barkway*

v. South Wales Transport Company (1948) 2 All E.R. 460 summarised the principle applicable to onus of proof in the following short

propositions;

(i) If the defendant's 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 omnibus leaving the road is a tyre-burst since a

tyre-burst is per se 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 Company* L.R. (1942) 1 K.B. 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 principal s have been restated in Halsbury's Laws of England, Volume 23, at page 6.71, 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 this 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 defendants 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 ensure, the burden is in the first instance on the defendant to disprove the 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.

9. The foregoing principles directly apply to the present case. The falling of all the 13 trusses tells its own story of negligence. Mr. Gopalaswami

Ayyangar, Counsel for the first defendant-appellant, contended that the principle of *res ipsa loquitur* is only a rule of evidence and that it cannot be

extended to hold that where the burden initially lies upon the plaintiffs, it would displace that burden and shift the burden to the defendants to show

that the accident was not due to negligence. We are unable to accept this argument. We have already referred to the evidence of D.W. 1, which

clearly shows that he knew next to nothing about the cause of the accident. As the falling of all the trusses by itself raises a presumption of

negligence, the burden shifts to the first defendant to show what care was taken in hoisting the trusses and why all the 13 trusses fell down. The first

defendant did not examine any Engineer or any one else, who was on the spot attending to the erection at the time of the accident, to show what

precaution was taken to securely fasten the trusses, which were fixed temporarily and how the derricks were operated and under what

circumstance Section 11 the 13 trusses fell down. All these matters were in the peculiar knowledge of the first defendant. It is not possible to

expect the plaintiffs to let in evidence to show that, any peg gave way or any stay wire snapped or any particular stay wire, which should have been

put, was not put or why the trusses fell down. It is in these circumstances that the Court below rightly applied the principles of *res ipsa loquitur* and

inferred that the accident was caused by the negligence on the part of the first defendant. We see no flaw in this conclusion.

10. The next argument of Mr. Gopalaswamy Ayyangar, Counsel for the appellant, was that the Court below erred in awarding a sum of Rs. 5,000

as loss to the estate. We must at this stage observe that Mr. Gopalaswami Ayyangar, did not advance any argument on the assessment of the sum

of Rs. 29,000, which has been awarded to plaintiffs 3, 4 and 5. His only argument was with regard to the award of Rs. 5,000 as loss to the estate.

Before we examine this argument, it is necessary to set out the relevant provisions of the Act.

1-A. Suit for compensation to the family of a person for loss occasioned to it by his death by actionable wrong:--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 proportionate 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.

2. Not more than one suit to be brought.--Provided always that not more than one action or suit shall be brought-for, and in respect of the same

subject-matter of complaint; Claim for loss to estate may be added:--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.

The mode of assessment of damages under these provisions is not free from doubt. It is beset with certain difficulties and it depends on many

imponderables. Section 1-A which was formerly Section 1, is in substance a reproduction of the English Fatal Accidents Acts, 9 and 10 Vict. Ch.

93 known as the Lord Campbell's Acts. Section 2 corresponds to a provision enacted in England by the Law Reforms (Miscellaneous

Provisions) Act, 1934. The English Courts have formulated certain basis for calculating damages under Lord Campbell's Acts.

The principles on which damages under Sections 1-A and 2 of the Act have to be assessed have been settled by the Supreme Court in *Gobald*

Motor Service Ltd. and Another Vs. R.M.K. Veluswami and Others, . Subba Rao, J. (as he then was) speaking for the Court, observed at page

7:

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 (1925) Lah. 451, In that case, Sir Shadi Lal, C.J., observed at page 453 thus:

The law contemplated 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.

The learned Judge clarified the position by giving the following Illustration also:

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 u/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 u/s 2 of the Act in respect of compensation for

the loss caused to the estate. To put it differently, if u/s 1 they got capitalised Value of Z, for the capitalised value of Y plus Z i.e., X would be the

capitalised value of his entire income.

On a review of the English authorities, the learned Judge observed that the cause of action u/s 1 and that u/s 2 are different that while u/s 1

damages are recoverable for the benefit of the persons mentioned therein, u/s 2 compensation goes to the benefit of the estate; whereas u/s 1

damages are payable in respect of loss sustained by the persons mentioned therein, u/s 2 damages can be claimed inter alia for loss of expectation

of life. Summarising the position, the learned Judge observed:

The rights of action under Sections 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 u/s 1 of the

Act, that portion shall be excluded in giving compensation u/s 2 and vice versa.

In that case compensation u/s 1, which was the old section, was fixed by taking into consideration inter alia the reasonable provision the deceased,

if alive, would have made for the dependants. u/s 2 the Courts below had

awarded damages for loss to the estate in a sum of Rs. 5,000 which figure represented the damages for the mental agony, suffering and loss of expectation of life. The Supreme Court held that there was no duplication in awarding damages under both the heads.

12. The question has been again examined by the Supreme Court in C.K. Subramania Iyer and Others Vs. T. Kunhikuttan Nair and Others, ,

Hegde, J., speaking; for the Court, after referring to certain English cases and to the decision in Gobald Motor Service Ltd. and Another Vs.

R.M.K. Veluswami and Others, , held at page 380:

The law on the point arising for decision may be summed up thus: Compulsory damages u/s 1-A of the Act for wrongful death must be limited

strictly to the pecuniary loss; to the beneficiaries and that u/s 2, the measure of damages is the economic loss sustained by the estate. There can be

no exact uniform rule for measuring the value of the human life and the measure of damages cannot be arrived at by precise mathematical

calculations but the amount recoverable depends on the particular facts and circumstances of each case. The life expectancy of the deceased or of

the beneficiaries whichever is shorter is an important factor. Since the elements which go to make up the value of the life of the deceased to the

designated beneficiaries are necessarily personal to each case, in the very nature of things, there can be no exact or uniform rule for measuring the

value of human life. In assessing damages, the Court must exclude all considerations of matter which rest in speculation or fancy though conjecture

to some extent is inevitable. As a general rule parents are entitled to recover the present cash value of the prospective service of the deceased

minor child. In addition they may receive compensation for loss of pecuniary benefits reasonably to be expected after the child attains majority. In

the matter of ascertainment of damages, the appellate Court should be slow in disturbing the findings reached by the Courts below, if they have

taken all the relevant facts into consideration.

13. In the light of the foregoing principles, it has to be examined whether the Court below was right in awarding Rs. 5,000 as loss to the estate u/s

2. In other words, the question is whether there is any duplication of the same claim under Sections 1-A and 2. The Court below estimated the

annual gross income of the deceased at the time of his death at Rs. 4,860. At the

time of his death the deceased was 30 years old. On these aspects there is no controversy. The Court below found on the evidence that the third plaintiff, the widow, would have had the benefit Rs. 1,800 per annum out of the salary of the deceased. The Court below took it that the deceased would have lived for another 30 years and on that basis observed that the third plaintiff would have received from the deceased benefit of about Rs. 54,000. But the Court did not award this sum. A contention appears to have been raised on behalf of the first defendant to the effect that the deceased had insured his life for Rs. 20,000 and that the benefit of the policy was to go to the third plaintiff and that amount should also be deducted. The Court below took note of that fact and held that even if the total benefit due to the third plaintiff Was taxed down at 30 per cent and a further deduction of Rs. 20,000 (insurance amount) was made, still what the third plaintiff claimed, namely, Rs. 10,000 was just and proper. So far as plaintiffs 4 and 5 are concerned, the Court below took their ages into consideration and the period during which they would normally receive help from the deceased and on that basis calculated the benefit which they had lost. Our attention has not been drawn to any circumstance to hold that the said basis is in any way erroneous. u/s a damages can be claimed inter alia for loss of expectation of life. The only restriction as laid down by the decisions of the Supreme Court is that same persons should not claim damages under both the heads. As we have pointed out already, the learned Judge has rejected the claim of plaintiffs 1 and 2, namely, the parents of the deceased on the ground that they were not dependants and that they were not entitled to get any damages under head No. 1. However, with regard to the loss to the estate, the mother, namely, the second plaintiff is an heir under the Hindu Succession Act, 1956, and consequently, she will be getting the benefit only under the second head i.e., u/s 2 and not with reference to damages u/s 1-A. Having regard to these circumstances, we do not think that the Court below was wrong in fixing the sum of Rs. 5,000 as damages u/s 2, though it has to be admitted that this amount has been arrived at as a result of surmise and conjecture which are inevitable in the circumstances; nor do we find any ground to accept the contention of plaintiffs 3, 4 and 5 that the Court below should have awarded more under this head.

14. In the result, the appeal fails and is dismissed with costs. The Memorandum of cross-objections is dismissed, but in the circumstances, without costs.