
(1961) 06 PAT CK 0004
In the Patna High Court
Case No : A.F.A.D. No. 1183 of 1959

Jang Bahadur Singh

APPELLANT

Vs

Sunder Lal Mandal and Others

RESPONDENT

Date of Decision : 27-06-1961

Acts Referred:

Citation : AIR 1962 Patna 258

Hon'ble Judges : Raj Kishore Prasad, J

Bench : Single Bench

Advocate : Ramakant Varma, for the Appellant; Sailesh Chandra Sinha, for the Respondent

Final Decision : Dismissed

Judgement

Raj Kishore Prasad, J.—The principal question, for determination in the appeal is, whether defendant 1, the owner of the motor-bus which, while being driven by defendant 2, caused injury to the horse of the plaintiff, as, a result or which it became permanently lame, is also liable in damages?

2. Briefly stated, the facts relevant to the appeal are these:

3. The plaintiff had a horse and the members of his family used to ride on it. On the 10th September, 1954, at about 1 P.M. in the broad day-light, the plaintiff's sister's son, Gulab Narain Jadav (P. W. 2), was proceeding on the horse towards Nathnagar. When he reached near a bridge, called Champanala, he got down from the horse, held its reins, waited towards the left side of the road for he syce to come and take charge of the horse. At that very time, the motor bus, driven by defendant 2, belonging to defendant 1, was coming from the opposite direction.

4. According to the plaintiff, on seeing the bus coming near him, P.W. 2, Gulab Narain Jadav, raised his hand giving a signal to the driver (defendant 2) to stop the bus, so that he could remove the horse from the road, but the driver did not Pay any heed to his signal, and, came driving the bus, rashly and negligently,

towards the wrong side of the road, blowing the horn, and, passed by the side of P.W. 2. The horse on this got frightened and, the bus dashed against the horse causing serious injury to it making it permanently lame.

5. The plaintiff, therefore, brought an action in damages in ion against defendant J the owner of the bus, and its driver, defendant 2 and, another, who was also alleged to be the owner of the bus, but we are not concerned with him now. The plaintiff alleged in his suit that it was due to the rash and negligent driving of the bus by defendant 2 that the horse was seriously injured, and, therefore, be claimed Rs. 1200/-, the price of the horse, as damages jointly against all the defendants.

6. The suit was contested only by defendant 1, the appellant. The driver, defendant 2, did not appear, nor did he file any written statement contesting the claim of the plaintiff nor, was he examined in the suit.

7. The main defence of defendant 1, with which alone we are concerned, was that the horse of the plaintiff was straying on the road unattended by any person, and, when the bus reached near the Champanala bridge, the driver, defendant No. 2 blew the horn and the horse moved away from the road, and, defendant 2 drove the bus further, but as soon as the bus crossed the bridge the horse all on a sudden took its turn and came on the road and began jumping and it got collided with the bus, and, the driver, in spite of his due care and caution, could not avoid the accident. It was, accordingly, alleged that there was no negligence on the part of the driver, defendant 2, and, as such, the plaintiff was not entitled to any damage. The quantum of damage was also challenged.

8. The trial Judge, who heard the suit, in the first instance, held that on the evidence "it could not be concluded that the accident, was caused by the negligent driving of defendant No. 2" and, that, therefore the plaintiff was not entitled to any damage. He, further, held that since the horse had become lame and permanently useless the plaintiff, if the suit had been decreed, would have been entitled to Rs. 1200/- as damages, as claimed, both against the owner, defendant 1, and, his driver defendant 2. He, therefore, on the earlier finding, dismissed the suit.

9. The plaintiff, thereafter, preferred an appeal to the first appellate court, which was heard and disposed of by the learned Subordinate Judge of Bhagalpur. He held that the driver was driving the bus on the wrong side of the road, that he was also driving it negligently, that there was no negligence on the part of P.W. 2; that the plaintiff was not guilty of contributory negligence, that the horse of the plaintiff got injury by the sole negligence of defendant 2, and, that, therefore the plaintiff was entitled to recover Rs. 1200/- by way of damages from both defendants 1 and 2. He, therefore, rejected the defence, reversed the decision of the first court-and decreed the plaintiff's suit against defendants 1 and 2 only.

10. Against the said joint decree passed against both defendants 1 and 2, only defendant 1 has come up in appeal, and, defendant 2 has not instituted any

appeal in this court. The plaintiff also has not filed any cross objection to the decree appealed from so far as his suit was dismissed against defendant 3.

11. The points raised by Mr. Ramakant Varma, on behalf of the appellant, were:

(1) that the learned Subordinate Judge has decreed the plaintiff's suit only because of his sympathy for him, which was no legal consideration, and as such he should not have taken it into account. In this connection, he relied on a Bench decision of this Court in Governor-General of India in Council Vs. Bibi Saliman, ;

(2) that the finding of the court of appeal below, that defendant 2 was guilty of negligence and that his negligence was the effective cause of the injury to the plaintiff's horse, is erroneous in law;

(3) that the plaintiff has not discharged the onus, which was on him, and, that the court of appeal below has wrongly placed the onus on the appellant to prove want of negligence on the part of defendant 2;

(4) that the plaintiff himself was guilty of contributory negligence, and, therefore, the plaintiff was not entitled to recover any damage. He relied, in support of his argument, on a Bench decision of the Calcutta High Court in Jeet Kumari Poddar and Others Vs. Chittagong Engineering and Electric Supply Co. Ltd. and Another, ;

(5) that the appellant, the admitted owner of the bus, was not liable in damages, because his driver, defendant 2, was not liable, according to the doctrine of "the last opportunity". In support of his contention, he strongly relied on Davies v. Mann (1842) 10 M W 546, and, on Radley v. London and North-Western Railway Co. (1876) 1 App Cas 754, in which the just mentioned case was approved by the House of Lords;

(6) that, admittedly, the appellant was not on the bus, and that assuming his bus was being driven rashly and negligently by his driver, and, that, the latter was liable in damages, a decree having been passed against him, no decree should have been passed against the appellant also simply because he was the owner of the bus, although, admittedly, he had no hand in causing the injury to the plaintiff's horse; and,

(7) that the damage allowed was excessive.

12. Mr. Sailesh Chandra Sinha, appearing for the plaintiff-respondent, combated the above contentions of Mr. Verma by countering that defendant 1, being the admitted employer of defendant 2 and the court of appeal below having found that it was due to the negligence of his driver that the injury complained of was caused to the plaintiff's horse, not only the driver, but his employer, defendant 1, was also liable in damages and as such he contended, the suit has rightly been decreed against both the employer and the employee, namely, defendants 1 and 2.

He, further, argued that, according to the defence the accident occurred when the bus had crossed the bridge, but, this defence has been rejected, and, on the

finding of the court of appeal below, the accident took place when the driver was driving the bus on the wrong side of the road, and, as such, on the off-side of the road, and, therefore, that was itself prima facie evidence of negligence, and, consequently, prima facie presumption of negligence of the driver, and accordingly the finding of the court of appeal below that he was negligent and that due to Ms negligence the injury was caused to the plaintiffs horse cannot be assailed and got rid of on any of the grounds urged. In support of this contention, reliance was placed on a Bench decision of the Madras High Court in Gobald Motor Service Ltd. and Another Vs. R.M.K. Velusami and Others, which has been relied upon also by the court of appeal below. I will now proceed to consider the points raised seriatim in the order in which they are stated above.

13. Re: (1): The learned Subordinate Judge has been vigorously criticised for addressing himself first to the question of the defendant's negligence. The effect of doing so, it is said, Was to warp his mind when he came to consider the defence whether the plaintiff was guilty of negligence, and, thereby it is said he has allowed his sympathy for the plaintiff to sway his decision. I do not agree with this criticism. It is true that a Judge must decide the case on legal evidence and must not allow himself to be carried away by his sympathy for the party. The Judge, therefore, should be careful not to allow his sympathy to affect his judgment. As observed by Farewell, L.J. in Latham v. R. Johnson and Nephew Ltd. (1913) 1 KB 398 .

"Sentiment is a dangerous will-of-the-wisp to take as a guide in the search for legal principles."

14. The above observation was, no doubt, read with approval by Ramaswami J. (as he then was), sitting in a Division Bench of this Court, in Governor-General of India in Council Vs. Bibi Saliman, , relied upon on behalf of the appellant but in my judgment the learned Subordinate Judge has not in the least allowed his sympathy for the plaintiff to sway his decision. He was right to keep in the forefront of his mind the question what was the main cause of the accident, it being admitted that the plaintiffs horse got injury by collision with the bus of the appellant while being driven by defendant 2. It was most important to form some view as to the nature of the conduct of P.W. 2 and as to how far it was reasonably foreseeable by defendant 2. For, as I shall presently show, this was an important matter to have in mind when considering the defendant's responsibility for the accident. This view of mine is supported by the observation of Sellers, L.J., in Quintas v. National Smelting Co. Ltd. (1961) 1 All ER 630 . The first grievance of the appellant, therefore, has no foundation to support it.

15. Re: (2): Here, the cause of action is founded On negligence. The charge against defendant 2, the driver, is that by rashly and negligently driving the motor bus he caused permanent injury to the plaintiff's horse. On the arguments advanced, therefore, the first and the crucial question, for consideration, is, was the defendant, 2 guilty of negligence?

16. This question can be answered really by considering whether, the plaintiff proved that the defendant was under any liability to him at Common Law. This, I think, involved consideration of three Questions, which way be framed thus:

(i) Was P.W. 2's behaviour such as was reasonably foreseeable by defendant 2, so as to impose on him a duty at Common Law to guard against it?

(ii) If so, did the defendant take adequate steps to discharge that duty? And

(iii) If he failed to take adequate steps in discharge of his duty, was his failure the cause of the plaintiff's damage?

17. In order to answer the above questions, however, it is necessary, first to know, What is Negligence?

WHAT IS NEGLIGENCE?

18. Negligence as a tort is a breach of a legal duty to take care which results in damage, undesired by the defendant to the plaintiff. The mere fact, therefore, that a man is injured by another's act, gives in itself no cause of action. If the act involves lack of due care, again no case of actionable negligence will arise, unless duty to take care exists. There is no liability for negligence unless there is, in the particular case a legal duty to take care, and this duty must be one which is owed, to the plaintiff himself and not merely to others. Thus, the ideas of negligence and duty are strictly correlative, and there is no such thing as negligence in the abstract; negligence is simply neglect of some care which we are bound to exercise towards somebody. "The duty to take care is not in the air, but only towards particular people." The duty must be in respect of the particular conduct complained of. Where, therefore, there is no duty there can be no action for negligence.

19. In Jeet Kumari Poddar and Others Vs. Chittagong Engineering and Electric Supply Co. Ltd. and Another, on behalf of the appellant, also it was held that there is no liability for negligence unless there is in the particular case a legal duty to take care therefore, where there is no duty to exercise care at all, negligence in the particular case has no legal consequences and that as such two things have to be kept distinct; first, there must be the existence of such a legal duty to take care; and, secondly the degree or amount of care which is obligatory.

20. The well-known definition of "Negligence" given by Baron Alderson, in Blyth v. Birmingham Waterworks Co. (1856) 11 Ex. 781 , is this :

"Negligence is the omission to do something which a reasonable man, guided upon those considerations, which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.""

So also Lord Wright said in Lochgelly Iron and Coal Co. v. M'Mullan (1934) AC 1 .

21. The above definition of "Negligence," therefore, speaks of two things: (1)

doing something which should not be done, or (2) omitting to do something which is to be done. Of the two it is easy to say that where a person does a thing which he, should not do he would certainly be liable, but where a person omits to do a thing he would not be liable for negligence unless the person whose conduct is impeached was under a duty to take care.

22. The sole standard is the care that would be shown in the circumstances by a reasonably careful man, and, the sole form" of negligence is a failure to use this amount of care. As said by Lord Macmillan, in *Glasgow Corporation v. Muir* (1943) AC 448 :

"The standard of foresight of the reasonable man eliminates the personal equation and is independent of the idiosyncrasies of the particular person whose conduct is in question. Some persons are by nature unduly timorous and imagine every path be set with lions; others, of more robust temperament, fail to foresee or non-chalantly disregard even the most obvious dangers- The reasonable man is presumed to be free both from over-apprehension and from over-confidence."

As observed in *Ghannan v. Glasgow Corporation* 1950 SC 23

"The reasonable man is cool and collected, and remembers to take precaution for his own safety even in an emergency.""

See, in this connection, *Salmond on the Law of Torts*, Twelfth Edition, 1957, pages 411-412.

23. The tort of negligence may, therefore, be described as the absence of the exercise of the ordinary care and skill of a reasonable and prudent man where a duty to exercise such care exists, either with regard to the circumstances of any act or omission or its consequence which results in damage to another.

24. The essential conditions of liability for negligence accordingly, are:

(i) The existence of a duty owed by the defendant to the plaintiff himself, and not merely to others to take reasonable care towards the plaintiff to avoid the damage complained of;

(ii) The breach of that duty on the part of the defendant and,

(iii) Consequential injury or damage thereby, i.e. damage as the natural and probable consequence and the direct cause of breach of the duty complained of.

25. As observed by Viscount Simonds of the Privy Council in *Overseas Tankship (U. K.) v. Morts Dock and Engineering Co. Ltd.* (1961) 1 All ER 404 at page 415,

"The essential factor in determining liability is whether the damage is of such a kind as the reasonable man should have foreseen."

26. To entitle a plaintiff to recover in an action for negligence, therefore, he must not merely establish the facts of the defendants-negligence and of his own damage, but he must show that the one was the effect of the other; there must,

to use an expression of Lord Cairns, in *Metropolitan Rly. Co. v. Jackson* (1877) 3 AC 193, page the proof of "incuria dans lacum injuriae." There must be causal connection between the negligence and the occurrence.

27. In the present case, therefore before the plaintiff succeeds, he has to prove that defendant 2 was guilty of negligence, and, that such negligence was the effective cause of the injury caused to the plaintiff's horse.

28. Applying the above tests here what we find is this: P.W. 2 on seeing the bus coming from the opposite direction got down from the horse and caught hold of its reins, and was standing to the left side of the road waiting for his syce to come to take charge of the horse. On the finding of the court of appeal below, which is fully supported by evidence and which has not been challenged on appeal, defendant 2, who was coming from the opposite direction, was driving the bus on his right side, that is towards the right side of the road, which was his own wrong side as also of the road. Defendant 2 was given a signal by P.W. 2 to stop the bus, but defendant 2 paid no heed to it and did not stop the bus nor did he slow down the speed; on the other hand he came driving the bus rashly, negligently and in speed on his right side, which was the wrong side of the road.

RULE OF THE ROAD

29. There is what is called the Rule of the Road. A person must be on his left side, in the case of a motor collision therefore the enquiry about reasonable care is reduced to the more precise and narrow, one, "Was the defendant on the left or right side of the road?"

30. It is equally a well established Rule of the Road that it is the duty of a person driving either over a crossing for foot passengers at the entrance to a street or over a bridge, which is used also by foot passengers to drive slowly and with caution. A driver of a motor vehicle must take all reasonable steps to give precedence to a foot passenger. The foot-passenger himself will be held wholly or in part responsible for a motor collision only if he steps off the foot-path on to the crossing, or, goes to the wrong side of the road, or comes in the middle of the road, or tries to cross the road, while the vehicle is coming from the opposite direction and is approaching him, so as to give the driver of the vehicle no reasonable chance of avoiding it.

31. A duty is owed by one user of a road to another or his property. A principle is that any particular user owes a duty to any other particular user not to do or omit anything which he might reasonably anticipate might injure the other, or at best, where such person might reasonably be expected to be injured by a failure to take care; per Lord Russell, in *Bourhill v. Young* (1943) AC 92 at p. 102.

32. The general rule is that the vehicle should be driven at a speed which enables the driver to stop within the limits of his vision and failure to do this will almost always result in the driver being held, in whole or in part, responsible for the collision. Though being on the wrong side of the road is evidence of

negligence, it is slight evidence only, for the rule of the road, necessarily is not inflexible. For example, if a collision, can be better avoided by going On the wrong side, it is not merely justiciable to do so but obligatory; See Clerk and Lindsell on Torts, Eleventh Edition, 1954 pages 368-370.

33. The above rules apply here also. There was, therefore, a duty on the part of the defendant 2, which, he owed towards P.W. 2 as well as towards the horse of the plaintiff, to take reasonable care to ward off the danger ahead of colliding with the horse, and, to avoid the damage complained of. He would have easily averted the incident and its consequential injury to the horse if he had only observed the above ordinary rules of the road. He not only disobeyed them but by deliberately disregarding them caused injury to the horse by his rash and negligent driving in speed. The horse was within kicking distance of the bus and it was standing not out of the range of the collision. Even then defendant 2 not only was driving on the wrong side of the road but was driving it in speed as, found by the Court of appeal below. It is not the defence that the driver went to the wrong side of the road to avoid the accident. There was, as such, *prima facie* negligence on the part of defendant 2. The consequences of his negligence were clearly and reasonably foreseeable by defendant 2. It is admitted that the injury caused to the horse was the direct cause of accident which took place due to the breach of duty on the part of the defendant 2.

34. It follows, therefore, that the question posed by me must be answered in the affirmative by holding that defendant 2 was guilty of negligence and his negligence was the effective cause of the injury complained of. The finding of the Court of appeal below on this question, therefore, is correct in law and is accordingly, affirmed. The first and the third subsidiary questions, posed by me. must therefore be answered in the affirmative, and, the second in the negative.

35. Re No. (3): The burden of proving negligence lies on the plaintiff who alleges it. In a limited number of cases, however, the facts of the accident may of themselves constitute evidence of negligence and to such a case the doctrine *res ipsa loquitur*, which, means "the thing speaks for itself", that is, that the events "charged as negligence tells its own story of negligence on the part of the defendant, the story as told being clear and unambiguous, applies. The rule *res ipsa loquitur* is one of the exceptions to the general rule that the burden of proving negligence lies on the plaintiff. The expression "*res-ipsa loquitur* does not state any principle of law. It is only a convenient label to apply to a set of circumstances in which a plaintiff proves a case, so as to call for a rebuttal from the defendant without having to allege and prove any specific act or omission on the part of the defendant. This maxim is only a rule of evidence affecting onus, but it does not alter the rule that the burden on proving negligence rests upon the plaintiff. It applies only to those cases where the exact cause of the accident is unknown.

36. In such a case, the accident speaks for itself, so that it is sufficient for the plaintiff to prove the accident and nothing more. The plaintiff merely proves a

result, not any particular act or omission producing the result. If the result, in the circumstances in which he proves it, makes it more probable than not, that it was caused by negligence of the defendants the doctrine is said to apply and the plaintiff will be entitled to succeed unless the defendant by evidence rebuts that probability. The doctrine *res ipsa loquitur*, therefore, applies (1) when the occurrence suggests, as a matter of reasonable inference, that it was the result of the negligence of the defendant or of some one for whose acts or omissions he is responsible, (2) the cause of the occurrence is unknown, and, (3) the presumption of negligence raised by the occurrence is not rebutted by any explanation based on additional facts proved: See, Clerk and Lindsell on Torts, Eleventh Edition, 1954, para 647 page 399.

37. To the facts of the instant case, however, the doctrine "*res ipsa loquitur*" to which also a reference was made in course of the argument, does not apply, for the simple reason that, here, the cause of the accident is not unknown rather it is well known.

38. In all actions for negligence, the plaintiff must plead and prove duty, breach and causal relation. He must, therefore, prove :

(i) that the defendant was under a duty, to take reasonable care towards the plaintiff to avoid the damage complained of--a duty to take care owed by the defendant to the plaintiff;

(ii) that there was a breach of the duty on the part of the defendant, which means his negligence; and,

(iii) that the breach of the duty was a direct cause of the damage complained of--damage as the natural and probable consequence.

39. Viscount Simonds, in (1961) 1 All ER 404 (*supra*), at p. 414, analysed the elements of tortious liability for negligence in these words:

"That the plaintiff must prove a duty owed to him by the defendant, a breach of that duty, by the defendant and consequent damage. But there can be no liability until the damage has been done. It is not the act but the consequences on which tortious liability is founded. Just as (as it has been said), there is no such thing as negligence in the air, so there is no such thing as liability in the air."

40. Their Lordships of the Privy Council, in, the just mentioned case, at page 415, displaced the proposition that unforeseeability is irrelevant if damage is "direct," and, observed:

"In doing so, they have inevitably insisted that the essential factor in determining liability is whether the damage is of such a kind as the reasonable man should have foreseen."

41. The general rule, as such, is that the plaintiff must establish a breach of duty and its causal connection with his injury. If he fails to prove either of them, his action fails. The mere proof of some injury is not enough. He must, therefore,

prove not only that the defendant was negligent but also that the defendant's negligence was the cause of the accident.

42. Let us now see if the plaintiff here, judged by the above tests, has discharged his onus by giving affirmative proof of negligence on the part of defendant 2, the servant of the appellant, and if he has further shown that the negligence of the defendant 2, was the proximate cause or the immediate or precipitating cause of the damage or whether the damage complained of was of such a kind as the reasonable man should have foreseen.

43. The plaintiff examined P.W. 2, who was an eye-witness to the accident and who was riding on the horse, besides examining himself as P.W. 4 and "his son P. W. 1 both of whom stated that ,the horse used to get frightened on hearing noise. The plaintiff also examined the veterinary doctor P.W. 3. The driver, who was the best person to controvert the allegation of the plaintiff, as he was the only other admitted eye-witness to the accident, was not examined nor did he file any written statement denying the assertion of the plaintiff. It was admitted by the appellant, who was examined as D.W. 1, although admittedly he was not in the bus, that defendant 2 was driving the bus that day and that he (defendant 2) informed him that the horse had collided against the bus as it had got frightened and it suddenly came before the bus.

The defence of D.W. 1, already indicated, has been rejected by the Court of appeal below, which accepted the evidence on behalf of the plaintiff. In these circumstances, it is not correct to say that the plaintiff has not discharged the onus which lay upon him by proving, very satisfactorily and convincingly, that defendant 2 owed a duty towards the horse of the plaintiff, and that there was a breach of that duty on his part which caused the damage complained of and as such he was guilty of negligence and that his negligence was the sole cause of the injury complained of, and, further, that the damage complained of was of such a kind as defendant 2, as a reasonable man, should have foreseen. All the prerequisites of the liability of defendant 2 having been proved, the appellant consequently had rightly been held liable. I, therefore, hold that the plaintiff has discharged his onus.

44. While considering the evidence adduced on behalf of the plaintiff, the court of appeal below has, no doubt, referred to the fact that defendant 2 was not examined to rebut the evidence of P. W. 2; but that does not mean that it has misplaced the onus. When the court of appeal below found that the plaintiff had discharged his onus by proving negligence on the part of defendant 2, which was the direct cause of the damage of the plaintiff, naturally, thereafter, the onus then shifted to the appellant to prove there was no negligence on the part of his servant, rather there was negligence on the part of the plaintiff, which was the decisive cause of the injury complained of.

The appellant having failed to produce the best evidence, which was under his control, to rebut the evidence adduced on behalf of the plaintiff, the learned

Subordinate Judge rightly held that the plaintiff had proved his case. There is, therefore, no question of wrongly placing the onus. Moreover, in a case, where both parties adduce evidence, the question of onus of proof loses importance and it recedes to the background and the court does not commit any error of law in deciding the case on a consideration of the evidence of both sides, as had been done in the instant case. On the totality of the evidence in this case, the learned Subordinate Judge had no alternative but to find the charge of the plaintiff against defendant 2 proved. The objection of Mr. Verma, On the ground of onus of proof, is, therefore, devoid of any substance.

45. Re: (4): The next question, which falls for consideration, is : Was the plaintiff guilty of contributory negligence?

46. In order to answer this question, it is essential to know what is meant by contributory negligence? WHAT IS CONTRIBUTORY NEGLIGENCE?

47. In an action for negligence, where negligence of the defendant has been alleged by the plaintiff, one of the defences, which are available to a defendant, in such an action, is the plea of contributory negligence. Contributory negligence of the plaintiff is a good defence, because it is commonly the duty of every man to look after himself, and for injuries which he would have avoided by the use of care, he will seek redress from the law in vain.

48. The common law rule of contributory negligence, however, has now been abrogated in England by the Law Reforms (Contributory Negligence) Act, 1945 but, in India, it is still a good defence. It should be remembered, however, that the burden of proving the negligence of the plaintiff and that it contributed to the damage in such a way as to exonerate the defendant wholly or partially from liability lies upon the defendant. In India, the rule that has been generally followed is that the Common Law of England, which represents Justice, Equity and, Good Conscience, should be applied where there is no other law for the time being in force, that is, where there is no provision to the contrary. Section 37(2) of the Bengal, Agra and Assam Civil Courts Act (Act XII of 1887) enacts that in case not provided by Section 37 (1) or by any other law for the time being in force, the Court shall act according to justice, equity and good conscience. This gives jurisdiction to Civil Court in India to try actions based on Tort, because so far there is no statutory law on the subject But the Courts in India have, however, on several occasions refused to apply a rule of English Law on the ground that it is not applicable to Indian Society and circumstances and that if it is adhered to in this country, it will work an injustice or a hardship.

49. The theory of contributory negligence is no special branch of the law. It is only a different aspect of the main question to be determined in the case, that is what is the effective or predominant cause of action. The doctrine of contributory negligence rests upon the view that though the defendant has, in fact, been negligent yet the plaintiff has by his own carelessness severed the causal connection between the defendant's negligence and the accident which has

occurred, and that the defendant's negligence accordingly is not the true proximate cause of the injury.

50. The leading authority on the law of contributory negligence is the judgment of Lord Penzance in (1876) 1 AC 754 (supra). His Lordship in his speech to the House of Lords, formulated the following rules:

"The first proposition is a general one, to this effect, that the plaintiff in an action for negligence cannot succeed if it is found by the Jury that he has himself been guilty of any negligence or want of ordinary care which contributed to cause the accident."

"But there is another proposition equally well established, and it is qualification upon the first, namely, that though the plaintiff may have been guilty of negligence, and although that negligence may, in fact, have contributed to the accident, yet if the defendant could in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him."

Lord Penzance, in the just mentioned case, clearly stated the doctrine thus:

"Though the plaintiff may have been found guilty of negligence, and although that negligence may, in fact, have contributed to the accident, yet if the defendant could in the result by the exercise of ordinary care and diligence, have avoided the mischief, which happened, the plaintiff's negligence will not excuse him."

The Rule of Law of Liability for Negligence:

51. Lord Blackburn, in *Cayzer, Irvine and Co. v. Carron Co.* (1884) 9 A C 873 said:

"The rule of law is that if there is blame causing the accident On both sides, however small that blame may be on one side, the loss lies where it falls."

52. The rule of law, therefore, is that when, two persons have been negligent, he must bear the blame who was at fault in not avoiding the result of the other's negligence. The ultimate question, rather the crux of the matter, in such a case is: Who caused the accident? Its answer furnishes the working rules of Contributory negligence, and, as such, the rule of law of liability for negligence and its effect on the plaintiff's action for damages for actionable negligence. The answers to the question, Who Caused the accident? are:

(1) If it was the defendant, the plaintiff can recover in spite of his own negligence. The plaintiff succeeds if the defendant's negligence was subsequent to and severable from the plaintiff's. This rule is illustrated by what is called the "donkey's case" in (1842) 10 M W 546 (supra) the usual mode of formulation which rule is to say that the defendant is liable, if he, notwithstanding the contributory negligence of the plaintiff, could have avoided the accident by the use of reasonable care. This principle is also illustrated by the decision of the

House of Lords in (1876) 1 AC 754 in which (1842) 10 M W 546. was approved;

(2) If it was the plaintiff, he cannot recover in spite of the defendant's negligence. The plaintiff fails if his negligence was subsequent to and severable from the defendant's. This rule is illustrated by *Butterfield v. Forrester* (1809) 11 East 60;

(3) If it were both plaintiff and defendant, the plaintiff cannot recover. The plaintiff fails also if his negligence and the defendant's negligence are simultaneous and synchronous, or, if the defendant could not have avoided the result of the plaintiff's negligence. This rule rests upon the decisions of the House of Lords in *Admiralty Commissioners v. S. S. Volute Owners* (1922) 1 AC 129; *McLean v. Bell* (1932) 147 LT 262 and *Swadling v. Cooper* (1931) 1931 AC 1;

(4) If the plaintiff's conduct, though subsequent, was not severable, but was really due to the dangerous situation created by the defendant's negligence, the plaintiff succeeds. This rule is spoken of as *The Bywell Castle* (1879) 4 PD 219. It is also known as the doctrine of "alternative danger" = the "dilemma principle". Where the plaintiff is perplexed or agitated by being exposed to danger by the wrongful act of the defendant, it is sufficient if he shows as much judgment and self-control in attempting to avoid that danger as may reasonably be expected of him in the circumstances. What is done or omitted to be done in the "agony of the moment" cannot fairly be treated as negligence unless the plaintiff's trade or calling is such that a certain degree of aptitude for dealing with dangerous situations may be expected of him. See, also the Coach accident case in *Jones v. Byce* (1816) 1 Stark 493. This doctrine was further extended in *Brandon v. Osborne Garrett and Co* (1924) 1 KB 548; and,

(5) If the circumstances which are established are equally consistent with the allegation of the plaintiff as with the denial of the defendant, the plaintiff again fails, in the absence of direct proof of negligence on the part of the defendant, for the very simple reason that the plaintiff is bound to establish the affirmative of the proposition : "Ei qui affirmat, non ei qui negat, incumbit probatio". Lord Macmillan in *Jones v. G.W. My. Co.* (1931) 144 LT 194, at p. 201 on this question said:

"If the evidence establishes only that the accident was possibly due to the negligence to which the plaintiffs seek to assign it, their case is not proved. To justify the verdict which they have obtained the evidence must be such that the attribution of the accident to that cause may reasonably be inferred. If a case such as this is left in the position that nothing has been proved to render more probable any one of two or more theories of the accident, then the plaintiff has failed to discharge the burden of proof incumbent upon him. He has left the case in equilibrium, and the Court is not entitled to incline the balance one way or the other."

53. The above passage was quoted with approval by Ramaswami J., as he then was, in *Governor-General of India in Council Vs. Bibi Saliman*, relied upon by the

appellant. Ramaswami, J., who delivered the main judgment of the Court, exhaustively reviewed the leading authorities on the point and took the same view and Manohar Lall. J. echoed his views.

54. The doctrine of contributory negligence is founded upon a maxim of Bacon, "In jure non remota causa, sed proxima spectator,"--"It were infinite for the law to judge the cause of causes and, their impulsions one of another; therefore, :it contenteth itself with the immediate cause and judgeth of acts by that without looking to any further degree". The law takes into consideration any act or conduct of the party injured or wronged which may have immediately contributed to that result. This is called the Test of Proximity, that is, the lest of proximate cause, which is one of the tests of causation; but it is of no avail where there is a duly to anticipate and guard against the intervention of other causes for instance, a bailees negligence resulting in loss due to the goods being stolen by a thief.

55. Another well-known test is the Test of Probability, that is, the test of natural and probable consequence or reasonable foreseeability. It was formulated by Pollock, C.B., in *Greenland v. Chaplin* (1850) 5 Ex. 243 at p. 243 thus:

""A person is expected to anticipate and guard against all reasonable consequences, but he is not by the law of England expected to anticipate and guard against that which no reasonable man would expect to occur."

56. The above test of probability held the held till before 1921. Prior to 1921 it was generally thought that there was only one test to be adopted in the law of Torts with respect to (i) ascertainment of liability, and (ii) the fixing or the extent of that liability; and this test was the test of probability or foresight or the test of possible foresight, as it is called. This law underwent a change in 1921 with the decision of the Court of Appeal in *Re; An Arbitration between Polemis and Furness, Withy and Co.* (1921) 3 KB 560: (1921) 1 All ER 40.

57. The rule laid down in the above case, better known as *Polemis*" case 1921) 3 KB 560 was that if the defendant was negligent he is liable for all the actual consequence, whether probable or not, and the test to determine whether the defendant was negligent or not is the probability of evil consequences. According to this rule a man may have to answer for consequences which he not only did not, but could not, con emplate having no notice of the conditions that made him liable. The decision in *Polemis* plainly asserts, as observed by the Privy Council in (1901) 1 All ER 404, that if the defendant is guilty or negligence, he is responsible for all the consequences, whether reasonably foreseeable or not.

58. The above rule in *Polemis* (1921) 3 KB 560 was, however, rejected in 1961 by the Privy Council in (1961) 1 All ER 404, (*supra*). Viscount Simonds, who delivered, the opinion of the Board, at page 413, said:

".....the authority of *Polemis* (1921) 3 KB 560 has been .severely shaken, though lip-service has from time to time been paid to it, in their Lordships"

opinion, it should no longer be regarded as good law."

59. Their Lordships, therefore, laid down, the law, to quote the placitum, in these words:

""In the law of negligence the test whether the consequences were reasonably foreseeable is a criterion alike of culpability and of compensation; and the dichotomy whereby culpability (viz. breach of duty to take reasonable care) was regarded as depending on the foreseeability of consequences but compensation (viz., the remoteness of damage) depended on whether the negligent act or omission was the "direct" cause of the damage, whether foreseeable or not, was a false dichotomy."

60. The rule laid down, in the above Privy Council case, therefore, to quote the words of Viscount Simonds, as stated before, is that

"the essential factor in determining liability is whether the damage is of such a kind as the reasonable man should have foreseen."

61. Let us now examine the facts here, in the light of the above rules of liability for negligence, in order to decide if the plaintiff was guilty of contributory negligence, as contended?

62. In the present case, the court of appeal below has found that there was no negligence on the part of the plaintiff.

63. As observed by Lord Roche of the Privy Council, in *Holford Stewart v. G. A. F. Hancock* AIR 1940 PC 128: 1940 Pat WN 733 negligence is a question of fact, not of law and each case must depend upon its own facts.

64. Contributory negligence implies negligence on both sides. It is a question of fact in each case whether the conduct of the plaintiff amounts to contributory negligence.

65. Furthermore, it is well-settled that in order that negligence of a party may be contributory, it is necessary that it should be the decisive or effective cause of the accident or collision. Therefore, where a party's negligence, even though it continued to the end but did not contribute to the accident, or the collision, which was entirely due to the negligence of the other party, the latter is liable to the former in damages; *William Ralph v. Robert Woodbur* AIR 1943 PC 110.

66. If, therefore, there was no negligence on the part of the plaintiff and on the evidence and facts of the case, there could be none, the question of contributory negligence of the plaintiff does not arise. In this view, it is obvious that Mr. Varma was arguing on the question of contributory negligence in a sense an academic case. Here the accident complained of was due to the sole negligence of the defendant. The plaintiff at no stage was at all negligent. The learned Subordinate Judge, therefore, rightly held on the evidence before him that there was no contributory negligence on the part of the plaintiff.

67. Mr. Verma, however, relying on Jeet Kumari Poddar and Others Vs. Chittagong Engineering and Electric Supply Co. Ltd. and Another, strongly urged that mere absence of negligence on the part of the plaintiff would not be sufficient to show that he was not guilty of contributory negligence and, further that knowledge by the plaintiff of an existing danger or of the defendants' negligence is a very important element in determining whether or not he has been guilty of contributory negligence. In the just mentioned Calcutta case, K.C. Chunder, J. with whom R.C. Mitter, J. agreed, referred to the decision of Lord Parmoor, in Grayson Ltd. v. Ellerman Line, Ltd. (1920) AC 466, at p. 198 and said:

""Lord Parmoor said:

I do not think that the question of contributory negligence depends upon any breach of duty as between the plaintiff and the negligent defendant; it depends entirely on the question whether the plaintiff could reasonably have avoided the consequences of the defendant's negligence".

"Ordinarily, in case of contributory negligence, there is negligence on both sides, but, as has been pointed out in the passage just quoted the real test is whether one party could reasonably have avoided the consequences for the other party's negligence. Therefore, in the present case, even mere evidence of negligence on the part of the deceased would not be sufficient to justify want of contributory negligence."

"The rule in (1842) 10 M W 548, approved and applied by the House of Lords in (1876) 1 AC 754, seemed to lay down as universal rule that the true test in case of contributory negligence is the existence of the last opportunity of avoiding the accident. The decision of the Judicial Committee of the Privy Council, however, in British Columbia Electric Co. v. Loach (1916) 1 AC 719: (AIR 1916 PC 208) shows that this rule, although an approximation to the truth is not a complete and adequate statement of it. This decision of the Judicial Committee has been approved of and accepted in other Subsequent decisions. It is unnecessary for us to enter into the question of qualifications of the rule in (1842) 10 M. W. 546."

68. Let us now ascertain the facts here, to see if the above mentioned case has any application here, by applying the test, whether one party could have reasonably avoided, consequences of the other party's negligence.

69. On the facts here, it was simply impossible for P.W. 2 to have avoided the consequences of the negligence of defendant 2. It should be remembered that, on the evidence, P.W. 2 with his horse, was standing towards the left side of the road; defendant 2 was coming With the bus from, the opposite direction and driving it on the wrong side of the road, that is, he was only coming by same side of the road, which was the wrong side of the road for defendant 2, where P.W. 2 and his horse were standing. Towards the left of P.W. 2 was the horse and further left was a ditch. P, W. 2, therefore, was standing with his horse so to say,

on the brink of a ditch. P.W. 2 raised his hands to defendant 2 to stop the bus.

P.W. 2, therefore could not possibly have knowledge of the danger to come, or, of the negligence act of defendant 2 in not heeding the signal to stop the bus, in breaking the ordinary rule of the road, and in committing breach of his duty which he owed towards P.W. 2 and the horse. P.W. 2 could not possibly have anticipated that defendant 2 would not, in spite of his signal to stop, slow down the speed of the bus, or, stop it, or pass by the left side of the road which would have clearly avoided the collision, because in that case the bus would have been beyond the kicking distance of the horse. Placed in such a situation, even if P.W. 2 would have wanted to move further left, he could not possibly have done so in view of the ditch to the left of the horse.

For these reasons, in my opinion, P.W. 2 could not at all reasonably have avoided the consequences of the negligence of defendant 2. In the instant case, therefore, absence of negligence on the part of the plaintiff would be sufficient to justify want of contributory negligence on the part of the plaintiff. The ease, relied upon, therefore, has no application to the facts here.

70. It is important to remember, in this connection the caution given by Lord Finlay, in *Thomson v. Inland Revenue* 1919 SC 1. The Lord Justice, at p. 10 said:

"No inquiry is more idle than one which is devoted to seeing how merely the facts of two cases come together. The use of cases is for the propositions of law they contain; and it is no use to compare the special facts of one case with the special facts of another for the purpose of endeavouring to ascertain what conclusion you ought to arrive at in the second case."

71. *The Governor-General of India in Council Vs. Bibi Saliman*, , also does not help the appellant, because, in the instant case, the negligence of the defendant was the decisive cause of the harm done to the plaintiff's horse and, as such, on that decision, the defendant would be liable even assuming there was negligence on the part of the plaintiff, although on the facts here, there was none.

72. For the foregoing reasons, therefore, I hold, in agreement with the court of appeal below, that, on the facts of this case, the plaintiff was not guilty of contributory negligence. The point of contributory negligence, urged on behalf of the appellant, must, therefore fail.

73. Re: (5): The next question, which arises for decision, and, on which over-emphasis was laid on behalf of the appellant, is whether the plaintiff had the "last opportunity"? To answer this question, it is necessary to know what is the doctrine of the "last opportunity"?

The Doctrine of the "Last Opportunity".

74. There are cases where there is so substantial a difference between the position of the two parties at the material time that, although the accident would not have occurred without the plaintiff's negligence, it would not be fair or

reasonable to regard, him as the author of his own wrong. This is the fundamental (though seldom openly expressed) idea behind a series of cases which begin with (1842) 10 M W 546 (*supra*).

75. The doctrine, laid down in these cases, with the object of mitigating the harshness of the original Common Law rules, has often been called (although not in the cases themselves) the doctrine or rule, of the "last opportunity", the "last clear opportunity" or the "last clear chance".

76. The doctrine of the "last opportunity" is a very important qualification of the general principle that the contributory negligence of the plaintiff is a good defence. This qualification may be conveniently termed the rule in (1842) 10 M W 546 this being the first, case in which it was recognised, and, later the rule was approved as stated earlier by the House of Lords in (1876) 1 AC 754. Read literally it is not merely a limitation of the general rule as to contributory negligence but the complete negation of it.

77. The rule in (1842) 10 M W 546 may therefore be formulated thus :

The contributory negligence of the plaintiff is no defence if the defendant had later opportunity than plaintiff of avoiding the accident by reasonable care, and at the time either knew or ought to have known of the danger caused by the plaintiff's negligence.

78. Combining this rule in (1842) 10 M W 546 with the general principle of contributory negligence, the following result is reached:

"When an accident happens through the combined negligence of two persons, he alone is liable to the other who had the last opportunity of avoiding the accident by reasonable care, and who then knew or ought to have known of the danger caused by the other's negligence." See, Salmond on the Law of Torts, Twelfth Edition 1957 page 439-441.

79. In other words, the rule is that he who last has an opportunity of avoiding the accident, notwithstanding the negligence of the other is solely responsible.

80. According to the doctrine of the "last opportunity", therefore, the true test is the existence of the last opportunity of avoiding the accident that when the accident happens through the combined negligence of plaintiff and defendant, the defendant is liable, but only if he had a later opportunity than the plaintiff of avoiding it by reasonable care. In other words although, both plaintiff and defendant may have been guilty of negligence in causing the accident yet if at some point of time before the accident the plaintiff has ceased to have any power to prevent it--the issue having passed beyond his control--and nevertheless the defendant still retains the power of preventing it by due care, the whole responsibility passes to the defendant. Since he alone has now the power, he alone has the duty of preventing the accident, and the prior negligence of the plaintiff becomes irrelevant and immaterial.

81. The above rule was modified to accommodate the strange case of (1916) 1 AC 719 : AIR 1916 PC 208 (Supra). From the decision of the Judicial Committee of the Privy Council in the said Loach's case 1916) 1 AC 719 : AIR 1916 PC 208 it appears that a last opportunity which the defendant would have had but for his own negligence is equivalent in law to one which he actually had. He will not be suffered to say that he had not the last opportunity, if he would have had it had he not disabled himself by some prior act of negligence. The doctrine in Loach's case (1916) AC 719 : AIR 1916 PC 208, however, has never been applied against a plaintiff guilty of antecedent negligence.

82. There are, therefore three classes of cases to be distinguished:

(a) The opportunities of the plaintiff and the defendant may have been contemporaneous as when two persons driving in opposite directions in the middle of a road at night and without lights come into collision with each other. In such a case, there is no liability on either side, An action by either may be met by the plea of contributory negligence;

(b) The opportunity of the plaintiff may be later than that of the defendant. In this case also there is no liability; and

(c) the opportunity of the defendant may be later than that of the plaintiff. In this case there is liability as the general rule of contributory negligence of the plaintiff is excluded by the above mentioned rule in (1842) 10 M W 546.

83. The fact, however, that the last opportunity was with the defendant as envisaged by the third case, mentioned above, will not make him liable unless at that time he either knew or ought to have known the danger created by the prior negligence of the plaintiff. He is not to blame for failing to avoid the danger, unless he knew or had the means of knowing of its existence. Where the defendant alone actually knows of the danger and fails to use due care to avoid it--he is liable even to a negligent plaintiff who had in fact the last opportunity.

84. The observation of Lord Simon, regarding the rule of "last opportunity", in *Boy Andrew (Owners) Ltd. v. St. Rognvald (Owners), Ltd.* 1948 AC 140 at pages 148-149, is very apposite and it may usefully be read here. The Lord Justice said:

"The principle of (1842) 10 M W 546 has often been explained as amounting to a rule that when both parties are careless, the party which has the last opportunity of avoiding the results of the other's carelessness is alone liable. The suggested test of "last opportunity" seems to me inaptly phrased and likely in some cases to lead to error, as the Law Revision Committee said in their report (Cmd. 6032 of 1939, 16); "In truth, there is no such rule--the question, as in all questions of liability for a tortious act" is, not who had the last opportunity of avoiding the mischief but whose act caused the wrong?"

85. In *Salmond on the Law of Torts*, 12th Edition, which was brought out in 1957 by Mr. R. F. V. Houston, the learned commentator, at page 443, after quoting the above passage, has said:

"A number of other judicial statements of high authority have made it clear that the rule of last opportunity, in this incorrect sense or the term, suffered a demise quite independently of the Act Of 1945."

86. Such authorities, mentioned in the foot-note at that very page, are *Davies v. Swan Motor Co.* (1949) 2 KB 291 and *Jones v. Livox Quarries, Ltd.* (1952) 2 QB 608 (615). The principle in (1842) 10 M W 546, therefore is not entirely equivalent to the last opportunity rule. The learned author, at page 444, has, therefore, observed that the principle in (1842) 10 M W 546 is still of importance today, although fortunately rid of the complexities and error which once obscured it. The rule of "last opportunity," in the sense of an inflexible rule of law applicable over the whole field of contributory negligence, no doubt, became obsolete even before the Act of 1945 in England; but this does not mean that the plain and sensible principle expounded in (1842) 10 M W 546 and *Radley's case* (1870) 1 AC 754 also became obsolete. The daring statement of the Law Revision Committee in England; read before that "there is no such rule" has now been adopted and authoritatively affirmed by Viscount Simon *ex Cathedra* in the House of Lords in *Boy Andrew (Owners'')* case 1948 AC 140, referred to before.

87. The true rule of liability for actionable negligence, which is the crucial question, as in all questions of liability for a tortious act, therefore, is, whose act caused the wrong? and, not who had the last opportunity?

88. In all such cases of tortious liability for actionable negligence, in order to answer the question, Whose act caused the wrong? the essential factor in determining liability is whether the damage is of such a kind as the reasonable man should have foreseen. It is not the fact, but its consequences on which tortious liability is founded.

89. That reasonable foreseeability is still the effective test is established by the most recent two decisions of (i) The Court of Appeal in (1961) 1 All ER 630 and, (ii) the Judicial Committee of the Privy Council in (1961) 1 All ER 404. The proposition that unforeseeability is irrelevant if damage is "direct" was rejected in the just mentioned Privy Council case.

89a. In the light of the above cardinal principles and tests of liability for actionable negligence, let us now examine the argument advanced on behalf of the appellant. The argument of Mr. Verma was that the opportunity of the plaintiff was later than that of defendant No. 2, and, therefore there was no liability on the part of defendant 2, and, consequently, on the part of the appellant also.

90. I, therefore, now pass to consider, whether the plaintiff had the last opportunity as contended.

91. Let us re-state the material facts here bearing on this question and in the background of the same ascertain the position of P.W. 2 and defendant 2 at the material time.

92. The learned Judge of the Court of appeal below accepted the evidence of P.W. 2, who was riding the horse, to the effect that he was on the left side of the road and was standing with the horse, which was to his further left, towards a ditch., and therefore, the learned Judge held that the plainer, in such a situation, could not be expected to move further left. He has further found that the bus which was coming from the opposite direction, collided with the horse, which was standing on the left side of the road, because the driver was driving the bus rashly and negligently in speed and on the wrong side of the road, and, as such coming on the same side from the opposite direction on which P.W. 2 was standing with the horse.

The learned Judge has, further, accepted the evidence of P.W. 2 that he gave signals to the driver, defendant 2, to stop the bus, because the horse used to get a little frightened of the noise, but the driver, defendant 2, did not stop the bus when he saw P.W. 2 signaling to him to stop it on the other hand, he drove motor bus on the wrong side of the road negligently causing injury to the plaintiff's horse. The time of the occurrence was 1 p.m. in the broad day-light. The driver, therefore, was in a position to see that P.W. 2 was standing on the left side of the road with his horse, and, that, further left of him was a ditch and therefore it was impossible for P.W. 2 to move any further left of the road.

The evidence that the bus was running in speed has been accepted by the learned Subordinate Judge, and this is also proved, as rightly observed by him, by the fact that the bus did not stop even after the accident. P.W. 2, placed as he was, acted like a prudent man in getting down from the horse and catching hold of its reins and standing aside towards the left of the road. There was, therefore, no lack of reasonable care by P.W. 2 for the safety of the horse. It is not said that defendant 2 did not see the situation in which P.W. 2 and his horse were placed, and, therefore, it was the duty of defendant 2 to drive the motor bus at a less speed and on the left side of the road, which . would be the right side of P.W. 2 and the horse, and the left side of the motor bus as it was coming from the opposite direction. Moreover, when P.W. 2 signalled defendant 2 to stop, he should have stopped the bus to avoid the accident.

Furthermore, when the driver reached the place where P.W. 2 was standing with his horse, he should have pulled up his bus, stopped it or slowed down the speed and taken to the left side of the road, which would have surely warded off, the accident.

93. It is manifest, therefore, that on this evidence, defendant 2 alone knew of the danger ahead and of the harm which was bound to be caused to the horse by his going by the wrong side of the road and driving the bus in speed unmindful of the presence of P.W. 2 with the horse on the brink of a ditch. Defendant 2 failed to observe the ordinary rule of the road, and to vise due care to avoid the accident, in spite of having knowledge of the existence of the danger resulting from his reckless action.

94. It is reasonably clear, therefore, that the conduct of the driver was not of a reasonable man. He failed to foresee and obviously nonchalantly disregarded even the most obvious danger ahead to the horse of P. W. 2 by his bus. It is true that it is not the general nature of horse to kick, but, because, in the instant] case the horse appears to have the kicking propensity, inasmuch as, it used to get frightened at noise, P.W. 2 got down from the horse, caught its reins and stood aside to the left and signalled defendant 2 to stop the bus. P.W. 2, therefore, did all that could reasonably be done by any prudent man, placed in that unfortunate position to avert the damage likely to be caused by the negligent act of defendant 2. It is plain, therefore, that before the actual accident and the collision of the bus with the horse, P.W. 2 ceased to have any power to prevent it, the issue having passed beyond his control. The defendant 2, nevertheless, retained the power of preventing the accident and the collision by due care, since defendant 2 alone had the power to prevent the accident, and, as such he alone had the duty to prevent the accident.

In such a situation, which can be better imagined than described, even if there was prior negligence of the plaintiff, it became irrelevant and immaterial. In the instant case, however, there was no negligence whatsoever on the part of the plaintiff at any stage at the time of or prior to the accident. It cannot, therefore, be said that the finding of the learned Judge that the horse of the plaintiff got injury by the sole negligence of the defendant is not correct in law. In a situation like the present, when the motor accident takes place near a bridge on the road due to the motor-bus being driven on the wrong side of the road and it injures the horse of, the plaintiff, when both the rider (P.W. 2) and the horse were standing on the left side of the road, which was their correct side, there is a *prima facie* evidence of negligence and as such a *prima facie* presumption of negligence on the part of the driver, which in the present case, has not been rebutted, because the driver, who was the only other admitted eye-witness to the occurrence and the best person to assist the Court in arriving at the truth and in controverting the plaintiff's case, has not been examined nor has he contested the suit. This view is supported by the principle of law laid down in *Gobald Motor Service Ltd. and Another Vs. R.M.K. Velusami and Others*, , relied upon by the respondent.

95. It is true that the facts and circumstances of the just mentioned Madras case, were different; but, in my opinion it establishes a rule of law applicable to both. As observed by Lord Halsbury, in 1907, Halsbury's Laws of England Volume I," (Simond's Edition), at p. 191 :

"While it may be true to say that no one case can necessarily decide another case under different circumstances and between different persons, the principle of law or justice may be severable from the difference of circumstances or persons, and may establish a rule applicable to both and it may well be contended that a selection of cases in which some one principle of law is argued will illustrate more cogently the real solution of a legal problem than any amount

of technical or abstract reasoning.

96. It is manifest, therefore, that the last opportunity was not with the plaintiff, but with the defendant.

97. The doctrine of last opportunity which is the appellant's spring-board, assuming it is still the true rule and the guiding test of liability for negligence, therefore is of no assistance to the appellant here, rather it goes against him.

98. The test of liability for the damage complained of was the foresee ability of the injury to the horse by the bus, and, as a reasonable man defendant 2 on the foregoing facts of this case ought to have foreseen such injury, and, as such, the appellant was liable in negligence for the damage, which was the direct cause of the negligence of his servant, namely, defendant 2's negligence. The case is, in my judgment, plainly one in which the accident was caused not by the default of both sides, but by the fault of defendant 2 alone.

99. I come back in the end therefore, to the simple point which is one, namely, whose act caused the wrong? This question must be answered by saying that the sole author of the damage complained of was defendant 2 and that his wrongful act caused the wrong in question here.

100. Re: (6): Mr. Verma next argued that the appellant was not liable for the negligent act of his servant, due to which, even accepting, the injury complained of was caused to the plaintiff's horse. It is an established rule of law that a master is jointly and severally liable for any tort committed by his servant while acting in the course of his employment. If the relationship of master and servant exists, certain obligations from one to the other How from it under the law and apart from contract.

101. The master is as such vicariously liable for the servant only when the servant himself would be liable. The principles behind the rule of such vicarious liability is that it is more just that a person who has entrusted his servant with the power of acting should be the loser than that the other and innocent party should bear the loss. In every such case, therefore, too first question is to see whether the servant was liable. If the answer is yes, the second question is to see whether the employer must shoulder the servant's liability. In the normal case there has been only one tort, but as it has been committed in the course of employment, the master is jointly responsible for it. Hence, the relationship of master and servant of itself gives rise to the liability. The principle embodied in the maxim, *qui facit per alium facit per se* that is, "He who acts through, another is deemed in law to do it himself" or, All who procure a trespass to be done are trespassers themselves applies to such a case.

102. Another maxim, usually referred to in this connection, is "respondeat superior", that is, "the superior must be responsible," or, "let the principal be liable." In such cases, not only he, who obeys but also he who commands, becomes equally liable. It is true that the maxim *respondeat superior* does not

explain why the superior should answer. As observed by Lord Keith, in *Kilboy v. South-Eastern Fire Area Joint Committee* 1952 SC 280 at page 287 it "does not enshrine a principle, but announces rather a result." The reason of the rule as given by Lord Brougham, in *Duncan v. Findlater* (1839) 6 C F . 894, at page 9.10, is in these words:

"The reason that I am liable is this, that by employing him I set the whole thing in motion; and what he does, being done for my benefit and under my direction I am responsible for the consequences of doing it."

This still seems to be an adequate explanation of the just mentioned doctrine, subject, however to two qualifications, namely, first the master may be liable even though the act or default is not for his benefit, and even though he has expressly prohibited it; and, second, the master's right of control is the criterion of the existence of the relationship which gives rise to vicarious liability, and not in itself a justification of that liability.

103. In view of this rule of master's liability it is manifestly clear that when defendant 2 was liable for the negligence, committed by him in course of his employment, which was the effective and decisive cause of the harm complained of the appellant, being his master, was also jointly liable, and, as such, the joint decree passed against the appellant also is correct in law.

104. Re: (7): Lastly, it was attempted to be argued that the quantum of damages allowed is excessive, but in the circumstances of this case, in my opinion, it cannot be said to be excessive, when both, the courts below have concurrently found that the plaintiff on being granted a decree, was entitled to Rs. 1200/-, which represented the price of the horse, which had become permanently useless for ever due to the negligent act of defendant 2. The question of quantum of damages is a question of fact, and I do not think any principle of law has been violated here in awarding the damages claimed.

105. In such a case, the question is: What has the plaintiff lost? Here, the plaintiff has lost the use of his horse for ever. The damages to which a man is entitled are the consequences of a wrongful act by which he suffers. The consequences of the wrongful act of defendant 2 here are undoubtedly that the plaintiff has been and is prevented from making any use of his horse in future as he would have been likely to use it if, this accident had not happened. Restitutio being impossible in the sense that nothing can restore the horse to its former useful condition, there is no reason why should the wrong doer be freed from compensating the plaintiff for the pecuniary loss which he has caused him. General principles require that a wrong doer should compensate his victim for the injuries caused to him, and that, where the injury results in a pecuniary loss to the injured person, that person should be compensated in full for such loss; See observations of Smeatfield, J., in *Pope v. D. Murphy and Son Ltd.* (1960) 2 All ER 873 at p. 877.

106. The measure of damages, in the instant case, for loss of use of the horse,

when it has become permanently useless would naturally be the market price of a comparable horse.

106a. In my view, therefore, the proper approach to the question of damages for the injury caused to the horse of the plaintiff which made it permanently lame and thus useless for ever, is to compensate the plaintiff what he has in fact lost. That he has lost is the prospect of using the horse whatever its use was over the period of time during which he might otherwise, apart from, the accident, have reasonably expected to use it. It is the power of the plaintiff to use his horse, what he used before the accident which has been taken away from him. If the horse had not been injured and consequently become permanently lame and useless, the plaintiff could reasonably expect to use it for the rest of its working life. His pecuniary loss is that he cannot use it for that period.

107. It has been held, in *Sunley and Co. v. Cunard White Star Ltd.* (1939) 2 KB 791, that damage can be recovered for loss of use of property even without establishing actual financial loss, on the principle that the plaintiff should be put into the position he would have enjoyed if not wronged. Here, however, the fact that the horse has become useless for ever does involve pecuniary loss to the plaintiff in more ways than one. For example, he will have to maintain the horse as long as it is alive without getting any use of it in return. The plaintiff is entitled to recover general damages for the loss of the use of his horse even though it be used only for pleasure purposes. It is not necessary, however to state anything further on the question of the amount of damages, because the sum of Rupees 1200/- which represented the price of the horse, which had become lame and permanently useless, was not agitated before the court of appeal below, as mentioned in its judgment. This loss was assessed by the plaintiff himself at Rs. 1200/- which, on the facts here, cannot be called excessive or wrong on principle.

108. For these reasons, therefore, I do not think it is right to say as the learned Counsel for the appellant invites the to, that the plaintiff's damages are excessive or disproportionate to the damage suffered by the plaintiff.

109. For the above considerations and for the foregoing reasons, therefore, the principal question posed by me in the very beginning must be answered in the affirmative by holding that the appellant is also liable to in damages for the injury caused to the horse of the plaintiff by defendant No. 2, his driver.

110. All the grounds of attack against the judgment in appeal urged on behalf of the appellant, having been, fully considered in detail and negatived, it is plain that the judgment of the learned Subordinate Judge is invulnerable, and as such, there is no merit in the appeal.

111. The result, therefore, is that the appeal fails and is dismissed; but, in the circumstances of the case, there will be no order for cost of this Court.