

(1932) 06 AHC CK 0032
In the Allahabad High Court

Krishna Murari Lal

APPELLANT

Vs

Dixit Chaturbhuj

RESPONDENT

Date of Decision : 06-06-1932

Acts Referred:

Citation : (1932) 06 AHC CK 0032

Hon'ble Judges : Bennet, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Bennet, J.—This is a second appeal by the defendant against a decree of the lower appellate Court awarding the plaintiff Rs. 200 damages for injuries caused to the Red Setter bitch of the plaintiff. It is common ground that the motor lorry driven by one of the defendants and owned by both the defendants collided with the bitch of the plaintiff and caused some injury to that bitch. The finding of fact of the Court of first instance was that the bitch had caused the accident by suddenly rushing across in front of defendants' lorry, and that it was not possible for the defendants to stop the lorry. The Munsif therefore dismissed the suit of the plaintiff. The lower appellate Court came to the opposite conclusion that the bitch did not rush across the road but that the bitch was standing on the road easing at the time that the lorry approached it, that the defendant did not consider it worth his while to stop the lorry for the bitch, that at a speed at which the lorry was going, 10 to 12 miles an hour, it could be instantly stopped dead if the driver wished to stop it.

But apparently he did not choose to spend two minutes and hoped the dog would get out unscathed from under the lorry.

2. It therefore held that the respondent driving the lorry was negligent in running down the appellant's dog. The first question argued was that there was contributory negligence on the part of the plaintiff, and learned Counsel referred to 56 Cal. (at p. 767), the case of *In Re: "Rabenfels"* (*Stoomvaart Maatschappij*

Nederlands), In this case a quotation was made from a ruling reported in Nani Bala Sen Vs. Auckland Jute Co. Ltd., laying down what amounted to contributory negligence as follows:

Where the negligence of the plaintiff or that of the defendant is the sole cause of the accident the matter is free from doubt. But difficulty may arise where the accident is caused partly by the negligence of the plaintiff, and partly by that of the defendant. In such circumstances it becomes the duty of the Court to endeavour to ascertain whether the negligent act or omission of the plaintiff, or that of the defendant, was the cause of the accident. If the Court finds itself unable to discover to what extent the negligence of the plaintiff or that of the defendant contributed to bring about the accident, the defendant is entitled to succeed, for in *pari delicto potior est conditio defendantis*. On the other hand, 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" per Lord Penzance, *Radley v. London & N.W. Ry. Co.* (1876) 1 AC 754.

3. In my opinion the question as to whether a plaintiff was guilty of contributory negligence is a question of "fact, and it is a question which it was for the lower appellate Court to determine, that is, it was a question of fact as to whether the accident was caused partly by the negligence of the plaintiff and partly by the negligence of the defendant or whether the accident was caused solely by the negligence of the defendant. It appears to me that in the present case the lower appellate Court has found that the accident was caused solely by the negligence of the defendant. This appears to me to be the meaning of the following passage:

Admittedly the place where the accident occurred is a busy thoroughfare of the town of Etawah and motor lorries frequently pass by that road. Obviously an owner of a valuable dog is expected to allow his dogs on the thoroughfare leashed and properly attended. But neglect of this alone would not contribute to the negligence of the other party.

4. It was further argued by the learned Counsel that the lower appellate Court had misinterpreted the evidence for the defence. (Here the judgment considered evidence whether the dog was standing on the road and proceeded). On this evidence I think that the lower appellate Court came to the correct finding that at the time of the accident the dog was standing on the road and that the accident was caused because the defendant driving the lorry did not choose to stop the lorry on account of the dog. Now the contributory negligence stated to exist on the part of the plaintiff was that the dogboy Ajudhi of the plaintiff was not present at the time of the accident. This dog-boy had taken the dogs of the plaintiff out and apparently he was not at the spot. Further it was stated that the dog was not on the leash. It is not easy to see how a dog can get exercise if he is taken out on a leash, but I do not think this point is of much importance. It is not shown how if Ajudhi had been present his presence could have prevented the

accident. It is suggested by counsel for defence that Ajudhi could have dragged the dog from in front of the lorry. No evidence was put forward of cross-examination or otherwise on the record to prove this suggestion. I think the suggestion is rather an improbable one and it cannot be accepted without evidence in proof as it is certainly not obvious. I think therefore the lower appellate was correct in finding that there was not contributory negligence on the part of the plaintiff. Reference has also been made by learned Counsel for the respondent to the ruling reported in *Davies v. Mann* (1842) 10 M & W 546 where the plaintiff had a donkey which had its forefeet fettered and the servant of the defendant driving a wagon collided with the donkey and killed it. The rule laid down was

that the negligence which is to preclude a plaintiff from recovering in an action of this nature, must be such as that he could, by ordinary care, have avoided the consequences of the defendant's negligence.

5. In the actual case applying this rule the Court found:

Although the ass may have been wrongfully there, still the defendant was bound to go along the road at such a pace as would be likely to prevent mischief. Were this not so, a man might justify the driving over goods left on a public highway, or even over a man lying asleep there, or the purposely running against a carriage going on the wrong side of the road.

6. I asked learned Counsel for the appellant whether on his view of the law the driver of a motor vehicle would be entitled to drive against cattle which were standing in the roadway and he stated that the answer was in the affirmative. He was unable to show any authority for this proposition. I think that the principle of the ruling in question applies to the present case and that the negligence of the plaintiff, whatever it may have amounted to, was not sufficient negligence to prevent the plaintiff recovering damages under the circumstances of the present case. (Here the evidence on the question of damages was considered and the judgment proceeded). Under these circumstances I do not think that the damages awarded were excessive. Accordingly I dismiss this appeal with costs. Application was made for a Letters Patent appeal. No authority was shown for the law expressed by the appellant's counsel, and therefore I do not think there is any matter which can be laid before a Bench to contradict the view expressed in *Davies v. Mann* (1842) 10 M & W 546 already quoted. Accordingly the application is refused.