
(1975) 11 BOM CK 0029
In the Bombay High Court
Case No : First Appeal No. 2029 of 1966

Nepoleon Fernandes

APPELLANT

Vs

The Union of India

RESPONDENT

Date of Decision : 14-11-1975

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 80
Employees Compensation Act, 1923 — Section 10, 2, 22, 29, 3
Fatal Accidents Act, 1855 — Section 1

Citation : (1976) 78 BOMLR 337 : (1976) MhLj 888

Hon'ble Judges : Mukhi, J;Hajarnavis, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Mukhi, J.—Benedict Belchour Fernandes, the appellant-plaintiff's son, was an engine driver in the employment of the Central Railway, posted at Bhusawal Division. On January 5, 1963 he received injuries while driving a goods train (P-20Up) from Itarsi to Bhusawal. He was given first aid, and then removed to a hospital, but on the very next day, as the direct result of the injuries so received by him, he died.

2. There is no dispute that the said Benedict Belchour Fernandes (hereinafter referred to as the deceased) died during the course of his employment with the Central Railways and that he died as the result of the injuries received by him while he was driving his goods train from Itarsi to Bhusawal. At the time of the fatal accident he left behind him his father, mother, and a wife whom he had married only a few months earlier. It is on record that a son was born to the deceased posthumously.

3. The appellant Napoleon Fernandes (hereinafter referred to as "the plaintiff") who is the father of the deceased, filed a suit under the Fatal Accidents Act, 1855, claiming a sum of Rs. 75,000 and costs of the suit from the Central Railway (hereinafter referred to as "the defendant railway").

4. It requires to be noticed that the requisite notice u/s 80 of the CPC was served upon the defendants on January 3, 1964. The suit was filed in forma pauperis and the petition in that behalf was presented to the civil Court on March 4, 1964. According to the plaintiff, the death of his only son Benedict took place due to the negligence on the part of the defendant railway in improperly loading iron frames of a bailey bridge in another goods train (hereinafter referred to as "the food special goods train") with the result that the iron frames were protruding in the direction of the up-line so that when the special food goods train crossed the P-20Up train being driven by the deceased the protruding iron frames hit the deceased on his chest and shoulder causing serious injuries which proved fatal. The plaintiff has averred that his son was earning about Rs. 500 per month at the time of his death and was sending to him as his father a sum of Rs. 100 per month.

5. It is the plaintiff's case that he and the deceased's mother Helene were wholly dependant upon the deceased, as he (the plaintiff) himself had retired from Railway service many years previously.

6. It is significant that in the plaint it was specifically stated by the plaintiff, Nepoleon Fernandes, that on his death the deceased had left behind him as his dependants the plaintiff (his father), his mother Helene, and his widow Racheal Fernandes. It was also stated that a posthumous child was born to the deceased after his death so that the child too became a dependant.

7. It is also significant that after setting out the cause of action and the extent of the dependency of the persons whom the deceased had left behind, the plaintiff, prayed that the defendant may be decreed and ordered to pay to the plaintiff Rs, 75,000 as damages for the pecuniary loss sustained by legal representatives of the deceased due to his death.

8. In other words, the plaintiff sought to maintain a representative action not only on his own behalf as one of the dependants of the deceased but also on behalf of the other dependants, viz., the mother of the deceased, the widow of the deceased and the posthumous child of the deceased.

9. The defendant railway denied the claim almost on every point. In particular they denied any negligence on the part of the defendant railway in loading a wagon of the food special goods train with steel frames of a bailey bridge. The defendant railway also denied the quantum of the pay of the deceased but admitted that the average wages of the deceased were Rs. 449.26.

10. According to the defendant railway, the death of the deceased Benedict Fernandes was purely accidental and it was further contended that all possible medical aid had been rendered to the deceased.

11. Curiously after denying their negligence, the defendant railway went on to admit that on January 5, 1963 at about 6.85 p.m. the deceased was driving P-20-UP goods train from Itarsi to Bhusawal and that he sustained serious injuries

after passing through Banapur station due to the hitting of his shoulder by the projecting parts of the bridge loaded in wagon No. 59807 WR of the down food special goods train which was running in the opposite direction to the goods train (P-20-UP) being driven by the deceased.

12. The defendant railway then went on to state that the loaded consignment of wagon No. 59807 of the down food special goods train shifted sideways towards the Up-line as the coir rope gave way due to oscillations in transit, According to the defendant railway, medical aid was given to the injured person who was subsequently sent to Bhusawal railway hospital where he died on January 6, 1968 at 7 a. in.

13. The defendant railway then went on to take other contentions, viz., that the suit was brought by the plaintiff in his personal capacity and was, therefore, not tenable; that the notice given u/s 80 of the CPC was not valid, and further that the suit filed by the plaintiff was not tenable because it was hit by the provisions of Section 3(5)(a) of the Workmen's Compensation Act, 1923.

14. According to the defendant railway, the plaintiff had applied for compensation under the Workmen's Compensation Act and, therefore, he could not maintain a suit for damages on the basis of the defendant railway's alleged negligence, A suggestion was thus made that the civil Court had no jurisdiction. There was also a vague contention that because of Order II, Rule 2 of the CPC the suit was not maintainable.

15. The trial Court appears to have framed a large number of issues and on the basis of the evidence recorded before it came to the conclusion that although the plaintiff had proved that the death of the deceased Benedict was due to negligence on the part of the defendant railway administration as alleged, defendant No. 1 had also proved that the death was accidental and that the accident was unavoidable. The trial Court also held that the suit was not tenable under the Fatal Accidents Act; that it was not a representative action and that in any event the suit was not tenable in view of the provisions of Section 3(5)(a) of the Workmen's Compensation Act. In these circumstances, the suit was dismissed.

16. The plaintiff being aggrieved by the order and judgment of the trial Court has filed this appeal.

17. Before the rival contentions of the parties are set out, it is appropriate to notice that the trial Court answered the issue on the question of negligence on the part of the defendant railway in the affirmative and thereby held that the plaintiff had proved that the death of the deceased was due to the negligence of the defendant railway.

18. Mr. M.B. Badkar, the learned advocate for the appelleant-plaintiff, contends, firstly, that there is considerable material on record to show that defendant railway was negligent and that that negligence resulted in the death of deceased.

According to Badkar, therefore, the trial Court was right in holding that the plaintiff had proved that the death of the deceased was due to the negligence on the part of the railway administration. The second contention of Mr. Badkar is that the suit as filed by the plaintiff, is clearly a representative suit within the meaning of the Fatal Accidents Act, and that the trial Court was clearly in error when it came to the conclusion that the suit as filed by the plaintiff was in his personal capacity and not in a representative character as enjoined by the Fatal Accidents Act.

19. It was then contended by Mr. Badkar, that the trial Court had fallen in error in coming to the conclusion that the suit as filed by the plaintiff was not tenable because of the provisions of Section 3(5)(a) of the Workmen's Compensation Act, 1923. The learned advocate for the appellant-plaintiff pointed out that the trial Court had framed two issues on this point, being Issues No8. 11 and 17 and had come to the conclusion that because the plaintiff had "filed" an application before the Workmen's Compensation Commissioner, his remedy by way of suit for damages was barred under the provisions of Section 8(5)(a) of the Workmen's Compensation Act.

20. Mr. Badkar urged firstly that in the present case Section 3(5)(a) of the Workmen's Compensation Act could not constitute a bar because, firstly, the plaintiff never instituted any claim within the meaning of Clause (S)(a) of Section 3 of the Workmen's Compensation Act; secondly, that the claim under the Workmen's Compensation Act does not bar a claim under the Fatal Accidents Act, because a special statute does not derogate from another special statute without express words of abrogation; thirdly, he contended that the bar of remedy by suit can only apply when the Commissioner for Workmen's Compensation can grant the relief sought for, and that, in any event, loss of dependency caused by negligence constitutes an entirely different cause of action than that in Section 8(5) of the Workmen's Compensation Act, Mr. Badkar then contended that on the facts of this case, it is clear that the plaintiff did not elect to pursue the remedy under the Workmen's Compensation Act as against the remedy available by way of a suit for damages, under the Fatal Accidents Act.

21. Dr. B.R. Naik, the learned advocate for the respondent Union of India and the defendant railway strenuously urged that the plaintiff's suit was not maintainable. In fact, it requires to be noticed that the plaintiff's suit was resisted by the defendants on every conceivable ground, including all possible technical objections as to the maintainability of the suit, and that is why the learned trial Judge had to frame as many as seventeen issues in a suit which perhaps involved consideration of three real points.

22. Now, Dr. Naik contended, firstly, that the suit was not maintainable because, according to him, it had been filed by the plaintiff in his personal capacity and not in a representative character. It was then contended that necessary particulars required under the Fatal Accidents Act, were also not given. The next contention of Dr. Naik was that the plaintiff had filed an application before the

Workmen's Compensation Commissioner and that that application filed by the plaintiff amounted to an institution of a claim within the meaning of Section 3(5) (a) of the Workmen's Compensation Act. The suggestion was that the plaintiff and the widow of the deceased had thereby elected to avail themselves of the remedy under the Workmen's Compensation Act, instead of the remedy by way of a suit for damages under the Fatal Accidents Act. On this basis, according to Dr. Naik, the plaintiff's suit was barred by Section 3(5)(a) of the Workmen's Compensation Act and was required to be dismissed. Dr. Naik argued that even if it was held that there was no bar as such to the filing of a suit under the Fatal Accidents Act, the defendants could not be subjected to double jeopardy with two claims against them. Lastly, Dr. Naik urged that defendant railway was in no way negligent and that the death of the deceased was accidental because the steel-frames of the bailey bridge loaded in the food special goods train and tied with a coir rope had moved due to the vibrations of the moving train. This, he Bought to suggest, was purely accidental.

23. These then are the rival contentions and we find it appropriate to dispose of right away the point as to negligence of the defendant railway. The manner in which the unfortunate accident took place at kilometer 708 is undisputed and culled out from the evidence placed on record by defendant railway itself. Apart from the oral examination of several railway servants, the defendant railway has placed on record as exh. 60, the proceedings of the official enquiry held on January 8 and 10, 1963 to investigate the circumstances in connection with the fatal injury to the deceased who on the relevant date was on duty as the driver of P-20 UP train. It was revealed by this inquiry that the actual impact took place at kilometer 708 and that the deceased sustained fatal injuries while working on P-20-UP goods train. While his train was in the block section between BPF (Banapur) and PGL (Pagdhal) he was hit on his right shoulder by a projected material loaded on BFR of the down food special goods train which crossed the deceased's train at kilometer 708, Three such frames were found at kilometers 698/10-11 and one was found at kilometers 698/11-13. Two such frames were noticed projecting out from the BFR when the train was stopped at BPF (Banapur) by the display of danger signal by the station master of BPF (Banapur).

24. The report also mentions that prior to the impact at kilometer 708, another Up-train viz. 544 Up-parcel train, which had also crossed the food special goods train in the section between Banapur and Pagdhal earlier had had its engine and three wagons damaged by the same material projecting from the wagon of the food special goods train.

25. It would appear that by tragic mischance when it was discovered that the Up-parcel train 544 engine and three wagons of that train had been damaged by the material projecting from the food grain special, the personnel on the 20-UP train could not be informed. The driver of 544 Up-parcel, on arrival at Pagdhal at 18-25 hours checked the damage caused to his engine, and immediately informed the assistant station master on duty at about 18.30 hours to advise

Banapur to stop and examine the down food special goods train. At this very moment the "train entering section" signal was received from Banapur for P-20 UP Goods train, and therefore, P-20 UP Goods train could not be stopped at Banapur.

26. It is significant at this stage to note the findings given at the said enquiry held by defendant railway, which is in the following words:

We find that at about 18.35 hours on 5-1-1963 while Down Food Grain Special was running between Pagdhal and Banapur, a part of the consignment loaded in BFR No. 59807 WR shifted sideways towards the adjoining Up-track due to the coir ropes giving way and caused fatal injuries to the driver of P. 20 Up goods train which was at the same time running on the Up-track.

27. Now, there can be no manner of doubt that the loading of the relevant consignment, viz. steel frames of the bailey bridge in the wagon No. 59807 was inadequate and that only coir ropes had been used to anchor the consignment. There is no suggestion that the vibrations or oscillations of the train carrying the consignment were of an unexpected nature. The defendant railway and its servants obviously did not anchor the steel frames of the bailey bridge in the wagon in such a way that they would not shift by reason of ordinary vibrations to be expected when the train is moving at normal speed.

28. The question at once arises whether the railway administration was not at fault in not properly anchoring iron frames in the wagon so as to prevent them from shifting under normal circumstances. It has not been suggested that the down food special goods train was subjected to any violent and unusual movement which may have caused the coir ropes to give way. As a matter of fact, we find it questionable whether in the circumstances coir ropes were the proper ropes to be used when anchoring steel frames, because it is known that coir ropes stretch within certain limits and that steel can cut through a rope.

29. The legal position as to negligence is fairly clear and has been discussed in a number of cases. For instance it has been held that "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." (See *Blyth v. Birmingham Waterworks Co.* (1856) 11 Ex. 781. The observations of Scrutton L.J. in the *Polemis and Furness, Withy & Co., In re* [1921] 3 K.B. 500 case are on the facts of the case before us most apt and need to be set out. Scrutton L.J. said (p. 577) :

...To determine whether an act is negligent, it is relevant to determine whether any reasonable person would foresee that the act would cause damage; if he would not, the act is not negligent...Once the act is negligent, the fact that its exact operation was not foreseen is immaterial.

30. It is a matter of regret that the enquiry committee of the defendant railway

came to a somewhat facile conclusion that they could not hold any one from the defendant railway responsible for the accident. It appears to us obvious that without proof of any unusual vibrations or oscillations of the train, the anchoring of the consignment of iron frames in the wagon with a coir rope was inadequate and someone must have been responsible for that kind of loading. Indeed this is borne out by the fact that the enquiry committee of the defendant railway itself made a recommendation at the foot of the enquiry report in the following words :

The Committee recommends that steel frames of the description involved in the accident should be lashed adequately by sufficiently, long chains and not by coir or Manila ropes as these have a tendency to get out while rubbing against the sharp edges of the frames due to oscillation.

It is somewhat curious that the enquiry report does not mention that the coir ropes used for lashing the steel frames of the bailey bridge had been cut or had merely stretched.

31. Dr. Naik's contention on behalf of the defendant railway, that they were not negligent, is clearly untenable. As a matter of fact we find that, apart from their own admission the doctrine of *res ipsa loquitur* would apply and it would have been upto the defendant railway to show that while loading the consignment of the steel frames, it had taken all conceivable precautions against the shifting of the iron frames which would endanger the train itself as well as other passing trains.

32. In our view, therefore, the trial Court was right in coming to the conclusion that the negligence of the defendant railway had been proved and that the death of the deceased was caused by that negligence. It is also substantially clear that the reference of the trial Judge to the suggestion that the death of the deceased was accidental relates to the so-called finding of the enquiry committee of defendant railway that the accident falls under the category of "accidental".

33. The next point which requires to be considered is whether the plaintiff's suit as filed is a suit filed by him in his personal capacity or whether it is a representative suit under the Fatal Accidents Act, and the necessary particulars have been furnished as required by the Fatal Accidents Act.

34. The trial Judge has observed that it had nowhere been stated in the plaint by the plaintiff that he has brought the suit for the benefit of all the dependants according to Fatal Accidents Act. Now, the plaint itself would show that the learned trial Judge was in error when he held that the suit as filed was not in a representative capacity.

35. A perusal of the plaint shows that it has been clearly, stated therein that at the time of his death the deceased had left behind him the following dependants viz. (1) Napoleon Fernandes, his father, (2) Mrs. Helene Fernandes, his mother (8) Mrs. Rachael Fernandes, his widow. Then there is a specific averment that a son by name Benedict Orlando Fernandes was born as the posthumous child of

the deceased, and would also be, therefore, a dependant of the deceased. Then there is a mention of the fact that the deceased's widow and son are residing at Bhusawal. In the prayer clause after seeking leave to sue in forma paufris, it is prayed :

...the defendant may be decreed and ordered to pay to the plaintiff Rs. 75,000/- as damages for the pecuniary loss sustained by legal representatives of the deceased due to his death.

It is substantially clear that the plaintiff did not ask for a decree in his favour only. What he prayed for was that a suitable decree should be passed for the amount claimed for the benefit of all the legal representatives of the deceased whose names had earlier been set out in the body of the plaint.

36. It requires to be noticed that the relevant provision of the Fatal Accidents Act prescribes that "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." It does not appear to us to be necessary that there must be a formal statement in the body of the plaint that the action is being brought for and on behalf of the other representatives of the deceased or that all the representatives of the deceased should join in as applicants. It would of course be proper if the other representatives of the deceased, other than the one who files the suit, are impleaded as party-defendants if they had not opted to join the plaintiff in filing the suit. But that would be a mere irregularity and can be cured even at the stage of appeal. The plaintiff by way of caution took out a civil application in this Court for adding the names of the other representatives which we have granted.

37. There is, therefore, no substance in the contention urged on behalf of the defendant railway that the suit as filed is not in a representative character or that the necessary particulars have not been furnished. The trial Court Judge was clearly in error when he held that the suit as filed by the plaintiff was not tenable under the Fatal Accidents Act.

38. Now, we come to the real defence which has been urged by the defendant railway and that is the question as to the scope and legal effect of Section 3(5) of the Workmen's Compensation Act and its impact on the facts of this case. Now, this point requires to be considered from two aspects; firstly whether the plaintiff can be said to have "instituted a claim" before the Commissioner for Workmen's Compensation Bombay in respect of the injury. It is only if he has done so, that the bar of Section 8(3) would operate against him and his suit for damages would not be maintainable. Secondly, whether the provisions of Section 3(5) of the Workmen's Compensation Act do constitute a bar to the filing of a suit by dependants of a workman on the cause of action furnished to them by the special statute in the form of the Fatal Accidents Act.

39. Before we consider whether the plaintiff and/or the widow of the deceased in

fact "instituted a claim" before the Commissioner for Workmen's Compensation Bombay, it would be appropriate to notice the relevant provisions of the Workmen's Compensation Act, 1923, as to the institution of such a claim.

40. It is Section 10 of the Workmen's Compensation Act which provides for the institution of a claim under that Act. In other words a claim is made by an application u/s 10. Now, Section 10 provides that no claim for compensation shall be entertained by a Commissioner unless notice of the accident has been given in the manner hereinafter provided as soon as practicable after the happening thereof and unless the claim is preferred before him within two years of the occurrence of the accident or in case of death, within two years from the date of death. Section 22 provides that no application for the settlement of any matter by a Commissioner (other than an application by a dependant or dependants for compensation) shall be made unless and until some question has arisen between the parties in connection therewith which they have been unable to settle by agreement.

41. Now, it has been held that application u/s 22 is an application for settlement of any matter by the Commissioner after the claim is made. It requires to be noticed that Section 10 lays down that no claim for compensation shall be entertained unless a notice has been given. It also provides that the want of or any defect or irregularity in a notice shall not be a bar in certain circumstances. But it is clear that a claim is required to be made u/s 10, and no particular form is prescribed or required for such a claim (See: *Fakiragram Rice Mills v. Ramu* [1930] A.L.R.188 Ass.

42. In so far as the application u/s 22 is concerned, forms are prescribed by the Bombay Workmen's Compensation Rules of 1934 and these forms are Forms "F" and "G" under Rule 20. A procedure for disposing of applications referred to in Section 22 of the Workmen's Compensation Act is set out in Rules 19 onwards in Part V.

43. It is now necessary to consider whether it could be said that the plaintiff and/or the widow of the deceased did in fact and law institute a claim for compensation before the Workmen's Compensation Commissioner within the meaning of Section 8(5) of the Workmen's Compensation Act.

44. Dr. Naik was at great pains to point out that in fact the claim had been so instituted and further that the plaintiff and/or the widow of the deceased had elected to pursue the remedy under the Workmen's Compensation Act as against the remedy by way of a suit under the Fatal Accidents Act.

45. It is appropriate at this stage to notice the relevant facts and then to consider whether the plaintiff and/or the widow of the deceased can be said to have instituted a claim as alleged by the defendant railway with the effect as alleged.

46. Now, on January 1, 1964, the plaintiff caused a notice u/s 80 of the CPC to

be issued to the Union of India, New Delhi, and the General Manager, Central Railway, Victoria Terminus, Bombay. This notice is on record as exh. Q6 and in this notice the necessary particulars are set out including the details about the dependants left behind by the deceased. In this notice, defendant is called upon to pay a sum of Rs. 75,000 as damages, and there is a statement that in default of such payment legal proceedings would be adopted against the defendant railway. Then in terms the nature of the legal proceedings contemplated is indicated by stating that this notice was to be treated as a statutory notice u/s 80 of the Code of Civil Procedure.

47. It requires to be noticed that there is no suggestion whatsoever, that nearly a year after the death of the deceased the plaintiff contemplated or was thinking in terms of a remedy under the Workmen's Compensation Act.

48. However, it would appear that the defendant railway had themselves unilaterally and without a claim decided to pay a meagre amount of Rs. 4,500 under the Workmen's Compensation Act and appear to have voluntarily deposited that amount with the Commissioner, Workmen's Compensation, Bombay. This is mentioned in a letter dated February 18, 1964 sent by the Divisional Superintendent of Bhusawal to the plaintiff's advocate Shri Shivram G. Borkar. This letter, which is exh. 61 on record, is in reply to the statutory notice u/s 80 of the CPC dated January 1, 1964. Instead of dealing with the requisitions contained in that notice, the Divisional Superintendent Bhusawal merely stated that "necessary amount of compensation for the death of the driver Shri B.B. Fernandes, has already been deposited with the Commissioner for Workmen's Compensation, Bombay for distribution." It is significant that this letter, which appears to have been received by Shri Borkar on February 17, 1964, the amount deposited is not mentioned. It came to be known later that only a sum of Rs. 4,500 had been deposited by the defendant railway even though the amount prescribed by the Workmen's Compensation Act appears to be Rs. 10,000. Indeed, no explanation is forthcoming as to why a sum of Rs. 4,500 only was deposited and how it was arrived at.

49. Now, it would appear that on August 14, 1963, the Divisional Superintendent of the defendant railway prepared a statement in Form "A" under which he sought to present for deposit in respect of injuries resulting in the death of deceased a sum of Rs. 4,500 with the Commissioner for Workmen's Compensation. The actual amount seems to have been deposited only on September 13, 1963. This deposit appears to be a deposit u/s 8 of the Workmen's Compensation Act, which provides that no payment of compensation in respect of a workman whose injury has resulted in death and no payment of a lump sum as compensation to a woman or a person under a legal disability shall be made otherwise than by deposit with the Commissioner and no such payment made directly by an employer shall be deemed to be a payment of compensation. This shows that the initiative for payment of the compensation at Rs. 4,500 came from the defendant railway and the amount was not deposited as

the result of any demand from the plaintiff, or any other dependant of the deceased.

50. Now, pursuant to the deposit made by the defendant railway with the Commissioner for Workmen's Compensation, a notice appears to have been issued on November "23, 1963 to Mrs. Rachael Benedict Fernandes, The notice is in a cyclostyled form and information is conveyed by that that the defendant railway had deposited Rs. 4,500 as compensation u/s 8(1) of the Workmen's Compensation Act, 1923, in respect of the injuries resulting in the death of the deceased. It is then stated that under the rules the dependants of the deceased workmen are required to apply for distribution of the compensation to the Commissioner and to. prove that they are the dependants and the only dependants of the deceased.

51. The cyclostyled notice also informed the widow of the deceased that the formal application for distribution was to be filed in the pro forma attached. It would appear from the notice that the matter was registered as Fatal Accident Register No. 174 of 1968.

52. A similar notice was issued to the plaintiff on December 30, 1963 which appears to have been received by him on January 2, 1964. On December 21, 1963, the widow of the deceased filed two documents in the pro forma sent to her - one for herself and one for her minor son. Similarly, on January 29, the plaintiff filed a document as per the pro forma.

53. Pausing here for a moment, it requires to be noticed that on December 17, 1968 (i. e. before the receipt of the notice from the Commissioner), the plaintiff wrote a letter to the Commissioner for Workmen's Compensation Bombay. In that letter (exh. 76), he referred to the Fatal Accidents Register No. 174 of 1963 and stated that he had learnt that the Central Railway had deposited a sum of Rs. 4,500 as compensation: The plaintiff then set out the list of the dependants left behind him by the deceased which includes himself and then stated :

I learnt that the said Mrs. Rachael widow of Benedict Belchour Fernandes is trying to apply for the payment of the entire amount of compensation to her. If any such application is made by her, the same should not be entertained in our absence. The said Rachael Fernandes is not residing with us and hence we have objection for the entire amount being paid to her.

It is significant that plaintiff lastly stated that:

This intimation is given without prejudice to our rights under the Fatal Accidents Act.

54. In other words, the plaintiff in terms informed the Commissioner for Workmen's Compensation that he had decided to pursue the remedy available to him by way of a suit for damages under the Fatal Accidents Act. However, as the father of the deceased (and one of the dependants left by the deceased) he felt (on some imagined right) that the amount of Rs. 4,500 deposited by the

defendant railway should not be paid to the widow of the deceased as the said widow was not residing with the parents of her deceased husband.

55. It requires to be noticed that in his deposition in the civil Court he clearly stated that he had given notice u/s 80 of the CPC to the Union of India, a copy of which along with a postal acknowledgement receipt he produced, and he stated :

I have not applied in the first instance claiming any amount as compensation for the death of my son. The widow of my son had given an application for compensation and so I had intimated the Commissioner for Workmen's Compensation regarding the other dependants.

It may be mentioned that there is nothing on record to show that the widow had instituted any claim as such. In his cross-examination the plaintiff affirmed that he had given intimation to the Commissioner of Workmen's Compensation for reserving his right for filing the suit. It is obvious that the plaintiff while making this statement m referring to the letter dated December 17, 1963 (exh. 76) which he had addressed to the Commissioner for Workmen's Compensation and in which he had informed the Commissioner that his intimation that the entire amount of Rs. 4,500 should not be paid to the widow of the deceased, was being made without prejudice to his rights to seek a remedy by a suit for damages under the Fatal Accidents Act, 1855.

56. Even in his statement before the Commissioner for Workmen's Compensation, Jalgaon, to whom the case was transferred by the Commissioner for Workmen's Compensation, Bombay, the plaintiff categorically stated that he had filed a suit for Rs. 75,000 on the death of his son against the railways and that that suit was pending in the civil Court.

57. Dr. Naik has argued that the filing by the plaintiff (as well as by the widow of the deceased) of a formal application for distribution in the pro forma attached to the notice given to them by the Commissioner for Workmen's Compensation, Bombay, amounted to an institution by them of a claim for compensation and that they had thus elected to avail of the remedy under the Workmen's Compensation Act as against the remedy by way of a suit.

58. First of all we are unable to agree with Dr. Naik that by filing an application for distribution in the pro forma the plaintiff and/or the widow of the deceased had instituted a claim within the meaning of Section 3(5) of the Workmen's Compensation Act. We have already noticed that a claim is required to be made u/s 10 although no particular form is prescribed. However, there is nothing on record to suggest that any claim was made either by the plaintiff or by the widow of the deceased as contemplated by Section 10 of that Act. All that they did was to file a document in the pro forma and appear before the Commissioner for Workmen's Compensation because they were asked to do so. So far as the plaintiff is concerned before doing so, he had in terms informed the Commissioner for Workmen's Compensation that his intimation (as to distribution of the amount deposited by the defendant railway) was without

prejudice to his rights under the Fatal Accidents Act.

59. Apart from that in order to institute a claim within the meaning of Section 3(5) of the Workmen's Compensation Act, 1923, it is required and the phraseology of that clause so indicates that the workman must have instituted a claim for compensation in respect of the injury before the Commissioner. The word "instituted" in Section 3(5) of the Workmen's Compensation Act, has not been defined, but it seems to be imperative that a litigant who may be said to be dominus litis must affirmatively go before the Authority constituted under the Workmen's Compensation Act and say that he wanted to avail of his right to compensation as provided for by the Workmen's Compensation Act, liability for which is created by Section 3 of that Act.

60. In the case before us neither the workman nor his dependants have done so. They have merely sought to protect themselves by complying with a notice issued to them by the Commissioner for Workman's Compensation in a matter initiated and commenced not by the workman or dependants but by the defendant railway.

61. It is substantially clear that nobody had asked, the defendant railway to deposit the amount of Rs. 4,500 with the Commissioner for Workman's Compensation (apart from the fact that the amount does not seem to be correct. They did tills on their own volition conceivably with the ulterior object of short-circuiting the rights of the dependants of the workman who had clearly died as a result of the negligence on the part of the defendant railway.

62. On the facts of this case, we have no hesitation in holding that it cannot be said that either the plaintiff or the widow of the deceased instituted a claim as such within the meaning of Section 3(5) of the Workman's Compensation Act and if that is the correct view of the matter, then it follows that Section 3(5) cannot constitute a bar to the plaintiff's suit for damages.

63. As regards the argument of Dr. Naik for the defendant railway that the plaintiff and the widow of the deceased had elected to pursue the remedy provided by the Workmen's Compensation Act, we find that on the contrary the conduct of the plaintiff shows that if there was an election, there was an election to pursue the remedy under the Fatal Accidents Act and not that under the Workmen's Compensation Act.

64. It was suggested by Dr. Naik that the plaintiff and the widow of the deceased had participated in the proceedings before the Commissioner for Workmen's Compensation and that this was sufficient to non-suit them. We find ourselves unable to agree with this contention.

65. First of all it has already been discussed that the bar u/s 3(5) will operate only and only if the workman concerned has himself instituted a claim to compensation. Secondly, so far as the plaintiff m concerned, Dr. Naik has been unable to show that the amount of Rs. 900 awarded to the plaintiff and his wife

(mother of the deceased) was, in fact, received by them. Now, so far as the widow of the deceased is concerned, it does appear to us that a sum of Ra. 1,800 was paid to her. But it cannot be said that by receiving the amount, she elected to pursue a remedy under the Workmen's Compensation Act and thereby disabled herself from claiming or receiving damages under the Fatal Accidents Act. The defendant railway has not in any way shown that the widow of the deceased was aware that an option was available to her. Before an election can be attributed to the widow, it must be shown that she accepted the compensation under the Workmen's Compensation Act with knowledge that she had a common law or statutory right to recover damages for negligence of the defendant railway. The burden of proving these facts, that is to say, that the widow had the requisite knowledge that by accepting compensation under the Workmen's Compensation Act, she was giving up her common law right (or in this case a right under the Fatal Accidents Act) to recover damages, is on the employer. Mr. Badkar referred to a judgment of the English Court of Appeal in *Olsen v. Magnesium Castings* [1947] 1 All E.R. 333 in support of his contention that the mere fact that the widow had accepted compensation would not disentitle her to claim or receive damages by way of a suit unless it was shown that she had knowledge of her right to elect between the two remedies.

66. Now, election is a choice between alternatives and in the legal sense it may be a choice between two alternative and perhaps inconsistent rights. But it is settled law that the choice can only be made with the knowledge that there is a choice. To say that in this case the widow had a choice to accept compensation under the Workmen's Compensation Act, without showing that she knew that she had the right to obtain perhaps a much larger and more realistic amount of compensation under the Fatal Accidents Act is to suggest that a person can make a choice without knowing the alternative.

67. Section 3(5) of the Workmen's Compensation Act gives a choice between enforcing the right to compensation under the Workmen's Compensation Act against the employer and claiming damages in a Court of law under common law or special statute incorporating the common law right. But it can never be stated with any show of reason that a person can be said to have made a choice without knowing that he or she had the right to elect between the two remedies.

68. In the English case cited above, it was observed that the defence under (the analogous) Section 29(1) of the English Workmen's Compensation Act was a statutory defence given by the sub-section and it seems that unless the employers had established all the facts necessary to bring the statutory defence into operation they must necessarily fail. If the defendant railway wanted to succeed in establishing the statutory defence, then it was obligatory on them to prove to the satisfaction of the Court, that the widow had the necessary knowledge of her rights in order to enable her to make an election and that on facts the widow did make an election.

69. On the facts of this case it cannot be said that the widow had accepted

payment under the Workmen's Compensation Act, 1923, with full knowledge that she had or might have a common law right as incorporated in the Fatal Accidents Act to bring a suit for damages.

70. In this view of the matter the learned trial Judge was obviously in error when he first held that the plaintiff had instituted a claim for compensation under the Workmen's Compensation Act; and secondly that he had elected to avail himself of the remedy under the Workmen's Compensation Act as against the remedy under the Fatal Accidents Act.

71. In our opinion, on the facts of this case, Section 3(5) of the Workmen's Compensation Act does not constitute a bar to the plaintiff's suit and the right of the plaintiff and the other dependants of the deceased including the widow to claim damages under the Fatal Accidents Act.

72. Before discussing the question of the quantum of compensation to which the dependants of the deceased would be entitled a reference may be made to two somewhat attractive arguments advanced by Mr. Badkar, on behalf of the plaintiff. These arguments were that a claim under the Workmen's Compensation Act does not bar a claim under the Fatal Accidents Act because both were special statutes and one special statute cannot derogate from another special statute without express words of abrogation. It may perhaps appear on a cursory reading of Section 3(5) that it does not bar the right of a dependant of the workman to file a suit under the Fatal Accidents Act because the right under the Fatal Accidents Act is a right given to the dependants as such and is concerned with loss of dependency suffered by the dependants. The Fatal Accidents Act, 1855, in terms provides that the dependants of a deceased person must claim compensation on account of the loss occasioned to them by his death by an actionable wrong.

73. The second argument is a corollary of the first, in that it is suggested that a claim under the Fatal Accidents Act constitutes an entirely different cause of action than that with which the Commissioner for Workmen's compensation Act could deal. It was argued that the Commissioner for Workmen's Compensation had jurisdiction to award compensation within the limits prescribed by the Act if the person claiming compensation was a workman and if the accident had occurred in the course of employment.

74. Negligence of the employer played no part in awarding compensation under the Workmen's Compensation Act. But in a suit under the Fatal Accidents Act, the right to claim compensation was based on two other factors, viz., that the plaintiff was the dependant of the deceased person and that it is the loss of the dependency which furnishes the cause of action so that on proof of negligence the employer is required to pay compensation to the dependants to the extent of their dependency which they have lost because of the actionable wrong on the part of the employer.

75. Since we have already held that Section 8(5) of the Workmen's

Compensation Act does not constitute a bar to the suit filed by the plaintiff under the Fatal Accidents Act it is not necessary in this appeal to consider the aforementioned two arguments. But we may observe that there may be some substance in these contentions because if it can be contended that the two causes of action are different, then Section 3(5) of the Workmen's Compensation Act may perhaps not be a bar to the dependants of the workman from filing a suit for compensation under the Fatal Accidents Act. Again whether Section 3(5) of the Workmen's Compensation Act is at all applicable in a case where the workman has died and the action is brought by the dependants of the workman is a point which would require more elaborate arguments than have been advanced in this appeal. We do not propose, therefore, to deal with the aforesaid two points in this appeal.

76. This takes us to the question of quantum of compensation.

77. It is unfortunate that the learned Judge did not deal with this aspect of the matter and that is perhaps so because he was dismissing the suit on several legal and technical objections. Fortunately, there is sufficient material on record for us, as the appellate Court, to arrive at a just figure as to the compensation which may be awarded now that it has been held by us that the suit as filed is maintainable and that Section 8(5) of the Workmen's Compensation Act does not constitute a bar.

78. First of all, it is admitted that the average wages of the deceased person at the time of his death as an engine driver with the Central Railways were Rs. 449.26. The plaintiff in his deposition has stated that his son was sending to him and to his mother at the time of his death a sum of Rs. 100 per month. This assertion of the plaintiff has not been seriously challenged, and indeed, there is sufficient evidence on record to this effect. The plaintiff has, however, added that "his son was sending Rs. 225 per month for his dependant." This later statement can only refer to the widow of the deceased. In order to find out the proper amount of dependency, particularly as a posthumous son was born to the deceased after his death, the proper approach would, in our opinion, be to deduct from the average amount that the deceased was earning a reasonable sum which the deceased must have been spending on himself. There is no suggestion that the deceased was spending any inordinate amount on himself. As a matter of fact, the evidence seems to disclose that he was sending Rs. 100 to his father and mother and Rs. 225 to his wife. It requires to be noticed that as an engine driver he was constantly on the move and could have hardly stayed for a substantial period at his own residence with his wife. In these circumstances, it is reasonable to hold that if the deceased was spending a sum of Rs. 125 on himself, he would then have Rs. 325 left with him for his dependants, including his father and mother. It is on record that the deceased was about twenty-seven years of age at the time of his tragic death and it is reasonable to expect that he would have lived for at least thirty-five to forty years more and that he would have before him a working life of another twenty-eight years, if not more. These

are the facts on which the value of the dependency can be ascertained and a proper multiplier applied.

79. Now, so far as the quantum of damages is concerned, this Court had occasion in *Shakuntala Shetty v. Maharashtra State* (1974) 78 Bom. L.R. 106 to which I was a party, to set out the principles governing assessment of damages under the Fatal Accidents Act, as emerging from the statute and the decisions of the Supreme Court in *Gobald Motor Service Ltd. and Another Vs. R.M.K. Veluswami and Others*, and in *C.K. Subramania Iyer and Others Vs. T. Kunhikuttan Nair and Others*, In the later case the Supreme Court observed (p. 380) :

...Compulsory damages u/s 1A 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.

The main criteria is the value of the dependency multiplied by an appropriate number of years of purchase. As Supreme Court cautioned, in assessing damages the Court must exclude all considerations of matter which rest in speculation or fancy though conjecture to some extent is inevitable.

80. As observed in the judgment of this High Court in *Shakuntala Shetty v. Maharashtra State*, referred to above :

...the mode of assessment of damages in a Fatal Accidents case is beset with certain difficulties and depends upon many imponderables. But nevertheless the Court has to do its duty and come to a finding as to what should be the prop or quantum of damages. It may not be made with mathematical accuracy but it will depend on the facts and circumstances of each case and as the Supreme Court has rightly observed, "conjecture to some extent is inevitable." (p. 114)

81. Now, on the facts of this case there is no reason to suggest why the

deceased who was a young man of twenty-seven years, would not have had another thirty years of useful and working life. It has been stated that the engine drivers retire at the age of fifty-five years, provided of course they maintain their health. It would, therefore, not be improper in our view in this particular case to take twenty-eight years purchase as the multiplier. But it is settled law that the figure of damages is not a simple multiplication with the period that the deceased expected to live and the amount per year during that time which he would have supplied to the support of his dependants. The amount is to be discounted for the purpose of lump sum payment instead of being spread over for a period of years. We must also take into consideration the fact that the deceased may have suffered from illness or, disease or from some other disabling factor, We must also take into account the fact that although his widow and his son would be expected to live as long as he would have lived if he had not been killed, his parents would not be expected to live in normal circumstances for the entire period of the deceased's putative life.

82. It will also be necessary to consider (and we have taken that into consideration) that the deceased would not have earned only Rs. 450 per month for his entire working life till the age of fifty-five years if he had not died. It is reasonable to expect that he would have received some increments and his wages would have gone up from time to time until they reached a maximum level.

83. Another factor which may be noticed is longevity in the family. In 1965, the plaintiff was sixty-seven, which means that to-day he is seventy-seven. In this view of the matter it could be said that twenty-eight years purchase is not a very long period.

84. Taking, therefore, the basic figure of Rs. 325 per month or Rs. 3,900 per year, we find that at twenty-eight years purchase the gross amount would come to Rs. 1,09,200 or roughly Rs. 1,10,000. To this amount is to be added a certain amount to represent the possibility of increased earnings as well as the decrease in the value of the rupee in the last thirteen years. Then we have taken into account the factor that the gross amount must be discounted because the dependents of the deceased will be now receiving a lump sum amount at once. That is to say, we have to find out the present value. The present value, in our opinion, after taking into consideration the various relevant factors should be about 60 per cent.

85. From the present value, a reasonable amount will be required to be deducted for the consideration that life is uncertain and it is not possible to predicate that the deceased would have necessarily lived through his entire working life. Again in so far as the deceased's father and mother are concerned, although they have lived for thirteen years, since the death of their son, it is also not possible to predicate how far more they would continue to live so as to be entitled to dependency. It is not necessary for us to set out the various figures which have been running through our minds but after giving the matter our most anxious

consideration and making additions and subtractions, we have come to the conclusion that a sum of Rs. 75,000 would be a fair figure to represent the pecuniary loss of the dependants of the deceased person.

86. Now, there is one more factor which requires to be taken into consideration for the purpose of fixing the quantum of compensation and that is the fact that the sum of Rs. 4,500 was deposited by defendant railways with the Commissioner for Workmen's Compensation. As we have stated, it is not known whether the sum of Rs. 900 was or was not paid to the deceased's father and mother, but it appears that a sum of Rs. 1,800 was, in fact, paid to the widow of the deceased. A sum of Rs. 1,800 is lying in deposit for the minor. We feel, in the interest of justice, that this amount of Rs. 4,500 should be "deducted from the quantum of damages to which we have arrived at so that the amount which we propose to award is Rs. 70,500 for the dependants of the deceased to be apportioned in the manner which is being directed by us.

87. The order and judgment of the Joint Civil Judge (Senior Division), Jalgaon, dated August 19, 1965 is set aside and the suit decreed for Rs. 70,500 with interest at 6 per cent, per annum from the date of the suit.

88. In "accordance with Section 1 of the Fatal Accidents Act, 1855, the amount awarded shall be divided in the following manner.

89. A sum of Rs. 10,000 shall be paid to the deceased's father Napoleon Fernandes;

90. A sum of Rs. 10,000 shall be paid to the deceased's mother Mrs, Helene Fernandes;

91. A sum of Rs. 25,000 shall be paid to Mrs. Racheal Benedict Fernandes, the widow of the deceased;

92. A sum of Ra. 25,500 is awarded to the minor son of the deceased, Benedict Orlando Fernandes.

93. Interest due on the compensation awarded shall also be apportioned in the same manner.

94. The amount payable to the minor Benedict Orlando Fernandes shall be invested in fixed deposit with a Nationalised Bank for the period of his minority. Monthly interest accruing on such fixed deposit shall be paid to the widow of the deceased, Mrs. Racheal Fernandes for the upkeep of the minor son.

95. The amount lying to the credit of the minor with the Workmen's Compensation Commissioner Jalgaon shall be transferred to the same Nationalised Bank with which the amount awarded herein is ordered to be deposited in a fixed deposit. The plaintiff and the deceased's mother will be at liberty to withdraw and receive the said sum of Rs. 900 from the Commissioner for Workmen's Compensation if it has not been so far paid to them.

96. The respondent, the Union of India, is given three months time to make the payment as decreed. The decree should be sent to the Collector for recovery of Court-fees from the defendant railway.

97. The appeal is allowed, as indicated above, with costs throughout.