

(1955) 01 GAU CK 0006
In the Gauhati High Court
Case No : First Appeal No. 20 of 1951

Sardar Nand Singh

APPELLANT

Vs

Abhyabala Debi

RESPONDENT

Date of Decision : 07-01-1955

Acts Referred:

Fatal Accidents Act, 1855 — Section 1, 1
Limitation Act, 1908 — Article 21, 21

Citation : AIR 1955 Guw 157

Hon'ble Judges : Sarjoo Prosad, C.J. and H.Deka, J

Bench : Division Bench

Advocate : S.K.Ghose , P.K.Gupta, P.Choudhary, B.Sharma, J.C.Sen, Advocates
appearing for Parties

Judgement

Sarjoo Prosad C. J.

1. This appeal relates to a claim for compensation instituted by the plaintiffsrespondents under the Fatal Accidents Act (Act 13 of 1855).

(2) On 17111947, one Nalini Kanta Sarma while proceeding on the Assam Trunk Road from West to East was knocked down and run over from behind by a motor truck No. ASN. 382. The unfortunate man, as a result of the collision, received serious injuries and the post mortem examination showed amongst others that the upper part of the right half of the back and the contiguous part of the right parietal bone were fractured to pieces and there were also fractures of the 7th and 8th ribs of the right side at the level of angles. The left thigh bone was also completely fractured in the middle. The man fell in the drain on the left side of the road and died almost instantaneously. The vehicle after passing over the poor victim swerved to the south and then turning to the north struck against a post and fell down in the road side ditch or "nullah". At the time of the accident, there were admittedly four occupants in the truck including the driver himself. This happened at about 12 or 1230 P. M. in broad daylight when the Trunk Road was clear of traffic and there were no other vehicles in sight.

(3) The deceased was aged about 28 years at the time of his death. He was of good health and physique and in normal course, but for the fatal accident, would have survived many years longer. At the relevant time, he was earning about Rs. 87/ a month as a cashier in a Bank.

(4) Srimati Abhayabala Debi (plaintiff No. 1) is his widow, plaintiff No. 3 is their daughter and the other three plaintiffs are their sons. Apart from the mother, the other plaintiffs are all minor infants under the guardianship of the first plaintiff and their age ranges from one and a half to 7 years. They have claimed compensation for his death as representatives of the deceased. They aver that the death of Nalini Kanta was due to the rash and negligent driving of the motor lorry for which the defendants are liable to pay compensation.

(5) The defendants 1 and 2 were impleaded in the suit as registered owners of the above lorry while defendant No. 4 was impleaded as the driver thereof. It was alleged that this defendant, the driver, negligently allowed the defendant No. 3, the son of defendant No. 1, to drive the lorry when the accident happened. It was stated that defendants No. 3 and 4 were acting at the relevant time as agents of defendants Nos. 1 and 2 and therefore all the defendants were liable. Defendants 6 and 7 are parents of the deceased. They are merely proforma defendants and have preferred no claim of their own. After the institution of the suit, the Insurance Company was impleaded as defendant No. 5 because the lorry in question happened to be insured with the said limited company under the Motor Vehicles Act.

(6) The defendants Nos. 1 to 3 filed a joint written statement in which they denied their liability to pay any compensation. They denied that at the time of the accident defendant No. 3 was driving the vehicle and they also disputed the quantum of compensation claimed. It is however significant that the written statement does not disclose as to who was actually driving the lorry at the time though in his deposition in Court Harbans Singh (defendant No. 3) admitted that he was then in that lorry. The driver Janki Ram Sarma (defendant No. 4) in his written statement definitely stated that at the relevant time, Harbans was driving the lorry from Pandu to Gauhati. He explained that in spite of his protest Harbans Singh, being the son of Nand Singh (defendant No. 1), the owner of the lorry, forcibly removed him from the driver's seat directing him to sit at the back and himself took charge of the driving. He stated that he being a mere employee was bound to obey Harbans Singh and had therefore no liability for any negligent act of the latter.

The Insurance Company has disputed the plaintiffs' claim on various grounds. It is unnecessary to recapitulate all of them. Their main defence is that according to the statement in the plaint itself, at the time of the accident, the vehicle was being driven by Harbans Singh who had no driving license. The defendant therefore claimed that the accident having been caused by an unauthorised person, the Insurance Company was not liable to indemnify the plaintiffs. This defendant also averred that the claim against the Company was barred by

limitation and that the terms and conditions of the policy which were imperative in order to fasten liability on the defendant had not been fulfilled.

(7) The learned Subordinate Judge who tried the suit decided all the material issues in favour of the plaintiffs. He held that the death of Nalini was caused by the rash and negligent driving of the vehicle in question and that at the material time, the vehicle was being driven by Harbans Singh, who had no license to drive the same. He also found that the driver Janki Ram Sarma acted wrongly and negligently, not only in making over the steering wheel to an unlicensed person but also in not even sitting by his side so as to be on the alert to avoid accidents. This negligent act of the driver having been committed in the course of his employment, the other defendants, Nand Singh and Inder Singh, his masters were also liable. He therefore held all these four defendants liable for payment of compensation to plaintiffs. In regard to the Insurance Company (defendant No. 5), the learned Subordinate Judge was of the view that the motor lorry having been admittedly driven by an unlicensed driver when the accident happened, the plaintiff had no remedy against the company. He also held that the suit as against the Insurance Company was barred by limitation, the occurrence having taken place on 17/11/1947 and the Insurance Company, having been made a party to the suit on 15/3/1950. On these grounds, he decreed the suit as against the other defendants but dismissed it as against the defendant company. The decree for damages was for a modified sum of Rs. 13,000/ only, though plaintiffs laid their claim at Rs. 25,000/.

(8) The point of limitation which the learned Subordinate Judge found in favour of the Insurance Company is not very material for the decision of this appeal, but I should like to point out that there was some misconception in arriving at that finding. The Insurance Company was made a party to the suit on the terms of S. 96 (2) Motor Vehicles : Act (Act IV of 1939). This could only be done after the institution of the suit and after the other defendants had filed their written statement disclosing the liability of the defendant company or when the plaintiffs had knowledge of the insurance. The first three defendants filed their written statement on 19/7/1949, issues were settled on 26/8/49, and then on 8/3/50, they filed a petition, when, after hearing the advocates, the Court directed the plaintiffs to take steps for adding the Insurance Company as a party defendant. This was followed by a petition for amendment by the plaintiffs on 15/3/50 as ordered by the Court. The amendment petition also shows that the plaintiffs came to know "of the existing Insurance on the motor lorry when the matter was disclosed to them by the other defendants on the previous date; and then they prayed that the Court should communicate to the said Insurance company the plaintiffs' claim in the action. The defendant then appeared and contested the claim. In these circumstances, no question of limitation arose at all and the Insurance Company was duly brought on the record within the terms of S. 96 (2), Motor Vehicles Act. It appears that the attention of the Court was not "directed to the provision at all.

(9) The present appeal has been presented by the first two defendants only. The other defendants Harbans Singh and the driver Janki Ram Sarma have not appealed.

(10) Mr. Ghose has contended that there was no rash and negligent act and the accident was not the efficient cause of the death of Nalini. The nature of the injuries on the person of the deceased and the manner of the accident as described by the eyewitnesses belie any such assumption. There are two witnesses on the point: Padmakanta Bordoloi and Vishwnath Sarma. Witness Padmakanta has given a somewhat graphic account of the unfortunate incident. He is a man of Majirgaon about eleven miles away from Gauhati but on the relevant date & time, he was going on foot from Bharali to Tokobari i. e., from West to East on the Trunk road, probably having something to do in Court. At the time, Nalini was walking on the road, about 30 yards ahead of him in the same direction. He heard sounds of a Motor Vehicle coming from behind and noticed its lurching movement. He was about to be knocked when he escaped by jumping to a nulla or depression by the side of the road. He saw the man ahead of him knocked down by the vehicle; the man fell down on the road and he saw the vehicle passing over his person.

The vehicle then swerved to the south and then turning to the north knocked against a post and fell down the "nulla". He ran to the injured whom he found bleeding profusely from nose and mouth and hovering between life and death. He gave him some water by dipping a handkerchief in a neighbouring khal but the man died then and there. Police and relations of the injured came and took away the dead body. The witness then learnt that the injured was Nalini. The witness deposes that the accident happened on the Assam Trunk Road and the time was between 1230 or 1 p. m. He further says that the vehicle in question did not look like being driven by one knowing how to drive. He noticed four men in the vehicle out of whom three appeared to be Punjabis and another, a nonAssamese like a Nepali. This nonPunjabi according to him was behind the front seat. He identified Harbans Singh, Punjabi, as driving the vehicle when the accident happened.

The other witness Vishwanath is a resident of Kamakhya and is a Panda there. This man was returning to Kamakhya from the Railway Station, Pandu when he saw the motor running in an uncommon way with the front wheels moving in a zig zag manner and it knocked a man (identified to be Nalini), ran over him, and swerving to the north fell into a ditch. The witness has made some confusion about the direction in which he was proceeding but on the whole, his evidence appears to be reliable. There is nothing else to induce us to reject the testimony of these otherwise disinterested witnesses whose evidence the Court below, has rightly accepted. Harbans Singh (defendant No. 3) in his deposition admits that truck No. ASN S82 belongs to him and that on the day in question, he was in the truck with Prittam Singh and Jaswant Singh as also his driver. Jaswant Singh is his wife's brother and Prittam Singh, a distant relation and Sardar Indar Singh

(defendant No. 2) is his Mama or maternal uncle.

His description of the occurrence is that the truck was returning from Pandu to railway office and was proceeding at a speed of 15 miles only. When the lorry blew the horn the injured looked to the left and as if in confusion suddenly slipped and fell down; and although the driver attempted to save him, he could not do so and the man got injured and died there. He also admits that the vehicle fell in a ditch while swerving to the left. Prittam Singh, who is a relation of Harbans Singh, the latter being the son of his wife's brother, has endeavoured to support Harbans on the point; but the explanation of the accident as given by the defendant does not carry conviction at all. Harbans Singh himself admits that the injured was proceeding on the left side of the road and yet the truck was also running close on the left so much so that the left wheel of the truck was running along the edge of the pucca or metalled portion of the road. The road was broad enough to admit two vehicles to pass and there was no other vehicle on the road at that time.

The fact that there was enough room for other vehicles to pass and there was then no vehicle passing on the road is admitted also by Prittam Singh. There was therefore no reason why the left wheel of the truck should have been running along the edge of the pucca portion of the road and not sufficiently on the right side of the road so as to give a wide berth to pedestrians. The evidence of plaintiffs' witnesses, therefore, cannot but be accepted. It is quite obvious from the description of the accident given by these witnesses that the man at the wheel had really no control over the vehicle or had completely lost control over it at the time when the accident happened. The incident happened in broad daylight and in the circumstances, any person who knew driving could have easily avoided it. The evidence therefore leads to the inevitable inference that the death of Nalini was caused by the wrongful act of the person driving the vehicle which was apparently being driven in a very reckless and careless manner without any consideration of the safety of other wayfarers,

(11) The question then is who actually drove the vehicle, whether it was the driver of the vehicle Janki Ram (defendant No. 4) or it was Harbans Singh (defendant No. 3). I have already pointed out that in the written statement which was signed by Harbans Singh himself on his own behalf and by Inder Singh (defendant No. 2) for himself and for the defendant No. 1, the defendants simply denied the allegation that the truck was being driven by Harbans Singh at the relevant time. There was no specific averment as to who was actually driving the truck, a fact which Harbans Singh was expected to know. Janki Ram Sarma, the driver in his written statement definitely stated that the truck was being driven by Harbans Singh and not by himself and he explains under what circumstances Harbans Singh took the steering wheel from him and proceeded to drive the truck asking the driver to sit at the back.

In his deposition, Harbans Singh has of course stated that the driver Janki Ram drove the truck.

The driver in his evidence has reiterated the facts stated in his written statement and his evidence is corroborated by the evidence of plaintiffs' witnesses. Witness Padmakanta Bordoloi has stated that out of the four persons in the truck, three Punjabis were in the front seat and the nonPunjabi or the nonAssamese looking like a Nepali was at the back seat and he identified Harbans Singh as driving the vehicle. I am inclined to prefer the evidence of the driver Janki Ram to that of Harbans Singh and to hold in concurrence with the court below that the defendant No. 3, Harbans Singh was driving the vehicle at the time.

Admittedly, Harbans Singh had no driving license at all and the way the vehicle was zig zagging in its movement on the road clearly indicates that it was being driven by a person who did not either know how to drive or was drunk or both. This in effect is the evidence of the eyewitnesses as well. It was suggested to Harbans Singh that he was probably drunk at the time. He admitted that during dinner at night, when off duty, he does take liquor but he denied that he had any drink on the day in question. The driver's impression was that Harbans and his companions were drunk at the time. It may be that Harbans may have been also drunk at the time but it is obvious that he did not know driving and had no license for that purpose and the manner in which the vehicle lurched on the road clearly shows that he could not control its movement, which resulted in the death of the unfortunate man who was lawfully proceeding on the left side of the road. The accident would not have happened but for this inexperienced and careless driving which was the efficient cause of the death of Nalini.

(12) In view of the above finding, it is obvious that the defendant No. 5, the Insurance Company cannot be held liable for payment of damages. But it is contended that defendants Nos. 1 and 2 should be also exempted from liability; and, if at all, only Harbans Singh should be made liable for the payment of compensation, he having been responsible for causing the death of the man. The defendant No. 1, I have already shown is the father of Harbans Singh and Harbans Singh in his deposition claimed that the truck belonged to him and he was the owner of the truck, though it may have been registered in the name of the other defendants 1 and 2. It appears from the evidence of both Harbans Singh and Prittam Singh that they were railway contractors and that at the time of the occurrence they were going from Pandu Railway Station to the Railway Office. Prittam admits that they had been to Pandu for bills and cheques. There can be no doubt therefore that the truck was at the time employed for the purpose of the business of the defendants.

I regret that this part of the case has not been sufficiently clarified in the judgment under appeal. Defendants 1 to 3 have filed a joint statement and the truck is registered in the names of both defendants 1 and 2. Inder Singh, the defendant No. 2 has not made out any separate case for himself. On the contrary, he has filed the joint written statement along with Harbans Singh signing it for himself and on behalf of Nand Singh. In the court 1955 Assam/21 & 22 below also, there was no suggestion made on his behalf that even if the

father of defendant No. 3 was held liable for the negligent act of Harbans Singh, the defendant No. 2, Inder Singh, the other joint owner of the truck, could not be made liable, there being no relationship of master and servant between Harbans Singh and Inder Singh. The point however loses all its force if we remember that the driver was also present in the truck at the time of the accident and he allowed the defendant No. 3, whom he knew to be a person without even a license for driving, to take charge of the steering wheel. He indeed yielded even to the direction of Harbans Singh in not sitting by his side but in going to sit at the back; so that in case of need, he could not be possibly of any assistance to Harbans in avoiding the accident.

He should have foreseen that an accident might easily happen on account of the vehicle being put in charge of a man who had no license or authority to drive and who in fact did not know driving. It was obvious that this driver Janki Ram who was the servant of both the appellants before us permitted Harbans, an unauthorised person to take charge of the vehicle in his presence and allowed intermeddling with the same. In view of this, there can be hardly any doubt that the appellants who are the owners of the truck would be liable for damages.

(13) The proposition is well settled that the master is liable for the wrongful act or conduct or negligence of his servant where the act or conduct or negligence occurs in the course of the master's employment or in furtherance of his interest even though the servant may have been prohibited from the act. This principle of vicarious liability is supported by a host of English and Indian decisions.

"A servant may well make the master liable by allowing an unauthorised person to take charge in his presence; for it is his duty to keep control and exclude incompetent meddling while he is there." (See Pollock on Torts, 15th Edition, page 64).

A parallel instance is to be found in the decision of the House of Lords in "Ricketts v. Thos. Tilling, Ltd.", 19151 KB 644 (A). In that case, at the end of a journey, the conductor of an omnibus belonging to the defendants, in the presence of the driver, who was seated beside him, for the purpose of turning the omnibus in the right direction for the next journey, drove it through some bystreets so negligently that it mounted the foot pavement and knocked down and seriously injured the plaintiff, who was standing there. It was held that there was evidence of negligence on the part of the driver in allowing the omnibus to be negligently driven by the conductor so as to make the employer also liable.

The House of Lords set aside the decision of the trial Judge which had dismissed the suit relying upon an earlier decision in "Beard v. London General Omnibus Co.", 19002 QB 530 (B), on which the appellants here also seek to rest their case. The Lord Justices unanimously held that where a man is entrusted with the duty of driving and controlling the driving of a motor omnibus

and is sitting along side a person who is wrongfully driving and the motor omnibus is negligently driven and thereby causes an accident, there is evidence

at any rate of negligence on the part of that driver in having allowed that negligent driving. In this case, the driver says that Harbans took the wheel from Pandu and he was ordered by Harbans to sit on the platform, while the relations of Harbans sat on the front seats. He also admits that he had a right to warn Harbans if he drove at great speed; and that in fact he did warn him to slow down the speed once near the burial ground, but Harbans did not listen and drove probably at a speed of 25 to 30 miles. The explanation that he was forced to sit at the back in obedience to defendant 3 does not satisfy me and will not exempt him from liability.

It was his responsibility to drive the omnibus instead of allowing Harbans to take the steering wheel. It does not appear that he resisted the attempt of Harbans in taking possession of the steering wheel or even warned him of the grave consequences of the act. It is more than clear that deliberately, he connived or acquiesced in the wrongful act of Harbans in trying to drive the Vehicle without any license and in the negligent manner in which he drove resulting in the fatal accident. The driver says that from the talk which he had with Harbans, he and his companions appeared to be intoxicated though he was not altogether sure. In these circumstances, it was all the more incumbent on him to resist this act of Harbans and not to allow him to take possession of the steering wheel. The principle of vicarious liability will therefore govern this case and the appellants as masters will be liable for damages to the party who suffered on account of the servant's negligence.

I may also refer here to a decision of the Privy Council in "Gob. Choon Seng v. Lee Kim Soo", 1925 AC 550 (C). In that case, the principle was extended even to cases where the act of the servant was prohibited by the master. It was pointed out then that

"when a servant does an act which he is authorised by his employment to do under certain circumstances and under certain conditions, and he does them under circumstances or in a manner which are unauthorised and improper, in such cases, the employer is liable for the wrongful act."

Therefore, the employer is responsible for damage caused to a third party by the negligent act of his servant in carrying out the work which he is employed to do even if the act incidentally involves a trespass which the employer has not authorised.

Another recent decision of the Privy Council in "Canadian Pacific Rly. Co. v. Lockhart", AIR 1943 PC 63 (D), is also in point. There the servant of the appellant company in disregard of written notices prohibiting employees from using privately owned motor cars for the purpose of the Company's business unless adequately protected by insurance, used his own motor car, which was uninsured, on a Journey for the purpose of, and as a means of execution of work which he was ordinarily employed to do and by negligent driving injured the respondent. It was held that the means of transport was incidental to the

execution of that which he was employed to do, and that the prohibition of the use of an uninsured motor car merely limited the way in which, or by means of which, he was to execute the work and that the breach of the prohibition did not exclude the liability of the company to the respondent. The servant was obviously doing an authorised thing in an unauthorised and improper manner and the general law is that the master is responsible for the way in which the servant does the work even though it be in breach of specific directions.

Here also, on the evidence, the driver in taking out the truck in question, was employed in the execution of appellants' business and he acted improperly in handing over the charge of the truck to a person who had no licence to drive and who did not know driving and thereby caused the fatal accident. The principles aforesaid therefore apply to the case. It is unnecessary to multiply authorities. In the circumstances I hold in concurrence with the court below that the appellants are liable for the payment of compensation to the plaintiffs. I have already mentioned that Inder Singh has not put forward any distinctive defence and throughout he contested the suit on grounds common to all the defendants 1 to 3.

(14) On the quantum of damages decreed by the learned Subordinate Judge, no serious argument has been advanced before us. The assessment is bound to be somewhat speculative provided some basic principles are kept in view. Under S. 1, "Fatal Accidents Act, right has been given to ask for damages in proportion to the loss resulting from the death to the parties claiming such damages. In other words, it is a reparation for the loss caused to the beneficiaries mentioned in the Act. The loss must be pecuniary loss, actual or reasonably expected. There must be some amount of guess work in estimating the pecuniary value of such expectation and various factors have to be considered. At the same time, sympathetic damages or solatium for loss of companionship etc., are not relevant. The real criterion is the loss of reasonably expected pecuniary benefit. To determine this, the probable earnings of the deceased and his future prospects have to be taken into account. It is obvious that the extent to which a person can benefit others depends largely on his earning capacity.

The above principles are well illustrated in the case of "Jeet Kumari v. Chittagong Engineering and Electric Supply Co.", AIR 1947 Gal 195 (E). The claim here was for the maintenance of the widow and the children, expenses for the marriage of the daughter and the education of the sons. Nalini was young and in good health and although not very educated, he was earning about Rs. 90/ month and eking out his salary by doing contract work and other odd jobs. The learned Subordinate Judge in this case has paid due regard to relevant considerations in assessing damages and passed a modified decree for a sum of Rs. 13,000/ only as against a claim for Rs. 25,000/. We see no adequate reason to interfere with his estimate, the matter being within his judicial discretion.

(15) The appeal is accordingly dismissed and the decree of the court below is affirmed. The plaintiffs are entitled to their costs of this appeal.

(16) DEKA J. I agree.