Wilkinson Vs. Shields

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Court : Allahabad

Decided On : Dec-31-1969

Reported in : (1887)ILR9All398

Judge : John Edge, Kt., C.J. and ;Brodhurst, J.

Appellant : Wilkinson

Respondent : Shields

Judgement :

John Edge, Kt., C.J.

1. This was an application to this Court to exercise its powers of revision under Section 622 of the Civil Procedure Code in respect of a judgment and decree passed by the Judge of the Small Cause Court of Allahabad on the 16th December last. The action in the Small Cause Court was one in which the plaintiff sought to recover damages against the defendant for an alleged breach of a contract of bailment. The facts shortly were these. On the 6th November last the plaintiff let a horse on hire to the defendant for the purpose of being ridden by the defendant on the afternoon of that day. That horse was not returned to the plaintiff, and it was ascertained that the horse, while in the custody of the defendant and while being ridden by him, had died from rupture of the diaphragm. The evidence on behalf of the plaintiff in the Small Cause Court was that the horse was a quiet horse, which he had had for several years, during which time it had not bolted with

him, and that the horse had had some exercise on the day in question prior to its being sent to the defendant's house. The plaintiff denied that the horse was fed immediately before it was let out for hire to the defendant. On the other hand, there was the evidence of the defendant, of Mr. Blenkinsop and of another witness. The defendant's statement was that, shortly after he started on his ride, the horse became restive and jumped about, that he brought it under control, and that shortly afterwards it began again to jump about and tried to back into the gateway of Mr. Porter's compound. The defendant then goes on to say that he may have then touched the horse with his riding cane. Whether he did so or not is not quite certain, and if he did use the cane moderately ill was nothing more than what a man of ordinary prudence and care would have done under the circumstances. According to the defendant, the horse, after jumping about at Mr. Porter's gateway, bolted with him and ran away, and he lost control over it, and after the horse had gone about two miles he got it under control, when it trotted for a short distance, and then fell down and died.

2. Mr. Blenkinsop's evidence was that the horse's stomach contained undigested food eaten by the horse shortly before it was taken out for the ride, and that the horse died from rupture of the diaphragm, the result of over-exertion on a loaded stomach. Mr. Blenkinsop also stated that a quiet horse was nod likely to bolt after a meal without an exciting cause.

3. The evidence of the defendant's other witness was that he went to the plaintiff's stable to order the horse, and found the horse eating grain. This was substantially the evidence given below.

4. The Judge of the Small Cause Court came to the conclusion that the defendant had used the whip freely, or done something else which caused the horse to bolt, and that the defendant, in freely using the whip, had not taken such reasonable care of the horse as a man of ordinary prudence would, under similar circumstances, have taken of his own horse, and that the death of the horse had resulted from such want of care, and gave the plaintiff a decree for Rs. 400 and costs.

5. Under these circumstances the first question that arises is whether we have power, under Section 622 of the Civil Procedure Code to entertain this application for revision. That depends, I think, upon the consideration whether there was any evidence upon which the Judge of the Small Cause Court might make the decree which he did. It appears to me that no Judge of the Small Cause Court, any more than a Judge of the High Court or any other Court, has any power, or in other words jurisdiction, to pass in a contested suit a decree adversely to a defendant where there is no evidence or admission before him to support the decree. I am not speaking of cases in which there is a balance of evidence or some evidence to support the finding upon which a decree is based, but of cases in which there is no evidence at all which the Judge should take into consideration or submit to a jury if the case was before a jury. In such a case the provisions of Section 622 of the Civil Procedure Code will apply. For the Judge, In passing a decree which is not supported by any evidence on the record, has taken upon himself a jurisdiction not vested in him by law. The Judge is bound to pass a decree only in accordance with the law; and if he passes a decree which the law does not give him any power to pass, such as a decree adverse to a defendant in a contested suit when there is no evidence and no admission to support the decree, he exercises a jurisdiction not vested in him by law. In saying this I am not alluding to cases in which, from the nature of the case, the whole burden of proof was, and continued to be, upon the defendant, of which the present case is not, in my opinion, one.

6. It is contended by Mr. Hill on behalf of the plaintiff that the onus of proof in this case was upon the defendant. He contends that although in this case if it had been tried in England the onus of proof might have been upon the plaintiff, Section 151 and the subsequent sections of the Indian Contract Act cast the burden of proof upon the defendant. For this it is necessary to see what those sections are. Section 151 says: 'In all cases of bailment the bailed is bound to take as much care of the goods bailed to him as a man of ordinary prudence would under similar circumstances take of his own goods of the same bulk, quality, and value as the goods bailed.' Section 152 says: 'The bailed, in the absence of any special contract, is not responsible for the loss, destruction or deterioration of the thing bailed, if he has taken the amount of care of it described in section 151.' Mr. Hill has contended that it was for the defendant to show that he had taken as much

care of the horse as a man of ordinary prudence would have taken of his own horse under similar circumstances. What these circumstances were must depend in this case upon the uncontradicted evidence of the defendant. The development of Mr. Hill's contention is that it was for the Judge to consider whether the defendant's evidence was reliable, and whether be had established that he had taken such care as is referred to in Section 151 of the Indian Contract Act, and that the Judge's finding On that question is conclusive. Mr. Hill cited the case of Collins v. Bennett, 46 New York Reports, referred to by Story in his work on Bailments, page 413. He also referred to the case of Byrne v. Boadle, 2 H. and C., 722: 33 L. J., Exch., 13, where the plaintiff, while walking in a street in front of the house of a flour-dealer, was injured by a barrel of flour falling upon him from an upper window, and where it was held that the mere fact of the accident without any proof of the circumstances under which it occurred was evidence of negligence. That class of authorities shows that in some cases, from the nature of the accident, it lies upon the defendant to account for the happening of the accident, and thus to show that he had not been guilty of negligence. That is a proposition which I do not dispute. Bach case, must, however, be looked at from its own particular circumstances. In some cases the very happening of the accident may be prima facie evidence that some want of care or some negligence must have taken place to cause the accident, as was held by Brett, J., in Gee v. The Metropolitan Railway Co., L. R., 8 Q. B., at p. 175: 42 L. J., Q. B., 105. In Scott v. The London Dock Company, 3 H. and C., 596: 34 L. J., Exch., 220, Erle, G. J., said: 'There must be reasonable evidence of negligence. But when the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care.' It appears to me that the two cases referred to by Mr. Hill were examples of the class of cases which were referred to by Erle, C. J., in the passage from his judgment which I have quoted. The mere fact of a barrel of flour coming out of an open window was, until accounted for, prima facie evidence that there was some want of care in those who had the control of the barrel, because the barrel could not have fallen out of the window of its own accord: there must have been

something to have put it in motion. In such a case it lies upon the defendant to show how the accident actually happened.

7. In the case of Collins v. Bennett, 46 New York Reports, which is more like the present case, the horse when delivered to the defendant was sound, and when returned was found to be foundered. In that case it was held that it was for the defendant to show how the horse, which was perfectly sound when taking out, was foundered when returned. That is a case which probably would come under Section 106 of the Indian Evidence Act, as an example of a case in which the burden of proof lies on the person who has special knowledge of the facts. These cases to my mind only show this, that in such cases it is for the defendant to give & prima facie explanation in order to shift the burden of proof on the other side.

8. What we have to consider here is whether such a prima facie explanation was given. The only evidence as to how this happened, that is how the horse happened to run away, was the evidence of the defendant himself. The defendant's evidence is not contradicted on any point; it is not inconsistent with what ordinarily happens in the life of everyone accustomed to ride or drive horses; there is nothing improbable in his statement; and under these circumstances is a Judge justified in holding that the defendant did not act as a reasonable man would have acted, and that he must have done something to cause the horse to bolt? What is the evidence upon which the Judge below has founded his judgment? He assumes that the horse undoubtedly must have been freely whipped to such an extent as to cause it to run away, or that there must have been some other cause within the knowledge of the defendant for the horse running away. His finding is based purely and solely upon speculation and assumption. In my judgment no Judge has any right to make or act upon such an assumption where there is no evidence to support it, and the evidence of the defendant on this point is uncontradicted, and is not within our common knowledge improbable. There was no evidence to contradict the defendant's evidence. There was nothing to show that it was even improbable that the horse had bolted and run away under the circumstances deposed to by him; still the Judge makes the assumption that something must have happened which had not been deposed to. If the burden of proof was upon the defendant, I think that burden was shifted on to the plaintiff by

the defendant's uncontradicted and not prima facie improbable evidence. I must say that I thoroughly agree with the opinion expressed by Lindley, J., in Manzoni v. Douglas, 6 Q. B. D., 145, when he said: 'To hold that the mere fact of a horse bolting is per se evidence of negligence, would be mere reckless guess-work.' What the Small Cause Court Judge had to find was whether the defendant had or had not taken as much care of the horse as a man of ordinary prudence would have taken of his own horse under similar circumstances. He found that the defendant had not taken such care. What was there on the evidence here which showed that the defendant had not taken such care? There is nothing to support that finding, except perhaps the mere fact that the horse was a quiet horse. I think this case falls exactly within the words of Lindley, J., above quoted. It does not cease to be anything less than mere reckless guess-work because the Judge has, contrary to the evidence and without any evidence, come to the conclusion that the defendant had freely used the whip. It appears to me that that is an assumption which is unsupported by evidence, and is mere reckless guess-work.

9. If I were trying the case with a jury, it is quite cigar to me that there was no evidence here which would justify me in leaving the case to the jury. If there is in a case tried by a Judge with a jury no evidence which the Judge ought to submit to the jury as against the defendant, it is the duty of the Judge to direct the jury to find a verdict for the defendant, and that would be a direction which the jury would be bound to act upon. Similarly, when the Judge is trying such a case without a jury, as was the case here, he is bound in law to find for the defendant. The eases to which I am going to refer show the principles on which a Judge is or is not justified in leaving a case of this kind to a jury. In Cotton v. Wood, 8 C. B. (N.S.), 568: 29 L. J., C. P., 333, Gill, C. J., said: 'To warrant a case being left to the jury it is not enough that there may be some evidence; a mere scintilla of evidence is not sufficient, but there must be proof of well-defined negligence.' In Davey v. The London and South-Western Railway Co., 12 Q. B. D., 70, it was held that if there is no reasonable evidence of negligence occasioning the injury, the Judge is bound to direct a verdict for the defendant. In Hammack v. White, 11 C. B. (N.S.), 588; 31 L. J., C. P., 129, it is said: ' The mere happening of an accident is not sufficient evidence of negligence to be left to the jury, but the plaintiff must give some affirmative, evidence of negligence on the part of the defendant.'

10. It was also held in that case that the mere bolting of a horse in itself was no evidence of the negligence of the person who had care of the horse, nor was it evidence that the horse was improperly brought into the street.

11. As I have said, there was in this case no evidence of any want of care within the meaning of Section 151 of the Indian Contract Act. There is no evidence which would have entitled the Judge of the Small Cause Court to submit this case to the jury had he been trying the case with a jury. In fact he would have been bound to withdraw the case and direct the jury to find a verdict for the defendant. On the evidence before the Judge of the Small Cause Court, he had, in my opinion, no jurisdiction or authority in law to make the decree which he did. It is not necessary, in the view which I take of this case, to consider whether the Small Cause Court Judge should not have taken into consideration the effect on this case of Section 150 of the Indian Contract Act. Under the circumstances it appears to me that in this case it is our duty to exercise our jurisdiction under Section 622 of the Civil Procedure Code. Under that section of the Code we may pass such order as we think fit: Maulvi Muhammad v. Syed Husain I. L. R., 3 All., 203; Sarnam Tewari v. Sakina Bibi I. L. R., 3 All., 417. The order which I propose to make in this case is that the judgment and the decree of the Small Cause Court be set aside, the plaintiff's suit be dismissed, and judgment be entered for the defendant with costs below and costs here.

Brodhurst, J.

12. The learned Counsel for the plaintiff, opposite party, has taken a preliminary objection that there is no ground either under Section 9 or Section 15 of the Royal Charter Act, or under Section 622 of the Civil Procedure Code, for entertaining the defendant-petitioner's application. I, however, concur with the learned Chief Justice in overruling this objection, for in my opinion the finding of the lower Court is not only unsupported by any proof, but it is, moreover, opposed to the evidence on the record, and I therefore consider that the lower Court has 'acted in the exercise of its jurisdiction illegally,' so as to bring the application within the meaning of Section 622 of the Civil Procedure Code.

13. The statement of the defendant-petitioner was recorded on oath. It may be said to be unrefuted, and it is in my opinion reliable. The plaintiff's mare was ridden by the defendant on the evening of the 6th November 1886, and then died. It is admitted by the plaintiff that he left Allahabad for Hamirpur about four days before the 6th November, that he returned to Allahabad on the morning of the 6th, that when he started for Hamirpur he left orders that the mare was merely to have walking exercise during his absence, and that on the 6th, prior to her being sent to the defendant, she was not worked at all beyond being driven between the Railway Station and the plaintiff's house. The plaintiff's witness and relative, H. M. Gordon, deposed that he had often ridden the mare, and that she had neither a hard nor a soft mouth; but from the evidence of the defendant, it is, I think, clearly proved that the mare had a hard mouth, and that she ran away with him for two miles or more in spite of his utmost endeavours to restrain her.

14. Admittedly the mare had been out of work for about four days prior to the 6th November, and had had very little work on the latter date, and, as might be expected, she was very fresh when ridden by the defendant on the evening of the 6th November. Almost immediately after she was mounted she became restive and plunged, and after galloping for a short distance and then being pulled up, she again plunged and tried to back into the Collector's compound. If under these circumstances the defendant hit her with his riding-cane, he did nothing more, in my opinion, than he should have done. There is proof that the defendant was not wearing spurs. There is not a particle of evidence that he made 'free use of the whip,' there is no ground for assuming that he even made use of his riding-cane otherwise than in a moderate and proper manner; and from such evidence as there is on the record I see every reason to believe that the defendant took as much care of the mare as a man of ordinary prudence would, under similar circumstanecs, have taken of her had she been his own property.

15. Mr. Blenkinsop, of the Army Veterinary Department, who held a postmortem examination of the mare, deposed that there were no external marks of violence on the body; that, on opening the car-case, he found that the diaphragm was ruptured; that the stomach contained undigested food; that the mare must have eaten shortly before she died; that the stomach was distended with undigested

food; and if a horse gallops with a full stomach the probabilities are that he would have some internal injury such as rupture of the diaphragm; that the cause of the mare's death was rupture of the diaphragm; and that in his opinion, the animal was not in a fit state to be galloped or ridden fast. In addition to the above evidence there is the deposition of the witness Ram Prasad, who deposed that when he went to Mr. Wilkinson for the mare she was at the time (4-10 or 4-20 P. M.) eating gram.

16. It is, I think, obvious that the mare was restive owing to want of a proper amount of work for some days prior to the time that she was let to the defendant for hire ; that she consequently plunged and backed and then ran away with the defendant in spite of all his efforts to restrain her; and that the cause of death was rupture of the diaphragm owing to the mare having galloped when her stomach was distended with food which had been given her in the plaintiff's stables shortly before she was let to the defendant for hire. Under these circumstances, the plaintiff alone was, I consider, responsible for the mare's death; and I therefore concur in allowing the application and in reversing the decree of the lower Court with all costs.