W. J. Rees Vs. John Young

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Court : Kolkata

Decided On : Feb-16-1921

Reported in : AIR1921Cal543,66Ind.Cas.745

Judge : Asutosh Mookerjee and ;Buskland, JJ.

Appellant : W. J. Rees

Respondent : John Young

Judgement :

Asutosh Mookerjee, J.

1. This is an appeal by the defendant in a suit for damages. The plaintiff is a Blast France keeper in the Bengal Iron and Steel co. the defendant is a a Superintendent of Collieries. On the night of the 9th December 1916 the plaintiff was proceeding on his motor cycle from Asansol to Kulti along the Grand Trunk Road, the defendant was driving his motor car in the opposite direction. The car and the cycle collided with the result that the cycle was damaged and the plaintiff sustained severe injuries. He was detained in hospital for a considerable time and has become maimed and disfigured for life. The plaintiff asserts that the collision was due to the negligence of the defendant and claims, Rs. 10,534 as damages. The substance of the case for the plaintiff is set out in the third and fourth paragraphs of the plaint Sled on the 6th August 1917, where ii is alleged that while the plaintiff was proceeding on his motor cycle along the left side of the road, he

saw two motor cars coming at a great speed from the opposite direction one behind the other, that the plaintiff passed the first motor tar whereupon the defendant who was driving lis car just behind the first car, without any warning and contrary to the rules of in the road, suddenly and negligently swerved out at a high and dangerous pace to the right in order to piss the first car, with the 0 result that his car dashed into the cycle of the plaintiff. The case for the defendant is set out in the seventh paragraph of his written statement filed on the 1st October 1917, in which it is stated that he had passed the car in front (which was driven by one Mr. Gibson) as also another gentleman (one Mr. Hall) who was coming in a motor cycle evidently in the same direction as the plaintiff, and that there after the plaintiff ran into and collided with his car. The defendant states that the distance between Mr. Gibson's car and Mr. Hall's cycle was 100 ft,: and that between Mr. Hall's cycle and the plaintiff's cycle was 300 ft. He farther adds that at the moment of collision, he was proceeding by his left side of the road, leaving more than half the width of the road for vehicles coming from the opposite direction to pass. In the 8th paragraph of the written statement, the defendant alleges that on enquiry he learnt that the plaintiff bad consumed a quantity of spirits at a refreshment room at Asansol which made him negligent, reckless and confused, and accounted for his suddenly running into the aar. The respective allegations, it may be observed, had been formulated by the parties in the course of correspondence antecedent to the suit, namely, on the 19th May 1917, on behalf of the plaintiff and the 19th June 1917, on behalf of the defendant. The Subordinate Judge has found that the collision was brought about by negligence on the part of the defendant. He has disbelieved the story that the plaintiff was under the influence of liquor, and, unable to control himself, dashed into the car of the defendant. He has also accepted the plaintiff's story that the accident happened at the time when the defendant was trying to pass Mr. Gibson's car. The Subordinate Judge has accordingly decreed the suit, holding, as regards the measure of damages that the amount claimed was not unreasonable. On the present appeal the judgment of the Subordinate Judge his been attacked on the ground that his conclusions are not supported by the evidence on therecord and that he has in fast given the plaintiff a decree on a theory inconsistent with the case made in the plain. It has not been disputed on behalf of the respondent that, as pointed out by Lord Westbury in

Eshen chunder Singh v. Shamachurun Bhutto 11 M. I. A. 7 : 6 W. R. P. C. 57 : 2 Ind. Jur. (n. s.) 87 : 2 Sar. P. C. J. 209 : 20 E. R. 3. and recently affirmed by Sir Liwrence Jenkins in Malraju Laithmi Venkayyamma Row v. Venkatadri Appa Row (sO.itisabsolutely necessary that the determinations in a cause should be founded upon a case either to be found in the pleadings or involved in or consistent with the case thereby made. The fundamental principle that the plaintiff cannot be permitted to follow a line of attack which the defendant had no opportunity to meet is of special importance in collision cases, where the accident happens very often in an entirely unexpected manner and in an extremely short space of time, thus rendering an accurate observation of the elements of the incident difficult in the highest degree. In this class of cases, it has consequently been considered specially necessary that the plaintiff, in framing his statement of claim, should set out the circumstances of the collision, to far as they are known to him, with clearness and accuracy to enable his adversary to know the case he has to meet; be should also stale in specific terms the particular acts of negligence which, according to him, caused the collision see the observation of Lord Chelmsford in Alice {The) and Rosita(The) 1868) 2 P. C. 214 : 5 Moore P. C. (n. s.) 803 : 8 L, J. Adm, 20 : 19 L, T 753 : 16 E. K. 5,8. We consequently to consider, whether the accident took place in the manner described in the plaint.

2. In the determination of this question, we must remember that according to the plaintiff he was always on his proper side of the road; the defendant did not seriously challenge this, but asserted that the plaintiff was so intoxicated that he lost all control over himself and ran into the car. This theory has been negative by the Subordinate Judge, and, in my opinion, no solid foundation was laid for it in the evidence. Immediately after the accident, a medical man was on the spot; no suggestion was made to him by the defendant that the plaintiff was intoxicated; and the information subsequently a-Heated with much assiduity from the refreshment room is entirely inconclusive. In this court, no endeavour has been made to controvert the conclusion of (h) Subordinate Judge on this point. The position consequently is that the assertion of the plaintiff that ho was on the proper side of the road practically remains uncontradicted, while the only theory suggested why he should have run into the car of the defendant has completely broken down. We pass on next to the case of the defendant. Admittedly, there was

another sir in front of his car; he did swerve out of what was his proper track with a view to get in front of that car; to this extent, he did violate the rule of the road, He is thus constrained to take up the position that be successfully passed the car in front and managed to get again on the proper side of the road before the accident had happened. The burden of establishing this assertion lies primarily on him. If this allegation is not proved, the accident is explained. Upon the question, whether he did actually passed the oar in front of him and regained the proper side of the road, the evidence is conflicting. The plaintiff asserts that the first ear passed him quite safely and the second car, evidently with the object of passing the first oar, swerved out of its way, thereby catching him just when he had passed the first car. His statement is quite premise and he adds that when the rear oar struck him, some portion of it caught his right thigh and some other portion caught his right leg below the knee. Mr. Hall first came up to him, after the accident, and the plaintiff is definite that both the cars had passed Mr. Hall before the accident. This description is borne out by Mr. Hall. He states that he and the plaintiff left the refreshment room together, but outside the station he went ahead He then waited for the plaintiff to come up to him and was about 100 ft. to 5Cft. off from the place of accident. He saw the two cars pass him. and immediately after the second ear had passed him, it swerved to the right, evidently with the intention of overtaking and passing the first car. At that time, the plaintiff was approaching from the opposite direction. He then describes how the plaintiff struck the side of the second car as the position of the second ear did not give the plaintiff room enough to pass. The witness substantially adhered to this description even after a severe cross-examination. I see no reason to distrust the testimony of Mr. Hall and there is no doubt that he should see how things happened in the bright moon light as it was the night of the full moon. On the other hand, the defendant asserted that be had passed the car in front of him and had reached the proper side of the road before the accident happened, and in this version he was supported by his wife who was with him in the car. There is thus a clear conflict of testimony upon this, the fundamental point in the case. The Subordinate Judge has accepted the version given by the plaintiff. I am unable to say that the story narrated by the defendant should have been preferred: it is to my mind plain that his estimate of the distances between the cars and the cycles and the speeds of the two cars is

inaccurate. The same remark applies to the evidence of Mr. Gibson. This is precisely the class of 'cases where a court of Appeal should, as Lord Kingpdown said in Bland v. Eon(1860) 14 Moore P. C. 210 at p. 235 : 15 E.R. 284 : 134 B. R. 43; Lush 224., in order to reverse the decision of the Court below upon a point of this description, not merely entertain doubts whether the decision below is right but be convinced that it is wrong The same view has been emphasised by the Judicial Committee in later collision cases : Alice {The) and Prineen Alice (The) (1868) 2 P. C. 245 : 88 L. J. Adm. 5;19L.T. 678 : 17 W. B. 209, 5 Moore P. C. (N. S.) 333 : 16 E. R. 541. Tasmania (The) (1890) 15 A. C. 223 : 63 L. T. 1 : 6 Asp. M. C. 517. Riven Steam Navigation Co. Ltd, v. Rathor Steamthip Go. Limited35Ind, Cas. 193 : 20 C. W. N. 1022; (1916) 1 M. W. N. 416 : 3l M. L. J. 159 : 4 L. W. 176 (P.C.). No doubt, as was observed in Glannibanta (The) (1876) 1 P. D. 283 : 34 L. T. 934 : 24 W, B. 1033 : 3 Asp. M, C. 339. the parties to the cause are entitled, as well on questions of fact as on questions of law, to demand the decision of the Court of Appeal, and that Court cannot excuse itself from the task of weighing con-dieting evidence and drawing its own inferences and conclusions, though it should always bear in mind in deciding a point on which there is a conflict of oral testimony that it has neither seen nor beard the witnesses and should consequently make due allowance in this respect. In the present ease, we have the cardinal fast that the defendant at one stage took his oar to the wrong side of the road which would inevitably lead to an accident if another vehicle came from the opposite direction before the car could be taken again to the proper side of the road. That the car of the defendant did actually get back to the proper side has not, according to the Subordinate Judge, been established by the evidence, and I do not see adequate grounds to dissent from this conclusion.

3. I may add that the Subordinate Judge properly declined to draw any inference adverse to the plaintiff merely from the position in which he was found lying on the road immediately after the accident. It is manifestly impossible to reconstruct, even in imagination and with any approach to contrary, the conditions under which the collision took place, solely from the position in which one of the occupants of the cycle or oar is found after the accident, that position is the resultant of a number of factors which are absolutely unknown in the case before us. I hold accordingly, in concurrence with the' Court below, that the accident was due to the negligence of

the defendant.

4. As regards the quantum of damages, no conclusive reasons have been assigned in support of the contention that the assessment has been excessive; it is certainly neither perverse nor based upon a misconception of the facts of the case.

5. The result is that the appeal must be dismissed with costs.

Bugkland, J

6. On the 9th December 1916 the plaintiff had been spending the evening at Asansol, and at about 11 p. m. he left to return to Kulti, a place about ten miles away where he lived, A Mr. Hall accompanied him, and they both rode motor cycles. The defendant and his wife and child, and a Mr. Gibson and his wife had, been spending the game evening at the house of a Mr. Maskay which lies oft the road from Asansol along which the plaintiff had to travel. Shortly after 11 p. m,, Mr. Mackay's guests left his house in two motor cars, the Bees being in one and the Gibsons in another. Very soon after, they had turned into the main road they passed Mr. Hall, who was in front of the plaintiff and was standing by the side of the road waiting for the plaintiff (a overtake him. This the plaintiff never did, for within a very short time of the cars passing Mr. Hall the plaintiff's motor cycle and the defendant's ear collided, with the result that the plaintiff was thrown on the road and sustained severe injuries, his motor cycle also being considerably damaged, The plaintiff brought the suit, whiah has resulted in this appeal, for damages which be has suffered in consequence of the collision which he says was due to the negligence of defendant.

7. The plaintiff's case is that he had passed one of the cars when the other, which was Occupied by the defendant, swerved out into the read in order to pass the first car and in so doing collided with his motor, ay ale which was on its proper side of the road.

8. The defendant's case is that he had already passed the other car, in pursuance of some thing that was said before the cars left Mr. Mackay's house, and that his

car was leading. He denies that he swerved at all and says that 'for some reason,' as he puts it in one of his letters, the plaintiff turned into his car, which he says was on his own side of the road.

9. On the cases as presented by the parties there is, therefore, a direst conflict of evidence as to (1) which of the oars was leading, (2) the position in the road of the defendant's car, (3) whether the plaintiff turned into the defendant's car.

9. The Subordinate Judge has found that the accident was due to the negligence of the defendant. His findings as to the relative positions of the two cars are not clear, but he does not accept the allegations of the defendant and his witnesses as to the defendant's car having passed the other and being 200 or 300 feet ahead. He has found that the accident happened to the south of the center of the road, which means that the defendant's car was not in its proper track at the time of the collision. This finding also impliedly negatives the defendant's case that the plaintiff turned into him. In effect the Subordinate Judge has accepted the evidence of the plaintiff and rejected that of the defendant and of his witnesses.

10. The plaintiff's account of the incident is contained in a very few lines of his evidence. He said :---'When the two motors approached me, the first aar passed me quite safely and the second car, evidently with the object of passing the first car, swerved oat of its way, and caught me just as I had got past the first car . . . . As I passed the first car the rear car same across the road evidently with the intention of passing the first car. But when the rear oar struck me, some portion of the rear car caught my right thigh, some other portion of the car caught my right leg below the knee. This knocked me on to the side of the car which went past.'

11. I do not propose to examine in detail the evidence of the defendant and of his witness, Gibson, as to their positions at the time of the accident, The Subordinate Judge has not accepted it and I am not prepared to say that he ought to have done so. They both, however, say that when Gibson passed the seens of the accident he was going very slowly; he himself says he 'was simply crawling along, ' while the defendant says, Gibson's speed was 4 cr 5 miles an hour, Gibson further says that he did not see how the accident happened. I find it quite impossible to reconcile these statements with the case that the defendant bad

passed Gibson some way further back and that the cars were proceeding at a distance of 200 or 300 feet apart, at a normal speed, both on their right side of the road when the collision occurred. Were those the facts Mr. Gibton must have seen, if not the accident, at least the plaintiff lying in the road where he had fallen. Nor is his slowing down to 4 or 5 miles an hour in those circumstances explained. On the other hand, the reduced speed would be explained if it was for the purpose of allowing the other car to pass. If this is the explanation, then it follows that the collision took place either as the defendant's car had just passed the other, or as it was passing, or as it was on the point of passing. The plaintiff gays ho bad passed the first oar when the other car swerved and the collision took place. Which of the other 'two alternatives represents the fasts is, not, in my opinion, very important. It is clear both on the evidence and on the findings of the Subordinate Judge that the second car was very near, and so near, in my view of the evidence, that the defendant in trying to pass the first ear without satisfying himself that the read was clear and that he should get by, was guilty of negligence which resulted in the collision.

12. The Subordidate Judge has some to his conclusion principally on the evidence of the witnesses other than Mr. Hall, whore statements, he says, he has not mash referred to, for, he has been accused of having instigated the plaintiff in bringing the quit. He does not say that he has any reason sor not believing Mr. Hall, and though his disregard of that gentleman's evidence emphasises his conviction of the truth of the plaintiff's evidence, I think he has erred on the side of excessive camion in not taking more into account what Mr. Hall said about the occurrence. Mr. Hall appears at the time to have expressed an opinion adverse to the defendant, bat that is not unnatural if 'his evidence is true. Beyond that there is nothing in the evidence to justify the accusation to which the Subordinate Judge refers, even if that is a justification. Mr. Hall, beside the parties, was the only person who saw the accident. It was a moonlight night and he was at a short distance away. Irrespective of the estimates of the distance given by witnesses, this is proved by the fast that after the collision the defendant pulled up about 20 feet off from where it occurred, spoke a few words to his wife and ran bask to where tbe plaintiff was lying and found Mr. Hall already there attending to the plaintiff. Mr. Hall's statement as to the collision is that the cars passed him; then he

says:---'Immediately after the second car passed me it swerved to its right evidently with the intention of overtaking and passing the first car...plaintiff was approaching , , . when he was about in a line with the first sar the second air evidently seeing that the road was not clear attempted to get behind the first car again but as he was so near the first oar that at the time of swerving to the right he could not get back to his left side of the road and did not give Mr. Young room to pass.' This is an intelligible account of the occurrence corroborating the plaintiff and I see no reason for not accepting it. This account is also corroborated by the defendant's statement of damage done to his car. The Subordinate Judge bas not accepted the statements of the defendant and of Mr. Gibson as to the defendant's car having gone ahead before reaching the place where Mr. Hall was standing. Not only is this finding supported by the evidence of Mr. Hail but the evidence generally supports) the argument advanced on behalf of the respondent that it was on account of Mr. Hall being on tha road that the defendant did not overtake and pass Mr. Gibson earlier, but waited till the cars were clear of Mr. Hall.

13. A great deal has been made on behalf of the appellant of the position in the road in which the plaintiff was found to b9 lying after the collision. It has been argued that as he lay practioally on the center line of the road the defendant's oar must have been on its proper side or it would have run over him. I find it impossible to draw any inference from this. The colliding vehicles ware approaching cash other at a speed aggregating between 3O and 40 miles an hour, the plaintiff must have been thrown violently from his machine, contest with the car protested him in another direction How is it possible to say after he had been thus thrown about that the place where he same to rest gives any precise indication of his position before he was subjected to these force?

14. Though it has not been contended on appeal, and the point has very properly been abandoned, that the plaintiff was under the influence of alcoholic stimulant on the occasion in question, I wish to say a word with regard to the matter. The Subordinate Judge has found that the suggestion is without any basis. Not only do I agree with this finding but the suggestion ought never to have been put forward. It is in evidence that the very day after the accident the defendant made enquiries at Messrs, Kellner and Co.'s refreshment-room at Asanco), yet ha said nothing in

his latter of the 19th June about the plaintiff being the worse for liquor. On the occasion of the accident a Dr. Tomb was present and attended to the plaintiff, bat he was not tailed to support this suggestion. Yet the charge was made in the written statement filed on the 1st October 1917 and persisted in when the plaintiff was across-examined, though the defendant and his advisers mast have known that there was not a word of troth in it. Such charges, irresponsibly made, may do incalculable harm, and they should be finally laid to rest.

15. On the question of damages, I can only say that I think that, considering the plaintiff's injuries, the pain and suffering, which he underwent, at one time his life was said to be in danger, hit claim is extremely moderate, and that I know of no reason for reducing them even by the smallest coin of the realm, I agree that this appeal should be dismissed with coats.