

E.V. Penheiro Vs. M. Minney

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Court : Kolkata

Decided On : Jan-31-1933

Reported in : AIR1934Cal655

Appellant : E.V. Penheiro

Respondent : M. Minney

Judgement :

Roy, J.

1. This is an action under the Fatal Accidents Act (Act 13 of 1855). On 26th June 1933, at about 10 a.m., one Charles Penheiro, an assistant in Messrs. Liptons Limited was crossing Bentinck Street from west to east in order to reach Weston Street when he was knocked down by the defendant's motor car which was being driven from south to north along Bentinck Street by the defendant's driver, Charles Penheiro was seriously injured and died the same afternoon at the Medical College Hospital, death being due to fracture of the skull. On 4th August 1933, Mr. E. P. Swinhoe, a Solicitor, under instructions from Mrs. Charles Penheiro wrote to the defendant claiming Rupees 45,000 as loss and damages sustained by her by reason of her husband's death and threatening legal proceedings in default of payment. The claim was repudiated by Messrs. Orr, Dignam and Co., Solicitors, acting on behalf of the defendant, by their letter of 8th September 1933; but before that date and on 31st August 1933 this suit was filed. In the plaint, as it stood

before the amendments to which I shall refer later, the only plaintiff was Mrs. Esther Virginia Penheiro, the widow of Charles Penheiro, and she sought to recover the sum of Rs. 45,000 or such other sum as may deem just to this Court as damages, which she on her behalf assessed at Rs. 45,000. It was stated in the plaint that Charles Penheiro had died leaving him surviving his widow, the plaintiff, and others who were not desirous of joining in the suit, and that the plaintiff had instituted the suit as representative of Charles-Penheiro, deceased, for the benefit of herself.

2. In para. 3 of the plaint it was alleged that the defendant's motor car No. 19912 under the charge and control of the defendant's servant was being driven from south to north along Bentinck Street rashly and negligently at a rapid and dangerous speed and struck the said Charles Penheiro down and ran over him. As a result, Charles Penheiro received injuries, which are described in the plaint, and died. On 16th November 1933, Messrs. Orr, Dignam and Co., Solicitors for the defendant, asked for particulars: (1) as to all parties interested in the suit and the nature and extent of their interest, and (2) as to the damages alleged to have been sustained. On 24th November they sent a reminder and on 27th November 1933, they received a reply to their letter of 16th November from Mr. E.P. Swinhoe, Solicitor for the plaintiff. In his letter Mr. Swinhoe stated that the children of his client, Mrs. Esther Virginia Penheiro, and her husband the late Charles Penheiro were not desirous of joining in the suit as they had agreed that their mother should get all the compensation. As for the particulars of damages asked for, the letter stated that the plaintiff's sole means of support during her married life was provided by her husband from his monthly salary of Rs. 175 and a varying monthly amount as allowance, etc., the total from both sources being Rs. 200, or thereabouts, and that by the death of the deceased the plaintiff had been deprived of the whole of this amount and consequently of her means of livelihood. On 29th November Messrs. Orr, Dignam and Co. wrote that the particulars furnished were not sufficient, and did not comply with the provisions of law and further that their client had been advised that the plaint did not disclose any cause of action and the suit as framed was not maintainable. In reply to the letter of 29th November, Mr. Swinhoe wrote on 2nd December stating that Charles Penheiro had left him surviving his widow and the children whose names were mentioned as his only

heirs and legal representatives, and that the children had given up their rights and claims to the money that might be recovered from the defendant as costs, compensation or damages in favour of the plaintiff. The letter also gave particulars of the damages which the widow had sustained, making up the total of Rs. 45,000 claimed in the plaint.

3. In the meantime and on 22nd November 1933, the defendant had filed his written statement in which he took the point that the plaint did not disclose a cause of action, and that the suit as framed was not maintainable. He denied that his servant drove the car negligently or was guilty of the alleged or any negligence or that the motor car was being driven at a rapid or dangerous speed. He alleged that the accident was not caused or occasioned by any of the acts complained of but arose from an inevitable accident and alternatively there was contributory negligence on the part of Charles Penheiro. Particulars were given of the alleged contributory negligence. It was submitted that the plaint did not disclose any damages which the plaintiff was entitled to claim and that the plaintiff was not entitled to recover Rs. 45,000 or any sum at all. On 4th December 1933, there was rather a curious letter written by Mr. Swinhoe to the defendant's solicitors calling upon them to give discovery of 'certain facts' of which 'your client is in possession' and 'which are not personally known to my client.' The letter went on to say:

For instance, your client is personally aware of the negligent and wrongful act which caused the death of my client's husband, and your written statement is not sufficiently clear to indicate properly the nature and extent and mode of the injury. And although your client was sitting in the car at the time of the said wrongful act, you have not disclosed all the facts connected with the said negligence and wrongful act of your client.

4. In his final address counsel for the defendant relied on this letter as indicating that the plaintiff had not made up her mind even on 4th December as to what case of negligence she was going to make and that up till then the only case of negligence was, as stated in para. 3 of the plaint, a case of the car having been driven at a dangerous speed. On 17th instant an application was made for an amendment of the plaint and as the defendant did not appear to oppose the

application I made the order asked for. By the amendments made in the plaint we have now as plaintiffs, the widow and the four children of Charles Penheiro. There is a new paragraph (para. 2-A) in which it has been alleged that the added plaintiffs had agreed with the original plaintiff that all damages and compensation recoverable from the defendant should be enjoyed by the original plaintiff and another paragraph (para. 7) stating that Charles Penheiro left no will and that there is no executor or administrator of his estate. No additional written statement has been filed.

5. The hearing of this case started on the afternoon of Monday the 22nd and when counsel for the plaintiffs was opening his case he gave certain particulars of the negligence alleged in para. 3 of the plaint. Counsel for the defendant contended that in para. 3 of the plaint the only negligence alleged was that the car was being driven at a rapid and dangerous speed and that the plaintiffs should not be allowed to go into any other case of negligence, I thought it sight that I should allow the plaintiffs to go into the case made by counsel in his opening, and I directed counsel to furnish full particulars in writing of the negligence of which he complained and with regard to which he desired to lead evidence. The particulars have been furnished and are on the file. The following issues were submitted and accepted:

(1) Does the plaint disclose a cause of action? (2) Is the suit maintainable as framed? (3) Are the plaintiff's, representatives of Charles Penheiro? (4) Are the plaintiffs entitled to maintain this suit? (5) Did the defendant's driver drive negligently in the following particulars: (a) Was he driving at a rapid or a dangerous speed? (b) Did he negligently fail to sound his horn? (c) Did he negligently fail to heed a warning alleged to have been given by the deceased? (6) Was there contributory negligence as alleged in the written statement? (7) Was the collision due to inevitable accident? (8) Is the plaintiff, Mrs. Penheiro, entitled to recover the sum of Rs. 36,000 claimed in the particulars or Rs. 350 for funeral expenses or Rs. 200 or any other sum as expenses alleged to have been incurred in the Police Court.

6. The first witness examined on behalf of the plaintiffs was Upandra Nath Roy, a Surveyor. He proved a plan (Ex. A) prepared by him of that portion of Bentinck Street where the accident took place, and its surroundings. The accuracy of this plan was challenged in certain particulars, but I do not think the alleged inaccuracies are very material. (After considering the evidence in the case his Lordship proceeded.) That concludes the oral evidence in the case and I might say at once that I much prefer the testimony of the defendant and his witnesses. I have come to the clear conclusion on the evidence before me that the plaintiffs have failed to make out their case. I find that the deceased while crossing the road while he was still on the western tram track had for some reason or other hesitated and either stepped back or made a backward movement and that in consequence the driver of the car who had intended to pass the deceased on the left, finding that he might not be able to pass the deceased on the left, swerved his car to the right in order to pass the deceased on the right but the deceased suddenly changed his mind and dashed forward with the result that he got in the way of the car and the car hit him and knocked him down, although the driver had put on the brakes. In my view the driver did the correct thing when he turned to the right and if the deceased had not dashed forward there would have been no accident at all. The spot where the man was knocked down and the position in which the car was found after the accident shows that the account given by the defendant and his witnesses is the correct account.

7. The fact that a good portion of the dead man's body was protruding beyond the bonnet of the car proves that at the time of the impact the car could not have been travelling at a great speed. In my view, in the circumstances of the case the accident was unavoidable and no blame can attach to the driver of the car. I find that the accident was due to the conduct of the dead man. It is difficult to say why the deceased behaved in the way he did. The plaintiff's witness Mungul Mia stated that he spoke to the deceased while he was still on the western tram track and that the deceased spoke to Mungul Mia. It might be that at that time the deceased saw the car coming and he got flurried and could not decide as to whether he should move backward or forward. I am unable to accept the testimony of the witnesses Mungul Mia and Giribala. They were obviously persons of limited intelligence and their ideas of speed and distances are vague and uncertain. I cannot help

doubting their capacity for proper or correct observation and it is difficult to say how much the witnesses had really seen of the accident. It is impossible to believe that the driver of the car made no effort whatsoever to avoid knocking the old man down. It is curious that though the accident took place in a busy street in Calcutta, and the evidence shows that there were a certain number of people about, the only two witnesses who should have come forward to give evidence in support of the plaintiff's case were two persons who had known the deceased for some considerable time and who are likely to let their sympathies with the deceased's family influence their minds. I find that the car was being driven at a reasonable and proper speed and not at a rapid or dangerous speed. I find that the driver did sound his horn when he saw the deceased and there was no warning given by the deceased. Issues 5, 6 and 7 are decided in favour of the defendant.

8. The plaintiff's suit therefore fails. I think however I should give my views with regard to the other issues raised. I shall take up the consideration of issues 1, 2, 3 and 4 together. It has been contended that the suit has not been properly framed as it has not been filed by the proper persons and has not been brought for the benefit of all the persons for whom it should have been brought. Counsel for the defendant argued that in the case of Europeans and Eurasians a suit under the Fatal Accidents Act (Act 13 of 1855) could only be brought by his executor or his administrator and the word 'representative' in the Act had no application to such persons but was used only with reference to Hindus and Mahomedans. Reliance was placed by counsel for the plaintiffs on the case of *Johnson v. Madras Railway Company* (1905) 28 Mad 479, where this very point was considered and decided. In that case the argument advanced before me by learned counsel for the defendant had been advanced by the Advocate-General of Madras and was overruled by the Court, and the learned Judges held that the word 'representative' in Act 13 of 1855 meant and included all or any of the persons for whose benefit a suit under the Act could be maintained. At one time I was inclined to doubt the correctness of the decision in the Madras case, but on further consideration I have definitely come to the conclusion that the Madras decision is right and I should follow it.

9. In my view the word 'representative' in Act 13 of 1855 has a special meaning of its own. It has not the same meaning as 'legal representative' in the Civil Procedure Code. It seems to me that the intention of the Legislature was that in the absence of an executor or administrator any one or more of the persons for whose benefit the right of action was given should be deemed to be a 'representative' of the deceased for the purpose of maintaining a suit under the Act. I do not think 1. (1905) 28 Mad 479 the word 'representative' in the Act can be treated as mere surplusage in the case of Europeans and Eurasians. It could not have been intended that in such a case, where there is no executor or administrator, the persons for whose benefit the right of action was given should be without a remedy. I hold the plaintiffs are the representatives of the deceased within the meaning of the Act and are entitled to maintain the suit. I do not think there is much substance in the further objection made by counsel for the defendant that the suit had not been brought for the benefit of all the persons for whom it should have been brought.

10. On the plaint as amended it is clear that the children of the deceased are making no claim for damages at all and as all the persons for whose benefit the suit should have been brought are the plaintiffs before me and no further action can be brought in respect of the same subject matter of the complaint the purpose of the Act has been served and I hold that the plaint substantially complies with the requirements of the statute. I must not however be understood to say that I approve of the way in which the plaint in this suit has been drawn. In my view a plaint in a Suit under the Fatal Accidents Act has to be very carefully drawn and should give full particulars of the person or persons for whom or on whose behalf the action has been brought and of the nature of the claim in respect of which damages are sought to be recovered. I do not approve of the plaint in this suit but I cannot go to the extent of saying that it does not disclose a cause of action or that the plaint should not be entertained at all. Issue 8 deals with the question of damages recoverable by the plaintiffs in the event of their succeeding in the suit. In my opinion, the plaintiffs are not entitled to claim the funeral expenses or the expenses alleged to have been incurred in the police Court and if I had been disposed to make a decree in the suit I would have awarded a sum of Rs. 2,000 as compensation to be paid to the plaintiff, Mrs. Esther Virginia Penheiro. The suit will

be dismissed with costs, including reserved costs.

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