

## ORIGINAL CIVIL.

—  
*Before Roy J.*

ESTHER VIRGINIA PENHEIRO

v.

MAURICE MINNEY.\*

1934

Jan. 22, 23, 24,  
 25, 31.

*Fatal accident—"Representative", meaning of—Pleadings—Indian Fatal Accidents Act (XIII of 1855).*

The word "representative" in the Indian Fatal Accidents Act has not the same meaning as the expression "legal representative" as defined in the Code of Civil Procedure. In the absence of an executor or administrator, the persons, for whose benefit a right of action is given by the Act, will be deemed representatives of the deceased for the purpose of bringing a suit under the Act.

*Johnson v. The Madras Railway Company* (1) followed.

A plaint in a suit under the Indian Fatal Accidents Act should give full particulars of the person or persons, for whom or on whose behalf an action is brought, and also of the nature of the loss, for which damages are claimed.

## ORIGINAL SUIT.

The facts of the case and arguments of counsel are sufficiently set out in the judgment.

*I. P. Mukherji, P. P. Mukherji and D. P. Chatterji* for the plaintiffs.

*Clough* for the defendant.

Roy J. This is an action under the Fatal Accidents Act, 1855. On the 26th of 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

\*Original Suit No. 2025 of 1933.

(1) (1905) I. L. R. 28 Mad. 479.

died the same afternoon at the Medical College hospital, death being due to fracture of the skull. On the 4th of August, 1933, Mr. E. P. Swinhoe, a solicitor, under instructions from Mrs. Charles Penheiro, wrote to the defendant claiming Rs. 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 & Co., the solicitors acting on behalf of the defendant, by their letter of the 8th of September, 1933; but before that date, that is, on the 31st of 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 seem 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 the representative of Charles Penheiro, deceased, for the benefit of herself. In paragraph 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 and at a rapid and dangerous speed and had knocked the said Charles Penheiro down and run over him. As a result, Charles Penheiro received injuries which are described in the plaint, and died. On the 16th of November, 1933, Messrs. Orr, Dignam & Co., solicitors for the defendant, asked for particulars: (1) as to all the 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 the 24th of November they sent a reminder and on the 27th of November, 1933, they received a reply to their letter of the 16th November from Mr. E. P. Swinhoe, the

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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 the 29th of November, Messrs Orr, Dignam & 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 the 29th of November, Mr. Swinhoe wrote, on the 2nd of 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 as claimed in the plaint. In the meantime, on the 22nd of November, 1933, the defendant had filed his written statement, in which he took the point that the plaint did not disclose any 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 running down was not caused or occasioned by any

of the acts complained of, but arose from inevitable accident, alternatively, that 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 the 4th of 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:—

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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, yet you have not disclosed all the facts connected with the said negligence and wrongful act of your client.

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 the 4th of 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 paragraph 3 of the plaint, a case of the car having been driven at a dangerous speed. On the 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, namely, 2A, 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 in paragraph 7 it is stated that Charles Penheiro left no will and that there is no executor or administrator of his estate. No additional written statement has been filed. The

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hearing of this case started in the afternoon of Monday, the 22nd instant and when counsel for the plaintiffs was opening his case, he gave certain particulars of the negligence alleged in paragraph 3 of the plaint. Counsel for the defendant contended that in paragraph 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 right 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 plaintiffs 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 ?

[Here his lordship considered the evidence in detail and then proceeded as follows]

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.....

Issues 5, 6 and 7 are decided in favour of the defendant. 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 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. The Madras Railway Company* (1), 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, but it was not accepted by the Court, the learned Judges holding that the word "representative" in the Fatal Accidents Act, 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. In my view, the word "representative" in the Act 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

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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. 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; it 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 loss 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 proceedings, but 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.

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The suit will be dismissed with costs, including  
reserved costs.

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*Suit dismissed.*

Attorney for plaintiffs : *E. P. Swinhoe.*

Attorneys for defendant : *Orr, Dignam and  
Company.*

P. K. D.