Bai Nada Wd/O. Bhoi Shana Kalyan And Ors. vs Patel Shivabhai Shankerbhai And Ors. on 22 November, 1965

Equivalent citations: (1966)7GLR662

JUDGMENT

M.U. Shah, J.

1. This appeal arises out of dismissal of a Civil Suit for compensation instituted under the Fatal Accidents Act, 1855 (Act XIII of 1855) by a young widow of 25 years and her two infant sons for the benefit of themselves and of two minor daughters named Shanta and Kamla. The compensation prayed for in the suit which was filed in the Court of the Civil Judge Senior Division at Nadiad as Special Civil Suit No. 28 of 1957 was for loss occasioned by the death of one Bhoi Shana Kalyan to the said dependants of the deceased, who was the husband of the plaintiff-widow and father of the four minor children. The death of said Bhoi Shana Kalyan is alleged to have been caused by wrongful acts of the original defendants who are respondents herein. Deceased Bhoi died at a young age of 25 years, leaving behind him the plaintiff-widow and four minor children aged 9, 2, 8 and 4 respectively. The plaintiffs claim damages against the defendants as joint tort-feasors for their tortious acts which in this case amount to a crime.

2. The plaint-allegation is that deceased Bhoi Shana Kalyan along with his wife Nanda the first plaintiff and her four minor children Asha, Raoji Shanta and Kamla was residing in a hut situated in a filed on the outskirts of village Anklay in taluca Borsad in Kaira District. On the night of August 11, 1954, the whole family had supper between 9-00 And 10-00 P.M. and thereafter they went to sleep in the hut. Five defendents-respondents who bore enmity and malice against deceased formed an anlawfai assembly and came to the not of the deceased cm that night with common object to cause murder of the deceased. The defendants were at that time armed with deadly weapons. The plaint-allegation further is that in prosecution of their common object to cause death of the deceased, the respondents asked the deceased to go out of the hut and as the deceased did not move out, the first respondent dealt a dharia blow on the deceased and with the aid of the other defendants dragged the deceased out of the hut. The deceased was then dealt dharia blows by the defendants in the neighbouring field of the second respondent Parshottam and murder of the deceased was committed by belabouring him cruelly and intentionally out of enmity and malice. The allegation is that all the defendants were parties to this crime and the death of the deceased was instantaneous. The allegation further is that the third defendant and some others beat the plaintiff-widow and caused her hurt.

3. On a complaint being filed by the plaintiff-widow, all the five defendants were arrested for alleged offences under Sections 147, 148, 149, 302 and 323, Indian Penal Code and were charge-sheeted and ultimately committed to the Court of the Sessions Judge at Nadiad to stand their trial for the said

offences. In Sessions Case No. 64 of 1954, the learned Additional Sessions Judge, Nadiad, to whom the case was transferred, held the present defendants guilty of being members of an unlawful assembly, the common object of which was to voluntarily cause hurt to decreed Shana and convicted the defendants under various sections of the Indian Penal Code and sentenced them to varying terns of imprisonment In appeal, the High Court enhanced the sentence of the first and second defendants.

4. The plaintiffs have claimed damages for loss to the plaintiffs and two other beneficiaries; as also for loss of expectation of life of the deceased and for physical and mental injury for which the plaintiffs as stated in the plaint were entitled to compensation. The damages ate claimed at Rs. 20, 000/- and these include the provision for maintenance, clothing, marriage and educational expenses of the four minor children of the deceased and the first plaintiff.

5. All the five defendants have filed a joint written statement, wherein they have denied the plaint allegations of the defendants having caused death of deceased Shana. They have stated that in the Sessions Case, the charge of murder was not proved and the defendants were falsely accused and convicted for having caused hurt to the deceased. They have denied that they bone any enmity or malice to the deceased and have further pleaded that as the first defendant was the leader of the village, the first plaintiff, under the false guidance of the enemies of the defendants has falsely accused them of murder and thus caused them harassment and pain. The defendants have denied that the plaintiffs or the two other beneficiaries have suffered any damages or were entitled to any damages. Their plea is that there was no special alteration in the first plaintiff's earning capacity or in the means of earning.

6. On the aforesaid pleadings, the learned trial Judge, bad framed the following issues:

(1) Whether the plaintiffs prove that the defendants murdered Shana Kalyan.

(2) Whether the plaintiffs prove that they are entitled to recover Rs. 20, 000 as damages as alleged from the Defendants.

(3) What order should be made?

7. On consideration of the oral and documentary evidence that was on the record before him, the learned trial Judge reached a finding that the plaintiffs had failed to prove the facts alleged by them in the plaint and therefore, negatived the first issue. On the second issue, the lestued Judge held that in view of his finding on first issue, he did not consider it necessary to decide the second issue. He accordingly dismissed the vat on his finding that the plaintiffs had failed to prove the plaint allegations. Being aggrieved by the aforesaid judgment and decree of dismissal of the suit, the original plaintiffs have filed this First Appeal against the original defendants and this has now come up for bearing before us.

8. Mr. M.C. Shah, learned Advocate appearing for the appellants has in main contended that the learned trial Judge was in error in finding that the plaintiffs had failed to prove the plaint allegations

relating to the death of the deceased Shana. Mr. Shah also contended that there was sufficient evidence on record to reach a conclusion that the defendents had by their wrongful acts caused fatal injuries to the deceased Shana as a result of which Shana bad died instantaneously. He further contended that the learned Judge was in error in not deciding the second issue even though the parties had joined the issue and led evidence on the question of damages.

9. Before discussing the aforesaid contentions of Mr. Shah, we may say that although the first issue is broadbased as aforesaid and has relation to the defendants having caused murder of Shana Kalyan, the parties, as appears from the pleadings and evidence on the record, have understood the plaint allegations as relating to the defendants having, by their wrong ful acts amounting to crime, caused death of deceased Shana. Therefore, for our purpose we win consider that the parties have joined issue on the pleadings aforesaid and the first issue so framed, though broadbased, covers the issue of alleged wrongful acts of the defendants resulting in the death of the deceased.

10. Before we discuss the material evidence relating to the alleged wrongful acts of the defendants resulting in the death of the deceased, it will be convenient to first set out the topography of the place of incident, the relationship of the defendants inter se and certain other facts as they emerge from the evidence on record.

11. It is disclosed from the evidence and is not disputed that the deceased Shana along with his wife and four minor children was living in a hut situated in a field known as Visvaghavalu fueld. This hut had no door as stated by the first plaintiff Nanda. It also, appears from the evidence of Bai Nanda that deceased, was cultivating about five bighas of the aforesaid field. These facts are not in dispute. In the cross-examina-tion. made on behalf of the defendants, plaintiff widow Nanda has stated that the field of Parshottam, presumably the second defendant,, was of about 2, to 3 bighas and a part, of, it was touching, the field which the deceased was cultivating and that one can go from the field of the deceased 40 the-field of said Parshottam from the Shedha (boundary line); that the distance between Ambalal's field and the field of the deceased was about 100 paces; that the distance is from the open space in Arabalal's field to Parshottam's field was 50 paces; and that the dead-body of deceased Shana was lying at a distance of about 10 paces from this open space, in Ambalal's field. We may say that it is established on good and reliable evidence and is not disputed that the dead-body of deceased Shana was lying in the field of Parshottam which accordingly was at the higher at a distance of 150 paces from the hut of the deceased if one has to go from Ambalal's field. One can, as well, go straight to the field of Parshottam from the hut of the deceased through the Shedha aforesaid.

12. It is common ground that the first defendant was a leading man in the village and was an influential person. He had two houses and a bungalow worth Rs. 10,000/- and 80,000/- respectively. He was also possessed of 30 to 35 bighas of land worth Rs. 1,00,000/-. The first defendant has also stated that he raised tobacco and food grains in his field and also raised seedling. The second defendant is the son of the first defendant and the third defendant is his nephew; fourth and fifth defendants are the servants of the first defendant and inter se they are father and son respectively.

13. The other material fact to be stated is that according to Nanda, as stated in her evidence which is reliable and has gone unchallenged, all the five defendants had on the relevant night gone armed with deadly weapons to the hut of the deceased. First three defendants were armed with Dharias, the fourth defendant was armed with a spear and the fifth defendant was armed with a stick. Second defendant who is the son of the first-defendant had, according to Nanda, a battery (torchlight) with him and this is the answer elicited in her cross-examination made on behalf of the defendants. She has also stated that the fourth defendant had struck the deceased with a spear on his leg and that she had, from the outlet in Parshottam's field, seen the defendants beating the deceased. It is noteworthy that inspite of the clear evidence of Nanda referring, to the presence of all the defendants with the aforesaid arms and also referring to the parts the defendants played first in the hut of the deceased and then in Parshottam's field where the deceased ultimately lay dead on that fateful night, except the first defendant, none of the remaining four defendants has entered the witness box and has cared to deny the statements made by Nanda. The-result is that the incriminating evidence against the four other defendants as given by Nanda has gone unchallenged. It is also noteworthy that although the defendants have in their written statement denied the plaint allegations, in the evidence led on behalf of the first defendant, the plea taken is one of alibi of the first and second defendants. Thus there is a variance between the pleading and proof in respect of this plea taken by the first defendant to which we will refer at a later stage.

14. The next material circumstance to be considered is the motive element. According to Nanda, the defendants bore enmity and malice to the deceased and there is a reference to the quarrel about fish catching between the deceased and the first defendant. The plaintiffs witness Babardas has in his deposition at Exh. 35 stated that relations between deceased Shana and defendants were spoiled, due to fish and plough inci-dents and the first defendant had fined the deceased Rs. 100/- for fish-catching. The first defendant himself in his deposition at Exh. 50 has referred to this fish incident; but his statement is that he had no personal-dispute with the deceased. He has however admitted that Shana and 30 other persons were near his dwelling house and he had scolded the deceased about fish catching. He states that he had rebuked the deceased four to five times before that also, but the deceased did not cease fishing The father of the deceased had agreed to give Rs. 100/- in charity for the act of fish-catching done by the deceased. He has dented that there was any quarrel about the alleged plough incident. In our judgment, there is no material evidence about the plough incident. But the evidence of the first defendant himself makes it clear that there was some sore point between the first defendant and the deceased about fish-catching; that the first defendant was insisting that the deceased should not indulge in fish-catching and the deceased was repeatedly acting otherwise. Thus, the relationship between the first defendant and the deceased were strained. We will have to bear this circumstance in mind while appreciating evidence of the parties on the material question of the alleged acts of the defendants although we may say that this circumstance by itself will not supply a strong motive for the wrongful acts.

15. We may also say that prior to the institution of the suit the plaintiffs had given a suit notice Exh. 16 to all the defendants jointly' wherein-some allegations as made in the plaint were made and the damages of Rs. 20,000/- were claimed as in the plaint. This notice was served on the first defendant but he has not replied to the notice. Similar notices were sent to the third, fourth and fifth defendants by registered post but they were refused and these notices have been brought on record

as Exhs. 18, 19 and 20.

16. We will now proceed to consider various arguments urged by Mr. Shah on behalf of the appellants in support of his first contention that the learned trial Judge was in error in finding that the plaintiffs had failed to prove the plaint allegations as regards the wrongful acts of the defendants resulting in the death of the deceased. Mr. Shah had first relied upon the judgment of the Criminal Court in Sessions Case No. 64 of 1954 in which present five defendants-respondents along with two others were tried for the offences punishable under Sections 147, 148, 149, 302 and 323 of the Indian Penal Code. In the Sessions case, the present first defendants was who accused No. 1 was convicted under Section 324 and sentenced to six month's rigorous imprisonment; the present defendants Nos. 2 to 5 were convicted under Section 324 read with Section 149 Indian Penal Code and sentenced each, to suffer rigorous imprisonment for a period of four months. The accused No. 3 who is defendant No. 3 was further convicted under Section 323, Indian Penal Code and sentenced to rigorous imprisonment for a period of one week. Two other persons besides the present five defendants who were tried in the Sessions Case were acquitted of the offences with which they were charged. The learned Additional Sessions Judge has held that first five accused (who are present five defendants) were members of an unlawful assembly, the common object of which was to voluntarily cause hurt to deceased Shana. In the appeal that was filed in the High Court by the first and second accused (first and second defendants), the High Court had enhanced the sentence of the first and second defendants to one year and 8 months respectively and had maintained the conviction under various counts. In passing the aforesaid sentence, the learned Sessions Judge had observed that as accused No. 1 (first defendant) was sentenced for an offence under Section 324, Indian Penal Code and as accused Nos. 2 to 5 were sentenced for offences under Section 124 read with Section 149 of the Indian Penal Code, separate sentences for offences under Sections 147 and 148 Indian Penal Code need not be passed. Mr. Shah relying upon this judgment of the Sessions Court, wanted further to rely upon the evidence that was led in the Sessions case and the reasoning of the learned Additional Sessions Judge adopted in basing the conviction and awarding the sentences aforesaid. The judgment of the Criminal Court has been produced on the record at Exh. 21. In our judgment, the judgment of a Criminal Court is not admissiable in a Civil Court as proof of the point decided by the Criminal Court. The judgment of a Criminal Court convicting a person is relevant in a Civil Court only to show that there was such a trial resulting in conviction and sentence. It is also clear that a Civil Court is not bound to adopt the finding of the Criminal Court and must find the facts for itself and independently of what was decided by the Criminal Court. The judgment of conviction cannot in a subsequent Civil Suit be treated as evidence of facts on which the conviction is based.

17. The question is set at rest by a decision of Their Lordships of the Supreme Court in Anil Bihari Ghosh v. Latika Bala Desai and Ors. wherein Sinha J. (as he then was) delivering the judgment of the Court has at page 571 observed as under:

> x x x x On this question the Courts below have assumed on the basis of the judgment of conviction and sentence passed by the High Court in the sessions trial that Cham was the murderer. Though that judgment is relevant only to show that there was such a trial resulting in the conviction and sentence of Cham to transportation for life, it is not evidence of the fact that Cham was the murderer, that question has to be decided

on evidence.

In the Supreme Court case, the question for consideration was revocation of a grant of probate under Section 263 of the Indian Succession Act on the ground that one Charu who was the adopted son of the testator had murdered the testator and therefore, the probate of the will that was granted in his favour should be revolted. In that case, the Court below had relied upon the judgment of the Criminal Court that was given in a murder case that was filed against said Charu, and one of the question that was raised before Their Lordships was whether the judgment of the Criminal Court was relevant to show that Charu was the murderer of the testator. The aforesaid observations of Sinha J. have been made in that connection and they fortify our view that the judgment of a Criminal Court is relevant only to show that there was such a trial resulting in the conviction and sentence of the defendants and that it is no evidence of the fact that the present defendants were the murderers of deceased Bhoi Shana or that they were perpetrators of the alleged wrongful acts. That question has to be decided on evidence on the record of the Civil Court. In this view of the matter, we cannot accept Mr. Shah's submission that the aforesaid judgment of the Criminal Court Exh. 21 as well as the evidence relied upon in the judgment should be looked into as an evidence for the purpose of determining the relevant issue in the Civil Case out of which this appeal arises. We will, therefore, consider the judgment Exh. 21 only for the limited purpose laid down in the aforesaid observations of the Supreme Court namely, to show that there was such a trial resulting in the conviction and sentence of the defendants and it was with this view in mind that we have set out earlier the offences for which the accused (defendants) were tried in the Sessions case and the conviction and sentences which were passed on them in the said Sessions case. As regards the evidence of the alleged wrongful acts of the defendants resulting in the death of deceased Shana, as aforesaid, we must take the facts as on the record in the civil case and must reach a conclusion independently of what was decided by the Criminal Court. It is in the light of this view that we will now proceed to examine the evidence recorded in Civil case.

17A. On behalf of the plaintiffs, first plaintiff Nanda who is widow of deceased Bhoi Shana Kalyan has been examined at Exh. 15. She has stated that on that fateful night of August 11, 1954, while they were sleeping in thier hut situated in a field known as Visvighavalu field, after about 10-00 p.m., all the five defendants came into their hut and began to give abuses. At that time according to Nanda, first three defendants were armed with Dharias, which, it may be stated are sharp cutting instruments; that fourth defendant was armed with a spear and the fifth defendant was armed with a stick. The hut in which they were sleeping had no doors. Deceased Shana was sleeping on one cot and in the nearby cot Nanda was awake and reclining along with her four minor children named Asha, Raoji, Shanta and Kamla aged respectively 9, 2, 8 and 4 years. According to Nanda the deceased was roused from his sleep and the second defendant who is the son of the first defendant told the deceased that there was a warrant against him land he should accompany the defendants to the Police

Office. However, Shana refused to go with them. Thereupon, the first defendant struck the deceased with a dharia blow on his head, while the deceased was sitting on the cot. The deceased, ran away towards Parshottam's field through, AmbalaPs field and he was pursued by the defendants who ran after him. Nanda has stated in her cross-examination that the second defendant had a battery (torchlight) with him. Some other three persons prevented, Nanda from going out and beat her and her children. Soon thereafter, there was sound of a whistle and the said persons went out of the hut. Nanda immediately followed them to the outlet in Parshottam's field, wherefrom she saw the defendants beating her husband. This was from a distance of five to six paces. She has earlier stated that she had seen the defendants going away after beating her husband. Nanda immediately went near tier husband and found him dead in the field of Parshottam. She has also stated Shana died while receiving blows of the defendants in Parshottam's field. She had lodged the complaint on the next morning before the P.S.I. at Anklav. We may say that we have been referred to the original Gujarati deposition of Nanda by the learned Advocates of both the parties.

18. The aforesaid evidence of Bai Nanda given in her examination-in-chief has remained unshaken in her cross-examination. We may even say that there is no effective cross-examination, either on the question of the above stated various wrongful acts of the defendants or on the question of the presence of the defendants armed with dangerous-weapons first at the hut and then at the field of Parshottam, where the dead-body of deceased Shana was then lying. As aforesaid, the evidence of the first defendant is in relation to his plea of alibi, which we will consider a little later. Second, third, fourth and fifth defendants-respondents have not cared to step in the witness box and have not controverted the evidence given by Nanda. Even in the cross-examination made on behalf of the defendants Nanda has stated that the first defendant had entered the hut first followed by all the four other defendants that the second defendant had a battery with him; that the fourth defendant had struck the deceased with a spear in his leg and the first defendant had struck a Dharia blow by taking it over the head of the deceased Shana. Nanda has further stated in her cross-examination that she had seen the defendants beating her husband from the outlet in Parshottam's field. She has also stated that the outlet to Parshottam's field was 50 paces away from Ambalal's outlet and that the outlet in Ambalal's field was 50 paces away from her hut. She has stated in her Gujarati deposition that the part of the field of Parshottam was touching the field of the deceased wherein the hut was situated and that one can go straight to Parshottam's field. She has further stated that there was no crop in Parshottam's field. It is clear, therefore, that Nanda had a reasonable opportunity to see the beating that was given to the deceased by all the defendants. We may say that at the highest the distance was 150 paces from the hut of Nanda. It is in evidence that three other miscreants who had restrained Nanda and given her beating had immediately left the hut on hearing whistle and that thereafter Nanda had rushed in the direction of Ambalal's field and seen the beating from a distance of 5 to 6 paces. Nanda's conduct is at once natural and inspires confidance. There is no reason to disbelieve her testimony. There are no material Contradictions brought out in her cross-examination to which we shall refer just in a moment. In our judgment, there is no reason to discredit the testimony of Nanda. It has to be remembered that Bhoi Shana, as appears from the record, was a healthy young man aged 25 and he had run out of the hut in the direction of the field

of Parshottam. It may be that he might have been dragged to a little distance and then he might have run away. We may say that there is some discrepancy as regards the fact whether deceased Shana had immediately run away from the hut or he was dragged out by the defendants and then ran away. But, in our view, this is not a material infirmity. The fact remains that the defendants had entered the hut of Shana and abused him; that the first defendant had dealt a Dharia blow on Shana's head; that the second defendant had asked the deceised to accompany the defendants to the police station on a false protext that there was a warrant against him; that the fourth defendant had struck the deceased with a spear; that all of them were armed with deadly weapons; that Shana had run away or was dragged in the direction of Parshottam's field and the defendants were seen by Nanda belabouring the deceased Shana in Parshottam's field and that Shana had died an instantaneous death in Parshottam's field. There was a previous history of strained relations arising out of the aforesaid fishing incidents. In our view, having regard to all the aforesaid facts and circumstances on the record, a reasonable inference can be drawn that all the defendants are responsible for the injuries caused to the deceased which caused his death and which as witness Babardas Revandas has stated were as many as 11 in number. It also appears from the record that the defendants were persons residing in the same village and the hat of the deceased was on the outskirts of the village and the second defendant had at the relevant time a battery with him, It therefore stands to reason that Nanda knew the defendants and had a reasonable opportunity to observe the presence of the defendants both the hut and in the field. There is no question of mistaken identity and we may say that there has been no cross-examination on this point.

19. We will now consider what Mr. Patel learned Advocate appearing for the respondents-defendants, has referred to as contradictions in, Nanda's deposition. Mr. Patel had first urged that there was a discrepancy between Nanda's evidence in Court and the relevant averment in the plaint as regards the running away of the deceased Shana from the hut after he was first given a Dharia blow by the first defendant. It is true that in her aforesaid deposition Nanda has stated that after the first defendant had struck a Dharia on the head of the deceased, he had got up from the cot, and run away towards Parshottam's field. In the plaint, it is stated that the deceased Shana was dragged by the defendant with the aid of other defendants out of the hut. The fact, however, remains, that the deceased had proceeded towards Parshottam's field, whether he was dragged or had himself run away. It is also proved that he was beaten to death by the defendants in Parshottam's field, where he died. We have incidentally dealt with this submission in the earlier part of pur judgment. Having regard to the totality of the evidence as discussed above relating to the incident that had first happened in the hut and the incident of beatings given by the defendants to the deceased in the field of Parshottam resulting in the instantaneous death of the deceased, the question whether deceased Shana himself ran in the direction of the field of Parshottam or was dragged by the defendants pales into insignificance. In our judgment, as aforesaid, Nanda's version at once inspires confidence. She was a witness to the beating given to her husband in the field of Parshottam. She has seen the defendants giving blows to the deceased in Parshottam's field. She has also seen them running away from the field. All this she has observed from a distance of only five to six paces from the outlet in Parshottam's field as aforesaid. In our judgment, there is no reasonable doubt that Nanda was an eye-witness to the two incidents in the hut as well as in the field. Therefore, the discrepancy cannot be said to introduce any material infirmity in the version of Nanda such as to discredit her testimony.

20. Mr. Patel then urged that there was a discrepancy as regards the dress which the defendants had put on at the relevant time. It is true that Nanda has, in her examination in chief, stated that the defendants had put on dress like that of policemen, while in her cross-examination, she has stated that the second and the third defendants had put on Khakhi shorts and shirts, and the first, fourth and fifth defendants had put on a Dhoti, a shirt and a white cap. But it is in evidence that the second defendant had a battery with him and that it was the second defendant who had told the deceased that there was a warrant against him and that he should accompany the defendants to the police station. The second and third defendants had, as stated in the cross-examination put on Khakhi shorts and shirts. It may be that Nanda who was giving her evidence in the Court on August 13, 1958 after a lapse of about four years might not have correctly remembered the dress each one of the defendants had put on at the time It appears that Mr. Patel was inspired to raise this contention because in the paper-book in which English translation of the deposition of Nanda is included, it is stated that "defendants were attired in Khakhi police uniform". However, our attention was invited to the original Gujarati deposition, wherein we find it stated that "the defendants had put on Khakhi clothes like those of policemen." As aforesaid, Nanda had reason to know the defendants The first defendant himself has stated that he was a leading man in the village and that there was a fishing incident in which the deceased was involved and the deceased's father had to pay a penalty of Rs. 100/-. It is, therefore, not unreasonable to infer that Nanda knew the defendants. There is no case of mistaken identity as aforesaid. The defendants other than the first defendant have not devied the version of Nanda as regards the presence of all the defendants at the scene of offence, both in the hut and in the field. Having regard to these facts and circumstances as they appear on the record, the mere mention of the dress of the accused as resembling those of policemen cannot be said to be an infirmity which should go to discredit the trustworthy evidence given by Nanda as aforesaid.

21. Mr. Patel then contended that there was a discrepancy between Nanda's version about the incident that happened in the hut as given in para 4 of her cross-examination. In para 4, Nanda has stated that the second defendant had told Shana that there was a warrant against him and had asked him to accompany the defendants to the police station, but as Shana had refused to go, the first defendant had struck Shana with a Dharia on his head while he was sitting on this court; Shana then got up and ran towards Parshottam's field from Ambalal's field and the defendants ran after him. In para 41 Nanda has stated that the defendants Nos. 1 and 2 abused Shana from outside the hut and asked him to go out. In the Gujarati version of para 41 to which our attention has been invited, Naada has stated that she had made a statement to the police that Shivabhai's son, meaning second defendant, had come and abused Shana and asked him to get out of the hut. She has then stated that in her police statement, she did state that immediately thereafter, the fourth and the third defeddants had dragged out the deceased from the hut. In our view, this does not amount to a contradiction. On the contrary, it appears that even in her police-statement she had referred to the part played by the second defendant and this cannot be said to be a contradiction. The subsequent police statement has reference to the dragging out of deceased Shana from the hut and we have referred to this discrepancy in the earlier part of our judgment and observed that it is not a material discrepancy. It is not disputed that neither the police statement nor the particular part thereof on which the defendants' advocate wanted to rely for the purpose of contradiction was shown to Nanda in her cross-examination. It cannot, therefore, be said that the contradiction, if any, is properly brought out on the record. In the same paragraph, Nanda in her Gujarati version has stated that the

statement as written by Fojdar Sahab that Shivabhai Mukhi, meaning the first defendant, had dealt first Dharia blow on Shana's bead is false. We may say that all these answers have to be read in the sequence of events as narrated by Nanda in her police statement. The police statements of Nanda were not with the defendants' advocate at the time of cross-examination and the attention of Naada was not drawn to the particular part of the statement finding its place in her police statement. The police statement of Nanda were recorded at three different times and have been produced on the record at Exhibits 59, 60 and 61 in the examination of the first defendant's witness P.S.I., Saktidas on December 19, 1958 and after the examination of Nanda was completed on September 11, 1958. It also appears from Exh. 36 which is an application for witness summons that defendants had given a Darkhast to summon the P.S. 1. and Clerk with the police statements on October 23, 1958, It is clear, therefore, that at the time when Nanda was examined, the defendants advocate could not have drawn the attention of Nanda to the particular part of her statement on which the defendants wanted to rely for the purpose of contradicting Nanda as required by Section 145 of the Indian Evidence Act. It was argued that Nanda had admitted in her police statement, she had not made the aforesaid statement relating to the first Dharia blow having been given by the first defendant to the deceased in the hut. With the consent of the advocates of both the parties, we have carefully scrutinised the Gujarati deposition of Nanda which, as aforesaid, refers to the three different acts of the defendants. It first refers to the second defendant asking the deceased to get out of the hut, then to the dragging incident is not having been stated by her in her police statement which is a mere omission, and then to the Dharia blow. She has stated that the statement recorded by the Fojdar that Shivabhai Mukhi, meaning the first defendant, had first given Dharia blow on the head of the deceased was falsely recorded. The sequence is clear. Giving of abuses by defendants, command by the second defendant to the deceased to go out of the hut and accompany him to the police station and then the Dharia blow by first defendant on the head of the deceased. When we consider the narration of events as Stated, we find that there is no discrepancy and that Nanda's statement does not amount to denial of the fact that the first defendant had given a Dharia blow on the head of deceased. The Dharia blow was given after the abusing and the command and therefore, Nanda's statement that the Fojdar had falsely recorded the incident of Dharia blow being given first by the first defendant has been put to the P.S.I. Who was examined as defendants' witness to explain whether he had falsely recorded the statement and if so why. But apart from these consideration, even if we assume that the first blow was not given by the first defendant in the hut, the other evidence that all the defendants had beaten the deceased Shana in the field of Parsottam resulting in his instantaneous death has been established on record. The wrongful acts of the defendants are the joint acts and all the defendants are responsible jointly and severally for the wrongful acts. In any view of the matter, therefore, we cannot accept Mr. Patel's submission that the apparent discrepancy in the two answers of Nanda amounts to any infirmity in the case of the plaintiff so as to discredit the testimony of Nanda and to non-suit the plaintiffs. Mr. Patel then argued that in the police statements of Nanda, Exhibits 59, 60 and 61, there were certain contradictions. Mr. Patel wanted to rely on these previous statements. However, as stated earlier, the attention of Nanda has not been invited to what Mr. Patel wants to rely upon as contradictions. The police statements as aforesaid were not available to the defendants at the time of cross-examination of Nanda. It is settled law that police statements are not substantive evidence and they can be used for the purpose of contradicting only as provided for by Section 145 of the Indian Evidence Act. We may say that the police statements of Nanda have been admitted in evidence in the deposition of defendants witness P.S.I.

Shaktidas, who was examined after plaintffs' evidence was over. In our view, the learned trial Judge was in error in admitting the said statements as substantive evidence. When a previous statement is not put to the party making it and the party making it is not cross-examined on it under Section 145, the said previous statement cannot be used to contradict the party making it. As observed by Their Lordships of the Privy Council in the case of Balgangadhar Tilak and others v. Shrinivas Pandit and another, 42 Indian Appeals, 135:

> A Court is precluded, both on general principles and by the Indian Evidence Act, 1872, Section 145, from treating the oral testimony of a witness as rebutted by statements by him contained in documents in evidence, unless these statements have been put to the witness in cross-examination. Aforesaid police statements of Nanda cannot, therefore, be used to contradict her.

22. Mr. Patel then wanted to rely upon a certified copy of the complaint Exh. 30 that was filed by Nanda before P.S.I., at Anklav. Mr. Patel also wanted to refer to the certified copy of the deposition of Nanda recorded before the Judicial Magistrate First Class Borsad in the committal proceedings, which has been produced on the record at Exh. 31. They have also not been shown to Nanda in her cross-examination and her attention has not been invited to any particular part of the two documents Exhibits 30 and 31 in order to enable her to explain the contradictions, if any. In absence of the proper procedure being followed as laid down in Section 145 of the Indian Evidence Act, we cannot look into these two documents in order to contradict Bai Nanda.

23. Mr. Patel, then realising the legal position that the alleged contradictions with reference to the said documents Exhibits 30 and 31 and the police statements of Nanda were not legally established in the case, urged that the case should be remanded to the trial Court to enable the defendants to confront Nanda with her various previous statements, We have given our anxious through to this request, but we are unable to accept it as no case of remand has been made out and the ends of justice do not warrant such an order. The defendants cannot be given an opportunity to fill in lacuna in the evidence. The suit was filed in 1957 and the motion for remand was made at the fag end of the hearing before us. We have accordingly rejected Mr. Patel's prayer for remand.

24. We may say that the learned trial Judge has found the testt- mony of Nanda as highly unnatural and improbable and as having been contradicted by her F.I.R., her statements Exh. 59, 60 and 61 made before the police, and her deposition given in the Criminal Court produced at Exhibit 31. As aforesaid, the F.I.R. Exh. 30 and her deposition in the Criminal Court Exh. 31 and her statement before the police Exhs. 59 to 61 have not been shown to witness Nanda and her attention was not invited to the statements or to the relevant parts thereof which was sought to be used for the purpose of contradiction. We have considered this question of the effect of documents Exhibits 30, 31 and 59 to 61 in detail in the earlier part of our judgment and we may here only say that they could not be used to discredit the testimony of Nanda in the aforesaid circumstances. The learned Judge has, in our judgment, erred in relying upon the said documents to discredit the testimony of Nanda,. The learned Judge has further observed in para 5 of his judgment that the first plaintiff (Nanda) has admitted in Exh. 50 that her father-in-law Kalyan and other had come on the spot at night. There is no such statement made by Nanda to be found in her dsposition which is recorded at Exh. 15.

Reference to Exhibit 50 made by the learned Judge must be to Exh. 15, as Exh. 50, is the deposition of the first defendent. The learned Judge has also considered the filing of the F.I.R. in the morning as discrediting the version of Nanda. These oberservations ignore the fact that Nanda was a helpless widow with four infant children and had seen her husband brutally murdered and lying dead in the. field of Parshottam away from the village. It is not shown that anybody else or even Kalyan was present at the time. Mr. Patel has not invited our attention to any such evidence. In our judgment, therefore, it was not unreasonable or unnatural for the helpless widow to go first to the house of her husband's relation Babardas on the next morning and than go to the police station accompanied by said Babardas to record her complaint. We do not find anything unnatural in this conduct of Nanda. The learned Judge has, in our judgment, erred in appreciating the evidence of Nanda, in admitting inadmissible evidence of Exhibits 30, 31 and 59 to 61 and in finding Nanda's testimony as unreliable. The learned Judge was also in error in considering the discrepancy in the mention of the dress of the defendant as a material infirmity. As aforesaid, we do not agree with this view of the learned Judge. The dress of the second defendant was a khakhi dress and the reference to the dress made by Nanda in her examination-in-chief was the dress "like that of policemen". The fact remains that second and third defendants had put on khaki Chaddis and shirts. In our view, this is no infirmity as aforesaid.

25. As aforesaid, Nanda's evidence clearly proves the presence of all the five defendants at the hut of the deceased Bhoi Shana on the relevant night. Her evidence also proves that the defendants had abused the deceased. It is also proved that all the defendants were armed with deadly weapons as aforesaid. The second defendant had commanded the deceased to go out with him to the police station. The first defendant had dealt a Dharia blow on the head of the deceased. The fourth defendant had given a spear blow. All the five defendants had aided and abetted each other and in fact participated in the aforesaid acts which, in our judgment, were their conjoint acts. It is also proved from the evidence of Nanda who was an eyewitness to the incident that all the five defendants had pursued the deceased to the. field of Parshottam and had beaten him to death by giving blows with the weapons in their possession. The deceased has died an instantaneous death in the field of Parshottam, which was at the highest at a distance of 150 paces away from the hut of the deceased. Nanda had seen the defendants beating her husband from a distance of 5 to 6 paces. The first information was lodged on the next morning by Nanda. The version of Nanda is, as aforesaid, at once straight-forward, honest and a natural one and inspires confidence. No material contradiction or infirmity is shown in her evidence. The incident had happened at about 10-00 O'clock in the night first in the hut and had continued in the field of Parshottam at a distance of about 150 paces away untill the deceased succumbed to the injuries in the said field. There is no reason to disbelieve the testimony of this witness who was awake at the time and who had opportunities to know the defendants. In our judgment, Nanda's testimony alone is sufficient to prove the presence and participation of all the defendants in the aforesaid wrongful acts resulting in the instantaneous death of the deceased in the field of Parshottam. All the defendants are proved to our satisfaction to have Conjointly committed the wrongful acts, namely trespass, assault, chasing the deceased and beating him at various, plaices till he died.

26. The next witness examined on, behalf of the plaintiffs is one Dhula Lakha, an old inhabitant of the same village Anklav, where the defendants resided. At the date of his deposition in 1958, he was

65 years of age. He is not shown to have any intimacy or interest in the plaintiffs. Dhula has deposed that on the relevant night, he was returning to Anklav from Baroda, at about 9-00 P.M., and while he was on the Umeta road, at a distance of about 200 to 300 paces away from village Anklav, he had seen the defendants and two other persons coming from Anklav side. These persons had met him and, amongst them, the first defendant had accosted him. The first defendant was attired in white clothes and the rest were in Khakhi clothes. Dhula has deposed that all these persons went towards the field of Shana which was at a distance of about 1 1/2 bighas. The witness while proceeding towards the village had sat down under a mango tree to recline. After some-time, he had heard cries of woman and children from the field of Shana. Dhula has further deposed that after sometime he had seen defendants going towards the village. The evidence of this witness who is an old man of 65 and who is not shown to be inimical to the defendants proves that on the relevant night at about 9-00 P.M., he had seen the defendants coming from Anklav side and going towards the field of Shana. The witness has admitted that he was once convicted for consuming liquor and that in the last year, he was convicted for an offence of theft. The incident of theft shows, the character of the witness. However, these two incidents of theft and consumption of liquor will not, by themselves, be sufficient to discredit the evidence of this witness. The learned trial Judge has considered this witness Dhula as a chance witness and has observed that he has acted like a fool and that it could be seen from his deposition that he had enmity with the first defendant. The learned Judge has also observed that he had no reason to go to Baroda He has been disbelieved by the learned Judge also on the ground that he had not approached the police, nor did he raise a hue and cry in the village. The learned Judge has also observed that his statement was recorded by the police on August 15, 1954 and that it was sufficient to believe that Dhula was a got up witness. As aforesaid, Dhula is not shown to be an interested or on inimical witness. The mere fact that he was convicted once for theft cannot discredit his testimony. He does not appear to us to be a chance witness. We have carefully scrutinised his evidence in view of the aforesaid observations of the learned Judge with which we do not agree and have found that his testimony that he was returning from Baroda on the relevant night and had seen the defendants with some two or three persons coming from the village and going towards the field of the deceased is trustworthy. Evidence of Dhula lends assurance to the testimony of Nanda that the defendants had gone to the hut of the deceased at the relevant time. However, as aforesaid, we have earlier reached a conclusion of the wrongful acts of the defendants from the sole testimony of Nanda.

27. The third and last witness examined by the plaintiffs is one Babardas Revandas examined at Exhibit 35. The deceased was his maternal uncle's son and as such a near relation. It is natural that widowed Nanda should have gone to him in the morning and informed him about the sad happenings at the night. The witness has deposed that Nanda had gone to him at about 7-00 O'clock in the morning and had informed him that deceased Shana was murdered by the defendants on the previous night between 9-00 and 10-00 P.M. with the help of Dharias and a spear. He has further deposed that he had then gone to the hut of the deceased and then to Parshottam's field. He had seen the dead body of the deceased lying in the field with 11 injuries on his body. He then returned to his house, which was situated in the village and took Nanda to the police station at about 8-00 A.M. and Nanda lodged the complaint. He also refers to the strained relations between the deceased and the defendants due to the fish and plough incidents. In cross-examination, the witness has said that he had good relation with the first defendant whom he had served 20 years back. He also says

that he knew the defendants. His testimony that he had seen the deceased with 11 injuries is neither controverted, nor challenged. In our judgment, his evidence establishes the fact that Nanda had gone to his house and informed him about the wrongful acts of the defendants resulting in the death of deceased Shana and that he had gone to Parshottam's field and found Shana lying dead with 11 injuries on his body and that he had accompanied the widow to the police station to lodge the complaint. There is no reason to doubt the testimony of this witness. The learned Judge has disbelieved his testimony on the ground that he is a near relation. It is settled law that mere relationship would not be a circumstance by itself to discredit the testimony of a witness. The evidence of Babardas appears to be a trustworthy and there is no reason to disbelieve that Nanda had gone to him in the morning and that as a near relation he had gone to the field and seen the deceased lying with 11 injuries and then accompanied Nanda to the police station.

28. As aforesaid, the evidence of Nanda establishes the presence and participation of the defendants in the aforesaid wrongful acts resulting in the death of Bhoi Shana on the night of August 11, 1954. Nanda was a natural eye-witness of the various wrongful acts of the defendants first in the hut and then in Parshottam's field. There has been no effective cross-examination of Nanda as regards the wrongful acts of the defendants. Except the first defendant, other defendants have not entered the witness-box and have not controverted the aforesaid evidence of Nanda as regards the wrongful acts attributed to them and their presence in the hut as well as in the field as testified by Nanda. It is not disputed that the deceased had died an instantaneous death. It is not shown that Kalyan or anybody also was present in the field of Parshottam by the side of the dead-body on the relevant night. There is sufficient evidence to show the strained relation between the deceased Shana and the first defendant which arose out of the fishing incidents which Were resented to by the first defendant and many other village people as appears from the evidence of the first defendant himself. The situation of the hut and the field a way from the village and the circumstances in which the wrongful acts were I committed by the defendants have been satisfactorily proved by reliable evidence of Nanda as aforesaid. Dhula's evidence lends further assurance. The testimony of Babardas proves that Nanda had gone to him in the early morning and, thereafter Babardas had gone to the field of Parshottam and had seen 11 injuries on the person of the deceased and had then accompanied Nanda to the police station to lodge the First Information Report. The conduct of Nanda as it emerges from her evidence is at once a natural and straightforward one. There are no material contradictions brought out in her evidence. We are unable, therefore, to agree with the finding of the learned trial Judge that the testimony of Nanda is unreliable and as we shall presently discuss the defendants have led no reliable evidence to disprove the reasonable inference of their presence and participation in the aforesaid wrongful acts on the relevant night. In our judgment, the death of the deceased has been caused by the aforesaid wrongful acts of the defendants.

29. Now, the plea of the first defendant as also of the other defendants as taken in their joint written statement filed by all the defendants is one of denial of the commission of the wrongful act by the defendants. It may be remembered that the defendants have in their written statement denied that they had any personal enmity with the deceased. But they have at the same time admitted that the deceased had been fishing in the village pond and the defendants had rebuked the deceased as stated in para 3 of their joint written statement. The first defendant in his evidence in Exhibit 50 in para 5 has also referred to the fishing incident and has deposed that although he was not present

when the dispute about the fishing arose, some village people had gone to him and had taken the deceased with the fishing net to his dwelling house. According to the first defendant, the net and fish were lying near his Khadki (gate). Some persons who were present near the dwelling house of the first defendant wanted to prosecute the deceased for fishing. However, he had asked those persons not to file a complaint and had scolded Shana's father who was present and who had agreed to give Rs. 100/- as charity to Ranchhodji's temple by way of attonement for the repeated fishing incidents in which the deceased was involved. The first defendant has also deposed that he had rebuked the deceased Shana four to five times but the deceased did not cease fishing. Thus, the evidence discloses that Shana was fishing occasionally in the village pond and village people as well as the first defendant had resented these acts of the deceased and the first defendant had rebuked the deceased. Thus, there was probability of strained relations between the deceased and the first defendant as also some other village people.

30. It may also be remembered that in the written statement, the first defendant has not taken any plea of alibi and his only plea was of total denial of the wrongful acts. However, in his deposition, the first defendant has taken a plea of alibi which as we shall presently point out is not substantiated. We may say that there is variance between the pleading and the proof. The version of the first defendant, as deposed to by him in, Exh. 50, is that on the relevant evening, he had returned home from his fields at about sunset time. Tobacco and food grains were being raised in his fields. After taking his evening meals, he had gone to the house of one Gordhan Talsi for getting tobacco seedlings and he had waited there uplo 10-00 P.M. According to the first defendant, Ishvar Bhaiji and Chatur Bapu were also there at Gordhan's house, In cross-examination, the first defendant had to admit that he also raised seedlings in his field but has added that in case of failure, he had to purchase seedlings. He has then stated that he had brought six baskets of seedlings but he did not pay for the same. This is the version of the first defendant on the question of his alibi. He has admitted that Gordhan Talsi belonged to his caste. He has admitted that he was raising seedlings in his own fields. He is a man of means having, as stated by him in his examination-in-chief, two houses and a bungalow worth Rs. 10,000/- and Rs. 80,000/- respectively. He also owns 30 to 35 bighas of land worth about Rs. 1,00,000/-. He has stated that he kept servants. It is difficult, therefore, to believe that a man of his means would, instead of sending his servants to purchase seedlings, himself go to the house of Gordhan and purchase the seedlings and wait there for 2/1 hours upto 10. 00 P.M. on the relevant night as he wants us to believe. He himself was raising seedlings in his land as admitted by him and it is not shown that there was a failure of seedlings in his fields. His statement that he had gone to purchase the seedlings is modified by himself by admitting that he had not paid for the seedlings. Ishvar Bhaiji and Chatur Bapu who, according to the first defendant, were present at Gordhan's place during those two hours have not been examined by the first defendant. The evidence of the first defendant is unnatural and does not inspire any confidence and is unreliable. The incident of the purchase of seedlings seems to have been a subsequent development of the defence which has not been substantiated.

31. Gordhan Talsi who has been examined as a witness for the defendant at Exh. 54 has stated that on the night of Shana's death the first defendant had gone to his house at about 8-00 P.M. for tobacco seedlings and had waited there upto 10-00 to 10-30 P.M. He has Stated that it was raining at the time. He has also stated that the first defendant took away seedlings in the early morning with

the labourers. This is what Gordhan has stated in his examination-in-chief. In his cross-examination, he has admitted that he did not give seedlings to anybody else for price. Thus, Gordhan's evidence discloses that although the first defendant hid gone to his house on that night and stayed for two hours during which according to the plaintiffs case, the wrongful acts were committed by the first defendant and the other defendants as aforesaid, he had not taken the seedlings with him. The first defendant had again gone to Gordhan's house in the early morning with the labourers, and it was at that time Gordhan had given to the first defendant five to six baskets of seedlings. Thus there is a material improvement in the version of Gordhan. Gordhan does not speak of the presence at the night time of Ishvar Bhaiji and Chatur Bapu during the time the first defendant was at his house as stated by the first defendant. We are not prepared to accept Gordhan's version. He is a small agriculturist who, as he says, did not sell seedlings to anybody else. No reason is shown why. Gordhan gave the seedlings to the first defendant gratis. His version does not inspire any confidence, and on the contrary, renders the deposition of the first defendant unworthy of credit. The theory of alibi which was thus sought to be proved in his evidence has not been substantiated and we are not prepared to accept the first defendant's plea of alibi.

32. In his deposition, the first defendant has also stated that on his return to his house at about 10-00 P.M. on the relevant night, he had found the second defendant who is his son in his house. According to him, the second defendant was enjoying radio programme in the company of Haribhai Somabhai and Mihiji Babar and he enjoyed the programme upto 11-00 P.M. and then went to sleep. This is an attempt by the first defendant to create a plea of alibi on behalf of the second defendant who is his son. As aforesaid, the second defendant is not examined, nor are Haribhai Somabhai and Mahiji Babar examined to prove the presence of the second defendant in his house at 10-00 P.M. As aforesaid, Nanda has clearly stated that the second defendant had entered his house on the relevant night along with other defendants; that the second defendant was dressed in Khakhi Chaddi and shirt and had a battery with him. She has also stated that the second defendant had commanded the deceased to accompany him and other defendants to the police office as there was a warrant against the deceased. Nanda has also stated that the first defendant had struck the deceased with a Dharia. She had seen the defendants beating her husband in Parshottam's field and she had seen this from the outlet in Parshottam's filed from a distance of 5 to 6 paces only. The second defendant has not controverted this evidence. The evidence against him, therefore, stands uncontroverted and we are inclined to believe the evidence against him.

33. The aforesaid is the relevant deposition of the first defendant relating to the alleged wrongful acts. We are not prepared to accept his plea of alibi and there is no other evidence in his deposition which is relevant on the said question. The only other witness examined on behalf of the defendants is P.S.I. Saktidas at Exh. 58. He was P.S.I., in village Anklav at the relevant time and had investigated the offence. He says that he had recorded the statements of Nanda at three different times namely on August 13, 1954, August 16, 1954 and August 28, 1954. In his examination-in-chief he has stated that he Wrote down the statements. However, in cross-examination he says that he did not write the statements and he did not then remember who wrote the statements. He says that he cannot say anything about the height of the caves and length and breadth of the hut in which the deceased was sleeping on the relevant night in absence of the Panchnama being shown to him. Panchnama was not shown to him. He has stated that in his inquiry he found that the defendants

had murdered Shana the deceased. As aforesaid, three statements of Nanda have not been properly proved and the contradictions have not been brought out in the deposition of Nanda. The statement were not shown to Nanda at the time of her deposition and her attention was, not drawn to the relevant parts of the statement relating to the alleged contradictions. In fact, as aforesaid, the statements were not with the learned advocate of the defendants at the time of the cross-examination of Nanda. The evidence of P.S.I. Saktidas is of no assistance to the defendants.

34. From the aforesaid resume of the entire evidence on the record we have reached a conclusion that the defendants had on the relevant night gone to the hut of the deceased with the mental element namely, the intention to cause hurt and death of the deceased. The evidence discloses that the second defendant is the son of the first defendant and the third defendant is the nephew of the first defendant. It also appears that the fourth and fifth defendants who were father and son respectively were the servants of the first defendant. The first defendant is shown to be a leading man of the village to whom the villagers looked to as a headman. It is also established that there were fishing incidents and the deceased who was a Bhoi was fishing in troubled waters and had not heeded to the repeated demands of the first defendant and the village people not to fish in the village pond. As such, there were strained relations between the deceased on the one side and the first defendant and some other village people on the other side. There is cogent and reliable evidence to believe that on the relevant night, all the five defendants had gone armed with weapons of offence as aforesaid. The deceased was first abused and then commanded to go out of the hut, and dealt a blow with Dharia on his head by the first defendant. As he had refused to go out with the defendants, he was either dragged out and then ran or he had run out of the hut and towards the field of Parshottam and was pursued by all the defendants to the field of Parshottam and was belaboured to death by all the defendants as evidenced by Nanda. We accept Nanda's evidence as reliable and trustworthy. She was a natural and straight forward eye-witness to the incidents both in the hut and in Parshottam's field. She was a lonely woman in a field situated in a lonely place outside the village and could not naturally leave her infants and the dead-body at the dead of night and go to the village and inform her husband's relation about the unfortunate event. On the very first opportunity, she had gone in the morning at about 7-00 A.M. to her husband's near relation Babardas and had informed him about the death of the deceased having been caused by the defendants and then had lodged the complaint at the police station where she had gone accompanied by said Babardas. As evidenced by Babardas the deceased had 11 injuries on his body. The fact about the injuries leading to the death of deceased Shana has remained uncontro-verted. There was, therefore, no necessity for the plaintiff to examine medical evidence on the point. The testimony of Nanda that she had seen the defendants beating her husband from the outlet in Parshottam's field and that she had seen the body of the deceased lying 8 to 10 feet away in Parshottam's field has remained uncontroverted. The first defendant has also not controverted the material evidence of Nanda and the evidence relating to the injuries. His plea of alibi is unworthy of credit and has not been substantiated. The rest of the defendants have not entered the witness box. The evidence of Nanda as against them, as aforesaid, has remained uncontroverted. Nanda was a natural eye-witness and there is no reason to disbelieve her testimony. The death of the deceased was an instantaneous death. On a careful consideration of the entire evidence on record, in our judgment, it is established that death of the deceased was caused by the wrongful acts of all the defendants. The acts of the defendants, namely, trespass, assault and chasing and beating the deceased were conjointly committed. There being a clear

preconcert or a common intention with regard to the assault and beating of the deceased and there being participation of all in these wrongful and criminal acts, all of them would be clearly responsible for the total effect produced by this assault, viz. the death of the deceased caused by their wrongful acts. As painted out by the Suprema Court in Afrahim Sheikh v. State of West Bengal in such circumstances there was a clear preconcert where a large number of persons attacked an individual, chased him, threw him down and beat him till he died and there being common intention to beat him, all the assailants were responsible for the whole criminal act resulting in the death of the victim, irrespective of the part played by them in view of Section 34 or Section 35 of the I.P. Code. The same principle would clearly apply in respect of these joint tort-feasors and we, therefore, held that all the defendants were jointly and severally liable for causing the death of the deceased. The Court in such a case is entitled to pass a joint decree for damages against the defendants, as the defendants have joined in committing the wrong. The learned Judge was, therefore, clearly in error in finding that the defendants were not responsible for wrongful acts resulting in the death of Shana. The death of Shana has been caused by all the defendants by their wrongful acts and the defendants would have been liable to the deceased for the aforesaid wrongful acts resulting in the death of the deceased if his death had not ensued. It follows, therefore, that the defendants are liable for damages to the three plaintiffs and to the other dependants of the deceased for loss to them as also for loss to the estate as provided by Sections 1A and 2 of the Fatal Accidents Act, 1855 (which will hereafter be referred to as 'the Act'). It should be noted that this liability under Section 1A arises, notwithstanding the death of the person injured and although the death should have been caused in such circum-stances as amount in law to felony or other crime. We, therefore, hold that all the defendants were jointly and severally liable for damage under Sections 1A and 2 of the Act for causing the death of the deceased By their aforesaid wrongful acts. Mr. Patel relied upon a decision in Warren v. Henlys Ltd. (1948) 2 A.E.R. 935 wherein the question involved was of a vicarious liability of the master to third persons for acts of a servant. This case would have no bearing whatsoever on the question raised before us and cannot be of any assistance to Mr. Patel, who disputed the personal liability of the defendants for their own wrongful acts, It will now be convenient to refer to the relevant evidence on record relating to the yearly earnings of deceased Shana and the sums that he probably have applied to the support of his dependants.

35. It is established on evidence of Nanda and not controverted that the deceased Shana was a young man of about 25 years and have died leaving behind him his widow Nanda aged about 25, two minor sons named Asha and Raoji aged 9 and 2 respectively and two minor daughters Shanta and Kamla aged about 8 and 4 respectively. Nanda's evidence discloses that the deceased was giving monetary help to his father Kalyan during his life time. Kalyan appears to have died before the institution of the civil suit as stated by Nanda. The deceased was cultivating five bighas of land which formed a part of the field known as Visvighavalu field and was residing in a hut constructed on his part of the field. It is also established on evidence that Shana maintained himself, his wife and his four children out of the earnings from this field. There is nobody else to maintain his dependants. Nanda used to help the deceased in his agricultural pursuits it is not shown that the deceased was suffering from any disease or that his expectation of life would have otherwise shortened, He had, therefore, otherwise to run a full span of life of an average agriculturist which, in our opinion, looking to the modern conditions can be taken as sixty, which is now taken as retiring age in our country. Nanda's evidence is that after the death of Shana, the field which Shana was

cultivating has not remained with her and her husband's brother, is cultivating the said field. The husband's brother is separate. The field belonged to Murlidhar's family. According to Nanda, the whole family of the deceased was maintained from the income of the said five bighas of land. Nanda and minor children have now no source of maintenance. The evidence establishes the fact that the deceased Shana was a young man doing agricultural pursuits and thus earning his livelihood and maintaining himself and his family and also helping his father Kalyan. Nanda has further stated that they would require Rs. 800/- per year for maintenance and Rs. 1,000/- per child for education and marriage expenses. This statement of hers is reliable having regard to the present cost of living and to the admitted fact that the deceased was maintaining six persons including himself out of the income from the field. We can, therefore, safely infer that the deceased was earning about Rs. 800/- per year which sum used to be expended on the maintenance of the family and a part of it went to help Kalyan, the father of the deceased.

36. The first defendant himself has in his evidence stated that the deceased was cultivating five to six bighas of land and was growing foodgrabs and tobacco crop every year in his field. He has admitted that a person would require Rs. 20/- to 25/- per month for maintenance, He has also admitted that Shana's daughter would require Rs. 500/- to Rs. 1000/- for her marriage. However, he has denied that Shana realised tobacco worth Rs. 1000/- and food grains worth Rs. 500/- to Rs. 1000/- every year, He has stated, that after the death of Shana, Nanda cultivates the field and realises the income. Nanda has in her evidencs stated that the land has been taken away by her husband's brother and there is no reason to disbelieve her evidence which is most reliable and trustworthy. Plaintiffs' witness Babardas has been examiaed at Exh, 35 and has clearly stated that Nanda was doing labour work after Shana's death. We are therefore, not inclined to believe the first defendant's statement that the land had remained with Nanda and Nanda was cultivating the same, as regards the yield of the land, plaintiffs' witness Babardas in answer to the question put by the Court has stated that the deceased raised tobacco worth Rs. 800/- to Rs. 900/- per year weighing about 100 to 125 mounds. He has also stated that the deceased had not incurred any expenses for raising the crop. There has been no cross-examination on this point made on behalf of the defendants. The aforesaid denial of the first defendant cannot thus be said to negative the plaintiffs case that the deceased was raising tobacco in the field. In facts, the first defendant himself has earlier stated that the deceased was raising foodgrains and tobacco in his field. The dispute is only as regards the extent of the crop, and the price that is realised. Having regard to the fact that the agricultural income was the only source of maintenance of the family of the deceased which included the deceased, his wife Bai Nanda and their four children and also having regard to the fact that the deceased was helping his father, we are inclined to accept the statement of Babardas that the deceased was raising tobacco worth Rs. 800/- to 900/- per year. However, some expenses must have been incurred by the deceased in raising the crop. The evidence of the defendant witness Gordhan is that income per Bigha is Rs. 150/- to 200/- gross and that the cost would be 125/- per Bigha. It is an indisputable fact that the deceased was cultivating 5 Bighas of land. Thus the net income per year of the five bighas of land would be Rs. 625/- per year, even according to the estimate given by the defendants' witness. It is in evidence that the deceased had left no cash amount and no other income. It is, therefore, safe to infer that the deceased was expending an yearly amount of Rs, 750/- for the maintenance of himself and his family and a part of it used to go to help the deceased's father. Having regard to the totality of evidence on record, in our judgment, the average yearly income which the deceased was earning

would be not less than Rs. 750/-. This will be a material factor which will have a bearing while considering the damages awardable to the plaintiffs and to the two minor daughters of the deceased.

37. This will take us to a consideration of the principles which will govern the award of damages to the claimants and the proper approach to be made in order to evaluate the damages for loss to the claimants. We will first consider the relevant provisions of the Act.

38. Section 1-A of the Act provides as under:

> Whenever the death of a person shall be caused by the wrongful act, neglect or default and the act is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, the party who would have been liable if death had not ensued, shall be liable to an action or suit for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony or other crime.
>
> Every such action or suit shall be for the benefit of the wife, husband, parent and child, if any, of the person whose death shall have been so caused and shall be brought by and in the name of the executor, administrator or representative of the person deceased; and in and in every such action the Court may give such damages as it may think proportionate to the loss resulting from such death to the parties respectively, for whom and for whose benefit such action shall be brought; and the amount so recovered, after deducting all costs and expenses including the cost not recovered from the defendant, shall be divided amongst the before-mentioned parties, or any of them, in such shares as the Court by its judgment or decree shall direct.
>
> Section 2 reads as under:
>
> Provided always that not more than one action or suit shall be brought for, and in respect of the same subject-matter of complaint.
>
> Provided that, in any such action, or suit the executor, administrator, or representative of the deceased may insert a claim for, and recover and pecuniary loss to the estate of the deceased occasioned by such wrongful act, neglect, or default, which sum when recovered, shall be deemed part of the assets of the estate of the deceased.
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> The principles on which the damages under Section 1-A and 2 of the Act have to be assessed have now been finally settled by Their Lordships of the Supreme Court in GobaldMotor Service v. R.M.K. Valuswamy the Supreme Court in terms observed that the principle underlying these two kinds of damages in its application to the Act has been clearly and succinctly stated by Sir Shadi Lal, C.J. in Secretary of State v.

Gokal Chand A.I.R. 1925 Lah. 636 thus:

The law contemplates two sorts of damages: the one is the pecuniary loss to the estate of the deceased resulting from the accident; the other is the pecuniary loss sustained by the members of his family through his death. The action for the latter is brought by the legal representatives, not for the estate, but as trustees for the relatives beneficially entitled; while the damages for the loss caused to the estate are claimed on behalf of the estate and when recovered form part of the assets of the estate.

The Supreme Court clarified this position by an illustration. If X was the income of the estate of the deceased, Y was the yearly expenditure incurred by him on his dependants (ignoring the other expenditure incurred by him); X-Y i.e. Z would be his savings every year. The pecuniary loss to the dependants under Section 1-A would be the capitalised value, subject to the relevant deductions, of the amount Y, while the loss caused to the estate by his death under Section 2 would be the capitalised value of his entire income X, subject to the relevant deductions. If, therefore, the claimants were the same under both the heads, and they got under the head of loss caused to the estate the entire capitalised value of the whole income X, they would not claim once again the capitalised value of Y or the amount spent under the head of loss to the dependants. Conversely, if they get capitalised value of Y on the head of loss to the dependants, to that extent there would be a deduction in the claim under Section 2 and under the second head, they would get capitalised value of X-Y or Z only. To put it differently, if under Section 1-A, they got capitalised value of Y, under Section 2 they could get only the capitalised value of Z, for the capitalised value of Y+Z i.e. X would be the capitalised value of his entire income. The Supreme Court, therefore, summarised the position by stating that the rights of action under Section 1 (as it stood before amendment and which is now identical with Section 1-A) and 2 are quite distinct and independent. If a person taking benefit under both the sections is the same, he cannot be permitted to recover twice over for the same loss. In awarding damages under both the heads, there should not be duplication of the same claim, that is if any part of the compensation representing loss to the estate goes into the calculation of personal loss under Section 1-A of the Act, that portion shall be excluded in giving compensation under Section 2 and vice versa. In order to estimate the damages on the first head under Section 1-A, Their Lordships of the Supreme Court have relied upon the observations of Lord Russell of Killowen and Lord Wright in the case of Davies v. Powell Duffryn Associated Collieries Ltd. decided by the House of Lords, 1942 A.C. 601 at pages 606 and 611 and on the observations of Viscount Simon in Nance v. British Columbia Electric Railway Co. Ltd. 1951 A.C. 601 stating that under the first head the question to be considered would be if the deceased had not been killed, but had eked out the full span of life to which in the absence of the accident he could reasonably have looked forward, what sums during the period would he probably have applied out of his income to the maintenance of his wife and family? The Supreme Court has approved the method laid down by Viscount Simon as to the mode of estimating the damages under the first head.

According to this methods at first the deceased man's expectation of life has to be estimated having regard to his age, bodily health and the possibility of premature determination of his life by later accidents; secondly, the amount required for the future provision of his wife shall be estimated having regard to the amounts he used to spend on her during his lifetime, and other circumstances; thirdly, the estimated annual sum is multiplied by the number of years of the man's estimated span of life and the said amount must be discounted so as to arrive at the equivalent in the form of a lump sum payable on his death; fourthly, further deductions must be made for the benefit accruing' to the widow from the acceleration of her interest in his estate; and fifthly, further amounts have to be deducted for the possibility of the wife dying earlier if the husband had lived the full span of life; and it should also be taken into account that there is the possibility of the widow remarrying, much to the improvement of her financial position. It would be seen from the said mode of estimation that many imponderables enter into the calculation. Therefore, the actual extent of the pecuniary loss to the dependants may depend upon the data which cannot be ascertained accurately, but must necessarily be an estimate, or even partly a conjecture. Shortly stated the general principle is that the pecuniary loss can be ascertained only by balancing on the one hand the loss to the claimants of the future pecuniary benefit and on the other any pecuniary advantage which from whatever source comes to them by reason of the death, that is, the balance of loss and gain to a dependant by the death must be ascertained. In the case before the Supreme Court, the man who was killed was a doctor aged 34 at the time of his death and it was found that the yearly expenditure which he used to incur on the members of the family was about Rs. 3,000/-, while the sum awarded by the lower Courts as damages on the first head was Rs. 25,200/- which would represent the said expenditure for just over 8 years. Their Lordships of the Supreme Court felt that the amount of the said damages on the first head for the, pecuniary loss suffered by the dependants in the sense stated by Lord Wright and discount Simon was a moderate sum; it was rather a conservative estimate. On the second head for the loss to the estate, both the lower Courts in that case had estimated the loss at a sum of Rs. 5000/- by way of damages for the mental agony, suffering and loss of expectation of life. On that count also, the Supreme 'Court held that there was no duplication in awarding damages under both the heads as under the first head only the amount Y was capitalised in arriving at the personal loss and so under the second head for the loss to the estate, this amount could be rightly awarded. This decision has been followed by a Division Bench of the Mysore High Court in The State of Mysore v. Gowri Vithal Deshbhandari and others, A.I.R. 1964 Mysore 113, where the learned Judges had on the basis of actuary table for South India taken the full span of life as 60 years and have capitalised the amount spent on the dependants on that basis. It was assumed that the working dependants would require double the amount which the non-working dependants required for maintenance. As the deceased was 34 years of age, the expectation of life was taken as 26 years and the benefit which the wife would have received was multiplied by 26 years of life-expectancy of the deceased and that sum was reduced by 20% having regard to the uncertainty of life and the fact that the amount was payable in a lump

sum. In estimating pecuniary benefit to the minor sons, it was considered that the deceased would have maintained them till they attained 18 years age and so the benefits which the children received were multiplied by the years they would have received the same on the above basis and a further reduction of 10 to 15% was made since the payments were in a lump sum. In the case of claimants who were to receive the amount for a smaller period, no reduction was thought necessary. This question of taxing down or the relevant deductions to be made for the imponderables and uncertainties which enter into the calculations would be 4 question of fact to be determined having regard to the facts of each case. Applying this principle, we have first to ascertain the amount of earning or the income which the deceased was earning yearly. We have then to find out how much amount the deceased required or expended for his own personal and living expenses. The balance will give a datum or basic figure which will generally be turned into a lump sum by taking a certain number of year's purchase and for this purpose we have to make an estimate of the deceased man's expectation of life if lie had riot been killed and had eked out the full average span of his life. The basic figure thus arrived at will have to be taxed down haying regard to many uncertainties and imponderables, including (i) the fact that the payment of damages (pecuniary benefits) is to be made in a lump sum instead of the benefit being spread over a number of years, (ii) a deduction for accelerations of the interest of the claimant on the death of the deceased and (iii) a possibility that the wife might have died before the deceased or that the widow might remarry and even improve her financial position; and (iv) a possibility that the dependants might die a premature death. We will proceed to assess the quantum of damages payable to each one of the claimants-dependants bearing in mind these principles. As aforesaid, the deceased was a young healthy man of about 25 years of age and would have lived a normal life of 60 years when his death was caused by the aforesaid wrongful acts of the defendants. The expectation of the life of the deceased when he died may, therefore, be taken to be of 35 years. As found by us earlier, the average yearly income of the deceased was Rs. 750/ -. The deceased has died leaving behind him as his dependants his widow Nanda aged 25 years, his two minor sons Asha and Raojt aged 9 and 2 respectively and two minor daughters Shanta and Kamla aged 8 and 4 respectively. It is in evidence that the widow and the children were entirely dependant on the deceased's earning. Normally, the deceased, would have met the expenses of education and marriage of his four children. He was ordinarily expected to maintain his children until they attained the age of 18 years when they might be self-sufficient. It is also in evidence that the deceased was giving help to his father Kalyan who has since died The agricultural land which the deceased was cultivating has, after his death, been taken over by his brother and the dependants have been deprived of this land. The first defendant has admitted that the deceased's daughter would require Rs. 500/- to Rs. 1000/- for her marriage. He has also admitted that a person would require Rs. 20/- to 25/- per month for maintenance.

39. Normally, the deceased and his wife who were adult persons and working would require for their personal and living expenses twice the amount then that required by the non-working children. We

would, therefore, assume that during the coming years, the deceased, were he alive, would have applied double the amount for his own living and so also for the living of his wife. The deceased was helping his father Kalyan. Although there is no definite evidence as regards the nature of help, we will assume that the deceased was spending the same amount on his father" as he did on his minor children. We would thus divide the family into nine units two for the deceased, two for the wife and one each for the minor children and the no deceased father who was a non-working member.

40. The yearly income of Rs. 750/- that the deceased was earning would, therefore, be divisible by 9 and this will work out at a basic figure of Rs. 83/- per unit per year. The deceased would have accordingly expended an yearly amount ofRs. 166/- for his personal living and expenses and so would have his wife, now widowed. The deceased would have applied for the support of each one of his four minor children, until they attained the age of 18 years and of his father an yearly amount of Rs. 83/-.

41. The deceased man's expectation of life at the time of his death was, as aforesaid, 60 years and therefore his widow Nanda would be entitled to demages for the said period calculated on the estimated annual sum of Rs. 166/- which the deceased would probably have applied for the support of Nanda. The amount required for the future provisions of the first plaintiff (Nanda) has, therefore, to be computed by multiplying Rs. 166/- by 35 years, which was the expectation of life of the deceased. However, we find that the first plaintiff has claimed damages on the basis that she, would live at least for 25 years more. Thus, in the case of the widow who is the first plaintiff, it would be proper to capitalise the estimated annual sum of Rs. 166/- by multiplying it by 25 years, instead of by 35 years. On this basis, the total benefit, which the first plaintiff Nanda might have received from the deceased, comes to Rs. 4,150/-. However the said sum of Rs. 4,150/- has to be taxed down having regard to many uncertainties of life and many imponderables entering into the calculation such as acceleration of her interest as a result of the early death of the deceased and possibilities of her remarriage or early death and such other considerations for which purpose having regard to the facts of this case, the sum of Rs. 4150/- should be taxed down by 33% So calculated the damages to be awarded to first plaintiff Nanda would work out at Rs. 2767/-. With regard to the four minor children namely, second plaintiff, third plaintiff, daughter Shanta and daughter Kamla aged 9, 2, 8 and 4 respectively at the time of the death of the deceased Shana, in estimating the pecuniary benefits expected by them, we may expect the deceased to maintain them until they attained the age of 18 years. On this calculation, these children would have received the benefit for a period of 9, 16, 10 and 14 years respectively. Thus the pecuniary benefits which the second plaintiff, third plaintiff and two daughters Shanta and Kamla might have expected to enjoy, had the death of the deceased person not been caused as aforesaid, work out as under on the above basis:

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  Second plaintiff Asha Shana.         83 x 9  =  747
Third plaintiff Raoji Shana.         83 x 16 = 1328
Daughter Shanta Shana                83 x 10 =  830
Daughter Kamla Shana                 83 x 14 = 1162
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42. The above amounts have to be taxed down since the payments are made in a lump sum on the death of the deceased and the receipt of the benefits is accelerated. In case of second and third plaintiffs, we reduce the amount only by 5% and 10% respectively, having regard to the fact that they would have received the benefit of eduction at the hands of the deceased, and also taking into account the period of time during which they would have received the benefit. In the case of minor daughters Shanta and Kamla, we do not think it necessary to reduce the figures as, in any case, the daughters would have been got married by the deceased had be been alive at the time and as according to the first defendant himself, the deceased would have required a sum of Rs. 500/- to 1000/- for the marriage of a daughter.

43. On the above basis, the compensation payable to each of the plaintiffs Nos. 1, 2, and 3 and two daughters Shanta and Kamla is determined as under:

Plaintiff No. 1. Rs. 2767/-

Plaintiff No. 2. Rs. 710/-

PlaintiffNo. 3. Rs. 1195/-

Daughter Shanta Shana Rs. 830/-

Daughter Kamla Shana Rs. 1162/-
Rs. 6664/-

44. In our judgment, the plaintiffs together with Shanta and Kamla would be entitled to an award of Rs. 6, 6641- as compensation for loss under Section 14 of the Act to be apportioned between them in the manner stated above.

45. That would capitalise the amount of Rs. 500/- which would have been spent on the plaintiffs-dependants at little over 12 to 13 times. That will take us to the next question of computing the loss to the estate of the deceased. Mr. Patel argued that there was no specific claim under this head in the claim. We do not agree with him. In the present case, the same persons are claiming under both the heads, both as dependent as their sand, when they claim Rs. 20,000/- they claim it not only for their maintenance, marriage, education, clothing etc. bat also so as to include all claims of compensation on account of premature death of the deceased resulting in mental agony and forced widowhood. The claim clearly includes loss under both the heads and so long as the amount awarded does not exceed the amount claimed, the amount awarded can be suitably split up and awarded under the two Sections 1-A and 2 of the Act. As we have already capitalised the amount Y under the head of personal loss to the dependants under Section 1-A, under the second head of loss to the estate, the amount of saving Z only could be capitalised along with the claim for mental agony, if any, and the claim for loss of expectation of life of the deceased. The only saving on

our aforesaid calculations which would result would be from the fact that Rs. 83/- which we took as having been spent for the father of the deceased could be capitalised in the same way. There would also be found a further saving from the said income after the minors would have attained majority. It would therefore, be proper to award Rs. 1000/- as a reasonable figure on this count by capitalising this amount of saving taking into account the fact of the amount being paid in a lump sum and the question of relevant deductions. The claim of loss to the estate on the ground of loss of expectation of life would still stand on a totally different footing as it has nothing to do with the capitalising of the entire income X of the deceased which would only include both the amounts Y and Z, namely, the amount spent on the dependants and the amount saved. In England, damages under this head varied from £ 1200/- to £ 200/-. Therefore, the House of Lords in Benham v. Gambling, 1941 A.C. 157, brought consistency into this unseemly chaos, as observed by Lord Pearce in H. West & Son Ltd. v. Shepard (1963) 2 W.I.R. 1359 at page 1386. It imposed a small conventional figure within narrow limits. As Lord Pearce rightly put it the problem simply stated before the House of Lords was: "Is life a boon? And if so, what is the money value of all that which we lose by death?" This figure according to Lord Pearce was a great deal lower than that at which many of us would have set the value of human living. But although this might seem a hardship to plaintiffs and a leniency to defendants, it could fairly be said that in a majority of cases the plaintiffs,, were no longer alive to resent their hardship and their executors owed the very existence of their claims to the Act itself. To the living plaintiffs there was hardship in the decision to the minds of those who attached a higher value to life. In Benham v. Gambling (Supra) Viscount Simon L.C. had formulated the following propositions.

Damages given for the shortening of life should not be calculated solely or even mainly, on the basis of the length of life that is lost; they should be fixed at a reasonable figure for the loss of a measure of prospective happiness. If, however, the character or habits of the deceased were calculated to lead him to a future of unhappiness or despondency that would be a circumstance justifying a smaller award. No regard must be had to financial losses or gains during the period of which the victim has been deprived, damages being awarded in respect of lose of life, not of loss of further pecuniary prospects. In the case of a child, as in the case of an adult, the proper sum to be awarded should not be greater because the social position or prospect of wordly possession is greater in one case than another.

In the subsequent case, in H. West & Son Ltd. v. Shpeherd (Supra) Lord; Reid stated at page 1366 that it was now a rule of law that, if a man was cut off in the prime of life, then no matter how bright his prospects, only a conventional sum of £ 500/- or so could be awarded in respect of his lost years. The low figure was taken in Benham's case in assessing damages on an objective basis independently of what the injured person knew or felt. As Lord Devlin observed in the said judgment at page 1381, the amount of £ 200/- laid down as a conventional "figure had been raised on account of the depreciation of the currency from £ 200/- to £ 500/-. In the latter case the House of Lords thus confined the particular guidance in Benham v. Gambling in the assessment of damages for the loss of expectation of life and did not extend it to any other class of cases. It is thus

clear that on this head of damages, it is a settled practice in England to award only the conventional figure off 500/- after the depreciation of the currency. Patel J. of the Bombay High Court has considered this question in Abdul Mohmed v. Peter Leo 66 Bom. L.R. 565. The learned Judge has observed that as a result of the decision in Benham v. Gambling, the conventional figure of damages on this head was rather low, since the objective test of a happy life was to be applied after considering all the relevant circumstances to arrive at reasonable amount of damages on this head. In the case before Patel J., the boy who had died was of 6 years only and the damages awarded on this count were Rs. 5,200/- for loss of expectation of life. The figure was considered by Patel J. to be slightly higher looking to our Indian conditions but it was not so extravagant a figure as to be interfered with, especially as the amount awarded on the other head was slightly less. We think that keeping in mind our Indian conditions and the present depreciated value of the currency, this moderate figure should not be less than Rs. 3,000/-. Therefore, in all, the loss to the estate can be fairly assessed at Rs. 4,000/- in this particular case and the said amount will have to apportioned between the hairs in proportion of their respective shares in in the deceased's estate. Thus, the plaintiffs and the two daughters would be entitled to compensation under Section 1-A of the Act at Rs. 6, 664/- to be apportioned in the manner stated above and to a further sum of Rs. 4000/- as cementation under Section 2 of the Act for the loss to the estate to be apportioned in the proportion of their respective shares in the estate of the deceased.

46. In the result, we allow this appeal, set aside the decree of the trial Court and order that there shall be a decree in favour of the plaintiffs against all the defendants jointly and severally to pay the amount of compensation of Rs. 10,664/- which shall be apportioned in the manner stated in our judgment between the plaintiffs and the two daughters. The defendants shall also pay the proportionate costs of the suit to the plaintiffs in both the Courts. The plaintiffs shall pay the court-fees and the State shall have a first charge for the said amount on the subject matter of the suit. The defendants will bear their own costs.