1948 *Present :* **Dias and Windham JJ.**

DARLIS APPU, Appellant, *and* DAVID SINGHO, Respondent

S. C. 125—D. C. Matara, 17,334

Negligence—Damage by fall of coconut tree—Duty of owner—Act of God.

Where the defendant took no steps to prevent a coconut tree, which, to his knowledge, was a potential source of danger, from falling on his neighbour's house—

Held, that the defendant had been guilty of negligence.

Jinasena v. Engletina (1919) 21 N. L. R. 445, distinguished.

APPEAL from a judgment of the District Judge, Matara.

N. E. Weerasooria, K.C., with *S. W. Jayasuriya* and *W. D. Gunasekera*, for the defendant appellant.

Cyril E. S. Perera, with *Naina Marikar*, for plaintiff respondent.

Cur. adv. vult.

November 19, 1948. DIAS J.—

The plaintiff-respondent and the defendant-appellant are neighbours and adjacent land owners in the town of Weligama in the Southern Province. During the night of June 8, 1945, during what has been described as "an unprecedented storm", a coconut tree standing on the defendant's land near the plaintiff's house, and which slanted over the plaintiff's house, was brought down by the gale and almost destroyed the whole of the plaintiff's house. The nature of the storm can be gauged by the fact that it uprooted "the famous Nuge tree" of Weligama.

That this coconut tree, although described as being young and healthy, was a potential source of danger to the plaintiff's house is amply demonstrated by the evidence both oral and documentary which the District Judge has accepted. Furthermore, the evidence shows that this tree had been anchored or moored to another coconut tree half-way up its trunk by means of a wire or hawser.

The evidence, which the District Judge has accepted, proves that from about 1941 the plaintiff had been writing to the Urban Council of Weligama of which the defendant's cousin, Charles, was a member, complaining about this dangerous tree—see P3–P7. Curiously enough, when the Urban Council was summoned to produce these letters, it was stated that the office file was destroyed "because it was too thick", a singularly unconvincing reason. In a public office when files become "too thick" they are not destroyed, but sub-divided. Be that as it may, the evidence proves that both the then Chairman of the Urban Council and Mr. Wanigasekera, the Works and Revenue Inspector, inspected this tree. Mr. Wanigasekera says that the plaintiff and his wife showed him "only one tree as overhanging". The plaintiff has stated on oath that, although the defendant is a trader at Matale, he had told the

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defendant on his visits to Weligama on eight occasions about this dangerous tree. Plaintiff swears that about four months before the tree was blown down, the wire hawser snapped, but that the defendant did not get the wire replaced. The defendant denies that the plaintiff ever complained to him, or that he was aware that the tree was slanting towards the plaintiff's house. The District Judge has disbelieved him, and I agree with him that on the evidence, both direct and circumstantial, it is quite incredible that the plaintiff should have been complaining to the authorities without informing the owner of the tree. I am of opinion that the evidence points to the facts, that the tree was dangerous, that the defendant was well aware of the danger of that tree to the safety of the plaintiff's house, that he took the precaution of having the tree fastened to another tree, and that he failed to have the wire replaced when it snapped, probably owing to the swaying of the stem caused by the high winds which normally exist along the south coast of this Island.

In my opinion, the evidence when carefully considered establishes quite clearly that the defendant was the owner of the tree (in fact, there is an admission on record to that effect); that he was well aware of the danger and took steps to avert that danger; but that he was negligent when he failed to replace the wire hawser when it snapped some time before the night the tree was blown down. In my opinion, this amounts to negligence. It was the defendant's negligence coupled with the high wind which caused the tree to fall. One can take judicial notice of the fact that in June the south-west monsoon would be at its peak. In the Southern Province the winds of the south-west monsoon would normally be severe. These are facts the defendant should have been aware of and guarded against.

It has been contended that this tree fell, not because of the negligence of the defendant, but owing to "an act of God". This plea was not taken in the answer, but I agree with learned counsel for the appellant that it is open to him to rely on any facts which negative negligence.

"The act of God" is a plea which is very frequently brought forward to excuse the negligence of man. It really amounts to nothing more than an event which, as between the parties, and for the purpose of the litigation, is to be regarded as incapable of being definitely foreseen and controlled. In my opinion, any land owner living by the sea coast in the south of Ceylon whose coconut tree dangerously slants over his neighbour's house, must foresee the possibility of a strong wind causing the tree to fall, and should, therefore, take steps to prevent that possibility—either by felling the tree or anchoring it in such a manner that it would not fall on his neighbour's house. The case of *Jinasena v. Engletina*[1] can be distinguished from the present case on the facts. Schneider J. said: "The planting of a coconut tree on one's land is a lawful act, and is the making of a lawful use of the land. The mere fact that when that plant has become a tree, a part of it overhangs the neighbouring land, and the mere fact that it had a thin stem, do not render the tree a dangerous element, or even a danger to the neighbouring land. Wherever we cast our eyes about in the Island, we see coconut trees on one man's land overhanging his neighbour's land. It is nothing extra-

[1] *(1919) 21 N. L. R. 445.*

ordinary to find the stems of some of these overhanging trees thin. It is a matter of common knowledge that the stem of a coconut tree is very strong. Thus, *unless there was something extraordinary in the manner of the tree in question overhanging the plaintiff's land, or in the state of its trunk*, the plaintiff should have averred and proved *negligence* before he could obtain damages against the defendants. But he has proved neither of these things ".

It is important to note that what Schneider J. was there considering was, whether apart from negligence, the rule of absolute liability formulated in *Fletcher v. Rylands* [1] created liability in the defendant. Obviously, assuming that *Fletcher v. Rylands* applies to Ceylon (see hereon *Korrossa Rubber Co. v. Silva* [2], *Samed v. Segutamby* [3], *Subaida Umma v. Wadood* [4]) in the case of *Jinasena v. Engletina* the coconut tree being naturally on the defendant's land, and there being no proof of negligence on the part of the defendant, the rule of absolute liability was necessarily excluded.

Jinasena v. Engletina is clearly distinguishable from the present case on the facts. There was something extraordinary and dangerous in the tree in question, and the defendant was well aware of it, because he took the precaution of anchoring that tree to another. It was the defendant's negligence in not re-securing that tree after the hawser snapped which was the direct cause of the damage done to the plaintiff's house.

No question was raised in regard to the *quantum* of damages.

I dismiss the appeal with costs.

WINDHAM J.—I agree.

Appeal dismissed.