
(2000) 02 GUJ CK 0050
In the Gujarat High Court
Case No : First Appeal No. 817 of 1979

Bai Shanta

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 22-02-2000

Acts Referred:

Bombay Police Act, 1951 — Section 37

Citation : (2001) ACJ 1980 : (2001) CriLJ 2152 : (2001) 1 GLR 273 : (2001) 2 RCR(Criminal) 315

Hon'ble Judges : K.R. Vyas, J

Bench : Single Bench

Advocate : R.N. Shah, for the Appellant; J.S. Yadav and V.K. Parekh, AGP, for the Respondent

Final Decision : Allowed

Judgement

K.R. Vyas, J.—The appellants, by this appeal, have challenged the judgment and order passed by the learned Civil Judge, Senior Division, Himatnagar dated 31st January 1979 rendered in Special Civil Suit No. 8 of 1974 dismissing the suit claiming Rs. 1 lac towards damages with interest at the rate of 12% per annum from the date of the suit. The suit was filed by the widow Bai Shanta and her two minor sons and the brother, mother and father of deceased Shamalbhai being appellants no. 1 to 6 respectively, claiming damages of Rs 1 lac on the death of Shamalbhai who died as a result of bullet injury at the hands of N.C.C. Cadets who were undergoing firing practice at the firing butt of police department at village Dhandha, 2 miles north to Himatnagar town. During the pendency of the appeal, the appellant no.5, mother of the deceased and the appellant no.6 -Patel Nathabhai, the father of the deceased have expired.

2. It is the case of the appellants that on the firing butt, the cadets of National Cadet Corps of Sabarkantha District started practising firing operation from 11.12.1973. On 15.12.1973 at about 1.30 p.m., the deceased Shamalbhai, aged 32 years, while was doing the agricultural work in his field survey no. 133/3

situated about 5800 feet away on the north east side of the firing butt, received bullet on his chest from the gun of one of the cadets. It is alleged that he fell down on the ground. The persons who were in the vicinity rushed there and they immediately took him in a bullock cart for treatment. However, when they reached the outskirts of village Hansalpur, Shamalbhai succumbed to injury. An information was given to Himatnagar Police Station. The dead body was sent for post-mortem to the Civil Hospital, Himatnagar. The post-mortem certificate reveals that Shamalbhai died due to the bullet shot. According to the appellants, the death of Shamalbhai was due to the rash and negligent act of the respondents; it was the duty of the respondents or the persons of the National Cadet Corps who were in charge of firing operation to take proper and adequate precautionary measures in the vicinity. That nobody within the area of firing butt received any fatal injury. Since the respondents have failed to take precautionary measures for the safety of the people, the appellants are entitled to damages as the deceased was the sole bread winner of the family. It was the negligence on the part of the respondents and, therefore, both the respondents are jointly and severally liable to pay the amount of damages. It is the further case of the appellants that the Collector, Sabarkantha has paid Rs. 500/-immediately on 20.12.1973 as a relief, but that amount is neither an adequate compensation nor damages and, therefore, the appellants served the respondents with a registered post notice dated 24.12.1973 claiming damages of Rs. 1 lac from both the respondents jointly and severally. Even though the respondents are served, they have neither replied to the notice received by them nor have they paid any compensation to the appellants and, therefore, the suit to recover the amount of damages.

3. The respondents, in their written statement Ex. 36 and 34 respectively, while taking usual defences about the maintainability of the suit, denied the claim put forward by the appellants. It was inter alia contended that the deceased Shamalbhai expired as a result of the accident and due to the risky act and wrong committed by him by entering the dangerous zone when the firing operation was going on. It was further contended that all necessary precautions were taken by the respondents to caution the public in the vicinity. It was contended that the previous notices were issued and all the necessary precautions were taken before firing practice was carried out during the period of firing days. The red flags were affixed and bugles were blown. In substance, the respondents contended that the death was not due to the act of the respondents, but it was a result of the fault and risk of the deceased.

4. On the basis of the pleadings, issues Ex. 35 were framed by the trial court. After considering the evidence on record, the trial court recorded a finding that the deceased Shamalbhai died on account of receiving bullet injury on his chest. However, the appellants were unsuccessful in proving that the respondents had not taken proper measures by not making proper and necessary security arrangements. Accordingly, the appellants failed to prove that the deceased met with death on account of carelessness, negligence and rashness of the

respondents, as alleged. In that view of the matter, the respondents are not jointly and severally liable for the above incident which resulted into causing death of the deceased. In substance, the trial court recorded a finding that the incident in question was of accident and that it was due to the wrong and fault of the deceased of entering into the dangerous zone while firing operation was going on. In this view of the finding, the learned trial judge finally held that the appellants are not entitled to any amount as compensation or damages from the respondents.

5. The learned Counsel appearing for the appellants, after inviting my attention to the evidence on record and the reasonings of the learned trial judge, submitted that the appellants have successfully established on the basis of the evidence on record that the case on hand is a clear case of rashness and negligence on the part of the respondents as no safety precautions were taken to caution the public in the vicinity. In the submission of the learned Counsel for the appellants, the deceased died because of the bullet injury while working in his field and in absence of any case put forward by the respondents, it suggests that the death has resulted due to the firing by the NCC Cadets. My attention has been invited to the relevant provisions of necessary precautionary measures required to be taken before firing practice is undertaken. In the submission of the learned Counsel for the appellants, fixing of red flags around the firing butt and blowing of bugles at the time of firing practice are not sufficient measures.

On the other hand, the learned Counsel appearing for the respondents, while supporting the judgment of the trial court, contended that all the formalities required under the law were completed before the firing practice began. In the submission of the learned Counsel for the respondents, the evidence of the Government officers produced on the record of the case clearly suggests that all the precautionary measures were taken before the start of the firing practice. Therefore, there is no reason to disbelieve their version against the evidence of the witnesses examined by appellants who are admittedly of the same caste of the deceased and, therefore, they are interested witnesses. It was also contended that considering the range between the firing spot and the field of the deceased, the bullet could not have travelled such a long distance and, therefore, it is extremely doubtful that the deceased died because of the bullet fired by the NCC Cadet. Finally, it was contended that since the appellants have failed to prove their case for damages, they are not entitled to get the decree as claimed for and in any case, the claim is also exaggerated.

6. In view of the rival submissions, the questions arise for consideration are whether the deceased Shamalbhai died because of the bullet injury fired by the NCC Cadet and whether proper precautions were taken by the respondents before start of firing practice at the firing butt of police department at village Dhandha. The question of damages can be considered after arriving at a decision on the above questions.

7. The appellants, in order to prove their case, have examined certain witnesses

over and above the appellant no.1 Bai Shanta. Similarly, the respondents have also examined one Arjunsinh Vaghela Ex. 84, NCC Officer, who on the relevant day, was supervising the firing practice, Nanji Mangalji, Police Constable Ex.90, Shantaram Shankarram, Reserved PSI Ex.91 and one Gangaram Patel, Ex. 92, a clerk of the Office of the Collector. The appellants have also produced certain documents from the police papers vide Ex. 39 to 48. The same include : yadi given to the Mamlatdar to have the inquest report Ex. 40, inquest report Ex. 41, post-mortem report Ex. 42, panchanama of the scene of the incident Ex. 43 and map Ex. 44. Ex. 45 is regarding taking out of bullet from the body of the deceased; Ex. 46 is the receipt of muddamal, Ex. 47 is the post-mortem note and Ex. 48 is the map drawn by the revenue authorities. Similarly, Ex. 68 is the bullet in question while Ex. 75 and 79 are the writings passed by the deceased Shamalbhai for cultivation. Bai Shanta, in her evidence, has given the details about the family; they all were staying with the joint family. According to her, on 15.12.1973, her husband had gone to the field bearing survey no. 133/3 for taking crops, which is situated at a distance of one-and-half miles from the firing butt in the north east direction. She had gone to her father's house at village Kanknor prior to one day before the day on which her husband died. She has admitted that she came to know that while the NCC Cadets were undergoing firing practice at the firing butt, her husband was injured by firing of a bullet and he died as a result of the said injury. In her cross examination, she has stated that they keep gun for protection of their crops. She has admitted that many a times, her husband used to take with him gun for the protection of their crops. According to her, Shambhubhai and Haribhai also used to keep with them guns for protection and preservation of their crops. Many a times, they had fired from their guns to drive away the wild animals. She has admitted the relationship of different witnesses with the appellants. She has admitted the existence of firing by police since long and they used to do firing practice at the firing butt area. She has also admitted that the policemen blow bugles when they practice at the firing butt and keep red flags hoisted in the area of firing. She denied that her husband was not keeping sound health and that she filed a false suit claiming compensation.

8. Reading the evidence of the appellant, it is clear that as she had gone to her father's place in another village, it was not possible for her to give the exact details about the death of her husband. Her evidence is relevant only for the purpose of proving the claim of damages even though she has admitted that the policemen were blowing bugles when they were doing firing practice at the firing butt and keeping red flags in the area of firing butt. However, the rest of the witnesses have stated in no uncertain terms that neither bugles were blown nor any red flags were hoisted covering the firing butt. Thus, the evidence of rest of the witnesses examined by the police runs contrary to the evidence of Bai Shanta on this aspect. On the contrary, the evidence of Arjunsinh Ex. 84 and Nanji Mangalji Ex. 90 examined by the respondents will go to suggest that on 15.12.1973, both of them took a round to see that nobody including cattle is

visible within the range of the firing butt. The police had blown the bugle to inform that the firing was to take place; flags were hoisted on the boundary lines i.e. on left, right and in front. Before starting firing, after taking round with the Head Constable Nanji, the said Head Constable had given a Range Clear Certificate which was signed in presence of Arjansinh which is at Ex. 85.

9. In view of this evidence, it is required to be accepted that before the start of firing practice, bugles were blown and the red flags were affixed on three sides. Therefore, the evidence of other witnesses examined by the appellants denying this aspect is not acceptable. Admittedly, they are all of the same caste of the deceased and, therefore, they have deposed obviously with a view to help the appellants.

10. Joitabhai Jivabhai, Ex. 82 who is having his field adjoining to the field of the deceased, in his evidence, has stated that when the deceased was hit by bullet, he was in his field. He took the deceased in his cart to his house. In the cross examination, he has stated that the deceased Shamalbhai was of his community. At the time of the incident, he was cutting grass in his field. His attention was drawn by the shouts of Shamalbhai. He has admitted that the police has not recorded his statement regarding the death of Shamalbhai. The learned trial judge has rejected his evidence on the ground that even though he claims to be an eye witness, his statement has not been recorded by police on the same day and secondly on the ground that he being of the same community of the deceased, he has tried to oblige the appellants. True, he has stated that he is of the same community as of the deceased and that the police has not recorded his statement, but that fact itself is no ground to discard his evidence for the simple reason that his version of deceased Shamalbhai being hurt by bullet and he having taken Shamalbhai who was bleeding, in cart to his house, is not challenged in the cross examination. Since no prosecution was thereafter launched, his statement is recorded or not loses importance. Therefore, the evidence of Joitabhai is required to be accepted only for the limited purpose. Ex.39 is the entry in the police station diary entered at 13.45 hours. The information has been provided by Dahyabhai Ranchhodbhai of village Hansalpur on telephone that Shamalbhai Nathabhai had sustained bullet injury on his chest which came from the side of police butt and had stopped breathing. On the same day, the Taluka Magistrate, Himatnagar was also informed by the PSI Himatnagar u/s 174 of the Code of Criminal Procedure that the deceased Shamalbhai died because of the firing by NCC Cadets and it is an accident. Necessary inquest was drawn accordingly. The dead body was sent for post-mortem vide Ex. 42. Ex. 43 is the panchanama of the scene of offence. The doctor, after performing post-mortem, opined that the cause of death was shock and haemorrhage due to puncture of vital organs with bullet. In view of the aforesaid documentary evidence, it is clear that the deceased Shamalbhai died due to bullet injury fired from the firing butt. The respondents, in the cross examination of Bai Shanta, merely suggested that the deceased as well as the adjoining farmers used to keep gun for the purpose of protecting their crops from animals and birds.

However, nothing is suggested that the deceased died accidentally due to his own act. From the police papers produced in the case, no gun is recovered either from the field or from the house of the deceased. In this view of the matter, it is clearly established that the deceased had died because of the gun shot injury fired by the cadet of NCC while undergoing firing practice at the firing butt.

11. Mr. J.S. Yadav, learned Counsel for the respondent no.1, after inviting my attention to the evidence of Arjunsinh Vaghela, submitted that the bullet could not have covered a long distance between the firing range and the field. Arjunsinh, in his cross examination, has stated that the killing range of 303 rifle is 300 yards. The effective killing range is also for 300 yards for human beings. He has further stated that if the rifle is fired towards the sky, it can go upto 2000 yards and then it falls on the ground. The bullet fired in the sky does not revert with force. Frankly speaking, no proper evidence has been led in the instant case regarding the killing range of 303 rifles. While deposing about the killing range of the rifle, the witness Arjunsinh has clearly stated that he has no knowledge about the forensic science. According to him, the say of 300 yards killing range is as per the say of the Instructor. Mr. Yadav, however, at this stage, orally requested to examine the expert of forensic science to know the effective range of 303 rifle. Mr. Yadav submitted that the bullet fired by NCC Cadet could not have travelled such a long distance resulting into the death of Shamalbhai and, therefore, the evidence of the expert is necessary. There are more than one reasons for rejecting such a request. It is the case of the appellants that the deceased Shamalbhai died due to bullet injury fired by NCC Cadet while practising firing. The claim of the appellants is disputed by the respondents. In the circumstances, the respondents could have led the evidence to disprove the claim of the appellants. The respondents cannot be permitted to fill up the lacuna of evidence especially when they failed to lead the evidence in this connection by not availing the same. It would be too much for the Court to grant such a request after about twenty seven years of the incident. It is not in dispute that the Collector, Sabarkantha had realised that the deceased Shamalbhai met with an accidental death because of the firing by the NCC Cadets and, therefore, he immediately paid Rs. 500/- to the appellant no.1. This fact would go to suggest that the respondents impliedly accepted their moral responsibility. Had it been a case of suicide or killing by any other person, the Collector would not have paid Rs. 500/- to the appellant no.1. In fact, the police also investigated the case on the line that the death of Shamalbhai was out of bullet injury sustained by the firing by NCC Cadet. Therefore, the question whether the bullet fired by the NCC Cadet would travel such a long distance or not loses all importance. Even though the bullet recovered from the body of the deceased Shamalbhai is on record, the respondents could have led evidence that the same is not fired from 303 rifle. Having failed to do so, no permission can be granted to have the evidence of expert at such a belated stage.

12. In view of the above discussion, I am of the view that the deceased Shamalbhai met with death due to bullet injury fired by NCC Cadet while

practising firing on the fateful day.

13. This takes me to the next question as to whether proper and sufficient precautions were taken for the safety of the public, before start of firing practice by the respondents. I have referred to the evidence of Arjunsinh and Head Constable Nanji Mangalji earlier wherein they have stated that they had taken the round of the firing butt before the start of firing practice and affixed red flags on the boundary of firing butt and thereafter the certificate Ex. 85 was issued. Bugles were blown before the start of the firing. The question arises as to whether these are the sufficient measures for safety of persons who are having their fields surrounding the firing butt. Fixing red flags on three sides of the boundary of the firing butt, at the most, can be described as the "danger zone" and, therefore, nobody can be expected to enter or cross the said zone. Similarly, blowing of bugles, at the most, can be said to be a warning signal before the start of firing. It is too much to expect from an illiterate farmer to know about the so-called precautionary measures adopted by the respondents unless they are informed about the same well in advance. It is also too much to expect from an ordinary farmer to know that blowing of bugle before the start of firing practice would mean a "danger signal". He would hardly give any importance to the same as he would always think that this is nothing but a part of NCC training. Even in the cases of mining operations, a siren is blown before the start of the same. Blowing siren is always considered to be a "danger signal" by common and ordinary persons. In any case, blowing bugle is not an alternative to a siren. Thus, the aforesaid precautions taken by the respondents are no precautions at all. In any case, it is not the case of the respondents that the deceased entered the area of firing butt unauthorisedly and even though he was warned, he refused to leave the firing butt and died because of firing. In absence of any such evidence, it is required to be held that the deceased died due to bullet injury while working in his field on the fateful day.

14. A further question would arise as to whether the respondents have taken further precautions of covering the surrounding areas of firing butt and sufficient warnings were given in advance to the persons of the surrounding areas.

Section 37 of the Bombay Police Act, 1951 gives power to the authority to prohibit certain acts for prevention of disorder which reads as under:-

"37. Power to prohibit certain acts for prevention of disorder:- The Commissioner and the District Magistrate in areas under their respective charges may, whenever and for such time as he shall consider necessary for the preservation of public peace or public safety by a notification publicly promulgated or addressed to individuals, prohibit at any town, village or place or in the vicinity of any such town, village or place--

(a) the carrying of arms, cudgels, swords, spears, bludgeons, guns, knives, sticks or lathis or any other articles, which is capable of being used for causing physical violence.

- (b) the carrying of any corrosive substance or of explosives,
- (c) the carrying collection and preparation of stones or other missiles or instruments or means of a casting or impelling missiles.
- (cc) the carrying of burning or lighted torches in a procession,
- (d) the exhibition of persons or corpses of figures or effigies thereof,
- (e) the public utterance of cries, singing of songs, playing of music,
- (f) delivery of harangues, the use of gestures or mimetic representations, and the preparation, exhibition or dissemination of pictures, symbols, placards or any other object or thing which may in the opinion of such authority offend against decency or morality or undermine the security of or tend to overthrow the State."

Subsection (4) of section 37 which is relevant for our purpose reads as under:-

"(4): The authority empowered under subsection (1) may also by public notice temporarily reserve for any public purpose any street or public place and prohibit persons from entering the area so reserved, except under such conditions as may be prescribed by such authority."

Reading the aforesaid provisions, it is clear that subsection (1) of section 37 enables the Commissioner of Police and the District Magistrate in areas under their respective charges to prohibit the acts mentioned in clauses (a) to (f) for the preservation of peace and public safety by a notification publicly promulgated or addressed to individuals within any town, village or place or in the vicinity of any such town, village or place. It is also clear that the power reserved u/s 37 of the Act can be exercised by issuing notification and publicly promulgating the same. The expression "publicly promulgating" is not defined in the Act. However, it should be understood in the normal connotation. The authorities must take steps to have the notification brought to the notice of the public who is likely to be affected thereby and that may be effected by proclaiming it e.g. by the beat of drum or affixing in public places like Police Stations, Chavadis and other public buildings. Mere publication in the Government Gazette cannot be regarded as "public promulgation" within the meaning of Section 37 of the Act.

Subsection (4) of section 37 empowers the authority under subsection (1) to reserve for public purpose any street or public place and prohibit person entering the area so reserved except under such conditions as may be prescribed by such authority. Under this subsection, notice must be publicly promulgated. At the cost of repetition, I may state that mere publication in a Government Gazette is not public promulgation and it should be by a beat of drum, affixing order to police stations, chavadis and other public places.

15. Reverting back to the facts of the case, the respondent no.2, while reserving firing butt for the purpose of firing practice, exercised powers under subsection (4) of section 37 of the Act, failed to follow the requirement of subsection (4) of section 37 of the Act. Gangaram Naranbhai Patel, Ex. 92 from the Office of the

Collector is examined. He has stated that notifications u/s 37(4) of the Bombay Police Act are being issued by his office. According to him, notifications are being issued on the strength of applications made for firing practice. In his examination-in-chief, he has further stated that regarding the notification dated 15.12.1973, he cannot say whether such a notification was notified as the record is sent to the record room. In the cross examination by respondent no.1, this witness has further stated that he cannot say about any other notifications before 1977. He admits that the District Superintendent of Police, Sabarkantha has to write for notification for firing practice to the District Magistrate, Sabarkantha. Except the evidence of this witness, no other witness is examined regarding the publication of notification and other requirement of subsection (4) of section 37. The notification reserving the area of firing butt and surrounding areas of village Dhandha is not on record. This witness has produced a notification dated 23.5.1978 Mark 93/1 and notification dated 16.12.1977 issued by the Dy. Superintendent of Police, Modasa, Mark 93/3. These notifications being subsequent to the incident in question, they are hardly relevant for our purpose. However, the fact remains that the notification for reserving the area of village Dhandha from 11.12.1973 to 15.12.1973 is not on record. Suffice it to say that there is no evidence on record produced by the respondents showing issuance of public notice besides publication in the Government gazette and affixing it at police station, chavadis and other public places and there is no beat of drums. It is a very sorry state of affair that the permission for firing practice was granted to the NCC Unit without following due procedure with the result that an innocent person lost his life. It is equally surprising that the entire case was fought by the respondents in a very casual manner. No proper evidence is led to show that proper precautions and safety measures were taken before permitting the NCC Unit to do firing practice.

16. This takes me to the question of compensation claimed by the appellants.

Bai Shanta, Ex. 50, widow of the deceased Shamalbhai, in her evidence, has stated that her father -in-law has 6 acres of agricultural land and her deceased husband was cultivating the said land. Her husband was also cultivating the lands of one Haribhai Jethabhai and Mohanbai three years prior to his death and he was paid Rs. 2000/- per annum each by Haribhai and Mohanbai towards remuneration. Besides these two persons, her husband was also cultivating the land of Shambhubhai two years before his death and was getting Rs. 1000/- per annum by way of remuneration. Thus, her husband used to get Rs. 5000/- per annum. She has further stated that from their land, they hardly get Rs. 1000/-. She has claimed Rs. 30,000/- for getting her children educated and married. In the cross examination, she has admitted that the appellants are solely dependent on the income from their agricultural. She has denied that she is not getting net annual income of Rs. 5000/-. She has admitted that after the death of her husband, the appellant no.4 is carrying out the agricultural work.

Reading the evidence of Bai Shanta, it is clear that the income of Rs. 5000/- per

annum which the deceased used to derive from other sources is not seriously challenged by the respondents. In view of the fact that Haribhai Ex. 70, Mohanbhai Ex. 72 and Shambhubhai Ex. 73, in their evidence, have clearly stated that they used to give their land for cultivation to the deceased and they used to pay to deceased Shamalbhai for cultivation, I have no reason to discard their evidence. Suffice it to say that the appellants have established that the deceased used to get Rs. 5000/per annum from the aforesaid persons for cultivating their land. In view of the fact that the deceased died at the young age of 32 years, he would have survived and lived a long life and looking to the young age of the minor children of the appellant no.1, for their education and marriage expenses, in my opinion, the claim of Rs. One lac put by the appellants is quite just and proper. As stated above, the claim put forward by the appellants is not seriously disputed by the respondents. Therefore, there is no reason for me not to grant the same. However, in view of the fact that the appellant no.4 Patel Bababhai is the brother of the deceased, he cannot be held to be the dependent of the deceased. As per the say of Bai Shanta, after the death of her husband, the appellant no.4 has started cultivating the land and, therefore, he is not entitled to claim any amount of compensation.

17. The net result of the aforesaid discussion is that due to the death of Shamalbhai, the appellants no. 1 to 3 only are entitled to get the amount of compensation. It is unfortunate that the appellants no. 1 to 3 who are the widow and the minor children respectively of the deceased Shamalbhai who have lost the only bread winner of the family at his young age for no fault of his were denied compensation in the year 1979 in a suit of 1974 on the ground which is not sustainable at all. In my opinion, the learned trial judge has completely misdirected himself on the facts not germane to decide the controversy between the parties. It is equally unfortunate that this appeal is not heard for about 21 years, with the result, for all these years, they have remained out of their legitimate claim. The amount they will now get cannot and will not substitute their dear one, but it could have helped them in their hard days of life if the appeal was heard earlier. Let the present case be an eye-opener to the Bench and the Bar.

18. In the result, this appeal is allowed with costs. The judgment and order passed by the learned Civil Judge, Senior Division, Himatnagar in Special Civil Suit No. 8 of 1974 dated 31st January 1979 is quashed and set aside. The appellants no. 1 to 3 are held to be entitled to receive compensation of Rs. One lac with interest at the rate of 6% per annum from the date of the suit till date and at the rate of 12% hereafter till the amount is realised. Both the respondents are held to be jointly and severally liable to pay the said amount. With a view to avoid further delay, both the respondents are directed to deposit the amount awarded before the trial court within eight weeks from today. On such amount being deposited, the trial court shall pay the same to the appellant no.1 after proper verification.