
(2013) 04 KL CK 0070

In the High Court Of Kerala

Case No : Regular First Appeal No. 542 of 2005

Government of Kerala

APPELLANT

Vs

Jolly Saimon and Others

RESPONDENT

Date of Decision : 10-04-2013

Acts Referred:

Constitution of India, 1950 — Article 38(1)

Citation : AIR 2013 Ker 152 : (2013) 2 ILR (Ker) 445 : (2013) 2 KHC 286 : (2013) 2 KLJ 519 : (2013) 2 KLT 402

Hon'ble Judges : Thottathil B. Radhakrishnan, J;B. Kemal Pasha, J

Bench : Division Bench

Advocate : Noble Mathew, Government Pleader, for the Appellant; P. Santhosh (Poduval) for Respondents 1 to 4, for the Respondent

Final Decision : Dismissed

Judgement

B. Kemal Pasha, J.—Soni Saimon a businessman, then 31 year old, was trapped to death during a night when his motorbike hit a speed barrier placed by the police across a National Highway without providing any night warning board or signals, purportedly as part of regulating the traffic. That barrier carried an advertisement of a private concern. Can a Welfare State be permitted to evade its vicarious liability by taking shelter under the doctrine of "sovereign immunity" to resist the claim for compensation by the dependents of the deceased? Soni's mother, widow and eleven months" old son sued the appellant, State of Kerala, for Rs. 10 lakhs as compensation and interest thereon. The second defendant is the father of the deceased.

2. Deceased Soni Saimon proceeded to Thrissur from Mundoor by riding his motorbike with P.W. 3 Sanjay, as pillion rider, by about 7.30 p.m. on 1-1-1998. At that time no speed barrier was seen placed across the road at Manappady near Peramanglam. By 10.15 p.m., while coming back through the said road, as and when they reached Manappady, all of a sudden the deceased could spot out a speed barrier placed across the road. As it was quiet unexpected, the deceased

could not stop the motorbike, even though he tried his level best. The motorbike hit on the speed barrier, thereby the speed barrier and the motorbike were thrown to the road. The deceased who fell on the road, got his head forcibly hit on a piece of rubble lying near the speed barrier, and sustained fatal injuries. However, P.W. 3 escaped with minor injuries.

3. The deceased succumbed to the injuries on the next day while undergoing treatment at the West Fort, Hospital, Thrissur. The plaintiffs claimed an amount of Rs. 10 lakhs as damages. The court below has passed a decree allowing the plaintiffs to release an amount of Rs. 3,75,000 with interest at 6% per annum from the date of decree till the date of realization, and hence the State is before us, as appellant.

4. The grounds on which the impugned judgment and decree have been challenged are; (i) the suit is bad for nonjoinder of necessary parties as the Central P.W.D. was not impleaded as a defendant, (ii) the motorbike that was being ridden by the deceased had never hit on the speed barrier, whereas, the motorbike capsized when the deceased, on seeing the speed barrier, attempted to stop the motorbike and he lost control in that process as he was in tremendous speed, (iii) the accident had occurred solely due to the rashness and negligence on the part of the deceased, and finally, (iv) the Road Transport Authority and the police, who are in control of the traffic are well within their powers and authority to place speed barriers for regulating the traffic as well as speed of the vehicles, and it being a sovereign function, the State has no vicarious liability.

5. There is no dispute with regard to the presence of the speed barrier across that portion of the road at 10.15 p.m., on the fateful day. There is no challenge to the fact that the speed barrier was not present at that portion at 7.30 p.m. on that day. The fact that the accident had occurred and the motorbike had fallen down near the speed barrier, is also not under challenge. Ext. A-11 series are the photographs showing the location of the speed barrier, lie of the road, the concerned motorbike which was lying on the road, the rubbles placed near the speed barrier etc. The genuineness of Ext. A-11 series photographs is not under challenge. Exts. A-11(b), A-11(c), A-11(g) and A-11(h) clearly show that the speed barrier, that was placed at the concerned portion of the road at the scene of the occurrence was seen lying on the road after the incident. The speed barrier on the other portion of the road was seen standing in an erect position.

6. Ext. A-6 scene mahazar also reveals the presence of the speed barrier at the scene of occurrence. As the speed barrier also had fell down in the incident, there is no meaning in contending that the motorbike did not hit on the speed barrier. Further, Ext. A-6 shows the tyre mark of the motorbike which reveals that the deceased had attempted to stop the motorbike immediately on seeing the speed barrier. When the incident had occurred as a result of the placing of the speed barrier on the road by the police, there is no meaning in contending that the Central P.W.D. is a necessary party to the suit. Apart from constructing

and maintaining the National Highway, either the National Highway Authority of India or the Central P.W.D. has not done anything in the matter.

7. According to P.W. 3, who was the pillion rider, while they were going to Thrissur, by about 7.30 p.m. through the very same road, the speed barrier was not placed there. While they were coming back through the said road by 10.15 p.m., unexpectedly the speed barrier was seen placed there; but no reflectors, sign boards, or other visible signals were there to give an idea of the speed barrier, and to see it from a distance. From the evidence of P.W. 3, it has come out that the speed barrier was placed on the road after 7.30 p.m., that too without any visible indicators on the road to enable the riders or drivers to see the speed barrier from enough distance.

8. According to P.W. 3, due to the light from the other vehicles coming from the opposite direction, the speed barrier could not be seen, and thereby, the motorbike hit on the speed barrier. The evidence given by him that the speed barrier was not there on the road at 7.30 p.m. while they were going to Thrissur, and the speed barrier appeared on the road while they were coming back by 10.15 p.m., has not been challenged in cross-examination. In Ext. A-21 reply notice issued by the learned District Additional Government Pleader, it has been contended that the speed barriers were placed with sufficient warning boards and cautioning signals. It was further contended that the deceased and P.W. 3 were under the influence of liquor and that was how the accident had occurred. At the same time, no such questions were put to P.W. 3, when he was subjected to cross-examination. There is no evidence to prove that any warning boards or cautioning signals were there to show the presence of the speed barrier on the road. Nobody has cared to mount the box for the State, and no evidence has been adduced for substantiating the contentions of the State. When the speed barrier was not present there while they were going to Thrissur at 7.30 p.m., naturally, the deceased and P.W. 3 could not have expected any such speed barrier on the road in their return trip. The placing of the speed barrier without any warning boards or cautioning signals, had in fact, acted as a trap on the road.

9. The next questions to be decided are, whether the State is vicariously liable for the acts of its officers in a case like this, and whether the State can take shelter under the principle of "sovereign immunity" to defend the claim for damages in a case of tort like the present one? In Smt. Nilabati Behera alias Lalita Behera Vs. State of Orissa and others, , it was held that the concept of sovereign immunity is not applicable to the cases of violation of fundamental rights. It was held:

A claim in public law for compensation for contravention of human rights and fundamental freedoms, the protection of which is guaranteed in the Constitution is an acknowledged remedy for enforcement and protection of such rights, and such a claim based on strict liability made by resorting to a constitutional remedy provided for the enforcement of a fundamental right is distinct from, and in addition to, the remedy in private law for damages for the tort resulting from the

contravention of the fundamental right. The defence of sovereign immunity being inapplicable, and alien to the concept of guarantee of fundamental rights, there can be no question of such a defence being available in the constitutional remedy. It is this principle which justifies award of monetary compensation for contravention of fundamental rights guaranteed by the Constitution when that is the only practicable mode of redress available for the contravention made by the State or its servants in the purported exercise of their powers.

10. In *Municipal Corporation of Delhi, Delhi Vs. Association of Victims of Uphaar Tragedy and Others*, , it was held:

Due to the action or inaction of the State or its offices, if the fundamental rights of a citizen are infringed, then the liability of the State, its officials and instrumentals is strict.

Roads are being constructed by the State by utilising the Revenue as well as other sources raised through taxes from the citizens of this country. All individual human beings are entitled to move freely through such roads and the same cannot be curtailed unreasonably. Digging of a ditch across the road, or the placing of a speed barrier across the road, or the erection of a barricade on the road without giving sufficient warning through visible signals or warning boards so as to give notice of such traps on the road to the riders or drivers, sufficiently early, to prevent the falling into such traps, cannot be styled as sovereign functions of the State. Exts. A-11, A-11(e), A-11(g), A-11(h) and A-11 (k) clearly show that the concerned speed barrier, which acted as a trap in this case was supplied by "M/s SUNTEC TYRES". The other speed barrier on the road was supplied by a colour lab. It was made as an advertisement board of private individuals or concerns. In such a case, the placing of such a speed barrier which contains the advertisement in bold letters as "SUNTEC TYRES" cannot be said to be a part of sovereign functions. The appellant has not adduced any evidence before the court below to show that any warning boards or visible signals were there at the side of the road to enable the riders or drivers to take note of the impending danger which they would be facing on account of the speed barrier. Especially when the speed barrier was not there on the road at 7.30 p.m., while the deceased had passed through that portion of the road to Thrissur, such a trap was unexpected by the deceased when he returned through that road at 10.15 p.m.

11. After the decision in *Rylands v. Fletcher* (1868) L.R. 3 H.L. 330, the doctrine of strict liability gained immense importance in the field of tortious liability. The law has assumed the proportion that one who should know that his activity, even though carefully prosecuted may harm others, should treat that harm as a cost of his activity. Prior to the doctrine of strict liability, the law on the subject was based on the *laissez-faire* theory, which was there in the 19th century. It has gone miles away when it reached the 20th century, when the theory of "Welfare State" came which concept is based on social justice and social security as its integral parts.

12. As per Article 38(1) of the Constitution of India, it is the duty of the State to function as a Welfare State, and look after the welfare of all its citizens. Article 38(1) of the Constitution of India states:

The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life.

Therefore, it is the duty of the State under the Constitution, to function as a Welfare State of all its citizens.

13. In *Jay Laxmi Salt Works (P) Ltd. Vs. State of Gujarat*, , it was held in paragraph 8.

law of torts being a developing law, its frontiers are incapable of being strictly barricaded.

In *Union of India (UOI) Vs. Prabhakaran Vijaya Kumar and Others*, , it was held,

The theory of strict liability for hazardous activities can be said to have originated from the historic judgment of Blackburn, J. of the British High Court in *Rylands v. Fletcher*. Before this decision the accepted legal position in England was that fault, whether by an intentional act or negligence, was the basis of all liability and this principle was in consonance with the then prevailing *Laissez-Faire* Theory.

It was further held,

With the advance of industrialisation the *Laissez-Faire* Theory was gradually replaced by the theory of the Welfare State, and in the legal parlance there was a corresponding shift from positivism to sociological jurisprudence. It was realised that there are certain activities in industrial society which though lawful are so fraught with possibility of harm to others that the law has to treat them as allowable only on the term of insuring the public against injury irrespective of who was at fault. The principle of strict liability (also called no-fault liability) was thus evolved, which was an exception to the general principle in the law of torts that there is no liability without fault.

In *The State of Rajasthan Vs. Mst. Vidhyawati and Another*, it was held,

In this connection it has to be remembered that under the Constitution we have established a Welfare State, whose functions are not confined only to maintaining law and order, but extend to engaging in all activities including industry, public transport, state trading, to name only a few of them. In so far as the State activities have such wide ramifications involving not only the use of sovereign powers but also its powers as employers in so many public sectors, it is too much to claim that the State should be immune from the consequences of tortious acts of its employees committed in the course of their employment as such.

14. In *The State of Rajasthan's case (supra)*, it was further pointed out that in

England, the crown was no longer immune from proceedings in court in regard to the tortious acts of its servants, and that it was realised in the United Kingdom that the rule "The King can do no wrong" had become outmoded and, therefore, the very citadel of the absolute rule of immunity of the sovereign has now been blown-up. It was further held that the State should be as much liable for tort in respect of a tortious act committed by its servant within the scope of his employment and function, as any other employer. The common law immunity that was prevailing in United Kingdom which was based on the old feudalistic notions of justice has never operated in India, and here the sovereign has been held liable to be sued in tort or in contract. It was also held that, in an independent India, governed by a Constitution, there was no justification for upholding the principle of immunity which was based on an outmoded common law theory that no longer operated as such in the country of its birth. In *Home Office v. Dorest Yacht Co.* [(1970) A.C. 1004 H.L.(F)] it was held that the crown is no longer protected from claim for compensation for the act of its servant if such act was performed negligently or ultra vires the statute creating the powers under which it is purported to have been done.

15. In *Kasturilal Ralia Ram Jain Vs. State of Uttar Pradesh*, it was held,

The doctrine of immunity which has been borrowed in India in dealing with the question of the immunity of the State in regard to claims made against it for tortious acts committed by its servants, was really based on the Common Law principle which prevailed in England; and that principle has now been substantially modified by the Crown Proceedings Act.

In dealing with the present appeal, we have ourselves been disturbed by the thought that a citizen whose property was seized by process of law, has to be told when he seeks a remedy in a court of law on the ground that his property has not been returned to him, that he can make no claim against the State. That, we think, is not a very satisfactory position in law. The remedy to cure this position, however, lies in the hands of the Legislature.

16. In *Shyam Sunder and Others Vs. The State of Rajasthan*, , the Apex Court by referring to the doctrine of sovereign immunity observed:

We do not pause to consider the question whether the immunity of the State for injuries on its citizens committed in the exercise of what are called sovereign functions has any moral justification today.

Today, hardly anyone agrees that the stated ground for exempting the sovereign from suit is either logical or practical. We do not also think it necessary to consider whether there is any rational dividing line between the so-called sovereign and proprietary or commercial functions for determining the liability of the State.

17. A Division Bench of this Court in *The State of Kerala and Another Vs. K. Cheru Babu*, held;

The concept of sovereignty is not a satisfactory test for deciding questions of immunity. Sovereign exercise of power is not the dividing line between jurisdiction and immunity. As stated earlier, apart from constitutional or statutory provisions granting certain immunities or exemptions or privileges to the State or its instrumentalities, and with the exemption of matters arising from war damage, the State, in relation to its citizens, has no immunity from liability or from the jurisdiction of its courts.

All powers vested in the State are derived from the Constitution or the relevant statute. Under the Constitution, there is no scope for immunity based on any prerogative or arbitrary right except where special provisions have been made under the Constitution, or a reasonable classification is made under a statute, treating the State or certain individuals as a special class and conferring upon them special privileges and exemptions or immunities, against a citizen. Therefore, the State has no right to immunity, and the State is vicariously liable to third parties in such circumstances as would render a private employer liable. It is inequitable to exempt the State from private law obligations as has been increasingly recognized in most jurisdictions. An unlimited claim of State immunity from legal proceedings has no theoretical or legal basis in India.

18. We do not think that there is anything in this case that enables the State to wash off its hands and to evade liability by imputing negligence on the deceased. The officers of the State had committed gross negligence in placing the speed barrier across the road without giving proper and visible signals or other precautions to enable the riders or drivers to note down the impending danger from a sufficient distance. In this case, the State cannot take shelter under the rule of sovereign immunity, which is presently not available even in its country of its birth, in relation to torts. The plaintiffs are entitled to be compensated for the loss sustained to them on account of the death of the deceased, who was the sole supporting pillar of the family. We find that the State is liable to compensate the plaintiffs in this case. It has come out in evidence that the deceased was conducting a financial institution and was earning a monthly income of Rs. 5,000 from it. It seems that the court below has considered the monthly contribution by him to the plaintiffs, at Rs. 2000 per month. The deceased was aged 31 at the time of death. The court below has taken the multiplier as 15, and calculated the loss of dependency, by applying the said multiplier with the amount at Rs. 2,000 per month noted above, as Rs. 3,60,000. It seems that the court below has granted an amount of Rs. 15,000 as loss of expectation of life. In fact, the court below has not granted any compensation towards loss of consortium, loss of love and affection, pain and sufferings, funeral expenses etc. We leave those questions, as the judgment and decree is not in challenge through any appeal or cross-objections by the plaintiffs. The amount allowed by the court below as compensation through the impugned judgment and decree is less than what the plaintiffs are entitled to. Matters being so, there is absolutely nothing to interfere with the impugned judgment and decree. This appeal is devoid of merits, and is only to be dismissed with costs, and we do so.

In the result, this R.F.A. is dismissed with costs.