
(1956) 09 AHC CK 0028
In the Allahabad High Court
Case No : S.A. No. 1631 of 1952

Husain Ul Zafar Khan

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 25-09-1956

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 80
Constitution of India, 1950 — Article 300
Government of India Act, 1935 — Section 176
Post Office Savings Bank General Rules, 1981 — Rule 17, 21, 26, 445, 491

Citation : (1957) 27 AWR 19

Hon'ble Judges : Upadhyaya, J

Bench : Single Bench

Advocate : M.A. Kazmi, for the Appellant; The Standing Counsel, for the Respondent

Final Decision : Allowed

Judgement

Upadhyaya, J.—This is a Plaintiff's appeal arising out of a suit for the recovery of Rs. 4,600/- principal and Rs. 92/- interest and interest pendente lite and future. The facts alleged by the Plaintiff are that he had an account No. 2t 095 in the savings bank in the post office at Etah. The account stood in his name under the guardianship of his father, M. Hafidul Zafar Khan and it had Rs. 5000/- in deposit in the month of June 1948. On 15-7-1948 the Plaintiff's father withdrew a sum of Rs. 60/- for the Plaintiff's use from the said account and the Pass Book was left with the clerk concerned at the post office for entry of interest, as suggested by the clerk. The Pass Book was not returned to the Plaintiff's father and remained in the post office for some time. In the first week of December 1948 the Plaintiff's father wanted to withdraw some money from the said account for the Plaintiff and went to the post office for the purpose. He asked the clerk concerned for the Pass Book but was told that the Pass Book could not be traced as a long time had elapsed and several clerks had been changed during the period. The clerk concerned, however, suggested to the Plaintiff's father to

apply for the issue of a duplicate Pass Book alleging that the original Pass Book had been lost. Following this advice the Plaintiff's father made an application then and there for the preparation of a duplicate Pass Book. The said application was dictated by the clerk and scribed by the post office Jamadar, Jagdamba Prasad. It appears that during the preparation of this duplicate Pass Book it was discovered that a sum of Rs. 4600/- had been withdrawn from the said account on 22-9-1948 by some unknown person. An application is said to have been made at once reporting the matter to the postal authorities and to the police and telegrams were also sent to the Deputy Postmaster-General and Superintendent of Post Offices Aligarh about this. It was alleged that neither the Plaintiff's father nor anybody on his behalf had made the said withdrawal of Rs. 4,600/- and the post office could not be exonerated from the liability of paying the said sum of Rs. 4,600/- with interest to the Plaintiff.

2. The suit was contested on various grounds. It was denied that the Pass Book was ever left by the Plaintiff's father in July 1948 as alleged and that the withdrawal of Rs. 4,600/- on 22-9-1948 had been made by the Plaintiff's father himself and the said withdrawal was not a fraudulent withdrawal by some other person, as alleged by the Plaintiff. It was also pleaded that the Plaintiff's father was negligent and responsible for the loss of the Savings Banks Pass Book and even if there had been a fraudulent withdrawal by some other person the post office was not responsible for the same in view of the rules of the post office savings bank which were binding on the Plaintiff. The validity of the notice u/s 80 of the CPC was also challenged.

3. The trial court held the notice u/s 80 of the CPC to be valid and properly served. It found that the Plaintiff had failed to prove that his father had left the Pass Book in the post office on 15-7-1948 as alleged and held that the Pass Book was lost on account of the negligence of the Plaintiff's father for which the post office was in no way responsible. It was also held that the amount of Rs. 4,600/- was not actually withdrawn by the Plaintiff's father on 22-9-1948 and that this payment was made to some wrong person. The Defendant, however, was held to be not liable as according to the trial court, the savings bank rules were binding on the Plaintiff and as the Pass Book was considered to be lost through the negligence of the Plaintiff's father and there was a fraudulent withdrawal the post office could not be held to be liable. The Plaintiff's suit was therefore dismissed.

4. On appeal, the lower appellate court affirmed the decision. The learned District Judge also did not accept the Plaintiff's version that the Pass Book was left by his father in the post office for entry of interest in July 1948. The attention of the learned Judge was invited to certain defects in the withdrawal form dated 22-9-1948. One of these defects was that the certificate required to be signed in the form according to rules to the effect that the money sought to be withdrawn was required for the use of the minor did not bear the signature of the Plaintiff's father and the withdrawal form itself did not bear any date. The learned Judge

agreed with the trial court's view-that "the alleged signatures of the Plaintiff's father on this withdrawal form were rather suspicious". The finding recorded by the trial court that the sum of Rs. 4,600/- had not been withdrawn by the Plaintiff's father was maintained in appeal. The learned judge further observed:

It seems to me that somehow or the other the Pass Book in question was taken away from the Plaintiff's custody and was presented at the post office for such withdrawal by some wrong person who impersonated as Plaintiff's father and after necessary comparison of the specimen signatures the amount was allowed to be withdrawn from the account in good faith.

5. After considering the provisions of Rule 21 of the rules for depositors relating to post office savings bank, the learned judge considered that the Plaintiff was not entitled to a decree and dismissed the appeal.

6. Of the points in dispute two are now concluded by concurrent findings of fact recorded by the courts below. The first is that the Plaintiff has failed to prove that his father left the Pass Book in the post office for entry of interest on 15-7-1948. Among the reasons given for this finding is the evidence of a witness, which has been accepted, to the effect that the statement relating to interest to be credited to the savings bank accounts of depositor: had not been received by the post office till 15-7-1948 and the savings bank clerk therefore could not, in all probability, ask the Plaintiff's father to leave the Pass Book for entry of interest. Rule 489 of the Posts and Telegraphs Manual, Volume VI, says that as soon as possible after the close of each year (financial year) the Audit Office will prepare for each head office a statement showing a) the interest that has accrued for the past year on each account open, (b) the closing balance standing on the 31st March at credit of each account open, and (c) the balance after the addition of interest. Sub-rule (2) further says:

In Head Offices, the annual statement of interest ought to be received not later than the 15th of June in each year. If it is not received by that date, a report should be made to the Head of the Circle.

7. Entries are then to be made in the ledger maintained at the head office and Rule 491 says:

Entry of interest in pass-books-In Head Offices, the first time that a pass-book is presented after the receipt of the annual statement of interest, whether for the purpose of operating on the account or only for the entry of interest, the amount of interest shown in the statement should be credited in the pass-book, as in the specimen below, the interest bring added to the balance at credit of the depositor. The passbook should then be placed with the statement and the ledger before the head post master, who should check the interest and the resulting balance [after addition of interest entered in the pass-book and the ledger, with the entries in the statement and then initial the pass-book and ledger and note the date in the latter. He should at the same time see whether the entry of the ledger-folio in the pass-book requires alteration. The pass-book should be

returned with as little delay as possible to the person who presented it.

8. The evidence to show that the audit office had not sent the statement of interest by 15-6-1948 is in conflict with the requirements of Rule 489. There is no evidence to show that the post office at Etah had made a report to the Head of the Circle, as required by Rule 489(2) that the statement had not been received. Certain circumstances, however, have been mentioned by the Court below for disbelieving the testimony of the Plaintiff's father on this point and, though it is possible to take a different view, the finding of fact need not be disturbed.

9. The other finding is that the withdrawal on 22-9-1948 had not, in fact, been made by the Plaintiff's father. By this finding the courts below have disbelieved a very important plea taken in defence. It was pleaded that the Plaintiff's father had come personally and made the withdrawal. The Savings Bank clerk who was on duty on the relevant date has deposed that the Plaintiff's father had made the withdrawal. For very cogent reasons to which it is also possible to add others, the court below has affirmed the finding of the trial court that the Plaintiff's father had not made the withdrawal and that the amount had been withdrawn by somebody else. This concurrent finding is also binding on me in second appeal.

10. The only question that remains to be considered is as to whether, having regard to the facts and circumstances of the case and the provisions of Rule 21 of the rules for depositors made under the Post Office Savings Bank Act, the Plaintiff's suit is not maintainable. The appeal has been argued at some length by the parties. It being found that the withdrawal had not been made on the Plaintiff's behalf by his father, the question is whether his claim for the amount is defeated by the provisions of Rule 21 of the rules for depositors relating to post office savings bank. Rule 21 reads as follows:

The pass-book will show, in the vernacular of the district or in English, as the depositor may wish, the number of his account, with the name of the office from which the book is issued, his own name and address. No deposit can be made and no money can be withdrawn from an account without its production, and the Post Office will not be responsible for any sum not acknowledged in the pass-book. Depositors should carefully examine their books before leaving the office and ascertain that the entries are correct. They should also be careful to keep their pass-books in their own possession, as the Post Office does not accept responsibility for any loss caused to a depositor, if, through his negligence, any person shall obtain possession of the book and fraudulently obtain the payment of any sum belonging to the depositor.

11. A glance at the rule shows that it provides what the pass-book issued to the depositor would contain, that the pass-book should be presented each time a deposit or a withdrawal is made and that the depositor should carefully examine his pass-book before leaving the office. The rule further says that the depositor should also be careful to keep his pass-book in his possession. This advice is

followed by a statement that the post office does not accept any responsibility for any loss caused to a depositor, if, through his negligence any person shall obtain possession of the book and fraudulently obtain the payment of any sum belonging to the depositor. As it has been found that the pass-book was not left at the post office it ought to have been with the Plaintiff's father. The courts below have assumed that the relevant passbook was presented at the time when the withdrawal was made. It might be so. The questions that remain to be considered are whether possession of the pass-book was obtained by somebody through the negligence of the Plaintiff or his father and whether it was the person who thus obtained possession of the pass-book that made the fraudulent withdrawal of the amount in question. There is no evidence relating to any such negligence. The courts below have assumed that the pass-book could be presented only because it had been obtained through the negligence of the Plaintiff or his father. There is, again, no evidence nor any finding to the effect that the person who made the withdrawal was the person who had so obtained possession of the pass-book. I am of opinion that the courts below were not right in making an assumption relating to negligence of the Plaintiff or his father and in not considering the tact that the rule could support the defence only if the person who had obtained the pass-book was the person who made the fraudulent withdrawal. As mentioned above, there being no evidence on these points i. cannot be held that the person who might have produced the pass-book and obtained the withdrawal was the person who obtained possession of the pass-book through the Plaintiff's alleged negligence. This rule appears to exempt the post office from a liability only if the obtaining possession of the pass-book and the fraudulent withdrawal of money are both effected through the negligence of a depositor. Learned Counsel for the Appellant placed before me the withdrawal form relating to the withdrawal on 22-9-1948 and several other withdrawal forms signed by the Plaintiff's father which are on record. It is obvious, as observed by the lower appellate court, that the signatures on the relevant withdrawal form are suspicious. In fact, I am surprised how the officials concerned in the post office could held that the alleged signatures of the Plaintiff's father in the withdrawal form tallied with his genuine signatures kept as specimen in the post office so as to enable them to allow the withdrawal. A guardian withdrawing money from a minor's account has to certify that the money is needed for the minor's use. Rule 445 of the Posts and Telegraphs Manual, Volume VI, says:

(1) Whenever a withdrawal from an account opened on behalf of a minor is desired, the father or other guardian must write above his signature on the application for withdrawal, the certificate prescribed in the Rules for Depositors as necessary for withdrawals from minors' accounts.

12. The certificate is prescribed under Rule 26 of the Post Office Savings Bank Rules and should be in the following terms:

Certified that the amount sought to be withdrawn is required for the use of the

minor who is alive this day.

13. The withdrawal form dated 22-9-1948 does contain the words required to be used in the certificate, but the certificate is not signed by the Plaintiff's father. This certificate has been found to be in the handwriting of a person named Jagdamba Prasad who was formerly in the service of the post office and was at the time when the case was heard working as a petition-writer in the same office. If, according to rules, withdrawal by a minor's guardian could be made only on his giving a certificate as required, the withdrawal form in which the certificate had not been signed by the Plaintiff's father was evidently one on which no payment should have been made. The irregularity was of a serious nature and it is difficult to see how the person or persons responsible could allow withdrawal when the withdrawal form was so materially defective. Notwithstanding the observations of the lower appellate court to the effect that the payment was made bona fide by the officials of the post office, I cannot but feel that the payment made on such a suspicious and defective withdrawal form can be attributable only either to the connivance or extreme inefficiency and carelessness of the officials concerned. In circumstances like these it is not possible so accord any protection to the person or persons at fault on the ground of good faith.

14. The payment therefore that appears to have been made on 22-9-1948 was made irregularly against the rules and, even if Rule 2I could be found to be applicable, the post office cannot refuse to pay back to the Plaintiff the amount deposited by him in the post office. Relating to the applicability of Rule 2I, I am of opinion that the rule has not been correctly construed by the courts below and, there being no evidence relating to negligence or to the effect that the person who obtained the pass-book through the negligence of the Plaintiff or his father was the person who made the withdrawal, the rule cannot be a bar to the Plaintiff's suit.

15. Learned Counsel for the Defendant argued that, in any view of the matter, the Plaintiff's suit was not maintainable against the Union of India. It was urged that the running of the post office savings bank was one of the governmental activities of the State and the savings bank clerk who paid the money wrongly to another person than the depositor was acting in the discharge of duties imposed on him by law. It was contended that the Union of India could not be held liable as an employer or master for the wrongful activities of the officials of the post office who were acting in the discharge of duties imposed on them by law, though they were the employees of the Defendant. This contention appears to be founded on two well-known principles of law. The first is that a sovereign power is immune from being sued in its own courts unless it submits by statutory provisions or otherwise to the jurisdiction of such courts, and the second is that the master cannot be held liable for a tort committed by the servant if the servant has acted in discharge of duties imposed by law.

16. Learned Counsel invited my attention to some cases relating to the question

of jurisdiction of the courts to entertain suits against the Union. My attention was also drawn to Article 300 of the Constitution of India wherein the liability of the Union of India has been declared to be the same as that of the Dominion of India prior to the Constitution. Section 176 (as adapted in 1947) of the Government of India Act, 1935, also contained similar provisions stating that the liability to be sued of the Dominion of India would be the same as that of the Secretary of State for India in Council prior to that Act. There were corresponding provisions in earlier Acts relating to the Government of India and the decisions which were given under the older enactments still embody the law relating to the jurisdiction of courts over the Government of the State. This principle of immunity appears to apply to every sovereign power whether the form of government is monarchical or democratic. In England the doctrine that "A King can do no wrong" appears to furnish the historical basis for this immunity and through the centuries the rule had to be considered from time to time in various cases. The Petition of Right in England gave rise to some considerations which may not affect the applicability of the rule to this country. In other States the doctrine of the State being the source and creator of the law and therefore above the law appears to have furnished the basis for the application of this rule. One of the earliest cases that came up for consideration in India was the *Peninsular and Oriental Steam Navigation Company v. Secretary of State for India* 5 Bombay H.C.R. Appendix A. In that case the Plaintiff sought to recover damages on account of injury caused to a horse of the Plaintiff through the negligence of certain servants of the Government working in the Kidderpore Locks at Calcutta. The Defendant's servants were carrying a big piece of iron funnel casing along a road. As the Plaintiff's carriage approached, the coachman and soyces called out and the men carrying the casing dropped it on the road. The iron fell with a great noise which startled the Plaintiff's horses, they rushed forward violently and one of them fell on the iron and damaged its legs. The suit was resisted inter alia on the ground that the Defendant was a State and as such not liable for damages occasioned by the negligence of its officers or of persons employed in its service. The general rule recognised by Sir Barnes Peacock, who delivered the judgment of the Supreme Court, is that "it is an attribute of sovereignty and an universal law that a State cannot be sued in its own courts without its consent". The learned Chief Justice, however, stated that an exception had to be made in respect of commercial activities of the State. Discussing several English cases he observed:

There is a great and clear distinction between acts done in the exercise of what are usually termed sovereign powers, and acts done in the conduct of undertakings which might be carried on by private individuals without having such powers delegated to them.

17. In the above case it was held that the men carrying the casing were lawfully employed in an act of a "private nature" and not in the exercise of powers usually called sovereign powers or in the performance of an act of State and it was held that the Secretary of State was liable. Since that case several other

cases have arisen in which courts had occasion to distinguish between ordinary governmental activities and activities of the State of a commercial nature. Usually running of railways by the State has been considered to be an activity of a commercial nature. The question in the present case is as to whether the running of the post office savings bank is an activity of a commercial nature.

18. It is by no means easy to draw an invariable line between governmental and nongovernmental functions. States are taking up more and more duties and responsibilities. The railways which at one time were generally considered to be activities of a commercial nature are now often recognised as essential activities of the State to provide safe and efficient transport and thus one of the duties of a good government. It may therefore be argued that the view so far taken relating to the nature of the State's activities in running a railway needs reconsideration. Mr. N.D. Pant, learned Counsel for the Defendant, argued that the Union of India is a welfare state and the motive in providing savings bank facilities at the post office is not to earn money but to promote thrift among the middle and lower class people. It, however, appears that, though the object of the State in providing savings bank facilities at the post office may be to encourage saving by the smaller people, this activity has not yet been recognised as one of the essential duties of a government. The money that is made available to the State through the post office savings bank is obviously utilised for development work etc., as appears from the various advertisements made by the State inviting people to make investments in the post office savings bank and the other deposit certificates that are issued through the post office. The nature of the work done is one which if done by a private person would be commercial. It is, therefore, in my opinion, not correct to say that in running the post office savings bank the Union of India is engaged in an activity which may be called an "act of State or a Governmental function". The rule therefore laid down in the *Peninsular and Oriental Steam Navigation Company v. Secretary of State for India* 5 Bombay H.C.R. Appendix A. appears to be applicable and the argument of the Defendant's counsel claiming immunity from the jurisdiction of courts cannot be accepted.

19. Another reason why the Defendant's argument cannot be accepted is that the claim preferred by the Plaintiff was not based on any wrongful act of tort committed by the Defendant's servants. The officials of the post office wrongfully made payment to a person who was not entitled to it. In doing so it cannot be said that they made any payment to the Plaintiff or his father. The Plaintiff is admittedly a depositor. According to the rules in force he is, and should be, entitled to get back his money unless he has already received it or unless he has done something because of which he has forfeited his right under the rules embodying the terms of the deposit to get the money back. The wrongful activity of the Defendant's servants in paying the money to a wrong person is therefore not the basis of the Plaintiff's claim. He is not suing for damages or for compensation because the money was wrongly paid. The wrongful payment by the postal officials is being pleaded in defence as a

justification for refusing payment to the Plaintiff. The cases therefore which were relied upon by the learned Counsel for the Defendant in support of his contention that the master is not liable for the tortious acts of his servants done in the performance of statutory duties are clearly inapplicable.

20. Some cases were cited but they all relate to claims for damages for wrongful acts or tortious acts committed by the Defendant's servants. These cases therefor afford no guidance in the present case, and I do not consider it necessary to discuss all of them in detail. Two cases, however, of this Court must be mentioned. In *Ram Gulam v. The Govt. of U.P.* 1950 A.L.J. 46 a learned Judge of this Court had to consider whether the State was liable to return certain ornaments lost from the malkhana on account of the negligence of the Defendant's servants. The Ornaments were stolen from the Plaintiff's house but were recovered from another house on a search by the police. The police seized the ornaments as stolen property and they were produced as exhibits at the trial of those who were prosecuted in connection with the theft. They were kept in the collectorate malkhana but were again stolen and became untraceable. The Plaintiff applied unsuccessfully to the magistrate for an order to get them back and then instituted a suit for the return of the ornaments and, in the alternative, for the recovery of their price as damages. The question that came up for consideration before this Court was whether the Government was liable to pay for the negligence of its servants through whose carelessness the ornaments were stolen from the malkhana. The learned Judge who decided the case held that the maxim "Respondent superior" is subject to the well-recognised exception that a master is not liable for the acts of his servants performed in discharge of a duty imposed by law. This was a case in which damages were claimed for the tortious acts of the servants. In *Mohammad Mnrud Ibrahim Khan v. The Government of U.P.* 1955 A.L.J. 597 certain jewellery belonging to minors was kept with the Nazir of the District Judge's court. There was a theft and the jewellery was stolen. The Nazir did not deposit the jewellery in the bank as he should have done. On attaining majority the minors instituted a suit claiming the return of the ornaments and, in the alternative, a sum of Rs. 25,000/- as damages alleging that the District Judge and the Nazir were negligent in keeping the jewellery. A Division Bench of this Court took the view that "the Government was not liable for loss resulting from a wrongful order of a court". The learned Judges found that "both the District Judge and the Nazir were functioning under certain provisions of law and in the performance of their duties they were negligent. "1 heir employer, the U.P. Government, is therefore not liable for damages caused by their negligent acts." This also was a case where the wrongful act of the servants was the basis of the Plaintiff's claim. In the present case, however, as mentioned above, the Plaintiff's claim is not based on the wrongful or negligent act of the employees of the post office at all.

21. The Plaintiff's claim in this case is based not on tort but arises out of what may be called a contractual relation between the Plaintiff and the post office. The terms of the contract are embodied in the rules framed by the Defendant. At the

time of opening an account Rule 17 of the Post Office Savings Bank Rules requires a depositor to sign a declaration in the following words:

I hereby declare that the Post Office Savings Bank Rule: have been read by me/ to me and that I accept them as binding upon me.

22. These rules therefore which a depositor accepts as binding upon him should reasonably be considered the terms of agreement between the post office and the depositor. The deposit is made according to these rules and a depositor is entitled to withdraw the money deposited by him again according to these rules. A withdrawal by a depositor may be resisted only under these rules. If, for instance, he wants to withdraw more often than once a week, the rules do not permit him to do so. But so long as a depositor has not received back his money he is entitled to get it back unless under some rule he loses his right to that money. One of such rules pleaded in defence is Rule 21. It has already been held above that Rule 21 does not apply to this case. It has further been held that in making the payment without there being a properly filled in withdrawal form containing a certificate by the Plaintiff's guardian the Defendant or its officials concerned are not entitled to any protection as no such payment could have been made by the post office at all. The payment thus in the present case does not entitle the Defendant to refuse payment to the Plaintiff. In the light of the above observation it must be held that the courts below have erred in dismissing the Plaintiff's suit.

23. The appeal is, therefore, allowed and the Plaintiff's suit stands decreed with costs throughout.

24. Leave to appeal is granted.