

(1968) 03 BOM CK 0019
In the Bombay High Court
Case No : Appeal No. 102 of 1966

Kailas Sizing Works

APPELLANT

Vs

Municipality of Bhivandi and Nizampur

RESPONDENT

Date of Decision : 18-03-1968

Acts Referred:

Bombay District Municipal Act, 1901 — Section 167, 167A
Bombay General Clauses Act, 1904 — Section 3(20)
Contract Act, 1872 — Section 2, 226
Evidence Act, 1872 — Section 114
General Clauses Act, 1897 — Section 3(22)
Penal Code, 1860 (IPC) — Section 52
Transfer of Property Act, 1882 — Section 3

Citation : AIR 1969 Bom 127 : (1968) 70 BOMLR 554 : (1969) ILR (Bom) 564 : (1968) MhLj 916

Hon'ble Judges : Nain, J;Chitale, J

Bench : Division Bench

Advocate : P.P. Khambata, D.S. Parikh and Shamaldas P. Modi, for the Appellant; Y.B. Rege and V.B. Rege, for the Respondent

Judgement

Nain, J.—This is a plaintiffs" appeal against the judgment and decree of the learned Civil Judge, Senior Division, Thana, dismissing their suit for recovery of Rs. 1,00,012 as damages for loss caused to their property on 5th July 1963 by flood water, filed against the Municipality of Bhivandi and Nizampur. The plaintiffs allege that they have suffered the loss on account of the negligence of the defendants.

2. The plaintiffs occupy a permanent structure on Yacoob Road at Bhivandi wherein they carry on the business of sizing yarn. They had machinery, raw materials and other goods stored in the premises at all material times prior to and during the month of July 1963. There is a gutter about 1 1/2 feet wide running along side Yacoob Road between the said Yacoob Road and their factory premises. On the other side of the road, there is an open nullah running parallel to the road. This nullah is about 40 to 45 feet wide and provides a passage for

dirty water and rain water passing to the creek. The plaintiffs alleged that the defendants covered the said nullah with a slab after narrowing it to a width of 15 feet where the slab was put without providing adequate passage for rain water and during the monsoon of 1963 for water from the catchment area constituting Varala Tank. The Government of Maharashtra at the instance of the defendants demolished a portion of Varala Tank in April 1963. In consequence, the rain water falling in the catchment area of the lake was expected to pass along with the rain water falling in the catchment area of the nullah through this nullah on to the creek. The plaintiffs say that in spite of the partial demolition of the Varala Tank, over a height of six feet from the ground level, the defendants commenced the work of laying the cement slab across the nullah after the demolition of the said part of the said tank and completed the work of the laying of the slab in the second week of June 1963. They further alleged that the centring work to support and settle the slab continued to remain unremoved till about the first week of July 1963. This centring work obstructed the passage of bushes and debris and together they prevented the water from passing. The defendants failed to keep the nullah free of centring bushes and debris for the flow of the water in July 1963. The plaintiffs further alleged that their machinery and goods in the said premises at Yacoob Road were damaged by heavy rain water entering the premises as a result of heavy rains on 5th July 1963. According to them, the nullah overflowed because of the obstruction to the passage of water caused by the narrowing of the nullah, slab, centring and garbage. According to them, the damage sustained by their goods was the direct result of the action of the defendants by reason of their negligence and the defendants were therefore liable to make good to the plaintiffs the loss caused by the damage. The defence of the defendants was that there was no negligence on their part in narrowing or stabbing the nullah or in not removing the centring or allowing garbage to collect. They contended that the damage was due to heavy rain which was an act of God. Their principal defence, however, was that a suit of this nature was barred by the provisions of S. 167 of the Bombay District Municipal Act, 1901.

3. One of the reasons, and in fact the principal reason, for the dismissal of the plaintiffs' suit was that the suit was barred by the provisions of Section 167 of the Bombay District Municipal Act, 1901. Sections 167 and 167A(1) read as under:

"167. No suit shall lie in respect of anything in good faith done or intended to be done under this Act or against any municipality or against any committee constituted under this Act or against any officer or servant of a Municipality or against any person acting under and in accordance with the directions of any such municipality, committee, officer or servant or of a magistrate".

"167A. (1) No suit shall lie against a municipality or against any officer or servant of a municipality in respect of any act done in pursuance of execution or intended execution of this Act....."

4. Mr. Rege appearing for the defendants contended that Section 167 of the

Bombay District Municipal Act, 1901, read with Section 3(20) of the Bombay General Clauses Act, 1904, gave absolute immunity to the defendants in respect of acts done under the Bombay District Municipal Act, even if they were done negligently. He contended that all suits for damages for loss caused by negligence of the defendants were barred, provided that such acts were done in the discharge of duties enjoined or authorised by the said Act. Section 3(20) of the Bombay General Clauses Act, 1904, is a verbatim reproduction of Section 3(22) of the Indian General Clauses Act, 10 of 1897 and reads as under:

"A thing shall be deemed to be done in "good faith" where it is in fact done honestly, whether it is done negligently or not".

5. The argument of Mr. Rege was that S. 167 of the Bombay District Municipal Act, barred all suits in respect of acts done in "good faith" in discharge of duties enjoined or authorised by the said Act. The expression "done in good faith" has been defined in the Bombay General Clauses Act to mean "done honestly whether done negligently or not". He therefore argued that all suits for recovery of damages for loss caused by the defendants' negligence were barred, and negligence of a District Municipality could never be actionable.

6. We pointed out to Mr. Rege the provisions of S. 167A(1) of the Bombay District Municipal Act which provided that no suit would lie against a municipality in respect of an alleged neglect or default in the execution of the Act, unless the suit was brought after the expiry of the period of statutory notice and within six months of the accrual of the cause of action. We suggested that this contemplated suits against a municipality in respect of acts of negligence, and did not appear to create an absolute bar against such suits. We pointed out that the interpretation suggested by Mr. Rege would be contrary to and do violence to the provisions of S. 167A(1), and would render the words "or in respect of any alleged neglect or default in the execution of this Act" superfluous and meaningless. Therefore, Sections 167 and 167A must be read together and reconciled and the correct interpretation must not discard or render meaningless any part of either section, but must give meaning to and be consistent with both the sections if such an interpretation is possible.

7. In our view, these two provisions read together give no absolute immunity to the defendants in respect of acts done negligently. The emphasis is on "good faith" i.e. honestly, and not on negligence. If municipality acts in discharge of statutory duties, whether enjoined or authorised (permitted), as long as it acts honestly, no action would lie against it even if it acted negligently. But if it did not act honestly, the negligence would be actionable. The plaintiff must in such action establish want of "good faith" or honesty in addition to the negligence. This interpretation gives meaning to all the parts of Ss.167 and 167A and is consistent with all the parts. This appears to us to be the correct interpretation.

8. In order to act in good faith, a person must act honestly. A person cannot be said to act honestly unless he acts with fairness and uprightness. A person who

acts in a particular manner in the discharge of his duties in spite of the knowledge and consciousness that injury to someone or group of persons is likely to result from his act or omission or acts with wanton or wilful negligence in spite of such knowledge or consciousness cannot be said to act with fairness or up-rightness and, therefore, he cannot be said to act with honesty or in good faith. Whether in a particular case a person acted with honesty or not will depend on the facts of each case. If, for example, with a view to construct a road a municipality wishes to blast a rock with dynamite near a town and acts against expert opinion that the town is within the range of harm, and the rock should be removed by quarrying it cannot be said to act honestly if it proceeds to blast the rock. It can also not be said to act honestly if it proceeds to blast the rock without taking expert advice. If it refuses to see light and hides its face from the light it would be acting with wanton and wilful negligence and its negligence coupled with want of honesty and good faith would be actionable. In the matter before us it is common ground that in laying the slab complained of the defendants were carrying out a duty authorised by Section 54(1)(i) of the Act. But if they carried out the said duty with the knowledge of demolition of Varala Dam up to a height of six feet and with such knowledge narrowed the nullah or allowed the centring to remain and to obstruct the passage of bushes and debris, they would not be said to act honestly. In such case, they knew and ought to have known that the constructed water passage would not be sufficient to carry the water coming from the additional catchment area and the centring would obstruct the passage of bushes and debris brought by the increased velocity of water.

9. The definition of "good faith" in the Indian General Clauses Act, X of 1897, Section 3 (22), would naturally not apply to Acts prior to the passing of the said Act, such as the Indian Contract Act or Transfer of Property Act. To these provisions, the definition of "good faith" as understood generally in civil law would apply, viz., that nothing is said to be done in "good faith" which is done without due care and attention; that is the care and attention expected of a man of ordinary prudence. Nor would the definitions of "good faith" in the Indian Penal Code or the Limitation Act, apply because those definitions are differently worded. In several States in India, the expression "good faith" is differently defined by the local General Clauses Acts in their application to the State Legislation and the interpretations put on the local definitions would only be a guide if the expression is similarly defined. Sections 167 and 167A were substituted for the original S. 167 by the Bombay Act 52 of 1949 and any interpretation of the previous provisions by our own High Court would have no direct application though it may be of some help. Mr. Rege has drawn our attention to the Statement of Objects and Reasons in introducing the amending bill which became Act 52 of 1949. This statement is published in the Bombay Government Gazette, dated 20th August 1949. Part V, page 287, and clause 33 of the Statement pertains to Ss. 167 and 167A. This statement can, however, not be used for arriving at the correct interpretation. After we have arrived at our

own interpretations of these sections, clause 33 of the Statement has not helped us to change our mind, because we have to interpret the sections as we find them, and not by the Statement of Objects which reads as under:

"Clause 33- It is considered desirable to give the municipalities and their officers and servant protection from suits in respect of the acts done or intended to be done by them in good faith in exercise of the powers conferred on them by the Municipal Acts or in respect of any alleged neglect or default in the execution of these Acts. The Bombay District Municipal Act, 1901, is being amended suitably for the purpose".

10. Mr. Rege has invited our attention to the observations of Chagla C. J. in the case of Govind Sadashiv Pathak Vs. Sadashiv Shivrao Nisal, where the expression "good faith" in Section 14(2) of the Indian Limitation Act, 1908, came up for interpretation. These observations are:

"Therefore, while the Bombay General Clauses Act emphasises "honesty" and ignores the factor of negligence, the Limitation Act emphasises not "honesty". but the fact that due care and attention has been given to the prosecution of the earlier application".

11. We have already stated that in Section 3(20) of the Bombay General Clauses Act, the emphasis is on acting honestly and if a municipality acts honestly, mere negligence would not be actionable.

12. Mr. Rege has cited before us the case of Emperor v. R. K. Naik 41 Bom LR 1227=AIR 1940 Bom 35 which interprets a section of the District Local Boards Act restricting the right to sue a local board. This section is differently worded and is not of any help. Mr. Rege has also cited the case of Kedarnath Vs. State, which interprets "good faith" in the Indian Penal Code, where also the definition is differently worded and is in context of criminal law. Mr. Rege also cited the case of Babulal Agarwalla Vs. Province of Orissa and Others, wherein in interpreting section 3(22) of the General Clauses Act in relation to the Defence of India Act, 1939. Section 17(1), it is observed at page 231 that:

"Hence if from the proved facts of this litigation it can be inferred that the public officials acted honestly even though they might have acted negligently it must be held that they acted in good faith within the meaning of Section 17(1) of the Defence of India Act".

13. A more instructive case cited by Mr. Rege is the case of Harbhajan Singh Vs. The State of Punjab and Another, wherein Mr. Justice Tek Chand after comparing the definitions of "good faith" in Section 52 of the Indian Penal Code and Section 3(22) of the Indian General Clauses Act, observes at pages 222-223 as follows:

The definition of "good faith" in the Penal Code is negative one. The term "good faith" is not attempted to be defined there but all that is stated is that if an act is not done with due care and attention, it would not be said to be done in "good faith". This definition comes into conflict with the definition in the General

Clauses Act to this extent only that if a thing has been done negligently, though honestly, it would not be deemed to have been done in "good faith". The definition of the term in the General Clauses Act lays stress on one aspect only, but, that in the Penal Code places emphasis on two aspects, namely, the honesty of intention along with due care and attention.

Thus Section 52 excludes the element of negligence from the purview of "good faith". Both the definitions retain the real essence of "good faith", which is that a thing is done "honestly". This is a feature common to both definitions without which the term "good faith" will lose its real meaning. "Good faith" therefore implies, not only an upright mental attitude, and clear conscience of a person, but also the doing of an act, showing that ordinary prudence has been exercised according to the standards of a reasonable person "Good faith" contemplates an honest effort to ascertain the facts upon which exercise of the power must rest. It must, therefore, be summed up as "an honest determination from ascertained facts". "Good faith" precludes pretence or deceit and also negligence and recklessness. A lack of diligence, which an honest man of ordinary prudence is accustomed to exercise, is, in law, a want of good faith. Once this is shown, good faith does not require a sound judgment".

14. With these observations we are in respectful agreement. The definition of the term in the General Clauses act lays stress on the one aspect of honesty only irrespective of negligence, but that in the. Indian Penal Code lays stress on two aspects, viz., honesty of intention along with due care and attention. Both the definitions retain the real essence of good faith, which is honesty. This is a feature common to both the definitions. Good faith implies upright mental attitude and clear conscience. It contemplates an honest effort to ascertain the facts upon which the exercise of the power must rest. It is an honest determination from ascertained facts. Good faith precludes pretence, deceit or lack of fairness and uprightness and also precludes wanton or wilful negligence. We must therefore see by application of these principles whether the defendants acted honestly.

15. Mr. Khambatta on behalf of the plaintiffs contended that Section 167 must be strictly construed as it takes away a citizen's right to redress against a Municipality in respect of injury done by negligence. This question would arise only if we were faced with a choice of interpretations. The interpretation we have put appears to us to be the only possible interpretation. He has next contended that the definition in Section 3(20) of the Bombay General Clauses Act would not apply to Section 167 of the Bombay District Municipal Act, because the words in Section 167A "or in respect of any alleged neglect or default in the execution of this Act" indicate that neglect and default are made actionable by Section 167A and this clearly indicates "something repugnant in the subject or context" - words occurring in the preamble part of Section 3 of the General Clauses Act - so as to exclude the application of Section 3(20) to Section 167 of the Bombay District Municipal Act. We have, however, stated above that we have put an

interpretation that reconciles this so-called repugnance. There is nothing repugnant in Section 167 of the Bombay District Municipal Act to the definition of "good faith" in Section 3(20) of the Bombay General Clauses Act, and the said definition applies to Section 167.

16. Mr. Khambatta attempted an extreme definition of Section 167 in submitting that Section 167 is restricted only to such cases as do not arise out of or in respect of any alleged neglect or default in execution of the Act. He contended that for this type of suit, there is no immunity in Section 167 and the only protection or safeguard given to the defendants is u/s 167A, viz., the statutory notice and special period of limitation. We are unable to accept this submission and are of the opinion that only honest acts are protected even if they be negligent. Acts of negligence coupled with dishonesty would however, not be protected. Mr. Khambatta also referred us to the provisions of English Common Law making a distinction between acts enjoined and acts permitted by statute and that permissive acts must be performed in conformity with private rights and such statutory powers must be exercised in a manner that is not harmful to the public. All these are very healthy principles, but we are here concerned with the interpretation of statutory provisions which must be interpreted not in light of principles of English Common Law, but in light of the express words used in the statute and it may well be the intention of the Legislature to make a departure from these principles.

17. We must now proceed to consider whether the defendants acted honestly in exercise of their statutory powers and so in good faith so as to be entitled to the immunity provided in Section 167 of the Bombay District Municipal Act, 1901.

18. Mr. Mohanlal Parsharam Karwa the President of the Bhivandi Municipality from 1961 has given evidence in the lower Court on behalf of the defendants. He stated in his examination-in-chief that the Varala Dam was not within Bhivandi Municipal limits and that the staff working at the dam is paid and controlled by the Health Department of the Government of Maharashtra and that the contract for the re-construction was also given by that department. He has, however, admitted that the expenses incurred for the re-construction are borne by the Municipality, He has also admitted that even before the contract for construction was given by the Government, the estimate of cost was submitted to the Municipality as the Municipality had to pay the amount although it had no control over the reconstruction work. He also admitted that before the monsoon of 1963, about 15 feet in length of the dam above 6 feet from the ground level had in fact been demolished although he stated that no information about the actual demolition work had been received by the defendants. In his cross-examination, he denied that Varala Dam vested in the Municipality, although at the time of the inauguration of the dam a sign plate had been put on the dam reading, "Bhivandi-Nazampur Nagarpalika Varala Talao". He also stated that the Municipality had paid Rs. 4,50,000 to the State Govt. for the re-construction of the dam. He admitted that water of the Varala dam was the source of the water supply of the

town of Bhivandi, except that in April-May in each year this source is dried up and water has to be taken from the Bombay Municipal Corporation. He admitted that the road from Bhivandi to Varala dam had been constructed by the defendants and that the defendants paid the electric bill for lighting the road. He, however, did not remember who paid the electricity charges in respect of the pump at the dam for lifting water. He did not know whether staff quarters on the dam belonged to the defendants or whether the defendants paid electricity charges for those quarters. He stated that the dam was not owned by the Municipality. He stated that Manerikar the Chief Engineer to the Government of Maharashtra had not informed him that the dam would be demolished before the monsoon of 1963 and reconstructed before April 1964. He admitted that Manerikar had visited the defendants in 1962 and thereafter there had been correspondence between the defendants and Irrigation Department of the Government of Maharashtra. He, however, did not remember whether the defendants had written to the Government about the urgency of the demolition of the darn.

19. At this stage we must mention that during the pendency of the suit, on 5th April 1965 the plaintiffs' Advocate served on the defendants as well as their Advocate a notice to produce documents (Exhibit 74) asking them to produce in Court on 7th April 1965, inter alia, correspondence with the Government of Maharashtra regarding the demolition and reconstruction of Varala dam. The defendants replied on 28th April 1965 (Exhibit 77) stating that the demand was vague and that the defendants would consider the matter if specific letters with sufficient description with dates were asked for. It is pertinent to note that the subject-matter of the correspondence was clearly stated in the plaintiffs' notice as well as the parties to the correspondence. Dates of letters could only be known to the defendants. The reply obviously was evasive. The defendants did not produce correspondence in Court in spite of the notice.

20. In cross-examination Karwa the defendants' President was put several questions about the correspondence and about its contents, but still the defendants chose not to produce the correspondence. He stated that the defendants had been pressing the Government of Maharashtra to reconstruct the dam soon. He admitted that the defendants had been asking for re-construction due to leakage in the dam. When pressed to answer why the correspondence was not being produced, he replied "I cannot state why the correspondence that took place between us and the Irrigation Department was not produced by us". Needless to say that the correspondence was not produced in the lower Court and has not been produced at all. We would, therefore, be justified in drawing an adverse inference against the defendants that they were aware that the Varala dam had been demolished in April 1963 from its height over 6 feet from the ground level and that had the correspondence been produced, it would have established the negligence of the defendants. It has been observed by the Supreme Court in the case of State of Punjab Vs. Modern Cultivators, Ladwa, as under:

"The sole ground upon which the liability of the State could be established in this case would be negligence of the State in properly maintaining the banks of the canal. For this purpose it would be relevant to consider whether there were periodical inspections, whether any breaches or the development of cracks were noticed along the banks of the canal and in particular at the place where the breach ultimately occurred or whether any erosion of the banks particularly at the place where one of the banks had been plugged had been noticed and no action or timely action had been taken thereon. There is evidence to show that the canals were being regularly inspected. That, however, is not the end of the matter. Immediately after the breach occurred some reports were made and as pointed out by my brethren in their judgments they were not placed before the Court despite its order requiring their production. When the matter went up before the High Court, it was said that the records had been destroyed in the year 1958 or so and therefore they could not be furnished. This action on the part of the State is manifestly unreasonable and the legitimate inference that could be drawn from it is that if the documents had been produced they would have gone against the State and would establish its negligence. In these circumstances, I would hold that though the plaintiffs have been enabled to adduce positive evidence of negligence it could legitimately be presumed that the State was negligent inasmuch as it had deliberately suppressed evidence in its possession which could have established negligence. In the circumstances of this case I do not think it appropriate to refer to the rule of evidence *res ipsa loquitur*".

21. As regards the ownership of the Varala dam, the plaintiffs produced an extract from the Village Register showing that Varala lake was situated within the municipal limits of Bhivandi. This was produced with an application dated 19th August 1965 after the arguments were over. Its production was objected to by the defendants. By an order dated 2nd September 1965, the day on which the judgment was delivered the lower Court admitted the extract in evidence. The lower Court has observed that this being an extract from a public document, its genuineness could not be doubted and "in the interest of justice" its production was allowed. We, however, think that this was admitted at too late a stage and the defendants had no opportunity to cross-examine or examine any witness on the extract. We have, therefore, not relied on this piece of evidence.

22. After the floods of 5th July 1963 on the very day, Karwa, the President of the defendants, sent a telegram to the Government (Exhibit 228) stating that due to breakage of Varala Talao water had rushed in the town, followed by the letter of 6th July 1963 (Exhibit 231), stating that before commencing the work of dismantling the old dam, no precautionary steps for the flow of water had been taken by the contractor and the result was that the capacity of the nullah was not sufficient to meet with the flow of water coming from the Talao and it would appear that the position would continue to remain the same till the monsoon was over.

23. But even apart from this extract, taking into consideration that (a) the Varala dam was the principal source of water supply of Bhivandi, (b) due to the leakage in the dam the defendants themselves had asked the Government for its re-construction, (c) pursuant to the request of the defendants, Manerikar, the Government Chief Engineer, had visited the defendants in this connection in 1962, (d) there had been correspondence regarding demolition and re-construction between the defendants and the Government thereafter, (e) even before the contract was given before the demolition an estimate of cost was submitted to the defendants, (f) the defendants paid Rs. 4,50,000 as cost of demolition and re-construction, (g) immediately after the floods on 5th and 6th July 1963, the defendants showed knowledge of the dam having been demolished (Exhibits 228 and 331), (h) Varala dam bore the sign-plate of the defendants, (i) the road to Varala dam had been built by and lit at the cost of the defendants. (j) the defendants had to make arrangement with the Bombay Municipal Corporation for water supply from the time of the demolition of the dam in April 1963 to April 1964 and they could not have done so unless they had known about demolition, (k) that the defendants who are a public body have suppressed the correspondence between them and the Government on the subject of demolition and re-construction leading to the presumption that they knew about the demolition of the dam in April 1963; and taking into consideration the cumulative effect of all these and all other circumstances, we hold that the defendants had knowledge in April 1963 of the demolition of the Varala dam above a height of 6 feet above ground level.

24. In support of his contention that the defendants had no knowledge of the demolition of the dam before the laying of this slab complained about, Mr. Rege took us through the resolution of the defendant Municipality on 28th November 1960 for putting slab between Teen Batti bridge and Habsanali bridge on the south (the slab complained about) and between Teen Batti bridge and Lendi bridge on the north (sketch Exhibit 148). He also took us through notices to contractors dated 6th April 1961 (Exhibits 222 and 223). sanctioning of the work on 1st February 1962 (Exhibit 224), and the agreements with the contractors for the execution of the work on 17th March 1963 (Exhibits 235 and 236). About these facts there is no dispute. They only indicate that the work had been planned much earlier and there was no want of good faith in planning it. The time and manner of execution however stand on a different footing.

25. The real dispute is about the date of the laying of the slab between Teen Batti bridge and Habasanali bridge which caused the damage. Pherwani, a partner of the plaintiffs who gave evidence in the lower Court, stated that the defendants constructed a wall on either side on the nullah and put a slab over it, that the slab was completed in the middle of June 1963 and that till the time of the flood on 5th July 1963. the centring material was not removed from the nullah and that due to the putting of the slab, the width of the slab was narrowed from 40 feet to about 15 feet. This shows that while the Dam was demolished in April 1963, the slab was completed in the middle of June 1963. It may have been

commenced 15 to 20 days earlier, as It is the evidence of the defendants that it took about 25 days to complete this slab. It is also a matter of common knowledge that once RCC slabs are started, work goes on continuously and without a break to avoid gaps and cracks.

26. As against this, the defendants relied on a letter (Exhibit 226) alleged to have been addressed by the contractor Madbhavi to the defendants on 9th May 1963, stating that the slabs between Lendi bridge and Teen Batti bridge and between Teen Batti bridge and Habsanali bridge were complete and possession may be taken and payment made. This letter has been produced through the defendants' witness Madbhavi. He states that he delivered this letter personally to the President at his private shop on 9th May 1963. In cross-examination, he was unable to produce either his office copy of this letter or any acknowledgment for its delivery. He admits that he neither informed the architects of the completion nor obtained or even applied for their certificate of completion to entitle him to payment. He denied the suggestion that this letter was not written by him on 9th May 1963. The defendants President Karwa was cross-examined on this letter and had to admit that he had no knowledge about the completion of the work, that the letter was not initialled by him or by any other officer of the defendants and that it had not been entered in the inward register. In view of these facts. we have no hesitation in rejecting the letter (Exhibit 226) as unreliable. Kini, the defendants' architect, has in his evidence not referred to this letter or alleged that the work was completed by 9th May 1963.

27. We, therefore, hold that the slab complained of was commenced and completed after April 1963 by the defendants with the knowledge of the demolition of the Varala dam. And if we come to the conclusion - and as we have as will appear subsequently - that the defendants narrowed the water-way near Teen Batti bridge to an extent that it was insufficient for discharge of water from the increased catchment area due to the demolition and that the defendants with full knowledge of the consequences narrowed the water passage,. put a slab on it and did not remove the centring at Lendi bridge and allowed it to accumulate garbage and debris so as to obstruct the passage of water, we cannot say that the defendants did so with fairness or uprightness or without wilful or wanton negligence. Every man is presumed to intend and to know the natural and ordinary consequences of his acts. The defendants should be liable for the natural and necessary consequences of their acts, whether they in fact contemplated them or not. We, therefore, hold that the defendants in executing this work did not act honestly or in good faith and are not protected in respect of their negligence by Section 167 of the Bombay District Municipal Act and that the present suit was not barred by Section 167.

28. Coming to the Question whether the defendants are guilty of negligence or not, we must first observe that if things authorised to be done by a statute are carelessly or negligently done, an action is maintainable. Such a breach is known as statutory negligence. The word "negligence" in such cases means adopting a

method which in fact results in damage to a third person except in a case where there is no other way of performing the statutory duty. So that it is negligent to carry out work in a manner which results in damages unless it can be shown that that - and that only - was the way in which the duty could be performed. Powers given by a statute must be exercised reasonably, and not to the prejudice of the public.

29. The negligence alleged by the plaintiffs is set out in paragraphs 4 to 8 of the plaint and consists of:

(a) In May 1963 the Varala dam was demolished by the Government of Maharashtra. In consequence of the demolition the rain water falling in the catchment area of the lake was bound to pass through the nullah in front of the plaintiffs' shop. The defendants and its officers prepared plans for narrowing the said nullah without making any provision for the passage of additional rain water from the Varala lake catchment area.

(b) That the defendants and its officers prepared plans for narrowing the said nullah without making any provision for the passage of rain water which normally used to pass through the said nullah during the monsoon season.

(c) The centring work for construction and support to the cement slab put across the nullah continued to remain in its position till the 1st week of July 1963 obstructing the free passage of water in sufficient quantity.

(d) The centring work held up shrubs and debris which the defendants did not clear and the said obstruction obstructed the flow of water.

(e) The cement slab put by the defendants across the nullah itself interfered with the natural state of the nullah and was carried out without making any provision for the passage of normal rain water.

30. The nullah runs from south to north and the water carried by it flows in the creek at northern end of the nullah. There are five bridges over the nullah, viz., Jaitunipura, Habsanali, Teen Batti, Lendi and Panirapole. The portion of nullah which lies between Habsanali bridge and Lendi bridge was covered with a concrete slab in, 1963. It is an admitted fact that due to heavy rain on the night between 4th and 5th July 1963 water accumulated at the southern end of Habsanali bridge and entered the surrounding area. Pherwani has deposed that there was 2 feet deep water within the factory of the plaintiffs on the morning of 5th July and this state of affairs continued for three days. Pawankumar an employee of the plaintiffs and Sikander Faki a Panch of the Panchnama made on 6th July 1963 have deposed that water in the plaintiffs' premises was 2 feet deep. Pherwani has stated that on Yacoob Road the water was knee-deep, Jaywantrai has stated that the depth of water over the slab was 5"-6". Pawankumar has stated that water level over the slab was 4". It is stated by these witnesses that the level of Yacoob Road was about 2 feet lower than the slab and that the plinth of the plaintiffs' premises was 2 1/4 feet above the level

of Yacoob Road. None of the witnesses took actual measurement of the water level. The defendants themselves put a suggestive question to Pawankumar in his cross-examination that water inside the factory premises was 6" deep. This suggestion itself shows that it was admitted by the defendants that there was considerable amount of water in the plaintiffs' premises. There is, therefore, no doubt that, whether the level of the water in the plaintiffs' premises was 6" or 2 feet or anywhere between 6" and 2 feet, water had entered the plaintiffs' premises. Pherwani has deposed that he took photographs of the flooded conditions of the premises. He has produced these photographs and has not been cross-examined on them. The photographs show that there is water inside the plaintiffs' premises. Karwa the President of the defendants did not state that water had not entered the plaintiffs' premises.

31. The plaintiffs commissioned one N. B. Malbari a well qualified and Senior Engineer to prepare a report on the flooding in their premises on 5th July 1963 and to give evidence. In his report dated 8th June 1965 (Exhibit I46) he states that he visited and inspected the plaintiffs' premises on 30th March 1965 and 10th April 1965. He stated that he took measurements of cross-section of the nullah at Habsanali bridge and it measured 40 feet x 4 feet and the water-way provided below Habsanali bridge was 2/13 feet-8 feet x 3 feet-8 feet. He took the level of the floor of the plaintiffs' premises and found that it was 6" on the top of the Habsanali bridge and 2"-6" above the old road level which could be seen from the building corner. He also inspected the drawings made by M/s. Shaikh & Co. and M/s. S. M. Kini & Co., Joint Architects of the defendants for the slab covering the nullah. He found that the water-way width at Habsanali bridge was 2"x11"-3" and it was reduced to only 15"-0" and the height was increased to 5"-0". He found that the increase in height to 5 feet was not effective and for discharging purposes only 3"-8" height was only effective at Teen Batti bridge. Malbari calculated the flood discharge by a number of formulae known to architects, including those in Bombay P. W. D. Handbook. He came to the conclusion that the existing open channel of water before Habsanali bridge, viz., 40"x4", was sufficient for discharge of 1445 cusecs. He found that the previous water-way at Teen Batti and Habsanali bridges was sufficient for discharge of 1425 cusecs, and that the new water-way of 100 sq. ft. provided at Habsanali bridge was sufficient for discharge of 1120 cusecs. He found that the ordinary catchment area of the nullah was 0.6 square miles and with the added catchment area provided by Varala lake which was 0.3 square miles, it made a total of 0.9 square miles. He found that the new water-way provided near Teen Batti bridge was insufficient for discharge even from a catchment area of 0.6 square miles. As per P. W. D. Handbook the water-way required was 104 square feet for catchment area of 0.6 square miles, and the waterway provided near Habsanali bridge and Teen Batti bridge was less than 104 square feet and that the water-way was further reduced by Lendi bridge due to the centring being erected for casting R.C.C. slab, and that due to the centring not being removed, the plants and weeds got entangled with the props further reducing the water-

way. He further found that the earthen dam at Varala tank having been demolished, there was added discharge of water through the nullah and that the proposed water-way section ought to have been increased for this added discharge, if the nullah had to be slabbed before the dam was re-constructed. He was also of opinion that due to faulty design and the choking up of water way, the water could not flow through and the water entered in the factory premises of the plaintiffs.

32. Malbari gave evidence in the lower Court in support of his report (Exhibit 146) and stated that his estimate of discharge of 0.6 square miles of catchment area was 1100 cubic feet per second (cusec) and for a catchment area of 0.9 square miles it was 150 subsection He stated that in his report he had assumed the rain fall at 3" per hour which was according to the P. W. D. Handbook. In cross-examination, he admitted that if the rainfall did not exceed 1 1/2" per hour, the present water-way would have been sufficient to drain the water. We might here observe that Malbari has not been cross-examined on his conclusions and his evidence appears to have gone unchallenged. Apart from this, we find his evidence to be thorough as well as reliable.

33. Earlier in point of time and made at the instance of the defendants is the report dated 9th, July 1963 of V. B. Manerikar, Chief Engineer to the Government of Maharashtra. He states in the report that the heavy rainfall before 5th July 1963 caused afflux on the upstream side of the nullah whereby water entered the adjacent factory weaving areas and caused damage to yarn and electrical equipment. On removal of the debris the water was said to have subsided. However, another heavy shower of rain on 7th July brought another flood which also caused afflux to the same extent, although this time drain was free from debris. He stated that the flood was not abnormal and was estimated at 1000 cusecs and was such as could reasonably be expected to occur. He stated that there was construction of natural water-way at the bridges. He stated that the catchment area of the nullah was 580 acres of which 190 acres had been intercepted by the old Varala water supply earthen dam which was dismantled before the monsoon as a preliminary to re-construction scheduled to be completed by April 1964. From the total catchment area, a maximum flood of about 1800 cusecs could be expected and that after re-construction of the Varala dam, a maximum could be assumed to be about 1200 cusecs. According to him, with the present constructed water-way in the slab drain, an afflux of about 4 feet should be expected with a flood of 1200 cusecs. This was not desirable as it would affect the adjacent localities and if the water-way in the drain was increased from 75 square feet to 120 square feet the afflux could be brought well within one foot or so which would be permissible. He stated that it was essential to keep the drain openings clear of obstruction throughout the monsoon. In his opinion, the natural water-way of the nullah had been unduly constructed and it was desirable to increase it as early as possible by providing additional openings on either side. Manerikar gave evidence in the lower Court on behalf of the plaintiffs. He states that it had been found desirable to get the dam re-

constructed and the work of re-construction had been undertaken by the Irrigation and Power Department on behalf of the Municipality. He stated that the Municipality was to pay the construction expenses. He stated that it was not possible to demolish the old dam and to re-construct a new one between two monsoons, and that the work would not take less than one year and the demolition work commenced in April 1963. He stated that the catchment area up to the drain area was 0.9 square miles and that out of this 0.3 square miles was intercepted by Varala dam and that in his opinion water-way should have been 120 square feet instead of the existing 75 square feet. He stated that the contract for reconstruction of the dam was given with the concurrence of the Municipality and that the Municipality was aware of the demolition work

34. As a result of a trunk-call from the defendants, M. N. Shevade, Sub-Divisional Officer to the Government of Maharashtra, visited the site on 5th July 1963, the day of the flood. He has not been examined by any party, but his report appears to have been admitted in evidence without any objection from any-body. In his report (Exhibit 241), he states that as a result of a trunk-call from the President of Bhivandi Municipality on 5th July 1963, he visited the site and inspected the flood caused by the heavy rains and due to demolishing of the Varala lake. He stated that due to demolishing of the Varala lake all water from the catchment area of the lake rushed towards the town as there was no other outlet. He found that the nullah through which the water rushed was not cleaned and drained and thereby all the debris and fallen trees and bushes etc., were carried away by the water and were deposited at the mouth of the newly constructed slab drain thereby causing afflux on the upstream side. He found that the flood subsided after the removal of the choking of the drain. He was of the opinion that the water-way was insufficient for the existing catchment area and that after construction of the dam, there may not be any trouble of flooding due to Varala lake.

35. S. M. Kini is one of the architects who designed and supervised the construction of the slab complained of. He is the architect of the defendants. He was summoned by the defendants on telephone and visited Bhivandi on several days in July 1963. He made two reports (Exhibits 232 and 233). It must be noted that if we come to the conclusion that the work carried out by the defendants was defective or the manner or timing was negligent, Kini would not escape a part of the blame. His report is more of an apology and shows anxiety to defend himself. Apart from this, before these reports, the defendants had been served with a legal notice of the claim of the plaintiffs in this suit. He agrees that on account of the demolition of the dam portion, the entire flood discharge rushed into the city and that water level was 6" over the R. C. C. slab. He found that abnormal rain along with choking up of upstream side of Habsanali bridge and all water plants and weeds, which also rushed with flood from the catchment area, had caused obstruction to the passage of water. He states that Municipality had removed 15 lorries of these plants from the nullah and that there were about 15 to 20 lorries still to be removed. In his opinion, the passage of water was

sufficient for a catchment area of 0.6 square miles. He gave evidence in Court and stated that 75 square feet passage was sufficient for Bhivandi catchment. He admitted that he had not taken into consideration the rain of 3" per hour. In his examination-in-chief, he said that this was not laid down in any book anywhere, but in cross-examination he admitted that he considered the P. W. D. Handbook to be an authority and had relied upon the observations made in the book on pages 709 to 722. He admitted that the water-way provided between Habsanali and Teen Batti bridges was not enough if the rain was 3" per hour.

36. We might here observe that the P. W. D. Handbook, Vol. II, page 717, gives formula for designing drainage works over mullahs with catchments up to one square mile. At page 818, it states that provision should be made for rainfall at 3" per hour for catchment areas up to one square mile. This passage has been followed by Malbari in his report. This book is accepted by Kini as authority in his evidence, but admittedly not followed by him.

37. Pherwani, in his deposition, has stated that about 80 lorry-loads of debris were removed. The defendants suggested to him in cross-examination that about 20 lorry-loads had been removed. Karwa in his evidence has stated that about 30 to 35 truck-load of debris had been removed and that the work was going on for two days.

38. K. H. Thanawalla from the office of Mamlatdar has given evidence about the figures of rain fall maintained in his office and states that on 5th July 1963 there was a rainfall of about 4" and on 6th about 6" and on 7th about 2 inches. Karwa has admitted that the defendants had not maintained any record of rain fall.

39. On the above evidence, we are of the opinion and we so hold that the narrowing of the water-way and putting a slab on it at Habsanali bridge was ill-timed. This work should have been commenced after the Varala dam was re-constructed. If for any reason, the defendants wanted to proceed with this work before the re-construction of the dam, sufficient water-way should have been provided for passage of water from a catchment area of 0.9 square miles providing for a rainfall of 3" per hour. In addition, the centring work should have been removed before the monsoon and, in any case, no trees, bushes, debris or garbage should have been allowed to be collected at the centring or the slab so as to obstruct the free passage of water. We are of the view that although the retention of the centring and the negligence in not clearing the passage of debris was the principal cause of the flood on 5th July 1963, the construction of the passage way, the stabbing of it and the demolition of Varala dam were all contributory to it.

40. Turning to the defence of the defendants on the question of negligence, their first contention is that the dam is demolished by the Government and the defendants were not liable for acts of third parties. Although in their written statement the defendants had pleaded that the damage was due to an act of God, since evidence had been led, we did not desire to hold the defendants to

technicalities and permitted them to argue that the damage was caused by an act of the Government of Maharashtra. We, however, find on evidence that the Varala dam was demolished and was being reconstructed at the request and with the knowledge and consent of the defendants. Mr. Rege next contended that the defendants were entitled to assume that the Government took necessary precautions to prevent the flood. We cannot accept this contention, because the defendants cannot shut their eyes to surrounding circumstances and to commence or continue their work by shutting their eyes to light. Mr. Rege next contended that official acts should be presumed to be done properly. Now, this presumption provided for in illustration (e) to Section 114 of the Evidence Act is only a presumption as to procedure that the necessary procedure in doing all official acts has been followed. There is no presumption that in carrying out public works the Government takes necessary precautions to see that no injury is caused by negligence to the public. The constricted passage way constructed by the defendants was not sufficient even for passage of normal rain water and in addition, they allowed centring to remain and garbage to collect. They cannot absolve themselves of their negligence by throwing the blame on the Government.

41. Coming to the quantum of damages, we find that on 5th July 1963, the plaintiffs through their Advocate served a notice on the defendants and several of their officers, including Karwa their President (Exhibit 79) stating that water had entered their factory premises on Yacoob Road on account of the flood and damaged their goods and that as the damage caused was considerable and the plaintiffs were holding the defendants responsible for the cause of the damage and intended to recover damages from them, they desired to make a Panchnama assessing the damage done. They stated that they intended to call experienced persons to assess the damage and to make a Panchnama and as the defendants were vitally concerned with the assessment of damage, they were requested to remain present at the plaintiffs' premises on Saturday 6-7-1963 at 1-00 P. M or to depute someone to represent them, The plaintiffs also offered that in case the time given in the notice did not suit the defendants, they could suggest any other time and the plaintiffs would accommodate them, although it was not desirable to postpone the making of a Panchnama beyond Saturday the 6th July 1963. They also made an offer that this Panchnama should be prepared without prejudice to the defendants' contention of denial of liability. The defendants replied by their letter of 6th July 1963 (Exhibit 68) cryptically stating that they were too busy to attend. We might here observe that if they were too busy to attend, they could have (a) asked for a postponement of the making of the Panchnama to a time suitable to them, (b) they could have deputed an officer of the Municipality, (c) they could have requested that the premises be sealed and surveyed at a later time, and (d) they could have asked for a survey of the damage by a competent surveyor. The defendants did none of these things.

42. The plaintiffs made a Panchnama (Exhibit 89) dated 6th July 1963 in the Presence of 5 Panchas, one of whom Sikandar Faki has given evidence in support

of it. The Panchnama describes the level of water, the goods lying in the premises, the nature of damage to them and the amount at which the damage was assessed. Some of the Panchas were themselves in similar business and were competent to assess and value the loss.

43. In that suit, the plaintiffs claimed a sum of Rs. 1,00,012 as damages for loss suffered by them:

(1) 20 cases of Art Silk Yarn weighing 4,000 lbs, and worth Rs. 27,875, damage 70 per cent.= loss Rs. 19,512.

(2) Yarn on loose cones weighing 12,000 lbs. = value Rs. 80,000 damage 70 percent = Loss Rs. 56,000.

(3) 23 beams of yarn weighing 190 lbs. value Rs. 12,500, damage 100 per cent = loss Rs. 12,000.

(4) Electric Motors damages, cost of rewinding Rs. 1,000.

(5) Damage to electric wiring Rs. 3,000.

(6) Damage to chemicals Rs. 2,000.

(7) Damage to beam papers = Rs. 2,000.

(8) Total loss of business from 5th July to 9th July and partial loss of business for 15 days thereafter = Rs. 4,000.

Total Rs. 1,00,012.

After examining the evidence, the lower Court allowed the plaintiffs a sum of Rs. 49,560 for item No. 2, a sum of Rs. 2,000 for item No.6, a sum of Rupees 2,000 for item No.7, and a sum of Rupees 1,000 for item No. 8, aggregating in all to Rs. 54,560. The lower Court disallowed the remaining part of the claim. Mr. Khambatta on behalf of the plaintiffs made an attempt to argue that the remaining part of the claim had been wrongly disallowed. Ultimately, however, he confined the claim in the appeal to the sum of Rs. 54,560 allowed by the lower Court.

44. Sikandar M. Faki, one of the Panchas, who is in a similar business, gave evidence in support of the statements contained in the Panchanama. Pherwani, a partner of the plaintiffs has given evidence to prove the extent of damage and the value thereof. He has produced account books in support of the items. Three extracts prepared from the account books were produced. Exhibit 73 is an extract from the account books regarding goods of third parties lying in the plaintiffs' premises for processing and damaged by the flood. Exhibit 76 is an extract from account books in respect of chemicals damaged and their value Exhibit 247 is an extract from account books in respect of yarn damaged. Pherwani has not been cross-examined materially on the evidence pertaining to loss and damage or in respect of account books or in respect of the assessment of damage and its value in respect of the yarn, the plaintiffs assessed the

damage at 70 per cent. of the value. Pawankumar has deposed that the cone yarn was completely damaged. Pherwani deposed that all the yarn was damaged, weighing in all about 6,608 lbs. On evidence, the lower Court came to the conclusion that 6,608 pounds of yarn were damaged due to flood waters and on the statement of Sikandar Faki, and on the price varying from Rs. 6.25 to Rs. 9 per pound, the learned Judge found an average price of Rs. 7.50 per pound and valued the yarn at Rs. 49,560. With regard to the damage to the chemicals and beam paper, relying upon the evidence of Pherwani, the learned Judge allowed a sum of Rs. 2,000 in respect of each of these items. With regard to loss of business although the plaintiffs had claimed Rs. 4,000, by the rule of thumb the learned Judge allowed a sum of Rs. 1,000. There may be a degree of arbitrariness in his assessing this part of the claim. But we are of the view that the amount allowed is not at all excessive. We have, therefore, no hesitation in coming to the conclusion that the lower Court has rightly allowed a sum of Rs. 54,560 to the plaintiffs.

45. In a claim of damages, it is always the duty of the person who has suffered the loss to mitigate the loss. We therefore, particularly questioned Mr. Khambatta appearing on behalf of the plaintiffs as to what measures the plaintiffs adopted to mitigate the loss. He drew our attention to the evidence of Pawankumar an employee of the plaintiffs who was sleeping in the premises on the night of 4th July 1963. He stated that at about 4-00 a. m the watchman woke him up and on getting up, he saw water entering into the factory premises through the main gate, and that at that time the water was about 2 feet deep inside the factory. He stated that after half an hour, the electric lights were off. He therefore left for Bombay by 5-45 a. m. State Transport Bus saw Pherwani, a partner of the plaintiffs, and told him about the loss. They returned together to Bhivandi at about 9-30 a. m. and by that time loss had already been caused.

46. According to a certificate given by Karwa, the Municipal President, to the witness Sheshmal who has given evidence in the lower Court, on account of excessive rains on 4th and 5th July 1 1/2 feet or 2 feet water had accumulated in the surrounding area at Bhivandi. We have examined the photographs taken by the plaintiffs. Photographs Nos.: 9 and 14 clearly show water in the premises of the plaintiffs, but the level of water cannot be ascertained. It may have been anywhere between 6" to 2 feet. We have, however, no doubt about the extent of the loss caused to the plaintiffs according to the evidence given in the lower Court, Pherwani has hardly been cross-examined on the photographs also.

47. The defendants contended that they had engaged qualified engineers and experienced contractors and, therefore, they could not be guilty of negligence. With regard to the contractors however much experienced, they would merely carry out the work according to the plans prepared by the Municipality. If the engineers are negligent, the defendants would be liable. The liability of principal for the wrongful act of his agent rests on the grounds that the principal is a person who has selected the agent and that the principal having delegated the

performance of a certain class of acts to the agents, the principal should bear the risk. All that is necessary is that the act should have been committed by the agent in the course of his employment, although the principal did not authorise, or justify, or participate in the act or even if he forbade it or disapproved of it. The liability of the principal for the wrongs of his agent is a joint and several liability with the agent. The injured party may sue either or both of them.

48. We hold that on 5th July 1963, flood water entered the premises of the plaintiffs. The execution of the work by constricting the nullah and by putting a slab on it, was carried out with wilful and wanton negligence without good faith causing damage to the plaintiffs' property. The said damage has been proved at Rs. 54,560. The suit is not barred by S. 167 of the Bombay District Municipal Act. In the result, we set aside the decree of the lower Court dismissing the plaintiffs' suit and pass a decree in favour of the plaintiffs against the defendants for Rs. 54,560 with interest thereon at 6 per cent per annum from the date of the decree of the trial Court till payment. The defendants will also pay the plaintiffs proportionate costs throughout. Defendants will bear their own costs in both the Courts.

49. Appeal allowed.