
(1999) 07 J&K CK 0011
In the Jammu And Kashmir High Court
Case No : C.W.P. No. 894 of 1996

Miss Afroza (Minor)	Vs	APPELLANT
State of J. and K. and Another		RESPONDENT

Date of Decision : 30-07-1999

Acts Referred:

Constitution of Jammu and Kashmir, 1956 — Section 104
Electricity (Supply) Act, 1948 — Section 40, 41, 82

Citation : (2001) ACJ 2081 : AIR 2000 J&K 103

Hon'ble Judges : N.A. Kakru, J

Bench : Single Bench

Advocate : S.U. Dar, for the Appellant; A.M. Magray, for the Respondent

Final Decision : Allowed

Judgement

N.A. Kakru, J.—The petitioner, a teenager and a student of 6th standard in Government High School Keegam, Pulwama having fallen

victim to a live electric wire of a transformer on 6-4-1995 while around her school, sustained burn injuries on her person. The ultimate fall out

being amputation of left arm. She has advanced a claim for compensation to the tune of Rs. 7/- lacs through this writ petition, filed by her on 15-

10-1996 through her next friend, who happens to be her father, the natural guardian.

2. The respondents were put on notice. Objections to the admissibility of the writ petition were filed, opposing it on the grounds that the

transformer was removed from the platform to the ground level by the villagers and the petitioner fell on the wire while playing. On these

objections, the respondents contended that Civil Court alone could adjudicate upon issues so raised. In the objections it was also contended that

the distribution and generation of electricity being a sovereign function, immunity is available to them. On these grounds the respondents had

challenged the very maintainability of the writ petition and in support of objections filed, the learned counsel for the respondents was heard but

objections did not help him and the petition came to be admitted to hearing vide order dated 23-5-1997. After admission of the writ petition,

notice was accepted by the learned counsel for the respondents. Sufficient time was granted to them for filing the counter, but they failed to, yet

another opportunity was granted vide order dated 6-9-1997, which reads;

Six weeks last and final opportunity is granted to the respondents to file the counter. Right to file the counter closed thereafter. The matter be

posted for hearing in the week commencing from 20-10-1997 on a hearing day as case No. 1 given regard to the nature of the case.

3. The last opportunity so granted was also not available of, thus the averments made in the writ petition have gone un-rebutted. However, learned

counsel for the respondents has during the course of his arguments sought permission to adopt the objections as counter and having regard to the

facts of the case, there appears no need for filing a rejoinder. Moreso, in my opinion such course is not going to prejudice the rights of the

petitioner. In this backdrop. I allow the prayer and proceed to take the stand of the respondents into consideration which they have pleaded in

their objections. It is manifest from the objections that they have not joined the issue in respect of date. place, time and the cause of occurrence but

the following questions do arise from the pleadings :

a) Whether the Immunity to the respondent State is available because distribution and generation of electricity is a sovereign function.

b) Whether villagers had shifted the transformer from platform to the ground level and the petitioner had fallen on a live electric wire while playing

therefore not liable to pay compensation.

c) Whether question (b) ousts the jurisdiction of the writ Court because it calls for evidence.

4. The very first objection taken by the respondents needs appreciation in the light of the fact that the citizens of the State are not living under a

monarchical rule but in a democratic set up and being a welfare State the Government has from time to time come out with statutory rules and

orders providing compensation to the dependants of those who are killed in the militancy related activities which sufficiently indicates that the State

is alive to the concept of welfare State as also to its obligation to protect the life, liberty and property of the citizens and failure to discharge the

constitutional obligation has the effect of rendering the State liable to compensate the victims. There cannot be any dispute on the Court that the

maintenance of electric supply is under the control of the respondents but they are equally bound to ensure that the life of the citizens is not in

jeopardy. While discharging the sovereign function, a duty is cast on the State to take the steps for the safety of the people and on their failure, they

cannot escape the obligation to compensate a victim on the ground of immunity claimed and while holding so I am strengthened and fortified by

Judgment of the Apex Court passed in Smt. Nilabati Behera alias Lalita Behera Vs. State of Orissa and others, . The Court was pleased to

consider the plea of immunity and held :

16. It follows that 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 in-

applicable, 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.

5. A similar view was taken by the Court in case Consumer Education and Research center and others Vs. Union of India and others, para 31.

Their lordships held :

..... .It is therefore settled law that in public law claim for compensation is a remedy available under Article 32 or 226 for the enforcement and

protection of fundamental and human rights. There is no question of defence being available for constitutional remedy. It is a practical and

inexpensive mode of redress available for the contravention made by the State, its servants, its instrumentalities, a company or a person in the

purported exercise of their powers and enforcement of the rights claimed either under the statutes or licence issued under the statute or for the

enforcement of any right or duty under the constitution or the law.

6. It is evident from the aforementioned judicial pronouncements that defence of sovereign immunity is inapplicable in a case where compensation

is claimed for an injury resulting from contravention of the fundamental rights of citizens. It is relevant to notice that in the case in hand, the

respondents have not contended that the transformer was maintained properly. It is also not pleaded by the respondents that they had taken

necessary and possible precautions to avoid a mishap, so much so, there is not even a whisper to indicate that steps were taken to safeguard the

lives of the Inhabitants of the village. Thus considering the objections of respondents in view of the facts of this case, the objections taken on the

ground of 'Sovereign immunity' fails. Question (a) is answered accordingly.

7. Coming to the question (b) it appears from the reply of the respondents that a strenuous effort has been made to make the Court to believe that

the transformer was lowered down to the ground level by the villagers. Presuming it to be correct, it no way helps the respondents in view of the

fact that the supply of electricity is maintained, controlled and supervised by them, coupled with the fact that they were conscious of the fact that by

keeping the transformer on the ground level, the human lives were endangered. It is not the case of the respondents that the villagers had resorted

to violence thus what prevented the respondents from restraining the villagers from doing an act, dangerous to the human lives that too, when

sufficient man power was available with them and even if villagers would have used force yet the respondents were required to mobilize the

statutory machinery and had they opted for timely action, the mishap could have been averted. The negligence of the respondents being obvious,

therefore, it is immaterial whether the transformer was placed on the ground level by the villagers or by the functionaries of the State.

8. The petitioner has specifically averred in para-6 of the writ petition that the accident occurred having come into contact with a loose live electric

wire of transformer placed on the ground level at the moment when she had come out of class room in response to the call of nature, whereas the

respondents in their objections have in reply to para No. 6 of the writ petition

stated that the petitioner was playing with other girls of the school when she lost the balance and came into contact with the loose live electric wire of the transformer. Thus the reply of the respondents makes it abundantly clear that the petitioner had come in contact with a loose live electric wire of the transformer but an attempt is made to attribute negligence to the petitioner. Assuming it to be so it cannot help them because the accident has occurred due to the negligence of the respondents who were duty bound to supervise and maintain the transformer. The respondents have failed to tender any plausible explanation as to the cause of the accident. It has to be borne in mind that in view of hazardous nature of the electricity, respondents were required to guard the transformer and keep it in such a manner so that people would not come in contact with the live electric wire. It is admitted fact that the transformer was placed near the school. It being so, the children were not expected to know the implication and gravity of coming in contact with a live wire. Thus it was imperative upon the respondents to provide ample protection to the people, in particular to the children. The transformer in the instant case was unfenced, unguarded and unattended and the petitioner is not expected to have appreciated the danger of an electric live wire, it throw to the passers-by. The petitioner, a teenager, is too young to appreciate the consequences, therefore, the attempt of respondents to attribute the negligence to the petitioner has to be frustrated and out rightly rejected.

9. Having admitted the occurrence, a duty is cast upon the respondents to show that despite such admission they are not liable to pay the compensation. It is not sufficient to say that the transformer was lowered down by the villagers and the petitioner had fallen on the live electric wire of the transformer while playing, but they are required to show the law which exonerates them from the liability. Learned counsel for the respondents was asked to refer to the law from which such defence flows to the respondents but nothing was pointed out and examining the question (b) in the light of the observation made by me in the preceding paras 7 & 8 of this judgment, I find the answer to the question in negative.

Consequently, the objections pressed into service do not help the respondents in escaping the liability. Question (b) is answered accordingly.

10. Coming to the third question which relates to the challenge thrown to the

maintainability of the writ petition on the ground that disputed

questions of fact are involved in the writ petition. In this behalf it is contended that the remedy by way of civil suit alone is available to the petitioner

and the questions which are said to be disputed are summarized as under :

i) The petitioner has averred in the writ petition that the respondents had lowered down the transformer to the ground level, whereas the

respondents contended that the villagers had done so;

ii) The petitioner has averred that she had gone out of the class room in response to a call of nature whereas the respondents have contended that

she had fallen on a live electric wire of the transformer while playing.

11. It needs to be noticed that I have proceeded in the matter on the assumption that the villagers had lowered down the transformer to the ground

level and the petitioner had fallen on the live electric wire of the transformer while playing yet I am of the opinion that the respondents are liable to

pay compensation. Therefore, the disputed questions projected by the respondents have paled into insignificance and do not call for evidence at

all, however, I would like to make a few observations.

12. There is no dispute on the count that the petitioner received burn injuries as a result of the accident. There is also no dispute on the score that

the transformer was installed adjacent to the school ground and the respondents knew it that the children were likely to trespass and as a matter of

fact they could not have ruled out that the children could even enter the platform, therefore, they were required to take precautionary measures so

as to prevent the transformer from becoming an Instrument of mishap. The respondents were also expected to be aware of the fact that the

children are less carefull than adults. Many dangers, which would be obvious to the adults, may be a mystery for the children. Obviously, the

respondents owed a duty to install the transformer at a place where no child was in a position to be exposed to danger, but they have failed in this

duty. Thus the objections of the respondents reflected in question (c) attributing omission and commission to the villagers and to the teenager

petitioner makes no difference. Moreso, the admitted position being that the petitioner had sustained burn injuries which were so grievous that her

arm had to be amputated therefore it cannot be contended that the petitioner should be relegated to the ordinary remedy of a civil suit. No doubt

such course could be proper if the claim for compensation was factually controvertial necessitating production of oral evidence but considering the objections in the light of the circumstances of the case coupled with the fact that the petitioners fundamental right has been violated, the objection is not sustainable and it is a fit case where Court should exercise the Jurisdiction under Article 226 of the Constitution of India to award compensation. Objections fail accordingly.

13. The objections of the respondents being bereft of any reason in law are not sustainable, leaving no option for the Court but to declare the petitioner entitled to the compensation and in respect of quantum learned counsel for the respondents has relied on the judgment of the Division

Bench in case Miss. Haneefa Bano Vs. State of J. and K. and Others, contending that the compensation should not exceed Rs. 1,68,000/- as

awarded by the Division Bench. Suffice to say that as far as principle of law laid down in the judgment is concerned, I am bound to toe the line but

in so far as quantum of compensation is concerned, it has been awarded on the basis of facts of the said case and every case has to be adjudged

on its own merits. Obviously quantum is to be assessed in this case on the facts and attending circumstances and the facts of the case relied at by

the respondents are not similar because the petitioner in that case was an illiterate girl and compensation has been awarded while assessing the loss

of her earning capacity, whereas, in the case in hand, the petitioner is a school going child and is continuing her studies. Moreover, the compensation

awarded on 8th of September, 1997 can't hold good in the month of July 1999 because escalation of price has touched the sky efflux of time and

for these reasons, contention of learned counsel for the respondents is not well founded, therefore, I proceed to determine the compensation

having regard to circumstances which are detailed hereunder and have direct bearing on the issue involved.

i) The petitioner was an indoor patient in SMHS Hospital Srinagar. She was referred to Bone and Joint Hospital Barzalla Srinagar where she was

operated upon and her left arm was amputated. She had to undergo treatment for a considerable period of time both inside and outside the hospital.

The fact of injuries and amputation has been reflected in para No. 8 of the writ petition and reliance has been placed on a medical certificate

appended therewith. The respondents in their objections have neither disputed the fact of injuries nor have they denied the fact of amputation. The petitioner has also been examined by me in the open court and a naked eye observation substantiates the fact that she is short of one arm and the amputation has caused permanent disablement to her. The petitioner being short of one arm. her chances of a healthy and normal life have deteriorated considerably. Howsoever intelligent a child the petitioner may be she can't escape the effect of deformity, which is bound to affect her educational career adversely. She has suffered mental pain and agony and prospects of her marriage also appear to have been impaired, besides loss of enjoyment of life and in real sense no amount of compensation can redeem her fortune, however, an amount of Rs. 2,00,000/- may be reasonable on this count, but not sufficient.

ii) It is contended that the petitioner has been under treatment for several months and a huge amounts has been spent for the purpose. In opposition it is stated by the respondents that the petitioner was operated upon free of charges, but no documentary proof whatsoever has been appended with the reply to substantiate the contention. Had it been so, nothing would prevent the respondents to obtain a certificate from the hospital authorities to defeat the contention of the petitioner. Assuming the contention of the respondents to be correct that the petitioner had not to pay charges for the operation, yet there is nothing to indicate from the reply of the respondents that the expenditure on the post operative care was reimbursed to the petitioner, therefore, there appears substantial justification in the averment made by the petitioner to the effect that such charges were borne by her father raising the amount by sale of two kanals of land which assertion of the petitioner has gone un rebutted and assessing such expenditure even on a very low side, it cannot be less than rupees twenty thousands.

iii) The respondents in their reply have not rebutted the fact that the petitioner was a student of 6th class on the date of accident. In this behalf it is relevant to notice that while addressing the Court the learned counsel for the petitioner contended that the accident coupled with amputation has resulted in loss of one full academic year of the petitioner, which statement was questioned by the learned counsel for the respondents and with a

view to do substantial justice between the parties, respondents were directed to take a stand one way or the other in respect of the alleged

interruption in the studies of the petitioner vide order dated 15-7-1999, but they failed to controvert the statement made by the learned counsel for

the petitioner. Conversely, the learned counsel for the petitioner has produced a certificate dated 12-7-1999, issued by the Head Master High

School Keegam Pulwama, which depicts that the petitioner is now in the 8th Class and short of interruption in studies, she would have been in 9th

class. The certificate has been taken on record and in view of un rebutted facts it is clear that the petitioner's studies were interrupted, consequently

she has suffered an irreparable loss by missing one full academic precious year and no amount of compensation can make the loss good, however,

by way of redressal, an amount of rupees twenty thousands may help her to some extent.

iv) That, during the pendency of the writ petition, the petitioner had filed a CMP bearing No. 330/99 in which she has stated that she required Rs.

30,000/- to undergo plastic surgery and the application is supported by an affidavit. Respondents were granted opportunities to file the objections

and in this direction last and final opportunity was granted on 25-5-1999, but objections were not filed. Be that as it may, there appears no reason

to disbelieve the petitioner's desire to opt for plastic surgery. Being a child she is expected to be aspirant for such surgery because she can hardly

understand that an artificial limb cannot enable her to get rid of deformity and no parent can afford to frustrate such desire of a child. So should be

the case with the parents of the petitioner who may not hesitate to sell their property even, to raise the amount to meet the expenditure. It is

appropriate to notice here that a sum of rupee thirty thousand which is claimed to be likely to be expended by the petitioner to go for fitment of

upper limb prosthesis does not appear to be unreasonable, therefore, the respondents have to pay it.

v) The petitioner had also served a notice on the respondents u/s 80, CPC, wherein claim of compensation to the tune of rupees seven lacs was

advanced, but they chose not to respond to such claim. Had they chosen to respond, the petitioner would have not been forced to approach the

Court and pursue the matter for about three years and for such failure the respondents deserve to be burdened with costs, but I take a lenient view

because the petitioner is saved of cumbersome procedure which she had to travel through, had she opted to institute a civil suit.

14. Thus totally the petitioner would be entitled to a sum of rupees two lacs and seventy thousand as compensation.

15. It is appropriate to notice that on the strength of the pleadings of the parties, I have come to an irresistible conclusion that the functionaries of

the respondent No. 1 have flagrantly breached the duty of care cast on them. I am also of the opinion that had the prudence worked with the

functionaries of the respondents No. 1 the accident could have been anticipated and the respondents being responsible for maintaining the

transformer, it was obligatory upon them to take all the precautionary measures but they have failed to and such failure on the part of erring officials

has the effect of endangering the lives of citizens on the one hand and on the other hand it has rendered the State liable to pay the compensation,

but the lapses of the officials responsible for the accident appear to have gone unnoticed by the respondent No. 1. How can the State make the

public servants accountable unless the latter are dealt with, is an area which calls for intervention of the authorities at the helm and I make it clear

that this pronouncement shall not debar the respondent-State from holding an enquiry to fix the responsibility in accordance with the procedure

established by law on one who has erred.

16. Taking the facts and circumstances of this case into consideration, this writ petition is allowed with the direction to the respondents to deposit

the awarded sum of rupees two lacs and seventy thousands minus the amount which has been already disbursed to the petitioner by way of an

interim relief, with the Registry within a period of three months which period shall be reckoned from today and I am loath to call upon the

respondents to pay interest on the compensation so awarded, provided the entire amount payable is deposited within the period so stipulated, but

on the failure, the respondents shall have to pay an interest @ 18% per annum from today till full realisation. The Registrar Judicial shall release a

sum of rupees fifty thousand in favour of the petitioner through her father for maintenance of the petitioner. Remainder shall be deposited in the

account of the petitioner to be opened in the Jammu and Kashmir Bank branch High Court Complex Srinagar in the form of fixed deposit for a

period of six and half years, leaving the petitioners free to approach to Court for release of a sum if a genuine need arises.