
(1977) 02 J&K CK 0001
In the Jammu And Kashmir High Court
Case No : Civil Suit No. 12 of 1969

Mrs. Pushpa

APPELLANT

Vs

State of Jammu and Kashmir

RESPONDENT

Date of Decision : 03-02-1977

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 80
Criminal Procedure Code, 1973 (CrPC) — Section 523, 550
Fatal Accidents Act, 1855 — Section 1, 1A, 2
Motor Vehicles Act, 1988 — Section 110, 110F
Ranbir Penal Code, 1989 — Section 279, 304A, 337

Citation : (1977) 02 J&K CK 0001

Hon'ble Judges : I.K. Kotwal, J

Bench : Single Bench

Advocate : R.N. Bhalgotra, for the Appellant; Amar Chand, for the Respondent

Judgement

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I.K. Kotwal, J.—By virtue of this suit, which has been brought in forma paupris, the Plaintiff claims a sum of Rs. 1,00,000.00 from the",

Defendant on account of damages arising out of an accident caused by the driver of truck No: JKA-27 belonging to the Defendant which resulted,

in the death of her husband. It may be noticed that the pauprism of the Plaintiff was upheld by the court vide its order dated May 19, 1969",

whereupon her application was registered as a suit. In nut shell the Plaintiff claims the aforesaid sum on the following facts:,

2. On July 29, 1966 at about 4-30 p.m. her husband Vijay Kumar was hit and run over by truck No: JKA-27 belonging to the State of Jammu &",

Kashmir at a place opposite to Head quarter 26 A.D. Coy: while he was going on a bicycle to Jammu city in connection with the discharge of his,

official duties. It is alleged that the truck was being driven rashly and negligently by one Janardhan Singh, an employee of the Defendant. Her",

husband was at the time of the accident on the extreme left of the road. As a result of this accident Vijay Kumar was crushed to death as both the,

front and rear wheels of the truck ran over his body causing several fractures and other injuries to his body. It is stated that the death was an,

instantaneous one. After the accident the driver of the truck was caught hold of by two persons, namely, Hav/clerk Gurdial Singh and Bakshi",

Bhagat Singh the I.P. driver while the driver was trying to run away. This amount has been claimed for the benefit of five dependents of deceased,

Vijay Kumar, the other four beside the Plaintiff, being, his minor son Avinash, his minor daughter Abha, his minor brother Dalip and his widowed",

mother Shri-mati Pan Kunwar. It is then stated that the deceased Vijay Kumar at the time of the alleged accident was posted at Jammu as S.D.O.,",

M.E.S. B/E grade I drawing a salary of 473/- per month out of which he was spending Rs. 373/- per month on his aforesaid five dependents. It is,

also stated that the deceased was only 34 years old on the day of the alleged accident. He was fairly intelligent and was possessing a robust health.,

A bright future was lying ahead of him and he was bound to get several promotions and better grades during the course of his service. Although the,

Plaintiff and the other dependents of the deceased Vijay Kumar were entitled to get a sum of Rs. 2,17,329/- on account of damages resulting from",

his accidental death, the details whereof have been given in the schedule annexed to the plaint, yet the Plaintiff confines the claim to Rs. one lac",

only. She then goes on to state that this sum of Rupees one lac can also be justified on the ground that in order to fetch Rs. 500/- as interest per,

month, which is a sum the Plaintiff and the other dependents of the deceased were likely to get out of the earning of the deceased, a total sum of",

Rs. 1.04,000.00 would be required to be invested in a Bank. The Plaintiff has further alleged that she served a notice u/s 80 of the CPC on the",

Defendant on 8th June, 1967 which was never replied by the latter, hence the suit.",

3. The Defendant has resisted the suit on a number of grounds. It is admitted by the Defendant that on 29-7-1966 truck No. JKA-27 was owned,

by the Defendant and the same was being driven by Janardhan Singh, an employee of the Defendant, from Pathan-kot to Naraina while carrying",

supplies of the Indian Army. It is then stated that although the truck belonged to the Defendant and the driver was also an employee of the, Defendant, yet before the date of the accident the truck had been lent by the Defendant to Indian Army by means of an agreement executed", between the Defendant and the President of India. On the date of accident the driver was not doing any Work of the Defendant nor was he in the, control of the Defendant. He was the servant of the Indian Army and under its control. The Defendant has further gone to state that the truck on, the date of the accident was being driven in a most skilful manner with adequate care and caution and the speed of the track did not exceed 15, miles an hour. It is denied that there was any collision between the truck and the bicycle on which the deceased was going to the city. It is also, denied that the deceased was run over by the truck. On the other hand it is alleged that the death of Vijay Kumar was caused due to his collision, with an army jeep. It is also alleged that even though the driver of the truck was challaned by the State for an offence u/s 304-A R.P.C. yet the trial, resulted in the acquittal of the driver. The Defendant has also denied the claim of the Plaintiff to any damages on account of the alleged accident., The other pleas taken by the Defendant in the written statement are that the Plaintiff is not entitled to sue the State for its vicarious liability as at the, time of the alleged accident the driver was discharging sovereign functions of the State by carrying supplies for the Indian Army; that the suit was, not maintainable u/s 110(f) of the Indian Motor Vehicles Act and that the suit was time barred.,

4. On a consideration of the pleadings of the parties, the court vide its order dated 5-3-1970 framed the following issues:",

1. Whether the jurisdiction of the court to entertain this suit is barred u/s 110-F of Indian Motor Vehicles Act ? O.P D.,

2. Whether the suit is barred by time?,

O.P.D.,

3. Whether the death of Shri Vijay Kumar s/o Late Shri Sajjan Bajji Mehta, resident of Jodhpur, occurred on 29th July, 1966, at about 4-30 p.m.",

on the Satwari-Jammu road opposite to the Headquarters of 76 A.D. Coy. as a result of reckless and negligent driving of truck No. JKA-27 by,

Shri Janardhan Singh son of Suram Singh Rajput, driver of Govt. Transport,

Jammu ?",

O.P.P.,

4. If issue No. 3 is proved in the affirmative whether Shri Janardhan Singh driver was not in employment of the Defendant and was driving the, truck in discharge of sovereign functions of the State at the time of the alleged incident?. If so, what is its effect on the suit ?",

O.P.D.,

5. In case Issue No. 3 is proved in the affirmative and Issue No. 4 is proved in the negative, what is the amount of damages, if any, to which the",

Plaintiff is entitled ?,

O.P.P.,

6. Relief.,

Issue Nos. 1 and 2 were treated as preliminary issues and the parties were afforded an opportunity of leading evidence on these issues. The parties,

did not lead any evidence, but only addressed arguments. The court after hearing the learned Counsel for the parties found both the issues against",

the Defendant and held that the suit was triable by the court and also that the same was within time. Thereafter the parties were called upon to lead,

evidence in respect of the remaining issues. Accordingly the Plaintiff examined Bhagwan Kumar, Dr. Samundar Singh, Om Parkash, Naik Bhagat",

Singh, Sardar Ourdayal Singh and Chuni-Lal as her witnesses in the court. The Plaintiff also appeared as her own witness in the court. Statements",

of P.W.s Guman Mai Lodha and Basant Raj Mehta were also recorded through interrogatories. In rebuttal the Defendant examined Ishwar Dayal,

Sharma, Th. Ganga Singh, Balba-dhar Singh, Dawarika Nath and P. B. Abaiah as its witnesses. Besides these witnesses the parties also produced",

some documents in proof of their respective cases. I do not propose to give a resume of the statements of the witnesses examined by the parties,

nor the gist of the documentary evidence produced by them. I shall however refer in detail to all such evidence while discussing the case issuewise.,

I have heard the learned Counsel for the parties at length and have also gone through the entire evidence on the record.,

Issue No. 3 The Plaintiff has produced two eye witnesses namely. P.W.s Bhagat Singh and Gurdayal Singh to prove that her husband Vijay,

Kumar died as a result of reckless and negligent driving of truck No. JKA-27 by its driver Janardhan Singh P.W. Bhagat Singh has stated that on, July 29, 1966 at about 4-30 p.m. he was going in a jeep to his unit from his Headquarter which was located in Satwari. When he reached in front", of the supply gate, he saw a person riding a bicycle whose name was later on known to be Vijay Kumar; a Sub-Divisional Officer in M.E.S. The", said Vijay Kumar was coming out of his unit and had proceeded ahead towards Jammu city on the road, covering a distance of 30 to 40 yards", when a truck belonging to the Jammu & Kashmir Government Transport which was being driven by A person whose name was also later on, disclosed as Janardhan Singh, collided against the bicycle, as a consequence of which Vijay Kumar fell down. The truck did not stop at this but", was driven ahead as a result of which the rear left and rear right wheel of the truck ran over the body of Vijay Kumar crushing him and causing, several injuries to his person. The truck which bore No. JKA-27 was coming from the direction of Pathankot and proceeding towards Jammu city., The witness has further stated that on seeing this accident he and the other bystanders raised hue and cry and made the truck stop at a distance of, nearly 15 yards from the point of accident. The witness then saw Vijay Kumar who was dead. The unit of Vijay Kumar was informed. On, receiving the information, some persons belonging to the unit of the said Vijay Kumar came on the spot and removed the deadbody to the Military", Hospital in a jeep. The witness has further stated that Janardhan was driving the truck at a speed of nearly 80 km. per hour and but for his rash and, negligent driving this accident might not have taken place at all. The witness has also stated that Vijay Kumar was going on a bicycle at a normal, speed on his own side of the road i.e. left side of the road. He has further stated that he was driving his own jeep at a speed of nearly 30 to 40, Kms. per hour. He has emphatically denied the suggestion made to him by the learned Counsel for the Defendant that this accident was caused by, him and has reiterated that the accident was caused due to the rash and negligent driving of Janardhan Singh who failed to control the movement of, his truck. P.W. Gurdayal Singh has substantially corroborated the statement of P. W. Bhagat Singh. This witness has further stated that on seeing, Vijay Kumar dead, he informed his Superintendent O.N. Khanna about the accident who alongwith some other members of the staff arrived at the",

place of occurrence and removed the body of Vijay Kumar deceased in a jeep to the Military hospital. The witness came back from the Military, hospital to the place of occurrence and narrated the incident to a constable of police who had by then arrived at the spot. The witness has, identified his signatures on his statement Ex. P.W. 6/1 which was recorded by the police as the first information of the occurrence. The third, witness whose statement is only remotely relevant to the issue is P.W. Chuni Lai, who at the relevant time was posted as Station House Officer at", Saddar Thanna, Jammu. This witness registered a case u/s 279/337 R.P.C. against the driver of the truck namely Janardhan and later on chained", him in the court of Sub Registrar, Magistrate 1st Class, Jammu, u/s 304-A R.P.C. (erroneously written as 403-A R.P.C. in the statement). In the", end the witness has stated that he reached the place of occurrence about two hours after the occurrence had taken place.,

5. In rebuttal the Defendant has examined two witnesses, namely, Thakur Oanga Singh and Balbadhar Singh. D.W. Thakur Ganga Singh has", stated that he knew Janardhan Singh, who was driving a Government truck sometime in July 1966. The witness was coming from Raipur, to", Jammu, when he saw a Military jeep proceeding towards Jammu city which was followed by the Government Transport truck driven by the said", Janardhan Singh. The jeep and the truck were proceeding towards Jammu city from the direction of Pathankot. The moment the jeep reached a, point where the link road of barracks meets the main road, the jeep took a turn so as to proceed towards the barracks. A person on a bicycle was", coming towards the main road from the side of the barracks. The said person became nervous on seeing the jeep in front of him going towards the, barrack and lost control of the bicycle. As it had also rained' on that day and the ground had become slippery, the person riding the bicycle lost the", control and collided against the jeep and fell down. The jeep did not stop as a consequence of which he was run over by the rear wheel of the, jeep. On seeing this the truck driver stopped whereas the person driving the jeep fled away. Thereafter some military personnel came over there, and removed the injured person to the hospital. According to the witness this accident occurred because of the mistake of the person going on the, bicycle. The witness could not say anything about the speed at which the truck was being driven but in his opinion the speed of the truck was not,

normal nor could it be abnormal as it was an area lying within the limits of Cantonment Board where there was strict checking of the speed of the, vehicles. The witness has also stated that during the investigation of the accident case, the police did not make any enquiries from him. In cross-", examination the witness has stated that he could not tell either the number of the truck or that of the jeep. He has further admitted that he did not, report this matter to the police but told only the driver of the truck, namely, Janardhan that in case he wanted him to appear as his witness, his", services were always available. He has denied having made a statement in the court of Sub-Registrar, Magistrate, Jammu to the effect that he had", also to go to Jammu city in the same truck therefore, he was present there at the time of the accident. In the end the witness has admitted that the", deceased sustained injuries not because of his collision against the jeep but because of his collision against the truck. The reason given by the, witness as to why he collided against the truck is that as the person riding the bicycle had become nervous so he lost control of his bicycle and, collided against the truck. The witness has also admitted the fact that before the occurrence he did not know Janardhan but after the police had, arrived at the scene of occurrence he had given his address to the employees of the police, who had come there and he was probably overheard", by Janardhan the driver of the Govt. Transport truck. He has admitted that he was not produced as a defence witness by Janardhan Singh during, the police investigation,"

6. D.W. Balbadhar has stated that he reached the place of accident after the accident had taken place. In his presence the person who had died on, account of the accident which was caused by a Govt. Transport vehicle parked nearby was removed in a jeep.,

7. It is amply borne out from the statements of P.Ws Bhagat Singh and Gurdalay Singh that Vijay Kumar was knocked down by truck No. JKA-,

27 which was being driven by its driver Janardhan S'nggh. It is also established that the truck was going at a speed of nearly 80 kilometers per hour,

when it collided against the bicycle ridden by Vijay Kumar. It is further established that when the collision took place, Vijay Kumar was going on",

the extreme left of the road and was therefore, not responsible for contributory negligence. These two statements further show that the driver of the",

Govt. Transport truck No. JKA-27 was so callous that he did not even care to stop the truck the moment it collided against the bicycle but went, ahead upto a distance of nearly 15 yards in a bid to flee away and had to stop the truck only when these witnesses and other bystanders raised hue, and cry blaming him for the accident. That the injuries sustained by Vijay Kumar on account of the said accident were the proximate cause of his, instantaneous death has been fully established from the statement of P.W. Dr. Samander Singh.,

8. The evidence in rebuttal as already stated consists of two witnesses namely Ganga Singh and Balbadhar. So far as Balbadhar is concerned he, can be of no help to the Defendant as he has clearly admitted that he reached the place of occurrence after the accident had taken place and could, not see anything with his own eyes. In a subdued tone this witness has supported the Plaintiffs case by saying that a person was lying dead on the, spot who had died on account of an accident caused by a Govt, truck which had been parked nearby. D W. Ganga Singh has no doubt tried to", help the Defendant in the beginning by saying that the accident occurred due to the mistake of Vijay Kumar himself as he had become nervous and, had lost control of the bicycle thereby colliding it against the army jeep, which was coming out from the barracks. When however driven to the", corner in the course of cross-examination, the witness had to admit that the collision of the bicycle was not against the army jeep but it was against", a Govt. Transport truck, although in the same strain the witness stated that this collision was a result of the mistake of Vijay Kumar himself who", had lost control of the bicycle due to nervousness.,

9. It is no doubt true that Janardhan Singh was challaned u/s 304-A R.P.C. for having caused this accident and tried by the Sub Registrar, Judicial", Magistrate, Jammu; the trial ultimately resulting in his acquittal. This finding of the criminal court cannot be binding on a civil court and the", Defendant can get no help from this finding of the criminal court. This position in law has not been denied by Mr. Amarchand, the learned Counsel", for the Defendant. Even otherwise, I have gone through the judgment of the Judicial Magistrate but to me it appears that the judgment been mainly", based upon the testimony of the defence witness at the same time assuming that the prosecution witness were not disinterested witnessess. The,

learned Magistrate did not assign any reason as to how he disbelieved the prosecution' witnesses and came to the conclusion that they were,

partisan. That a finding of the criminal court in such a case is not admissible in a civil case for damages arising out of the same accident has been,

held by the High Court of Delhi in Mahavir Prasad v. Municipal Corporation of Delhi 1975 A.C.J 190 . The conclusion is, therefore, inescapable",

that Vijay Kumar died due to the rash and negligent driving of truck No. JKA-27 belonging to the Govt. Transport Department, which was being",

driven at the relevant time by its employee Janardhan Singh. Issue No: 3 is, therefore decided in favour of the Plaintiff and against the Defendant.",

10. This issue in fact consists of two parts: ,

(i) Whether Janardhan Singh was not in the employment of the Defendant; and
(ii) Whether the accident took place when he was acting in,

discharge of any sovereign function of the State?,

The burden of proving this issue was placed upon the Defendant. The Defendant has not led even an iota of evidence in proof of the first part of,

this issue, i.e. that Janardhan Singh was not in the employment of the Defendant at the time the took place. As against this there is a clear admission",

made by the Defendant in its written statement which goes to show that Janardhan Singh was an employee of the Defendant on the relevant date,

and further that he was driving truck No: JKA-27 owned by the Defendant. To quote the Defendant in its own words, the relevant portion of Para",

2 of the written statement reads thus: ,

In reply to Paragraph No: 2 of the plaint, it is admitted that on 29-7-1965 at about 4-30 p.m. truck No. JKA-27 owned by the Defendant was",

being driven by Shri Janardhan Singh, who is a servant of the Defendant from Pathankot to Narian.",

Apart from this admission even D.W., P. B. Abaiah made no secret of the fact that vehicle No: JKA-27 belonged to tKe J&K Govt. Transport",

Department and the driver of the vehicle was also in the service of the J & K Govt. Transport, and was not an employee of the Army. In these",

circumstances therefore, I cannot but hold that Janardhan Singh was an employee of the Defendant on the date when the accident took place.",

11. This brings me to the second part of the issue as to whether Janardhan Singh was discharging any duties which were referable to the exercise,

of any sovereign or even delegated sovereign powers. - To prove this issue the Defendant has examined two witnesses, namely, D.W. Dawarika",

Nath and D.W. P.B. Abaiah. P.W. Dawarika Nath has proved the original agreements between the Saddar-i-Riyasat of Jammu & Kashmir and,

the President of India which are exhibited as Ex. D.W./1, Ex. D.W./2, Ex. D.W./3 and Ex. D.W./4. This agreement pertains to lending of vehicles",

by the Jammu & Kashmir Govt. Transport to the Army authorities for transporting gasoline and other commodities from one place to another on,

payment of hire and other charges. D. W. Abaiah has stated that on 29-7-1966 truck No. JKA-27 was despatched from the Pathankot Rail-head,

Depot to Field Supply Depot at Narain. The vehicle was loaded with crushed barley which is used as feed for mules and the mules are used for,

transport of army, its supply and equipment etc. in the hills. This witness is a clerk dealing in receipt and despatch section of Rail-head Supply",

Depot at Pathankot. He was summoned to bring the relevant official record and made the statement after perusing the said record in the Court.,

The Defendant has examined these two witnesses in order to prove his averment in the written statement that on the day when the occurrence took,

place truck No: JKA-27 had been lent to army authorities by the State Government by virtue of the written agreements which have been proved,

by D.W. Dawarika Nath. There is no rebuttal to this evidence from the Plaintiff's side and the conclusion must be that on the day when the,

accident took place Janardhan Singh was driving truck No: JKA-27 owned by the State Government but lent to the army authorities, and was",

carrying crushed barley from Pathankot to Narain. Be that as it may, the question still remains: was this act of Janardhan Singh referable to",

sovereign powers or for that matter referable to delegated exercise of any sovereign powers ? Mr. Bhargotra, the learned Counsel for the Plaintiff",

has vehemently argued before me that even if the truck had been lent by the State Government to the Army Authorities, yet by doing so, the",

Defendant could not be deemed to be exercising any sovereign powers nor could it be deemed to have delegated such powers to its employee,

Janardhan Singh. According to the learned Counsel such an act could never be referable to the exercise of any sovereign powers. He has placed,

reliance upon a number of authorities in support of his argument.,

12. The first authority which has been referred to by the learned Counsel for the The State of Rajasthan Vs. Mst. Vidhyawati and Another, . In this",

case a driver of Raias-than Government had caused the accident resulting in the death of a person when the former was driving a Government jeep,

to the office of the Collector after effecting some repairs to it. A suit was brought against the driver as well as against the State of Rajasthan for,

damages resulting from the tortious act of the driver. The trial court decreed the suit ex-parte against the driver but dismissed the same against the,

State on the ground that no vicarious liability could be attached to the State as the driver was acting in exercise of the sovereign powers of the,

State. On appeal the High Court upset the decree of the trial court and decreed the suit against the State as well as holding that such an act could,

not be referable to the exercise of any sovereign powers. The State of Rajasthan went in appeal to the Supreme Court and the Supreme Court,

traced the entire history of the legislation right from the framing of the Constitution of India and back to Act 21 and 22 Victoria C.H. 106, entitled",

An Act for the better Government of India"" for finding out the origin of the doctrine that the State shall not be vicariously responsible for the acts",

of its employees done in exercise of the sovereign powers of the State. The Supreme Court came to the conclusion that this doctrine was based,

upon the attributes of British Sovereignty that king could do no wrong and would not be sued in his own courts without his consent. In its judgment,

the Supreme Court relied upon a Full Bench judgment of Calcutta Supreme Court in Peninsular & Oriental Steam Navigation Co. v. Secretary of,

State for India (1861) 5 Bom. H.C.R. App. 1, which was a similar case filed against the East India Co. for damages arising out of the tortious acts",

of its employees. While dealing with the appeal, the Supreme Court also took into consideration the multifarious activities of Indian Govt, especially",

under the Constitution of India which were not only sovereign but had wider ramifications involving its powers as employers in so many public,

sectors as Trade and Commerce, Post and Telegraph, Road Transport Business etc. and held that the State could be as much liable in tort or",

contract on account of the acts committed by its servants as any other employer provided such acts were wholly dis-associated from the exercise,

of sovereign powers. The Supreme Court in its judgment quoted with approval the following observations of the Full Bench in Calcutta Supreme,

Court case (Supra):,

... 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 undertakings which might be carried on by private individuals without having such powers delegated to them:"""

X X X,

The Secretary of State in Council of India is liable for the damages occasioned by the negligence of servants in the service of Government if the,

negligence is such as would render an ordinary employer liable.,

13. The next authority cited by the learned Counsel for the Plaintiff is Union of India v. Smt. Jasso AIR 1962 P &H 312 . In this case a person had,

been knocked down and injured by a military truck driven by a military driver which was carrying coal on routine duty. The question referred to,

the Full Bench was; ""whether the Union of India is liable to be sued in respect of a tort committed by a military driver while transporting coal to",

General Headquarters at Simla in discharge of his duties."" The Full Bench of Punjab High Court placing reliance upon the basic authority 5 Bom.",

HCR App. I (Supra) and a few other authorities held that Union of India was liable to be sued in respect of a tort committed by the military driver,

while driving the vehicle loaded with coal on routine task presumably for the purpose of heating rooms as such act is not something done in,

exercise of sovereign powers, since such a thing could be done by private person as well. The Full Bench opined that one of the tests for making a",

distinction between an act done in exercise of sovereign powers and any other act was to whether it was done against the subject of the State or,

against a foreigner. I am afraid I cannot persuade myself to agree with this view taken by the Full Bench even though I am in respectful agreement,

with the conclusions-arrived by it, that the act committed by the driver did not relate to the exercise of any sovereign power. Sovereign power",

cannot be exercised only in respect of a foreigner but it may be some times exercised even against the subject of the State as for instance when the,

State has to deal with a situation created by treason or an unlawful assembly. Unless an act of the State is not to be mistaken for an act done in.,

exercise of sovereign powers of the State, I am afraid the law stated by the Full Bench is too narrow.",

14. The other authority relied upon by the learned Counsel for the Plaintiff is Satya Wati Devi v. Union of India 1968 A.C.J. 119 . In this case a,

driver of Indian Airforce three tonner had knocked down to death another employee of the Airforce on his way back to Park the truck in the,

section parking area after having dropped hockey and football teams in the playground. An argument was made on behalf of Union of India that it,

being the function of the Government of India to keep its forces in proper shape and trim, by providing to them all facilities of sport etc. the driver",

was in fact carrying out this purpose when he had taken players to the playground and was still in the process of discharging the same duty, when",

the accident took place. In these circumstances it was urged that the driver was in fact acting in exercise of the delegated sovereign powers and,

Union of India was not liable to pay any damages on account of its vicarious liability. This contention was repelled by the Division Bench and it was,

held that in view of the nature of the task carried out by the driver it cannot be said that his act fell within the ambit of delegated sovereign powers.,

15. The next authority referred to by the learned Counsel for the Harbans Lal and Others Vs. Union of India (UOI) and Another, . In this case a",

scooter rider had been knocked down by a Govt, vehicle driven by a member of the defence services in the course of his ordinary employment. A",

similar plea was raised on behalf of the Union of India in this case as well. Repelling the contention the learned Single Judge observed as follows:,

Thus from a resume of the above authorities it clearly follows that it is only when the servant is acting in exercise of delegated sovereign powers of,

the State and doing something which could not be done by a private individual that the State would not be liable for the tortious acts of its servant.,

In the instant case, there is no material on the record to indicate that Defendant No. 2 while driving the military vehicle at the time of accident was",

carrying on any peculiar duty of sovereign nature assigned to him under any law or rule or that there was anything special about his employment, in",

the circumstances, I have no hesitation in deciding issue No. 3 in favour of the Plaintiffs and against the Defendants.",

16. The last authority relied upon by the learned Counsel for the Plaintiff is State of Punjab v. Lal Chand Sabharwal 1975 A.C.J. 208 . In this case,

the agitator of Hindi Raksha Samiti was arrested by the police. It was decided by the Government of Punjab that he along-with other such,

agitators be taken to a far off place for being dispersed there. The van carrying them collided against a tree as a result of which the Plaintiff, sustained injuries. He filed a suit against the State of Punjab. It was pleaded that the act was attributable to exercise of delegated sovereign powers. The plea was rejected on the ground that no doubt maintenance of law and order was included in the sovereign powers of the State," , nonetheless to select a place of choice for dispersal of the agitators by the Government was not a sovereign power. The claim of the Plaintiff was, therefore upheld against the State of Punjab.,

17. From the discussion of the above said authorities it becomes amply clear that Government is as much liable for the tortious act of its employees, as any other employer. The Government can claim immunity only if it can successfully show that the tortious act of its employee was clearly, referable to the sovereign powers of the State. Again every act of an employee of the Government done by him in discharge of his official duties, may not be referable to sovereign powers. In a welfare State like India, the activities of a Government whether at the Centre or State are involved", in several fields, some of which may be purely commercial, or of a kind which are akin to those of private individual. Normally the test would be", whether the act committed by the Government employee was such as could have been committed only by the Government or some one else on, authority delegated to him by the Government. If the answer is in the affirmative the act may be referable to sovereign power and if the answer is in, the negative, the act cannot be referable to any sovereign powers. In the instant case I need not go into all these niceties as the case of the", Defendant itself is crystal clear. The State according to its own case had entered into an agreement with the President of India that it would on, payment of charges supply vehicles to the Army authorities for transporting its goods from one place to another to facilitate the task of the defence, forces. It is, therefore, a clear case of a commercial undertaking by which the Defendant i.e. the State Government had agreed to do the work of", the defence department on payment of charges. It was not an act which could be done only by the State of Jammu & Kashmir or for that matter, by any other State. On the other hand it was an act which could have been done even by a private individual as for instance a person owning a,

fleet of transport vehicles. Clearly, therefore Janardhan Singh while carrying crushed barley from Pathankot to Narain on the basis of a contract",

between the President of India and his employer, the State of Jammu & Kashmir, was not doing something which could be referable to delegated",

sovereign powers of the State.,

18. Mr. Amarchand, the learned Counsel for the Defendant has on the other hand placed reliance upon two authorities viz: Kasturilal Ralia Ram",

Jain Vs. State of Uttar Pradesh, , and Thangarajan Vs. Union of India (UOI), . It is no doubt true that in both these cases the claim of the Plaintiff",

was negatived by the courts on the grounds that the acts committed by its employees were referable to sovereign powers of the State but the facts,

of both these cases are materially different from the facts of the present case. In the case before the Supreme Court, AIR 1965 S.C. (supra) a",

person was arrested on suspicion that he was carrying stolen property and on search of the person arrested some gold was seized u/s 550 Cr. P.,

Code by the police. Regulation 165 of the U.P. Police Regulations provided a detailed procedure for dealing with the disposal of movable,

property under which till the property was finally disposed of by a Magistrate u/s 523 Cr. P. Code it was to remain in the Malkhana of the police,

when its value did not exceed Rs. 100/- and in the custody of the prosecuting Inspector in a separate box under his lock and key in Treasury if its,

value exceeded Rs. 100/-. The value of the property seized admittedly exceeded Rs. 100/- nonetheless the Head Constable in charge of,

Malkhana kept it under his custody in the Malkhana. The Head Constable later on absconded with the valuable property including the gold. The,

Plaintiff brought a suit for return of the gold or in the alternative for its value against the State of U.P. It was established that the police officer had,

not followed the provisions of the U.P. Police Regulations in taking care of the gold seized from the Plaintiff. The court held that keeping the,

property seized in Malkhana no doubt exhibited gross negligence on the part of the police officer due to which the Plaintiff had to suffer the loss,"

yet it was held that the police officer had been guilty of negligence while dealing with the property of the Plaintiff which they had of course seized in,

exercise of their statutory powers. The court held that the powers to arrest a person, to search him and to seize property found with him are",

powers conferred on specific officers by the statute and therefore, such powers could be properly characterised as sovereign powers. In these",

circumstances the claim of the Plaintiff against the State was negated. The Supreme Court while dealing with this aspect of the case remarked as,

under:

There is a material distinction between act committed by the servants employed by the State where such acts are referable to the exercise of,

sovereign powers delegated to public servants, and acts committed by public servants which are not referable to the delegation of any sovereign",

powers. If a tortious act is committed by a public servant and it gives rise to a claim for damages, the question to ask is: was the tortious act",

committed by the police servant in discharge of statutory functions which are referable to, and ultimately based on the delegation of the sovereign",

powers of the State to such public servant If the answer is in the affirmative, the action for damages for loss caused by such tortious act will not lie.",

On the other hand, if the tortious act has been committed by a public servant in discharge of duties assigned to him not by virtue of the delegation",

of any sovereign power, an action for damages would lie. The act of the public servant committed by him during the course of employment is, in",

this category of cases, an act, of a servant who might have been employed by a private individual for the same purpose...",

This authority is therefore clearly distinguishable as the employees of the Government in this case were acting in discharge of their statutory powers,

which could, be exercised only by the specified State employees and not by a private person.",

19. The facts of the next authority were that a driver of a lorry belonging to the defence department was being driven by a driver who was himself,

a defence personnel. The driver of the lorry was detailed by an Army Officer to carry Cos gas from the factory to the ship I.N.S. Jamna. On the,

way the driver knocked down a boy of 10 years injuring him seriously and rendering him incapacitated. There was no evidence to the effect as,

to why the gas was needed by the ship and the court assumed that the gas was needed for defence purposes. In these circumstances it was held,

that the driver was acting in exercise of delegated sovereign powers. This authority is also clearly distinguishable as a defence purpose in this case,

was assumed. Undoubtedly carrying out a defence purpose and that too by a defence personnel may be an act in exercise of the sovereign power,

of a State. In the instant case the act as I have already pointed out was clearly a commercial act. The act of a contractor is substantially and,

inherently different from a sovereign act. These two authorities are therefore, of no help to the Defendant. The conclusion is irresistible that",

Janardhan Singh while driving the lorry at the time of the accident which resulted in the death of Vijay Kumar was not discharging his official duty,

which could be referable to the exercise of any delegated sovereign powers. Issue No. 4 is therefore, decided against the Defendant and in favour",

of the Plaintiff.,

Issue No. 5.,

20. Before dealing with the factual aspect of this issue, it would be better to state broadly the law on the point which has been settled by the",

Supreme Court and should therefore be treated as the law of the land. The first case to come up before the Supreme Court was Gobald Motor,

Service Ltd. and Another Vs. R.M.K. Veluswami and Others, . In this case the deceased died in a bus accident due to the negligence of its driver.",

Compensation was awarded by the court against the owner of the bus on two counts, i.e. actual loss suffered by the dependants in pecuniary",

benefit out of the earnings of the deceased u/s 1 of the Fatal Accidents Act, and loss to the estate of the deceased u/s 2 of the said Act. Two main",

contentions were raised by the owner before the Supreme Court (i) that compensation u/s 1 of the Fatal Accidents Act was not properly assessed,

; and (ii) that the claimants being the same in both the counts, no compensation could be awarded in their favour u/s 2 of the Act.",

21. The Supreme Court repelled both the contentions. In repelling the first contention it observed as under:,

... Shortly-stated, the general principle is that the pecuniary loss can be ascertained only by balancing on the one hand the loss to the claimants of",

the future pecuniary benefit and on the other any pecuniary advantage which from whatever source comes to them by reason of the death, that is,",

the balance of loss and gain to a dependant by the death must be ascertained.,

In repelling the other contention the court observed as under:,

The law on this branch of the subject may be briefly stated thus. The rights of

action under Sections 1 and 2 of the Act are quite distinct and, independent. If a person taking benefit under both the sections is the same, he cannot be permitted to recover twice over for the same loss. In", awarding damages under both the heads there shall not be duplication of the same claim, that is, if any part of the compensation representing the", loss to the estate goes into the calculation of the personal loss u/s 1 of the Act, that portion shall be excluded in giving compensation u/s 2 and vice", versa.,

And finally the court held as under:.,

In the instant case, u/s 1 of the Act both the courts gave compensation to Plaintiffs 2 to 7 in a sum of Rs. 25,200/-. This sum was arrived at by",

taking into consideration, inter alia, the reasonable provision the deceased if alive, would have made for them. u/s 2 both the courts awarded",

damages for the loss to the estate in a sum of Rs. 5,000/-. That figure represents the damages for the mental agony, suffering and loss of",

expectation of life. There was no duplication in awarding damages under both the heads. No material has been placed before us to enable us to,

take a different view in regard to the amount of compensation u/s 2 of the Act.,

The next case brought to the anvil of the Supreme Court was C.K. Subramonia Iyer and Ors. v. T. Kunhikuttan Nair and Ors. 1970 A.C.J. 110 .,

In this case the parents had claimed a sum of Rs. 30,000/- as damages from the owner of the bus involved in an accident resulting in the death of",

their minor son aged 8 years. The basis of the claim was that the deceased was a fairly intelligent boy with a bright future lying ahead and the,

Plaintiffs were possessed of sufficient means to give him a good education to build up his future career. The Tribunal awarded a compensation of,

Rs. 5,000/- only in favour of the parents which was enhanced to Rs. 6,000/- by the High Court on appeal. Not being satisfied with the amount",

awarded, the claimants went in appeal before the Supreme Court. The Supreme Court after discussing various factors relevant for fixing the",

amount of compensation claimed under Sections 1-V and 2 of the Fatal Accidents Act (1855) the provisions whereof are identical with the,

provisions of sections I-A and 2 of the State Act, stated the law in these words:",

The law on the point arising for decision may be summed up as this: Compulsory damages u/s I-A of the Act for wrongful death must be limited,

strictly to the pecuniary loss to the beneficiaries and that u/s 2 measures of damages is the economic loss sustained by the estate. There can be no, exact uniform for measuring the value of the human life and the measure of damages cannot be arrived at by precise mathematical calculations but, the amount recoverable depends on the particular facts and circumstances of each case. The life expectancy of the deceased or of the beneficiaries, which ever is shorter is an important factor. Since the elements which go to make up the value of the life of the deceased to the designated, beneficiaries are necessarily personal to each case, in the very nature of things, there can be no exact or uniform rule for measuring the value of the", human life. In assessing damages, the court must exclude all considerations of matter which rest in speculation or fancy though conjecture to some", extent is inevitable. As a general rule parents are entitled to recover the present cash value of the prospective service of the deceased minor child., In addition they may receive compensation for loss of pecuniary benefits reasonably to be expected after the child attains majority. In the matter of, ascertainment of damages, the appellate court should be slow in disturbing the findings reached by the,, courts below, if they have taken all the", relevant facts into consideration.,

Authorities on the point are legion. Reference may be made to *Orrisa Road Transport Co. Ltd. v. Sibananda Pattanaik and Ors.* 1976 A.C.J., 497; *Municipal Corp. of Delhi v. Sub-hagwanti and Ors.* 1966 A.C J. 57 ; *Oriental Fire & General Insurance Co. Ltd. v. Kamal Kamini Dass and, Ors.* 1972 A.CJ. 92; *Vishwa Mitra Chadda v. Smt Amrit Kaur and Ors.* 1972 A.C.J. 213 ; and *Bhagchand Panju Ram and Anr. v. Snehlata and, Ors.* 1975 A.C.J. 9 .,

22. The position in law which, therefore emerges may be briefly stated in these words. The dependents are entitled to compensation not only when", the deceased was an earning hand but also when the deceased did not earn provided their existed a reasonable probability that he would have, earned had his life been not taken away by the fataL accident. This probability may in turn depend upon various factors e.g. his intellectual, standard, his source of receiving good education, his health, and his aptitude. The damage suffered by his dependants being their share in the", earnings of the deceased, which they would normally expect him to spend on

them, the quantum of compensation has to be ascertained by",
 calculating the total loss to them of such future pecuniary benefit less the
 pecuniary benefit which comes to them from other sources traceable to his,
 death e.g. G.P. Fund, Insurance etc. Again in calculating the loss of future
 pecuniary benefits regard must be had to the earnings of the deceased",
 at the time of his death, reasonable chances of any increase in his earnings,
 coupled with chances of relative increase in the pecuniary benefit to his",
 dependents, the security and nature of his service or other avocations, his life
 expectancy and the period for which his dependents or if there be",
 more than one dependent then each dependent is expected to receive the
 pecuniary benefit. In computing the life expectancy of the deceased or,
 his dependents, regard must be had to their average family age, and their health
 and standard of life. Similarly in determining the period for which a",
 dependent is expected to be benefitted out of the earnings of the deceased,
 regard must be had to the life expectancy of the deceased as well as",
 that of the dependent, and the period after which the dependent is expected to
 cease to depend upon the earnings of the deceased. The term ""the",
 period for which the dependent is expected to cease to depend"" may assume
 different connotation in different circumstances. Whereas in case of a",
 male child it may mean when the male child itself becomes an earning hand, in
 the case of a female child it may mean when the female child is",
 married. Similarly in case of a widow the chances of her remarrying are not to be
 excluded. These chances in turn depend upon various factors as,
 for example her age, her character, and the family or the society to which she
 belongs. Second marriage in high class families is generally looked",
 upon with disfavour, though the same may not be true of low class families.
 Again caste, Hindus by and large, are still averse to second marriage",
 notwithstanding the fact that the rigour of the taboo against second marriage
 has been relaxed, with the coming into force of the Hindu Marriage",
 Act.,

23. As far as the compensation for loss to the estate is concerned, the same can
 be payable only if any residue is left after deducting the",
 compensation awarded u/s 1-A of the Fatal Accidents Act from his total earnings.
 It matters little whether the claimants in both the cases are the,
 same. Again the amount of compensation thus arrived at may have to be taxed

down on more than one account. In the first instance the sum, awarded may have to be reduced to a percentage varying between 6 to 16 percent on account of the fact that the dependent is to get the entire, pecuniary benefit in lumpsum. In the second place the account of compensation may have to be reduced to the same extent where the dependent is, benefitted through other sources of the deceased on his death as for example where he gets in lumpsum insurance or G.P. Fund etc., on the death", of the deceased, what in legal parlance is known as "accelerated devolution of interest". This rule of taxing down the compensation whether on, one account or the other in my opinion should not have universal application but its application should depend upon the facts and circumstances of, each case. An inordinately delayed award of compensation by the court may be one of the circumstances militating against the rule. The percentage, of the deduction to be made should vary with the amount of compensation awarded or accelerated interest devolved for atleast one reason that the, amount of compensation is not to be awarded as solatium but the same should commensurate with the pecuniary loss suffered by the dependent.,

24. With this legal background let me now examine the evidence led by the parties in respect of their respective contentions covering the issue. The, burden of proving this issue is on the Plaintiff.,

25. P.W. Dr. Samandar Singh has stated that he conducted the post-mortem examination on the deadbody of Vijay Kumar and found him to be a, stout man. P.W. Om Parkash was summoned along-with service book of the deceased. He has stated that at the time of his death Vijay Kumar, was drawing Rs. 380/- per month as his basic pay excluding allowances etc. which were in the neighbourhood of Rs. 100/-. Besides this the, deceased was also getting Rs. 60/- as monthly ration allowance. The witness has further stated that Vijay Kumar deceased was a member of the, institute of Indian Engineers and would have retired at the age of 55 years. In the opinion of the witness the deceased could have risen even to the, rank of a Superintending Engineer. He has further stated that the deceased was not a confirmed employee and his services could be terminated by, one month's prior notice. He was to serve for seven year more in order to complete the minimum period of ten years on regular establishment, before he was entitled to become a permanent employee, though he could have

risen to the rank of Superintending Engineer even as a temporary",
employee. P.W. Dharam Vir is an Auditor in the office of the Dy. Controller of Defence Accounts. He has produced and proved the last pay, certificate of the deceased in court, a copy of which is Ex, P.W. 4/1 on the file. According to this copy the deceased was getting Rs. 476/- per",
month, i.e. Rs. 380/- on account of his pay, Rs. 96/-on account of Dearness Allowance. P.W. Guman Mai Lodha an advocate by profession, has",
stated that he knew deceased Vijay Kumar as he and the deceased lived in the same locality. The witness also knows his dependents, who are the",
Plaintiffs, his widow, his widowed mother, Pan Kanwar, his minor son Avinash, his minor daughter Abha and his minor brother Dalip. The",
deceased possessed good health and had a bright future. The deceased used to spend 75 per cent of his earnings on his above mentioned,
dependents. Three of his dependents, namely, son, daughter, and brother were receiving education at the cost of the deceased. Father of Vijay",
Kumar died at the age of 72. The social status of the family of the deceased is such that at least a sum of Rs. 20,000/- to Rs. 25,000/- is required",
for the marriage of a son or daughter. The witness also mentioned the names of different places where the deceased was posted from time to time.,
According to the witness the deceased was the only bread earner in the family. P.W. Basant Raj Mehta is also an advocate by profession. He has,
given a statement which is substantially the same as given by P. W. Guman Mai Lodha. This witness is a next door neighbour of the deceased,
besides being distantly related to him. The Plaintiff appearing as her own witness has stated that on the date of the accident her husband was 35,
years old. At that time the age of her son was 15 years and that of her daughter 7 years. The deceased has also left a widowed mother aged 60,
years and a brother aged 20 year. She has given her own age as 30 years. She has further deposed that her husband was a Grade-I Officer in,
M.E.S. and was the only supporter of the family consisting of himself, and the afore mentioned five dependents. The fam'-y has no other source of",
income. She has become hard of hearing due to the shock she received on the death of her husband. She has acknowledged the fact that she is,
getting Rs. 116/- as pension every month on account of the death of her husband. Her husband according to her possessed a very good health.,

She has denied having received any amount on account of G.P. Fund of her husband.,

26. The Defendant has examined only one witness in rebuttal, namely Ishwar Dayal Sharma, an Upper Division Clerk in the office of the Garrison",

Engg. where the deceased was employed at the time of his death. He was summoned alongwith record relating to the deceased. On perusing the,

said record he has stated that the deceased was employed on the relevant date as Supdt. Building and Roads Grade I in the office of Garrison,

Engineer, 860 Engg. Works Section. On his death pension has been sanctioned in favour of his widow, son and daughter vide Engineer-in-Chief is",

letter No. 79709/EIC dated 29-2-1968. According to it, the widow Pushpa is to get Rs. 95/- per month till her death or re-marriage, whichever ever",

occurs earlier; his son Avinash is to get Rs. 13/- per month till he attains the age of 18 years, and his daughter Abha is also to get Rs. 13/- per",

month till she attains the age of 21 years or till she is married whichever ever occurs earlier. The witness has also stated that besides this the family of,

the deceased has been paid a sum of Rs. 1,160/- standing to the credit of the deceased in his G.P. Fund account. The witness has also testified to",

the fact that according to the service-book the date of birth of the deceased is November 5, 1931. The witness has declined to make any",

comment on the future service prospects of"" the deceased as according to the witness nothing could be said in this behalf without knowing the",

remarks in his confidential rolls.,

27. That the date of birth of the deceased Vijay Kumar was Nov. 5, 1931 is Plaintiff's own case as stated by her in Para 1 of her plaint. This fact",

is further corroborated by the entries in his service-book as proved by D.W. Ishwar Dayal Sharma. As stated by P.W. Om Parkash the deceased,

could not have remained in service beyond the age of 55 years. The deceased must have retired by Nov. 5, 1986. As stated by P.W. Samandar",

Singh, Guman Mai Lodha and Basant Raj Mehta and the Plaintiff, the deceased was a very healthy man whose mother was still alive and whose",

Wife, Rs. 180.00

Widowed

mother ...", Rs. 100.00

Brother, Rs. 7500

Son, Rs. 75.00

Daughter, Rs. 75.00

(i), "Widow Mrs. Pushpa

(Plaintiff) ... Rs.

14,140.00

(ii), "Mother Mrs. Pan

Kanwar ... Rs.

18,000.00

(iii), "Son Avinash ... Rs.

4,932.00

(iv), "Daughter, Abha... Rs.

10,416.00

, "Total=Rs. 47,488.00