

(1994) 03 OHC CK 0011
In the Orissa High Court
Case No : O.J.C. No. 9777 of 1992

Ramesh Kumar Nayak

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 24-03-1994

Acts Referred:

Contract Act, 1872 — Section 73

Citation : (1995) ACJ 443 : AIR 1994 Ori 279 : (1994) 78 CLT 758 : (1994) 1 OLR 536

Hon'ble Judges : S.K. Mohanty, J;A. Pasayat, J

Bench : Division Bench

Advocate : N.K. Barik, J.K. Sahoo, A.K. Rath and D.K. Nayak, for the Appellant; U.G. Panda, A.S.C. (Central), for the Respondent

Judgement

Pasayat, J.—A wall encompassing the General Post Office, Cuttack collapsed on 29-8-1991. According to the petitioner, he was passing by the side of the wall, a portion of the wall fell on him, and he sustained injuries. He makes a claim of Rs. I lakh as damage from the Union of India, the Chief Post Master General of the State, the Senior Superintendent of Post Offices and the Post-Master of the concerned post office on the ground that due and proper care was not taken as regards maintenance of the wall, and on account of such negligence, he sustained serious injuries, was hospitalised for a pretty long time, his left leg was severely fractured and his right leg was also injured. Though the residents of nearby Bepari Sahi had many times requested the authorities for effecting repairs to the wall which was in a precarious stage and was on the verge of collapse, with apprehension of damage to life and property, the authorities turned a deaf ear to the same. The apprehension came to be true when on 29-8-1991 the wall collapsed.

2. A counter-affidavit has been filed by the opposite parties wherein it is accepted that the wall collapsed, but the same is attributed to natural calamity. A plea has been taken that there is no material to show that the petitioner is the

person who sustained injuries. It is stated that there was torrential rain on 29-8-1991, and due to such rain it was not possible to come out. Some persons belonging to the nearby locality came to the Post Master, General Post Office, Buxi Bazar (opp. party No. 4) and demanded money for treatment of a person who was injured due to collapse of the wall. Since the mood of the persons who had come for financial assistance was not very congenial, opposite party No. 4 and other members of the staff of the Post Office collected Rs. 500/- and gave it for treatment of the alleged injured, though there is no statutory prescription for making such payment. It is stated that whether any injury was caused or not was also doubtful, as no injured person was produced before the officials of the SPO. It is asserted that for a pretty long time prior to date of occurrence there was heavy and continuous rain, and there was no negligence on the part of the authorities in maintaining the wall. It is asserted that the boundary wall was in good condition, and is at a distance from the public road. The assertion of the petitioner that the local people had requested the authorities for repair of the compound wall is not correct, and as the wall was in good condition and there was no grievance by anybody, the question of any negligence does not arise.

3. There is no dispute and practically there is acceptance that the wall had collapsed. From the station diary entry made by the A.S.I. of Kangalabag Police Station it appears that the length of the wall which broke down is about 30 feet. From the various document filed like the Out Door Patient ticket, the station diary entry and the first information report lodged with the Police it is clear that one Ramesh Kumar Nayak sustained injuries on account of collapse of the wall. We find no material to discard the plea of the petitioner that he is the person who sustained injuries due to collapse of the wall.

4. The crucial questions are whether the petitioner is entitled to any compensation; whether there was any negligence on the part of the opposite parties; whether the collapse can be said to be resultant of natural calamity, and if there was negligence whether the opposite parties are liable to compensate the petitioner. A preliminary objection is raised by Shri U. C. Panda, learned Counsel for the opposite parties that in a case of this nature, a writ application is not the proper remedy. There can be no doubt that where disputed questions of fact are involved, the writ Court would be slow to entertain an application and permit the affected party to seek redress in a proper Civil Court. But in view of almost accepted position regarding accident, the only question is whether there was negligence, and therefore, we have entertained the writ application.

5. A calamity is a great disaster or misfortune; a great mischief or mishap; whatever is attended with destruction is a calamity; whatever is accompanied with a loss of property, or the deprivation of health, is a misfortune; whatever diminishes the beauty or utility of objects is a mischance or mishap; mischance and mishap are misfortunes of trivial nature. A calamity is dreadful, a disaster maloncholy, a misfortune grievous or heavy, a mischance or mishap slight or trivial. The word "calamities", signifying primarily, it has been said, that which

destroys the standing corn, thence any injury, hurt, mischief, damage, loss, misfortune. It has been defined or employed as meaning a state of deep distress or misfortune, produced by some adverse circumstance or event; misery; any great misfortune or cause of loss or misery; usually an event or disaster that produces extensive evil; and by context, mischance or misfortune. It has been said that the word indicates or supposes a somewhat continuous state, produced not usually by the direct agency of man, but by natural causes, such as fire, flood, tempest, disease, etc.; that, while usually used in a physical sense, is not always so used; that it is not limited to distress occasioned by physical forces, but extends to an overwhelming adversity, such as widespread inability to obtain employment and distress occasioned thereby. The word has been held to include the devastation of a country by hurricanes or earthquakes, and the desolation of its inhabitants by famine or plague.

Judged in above background, collapse of the wall by heavy rain cannot be labelled a calamity.

6. The further question is whether it can be said to be an accident. Losses on account of accident presently, for most significant purposes, are governed by the concept of negligence. Yet as an independent basis of tort liability, negligence liability is of very recent origin. The early common law was almost exclusively preoccupied with the intentional wrongdoer, and gave little attention to inadvertent harm. Even later, the formalities of the writ system precluded fruitful speculation concerning theories of culpability, since the entrenched causes of action were rigidly defined by reference to the nature of the plaintiff's injury rather than the quality of the defendant's conduct. Negligence is a basis of liability rather than a single nominate tort. Some interests are protected against negligent interference, others are not. Negligence is a matter of risk, that is of recognisable danger of harm. This immediately raises the question "Risk to whom ?" and "Risk to what ?" For the purpose of dealing with those questions, the Courts have evolved a number of artificial concepts, like "duty of care" and "remoteness of damage", which are concerned with the basic problems of what harms are included within the scope of the unreasonable risk created by the defendant, and what interest the law deems worthy of protection against negligent interference in consonance with current notions of policy. A basic problem in negligence is, therefore, that of limitation of liability, and no less than four "control" or "hedging" devices are employed with this single purpose in view: "duty of care", "remoteness of damage", "contributory negligence" and "voluntary assumption of risk". These have been highlighted in *The Laws of Torts* by John G. Fleming, Eighth Edition (1992), page 103.

7. Negligence is conduct falling below the standard demanded for the protection of others against unreasonable risk of harm. This standard of conduct is ordinarily measured by what the reasonable person of ordinary prudence would do in the circumstances. The behaviour of individuals is so incalculable in its variety, and the possible combination of circumstances giving rise to a negligence

issue infinite, that it has been found undesirable, if not impossible, to formulate precise rules of conduct for all conceivable situations. In order to ensure a high degree of individualisation in the handling of negligence cases, the law has adopted an abstract formula, that of the "reasonable man", and has left to the Judge, the task of concretising and applying that standard in individual cases. The general standard of conduct required by law is a necessary complement of the legal concept of duty. There is not only the question "Did the defendant owe a duty to be careful?" but also "What precisely was required of him to discharge it?" Negligence is commonly defined to include both acts and omissions involving an unreasonable risk of harm, and for most purposes such generalisations provide an adequate working rule. In some respects, however, it is still important to advert to the distinction, deeply rooted in the common law and common sense casual notions, between misfeasance and non-feasance, between active misconduct working positive injury to others and passive inaction, falling merely to take positive steps to benefit others or to protect them from some impending harm. The borderline between active misconduct and passive inaction has never been easy to draw. What superficially looks like non-feasance is often, upon correct analysis, a case of misfeasance. So, creating a situation of peril, however, blamelessly, generates a consequential duty to adopt precautions before it culminates in injury. Only in situations of purest non-feasance does our modern law continue to disclaim any general duty of care. The distinction between misfeasance and non-feasance has also played a role in defining the responsibility of public authorities for harm caused to private individuals in exercising, or failing to exercise, statutory powers. While it had long been accepted that public authorities did not enjoy a blanket immunity for negligence in the performance of statutory powers, a distinction was drawn between positive injury caused by an active exercise of their powers and a mere failure to exercise them at all or adequately in a manner that would have averted injury. In the celebrated case of *Anns v. Merton L.B.C.* (1978) AC 728, it was observed that though true it was, the defendant was under no public duty, but the statutory power conferred on it for the health and safety of the public engendered a private duty, once having decided to exercise that power, to carry it out with due care. The Canadian and New Zealand courts, have followed the message of *Anns* without reservation. (See *Kamloops v. Nielson* (1984) 2 SCR 2; *Johnson v. Mount Albert* (1979) 2 NZLR 234 (CA).) However, the House of Lords overruled *Anns* on the ground that the scope of the duty, if any, did not include purely economic loss. The question whether a common law duty could be derived at all from the statutory settings at least for cases of actual physical damage was left open. (See *Murphy v. Brantwood D.C.* (1991) 1 AC 398.) Negligence is conduct, not a state of mind -- conduct which involves an unreasonable great risk of causing damage. There is no necessary element of fault in the sense of moral blameworthiness involved in a finding that a defendant has been negligent. It is negligence in the objective sense that is referred to in the well known definition of Alderson B.

"Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do."

(See *Blyth v. Birmingham Waterwork's Co.* (1856) 11 Exc 781 at 784). Lord Wright said :

"In strict legal analysis, negligence means more than heedless or careless conduct, whether in omission or commission, it properly connotes the complex concept of duty, breach and damage thereby suffered by the person to whom the duty was owing."

(See *Lochgelly Iron and Coal Co. v. M. Mullan* (1934) AC 1 25. Lord Wright's analysis is logically correct, but it does not avoid the need for looking at the tort of negligence as a whole; the three elements of duty, breach and damage may penetrate one another.

The general principle is that before negligence can be established it must be shown not only that the event was foreseeable but also that there is a reasonable likelihood of injury. To base liability upon foreseeability alone would be too severe, for, foreseeability does not include any idea of likelihood at all. It is not certainly necessary that the chances that damage will result should be greater than the chances that no damage will occur. In *Bradford v. Robinson Rentals Ltd.* (1967) 1 WLR 337, the defendant was held liable in a case, where although damage from frost-bite is unusual in England, because he ought to have foreseen the type, kind or order of harm in question -- namely damage from exceptionally cold weather. It was not required that he should foresee the degree of damage which in fact occurred. The general principle is that the risk has to be weighed against the measure necessary to eliminate it.

8. Coming to the facts of the case, it is not in dispute that the protective wall was put up by the opposite parties for protection of property of the Post Office. It was, therefore, duty bound to ensure safety of the wall, and to see that it in no manner endangers any property or person. The stand of the opposite parties is that the wall was in good condition, and there was no question of damage to any property and was at a fairly good distance from the public road. If the wall was in good condition as alleged, it would not have collapsed for a length of about 30 feet as acceptedly happened. It can certainly be inferred from the aforesaid facts that the wall was not in good condition. The inaction to maintain the wall in a good condition whereby the property or person were endangered, can be said to be an act of negligence, because proper care was not taken. In the circumstances, we hold the opposite parties liable for payment of compensation to the petitioner.

9. From the discharge certificate filed, we find that the petitioner was hospitalised for a period of one week and there was compound fracture of fibula on the left side. Considering the nature of the injury, we feel a compensation of

Rs. 15,000/- (fifteen thousand) would be adequate. By an interim order dated 21-1-1993 this Court had directed payment of Rs. 10,000/-, which acceptedly has been paid. The balance Rs. 5,000/- be paid to the petitioner by issuance of a National Savings Certificate for five years.

10. The writ application is accordingly disposed of.

S.K. Mohanty, J.

11. I agree.