

(1977) 05 J&K CK 0002
In the Jammu And Kashmir High Court
Case No : Civil Suit No. 61 of 1970

Rattan Devi Jamwal and Another	Vs	APPELLANT
Union of India (UOI) and Another		RESPONDENT

Date of Decision : 05-05-1977

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 2, Order 6 Rule 4
Fatal Accidents Act, 1855 — Section 1A, 2
Jammu and Kashmir Fatal Accidents Act, 1920 — Section 1A, 2

Citation : (1977) 05 J&K CK 0002

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

Bench : Single Bench

Advocate : S.P. Gupta, for the Appellant; Amar Chand, for the Respondent

Judgement

I.K. Kotwal, J.—This is a suit for recovery of Rupees One lac as damages, under the Fatal Accidents Act. The pleadings of the parties

which gave rise to the controversy in the case, may be briefly stated as below:

2. The Plaintiff brought the suit with the allegations that Plaintiff No. 1 is the mother and Plaintiff No. 2 is the father of one Raghudev Singh, that

Plaintiff No. 2 is a Major in the Army whose age was 46 years, that the age of the Plaintiff No. 1 was 39 years, that Raghudev Singh was born in

April, 1950, that he was the student of Higher Secondary final in Shri Ranbir Multipurposes Higher Secondary School, Jammu, till 25-1-1969, that

the said Raghudev Singh was brilliant at studies and possessed enviable health, that on 25-1-1969 the said Raghudev Singh was going on scooter

No. 6676 JKA to his home village Suchani when he was struck down by an army turck bearing No. 22324 N.R.D. which was being driven

rashly, negligently and recklessly by Defendant No. 2, that as a result of this

collision Raghudev Singh was injured and died on the spot, that Manjit Singh who was also seated on the pillion seat of the same scooter also received injuries, that Defendant No. 2 in flagrant disregard to the traffic rules was driving his vehicle on the wrong side of the road, that the army truck belonged to Defendant No. 1 and Defendant No. 2 was an employee of the Defendant No. 1, who was vicariously liable to pay damages claimed in the suit; that the Plaintiffs suffered rude shock on account of the death of their son and that keeping in view his brilliance in studies and stout enviable health, Raghudev Singh would have earned even Rs. 5,000/- per month. The different heads under which the Plaintiffs have claimed this amount of Rs. 1,00,000.00 are as below:

(a) Damages for the mental shock, pain and injury : Rs. 25,000.00

(b) Damages for the shortage of life of the deceased : Rs. 40,000.00

(c) Damages for the loss of financial aid, support and gain to the plaintiffs : Rs. 28,000.00

(d) Damages for the loss of glory and honour to the family of plaintiffs : Rs. 5,000.00

(e) Damages for the injury to the deceased : Rs. 1,000.00

(f) Damages for funeral expenses of the deceased : Rs. 1,000.00

3. Defendant No. 2 failed to appear in the court despite service. As such he was set ex-parte vide order of the Court dated 21-5-1971.

Defendant No. 1 however, submitted his written statement disputing the claim of the Plaintiffs and pleaded that Raghudev Singh was the son of the

Plaintiffs, that the age of Plaintiff No. 2 was admitted but that of Plaintiff No. 1 was denied due to want of knowledge, that Raghudev Singh was 19

years old at the time of the fatal accident, that on 25-1-1969 Raghudev Singh was driving the scooter and the collision took place between the

scooter and the army truck No. 22324 which was being driven by Defendant No. 2 near Ashok Kiln as a consequence of which Raghudev Singh

died on spot, that it was also admitted that for the accident Defendant No. 2 was to be blamed, that Defendant No. 1 was not vicariously liable to

pay the damages as Defendant No. 2 was driving the vehicle in discharge of statutory functions referable to and based on delegation of statutory

powers of the State to him, that Defendant No. 1 was also not vicariously liable as Defendant No. 1 had issued standing instructions to Defendant

No. 2 to drive the vehicle cautiously and that the quantum of damages claimed by the Plaintiffs was not according to law and facts.

4. On these pleading of the parties, the following issues came to be framed:

1. Whether Defendant No. 2 Bajrang Behari was driving truck No. 22324 N.R.D. rashly, recklessly and negligently and at a very fast and

prohibitive speed when he struck scooter No. 6676 JKA driven by Raghudev Singh deceased near Ashok Kiln between villages Taroor and

Sarons, about 12 or 13 miles from Jammu towards Samba on 25-1-1969 as a result of which Shri Manjit Singh the companion of Raghudev Singh

was injured and Raghudev Singh was killed on the spot ?

2. In case issue No. 1 is proved, what should be the amount of damages that the Plaintiffs can recover ?

3. In case issue Nos. 1 and 2 are proved, is Defendant No. 1 liable to pay the damages to the Plaintiffs ?

4. To what reliefs are the Plaintiffs entitled to ?

5. The parties joined the issues. Only the Plaintiffs led evidence in support of their case but no evidence was led by Defendant No. 1 inspite of

opportunities being given to it in that behalf with the result that the Defendant's evidence came to be closed by order of the court dated 9th May,

1974. The Plaintiffs examined P. Ws. Rajinder Nath, Lt. Col. Rachpal Singh, Kasturi Lai, Manjit Singh, Darshan Kapoor, Circle Inspector, Th.

Bhaj Singh, Subedar Sher Singh, Dr. Durga Datt and Moh'd Anwar. The statements of the Plaintiff. Rattan Devi and Suraj Singh were also

recorded as their own witnesses. Whereas Suraj Singh appeared in the court for making his statements, Plaintiff Rattan Devi's statement was

recorded through a Commissioner.

6. I have heard the learned Counsel for the parties, who have also taken pains to take me through the evidence on the file.

Issue No. 1.

7. There is ample evidence on the record to show that the accident occurred due to the rash and negligent driving of Defendant No. 2, who was

driving truck No. 22324 at the relevant time. P.W. Manjeet Singh is the person who has provided ocular testimony to the incident. This witness

was occupying the pillion seat of the scooter when the collision took place. According to this witness the accident took place when Defendant No.

2 tried to overtake another vehicle of the army convoy and had to come on the wrong side in the process of this over taking. According to this

witness Defendant No. 2 was driving the vehicle recklessly and at a very dangerous speed. Another witness to prove the negligent driving of

Defendant No. 2 is Darshan Kapoor, Circle Inspector, who on receiving the information immediately reported to the spot and found that the army

vehicle which was being driven by Defendant No. 2 was lying on the wrong side of the road after smashing the deceased Raghudev Singh who

was driving the scooter and leaving him dead on the spot. To the same effect is the statement of Mohammad Anwar who was at that relevant time

S.H.O. Police Station, Bishna. Even P.W. Sher Singh who was the Convoy Commander on the fateful day stated that the accident was caused

due to wrong driving of the vehicle by Defendant No. 2. This witness further went on to state that Defendant No. 2 was tried by the Court Martial

for this accident, and was found guilty. Muchless to speak of any evidence in rebuttal, even Defendant No. 1 has gone on the record as admitting

the fact that the entire blame for this accident lay on Defendant No. 2. In view of this over-whelming evidence there cannot be any other conclusion

except the one that the accident resulting in the death of Raghudev Singh

deceased occurred due to the rash reckless and negligent driving of the army vehicle by Defendant No. 2. This issue is therefore, decided in favour of the Plaintiffs and against the Defendants.

Issue No. 2

8. Before adverting to the peculiar facts and circumstances of the present case, it would be necessary to notice a few authorities to which reference

has been made by the learned Counsel for the parties to show as to what should be the basis for granting damages on account of fatal accident and

in what manner the quantum of those damages should be fixed. The learned Counsel for the Plaintiffs has relied upon C.K. Subra-manian Iyer and

Ors. v. T. Kunhikuttan Nair and Ors. 1970 A.C.J. 110 . In this case Rs. 30,000/- were claimed as damages on account of the death of an 8 years

old boy. The claimants were the father and mother of the boy and the claim was made both u/s 1-A and 2 of the Fatal Accidents Act, 1855

corresponding to Sections 1-A & 2 of the Jammu & Kashmir Fatal Accident Act. The District Judge passed a decree for Rs. 5,000/-only but the

High Court on appeal enhanced the amount from Rs. 5,000/- to 6,000/-i.e. Rs. 5,000/- u/s 1-A and Rs. 1,000/- u/s 2 of the Fatal Accidents Act.

In this case it was established that the boy was brilliant and his parents quite affluent to give him good education. The Supreme Court quoted with

approval the observation made by Lord Wright in the House of Lords in Davies v. Powell Duffryn Associated Collieries Ltd., (1942) A.C. 601

while commenting upon the provisions of English Fatal Accidents Act. 9 and 10 Vict. Ch. 93 known as Campbell's Acts which are in substance a

reproduction of Section 1-A of the Fatal Accidents Act. The observations are quoted as below:

The general nature of the remedy under the Fatal Accidents Acts has often been explained. These Acts 'provided a new cause of action and did

not merely regulate or enlarge an old one,' as Lord Sumner observed in Admiralty Commissioners v. S.S. Amerikd 1917 A.C. 38 . The claim is,

in the words of Bowen L.J., in the Vera Cruz (1884) 9 P.D. 96 (No. 2), for injuriously affecting family of the deceased. It is not a claim which the

deceased could have pursued in his own life time because it is for damages suffered not by himself, but by his family after his death. The Act of

1846, Section 2 provides that the action is to be for the benefit of the wife or

other members of the family, and the jury (or judge) are to give such damages as may be thought proportioned to the injury resulting to such parties from the death. The damages are to be based on the reasonable expectation of pecuniary benefit reducible to money value. In assessing the damages all circumstances which may be legitimately pleaded in diminution of the damages must be considered: *Grand Trunk Railway Co of Canada v. Jennings* (1888) 13 App. Cas. 800 at 804. The actual pecuniary loss of each individual entitled to sue can only be ascertained by balancing on the one hand, the loss to him of the future pecuniary benefit, and, on the other, any pecuniary advantage which from whatever source comes to him by reason of the death.

In the same judgment the Supreme Court quoted the following observations of Pollock, C.J. in *Franklin v. South Eastern Railway Co* (1862) 157

ER. 3 H. & N. 448 We do not say that it was necessary that actual benefit should have been derived, a reasonable expectation is enough and such

reasonable expectation might well exist, though from the father not being in need, the son had never done anything for him. On the other hand a

jury certainly ought not to make a guess in the matter, but ought to be satisfied that there has been a loss of sensible and appreciable pecuniary

benefit, which might have been reasonably expected from the continuance of the life.

The Supreme Court while holding that it was condition precedent to the maintenance of an action under the Fatal Accidents Act that the deceased

should have been actually earning money quoted with approval the observations of Lord Atkinson in *Taff Vale Railway Company v. Jenkins*

(1913) A.C. 1:

I think it has been well established by authority that all is necessary that a reasonable expectation of pecuniary benefit should be entertained by the

person who sues. It is quite true that the existence of this expectation is an inference of fact there must be a basis of fact from which the inference

can reasonably be drawn: but I wish to express my emphatic dissent from the proposition that it is necessary that two of the facts without which the

inference cannot be drawn are, first, that the deceased earned money in the past, and second, that he or she contributed to the support of the

Plaintiff. These are, no doubt, pregnant pieces of evidence, but they are only

pieces of evidence, and the necessary inference can, I think, be drawn from circumstances other than and different from them.

9. Again holding that in an action under the Act, it was not sufficient for the Plaintiff to prove that he lost by the death of the deceased a mere speculative possibility of pecuniary benefit but a reasonable probability of pecuniary advantage quoted with approval the observations of Lord Haldane in 1913 A.C. 1 (Supra), which ran thus:

The basis is not what has been called solatium that is to say, damages given for injured feelings or on the ground of sentiment, but damages based on compensation for a pecuniary loss. But then loss may be prospective, and it is quite clear that prospective loss may be taken into account. It has been said that this is qualified by the proposition that the child must be shown to have been earning something before any damages can be assessed. I know of no foundation in principle for that proposition either in the statute or in any doctrine of law which is applicable ; nor do I think it is really established by the authorities when you examine them... I have already indicated that in my view the real question is that which Willes, J., defines in one of the cases quoted to us, *Dalton v. South Eastern Rly Co.* (1958) 4 CB (NS) 296 , Aye or No: was there a reasonable expectation of pecuniary advantage.

After having dealt with the basis upon which damages should be granted to the dependents of the deceased, the Supreme Court held that assessment of damages was not free from doubt and was beset with certain difficulties. What should weigh with courts in assessing the damages was ruled by the court by referring to the commentaries of Winfield on Torts 7th Edition at pp. 135 and 136 which were reproduced in the judgment as under:

The starting point is the amount of the wages which the deceased was earning the ascertainment of which to some extent may depend on the regularity of his employment. Then there is an estimate of how much was required or expended for his own person and living expenses. The balance will give a datum or basic figure which will generally be turned into a lump sum by taking a number of years' purchase. That sum, however, has to be taxed down by having regard to the uncertainties, for instance, that the widow might have again married and thus ceased to be

dependent, and other like matters of speculation and doubt. 'The number of years' purchase is left fluid, from twelve to fifteen has been quite a

common multiple in the case of a healthy man, and the number should not be materially reduced by reason of the hazardous nature of the

occupation of the deceased man. These principles are, however, only appropriate where the deceased was the breadwinner of the family,

obviously they cannot be applied, for example, where the claim is in respect of a mere expectation of pecuniary benefit from the deceased or

where the deceased's contribution to the family was in kind and not in cash. In truth, each case must depend upon its own facts. In *Dobley v.*

Godwin (1955) A. W.L.R. 553 at P. 1103, the Plaintiff was the widowed mother of the deceased, an unmarried man of 29 of years of age, and he

had contributed substantially to her upkeep.

The Court of Appeal held that it would be wrong to Assess the damages on the same basis as if the Plaintiff were the widow of the deceased,

principally on the ground that it was likely that he would have married in due course and that then his contributions to his mother would have been

reduced.

10. Mr. Amarchand the learned Counsel for Defendant No. 1 has on the other hand relied upon *Municipal Corporation, Delhi Vs. Sobhag Wanti*

etc., , *Madhya Pradesh State Road Transport Corporation, Bairagarh, Bhopal v. Sudhakar and Anr.* 1967 A.C.J. 90 and *Narayan Jethabai v.*

The Municipal Commissioner and the Municipal Corporation of Bombay I. L. R 16 Bom. 254 .

11. In 1960 *Punjab (Supra)* the Plaintiff who was about 12 years of age at the time his father was killed in the fatal accident had claimed Rs.

56,000/- on account of pecuniary loss due to the death of his father and a sum of Rs. 14,400/- on account of his mental pain and sufferings. The

High Court did not allow the sum claimed on account of mental pain and sufferings on the ground that there was no scope whatever for awarding

damages to the Plaintiff on account of his own suffering or bereavement. The High Court also observed that there was also no scope for allowing

the Plaintiff damages for any pain and suffering which might have been suffered by the deceased himself before he died.

12. In 1967 A.C.J. 90 (*supra*) the court held that pecuniary loss could be

ascertained only by balancing on the one hand the loss to the claimants of the future pecuniary benefits and on the other any pecuniary advantage which from whatever source comes to them by reason of death. It was also held that the dependants must further prove that they did not lose a mere speculative or possibility of pecuniary benefit but a reasonable probability of such benefit. The court also observed that the basis for calculating the pecuniary loss to the dependents may depend upon data which may not be ascertained accurately but must necessarily be an estimate or even partly a conjecture. Similarity in I. L. R. 16 Bom (Supra) it was held that in an action under the Fatal Accidents Act No. 13 of 1855 no sum could be awarded in respect of funeral expenses for removal or disposal of the body or for the out-lay for ceremonial or obsequial purpose.

It therefore follows that while granting damages u/s 1-A. of the Fatal Accidents Act, which confines to Section 1-A of the State Act, the following principles should be kept in view:

(i) the position of each dependent of the deceased should be considered separately;

(ii) the damages are not to be given as solatium but should be calculated with reference to a reasonable expectation of pecuniary benefit or benefit

reducible to money from the continuance of life of the deceased. Damages claimed by dependents for their own suffering or for the loss occasioned

to them due to the death of the deceased which is not referable to the expectation of any such pecuniary benefit is outside the scope of the

provisions of the Fatal Accidents Act:

(iii) in awarding damages it is not necessary that the deceased was earning or that his dependents actually derived benefit out of his earnings. It is

enough if there was a reasonable expectation of such earnings or benefit.

(iv) the pecuniary loss occurring to the dependents due to the death of the deceased should stem not from a mere speculative possibility of

pecuniary benefit from the continuance of his life but only from a reasonable possibility of such pecuniary benefit;

(v) where the actual extent of such pecuniary loss cannot be ascertained accurately, the sum may be an estimate or partly a conjecture;

(vi) in assessing the damages all circumstances which may be legitimately pleaded in diminution of the damages should be considered;

(vii) the actual pecuniary loss of each dependent should be ascertained by balancing on the one hand the loss to him of the future pecuniary benefit-fits and on the other any pecuniary advantage which from whatever source comes to him by reason of the death.

13. Applying the aforesaid tests to the claims made by the Plaintiffs details whereof have been given by them in Para 12 of their plaint, we find that

the Plaintiffs are not entitled to claim damages on any ground other than the one pleaded by them in CI. (c) of para 12 of their plaint i.e., Rs.

28,000/- as damages for the loss of the financial aid, support and gain to the Plaintiffs. All other claims made in Clauses (a), (b), (d), (e) and (f) of

the said para of the plaint, I think relate to the pain or shock which is personal to the Plaintiffs or for other injuries which were personal to the

deceased. As already observed and as also held in the judgments referred heretofore such claims including damages for funeral expenses of the

deceased cannot be allowed u/s 1-A of the Fatal Accidents Act. All such claims are therefore rejected.

14. Now the only thing which remains to be determined is what should be the quantum of the damages for the loss which the Plaintiffs have

suffered on account of the financial aid, support or other gain which they would have got but for the death of the deceased. The Plaintiffs have

claimed Rs. 28,000/- on this score. It is true that no data is available on the basis of which this amount could be determined with a certain degree

of accuracy. The deceased was not an earning hand when he had a tryst with destiny. In these circumstances therefore, this amount shall have to

be ascertained partly on the basis of estimate and partly on the basis of conjectures. It is in evidence that the deceased was quite brilliant at his

studies besides possessing an excellent health. His father was a Major in the Army and presumably in a position to give pretty good education to

his son i.e. the deceased. Furthermore, the family of the deceased as appears from the statements of Bhag Singh and the Plaintiffs themselves was

possessed of talent and aptitude for army service. It is therefore, reasonable to infer that a brilliant boy like Raghudev Singh deceased would have

joined army service and risen to a high rank. The life expectancy in the Plaintiff's family is also quite high for which also there is ample evidence on

the record. Again the mother and father of the deceased were also quite young on the date when the accident took place, and they would be

reasonably expected to live upto the age of 70 or 80 years. There is also evidence on the record that the deceased could have lived upto 100

years. Reference may be made to the statements of P.Ws Lt. Col. Rachpal Singh, Th. Bhag Singh and Plaintiffs themselves.

15. In these circumstances one can reasonably expect that the Plaintiffs might have derived the benefit of not less than Rs. 25,000/- during their life

time out of the earnings of the deceased. In my view therefore, the Plaintiffs are entitled to get Rs. 25,000/- only as dahiages on account of the

death of their son Raghudev Singh.

Issue No. 3:

16. The principle is now well established that the state is vicariously liable to pay damages to the dependents of the deceased on account of the

tortious acts of its employees in normal circumstances. Mr. Amar Chand, the learned Counsel for the Defendant No. 1, has however argued that in

the present case Defendant No. 1 Union of India, is not vicariously liable for tortious act of Defendant No. 2. He pleads exemption on two

grounds:

(i) that Defendant No. 2 was driving the military vehicle in discharge of his sovereign functions of the State on the basis of delegated authority ; and

(ii) that Defendant No. 2 had standing instructions from the Defendant No. 1 not to drive the vehicle negligently, rashly or recklessly.

In order to substantiate the first ground the learned Counsel has relied upon the statements of two witnesses for the Plaintiffs, namely. Sub. Sher

Singh and Darshan Kapur, Circle Inspector. The statement of Sub. Sher Singh is to the effect that the truck driven by Defendant No. 2 was

carrying M.E.S. supplies of coal-dust which was unloaded near Jammu air-field, Darshan Kapoor, Circle Inspector has stated that the truck was

carrying army supplies. On the basis of these two statements the learned Counsel has argued that in fact the coal-dust was needed for repairing the

air field which was a sovereign function of the Union of India. It cannot be gainsaid that every act of an employee of a state is not necessarily

referable to the discharge of sovereign lunctions of a State as in the present set up the functions of the State have been diversified which now

include functions like trade, commerce etc. In order that a State may successfully rely upon the plea of its sovereign functions it must specifically

plead all those material facts in its written statement which in its opinion constitutes an act committed by its employee in discharge of the sovereign

functions of the State. Order 6 Rule 2 of the CPC provides that every pleading shall contain a statement in a concise form of all the material facts

on which the party pleadings relies for his claim or defence though it is not necessary to state the evidence by which those facts are to be proved.

Again Order 6 Rule 4 CPC provides that all cases in which the party pleading relies on misrepresentation, fraud, breach of trust, wilful default or

undue influence and in all other cases also in which such particulars may be necessary the party shall plead those particulars. Rule 5 of the same

order enables the party to submit better particulars of any matter stated in any pleading. Instances are not lacking where courts have insisted upon

pleading of particulars in respect of certain claims and even gone to the extent of dismissing the suits or rejecting the defence, where such

particulars had not been pleaded. Such instances are not far to seek. In cases where custom is pleaded the courts have always insisted that the

party pleading a custom shall not be allowed to succeed on the basis of evidence led by it howsoever cogent or voluminous the same may be

unless it has concisely pleaded the particulars of such custom. In my opinion where the State pleads immunity from paying damages on the ground

of Sovereign functions of the State it is one of those ""other cases in which particulars may be necessary"" within the meaning of Rule 4 of Order 6 of

the Code of Civil Procedure. Defendant No. 1 has not said even a word beyond pleading that ""at the time of above accident Defendant No. 2 was

driving Defendant No. 1's military vehicle in discharge of sovereign functions referable to and based on delegation of sovereign powers of the State

to him"". In the absence of any such particulars in the written statement, nothing can be left to guessing and Defendant No. 1 cannot be permitted to

take advantage of the casual statements made by P.Ws. Sub. Sher Singh and Darshan Kapur in that behalf. Defendant No. 1 would be permitted

to take advantage of any evidence on the record only to the extent he has taken a plea to which that evidence may be relevant.. Furthermore there

is nothing on the record to show that the coal-dust was being carried for the purpose of repairing an air-field or for the purpose of clearing a

debris. This can be anybody's guess. Not a single sentence occurs on the file to show that this coal-dust was meant for an airfield. In these

circumstances therefore, I am relieved of expressing my opinion on the point as to whether or not even carrying coal-dust for repairing an air-field

amounts to doing anything in discharge of sovereign functions of the State. There being no proper pleading in support of the aforesaid plea taken

by Defendant No. 1 the same cannot be allowed to prevail.

17. Regarding the second contention of the learned Counsel for the Defendant No. 1, suffice it to say that there is no proof on the file to show that

any instructions as contained in the booklet ""Military Motor Vehicle Driver's licence"" which has been placed on the file were actually conveyed to

Defendant No. 2 by Defendant No. 1. The question whether any such instructions were issued to Defendant No. 2 which absolved Defendant No.

1 from his vicarious responsibility is not a pure question of law but a mixed question of law and facts. As already stated the fact as to whether

Defendant No. 2 was also provided a copy of the booklet or even otherwise conveyed the instructions contained therein, not having been

established by evidence, the legal proposition propounded by the learned Counsel for Defendant No. 1 cannot survive. It is therefore, held that

Defendant No. 1 is vicariously liable to pay damages to the Plaintiffs on account of the accident caused by Defendant No. 2, its employee. This

issue is therefore, decided in favour of the Plaintiffs and against the Defendants.

Issue No. 4:

18. In the result a decree in the amount of Rs. 25,000/- is passed in favour of the Plaintiffs and against the Defendants with proportionate costs.

The decree against Defendant No. 2 shall be however, ex parte. The Defendants are given three months time to pay the decretal amount to the

Plaintiffs.