

(2005) 06 BOM CK 0054

In the Bombay High Court

Case No : Writ Petition No. 2004 of 2004

Seema Ganesh Uikey

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

Date of Decision : 06-06-2005

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Citation : (2005) 4 ACC 500 : (2007) ACJ 1090 : (2005) 4 ALLMR 919 : (2005) 5 BomCR 117 : (2006) 3 CivCC 533 : (2005) 4 MhLj 559 : (2006) 4 RCR(Civil) 158

Hon'ble Judges : Patel J.N., J;Brahme P.S., J

Bench : Division Bench

Advocate : A.S. Manohar, for the Appellant; B.H. Dangre A.G.P., for respondent Nos. 1 to 3 and M.V. Samarth, for the Respondent

Judgement

Patel J.N., J.—The petitioner is widow of Ganesh Vikey, who has filed this petition seeking compensation for the death of her husband who died in a fatal accident in the compound in the office of the Collector, Nagpur, i.e. respondent No. 2 being crushed under the tree, for herself and on behalf of her children and mother-in law.

2. On the fateful day, i.e. 6-8-2002 the petitioner's husband Ganesh Ramdas Vikey, Police Constable Buckle No. 777, who was at the relevant time deputed by Police Department as a bodyguard of Shri Vilasraoji Muttemwar, the then Member of Parliament, happened to visit the office of the Collector at about 3.30 P.M. after completing his duty and fell victim to a tamarind tree in the compound of the office of the Collector which got uprooted and collapsed and crushed him under it. A Toyota Qualis motor car also got damaged with its driver getting trapped into it and one Advocate Shastri had a lucky escape as the tree fell moments after he had alighted from his vehicle and had gone into a nearby building. People rescued the driver of the motor car but the petitioner's husband died on the spot. The incident attracted people including Shri Narayan Chitnavis,

a former Public Prosecutor and an Advocate who also became victim of another tree (which also came crushing down) along with other persons who were injured. So far as the Advocate Chitnavis was concerned, he was rushed to hospital where he succumbed to his injuries at about 6.30 P.M.

3. The widow of Mr. Narayan Chitnavis, Advocate filed a petition in this Court and this Court in the case of Smt. Vandana Narayanrao Chitnavis v. State of Maharashtra and Ors. Writ Petition No. 4508/02, decided on 6-2-2004 reported in 2004 B.C.I. (N.B.)294 found the respondents liable to compensate the petitioner and awarded compensation by directing the respondent State to pay a sum of Rupees Five Lakhs to the petitioner within a period of four weeks from the date of receipts of the order and the petition came to be disposed of with no order as to costs. The State challenged the decision before the Hon'ble Supreme Court by filing S.L.P.(C) No. 11553/04 decided on 19-7-2004. The Supreme Court dismissed the SLP in limine. The petitioner, therefore, claims that she is entitled for compensation in the sum of Rs. 20,00,000/- as at the relevant time her husband was working as a Police Constable drawing a monthly salary of Rs. 7000/-, was 38 years of age and considering his age of retirement as 58 years he had 20 years to go and if future prospects are also taken into consideration he would have received much higher salary with due increments on account of promotions and other retiral benefits like gratuity and provident fund, in addition to compensation on other counts which are commonly accepted in case of fatal accidents like funeral expenses, loss of consortium and estate.

4. It is the case of the petitioner that her husband was strongly built, hale and hearty. He was having robust health and he suffered from no ailment of any type and it was only because of the negligence on the part of the respondent authorities that he met with an untimely death being crushed under a tree which fell on him. It is contended on behalf of the petitioner that the respondents had duty of care that their premises are safe as many people visit the office of the Collector for their work and the State ought to have ensured that the trees in the premises of the Collectorate were safe. It has come on record and which is not disputed that earlier to the said incident which took lives of the petitioner's husband and also that of Advocate Narayan Chitnavis on the fateful day when this unfortunate incident of falling of trees took place, the association of petition writers sensing danger from the old dry trees had made several representations to the authorities but no cognizance was taken and no heed was paid to it and, therefore, this clearly demonstrates the negligence on the part of the authorities in their discharge of duty of care to keep the premises safe. It is submitted that there is no general rule granting public authorities immunity from liability in negligence just because they are public, not private bodies and that the indisputed facts which are brought on record clearly show and demonstrate that the husband of the petitioner died because the public body has failed to take necessary care in keeping the premises free of danger by their negligence which resulted in falling of the trees as a result of which the petitioner's husband met a fatal accident and died on the spot.

5. It is the petitioner's case that her late husband has left behind one daughter Ku. Yogita, aged 8 years, a son Amit, aged 5 years, besides Smt. Shantabai her mother-in-law, i.e mother of the deceased and the fatal accident which took place due to the negligence of the respondent has placed the petitioner and her family members in an extremely pitiable condition which deprived them of not only love and affection of her husband, father and son but also their maintenance, education and basic needs of the family.

6. It is the case of the petitioner that though the petitioner made repeated representations to the authorities, copies of which are annexed to the petition like representations made to the Chief Minister of Maharashtra with recommendation from Mr. Vilasrao Muttemwar, Member of Parliament, the then Mayor of the city of Nagpur Corporation, except for placing the petitioner in the waiting list of persons who were entitled for employment on compassionate grounds, nothing much has been done. The petitioner, therefore, contends that as the widow of the late Advocate Narayan Chitnavis has been granted compensation, the petitioner is also entitled for the same.

7. In reply to the petition, the Collector has filed his affidavit on behalf of the respondent Nos. 1 and 2. Respondent No. 3 has filed a separate affidavit and so also respondent No. 4. It is contended on their behalf that the petitioner is not entitled for any compensation though they do not dispute the incident. In so far as the respondent No. 3 is concerned, he has taken a plea that there was no duty of care in so far as the tree which fell and crushed the petitioner's husband, as according to them, it was a green living tree and it being a rainy season, it has fallen on its own and it was an act of God for which the respondents cannot be held responsible. It is specifically contended that though the Executive Engineer, P.W.D., Nagpur Division, Nagpur is the authority and is expected to carry out the maintenance of office building in the collectorate compound, he was not a competent authority for the purpose of maintenance of trees in the limits of Nagpur Municipal Corporation. Further it is claimed that it was not necessary to go and remove the green trees about which there was no specific complaint from any quarter that it was dangerous to the life of the persons visiting the compound of the collectorate at Nagpur. There is a conflicting stand taken by the public Works Department and the office of the Collector in the matter of the incident. The public Works Department has accepted that there were two incidents of falling of trees on the relevant day, the first being that of tamarind tree under which the petitioner's husband was crushed and within 15 minutes another tree fell down which was a dried tree under which Advocate Narayan Chitnavis suffered fatal injuries as a result of which he died in the hospital; whereas on the part of the Collector it is stated that the petitioner's husband and Advocate Narayan Chitnavis died under the same tree. The correct fact situation is well accepted in the petition decided by this Court which was filed by Smt. Vandana Chitnavis, the widow of Advocate Narayan Chitnavis, that there were two separate incidents and not one as contended by the Collector.

8. Public Works Department is contesting the petition on the plea of vis Major and according to them, they cannot be held for negligence in discharging their duty of care if the tree under which the petitioner's husband got crushed was a live tree and it was just unfortunate that it got uprooted and fell. In so far as the respondent State through the affidavit of the Collector is concerned, they have taken a very peculiar stand by defending the case on the ground that the deceased husband of the petitioner was a State Government servant and he died while in service and, therefore, the present petitioner is entitled to get all consequential benefits, i.e. family pension, gratuity, group insurance scheme amount, provident fund, leave salary, etc., in addition to employment on compassionate grounds. Therefore, she is not entitled to get monetary compensation other than those indicated above being the legal heir of deceased Government servant. It has been reiterated that the case of Smt Vandana Chitnavis in writ Petition No. 4508/02 that arose out of the same unfortunate incident cannot be termed or labelled as an identical case for grant of compensation to the petitioner as the petitioner's deceased husband was a Government employee and would get all the consequential , monetary benefits including employment on compassionate grounds and, therefore, the petition deserves to be dismissed,

9. The stand taken by the Tree Officer, i.e. respondent No. 4 is that it was not brought to the notice of the Tree Officer that the trees in question were in a dangerous state so that they could have granted permission for its felling and as nobody moved such an application to the Tree Officer, he cannot be held responsible for negligence of duty. The respondent No. 4 has given instances that applications were made to the Tree Authority and they had granted permission to fell such trees.

10. Mr. A.S. Manohar, learned Counsel appearing for the petitioner, submitted that in view of the undisputed fact that the petitioner's husband died as a result of fatal injuries suffered by him due to falling of the tree within the compound of respondent No. 2 Collector and in the absence of any material being brought on record that the tree was healthy and would not have fallen, the plea taken by the respondent No. 3 that it was an act of God cannot be accepted. It is submitted that merely by contending that there was no complaint in respect of the tree under which the petitioner's husband got crushed and suffered the fatal accident and died cannot entitle them to raise a plea of vis Major (act of God) and, therefore, in absence of any defence, there can be no hesitation on the part of the respondents to arrive at a conclusion that the falling of the tree was due to the negligence on the part of the respondents in discharging their duty of care and, therefore, they are under strict liability to compensate the petitioner and the family of the deceased as heal in the case of Smt. Vandana Chitnavis (cited supra).

11. Another submission made by Mr. Manohar is that this Court in the earlier petition has considered the principle of "strict liability" in reference to the

negligence on the part of authorities regarding their duty of care and has held them liable to pay compensation which was challenged by preferring a SLP in the Supreme Court which came to be dismissed and there would be no justification in denying compensation to the petitioner whose husband died in similar circumstances which is not disputed.

12. Thirdly, it is submitted that merely because the petitioner's husband was a Government servant, does not deprive the petitioner and family members of the petitioner's husband from claiming compensation. It is submitted that whatever has been contended by the Collector in his affidavit relates to the pecuniary benefits which even otherwise the petitioner and her family would have got which has nothing to do with the accidental death of the petitioner and, therefore, that cannot be taken into consideration while considering grant of compensation to the petitioner and her family members arising out of the fatal accident suffered by him due to the negligence on the part of the respondents and, therefore, the petition should be allowed with costs.

13. It is submitted that there is no dispute relating to the salary of the petitioner's husband, the years of service he would have put in and the benefits he would have derived in service and on retirement. The issue is relating to his untimely death due to fatal accident for which the family is not only deprived of his love and affection but has left the children orphan and if they are not compensated, they will be required to suffer untold miseries. It is specifically pointed out that merely the Collector having listed the name of the petitioner in the waiting list of persons who are in queue for being appointed on compassionate grounds, does not in any manner affect the right of the petitioner to claim compensation.

14. Mrs. B.H. Dangre, learned Assistant Government Pleader appearing for the respondent State, Collector and Public Works Department, mainly defended the action on two counts. Firstly the unfortunate incident was an act of God and secondly, that the petitioner and her family does not suffer from penury due to loss of her husband having received all the benefits and even the assurance that she would be provided with employment so that she can take care of the family and, therefore, the petition deserves to be dismissed. In respect of the claim of compensation, it is submitted that it is highly inflated and without any basis and it deserves to be rejected.

15. One of the grounds on which the respondent No. 2 Collector on behalf of the State has contested the claim of damages is that the petitioner being Government servant would not be entitled for compensation as his family gets all the benefits. This issue was dealt by the Supreme Court in the decision rendered in Mrs. Helen C. Rebello and Others Vs. Maharashtra State Road Transport Corpn. and Another, , in which it held that common law principle of adjusting the pecuniary advantages coming from whatever source by reason of death, held, has to be interpreted in such case as referring to pecuniary advantage coming on account of accidental death and not other forms of death. Hence, provident fund,

family pension, cash balance, shares, fixed deposits, etc. cannot be termed as pecuniary advantages for the purpose of Motor Vehicles Act. The ratio which emerges from this decision is that if heirs are entitled to receive such benefits, amount of fund irrespective of the accidental death, then there is no correlation between the two, though these are all pecuniary advantages receivable by the heirs on account of one's death, but all these have no correlation with the amount receivable under a statute occasioned on account of accidental death. Therefore, in our opinion, all these benefits which a Government servant or his family members are otherwise entitled on his retirement or premature death have no correlation with the amount to which they are entitled by way of compensation in a case of death due to fatal accident caused due to negligence of the respondents to perform their duty of care. To put it in other words, the compensation is to be computed by ignoring such benefits and, therefore, we repel the contention of the respondents that the petitioner is not entitled for compensation/damages merely because the deceased was a Government servant and the petitioner and his family has received monetary benefits which accrued to them by virtue of his service conditions and which has nothing to do with the accidental death suffered by him as a part of negligence on the part of the respondents.

16. This Court in the case of Mrs. Vandana Chitnavis has taken into consideration three cases of the Apex Court, i.e. judgment rendered in ABL International Ltd. and Anr. v. Export Credit Guarantee Corporation of India Ltd. and Ors., 2003 (10) SCALE 815 which does not prevent an aggrieved or victim to invoke the extraordinary jurisdiction of this Court under Articles 226 and 227 of the Constitution of India and claim compensation and it can do so in appropriate case and there is no absolute bar for entertaining a Writ Petition in such matters. By further placing reliance on the case of M.S. Grewal and Another Vs. Deep Chand Sood and Others, ; the Court has also taken into consideration the defence raised by the respondents that it was an act of God and came to a finding that though it was brought to the notice of the authorities, they have been negligent towards performing their duty and such a defence is not available to the respondents.

17. In our opinion, this plea of act of God is not available to the respondents for the very reason that the respondents have not taken any specific defence but have merely raised a plea of act of God. It is an accepted position that complaints were made by the association of petition writers in respect of the trees in the compound of the Collector being dangerous and unsafe and in spite of that respondent No. 3 did not act and ignored the complaints which clearly establishes the negligence on their part in performing their duty. It does not lie in their mouth to plead that the tamarind tree was a green tree. For a common man, a tree may appear to be green but that by itself does not reflect its health. The Supreme Court in its decision rendered in the case of The Municipal Corporation of Delhi Vs. Smt. Sushila Devi and Others, which was heard along with the appeal preferred by Sushila Devi, did hold that the Municipal

Corporation was liable on account of negligence in a case where a scooter rider got injured because of a branch of roadside tree, resulting in serious injuries and he died the next day in the hospital considering it to be a case of negligence in performing its duty under the common law and hence, liable in damages to the heirs of the deceased. We, therefore, do not find such a plea can come to the rescue of the respondents. The Supreme Court in paragraph 13 of the said decision observed as under: -

"13. By a catena of decisions, the law is well settled that if there is a tree standing on the defendant's land which is dried or dead and for that reason may fall and the defect is one which is either known or should have been known to the defendant, then the defendant is liable for an injury caused by the fall of the tree (see *Prown v. Harrison*, *Quinn v. Scott* and *Mackie v. Dumbartonshire Country Council*). The duty of the owner/occupier of the premises by the side of the road whereon persons lawfully passed by, extends to guarding against what may happen just by the side of the premises on account of anything dangerous on the premises. The premises must be maintained in a state of repair. The owner/occupier cannot escape the liability for injury caused by any dangerous thing existing on the premises by pleading that he had employed a competent person to keep the premises in safe repairs. In *Municipal Corporation of Delhi v. Subhagwanti*, a clock tower which was 80 years old collapsed in Chandni chowk, Delhi causing the death of number of persons. Their Lordships held that the owner could not be permitted to take a defence that he neither knew nor ought to have known the danger. "The owner is legally responsible irrespective of whether the damage is caused by a patent or a latent defect" said Their Lordships. In our opinion, the said principle is applicable to the owner of a tree standing by the side of a road. If the tree is dangerous in the sense that on account of any disease or being dead the tree or its branch is likely to fall and thereby injure any passer-by then such a tree or branch must be removed so as to avert the danger to life. It is pertinent to note that it is not the defence of the Municipal Corporation that vis major or act of God such as a storm, tempest, lightning or extraordinary heavy rain had occurred causing the fall of the branch of the tree and hence the Corporation was not liable."

18. In the present case, except for standing that it was a rainy season, the respondents have not come up with a specific plea that on that particular day when these unfortunate incidents occurred taking lives of two persons, there was a storm, tempest, lightning or extraordinary heavy rains had occurred causing the fall of the trees and hence, the respondents were not liable. Therefore, this plea of act of God raised in defence by the respondents cannot be accepted.

19. The Supreme Court has gone a step ahead while dealing with the case of *Madhya Pradesh Electricity Board Vs. Shail Kumari and Others*, on which reliance has been placed by this Court while dealing with the petition filed by Smt. Vandana Chitnavis and held as under:

"Even assuming that all safety measures had been adopted, a person

undertaking an activity involving hazardous or risky exposure to human life, is liable under law of torts to compensate for the injury suffered by any other person, irrespective of any negligence or carelessness on the part of the managers of such undertaking. The basis of such liability is the foreseeable risk inherent in the very nature of such activity. The liability cast on such person is known, in law, as "strict liability". It differs from the liability which arises on account of the negligence or fault in this way, i.e the concept of negligence comprehends that the foreseeable harm could be avoided by taking reasonable precautions.... One of the seven exceptions to the doctrine of strict liability is : "act of stranger, i.e. if the escape was caused by the unforeseeable act of a stranger, the rule does not apply". But that exception is not available to the Board as the act attributed to the third respondent should reasonably have been anticipated or at any rate its consequences should have been prevented by the appellant Board."

20. In another case of Union of India v. Lt .Col. Bhagat Singh and Ors., reported in 2003 (10) S.C.C. 597 the Court has confirmed the findings of the Court below and upheld the liability of the Union of India to pay damages/compensation for death, consequent to head injury received by the pillion rider in an accident on account of a damaged road which lacked proper repairs and no signs to indicate the danger were displayed so as to caution user of the road. Therefore, if all these decisions are taken into consideration, the principle which emerges is that the negligence on the part of the respondents in performing their duty of care is sufficient to hold them vicariously liable to pay compensation to the legal heirs of the victim. The incident as such, being not disputed, the doctrine of Res Ipsa Loquitur clearly governs the case at hand. There is no plausible explanation on the part of the respondents as to how and why the occurrence took place. The doctrine is squarely applicable to the case as it is not common and it does not ordinarily happen of proper care is being taken that trees fall for no reason and there can be no dispute about liability of the respondents as the premises being within the exclusive control of the respondents it was their duty of care to see that the same is safe as it is within the clear knowledge of the respondents that the office of the Collector is visited and frequented by members of the public. This is a case where there is reasonable evidence of negligence on the part of the respondents and the nature of accident, i.e. falling of trees, was such as in the ordinary course of things does not happen if the respondents who have the management could have used proper care which they obviously failed, in spite of there being several complaints by the association of petition writers. This affords reasonable evidence in the absence of explanation by the respondents that the two fatal accidents arose from want of care. Therefore, we have no hesitation to hold that the respondents are liable to compensate the petitioner.

21. The next question which requires consideration is the computation of damages. The decision rendered by the Supreme Court in General Manager, Kerala State Road Transport Corporation, Trivandrum Vs. Mrs. Susamma Thomas and others, laid down the broad principles and parameters under which the Court

should determine the damages and it held:-

"The determination of the quantum of compensation must answer what contemporary society "would deem to be a fair sum such as would allow the wrongdoer to hold up his head among his neighbours and say with their approval that he has done the fair thing." The amount awarded must not be niggardly since the "law values life and limb in a free society in generous scales". All this means that the sum awarded must be fair and reasonable by accepted legal standards."

"In fatal accident action the measure of damage is the pecuniary loss suffered and is likely to be suffered by each dependent as a result of the death. Thus except where there is express statutory directions to the contrary, the damages to be awarded to a dependent of a deceased person under the Fatal Accidents Acts must take into account any pecuniary benefits accruing to that dependent in consequence of the death of the deceased. It is the net loss in balance which constitutes the measures of damages."

22. In the present case, though the petitioner has claimed a sum of Rs. 20,00,000/- as compensation, in our opinion, this would not be proper. We, therefore, assess the damages taking into consideration the salary drawn by the petitioner's husband, his age at the time of his death and the fact that he would have continued to serve till the age of 58 years, i.e. he had 20 years of service left, we are of the opinion that after permissible deductions, a sum of Rs. 5,00,000/- (Rupees Five Lakhs) would be just, proper and reasonable.

23. We, therefore, direct the respondent State to pay a sum of Rs. 5,00,000/- to the petitioner, her two children and Smt. Shantabai, mother of deceased in keeping with the principle laid down by the Supreme Court in General Manager, Kerala State Road Transport Corporation, Trivandrum Vs. Mrs. Susamma Thomas and others, . We direct that a sum of Rs. 2,00,000/- (Rupees Two Lakhs) each shall be deposited in a term deposits in the name of minor children Ku. Yogita Vikey and Amit Vikey in a Nationalised Bank, Post Office or Reserve Bank of India Bonds whichever is suitable and gives the maximum benefits in the form of interest, which they will be entitled to withdraw on their attaining majority with liberty to the petitioners to withdraw the quarterly interest on the said term deposit for the purpose of the education and upbringing of the two minor children till she gets employment on compassionate grounds. The balance amount of Rs. One Lakh be paid in cash in the sum of Rs. 50,000/- each to the petitioner and the mother of the deceased Smt. Shantabai by crediting it in the Bank account to be opened by them in their name. The compensation of Rs. Five Lakhs awarded by this Court shall carry a simple interest " 6% per annum from the date of filing of this petition till the same is paid to the petitioner as directed by this Court. This Court further directs the respondents State to disburse the payment within a period of six weeks from the date of pronouncement of this judgment and provide compassionate appointment to the petitioner before she attains the age of 35 years, which is the upper age limit for providing

employment in Government service for persons belonging to Scheduled Tribe as the petitioner claims that she belongs to caste "Gond" which is recognised as Scheduled Tribe in any Government department on the post suitable for her considering her educational qualification. This further order of providing employment is passed in favour of the petitioner by giving directions to the respondents as otherwise the petitioner would never get employment for indefinite period and as she has to maintain her two minor children who were at the time of filing the petition aged 8 and 5 years.

24. Rule is made absolute in the aforesaid terms with costs.