

(1997) 09 GAU CK 0052

In the Gauhati High Court

Case No : F.A No. 29 of 1991 and Cross Objection No. 5 of 1991

State of Assam

APPELLANT

Vs

Sunanda Kalita and Another

RESPONDENT

Date of Decision : 23-09-1997

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 80

Citation : (1998) 1 GLT 112

Hon'ble Judges : J.N. Sharma, J

Bench : Single Bench

Advocate : A.K. Goswami, G.A, for the Appellant; B.K. Goswami, T. Goswami and B.M. Sarma, for the Respondent

Judgement

J.N. Sarma, J.—This appeal has been filed against the judgment and decree dated 12.12.90 passed by the learned District Judge at Nalbari in Money Suit No. 11 of 1986. By the impugned decree the learned Judge decreed the suit for Rs. 82,000/-. Hence, this appeal.

2. The case of the Plaintiff was that they are permanent residents of village Tantra Sankar, Mouza Khata having both movable and immovable properties described in the Schedule and to protect their hearth and home, the Govt. of Assam constructed an embankment on the bank of river Pagladia in 1954 and as a result of construction of the aforesaid embankment a big artificial water reservoir was created. Their allegation is that the western side of the river pagladia's embankment was not properly maintained and repaired as required considering the potential danger of great magnitude to the people residing in the vicinity of the embankment. On 15.9.84 in the embankment near the house of the Plaintiff leakage of water was caused resulting the breach of the embankment about 500 metres and this breach allowed high water flood which washed away the entire belongings of the Plaintiffs. The Defendant has opposed the suit on some fact and law and mainly on the ground that it was an act of God and there was unprecedented flood and there was no lapse whatsoever on the part

of the personnel of E &D Deptt. They could not do anything to save the situation.

3. As many as 9 issues were framed in the suit and they are as follows:

- i) Whether there is any cause of action ?
- ii) Whether the suit is maintainable in its present form ?
- iii) Whether the suit is bad for non-joinder of parties ?
- iv) Is the suit barred by limitation ?
- v) Is the notice u/s 80 CPC properly served ?
- vi) Is there any negligence on the part of the department concerned in properly maintaining and strengthening the embank in question ?
- vii) Whether all the properties of the Plaintiffs were damaged by flood river of Pagladia ?
- viii) Whether the Plaintiffs are entitled to compensation ?
- ix) To what relief, if any parties are entitled?

Following witnesses were examined:

PW1 -Sunanda Kalita

this witness was subsequently again examined on 19.7.89. in the suits.

PW 2 - Kalindra Barman

DW 1 -Chandradhar Kalita.

DW 2 - Niranjan Goswami.

DW 3 - Harendra Nath Bora

DW4 - Karuna Baxi.

Following documents were exhibited:

Exts. 1,2 and 3 - Notices u/s 80 and Postal receipt and Postal A/D Card.

Ext. "ka" - The statement produced by Executive Engineer, Nalbari (E & D) Division, Nalbari.

Exts. "kha"Ga"& Cha Certified copy of statements made by the Executive Engineer Nalbari (E & D) Divn. Nalbari.

(these statements are regarding the steps taken by the authority for the maintenance of the embankment).

Ext. "Yunga" - Letter from the Member Flood Control Commissioner, Assam, Guwahati.

Ext. "Chaa" - 2 Nos. of sketch Map made by the SDC, Nalbari Circle.

4. On consideration of the materials on record, the learned District Judge decided Issue Nos. 1, 2 and 3 in favour of the Plaintiff. Regarding Issue No. 4 it was found that the suit is not barred by limitation. Regarding Issue No. 5 it was found that valid notice u/s 80 was issued and served on the authority. Issue No. 6 is the vital issue regarding negligence. It was found by the learned Judge as follows:

It is not expected that in the occurring of such magnitude of danger, they should have left the place keeping the people to the mercy of God and they were to continue in their effort or giving call to the head of the department for more labourers and there, was some amount of lapse or negligence and this issue is decided in favour of the Plaintiff.

5. Regarding Issue No. 7 it was found that the Plaintiff failed to prove the damage as claimed by him and the learned Judge without ascertaining the damage, decreed the suit for 1/4th of the claim i.e. for an amount of Rs. 82,000/-. The finding of the learned Judge is as follows:

Thus, it is seen that Plaintiff has not furnished detailed documents or date to come to a conclusion regarding his actual loss or damage on the contrary the Govt. assessment or assessment by any competent private person is evaded. Under such circumstances, the proper assessment in my opinion will be 1/4th of total amount claimed which would be reasonable and proper under the facts and circumstances described above and as a result an amount of Rs. 82,000/-(1/4th of 324200/-) is liable to be decreed.

6. A Cross Objection was filed claiming the entire amount of the suit and that Cross Objection is also taken up for hearing.

7. I have heard Mr. A.K. Goswami, learned Counsel for the Appellant and Mr. B.K. Goswami, learned Counsel for Respondents.

Mr. A.K. Goswami, learned Counsel submits that the present claim is a claim based on tort and if it is an act of God, for this act of God, the State cannot be held responsible. In this connection, Mr. Goswami places reliance at page 271 of Street on Torts in 7th Edition, where it is stated as follows:

This defence has received in connection with this tort a prominence out of all proportion to its practical importance. If an escape is caused, through natural causes and without human intervention, in "circumstances which no human foresight can provide against, and of which human prudence is not bound to recognise the possibility" there is then said to exist the defence of Act of God.

In Winfield on Tort, it is pointed out that the act of God is a well settled defence in action for strict liability under the rule in Rylands V. Fletcher. There was another case in Nichols V. Marsland. There a breach was caused directly due to natural causes. In that case the Defendant had an artificial lake on her land. An extraordinary rainfall, greater and more violent than any within the living memory of witnesses, caused the lake to overflow to the Plaintiff's property. The jury found that there was no negligence in the construction or maintenance of

the artificial lake, that the rainfall was most excessive and that the escape was caused by an act of God. The Defendant was held not liable. This case later on was criticised. Winfield pointed out that an act of God is an event which could not reasonably be anticipated. The last view of the House of Lords in (1971) AC 556 (Greenock Corporation v. Caledonian Ry.) is that an act of God which no human foresight can provide against and of which human prudence is not bound to recognise the possibility.

8. On the aforesaid background, now let us have a look at the pleadings as well as the evidence to find out whether the damage was the result of the act of God. In paras 2,3,4 and 6 of the plaint, the Plaintiff stated inter alia as follows:

2. That an embankment was constructed by the State Govt. to protect the area from flood of river Pagladia. The embankment was made in about 1954.

3. That as a result of raising of embankment near the river big artificial reservoir of water is created and unless the embankment is scientifically constructed and properly maintained and periodically strengthened the vast water reservoir in between the embankment on both sides of river poses a potential danger of great magnitude to the people residing in the vicinity of the embankment.

4. That the embankment on the west side of the river Pagladia was not properly maintained by the department. The Plaintiffs land including residence, valuable zirat, fishery, cultivable land etc. adjacent to the aforesaid embankment. On 15.9.84 the embankment just near the Plaintiffs house suddenly gave in and there was a breach of about 500 metres in the said embankment. As a result of this breach the accumulated water a high force and velocity washed away the houses of the Plaintiffs. All the zirats were washed away. The tank measuring about 70 feet x 50 feet which was used as a fishery was completely filled up by the silt carried by the water. Entire agricultural land of the Plaintiffs were also filled up making it completely unsuitable for cultivation. Many other families of the village and also of neighbouring villages suffered the same loss.

6. That the breach of the embankment was due to gross negligence on the part of the department concerned and the Government in properly maintaining and strengthening. The State of Assam which raised the embankment was legally bound to maintain the same properly. The damage caused to the Plaintiffs by the inundation caused by the breach of the embankment was due to the gross negligence on the part of the officers of the Govt. of Assam, whose duty was to construct the embankment scientifically and to maintain the same properly. The State of Assam is, therefore, liable to compensate the Plaintiff.

In para 14 (a) & (b) of the written statement it is inter alia stated as follows:

14 (a) That the facts leading to the flood of 15.9.84, it is submitted that during first two weeks of September, 1984 there was heavy and incessant rains causing flood on river Pagladia. The flood of 15.9.84 crossed all previous records of flood. The officers and men of the department concerned watched and worked round

the clock to protect the embankment from breach but failed against the Nature's fury.

(b) That the embankment of river Pagladia was constructed scientifically by competent Engineers and the same was duly, properly and scientifically maintained regularly by the department at huge cost and that there was/is no negligence on the part of the State Govt. and its officers and men. Flood of 15.9.84 inundated Nalbari Town even and it is regarded as an act of nature none could be blamed for it.

PW 1 deposed that from 15.9.84 there was incessant rain at Nalbari Town and in the ensuing flood the whole of Nalbari Town including the Court compound was under water. He further deposed that during his memory for the last 50 years, there was no such rain and flood at Nalbari.

DW 2- Niranjan Goswami deposed that the flood which occurred in 1984 was the highest in his memory.

So, this shows that the flood was unprecedented and it was not possible to take pre-cautionary measure against such unprecedented flood. So, it must be deemed to be an act of God and this is a good defence. That aspect of the matter was not considered by the trial Court and if it is an act of God beyond the control of human prudence, the Defendant certainly cannot be made responsible for it.

9. Mr. B.K. Goswami, learned Counsel for Respondents submits that the defence of act of God is not available to the Defendant in as much as flood is a recurring phenomenon in Assam and the authority is duty bound and obliged to take necessary preventive steps to safe guard the life and property of each of the citizen and he argues that the authority was negligent in this respect Whether the authority was negligent or not that aspect of the matter shall be discussed at a later stage of this judgment.

10. The next argument advanced by Mr. A.K. Goswami, learned Counsel is that the Govt. is not liable even if there is any negligence and he claims Sovereign Immunity. In support of this contention, Mr. Goswami places reliance on the following decisions:

1 Kasturilal Ralia Ram Jain Vs. State of Uttar Pradesh, wherein the earlier judgment reported in The State of Rajasthan Vs. Mst. Vidhyawati and Another, was considered. The Supreme Court formulated the position of law thus:

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 public 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 lost 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 Supreme Court in the case of *Kasturi Lal v. State of U.P.* (supra) distinguishes the case of *Vidhyavathi* holding that the driver in the case of *Vidhyavathi* while driving the jeep from the Workshop to the Collector's residence cannot be on the delegation of sovereign or governmental powers of the state and that the negligent act in driving the jeep car from the workshop to the Collector's residence he cannot claim immunity. The Supreme Court even pointed out that the employment of a driver to drive the car for the use of a civil servant is itself an activity which is not connected in any manner with the sovereign power of the State at all.

The Supreme Court in the case of *Kasturi Lal* (supra) found that the act of negligence committed by the police officers while dealing with the property of the Plaintiff which they had seized was in exercise of the statutory powers and their powers which can be properly characterised as sovereign powers.

11. I am aware of the fact that this decision of the *Kasturi Lal* has been criticised by the jurists, but the decision holds the field and I am bound by it. The criticism was that the legislation should be enacted to regulate and control the same by the State for immunity. It has been pointed out that this immunity has become a historical anachronism. In England they have gone back on the maxim that the King can commit no wrong and the doctrine of immunity which has been borrowed by India from England is no longer in existence and it has been specifically modified by the Crown Proceeding Act" 47.

12. In the case of *Vidhyavathi* (supra) the Supreme Court has pointed out that there is hardly any chance for the State to claim immunity specially after India has become a democratic Republic and the Constitution had been enacted. It is really a pity that if a suit filed based on tort for the negligence of the servants of the State it can be told on the face of the Plaintiff that the State has the privilege of doing wrong and to go scot free. This aspect of the matter also came up for consideration in *Shyam Sunder and Others Vs. The State of Rajasthan*, wherein para 20 it is been pointed out as follows:

Today, hardly anyone agrees that the stated ground for exempting the sovereign from suit is either logical or practical. We do not also think it necessary to consider whether there is any rational dividing line between the so-called sovereign and proprietary or commercial functions for determining the liability of the State.

This aspect of the matter also was considered in a recent case by the apex Court in *N. Nagendra Rao and Co. Vs. State of Andhra Pradesh*, where in paras 9, 18 and 24 it has been stated as follows:

In England it was recognised that the King could not be sued. "In illustrating the doctrine that the Queen can do no wrong" Prof. Dicey gives what he describes as an "absurd example", if Queen were herself to shoot the Prime Minister through the head, "he says ", no Court in England could take cognizance of the act". The basis for it in England was both substantive and procedural. The former flowed

from the divine right of the Kings and the latter from the feudal principle that the King could not be sued in his own Courts. Yet it did not mean that he was above law. The true meaning of the expression "that King can do no wrong" meant that the King has no legal power to do wrong" (H. W.R. Wade, Administrative Law, Sixth Edition). Therefore, the institution of the petition of rights was founded upon the theory that the King of his own free will, graciously orders right to be done. But the petition lay only to recover unliquidated damages for breach of contract by the Crown. It was not extended by the Courts to claims arising out of torts. In *Viscount Canterbury v. The Attorney General* 1 PH 306 (41 English Reports Chancery p. 648) one of the questions that arose was whether the Crown was liable to make good the loss for the fire which had been caused by the personal negligence of the Commissioners. The answer given was that even though the officer, who was guilty of negligence was liable personally, the liability did not extend to the Crown. This immunity peculiar to the English system found its way in our system of governance through various judgments rendered during British period, more particularly after 1858, even though the maxim "lex non protest peccare" that is the King can do no wrong had no place in ancient India or in medieval India as the Kings in both the periods subjected of the States. According to Manu, it was the duty of the King to uphold the law and he was as much subject to the law as any other person. "In the Vedic period Kingship was purely secular institution. Ancient Indian Philosophers were not prepared to recognise the divinity of the unworthy Kings" (G.P.Verma- State Liability in India). It was said by Brihaspati where a servant commissioned by his master does any improper act, for the benefit of his master, the latter shall be held responsible for it". Even during Muslim rule the fundamental concept under Muslim Law like Hindu Law was that the authority of King was subordinate to that of the law. It was no different during British rule. The Courts leaned in favour of holding the State responsible for the negligence of its officers. See *Narayan Krishna Laud v. Gerard Norman, Collector of Bombay*, 5 Bombay High Court Reports 1868-69 p.1, a decision which has been approved in *The State of Rajasthan Vs. Mst. Vidhyawati and Another*,

18. "Sovereignty" and acts of State" are thus two different concepts. The former vests in a person or body which is independent and supreme both externally and internally whereas latter may be act done by a delegate of sovereign within the limits of power vested in him which cannot be questioned in a Municipal Court. The nature of power which the company enjoyed was delegation of the "act of State." An exercise of political power by the State or its delegate does not furnish any cause of action for filing a suit for damages or compensation against the State for negligence of its officers. Reason is simple. Suppose there is a war between two countries or there are outbreak of hostilities between two independent States in course of which a citizen suffers damage. He cannot sue for recovery of the loss in local Courts as the jurisdiction to entertain such suit would be barred as the loss was caused when the State was carrying on its activities which are politically and even juris prudentially known as "acts of

State." But that defence is not available when the State or its officers act negligently in discharge of their statutory duties. Such activities are not acts of State. In *Sir Anthony Musgrave* (supra) the Privy Council while determining liability of the Governor observed that it cannot "be assumed that he possesses general sovereign power. His authority is derived from his commission, and limited to the powers thereby expressly or impliedly entrusted to him. Let it be granted that, for acts or power done by a Governor under and within the limits of his commission, he is protected, because in doing them he is the servant of the Crown, and in exercising its sovereign authority; the like protection cannot be extended to acts which are wholly beyond the authority confided to him. Such acts, though the Governor may assume to do them as Governor, cannot be considered as done on behalf of the Crown, not to be in any proper sense acts of State.

The Company was, thus, immune from being sued in Courts only in those limited cases where its activities were political and mainly in relation to the Indian State. It did not enjoy any sovereign immunity like the Crown in England.

24. It is contrary to modern jurisprudential thinking. The need of the State to have extraordinary powers cannot be doubted. But with the conceptual change of statutory power being statutory duty for sake of society and the people the claim of a common man or ordinary citizen cannot be thrown out merely because it was done by an officer of the State even though it was against law and negligently. Needs of the state duty of its officials and right of the citizens are required to be reconciled so that the rule of law in a welfare State is not shaken. Even in America where this doctrine of sovereignty found its place either because of the "financial instability of the infant American States rather than to the stability of the doctrine theoretical foundation," or because of "logical and practical ground," or that "there could be no legal right as against the State which made the law" gradually gave way to the movement from, "State irresponsibility to State responsibility." In welfare State, functions of the State are not only defence of the country or administration of justice or maintaining law and order but it extends to regulating and controlling the activities of people in almost every sphere, educational, commercial, social, economic, political and even marital. The demarcating line between sovereign and non-sovereign powers for which no rational basis survives has largely disappeared. Therefore, barring functions such as administration of justice, maintenance of law and order and repression of crime etc. which are among the primary and inalienable functions of a constitutional Government, the State cannot claim any immunity. The determination of vicarious liability of the State being linked with negligence of its officers, if they can be sued personally for which there is no dearth of authority and the law of misfeasance in discharge of public duty having marched ahead, there is no rational for the proposition that even if the officer is liable the State cannot be sued. The liability of the officers personally was not doubted even in *Viscount Canterbury* (supra). But the Crown was held immune on doctrine has become outdated and sovereignty now vests in the people, the State cannot

claim any immunity and if a suit is maintainable against the officer personally, than there is no reason to hold that it would not be maintainable against the State." Be that as it may, I am not going to throw out this appeal on the ground of sovereign immunity as claimed by the State.

13. The next contention of Mr. A.K. Goswami, learned Counsel is that there was no negligence what so ever on the part of the State and if there is no negligence the question of granting damages by way of compensation does not arise. In this connection, Mr. Goswami draws my attention to the evidence both oral and documentary. First he draws my attention to the deposition of P.W 1. PW 1 deposed that this embankment was constructed in the year 1954 and at that time it was not properly constructed. In the year 1974 there was a leakage and that leakage was stopped by putting sand bags. He admitted that from 1974 to 1983 there was no leakage. In 1984 he stated that there was no repair at the time of breach and no official was present at the site. PW 2 stated that the embankment was not properly maintained by the authority. It is stated that if the embankment was maintained properly there would not have been breach. DW1 with record deposed that this embankment was constructed in the year 1954-55 and in every year annual repair is done in the embankment. In 1983-84 there was repair in the embankment and in support of it, he produced before the Court documents and accounts. He denied that the embankment was not properly constructed. DW 2, the Sectional Asstt. of the E & D deposed that this embankment was properly maintained and he further deposed that in 1984 when there was breach, he alongwith his associates worked day and night and was on duty for 24 hours. He deposed that when there was high flood, the flood water crossed the embankment and there was breach. He denied the suggestion that since there was breach they left the place. He deposed as follows:

As we could not control the rush of water in spite of out best efforts, we left the place." (This is the deposition of Harendra Nath Bora, DW 3 who was Asstt. Engineer, Flood Control at Nalbari) DW 4 is the Sectional Asstt. and he also deposed in the same line.

14. It is argued by Mr. B.K. Goswami, learned Counsel that the documents produced shows only paper works and there was no real and practical work at the site. But this submission of Mr. Goswami cannot be accepted in as much as no such suggestion was given to the witnesses. It was not suggested that these documents have been manufactured only for the purpose of this case. The findings of the learned District Judge on this point of negligence as quoted above, the learned District Judge found fault with the officials for leaving the spot keeping the people to the mercy of God. But it is rightly argued by Mr. A.K. Goswami that it was found that it was not possible to close the breach in the embankment and the officials and staffs left the spot ultimately. It cannot be suggested that a person should commit suicide or it cannot be expected that he would do something which is impossible. The findings of the learned Judge quoted above regarding negligence is not a finding in the eye of law and

accordingly this is liable to be set aside and if this finding of negligence goes, the question of granting compensation by way of damage does not arise.

15. Regarding Issue No. 7, learned Judge himself found that the Plaintiff failed to establish the loss and damage. The burden to establish the loss and damage is squarely on the Plaintiff and he failed to discharge it and in the absence of it, the approach made by the learned Judge to grant compensation by way of damage of 1/4th of the claim made by the Plaintiff are not tenable and mis is also liable to be set aside and quashed. Accordingly I find as follows:

1. The high flood was an act of God because of incessant rain and that it was not possible for the authority to assess or think of it.

2. There was no negligence on the part of the officials of the authority.

16. The loss or damages as claimed by the Plaintiff has not been established. Accordingly, this appeal is allowed and the judgment and decree dtd. 12.12.90 passed by the learned District Judge at Nalbari in Money Suit No. 11/86 stands set aside and quashed.

17. Before I part with the record, I want to make one thing clear. this Court by order dated 26.8.91 directed the judgment-debtor-Appellant to deposit an amount of Rs. 60,000/- out of the decretal amount and that amount was deposited. It is submitted that this amount was withdrawn by the Plaintiff-decree-holder. Out of this amount, in the facts and circumstances of the case, I allow the Plaintiff to retain an amount of Rs. 30,000/- and the balance amount of Rs. 30,000/- shall be refunded. If it is not done, by way of restitution the State may claim back this amount from the Appellant.

18. In view of the above decision, the Cross Objection No. 5/91 filed by the Plaintiff-decree-holder shall stand dismissed.