
(2000) 08 GUJ CK 0094
In the Gujarat High Court

Case No : First Appeal No. 6473 of 1999 with Civil Application No. 7267 of 2000

State of Gujarat

APPELLANT

Vs

Purnimaben

RESPONDENT

Date of Decision : 29-08-2000

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 96

Citation : (2001) 21 GLH 276

Hon'ble Judges : K.M. Mehta, J;J.N. Bhatt, J

Bench : Division Bench

Advocate : A.D. Oza, GP, for the Appellant; Kusum M. Shah, for the Respondent

Final Decision : Dismissed

Judgement

J.N. Bhatt, J.—In this appeal u/s 96 of the Code of Civil Procedure, 1908 (Code for short), at the instance of appellants (original defendants), the challenge is against the judgment and decree recorded in Civil Suit No.5051 of 1986, by the City Civil Court, at Ahmedabad, on 19th March, 1999, whereby, the respondents (original plaintiffs) came to be awarded an amount of Rs.4,35,000/- by way of compensation with interest at the rate of 10 per cent, towards the untimely and unfortunate demise of the breadwinner, young, tax practitioner, Vinod Kapasi, holding that the deceased became victim of the negligent and tortuous act of one PSI, K.S.Kotra of Navrangpura Police Station, while firing shots from his revolver. The parties are, hereinafter, referred to as they originally arrayed in the suit, for the sake of convenience and brevity.

2. The suit was founded upon the premise that deceased Vinod Kapasi was shot dead by defendant No.2, PSI, K.S.Kotra, in the evening around 6.00 p.m. on 24.7.85, without any reason and any fault on the part of the deceased, that the act committed by defendant No.2 was without any lawful authority and it was unauthorised and that the act resulting into cutting short the life of a promising tax practitioner, on account of firing by defendant No.2, PSI, Kotra, was negligent and reckless act, as he fired shot without any precautionary measure and

remained indifferent to the safety of the people. The plaintiff, therefore, claimed an amount of Rs.5 lacs with interest at the rate of 18 per cent per annum from the date of suit till payment, by way of compensation against the defendant No.1, State of Gujarat and defendant No.2, PSI K.S.Kotra, contending that the act of defendant No.2 was, unauthorised, illegal and negligent and, therefore, he and his master, State of Gujarat, are jointly and severally liable for making loss good to the plaintiffs. On account of the unfortunate demise of a young, promising tax consultant, who was the only earning member of the family, the plaintiffs suffered incalculable loss and harm with the physical exit of deceased Vinod Kapasi, who was survived by plaintiff No.1, helpless, young widow, two minor children and an aged mother.

3. It was the case of the plaintiffs that the deceased was around 38 years of age and he was an income tax practitioner. He was B.Sc. LL.B. He was a social worker and associated with Lions Club and other NGOs at the relevant time. The deceased had a brilliant academic career and he was the only earning member of the family. He was having annual income of Rs.38,000/- at the relevant time and he would have flourished and earned substantial amount in the later years of his life, had his life not been cut short by the act of the defendants. On this premise, the plaintiffs, demanded an amount of Rs.5 lacs by way of compensation, by giving notice u/s 80 of the Code, on 2.6.86, and followed by a notice u/s 161 of the Bombay Police Act, on 30.6.86. Both the notices were not replied and complied. The plaintiffs were, only, offered an amount of Rs.20,000/by the defendant No.1, State of Gujarat, as a relief. The amount was also accepted as it was offered as a relief and ex-gratia payment.

4. The defendants appeared and resisted the suit by filing composite written statement, Ex.12, inter alia, contending that:

(1) the suit was not maintainable as it was time barred, (2) the Court had no jurisdiction, (3) the defendant No.2 was not responsible for the death of deceased Vinod Kapasi, as on the date of incident, at the relevant time, on account of communal riots in Ahmedabad, bomb blasting and private firing had, also, taken place, and therefore, the deceased was victim of private firing and not the firing made by defendant No.2, PSI, and that the plaintiffs have received an amount of Rs.20,000/- by way of compensation paid by the State of Gujarat and therefore, the suit is not maintainable.

Upon the pleadings of the parties and the facts and circumstances, the Trial Court raised issues, at Ex.22. In support of the plaintiff's case, they relied on the evidence of plaintiff No.1, widow, Purnimaben, at Ex.24 and one Pankaj J. Dalal, at Ex.70 and one Jatinbhai A. Shah, examined, at Ex.71. The plaintiffs also relied on the documentary evidence. The defendants placed reliance on the evidence of one PSI and Investigating Officer, N.D.Vyas, at Ex.82 and defendant No.2, examined, at Ex.81. They also placed reliance on the documentary evidence produced, at Ex.44 and 74.

Upon assessment and appraisal of the evidence, both testimonial and ocular, the Trial Court decreed the suit and awarded an amount of Rs.4,35,000/-, by way of compensation for the unfortunate demise of deceased Vinod Kapasi, due to firing by defendant No.2, PSI,Kotra, with interest and cost against both the defendants holding that defendant No.2, who, was the servant of defendant No.1, State was negligent and responsible for causing death and defendant No.1, State is, vicariously, liable and the State is not entitled to raise the defence of plea of sovereignty. That is how this First Appeal has come up before us, at the instance of the original defendants, questioning the legality and validity of the impugned judgment and decree passed against them in favour of the original plaintiffs.

5. Learned Government Pleader Mr. Oza in support of the appeal, has raised the following contentions, before us:

(1) That the plaintiffs have failed to prove that the deceased was the victim of the firing by PSI, defendant No.2, as there was commotion and communal disturbance, near the venue in Ahmedabad and there was also private firing.

(2) That the act of defendant No.2, as an Officer of the defendant No.2, State, is protected on account of the doctrine of State sovereignty.

(3) That the amount of compensation to the extent of Rs.20,000/- paid to the plaintiffs before filing of the suit was sufficient and in the alternative, such an amount ought to have been deducted by the Trial Court.

(4) That the amount of compensation awarded by the Trial Court is very excessive and on a higher side.

6. The aforesaid contentions are countered by the learned advocate appearing for the respondents-original plaintiffs. It is also contended on behalf of the original-plaintiffs that the deceased was young, energetic, promising tax consultant and his life was cut short on account of the unauthorised, illegal and also reckless firing made by defendant No.2, PSI, Kotra. The judgment and decree recorded in favour of the plaintiffs is, fully, supported.

7. Before we embark upon the merits of the appeal and the challenge against it, in the light of the evidence, which we have referred, in extenso, by calling original record and proceedings from the Trial Court, following aspects may be articulated, which are no longer in controversy.

(1) That on the day of incident, like that, on 24.7.85, in the evening around 6.00 p.m., deceased Vinod Kapasi lost his life, prematurely, untimely, unfortunately, on account of gun shot firing.

(2) Deceased, Vinod Kapasi, was aged about 38 at the time of his death. He was brilliant in academic life and he is survived by young, helpless widow, two minor children and an aged mother.

(3) Deceased was an Income Tax practitioner and he was, as per the evidence on record, earning Rs.38,000/- per month at the relevant time. He was B.Sc. LL.B.

He was active even in social life. He was associated with various NGOs.

8. Defendant No.2, PSI, K.S.Kotra, had fired thrice from his revolver before the incident occurred. Defence raised on behalf of the defendants was that the deceased Vinod Kapasi was not a victim of his bullet, but by the bullet fired by a private person. The incident occurred almost at twilight near Nav Darwaja, Khadia Char Rasta area which was at the relevant time, within the territorial jurisdiction of Kalupur Police Station; that there was some commotion and communal tension and riots, not only on the day of incident, but prior to that in certain areas of Ahmedabad and the venue where the deceased succumbed to the firing was forming part of such areas. That Vinod Kapasi sustained serious bullet injuries and he succumbed to the same instantaneously; that the defendant No.2, PSI, Kotra, had shot three fires from his service revolver as he was on duty near the venue of incident on account of the communal riots along with other security personnel.

9. Defence raised by the defendant No.2, PSI, K.S.Kotra, that he had fired one shot in the air and two aiming at the violent mob from his service revolver at the relevant time and none of his bullets had hit deceased Vinod Kapasi. That PSI, N.D.Vyas, defence witness No.1 rushed to the venue on receiving the intimation after the incident was communicated to Kalupur Police Station, whereupon, offence came to be registered with C.R.No.312/85; that PSI Vyas had investigated into the offence and upon completion of the investigation sought "A" summary which was granted.

It could, very well, be seen from the factual aspects that the controversy has shrunk down to a very narrow dimension and compass. Since the death of deceased Vinod on account of bullet firing in the evening around 6.00 p.m. on 24.7.85 is an admitted fact. However, the controversy revolves round as to who was the author of the death of late Vinod. Upon appraisal and analysis of the evidence, the Trial Court has reached to a clear conclusion, that the deceased had sustained serious injuries on his shoulder and chest through which the bullet passed off on account of bullet firing from the service revolver of defendant NO.2 PSI, Kotra and has awarded an amount of Rs.4,35,000 with interest by way of compensation. This finding of the Trial Court is assailed, mainly, on the premise that no eye witness is examined to prove the case of the plaintiff and, secondly, that since there was private firing at the relevant time on the day of incident, deceased became the victim of a bullet shot out of private firing and not from the service revolver of defendant No.2, PSI. This plea is reiterated before us.

10. The second contention advanced on behalf of the appellants original defendants, by the learned Government Pleader is that even if it is assumed to be an outcome of the bullet shot fired by defendant No.2, PSI, at the relevant time was on account of maintaining law and order situation while being on duty and therefore, it was in furtherance of the duty and not in breach of duty and since it is also having a protective umbrella of sovereignty of the State.

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11. The suit claim is founded upon the tortious liability. In the law of torts, the negligence has two meanings (1) an independent tort, with which we shall deal with later on, (2) a mode of committing certain other torts. In this latter, sense negligence is carelessness. In some cases, either negligence or wrongful intent is required by law as a condition of liability. Each involves a certain mental attitude of the wrong doer or the tort-feasor towards the consequences of his case. The willful wrongdoer is he, who desires to do harm; the negligent and wrongful intent are inconsistent and mutually exclusive states of mind. He who causes a result, intentionally, cannot also have caused it negligently, and vice versa. In the present case, the claim is based on tort of negligence.

12. Negligence is, usually, accompanied by inadvertence, but it is not the same thing, and this coincidence is not invariable. Carelessness as to possible consequences very often results in a failure to bring those consequences to mind, like that, inadvertence. Commonly, therefore, the careless person not only does not intend the consequence but does not even advert to it; its possibility or probability does not occur to his mind. But it is not always so, for there is such a thing as wilful, like that, conscious and advertent negligence. The wrong doer may not desire or intend the consequence but may yet be perfectly conscious of the risk of it. He does not intentionally cause the harm but he intentionally and consciously exposes others to the risk of it. It has been, therefore, described as "an attitude of mental indifference to obvious risks".

13. Ordinary meaning of the word in the law of torts is a high degree of carelessness. It is the doing of something which in fact involves a grave risk to others, whether the doer realises or not. Obviously, therefore, the test is objective and not subjective, as it is in criminal law.

14. The tort negligence and inadvertenceness has been succinctly, explained and expounded in the following decisions:

The decision of the House of Lords in *Donoghue v. Stevenson* (1932) A.C.562 (HL) treats negligence, where there is a duty to take care, as a specific tort in itself, and not simply as an element in some more complex relationship or in some specialised breach of duty. Actions do not lie for a state of mind. Negligence is conduct, not a state of mind - conduct which involves an unreasonably 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."

15. So also 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".

16. It is worth noting that it is erroneous, although usual, to speak of injuries being caused by negligence: injuries do not result from legal concepts, but from acts or omissions which may involve or constitute negligence.

17. There is one another interesting aspect of tort negligence which is required to be highlighted. It is emergence of liability without tort. In this connection, observations made by Salmond & Heuston on the Law of Torts, may be noted: (Twentieth Edition, R.F.V.Heuston and R.A.Buckley).

"In certain cases, liability is independent of intention or negligence. Liability in libel does not depend on the intention of the defamer, but on the fact of defamation; so too there is strict liability for damage done by a wild animal, or by the escape of dangerous things accumulated for some non-natural purpose (the rule in *Rylands v. Fletcher*); again, liability is strict when one is vicariously responsible for the acts of another. In cases such as these the security of the particular interest of the plaintiff is predominant over the defendant's interest in freedom of action. It is a mistake, however, to think of the predominance as complete. In appropriate cases defences such as act of God or act of a third party are available. Liability may be strict but it is never absolute.

The plea of inevitable accident is that the consequences complained of as a wrong were not intended by the defendant and could not have been foreseen and avoided by the exercise of reasonable care and skill.

An accident in its popular sense is any unexpected injury resulting from any unlooked-for mishap or occurrence. In law a happening is only regarded as an accident if it is one out of the ordinary course of things, something so unusual as not to be looked for by a person of ordinary prudence. So an ordinary fall of snow is not an accident, but only an incident which happens in the ordinary course of things. One form of inevitable accident is that which is due to an act of God, as when a car-driver has a sudden affliction, such as a stroke. The driver will not be liable if his actions were wholly beyond his control."

18. In the realm of tort negligence, at times, it becomes difficult to establish the nexus, with the result or the consequence or the cause thereof by leading direct evidence. In order to mitigate such a contingency, a very interesting concept and philosophy of doctrine of "res ipsa loquitur" has been evolved in English Law and we have also followed in tort negligence. Rule of "res ipsa loquitur", in reality, belongs to law of tort. Where negligence is in issue, peculiar circumstances constituting the event or accident in a particular case might themselves proclaim in concordant, clear, consistent and unambiguous basis the negligence of

somebody as a cause of the event or the accident. The primary facts, constituted from the record would give a rise to such a concept if cause of accident is unknown and no reasonable explanation as to its cause is coming forth from the opposite party. In such a fact situation, the maxim of "res ipsa loquitur" comes into play.

19. It is, therefore, necessary to invoke such a doctrine in examining, determining and adjudicating upon the claim of compensation founded upon the tort negligence. The event or the accident must be a kind which would not happen in ordinary course of event or nature or thing if those who have the management and control of the thing has exercised due, appropriate and reasonable standard of care and caution. Further, the events are caused, the accident must be within the control of the defendant or the adversary. The reason for second requirement is that where the defendant or the adversary has the control of the thing which caused the injury, he was in a better position than the plaintiff to explain as to how the incident or the accident has occurred. Moreover, "res ipsa loquitur" must not be speaking negligence but pin it on the defendant. In our country, the rules of evidence are governed by the Evidence Act, 1872, under which the general rule is with the burden of proving negligence as to the cause of the accident is on the party who propounds it. In order to lighten this burden, there are certain provisions and the doctrines, namely,

- (1) Permissive presumption,
- (2) presumption of fact,
- (3) rebuttable presumption of law
- (4) irrebuttable presumption of law.

20. Presumptions of fact are inferences on fact patterns drawn from the experience and experiments. It is, therefore, the discretion of the Court to draw an inference about the existence on certain factual situation, if primary facts brought out on record warrants such presumption. In fact, doctrine of "res ipsa loquitur" could only create an aid in evaluation and analysis and assessment of evidence on record. When such a doctrine is applied properly to the facts, the burden of proof, initially, rests with the victims of the tort or their heirs or legal representatives is lightened or reduced as the Court would be able to presume certain things and therefore, it will be for the defendant or the adversary to explain or rebut such a presumption. No doubt, this doctrine could be invoked where direct evidence is not obtainable. The Trial Court has found on examination and appreciation of facts that there was direct nexus between the death and the impugned act of defendant No.2, PSI, who used his revolver in firing three shots on or around the time when the deceased was hurt. It is established without any doubt that cause of death of deceased Vinod Kapasi was shock on account of the firing shot. Otherwise also, it is not disputed that the deceased became victim of a shot from fir-arm and the deceased was armless. The inquiry and investigation conducted by PSI, Vyas, resulted into "A" summary

in relation to the death of the deceased. These are the primary facts. Alternatively, therefore, they would give rise to the invocation of the doctrine of "res ipsa loquitur", which, in other words, means, things speak for themselves. It is, therefore, necessary for the defendants to explain or rebut the primary presumption that the deceased became victim of firm arm shot made by defendant No.2, PSI, K.S.Kotra.

21. The essential requirements of doctrine "res ipsa loquitur" are well expounded and in *Scott v. London* (1865) 3 H. & C. 596. In that case, the plaintiff, a customs officer, while near the door of the defendant's warehouse, was injured by some sugar bags falling on him. The Judge directed the jury to find a verdict for the defendants on the ground of lack of evidence of negligence by the defendants, who called no evidence. On appeal a new trial was directed. The court justified this direction of a new trial in the following terms, which have since become known as "res ipsa loquitur" It means it is not necessary to plead the doctrine, it is enough to prove the facts which make it applicable as laid down in *Bennet v. Chemical Construction, (Great Britain) Ltd.* (1971) 3 All ER 822. Therefore, the proposition, which has been evolved is :

"There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care."

22. It could, therefore, very well, be seen that three separate requirements must be satisfied for successful invocation of the doctrine of "res ipsa loquitur". They are :

(1) The doctrine is dependent on the absence of explanation (as stated by Lord Porter in *Barkway v. South Wales Transport Co. Ltd.* (1950) 1 All ER 392.)

(2) The harm must be of such a kind that it does not ordinarily happen if proper care is being taken (as stated by Erle, C.J. in *Mahon v. Osborne*, (1939) All ER 535.)

(3) The instrumentality causing the accident must be within the exclusive control of the defendant. (As stated in *Turner v. Mansfield Corporation*, (1975) 119 Sol J. 629 C.A.)

23. The rule that it is for the plaintiff to prove negligence and not the defendant to disprove it, in some cases, is one of the considerable hardship to the plaintiff because, it may be that the true cause of the accident lies solely within the knowledge of the defendant who caused it. The plaintiff can prove the accident, but he cannot prove how it happened so as to show its genesis or origin in the negligence of the defendant. This hardship is avoided to a considerable extent by the principle of "res ipsa loquitur". To sum up, the effect of the doctrine of "res ipsa loquitur" depends on the cogency of the inference to be drawn, and will vary

from case to case, if for instance, a vehicle mounts to pavement, this is evidence of negligence, but reasonable men may differ about the inference to be drawn from it, so that a verdict of no negligence would not be upset although a withdrawal from the jury would be - yet something may fall from the defendant's window in such circumstances that only an inference of negligence can be drawn, whereupon a verdict of no negligence might be set aside.

24. Truly and plainly speaking, the effect of doctrine of "res ipsa loquitur" is to shift the onus to the defendant in the sense that the doctrine continues to operate unless the defendant calls credible evidence which explains how the accident or mishap may have occurred without negligence, and it seems that the operation of the rule is not displaced merely by expert evidence showing, theoretically, possible ways in which the accident might have happened without the defendant's negligence. The doctrine of "res ipsa loquitur", therefore, plays a very significant role in the law of tort and it is not the relic of the past, but the living force of the day in determining the tortious liability.

25. The doctrine of "res ipsa loquitur" (the things speaks for itself) in Broom's Legal Maxims, 10th Edition (1939) 204 it has been explained as under:-

"In special circumstances, indeed, the mere fact that an accident has happened may be prima facie evidence of negligence, casting upon the party charged with it the onus of proving the contrary, for owing to the nature of the accident, res ipsa loquitur."

It would be appropriate to refer to the following observations of learned Author Winfield and Jolowicz on Law of Tort, Ninth Edition (1971) 45:

"Negligence as a tort is the breach of a legal duty to take care which results in damage, undesired by the defendant, to the plaintiff. Thus, its ingredients are: (a) A legal duty on the part of A towards B to exercise care in such conduct of A as falls within the scope of the duty. (b) Breach of that duty. (c) Consequential damage to B."

26. The Hon^{ble} Supreme Court in the case of Shyam Sunder and Others Vs. The State of Rajasthan, has in paragraphs No. 10 observed thus:

"The maxim is stated in its classic form by Erle, C.J. See: Scott Vs. London & St. Katherine Docks (1865) 3 H & C 596, 601:

.... where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence in the absence of explanation by the defendants, that the accident arose from want of care."

27. The maxim does not embody any rule of substantive law nor a rule of evidence. It is perhaps not a rule of any kind but simply the caption to an argument on the evidence. Lord Shaw remarked that if the phrase had not been

in Latin, nobody would have called it a principle. See: *Ballard Vs. North British Rly. Co.* 1923 SC (HL) 43. The maxim is only a convenient label to apply to a set of circumstances in which the plaintiff proves a case so as to call for a rebuttal from the defendant without having to allege and prove any specific act or omission on the part of the defendant. The principal function of the maxim is to prevent injustice which would result if a plaintiff were invariably compelled to prove the precise cause of the accident and the defendant responsible for it, even when the facts bearing in the matter are at the outset unknown to him and often within the knowledge of the defendant. But though the parties' relative access to evidence is an influential factor, it is not controlling. Thus, the fact that the defendant is as much at a loss to explain the accident or himself died in it does not preclude an adverse inference against him, if the odds otherwise point to his negligence (See: John G. Fleming. *The Law of Torts*, 4th Ed. p. 264). The mere happening of the accident may be more consistent with the negligence on the part of the defendant than with other causes. The maxim is based on the commonsense and its purpose is to do justice when the facts bearing on causation and on the care exercised by defendant are at the outset unknown to the plaintiff and are or ought to be within the knowledge of the defendant. (See: *Barkway Vs. South Wales Transport* (1950) 1 All ER 392, 399).

28. Again in paragraph No. 15 the Hon"ble Supreme Court further held as follows:

"Res ipsa loquitur is an immensely important vehicle for importing strict liability into negligence cases. In practice, there are many cases where res ipsa loquitur is properly invoked in which the defendant is unable to show affirmatively either that he took all reasonable precautions to avoid injury or that the particular cause of the injury was not associated with negligence on his part. Industrial and traffic accidents and injuries caused by defective merchandise are so frequently of this type that the theoretical limitations of the maxim are quite over shadowed by its practical significance. See: Millner: "Negligence in Modern Law" 92."

29. At paragraph No. 16 the Hon"ble Supreme Court has further held as under:

"Over the years, the general trend in the application of the maxim has undoubtedly become more sympathetic to plaintiffs. Concomitant with the rise in safety standards and expanding knowledge of the mechanical devices of our age, less hesitation is felt in concluding that the miscarriage of a familiar activity is so unusual that it is most probably the result of some fault on the part of whoever is responsible for its safe performance (see: John G. Fleming. *The Law of Torts*, 4th Ed. p. 260)"

30. This maxim has been considered by the Hon"ble Supreme Court in *Syad Akbar Vs. State of Karnataka*, . In this case at page 1852 the Hon"ble Supreme Court has observed at para 19 thus:

"As a rule, mere proof that an event has happened or an accident has occurred, the cause of which is unknown, is not evidence of negligence. But the peculiar

circumstances constituting the event or accident, in a particular case, may themselves proclaim in concordant, clear and unambiguous voices the negligence of somebody as the cause of the event or accident. It is to such cases that the maxim *res ipsa loquitur* may apply, if the cause of the accident is unknown and no reasonable explanation as to the cause is coming forth from the defendant. To emphasise the point, it may be reiterated that in such cases, the event or accident must be of a kind which does not happen in the ordinary course of things if those who have management and control use due care. But, according to some decisions, satisfaction of this condition alone is not sufficient for *res ipsa* to come into play and it has to be further satisfied that the event which caused the accident was within the defendant's control. The reason for this second requirement is that where the defendant has control of the thing which caused the injury, he is in a better position than the plaintiff to explain how the accident occurred. Instances of such special kind of accidents which 'tell their own story' of being offsprings of negligence, are furnished by cases, such as where a motor vehicle mounts or projects over a pavement and hurts somebody there or travelling in the vehicle; one car ramming another from behind or even a head-on-collision on the wrong side of the road."

31. At para 20 the Hon"ble Supreme Court further observed thus:

"Thus, for the application of the maxim *res ipsa loquitur* no less important a requirement is that the *res* must not only bespeak negligence, but pin it on the defendant."

32. Halsbury's Laws of England, Volume 34, (4th Edition), para 57 (page 48) - Inference of defendant's negligence Under the doctrine "*res ipsa loquitur*" a plaintiff establishes a *prima facie* case of negligence where (1) it is not possible for him to prove precisely what was the relevant act or omission which set in train the events leading to the accident and (2) on the evidence as it stands at the relevant time it is more likely than not that the effective cause of the accident was some act or omission of the defendant or of someone for whom the defendant is responsible, which act or omission constitutes a failure to take proper care for the plaintiff's safety. There must be reasonable evidence of negligence.

33. In Halsbury's Laws of England, Volume 45, 4th Edition, at page No. 587, in para No. 1278 - Negligence generally It means - 'Negligence is a specific tort and in any given circumstances is the failure to exercise that care which the circumstances demand. Where there is a duty to exercise care, reasonable care must be taken to avoid acts or omissions which can be reasonably foreseen to be likely to cause physical injury to persons or property. The plaintiff must prove that the defendant's negligence was a cause of his injuries. In a limited set of circumstances there is a duty to take care to avoid economic loss and liability in negligence for economic loss which results from breach of such a duty.'

34. At page 588 in para 1279 - Essentials of the cause of action - It provides that

`in order to succeed in an action for damages for breach of statutory duty the plaintiff must establish a breach of a statutory obligation which, on the proper construction of the statute was intended to be a ground of civil liability to a class of persons of whom he is one, he must establish an injury or damage of a kind against which the statute was designed to give protection and he must establish that the breach of statutory obligation caused, or materially contributed to, that injury or damage.

35. A defence to such a cause of action may be specially provided by statute. Contributory negligence on the part of the plaintiff may be established by the defendant as a partial defence. The maxim *volenti non fit injuria*, however, is not generally applicable by way of defence to an action founded on breach by an employer of his statutory duty.

36. In para 1280 regarding `Breach of statutory duty distinguished from negligence" it is stated as follows:

`The civil right of action for breach of statutory duty is an action in tort arising under the common law; however, the cause of action for negligence is not the same as that for breach of statutory duty, although the same injury may give rise to both types of liability. Furthermore, the conditions of liability may be similar where the duty imposed by statute is a duty to take care. It is difficult, although not impossible, to establish negligence against a defendant who has carried out the provisions of a detailed statutory code which in fact applies. Failure to conform with the requirements of statute does not necessarily constitute negligence, even when it may give rise to an action for breach of statutory duty, but it may and frequently does amount to *prima facie* evidence of negligence."

37. In our view, here, the defendant did not perform his statutory duty in connection with firing of pistol and he was negligent in performing his duty and he did not perform his statutory duty with care and caution which has resulted into injury to the plaintiff and therefore suit of the plaintiff is maintainable on the ground that this maxim apply in this case.

The roots of the existing law on State liability in tort lies in Section 65 of the Government of India Act, 1858. This section provided:

"All persons and bodies politic shall and may have and take the same suits, remedies and proceedings, legal and equitable against the Secretary of State for India as they could have done against the said Company (The East India Company.)"

38. This section preserved against the Secretary of State for India the same suits, remedies and proceedings, which were, till then available against the East India Company. This provision was continued under the Government of India Acts of 1935 (See: Section 32 of the Government of India Act, 1915 and Section 76(1) of the Government of India Act, 1935).

39. Under the Constitution of India, the liability of Union and of the State to sue and to be sued is governed by Article 300 of the Constitution. That article reads as follows:-

"(1) The Government of India may sue or be sued by the name of the Union of India and the Government of a State may sue or be sued by the name of the State and may, subject to any provision which may be made by Act of Parliament or of the Legislature of such State enacted by virtue of power conferred by this Constitution, sue or be sued in relation to their respective affairs in the like case as the Dominion of India and the corresponding Provinces or the corresponding Indian States might have sued or been sued if this Constitution had not been enacted.

(2) xxxxxxxx"

The liability of the State in tort under the Constitution is to the same extent as was that of the Dominion and the Provinces before Independence. This is subject to legislation by Parliament or the State legislatures laying down provisions in this regard. Until such legislation is passed, the law regarding such liability will be the same as it was before the advent of the Constitution.

40. In *Shyam Sunder Vs. State of Rajasthan* (supra) the Hon^{ble} Supreme Court at para 20 has held as follows:

"It was, however, argued on behalf of the respondent that the State was engaged in performing a function appertaining to its character as sovereign as the driver was acting in the course of his employment in connection with famine relief work and therefore even if the driver was negligent, the State would not be liable for damages. Reliance was placed on the ruling of this Court, in *Kasturilal Ralia Ram Jain Vs. State of Uttar Pradesh*, where this Court said that the liability of the State for a tort committed by its servant in the course of his employment would depend upon the question whether the employment was of the category which could claim the special characteristic of sovereign power. We do not pause to consider the question whether the immunity of the State for injuries on its citizens committed in the exercise of what are called sovereign functions has any moral justification today. Its historic oft-quoted words of Blackstone. Blackstone Commentaries (10th Ed. 1887)

`The King can do no wrong The King, moreover, is not only incapable of doing wrong, but even of thinking wrong; he can never mean to do an improper thing; in him is no folly or weakness"

41. In modern times, the chief proponent of the sovereign immunity doctrine has been Mr. Justice Holmes who, in 1907, declared for a unanimous Supreme Court: *Kawanankea Vs. Polyblank* (1906) 205 US 349 353

`A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends."

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."

42. When we consider the subject of sovereignty we cannot ignore the facts of this case here. By firing a shot the original plaintiff has died and therefore his life which is guaranteed under Article 21 of the Constitution has been taken away.

43. In Smt. Nilabati Behera alias Lalita Behera Vs. State of Orissa and others, , the petitioner's son died as a result of injuries inflicted on him while he was in police custody. The Hon'ble Supreme Court in para 9 at page 1965 observed as under:

"In view of the decisions of this Court in Rudul Sah Vs. State of Bihar and Another, , Sebastian M. Hongray Vs. Union of India (UOI) and Others, and Sebastian M. Hongray Vs. Union of India (UOI), , Bhim Singh, MLA Vs. State of Jammu & Kashmir and Others, , Saheli, A Women's Resources center, Through Ms Nalini Bhanot and Others Vs. Commissioner of Police Delhi Police Headquarters and Others, and State of Maharashtra and Others Vs. Ravikant S. Patil, the liability of the State of Orissa in the present case to pay the compensation cannot be doubted and was rightly not disputed by the learned Additional Solicitor General."

44. The Hon'ble Supreme Court again at para 13 held as follows:

"In this context, it is sufficient to say that the decision of this Court in Kasturilal Ralia Ram Jain Vs. State of Uttar Pradesh, upholding the State's plea of sovereign immunity for tortious acts of its servants is confined to the sphere of liability in tort, which is distinct from the State's liability for contravention of fundamental rights to which the doctrine of sovereign immunity has no application in the constitutional scheme and is no defence to the constitutional remedy under Articles 32 and 226 of the Constitution which enables award of compensation for contravention of fundamental rights when the only practicable mode of enforcement of the fundamental rights can be the award of compensation."

45. Learned counsel also relied on the recent judgement of the Hon'ble Supreme Court in the case of State of Andhra Pradesh Vs. Challa Ramkrishna Reddy & Ors. 2000(4) Supreme Today 741 where in paragraphs 17 and 18 the Hon'ble Supreme Court observed as under:-

"Para 17 - The maxim that King can do no wrong or that the Crown is not answerable in tort has no place in Indian jurisprudence where the power vests, not in the Crown, but in the people who elect their representatives to run the Government, which has to act in accordance with the provisions of the Constitution and would be answerable to the people for any violation thereof.

18. Right to life is one of the basic human rights. It is guaranteed to every person by Article 21 of the Constitution and not even the State has the authority to violate that Right. A prisoner, be he a convict or undertrial or a detenu, does not cease to be a human being. Even when lodged in the jail, he continues to enjoy all his fundamental rights including the right to life guaranteed to him under the Constitution. On being convicted of crime and deprived of their liberty in accordance with the procedure established by law, prisoners still retain the residue of Constitutional rights."

46. In the case on hand, the evidence has, clearly, disclosed that the plaintiff has, successfully, established that deceased Vinod Kapasi sustained fatal injuries on account of the shooting by defendant No.2 with his service revolver. We have, also, given our anxious thought to the evidence of widow, Purnimaben, examined at Ex.24, the evidence of Pankaj J. Dalal, Ex.70 and the evidence of the accountant J.A. Shah who was working with the deceased in his offence. From the testimony of these three witnesses, following aspects have remained uncontrovertible:

(1) That there was no curfew as deceased had gone to attend his office as Tax Consultant since morning and he left the office in the evening around 6.00 p.m. for going to attend Lions Club meeting, the unfortunate mishap occurred when he was about to start his scooter, as ill-luck would have been, he was shot dead on account of the bullet fire by respondent No.2, PSI, Kotra.

(2) The road was clear and there was no untoward incident or mob, at the relevant time, on that day. The plaintiff's witness, Pankaj Dalal, at Ex.70, who, is a cloth merchant having a cloth shop, which is adjacent to the venue on the Nava Darwaja road, deposed that he went to attend the shop, as usual. Not only that he also went back home for lunch and came back to the office. This, clearly, shows that there was no disturbance, there was no violence, there was no stone throwing and there was no curfew. Similarly, the plaintiff's witness Mr. Shah, an accountant working in the office of deceased Vinod Kapasi also attended the office, as usual.

(3) Deceased Vinod was shifted to V.S.Hospital in autorikshaw, which passed by the same route. It is not the case that deceased Vinod was one of the members of the crowd or mob. In fact, he had gone to the place where the scooter was parked alone and when he was about to start the scooter, he sustained fatal injuries of revolver shot.

47. In view of the evidence of the plaintiff, the contention propounded on behalf of the defendants that the area in which the incident took place, was tense on account of the communal riots, there were stone throwing by members of rival communities and also private firing, falls like a pack of cards.

48. It would be, also, interesting to refer that even as per the evidence of defendant No.2, PSI, K.S.Kotra, and also PSI, N.D.Vyas, there was no curfew, at the relevant time.

49. Following points are required to be highlighted from the testimony of defendant No.2, PSI, K.S.Kotra, and PSI, N.D.Vyas and the panchnama at Ex.65 and the report submitted by PSI, Vyas after completion of investigation into the offence registered with C.R No.312/85.

(1) Nothing was recovered from the venue, where the deceased was shot dead. No stones, no bricks or any other material came to be seized or came to be mentioned in the panchnama of scene of incident, produced at Ex.65, which could, even, remotely lend any reinforcement to the version of the defendant that there was commotion or communal riot at the relevant time, on the day of incident, like that, 24th July, 1985.

(2) No arrest was made and there was no curfew. No prior warning before firing three shots from revolver and directing the SRP to fire had been given. No tear-gas cell was used before the firing was resorted. PSI is not authorised to use and handle fire arms when PI and higher officer is in the rank available in the Police Station at the relevant time. This is, clearly, admitted by PSI, ND Vyas, in his testimony. He was present, at the relevant time, at Kalupur Police Station. Despite that, defendant No.2 PSI, Kotra, had resorted to firing. It was, therefore, clear that the same was unauthorised.

(3) Even PSI, Kotra, in his evidence, also, clearly, admitted that no authority was granted or obtained from the Commissioner of Police for firing. It means that no authority was with him, no permission was granted and the PI was present at Kalupur Police Station, at the relevant time. So on all three counts, he was not competent and entitled to use firm arms. It is, in this context, defendant No.2, Kotra, had to state in his evidence when law and order situation goes extreme and when situation so demands, even without authority PSI has to resort to firing so as to restore land and order. This is nothing but an afterthought. Even apart from that, evidence on record does not even, remotely, indicate that there was such a situation of law and order, which required or warranted resorting to fire arms and, that too, by PSI when PI, in charge of the Kalupur Police Station was available.

50. It becomes, therefore, crystal clear that the plaintiffs have, successfully, established from the evidence on record that deceased Vinod Kapasi, became victim of firing and he was shot dead by the Police without any reason, on account of the negligence, inadvertence, breach of duty on the part of the Police, apart from the fact that the firing was without any permission from the higher officers. We have, therefore, no hesitation in finding that the plaintiffs have, successfully, established that deceased, Vinod Kapasi, was shot dead without any reason by negligent, reckless and unauthorised act of defendant No.2.

51. As stated hereinbefore, the primary facts constituted, in the alternative, have given sufficient launching pad for invocation of the doctrine "res ipsa loquitur". Applying this doctrine, the defendants have failed to explain as to how this incident had happened, as it has been, successfully, proved that the deceased,

Vinod Kapasi, became victim of firing as he was shot dead without reason. So, alternatively, also, under the doctrine of "res ipsa loquitur", the defendants having failed to explain the cause and the mode and the reason why firing was resorted to and failing to explain the death of Vinod Kapasi, defendants are liable for the tortuous act for the payment of compensation to the original plaintiffs.

52. The Trial Court has, in our opinion, rightly, found that the defendants have, miserably, failed to show that the suit was not maintainable and that the Trial Court had no jurisdiction to entertain the suit. It is, rightly, concluded by the Trial Court that the defendants have failed to prove that, at the relevant time, there was stone throwing and private firing from public and, therefore, for dispersing the mob, Police had to fire. It appears that such contentions are advanced to cover up the unauthorised act of shooting down deceased Vinod Kapasi. The documentary and testimonial collection on record do not support the pleas raised by the defendants. In our opinion, therefore, the contentions propounded by the defendants in the written statement and in course of the evidence to avoid liability arising out of the tortuous act have been, rightly, negatived.

53. One of the contentions raised in the written statement and reiterated, before us, is that the impugned act is protected in view of the principle of sovereignty of the State. Reliance is also placed, in this connection, on a decision of the Hon'ble Apex Court rendered in *N. Nagendra Rao and Co. Vs. State of Andhra Pradesh*, . We have, dispassionately, examined the entire case law relied on by the learned Government Pleader and we have failed to comprehend as to how it would render any assistance to reinforce the plea of State sovereignty. On the contrary, the observations made therein, in para 18, 23, 24 and 27 run, diametrically, opposite to the pleas advanced on behalf of the appellants-defendants by the learned Government Pleader.

54. Again, it may be noted that, in that case, there was no question of death of a person. When a person is shot dead by a Police Officer, without any justification, without any authority, without any sanction of order, how could the State advance the plea of sovereignty ? It would cover the question of life and liberty of a citizen of the country, which is covered by the fundamental right enshrined in Article 21 of the Constitution of India. Nobody could be, even, permitted to whisper about the sovereignty of State umbrella in a case when a person is killed in violation of the fundamental rights of the citizen of the country. It is, therefore, rightly, said that the doctrine of State sovereignty, not only does not come into play in such a case, but it shall pale into insignificance for the simple reason of violation of fundamental rights enshrined in Chapter III of the Constitution of India. It is the sovereignty of people that is supreme and not the sovereignty of the State and that is not the cry, but the creed of the Constitution, and that is the command of the Constitution. Therefore, when the Officers of the State are responsible for cutting short the lives of the citizens of this country, they cannot be permitted to raise the plea of sovereignty of State and protect themselves while violating the Constitutionally protected right of the citizen of

this country.

55. A judgment of the Hon^{ble} Apex Court rendered in *Common Cause, A Registered Society Vs. Union of India and Others*, is a land-mark decision throwing abundant light on the principle of plea of State sovereignty versus responsibility of the State. The entire history relating to institution of suit by or against the State from the time of East India Company right upto the stage of formation and introduction of Constitution of India, has been considered and the theory of immunity on the basis of State sovereignty has been rejected. In this process of judicial pronouncement, earlier view in *Kasturilal Ralia Ram Jain Vs. State of Uttar Pradesh*, is rendered no longer a binding proposition of law as it has paled into insignificance. The Apex Court in para 78 of the judgment in *Common Cause (supra)* observed as follows:

"The entire case law was reviewed by R.M.Sahai, J. in his illuminating judgment in *N. Nagendra Rao and Co. Vs. State of Andhra Pradesh*, in which the case of *Smt. Nilabati Behera alias Lalita Behera Vs. State of Orissa and others*, was followed and it was observed inter alia as under :

"But there the immunity ends. No civilised system can permit an executive to play with the people of its country and claim that it is entitled to act in any manner as it is sovereign. The concept of public interest has changed with structural change in the society. No legal or political system today can place the State above law as it is unjust and unfair for a citizen to be deprived of his property illegally by negligent act of officers of the State without any remedy. From sincerity, efficiency and dignity of State as a juristic person, propounded in Nineteenth Century as sound sociological basis for State immunity the circle has gone round and the emphasis now is more on liberty, equality and the rule of law. The modern social thinking of progressive societies and the judicial approach is to do away with archaic State protection and place the State or the Government at par with any other juristic legal entity. Any watertight compartmentalisation of the functions of the State as "sovereign and non-sovereign" or "governmental or non-governmental" is not sound. 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 away 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."

In short, the revolutionary evolution in the Constitutional law in so far as the plea of sovereignty of State is concerned, is very significant. The maxim that the "King can do no wrong" on the basis of which Common Law rule that "Crown was not answerable for the torts committed by its servants" was generated has not been applied herein in this country. Not only that, this concept is given a go-by but it has to be forgotten when the question of violation of fundamental rights, at the instance of the protector of the law and order and when they became perpetrator of the fundamental rights, how could, even remotely, such an immunity of State on the principle of "Sovereignty of State" could be allowed to be raised. Therefore, the vehement contention propounded by learned Government Pleader that the impugned act, even if it is proved to be of defendants or the servants of the State, enjoys the immunity on the principle of "sovereignty of State" is, in our opinion, without any substance and merits. It is, therefore, rejected.

56. Last, it will lead us to the consideration about the amount of compensation awarded for the tortuous act on the part of the defendants. As such, this aspect is not, seriously, questioned before us, even on behalf of the appellants. However, the amount of compensation or damages on account of death of Vinod Kapasi, which was an outcome of the tortuous or wrongful act on the part of the appellants-original defendants to the extent of Rs.4,35,000/- awarded by the Trial Court while decreeing the suit with interest, by no stretch of imagination could be said to be at on a higher side. On the contrary, one would be tempted to mention that in the light of the facts on record, the amount is on conservative side. Even the claim made in the suit was only Rs.5 lacs, whereas, the Trial Court has awarded Rs.4,35,000/- under both the heads, pecuniary and personal loss. This aspect is, succinctly, and elaborately, mentioned in para 14 of the impugned judgment. We, therefore, do not propose to reiterate all the grounds, elaborately, articulated by the Trial Court in its judgment while awarding the amount of compensation to the extent of Rs.4,35,000/-. However, following aspects may be highlighted:

1. Deceased Vinod Kapasi was in prime of his youth and he was B.Sc., LL.B.
2. He was a social worker and he was connected with service oriented clubs and organisations.
3. He was running a tax consultant firm. Thus, he was an Income Tax Practitioner.

4. He was having a bright academic career and very good practice.

5. He was a dynamic and progressive young man.

57. In view of the income tax returns and other documents produced on record, the Trial Court has taken his annual income at Rs.38,000/-. Multiplier of 15 adopted by the Trial Court is, also, just and reasonable as the deceased was in his 30s. The Trial Court has assessed the annual utility of the deceased to the common family fund to the extent of Rs.29,000/-. Therefore the amount of $\text{Rs.}29000 \times 15 = \text{Rs.}4,35,000/-$ has been arrived at. The compensation awarded by the Trial Court is not only quite just and reasonable, but is on a very conservative side. In absence of any cross objections, we have to raise our hands in helplessness in granting any additional amount even if we were to add the amount.

58. In the result, the appeal shall stand dismissed with costs. Obviously, the impugned judgment and decree passed by the Trial Court is hereby confirmed.

59. Learned Government Pleader Mr Oza has submitted that reasonable time may be granted for challenging this order before higher forum. Learned advocate Ms.Shah for the respondent-original plaintiffs has, strongly, objected while submitting that despite filing of execution petition, no amount has been deposited by the appellants and therefore, instead of staying the operation of the judgment and decree, direction is necessary to be issued for early deposit of the decretal dues, which we have confirmed by our order in this appeal. We find much force and substance in the contention of Ms. Shah. The appellants-original defendants are directed to deposit the amount due and payable under the impugned judgment and decree with interest and cost within a period of six months from today. On amount being deposited before the Trial Court, it will be open for the Tribunal to pass appropriate order for disbursement.

60. In view of the dismissal of the appeal, the Civil Application does not survive and it stands disposed of accordingly.