
(1979) 03 J&K CK 0001
In the Jammu And Kashmir High Court
Case No : Civ. First Appeal No. 5 of 1977

State of Jammu and Kashmir

APPELLANT

Vs

Pushpa Devi

RESPONDENT

Date of Decision : 29-03-1979

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 80
Motor Vehicles Act, 1988 — Section 110F

Citation : (1979) 03 J&K CK 0001

Hon'ble Judges : Mufti Baha-Ud-Din Farooqi, J; Adarsh Sein Anand, J

Bench : Division Bench

Advocate : Amar Chand, for the Appellant; R.N. Bhalgotra, for the Respondent

Final Decision : Allowed

Judgement

Adarsh Sein Anand, J.—On July 29, 1966 at about 4.30 p. m. Vijay Kumar, husband of the Plaintiff, was knocked down by truck No.

JKA-27, belonging to the Jammu and Kashmir Transport Department and which was being driven by Janardhan Singh, an employee of the

Defendant, State of Jammu and Kashmir. As a result of the unfortunate accident, Vijay Kumar was crushed to death at the spot as both, the front

and the rear wheels of the truck, ran over his body. The accident took place opposite the Head Quarters of 26 Div. Company. Janardhan Singh,

after causing the accident made an attempt to run away but was caught hold of by Gurdial and Bakhshi Bhagat Singh P. Ws.

2. The widow of Vijay Kumar Mrs Puspa, brought a suit for the recovery of damages amounting to Rs. 1,00,000.00 as compensation for the

death of her husband, who according to her was killed because of the rash and negligent act of Janardhan Singh, an employee of the Defendant

State. According to averments in the plaint, deceased Vijay Kumar, at the time of the accident was working as a S.D.O. with the M.E.S. at

Jammu in Grade I and was drawing a salary of Rs. 473 p. m. He was 34 years of age at the time of the accident and had a bright future ahead of

him. It is further stated by the Plaintiff that the deceased was spending about Rs. 373.00 p.m. on his dependants out of his income. The Plaintiff has

further stated in the plaint that though she was entitled to get Rs. 2,17,329/- as compensation on account of damages for the death of her husband

caused by the rash and negligent act of the employee of the Defendant, yet she was confining her claim to Rs. 1,00,000.00 only. She had also

served a notice u/s 80 CPC on the Defendant. She had filed the suit in forma pauperis. She was declared a pauper by the court on 19-5-1969 and

the Defendant was served on the registration of the suit.

3. The suit was resisted by the Defendant on a number of grounds. While admitting that an accident had occurred on 29th July 1966, while truck

No. JKA 27 belonging to the Defendant was being driven by Janardhan Singh, an employee of Defendant, yet the Defendant was immune from

any liability as on the date of the accident Janardhan Singh was driving the truck in discharge of the sovereign functions of the State. It has also

been stated in the written statement that the truck in question had been lent by the Defendant to the Indian Army under an agreement executed

between the Defendant and the President of India for carriage of Army supplies and as such the driver was driving the truck in discharge of

sovereign function of the Union for which the State was not liable. The Defendant denied that there had been any negligence on the part of the

driver and even went on to state that there had been no accident. Another plea taken in the written statement was to the effect that the High Court

had no jurisdiction to entertain the suit in view of Section 110-F of the Motor Vehicles Act, and that the suit was also barred by time and was not

maintainable.

4. On a consideration of the pleadings of the parties, the learned Single Judge framed the following issues:

(1) Whether the jurisdiction of the court to entertain this suit is barred u/s 110-F of Indian Motor Vehicles Act ? O.P.D.

(2) Whether the suit is barred by time? O.P.D.

(3) Whether the death of Mr. Vijay Kumar S/o Late Shri Sajjan Bajji Mehta, resident of Jodhpur, occurred on 29th July, 1966, at about 4-30

p.m. on the Satwari Jammu road opposite to the Headquarters 26 A.D. Coy as a result of reckless and negligent driving of truck No. JKA 27 by

Shri Janardhan Singh son of Suram Singh, Rajput, driver of Govt, transport, Jammu? O.P.P.

(4) If issue No. 3 is proved in the affirmative whether Shri Janardhan Singh driver was not in employment of the Defendant and was driving the

truck in discharge of sovereign functions of the State at the time of the alleged incident ? If so what is its effect on suit ? O.P.D.

(4a) In case issue No. 3 is proved in the affirmative and issue No. 4 is proved in the negative, what is the amount of damages, if any, to which the

Plaintiff is entitled ? O.P.P.

(5) Relief.

Issue Nos. 1 and 2 were treated as preliminary issues. The parties did not lead any evidence on these issues. After hearing arguments on the

preliminary issues, the learned Single Judge decided both the issues against the Defendant and held that the suit was triable by the court and was

also within time. Parties were thereafter called upon to lead evidence in support of the remaining issues.

5. The Plaintiff examined Bhagwant Kumar, Dr. Sumandar Singh, Om Parkash, Bhagat Singh, Gurdayal Singh and Chuni Lal as her witnesses and

she herself also appeared in the witness box. Besides, the statements of Lodha and Basant Rai Mehta P. Ws were also recorded on

interrogatories. The Defendant in rebuttal examined Shri Ishwar Dayal Sharma, Th. Ganga Singh, Balbadher Singh, Dwarka Nath and T. E.

Abaish as its witnesses. Certain documents were also produced by the parties.

6. The learned Single Judge decided issue No. 3 in favour of the Plaintiff. It was held that the accident was caused due to rash and negligent act of

the driver of the truck and that the deceased had died as a result of the said accident. It was also held that at the time of the accident, the driver

was an employee of the State. Issue No. 4 was also decided against the Defendant and in favour of the Plaintiff and it was held that the driver was

not discharging any sovereign functions of the State and that the plea of immunity was not available to the Defendant. The learned Single Judge

while granting relief, awarded a total amount of Rs. 47,488/- as compensation to the Plaintiff and apportioned the amount between the various

dependants of the deceased. Aggrieved, the State of Jammu and Kashmir has filed an appeal in this Court against the judgment and decree of the

learned Single Judge and the Plaintiff has also filed cross objections stating therein that the decretal amount is low and should have been rupees one

hundred thousand. Both the appeal and cross objections shall be disposed of by this common judgment.

7. We have heard Mr. Amar Chand learned Counsel for the State. Mr. Amar Chand has not challenged the finding of the learned Single Judge that

the death of the deceased was caused by a rash and negligent act of Janardhan Singh and in my opinion, rightly so, because of the overwhelming

evidence on the record which supports that finding. He has raised only three contentions to assail the judgment of the learned Single Judge. I

propose to deal with each of those pleas seriatim.

8. Firstly, it is urged by Mr. Amar Chand that in view of Section 110-F of the Motor Vehicles Act, a civil court has no jurisdiction to adjudicate

upon matters expressly covered under the said Act. It is urged that the Motor Vehicles Act came into force in the State after the date of the

accident, yet the constitution of the claims Tribunal took away the right of the Plaintiff to pursue her remedy in a civil court and that the Plaintiff

should have gone to the Tribunal. Relying upon *New India Assu. Co. Ltd. v. Shanti Misra* 1976 A.C.J. 128 Mr. Amar Chand submits that the

enforcement of a right in a civil court or in the Claims Tribunal, being only a matter of procedure, the change in the law of procedure by the

constitution of the Tribunal, operates retrospectively and ousts the jurisdiction of the civil court to grant any relief to the Plaintiff in cases covered

under the Motor Vehicles Act. I am afraid I cannot persuade myself to agree with Mr. Amar Chand, even though the argument on the face of it

appears to be attractive.

9. It is not disputed that in 1966, when the accident had occurred as well as on 9-10-1967, when the suit was instituted by the Plaintiff in the High

Court, no Claims Tribunal had been constituted for the State. It is also not disputed that the Claims Tribunal came to be constituted in the State,

during the pendency of the suit. What would happen to the pending cases in the

civil court is the important question which requires determination ?

Before proceeding further, it would be desirable to notice the provisions of Section 110-F of the Motor Vehicles Act which bars the jurisdiction of

the Civil Courts. Section 110-F of the Act lays down as follows:

110-F Bar of Jurisdiction of Civil Courts:

Where any Claims Tribunal has been constituted for any area, no Civil Court shall have jurisdiction to entertain any question relating to any claim

for compensation which may be adjudicated upon by the Claims Tribunal for the area and no injunction in respect of any action taken or to be

taken by or before the Claims Tribunal in respect of the claims for compensation shall be granted by the Civil Court.

10. Section 110-F of the Act expressly bars the jurisdiction of a civil court to entertain any question relating to any claim for compensation which

may be adjudicated upon by the Claims Tribunal. This bar, however, can operate in cases where either the accident occurred after the constitution

of the Claims Tribunal and no claim had been instituted in the civil court. Section 110-F of the Motor Vehicles Act cannot so operate as to take

away the jurisdiction of a civil court to adjudicate upon matters already instituted in the civil court before the constitution of the Claims Tribunal.

The use of the expression "no civil court shall have jurisdiction to entertain" shows that the legislature only intended to bar the civil courts from

entertaining" any fresh suit, after the constitution of the Tribunal in respect of claims for compensation triable by the Claims Tribunal and that the

prohibition enacted in the section was not meant to apply to cases already pending in the Civil Courts. It is well settled that Civil Courts have

jurisdiction to try all suits of a civil nature, excepting suits of which cognisance is either expressly or impliedly barred and that suits instituted in the

civil courts would continue to be tried there unless there is any specific intention expressed to the contrary. The bar created by Section 110-F of

the Motor Vehicles Act, cannot apply to civil suits already pending in civil courts, before the constitution of the Claims Tribunal, and in such cases

the civil courts will continue to have jurisdiction to dispose of the claims pending before it, irrespective of Section 110-F of the Act, 1976 A.C.J.

128 on which reliance has been placed by Mr. Amar Chand does not expressly or even impliedly deal with the question of the present nature and

is not only distinguishable but also cannot advance the case of the Appellant even remotely. The view that I have taken, finds support from certain other authorities also.

In *Manibai and Anr. v. Raj Kumar Harpal Deo and Anr.* 1966 A.C.J. 107, a division bench of the Bombay High Court in somewhat similar

circumstances opined that the language of Section 110-F does not lead to an inference that the legislature intended to exclude the jurisdiction of the

civil court in pending matters also. Their lordships opined that the prohibition contained in Section 110-F of the Act is applicable only to future

cases and does not prohibit the continuance of a proceeding which have already commenced in a civil court.

In *Thomas and Ors. v. Hotz Hotels and Ors.* 1968 A.C.J. 86, it was observed:

However if the claim has already been filed in a Civil Court, before the constitution of the Tribunal, the Civil Court will continue to have jurisdiction

to dispose of the claim.

(emphasis mine)

Again, in *Bai Jayaben Girjashanker Oza Vs. Bai Bhanumati Damji and Another*, , a similar view has been expressed and it has been opined that it

no suit had been filed in respect of a claim arising prior to the constitution of the Claims Tribunal, the Claims Tribunal would have an exclusive

jurisdiction to entertain the claim as after the constitution of the Tribunals it alone has jurisdiction to deal with such a claim.

No judgment in which a contrary view may have been taken, has been cited by Mr. Amar Chand.

11. Thus, since in the instant case, the suit had been instituted before the civil court, prior to the constitution of the Claims Tribunal, the bar of the

jurisdiction of the civil court to entertain suits, enacted in Section 110-F of the Motor Vehicles Act can have no application to the 'pending suit' and

the prohibition under that section can operate only in regard to matter arising after the constitution of the Tribunal as well as in respect of such

claims, which had not been instituted or entertained by civil courts, before the constitution of the Tribunal, even though relating to accidents

occurring before the constitution of the Claims Tribunals. Where a suit is pending in the civil court, it shall continue to be tried by the civil court

alone.

12. In this view of discussion, I find no ground to interfere with the finding of the learned Single Judge holding the suit is triable by the Civil Court.

The finding on issue No: 1 as recorded by the learned Single Judge, is accordingly confirmed.

13. Secondly, it is urged by Amar Chand that driver Janardhan Singh was performing his duty in exercise of the delegated sovereign functions of

the State as he was transporting supplies for the Army and such, the State was absolved from any liability in respect of the tortious act committed

by him. It is urged that in the circumstances of this case, the learned Single Judge was not justified in holding the State liable for the tortious act of

its employee. On the other hand, Mr. Bhargotra has argued that the State was liable for the act of the driver, as the act was being performed by the

driver was not referable back to any sovereign functions of the State.

14. That the truck was owned by the Defendant and under an agreement of hire with the Union of India was transporting crushed barley for the

mules maintained by the Army, is the admitted case of the parties. That the accident occurred due to the negligence of the driver of the truck is also

not disputed. What is disputed by Mr. Amar Chand, however, is the liability of the Defendant to pay any compensation for the negligent act of

Janardhan Singh, who, Mr. Amar Chand claims was performing delegated sovereign functions of the State.

15. It is well settled and is an undisputed principle of The Law of Torts, that master is answerable for such of the wrongs of his servant as are

committed during the course of the employment of the servant. This doctrine of liability of the master, for the act of his servant, is based on the

maxim ""let the principal be liable"" and puts the master in the same position, as if he had done the act himself. However, this general principle of the

Law of Torts with regard to the liability of the master for the acts of his servant, is subject to a well defined limitation that where the act complained

of is the act of the servant of the Union of India or the State, performed while the servant was engaged in some duty in exercise of the sovereign

powers of the state or delegated sovereign powers, the master is immune from any liability.

16. In dealing with the liability or immunity of the State in respect of the negligent or tortious act committed by its public servants, the basic

authority which has been universally accepted by the High Courts in the country is the authority of the Supreme Court of Calcutta in P & O Steam

Navigation Company v. The Secretary of State for India in Council 5 Bom. H.C.R. App. A-1 wherein it was said that the Secretary of the State in

council of India is liable for damages occasioned by the negligence of the servant in service of Government, if, the negligence is such as would

render an ordinary employee liable. The facts of that case were that a servant of a company was proceeding in a carriage drawn by a pair of

horses on a highway through Kiddarpore Dockyard managed wholly by the persons in the service of the Government. Some other workmen, in

Government employ, who were carrying a piece of heavy iron funnel casing, about 9 feet long, suddenly dropped it on the road while attempting to

get out of the way, of the Plaintiff's carriage. The noise thus caused by the fall of the iron casing, startled the Plaintiff's horses which rushed forward

violently, and fell on the iron, resulting in injuries to one of the horses. The Plaintiff company claimed damages against the Secretary of State for

India for the damages caused by this accident. The Supreme Court of Calcutta held that the Secretary of State in Council for India would be liable

for the damages occasioned by the negligence of servants in the service of Government as the negligence was such which would render an ordinary

employer liable.

17. Peacock, C.J. after examining the matter in great details stated the legal position in these words:

(only) Where an act is done, or a contract is entered into, in the exercise of powers usually called sovereign powers, by which we mean powers

which cannot be lawfully exercised except by a sovereign, or private individual delegated by a sovereign to exercise them no action will lie.

18. The law propounded in the P & O Steam Navigation Company case 5 Bom. H C.R. App. A-1 has been accepted by their Lordships of the

Supreme Court in Kasturi Lal Ralia Ram Jain v. The State of U.P. AIR 1965 SC 1939 and after examining the matter in the light of various other

decisions, their lordships summed up the legal position in these words:

Thus, it is clear that this case recognises a material distinction between acts committed by the servants employed by the State where such acts are

referable to the exercise of sovereign powers delegated to public servants, and

acts committed by public servants which are not referable to the delegation of any sovereign powers. If a tortious act is committed by a public servant and it gives rise to claim for damages, the question as to 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 loss 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 act of the public servant committed by him during the course of his employment is, in this category of cases, an act of a servant who might have been employed by a private individual for the same purpose. This distinction which is clear and precise in law, is sometimes not borne in mind in discussing questions of the State's liability arising from tortious acts committed by public servants. That is why the clarity and precision with which this distinction was emphasised by Chief Justice Peacock as early as 1861 has been recognised as a classic statement on this subject.

(emphasis supported).

19. In *Kasturi Lal's case* AIR 1965 S.C. 1939 the facts were that the Appellant was a firm which dealt in bullion and other goods at Amritsar. It was duly registered under the Indian Partnership Act. Ralia Ram was one of its partners. On the 20th September, 1947, Ralia Ram arrived at Merrut by Frontier Mail at about midnight. His object in going to Merrut was to sell gold, silver and other goods in the Merrut market. Whilst he was passing through the Chaupla Bazar, he was taken into custody by three police constables. His belongings were then searched and he was taken to the Kotwali police station. He was detained in the police lock up and his belongings, which consisted of gold, weighing 103 toles 6 mashas and 1 ratti, and silver weighing 2 maunds and 6] seers, were seized from him and kept in police custody. On the 21st September, 1947, he was released on bail, and some time thereafter the silver seized from him was returned to him. Ralia Ram then made repeated demands for the return of the gold which had also been seized from him, and since he could not

recover the gold from the police officers, he filed a suit against the Respondent, in which he claimed a decree that the gold seized from him should either be returned to him, or in the alternative, its value should be ordered to be paid to him. The State claimed immunity on the plea that the act of the constables, who had already embezzled the gold, was referable to the delegated sovereign functions of the state.

20. Gajendragadkar, C.J. in the said case while dealing with the question of immunity of the state opined:

In dealing with such cases, it must be borne in mind that when the State pleads immunity against claims for damages resulting from injury caused by negligent acts of its servant, the area of employment referable to sovereign powers must be strictly determined. Before such a plea is upheld, the Court must always find that the impugned act was committed in the course of an undertaking or employment which is referable to the exercise of delegated sovereign power.

21. The legal position enunciated in the aforesaid authorities with regard to the liability of the State has not been disputed before us by learned

Counsel for the parties and in our opinion rightly so. The difficulty however, arises in the actual application of the principles, settled by the Supreme

Court in various cases, since in most of the cases controversy centres around the question "was the act complained of committed actually in the

course of an undertaking or employment which is referable to the exercise of sovereign powers or delegated sovereign powers or not ?

22. No precise definition of "sovereign power of the State or the delegated sovereign powers" has been pressed before us by either Mr. Amar

Chand or Mr. Bhal-gotra. According to Mr. Amar Chand, the sovereign functions of the State include the maintenance of Army, setting up of

various departments including that of the department for the preservation of law and order and proper administration of the country or the State

and where the act complained of can be referable to either of these functions, it can be said that the act was committed in discharge of sovereign

functions of the State or in any event of the delegated sovereign functions of the State. Mr. R.N. Bhalgotra, on the other hand has urged that

sovereign powers are only such powers which could not be lawfully exercised except by a sovereign and that the acts complained of could not be

exercised by a private individual except under a delegation of authority by the sovereign.

23. The question whether a tortious act was done in exercise of sovereign function of the State has to be considered not in any isolated way, either

as suggested by Mr. Amar Chand or as convassed by Mr. Bhargotra, but in the context of facts and circumstances in which the act complained of

was committed. In this connection guidance can be had only from various decided cases on the point.

24. In *Mt. Vidyawati and Another Vs. Lokumal and Another*, the Plaintiffs, who were the widow and daughter of the deceased, brought a suit for

damages against Defendant No. 1 who was a motor driver, in the employment of the State of Rajasthan, Defendant No. 2 in the suit. The

deceased had been knocked down on a foot path resulting in his death by a Jeep car belonging to the State, which had been placed at the disposal

of the Collector for his use. It was established that the death had been caused by the rash and negligent driving of Defendant No. 1, who was

getting back the car from a repairing workshop. The trial court decreed the claim against Defendant No. 1 but refused it against, Defendant No. 2.

The State of Rajasthan, allowing the plea of immunity raised by the State. On appeal in the High Court, it was held:

that in the circumstances of the case, the State of Rajasthan must be held to be responsible for the rash and negligent act of Defendant No. 1 just

as any other ordinary employer would have been. The car was being brought from a private workshop after repairs just as a car of any private

owner would have been brought back. The driver was not taking the car to quell any riot or disturbance and there was no question of his being

employed in exercise of sovereign powers.

This view has subsequently been confirmed by Their Lordships of the Supreme Court in *State of Rajasthan v. Mst. Vidyawati* AIR 1962 S.C.

993, and it was held that the act of the driver was not referable to any delegated sovereign function of the State.

25. In *Rup Ram Kalu Ram Aggarwal Vs. The Punjab State and Another*, where a truck belonging to the P.W.D. driven by a driver in the

employment of the department, struck against a motor cyclist causing injuries to the persons riding the motor cycle by his rash and negligent driving,

a Full Bench of the Punjab High Court held the State to be liable and negated their plea of immunity, based on sovereign functions of the State.

26. In *Union of India Vs. Jasso and Others*, wherein another Full Bench of the same High Court was called upon to deal with the liability of a

military driver who, while transporting coal to the General Headquarters at Simla in discharge of his duties caused an accident by his rash and

negligent driving, it was held as follows:

...it is difficult to see how it can possibly be held that such a routine task as the driving of a truck loaded with coal from same depot or store to the

General Headquarters building at Simla presumably for the purpose of heating the rooms is something done in exercise of a sovereign power since

such a thing could obviously be done by a person. Such being the case, I do not consider that the mere fact that the truck happened to be an army

truck and the driver a military employee can make any difference to the liability of the Government for damages for the tortious act of the driver.

27. In *Satya Wati v. Union of India* 1968 A.C.J. 119, the facts were that an army driver who had been detailed with a vehicle, went to report to

the Guard Room about his return and was about to park his vehicle, when he struck against the motor cycle driven by a permanent commissioned

officer of the Indian Air Force and caused him injuries ultimately resulting in his death. The Union of India pleaded that it was not liable for the

tortious act of its driver, but this plea was turned down holding that the act of the driver in this case was not committed in the course of an

undertaking or employment which was referable to the exercise of any delegated sovereign powers. S.K. Kapur, J. summed up his conclusion in

these words:

Reference to Exhibit P. 10 would show that the vehicle was engaged in carrying hockey and basket ball teams to Indian Air Force Station, New

Delhi, to play a match against Indian Air Force, New Delhi. It appears that after the match was over, the driver went to the Guard Room to report

about his return and was, at the time of the accident, going to park the vehicle at the Sub Motor Terminus. Such activity can hardly be referable to

the exercise of any of the powers mentioned above which can entitle the State to a claim for immunity.

28. In *Union of India v. Vrandambal* 1969 A.C.J. 220, a military lorry caused an

accident while it was going to the Railway Station, for picking up a military officer, the plea of the Union of India that it was immune from liability for compensation, was turned down by the Madras High Court and it was held that the Union of India was liable to pay compensation for tortious act of the driver of the military lorry as the act which was being performed by the driver was not such that it could not be performed by the driver of a private vehicle and that his act was not referable to any delegated sovereign functions of the State.

29. In *Amulya Pantnaik v. State of Orissa* 1967 A.C.J. 278 State's Claims for immunity for rash and negligent driving of one of its vehicles carrying A.S.I, trainees, by its employer was rejected and it was opined that the act was not done in exercise of sovereign functions of the State.

30. In *Thangarajan Vs. Union of India (UOI)*, , where the driver of the lorry himself a defence personnel, was driving the lorry for taking CO₂ gas from the factory to the ship I.N.S., Jamuna caused an accident on his way to the ship yard, the plea of the Union of India for the immunity was upheld. On facts it was held that the lorry was being driven by the driver for performing sovereign functions of the Union of India and it was that CO₂ gas was required for the defence purposes and the area of employment was strictly determined.

31. In *Union of India v. Sugrabi* 1968 A.C.J. 252 a military truck knocked down a cyclist while it was engaged in carrying some machine meant for military officers. It was held that the driver was not acting in exercise of any delegated sovereign powers of the State and that the State was liable to pay compensation for the negligent act of its employee.

32. In *Harbans Lal and Others Vs. Union of India (UOI) and Another*, , Jaswant Singh, J. rejected the plea of the Union of India for immunity in a case where the accident was caused by a military truck which was being driven by a member of the defence services while being driven back to the Army Unit. It was observed that unless it could be shown that the employee was acting in exercise of the sovereign powers delegated to him by some law or rule and the duty being performed by him was something which could not be done by a private individual, the State could not claim any immunity for the tortious act of its employee. On facts it was found that there was no material on the record to indicate that the driver while driving

the military truck back to the unit, at the time of accident was carrying on any peculiar duty of a sovereign nature or that there was anything special

about his employment which could not be performed by a private individual.

33. The decision in *Roop Lal v. Union of India* AIR 1972 J&K 22, has also followed the same principle of law.

34. In *Amrit Singh v. Union of India and Ors.* 1974 A.C.J. 97, the vehicle which was involved in the accident was detailed on duty for checking

military personnel on duty and it was held that the truck was being driven in the exercise of sovereign power of the State in view of the nature of

the duty it was performing at the time of the accident.

35. In *Fatima Begum and Ors. v. The State of Jammu and Kashmir and Ors.* 1976 A.C.J. 194, to which one of us namely, Mufti, J. was a party, a

truck belonging to the Government transport undertaking giving lift to B.S.F. personnels from their place of work to the barracks, knocked down a

cyclist, it was held that the act of the driver of the truck was not an act done in the exercise of sovereign powers or delegated sovereign power.

Mufti, J. opined:

That apart, there is nothing in law at least nothing was shown which will prevent a private individual from giving lift to the B.S.F. men, in the

circumstances of the present case, whether on payment or otherwise either absolutely or in the absence of any delegated authority of the State. If

that be so, as it really is, it cannot be said that the act of Defendant No: 3 was an act done in the exercise of of sovereign power or delegated

sovereign power.

36. The matter again came up before this Court in *Savita Sharma v. Union of India* 1979 A.C.J. 1, to which I was myself a party. In,that case a

military truck caused an accident resulting in injuries to Savita Sharma, while the truck was being driven to the Railway station to bring army

personnels from the station to their barracks. Mir J., who delivered the judgment for the court, rejected the plea of the immunity of Union of India

to pay compensation on the ground that the nature of duties which were being performed by the driver of the military truck were not referable to

any sovereign powers of the State. His lordship opined:

Even if it is conceded that the driver of the truck was driving the motor vehicle in question to Railway station to bring the Jawans to Unit

Headquarters it could not be said that the statutory duty he was performing was referable to the exercise of the delegated sovereign powers. The Jawans could have been transported to the Unit Headquarters in a private bus or a truck or in any other vehicle. It may be that the driver was performing a statutory duty but the performance of statutory duty alone could not entitle the Union of India in whose employment he was to claim that the act was performed in exercise of delegated sovereign powers. There is no rule or law to the effect that the Jawans could be transferred from one place to another only in military vehicles. Even if there may be such a rule or law that would hardly make any difference as the act of transporting Jawans from one place to another in the ultimate analysis could be performed by private individual also in their vehicles. The act of transporting the Jawans from Railway Station to the Army Unit Head quarters would have been the act in exercise of delegated sovereign powers only if it was shown that such an act could not have been performed by private individuals. The performance of only such acts could be said to be in exercise of the sovereign powers or delegated sovereign powers which could not be performed under the statute by any individual other than the person who allegedly performed the same case.

37. From a review of the aforesaid authorities, of this Court as well as of the other courts, though no exhaustive definition of what may constitute sovereign functions of the State emerges, yet, certain guide lines or principles do follow which assist the court in determining liability of the State for the tortious act of its employee. Those principles may be summarised as follows:

(1) The mere fact that the act complained of was committed by a Public Servant in the course of his employment is not enough to absolve the

Government of the liability for damages for injury caused by such an act;

(2) When the State pleads immunity against a claim for damages occasioned by an injury caused by the negligent act of its servants, the area of employment referable to sovereign powers must be strictly determined ;

(3) Before a plea of immunity is upheld, the Court must always find that the impugned act was committed in the course of an undertaking or an

employment which is clearly and unambiguously referable to the exercise of sovereign functions of the State or the delegated sovereign powers of

the State ;

(4) Where the employment, in the course of which the tortious act is committed, is such in which even a private individual can engage it cannot be

considered to be referable to sovereign Act of the State ;

(5) In determining whether or not the plea of immunity should be allowed, the nature of transaction in the course of which the act was committed,

the nature of the employment of the person who committed it as well as the occasion when it was committed, have all to be taken into

consideration.

(6) It requires to be determined whether it was essential for the State for the proper discharge of its sovereign functions to have the act done

through its own employee rather than through a private agency. It is only if the answer is in the affirmative, that the plea of immunity can sustain and

not otherwise.

38. We shall now examine the facts of the instant case, in the light of the aforesaid guide lines, which I must hasten to add, are only illustrative and

not exhaustive.

39. Nothing has been brought to the notice of this Court from which it can be said that the act performed by the driver of the truck was such which

was essentially referable back to any delegated sovereign functions of the State or was such an act which could not be performed by a private

party. The Defendant had given their bus on hire for the carriage of supplies and private transport companies were not debarred from entering into

similar agreements with the Union of India to carry the supplies. The fact that the vehicle in question was a vehicle owned by the State ; that its

driver was a public servant; that the vehicle at the time of accident was under an agreement of hire to carry supplies for the Army ; do not by

themselves render the Government immune from liability for the rash and negligent driving of Janardhan Singh its employee. To sustain the plea of

immunity, it was required to be proved at the time of accident, Janardhan Singh while driving the vehicle was acting in discharge of some sovereign

function of the State or in exercise of some sovereign powers delegated to him The carriage of crushed barley for use of the mules maintained by

the Army, under a commercial contract of hire for money between the Union of India and the State of J & K cannot, in my opinion be referable to

any sovereign function or be considered an act in exercise of the delegated

sovereign powers of the State. As already noticed, the job of carrying crushed barley could have been entrusted to any private individual also as there is no bar, which has been brought to my notice, to show that a private individual could not do that job. The maintenance of Army is a sovereign function but the carriage of supplies of crushed barley for consumption by the mules maintained by the Army cannot be referable to the sovereign functions of the State to maintain the Army. The transaction, in the course of which the accident occurred and the nature of employment of Janardhan Singh, while undertaking that transaction show that, the act was not done in exercise of any delegated sovereign powers of the State. Neither the area of employment nor the nature of the transaction are referable to the exercise of any sovereign functions of the State.

40. In this view of the matter, the conclusion is irresistible that Janardhan Singh while driving the vehicle belonging to the Jammu and Kashmir

Transport department, was not discharging any sovereign functions of the State. The plea of immunity raised by Mr. Amar Chand is, therefore,

clearly misplaced. The learned Single Judge was, in the facts and circumstances of the case, justified in negating that plea. The finding of the

learned Single Judge on issue No: 3 and 4 do not, in my opinion, require any interference and I confirm those findings.

41. Coming now to the third and the last contention of Mr. Amar Chand which relates to the quantum of compensation. The learned Single Judge

has awarded, in all, a sum of Rs. 47,488.00 to the Plaintiff, apportioned amongst the various dependants of the deceased. According to the

learned Counsel for the State, the amount awarded is excessive and has been arrived at on purely conjectural basis. While learned Counsel for the

Plaintiff on the other hand complains that the amount of compensation is grossly inadequate. Learned Counsel for the parties have suggested

different amounts, which according to them, would be proper compensation, in the cases and have relied upon judgments of various High Courts in

support of their respective contentions. It is, however, agreed by both of them that no rigid formula can be laid down for determining compensation

and in each and every case a number of factors peculiar to the life and the circumstances of the family concerned are in operation which have to be

taken notice of.

42. The deprivation of the earnings of the deceased to the surviving dependents in addition to the mental and emotional agony and the breaking

down of the family fabric are some of the factors which the courts generally take into consideration in their attempt to assess compensation which is

'just and fair'. Indeed there is every likelihood of an element of conjecture creeping in, but as stated by their Lordship of the Supreme Court in

C.K. Subramania Tyer v. T.K. Nair 1970 A.C.J. 110:

In assessing damages the court must exclude all considerations of matter which rest in speculation, or fancy, though conjecture to some extent is

inevitable.

43. A principle which has generally been accepted by most of the courts in India, including the Apex Court, for working out the amount of

compensation is to ascertain the annual income of the deceased, after making allowance for the estimated amount which the deceased was

spending on himself during his life time and then capitalising the same by multiplying that amount by the number of years of purchase of

dependency. Out of that amount an allowance is made for any amount which the family of the deceased receives on account of the death of the

deceased. The basic factor for working out compensation, which generally guides the courts, is that the compensation must be "just and fair". The

family of the deceased of course do not have to get a windfall or derive any undue benefit from the unfortunate death of the deceased, yet they are

entitled to at least receive so much of the amount which is essential for their upkeep and to meet other necessary expenses which, had the deceased

been alive would have been provided by him. These considerations assume very great importance in cases where the deceased happens to be the

sole bread earner of the family.

44. The principles governing the estimation of compensation in cases involving fatal accidents, as laid down by the British courts (See 1951 A.C.

601 : (1951) 2 All. ER. 448) i.e. to ascertain the loss of pecuniary benefits to the estate of the deceased by balancing the losses likely to be

suffered and the gains derived from the death, have generally been accepted by the courts in India. Their lordships of the S.C. in Gobald Motor

Service Ltd. and Another Vs. R.M.K. Veluswami and Others, held as follows:

It would be seen from the said mode of estimation that many imponderables

enter into the calculation. Therefore, the actual extent of the pecuniary loss to the Respondents may depend upon data which cannot be ascertained accurately, but must necessarily be an estimate, or even partly a conjecture. Shortly stated the general principle is that the pecuniary loss can be ascertained only by balancing on the one hand the loss to the claimants of the future pecuniary benefit and on the other any pecuniary advantage which from whatever source comes to them by reason of the death, that is, the balance of loss and gain to a dependant by the death must be ascertained.

In *Municipal Corporation of Delhi v. Subhagwanti and Ors.* 1966 A C.J. 57 their lordships observed thus:

In the present case, there is evidence that Ram Prakash deceased was 30 years old at the time of the accident, his widow Subhagwati being aged about 28 and his son 14 and daughters 12 and 2 years old. The evidence adduced regarding the income of Ram Parkash and the amount of loss caused to his widow and children was not satisfactory but the High Court considered that the widow and children must have been receiving at least a monthly sum of Rs. 150/- for their subsistence and for the education of the children from the deceased Ram Parkash. The income was Capitalised for a period of 15 years and the amount of Rs. 27,000/- was arrived at was more than what the trial court had awarded. The High Court accordingly saw no reason for reducing the amount of damages awarded by the trial court. In the case of *Tek Chand and his four children*, the High Court has estimated that the pecuniary loss caused by the death of his wife should be taken to Rs. 40/- p.m. and if a period of 15 years is taken for the purpose of calculating the total sum, the amount will come to Rs. 7,200. Lastly in the case of *Kuldip Raj* the High Court has calculated the pecuniary loss at the rate of Rs. 50/- p.m. and the amount of damages calculated for a period of 15 years would come to Rs. 9,000. In our opinion the High Court has applied the correct principle in estimation of the damages.

45. In *Amulya Patnaik v. State of Orissa* 1967 A.C.J. 278, the court suggested following facts to be taken into consideration in determining the proper compensation.

(i) The amount of wages which the deceased was earning, the ascertainment of

which may, to some extent, depend upon the regularity of his employment,

(ii) An estimate is to be made as to how much of that earning was required or spent for his personal and living expenses ;

(iii) The balance will furnish the basis which will be turned into a lump sum by capitalising it ; and

(iii) This capitalised sum would be taxed down having due regard to uncertainties ; for instance the widow might get remarried or might die, thus ceased to become a dependant.

46. In *Fatima's case* 1976 A.C.J. 194 the deceased was, at the time of his death drawing a salary of Rs. 350/- p.m. He was 38 years of age. The

learned Single Judge estimated that during his life time, the deceased must have been spending Rs. 330/- p.m. on his dependants and would have

continued to spend it for at least 17 years more i.e. till his retirement at the age of 55. The learned Judge capitalised the amount which was being

spent on the dependants by multiplying it with 17, i.e. the number of years (difference between the age at the time of an accident and retirement)

and estimated that Rs. 65,280/- would be just compensation.

47. Thus, there appears to be some consensus that for the assessment of compensation, the courts take into estimation the amount

which the deceased was spending on the claimants or was likely to spend on them and then capitalising it by multiplying it with the number of years

for which the benefit has been denied to them generally referred as year purchase of dependency and deducting such amounts which the death of

the deceased has brought into the hands of the family of deceased.

48. The criterion suggested by Mr. Amar Chand that after estimating the annual earnings of the deceased and allowing deductions accruing to the

Plaintiff from the accelerated death, only such amount should be allowed as compensation which may be able to fetch about the same amount of

Bank interest by which the dependants are short does not appeal to me to be very satisfactory. It is urged that according to the evidence, the

deceased was spending 75% of the income i.e about Rs. 35 /- p m. on the dependants during his lifetime out of his salary of Rs. 476/- p.m. and

that since after his death, the family is receiving Rs. 121/- p.m. as pension p. m. (Rs. 95 for wife and Rs. 13/- for the son and Rs. 13/- p. m. for the

daughter) and that it is only about Rs. 230/- p.m. more which is required to be made up. It is argued that a sum of Rs. 20,000 if invested with a Bank, would at the present rate of interest fetch Rs. 2,000/- p.a. as interest i.e. Rs. 166/- p.m. and therefore that should be treated as the proper compensation. Though this criterion has been followed by some courts in the country but in my opinion, this formula cannot be accepted as an inflexible principle for determining the 'fair and just' compensation in these days with the purchasing power of money diminishing rapidly and the cost of living index making a runaway upward trend. That apart, this calculation presupposes the rate of interest to be 10% for which there is no material on record. The normal rate of interest these days varies between 3% and 8% pa. and the interest on Rs. 20,000/- would not meet the shortage. The object of compensation is to provide an amount which is proportionate to the loss resulting from the death.

49. From the entries in the Service Book of deceased Vijay Kumar, as proved by D W. Ishwar Dayal Sharma, the date of birth of the deceased was November 5, 1931. According to Om Prakash and Dharam Vir P. Ws. he was drawing a salary of Rs. 476/- p.m. at the time of the accident.

A copy of the L.P.C. of the deceased Exhibit PW 4/1 shows that the deceased was getting Rs. 380/- p.m. as his basic pay and Rs. 96/- as

dearness allowance. Thus, it stands established that the deceased was getting a salary of Rs. 476/- p.m. at the time of his death. According to Om

Prakash P. W. the deceased would have retire at the age 55 i.e. by November 5, 1986, had the unfortunate accident not occurred from the

evidence of Om Prakash, Gurman Mal and B. R. Mehta P. Ws. it transpires that the deceased was an intelligent person having good health and

bright future prospects. The father of the deceased had lived upto the age of 72 and his mother aged about 60 was still alive. The averment of the

Plaintiff, in the suit that the deceased would have retired with a monthly pay of atleast Rs. 1,000/- p.m. had he not died cannot be accepted without

there being any material on the record to support this plea as no evidence has been led to substantiate this plea.

50. According to the evidence of the Plaintiff, which has remained unrebutted by the Defendant, the deceased was spending 75% of this earnings

on his dependants though there is nothing on the record to show as to what amount the deceased was spending on each of his dependants

individually. All that can be said on the basis of evidence is that out of his salary of Rs. 476/- p.m. 75% was being spent by the deceased upon the dependants. That amount would work out to about Rs. 375/- p.m. (and not Rs-373/- as averred in the plaint) which figure may be rounded up to Rs. 360/- p.m. The learned Single Judge, however, fixed the average pay and allowance of the deceased at Rs. 700/- p.m. from the date of his death till the date of his superannuation by taking into account chances of his future promotions etc. and opined that 75% of Rs. 700/- being Rs. 505/- p.m. was the amount which would have been spent by the deceased on his dependants during the time till he retired. There was no material on the record from which it could be said that the deceased would have earned a pay of Rs. 700/- inclusive of allowance till the date of his retirement. No evidence was led by the Plaintiff in this behalf and even the defence witness Ishwar Dayal was not cross examined on those lines at all. On the other hand, the evidence on the file shows that the deceased was only a temporary employee and was not even a graded employee. His total salary was only Rs. 476/- p.m. and it would not be justified to estimate his salary at Rs. 700/- as has been done by the learned Single Judge. Plaintiff was required to produce cogent evidence to establish the prospects of the promotion of the deceased (see 1969 ACJ 286) and no assumptions are permissible. While taking the earnings of the deceased into consideration, his earnings should have been estimated only at Rs. 476/- p. m. and not at Rs. 700/- p.m. The deceased was about 35 years of age at time of the accident and since the age of retirement is 55, he could have expected to serve for another 20 years had he not been killed.

51. From the statement of D. W. Ishwar Dayal, it transpires that the Plaintiff is already getting Rs. 95/- as pension on account of the death of her husband. She has also received an amount of Rs. 1,160/- from the G. P. Fund account of her deceased husband. Besides her the son of the deceased Avinasii is also getting Rs. 13/- p.m. as pension and he would continue to receive that amount till he attains the age of 18 years and that at the time of the death of his father, Avinash was 15 years of age. A sum of Rs. 13/- p.m. as pension is also being paid to Abha, daughter of the deceased and she is to receive that amount till she attains the age of 21 or till her marriage whichever courses earlier. At the time of the death of her

father, she was only 7 years of age. There is no rebuttal to this evidence and it must be held that the Plaintiff and the other dependants are receiving the benefits as deposed to by D.W. Ishwar Dayal.

52. The learned Single Judge while assessing compensation opined that the amount which the deceased was spending on his wife was Rs. 180/-

p.m. out of his earnings and since she was getting Rs. 95/- per month as pension she was entitled to Rs. 85/- p.m. more for a period of 15 years

and capitalising that amount and multiplying it with 15 years purchase of dependency i.e. (85 X 12 x 15) came to the conclusion that the wife is

entitled to receive Rs. 15,300/- and deducting the amount of G. P. Fund of Rs. 1,160/- received by her, held entitled to receive Rs. 14,140/- as

compensation. So far as the mother is concerned, the learned Single Judge, found her entitled to Rs. 100/- p.m. and capitalising that amount for a

period of 15 years, opined that she was entitled to receive (100X12X15) Rs. 18,000/-. The son and daughter on the same basis were held entitled

to receive Rs. 4,932/- and Rupees 10,416.00 respectively. The learned Single Judge himself observed that in fixing the amount which the

deceased was spending on his dependants namely wife (Rs. 180/- p.m.) mother (Rs. 100/- p.m.) and son and daughter (Rs. 75/- each) he was

only making a 'guess'. While arriving at those figures, the learned Single Judge had assumed that the deceased would have spent Rs. 505/- on his

dependants, including Rs. 75/- on his younger brother. As noticed earlier I have with respect to the learned Judge not agreed with the assumption

made by him. I also find it difficult to accept that for capitalising the amount, the anticipated benefit should be multiplied by 15 being the normal

years purchase of the dependency. There appears to be no justification for it as the deceased was aged 35 years at the time of his death and the

age of retirement in his case was 55 years. There is no unanimity among the courts to ascertain the multiplier i.e. the number of purchase years of

dependency.

53. In 1975 A.C.J. 396, the High Court of Delhi approved the multiplier of 12 years in case of the deceased aged 45 years. While in 1969 A.C.J.

286, the multiplier of 15 was approved in the case of the deceased aged 35 years. Both these judgments appear to have been influenced by the

English decisions where in view of the social security offered by the State, lower

multiple has found favour with the courts. In Fatima's case 1976

A.C.J. 194, this Court approved the multiplier of 17 in the case of the deceased in that case, aged 38, at the time of the accident on the

assumption that the deceased could have reasonably expected to live till his age of retirement. This approach commends to me.

54. No unanimity in determining a multiplier has been accepted by the courts and different considerations have weighed with different courts in

determining the appropriate multiplier. In determining a proper multiplier a reasonable test, in my opinion, would be to take the number of years of

the expected useful life of the deceased as the guiding factor mere so where the deceased is an employee in service, who is likely to continue to

work till his retirement age. The multiplier so determined, may in some cases appear to be on the high side but keeping in view the fact that in

estimating the amount, the value of money restraining at the date of the judgment is taken into consideration and further realising that the purchase

power of money is diminishing every day, the multiplier would not be deemed to be high. After the multiplier is determined 'fair and just'

compensation can be worked out and that amount would be the amount obtained after multiplying the estimated monetary loss to the dependants,

by the number of years of the expected useful life of the deceased and deducting from the figure so obtained the benefits which have occurred to

the Estate of the deceased and also after making further deduction for lumpsum payment of the accelerated amount to the Defendants.

55. Thus, in the instant case; the deceased was about 35 years of age at the time of accident and out of his salary of Rs. 476/- p.m., 75% was

being spent by him on the dependants i.e. about Rs. 375/- p.m. (rounded upto to Rs. 360/- p.m.). Had he not died, he would have retired at 55

years and thus had 20 years of expected useful life. On account of his death the Plaintiff has already received Rs. 1160/- as death-cum-gratuity

benefit, besides the family pension which has been noticed earlier. The deceased was the sole supporter of his family and the Plaintiff and his other

dependants were entirely dependent upon him for their maintenance. The dependants have thus been deprived of about Rs. 360/- p.m. for almost

20 years

56. Thus, in this case the basic figure would work out to be: $(360 \times 12 \times 20) =$

86,400/-. Out of this amount, the extent of monetary benefits received by the family of the deceased require to be deducted. The benefits proved to have been received are:

Wife's pension (95 x 12 X 20)

=Rs. 22,800.00

Son's pension (13x12x 3)

=Rs. 468.00

Daughter's pension (13 X12 x 14)

=Rs. 2,186.00

G.P. Fund received =Rs. 1,160.00

Total benefit received to be Rs. 26,614.00

57. Thus, the amount of compensation payable would become Rs. 86,400/- minus Rs. 26,614/- =Rs. 59,886.00. Out of this assessed amount, it

would also be desirable to make a further deduction for accelerated lumpsum payment. In 1972 A.C.J. 93, the Orissa High Court allowed

deduction for this purpose of 1/6th of the amount assessed. Thus, making a further deduction of 1/6 out of this amount i.e., Rs. 9,981/-, the

compensation payable would work out to be (Rs. 59,886.00) minus, Rs. 9,981)=Rs. 49,905/- which figure on being rounded up comes to Rs.

50,000/-. This amount, in the facts and circumstances of the case, would be the 'just and fair compensation'. I cannot persuade myself to agree

with Mr. Ram Nath that since the deceased was expected to maintain his family even after retirement for about 15 years more, assuming that the

deceased lived upto 70 years, the multiple should not be 20 but 35 or at least 30. There is no justification for it. The Plaintiff is getting pension at

the rate of Rs. 95/- p.m. and she would continue to receive it till her death. After retirement of the deceased, not more than Rs. 95/- p.m could

have been spared by the deceased for spending on her, out of his pension and therefore no other allowance is required to be made for the Plaintiff

for the period after the expected age of retirement of the deceased. The children of the deceased would also have settled down by then and the

mother of the deceased may not even survive till the expected age of retirement of the deceased.

58. So far as the apportionment of the compensation is concerned, no prayer for

apportionment was made in the plaint and, I do not find any justification for the learned Single Judge to have apportioned the amount amongst the various dependants. It is for the Plaintiff herself to apportion the amount amongst the dependants for whose benefit also she has filed the suit. This is more so in view of the fact that there is no evidence on the record from which we may be able to say as to what amount of Rs. 360/- p m. which was being spent by the deceased on his dependants, was actually being spent on any particular dependant so as to properly apportion the amount.

59. In view of the aforesaid discussion, I would modify the decree of the learned Single Judge and hold the Plaintiff entitled to Rs. 50,000/- as compensation. The Plaintiff would also be entitled to the costs of the suit and interest at the rate of 6% from the date of the suit till the realisation of the decretal amount. The Plaintiff would be liable to pay the court fee out of the decretal amount and the same be realised from her. Consequently, the appeal filed by the State is dismissed and the cross objections are partly accepted.

60. There shall, however, be no order as to cost so far as this appeal is concerned.

Mufti Baha-ud-Din Farooqi, J.--I agree.