

**(2001) 12 KL CK 0064**  
**In the High Court Of Kerala**  
**Case No : W.A. No. 1414/95 (A)**

State of Kerala and Others

APPELLANT

Vs

P. Gangadharan Pillai

RESPONDENT

**Date of Decision :** 13-12-2001

**Acts Referred:**

Constitution of India, 1950 — Article 21, 226  
Criminal Procedure Code, 1973 (CrPC) — Section 144  
Penal Code, 1860 (IPC) — Section 395, 427, 450, 461

**Citation :** (2001) 12 KL CK 0064

**Hon'ble Judges :** B.N. Srikrishna, C.J;M. Ramachandran, J

**Bench :** Division Bench

**Advocate :** Roy Chacko, Government Pleader, for the Appellant; P. Radhakrishnan and Meera, K., for the Respondent

**Final Decision :** Allowed

## Judgement

B.N. Srikrishna, C.J.—This Appeal is directed against the Judgment and Order of the learned Single Judge dated 31st July, 1995 rendered in O.P. No. 86 of 1992.

2. The first Respondent is the State of Kerala, second Respondent is the District Collector", Ernakulam, third Respondent is the City Police Commissioner, Ernakulam and the 4th Respondent is the Revenue Divisional Officer, Fort Cochin.

3. Petitioner is the proprietor of a vegetarian hotel by name "New Ananda Bhavan Hotel" at Kalvathy Road Fort Cochin, which was running for about 20 years and claimed to be a flourishing restaurant with high reputation in the locality with large custom. Sometime in October, 1990 a Muslim Priest of the mosque of Kattur was murdered by miscreants and this incident sparked off communal disturbances and riots in several places of the State.

4. On 16th October, 1990 a State-wide Hartal was announced by the Muslim community to protest against the murder of a Madrassa Teacher at Kattur in Thrissur District on 14th October, 1990. The entire police force within the

Mattancherry Sub division was mobilised and mobile patrols and police pickets were arranged at sensitive areas with the assistance of additional Armed Police. Precautionary measure by way of prohibition order u/s 144 of the Code of Criminal Procedure was also issued by the District Collector, Ernakulam. Despite all preventive measures adopted by the State machinery, the Hartal turned into a complete Bundh followed by large scale violence because of antisocial elements taking advantage of the situation. Large groups of people blatantly violated the prohibitory order issued u/s 144 of the Code of Criminal Procedure and started damaging the shops and setting fire to them. There was also large scale looting of several shops. Police attempted to control the situation by resorting to bursting of tear gas shells and lathicharge. But they were unable to bring the situation under control. Police parties were also subjected to attack by violent mob since the police tried to prevent the incidents of arson, looting and destruction. Police vehicles were also damaged and destroyed. Firing was resorted to by the police at 12.12 p.m. at New Road, Mattancherry at 2.15 p.m. at Bazar Road, and at 8.45 p.m. at Panayappally. All three firing incidents took place on 16th October, 1990. Separate Crime Nos. 306/90, 307/90 and 311/90 were also registered by the police. 78 cases were registered in Mattancherry Police Station and 3 cases registered at Fort Cochin Police Station with regard to various incidents of damaging of shops. Cases under Sections 450, 461, 395 and 427 of the Indian. Penal Code were also registered vide Crime No. 101/90 at Fort Cochin Police Station on 18th October 1990 at 11 a.m. The substance of the Petitioner's statement in the F.I.R. was that he had been informed by one Sudarsan who was an employee in the hotel at about 11.30 on 16th October 1990, that about 100 persons had trespassed into his shop by breaking open the closed doors and windows and caused heavy damage to the shop and they also took away furnitures, condiments, rice, stationery items and other valuables from the shop. Since the situation was worst, he could not go to the shop on 16th and 17th of October 1990. He went to the shop on 18th morning and found that various kinds of articles worth Rs. 57,000 were missing. There was also loss of cash to the tune of Rs. 17,000 kept in the cash counter.

5. Petitioner brought the Original Petition on the ground that there was gross negligence in the discharge of duties by Respondents 2, 3 and 4 for which the first Respondent State was vicariously liable. The Original Petition proceeds on the basis that the Petitioner deserves to be compensated for the loss sustained by him by the State as the State is vicariously liable for the acts of negligence of Respondents 2 to 4. Petitioner computed the damages sustained by him in the sum of Rs. 86,000 and demanded that the aforesaid sum be paid to him as compensation by the first Respondent State.

6. The State of Kerala, by its counter affidavit, controverted the averments with regard to negligence of its officers. In fact, the State does not deny the incidents of violence took place. It is also not denied that there was damage caused to the establishment of the Petitioner. The State denies that the police officers and the District Collector had not taken necessary steps for dealing with the possible

situation of Hartal, Bandh and violent incidents. It is pointed out on behalf of the State that there was no negligence on the part of the police or the State machinery for preventive measure by way of prohibition order u/s 144 of the Code of Criminal Procedure had been declared and that large police pickets were posted at sensitive points and additional Armed Police were also made available to deal with any probable incident. It is the stand of the State that an unusually large mob attacked the shops and establishments in the concerned area and, despite the best efforts on the part of the available police force, the policemen were also attacked and that several incidents could not have been prevented by them even after due exercise of care and, hence, there was no negligence on their part. According to the State the damage sustained by the Petitioner was only about Rs. 35,000. The State denies that the damage sustained by the Petitioner could be attributed to the failure of the police and State machinery or that the police and the State machinery had not taken effective steps in due time.

7. The material before the learned Single Judge consisted of affidavits filed by the Petitioner and some other citizens supporting the case of the Petitioner and the counter affidavit filed on the part of the State authorities. The learned Single Judge disposed of the petition by taking the view that it was an admitted fact that no police help was received by the Petitioner to save his business premises from want on destruction by the mob. It was the case of the State that no complaint as such had been received on 16th October, 1990 by the Assistant Commissioner of Police as urged in the petition. Unfortunately, the case rested on affidavits, authenticity of the contents of which was never tested in the crucible of cross-examination. Though the issue as to negligence on the part of the police authorities could have been tested only upon careful appreciation of the disputed facts, the learned Single Judge chose to rely on the affidavits filed by the Petitioner and totally rejected the case of the State simply for the reason that the facts of incident and damage had not been denied by the State. On the issue of damages the learned Single Judge accepted the assessment made by the State. As certain amounts (to the extent of about Rs. 17,000) had been paid from the Chief Minister's Distress Relief Fund to other petty traders, whose establishments were similarly damaged during the said riot, the learned Single Judge directed the State to pay a sum of Rs. 35,000 together with interest at the rate of 12 percent per annum from 1st May 1995 till the date of payment. It is this direction which is challenged in the appeal.

8. The first contention urged by the learned Government Pleader is that, merely because an incident of violence took place and a citizen sustained damage as a result of such incident, it would not be possible to hold that it was necessarily the consequence of negligence on the part of the police or the State machinery. Negligence is defined in Black's Law Dictionary 7th Edition as "the failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation; any conduct that falls below the legal standard established to protect others against unreasonable risk of harm, except for conduct that is intentionally, wantonly, or wilfully disregarding of others' rights".

Thus, in order to find the State authorities guilty of negligence there would have to be an assessment of the standard of duty and care that was imposed on the authorities at the point of time when the incident took place against the backdrop of the contemplated events and actual steps taken by the State authorities. After determining the standard of duty and care that was called for, an adjudication has to be made as to whether the steps taken by the State authorities fell below the standard of duty and care that the State authorities were to maintain. It is trite that "duty" is a legal obligation that is owed or due to another that needs to be satisfied; it is an obligation for which somebody else has a corresponding right.

9. In a situation where the police are expecting a communal riot, the law requires them to act to prevent the communal riot. This they can do by holding meetings, counselling the leaders of different factions that are likely to indulge in riots, posting pickets, armed or unarmed, at sensitive points where trouble is expected, calling for reinforcements of Armed Constabulary and taking resort to preventive measures like prohibitory orders u/s 144 of the Code of Criminal Procedure. The material on record shows that police had resorted to these steps very much before the trouble erupted. Once trouble erupted, the police appeared to have done all that was within their power to deal with the situation, including resorting to lathi charge and firing as a last resort. In the face of these steps taken by the police authorities and the District Collector, including that of inviting the communal leaders and counselling them, is it possible to hold that the police had failed in discharging the duty of care that was imposed upon them in the circumstances of the case? After anxious consideration of the material on record, we are unable to agree with the learned Single Judge's finding that there was any such failure to discharge that care so as to amount to "negligence" on the part of the State authorities.

10. Another facet of the case is that the assessment of evidence was on mere evaluation of conflicting averments made in affidavits without being tested by cross-examination. In our view, one set of averments have been accepted for no good reason evidenced from the Judgment under appeal. Had there been cross-examination, perhaps, things might have been turned out differently. In any event, the petition raised a number of disputed facts which could only have been satisfactorily decided upon a detailed trial of the case. Normally, this Court does not carry on such trial and leaves the parties to resort to their civil or criminal remedies. It is not that such a trial is not permissible in this Court and on suitable occasions this Court may held a trial. Unfortunately, that was also not done as no trial was held to ascertain the facts. Consequently, the conclusions reached, namely, that the State authorities were negligent in the discharge of their duties appears to be based on insufficient, inadequate material, that too untested by cross-examination.

11. A number of Judgments were cited before the learned Single Judge which arose out of allegations of breach of fundamental rights under Article 21. Most of

them were cases of extortion, torture and wrongful action on the part of the police. It may be possible in such cases, if the material on record clearly points out that the police have acted wrongly so as to abridge someone's fundamental right under Article 21, for the court to proceed even without cross-examination and decide the issue of violation of the fundamental right under Article 21 under Article 226 and to award compensation, if there is breach. There is a wide difference between assessing an act of commission and an act of negligent omission on the part of the State authorities. The former is proved by evidence; the latter requires higher degree of proof of facts to ascertain the standard of duty or care in the proven circumstances and a determination of the shortfall therefrom. It appears to us that this distinction was not kept in mind while deciding the petition under Article 226. Hence, we are unable to agree with the conclusions of the learned Single Judge that there was any such negligence on the part of the State authorities, merely because an incident took place in which the hotel of the Petitioner was looted and damaged.

12. The next question that arises is the manner of computation of damages. Although the Petitioner claimed a sum of Rs. 86,000, the learned Single Judge has accepted the computation made by the Respondents at Rs. 35,000. The learned Counsel for the Petitioner, Sri Radhakrishnan, contends that the compensation claimed in the petition should have been accepted. It is not possible for us to agree. In any event, it is unnecessary in this case for us to interfere with the amount of compensation towards damages which the learned Single Judge has arrived at. In our view, irrespective of whether negligence on the part of the State authorities could be established or not, the amount of Rs. 35,000 should be paid as ex-gratia to alleviate the misery to which the Petitioner has been subjected. This is precisely what was done in the case of other petty traders who were paid exgratia amount of Rs. 17,000 to Rs. 18,000 each. That is not by way of admission of liability, but as an act of grace on the part of the State.

13. We are of the view that the order of the learned Single Judge needs to be set aside for the reasons which we have given above, but there is no need to interfere with the payment of Rs. 35,000. We are of the view that the State should pay the amount of Rs. 35,000 to the Petitioner, without it amounting to adjudication of its liability in the matter. We are, however, not inclined to uphold the direction for payment of interest, which is hereby set aside.

In the result, the appeal is allowed, but there shall be a direction to the first Respondent to pay an amount of Rs. 35,000 to the Petitioner, together with costs of Rs. 2,000.