
(1997) 09 KL CK 0043
In the High Court Of Kerala
Case No : A.S. No. 219 of 1994

State of Kerala

APPELLANT

Vs

Joseph

RESPONDENT

Date of Decision : 09-09-1997

Acts Referred:

Citation : (1998) 1 CivCC 632 : (1998) 1 KLJ 180 : (1998) 4 RCR(Civil) 355

Hon'ble Judges : S. Krishnan Unni, J

Bench : Single Bench

Final Decision : Allowed

Judgement

S. Krishnan Unni, J.—Defendants in O.S. No. 237 of 1990 on the file of Prl. Sub Court, North Parur are the Appellants. The Appeal arises out of a suit for damages filed by the Plaintiff-Respondent against the Defendants to the tune of Rs. 50,000/- . The facts are not very much in dispute. Plaintiff is son of one Varghese who was a contractor and happened to be the President of Parent Teachers Association, hereinafter indicated by abbreviated form "P.T.A." of Government L.P. School, Chully. A new wing was put up in that school the P.T.A. was helping for this purpose. Plaintiff's father was supervising this work. Plaintiff, a man aged about 28 years who had completed SSLC without any avocation was helping his father. On 12.3.1986 he went to the work site and it began to rain. He took shelter in the veranda of the building of the school. At that time, classes from 1 to 4th standards were being run there. The building collapsed. Several students, teachers and the Plaintiff were injured. Plaintiff sustained injury to his spinal cord. He was admitted to the Medical Trust Hospital, Ernakulam. He contended that he was continuing the treatment and has spent over Rs. 68,000/- and he claimed 50,000/- as damages.

2. Defendants disputed their liability for paying any damages. Though they admitted the collapse of the building and the fact that students and teachers were injured, according to them, it was an accident, a vis major.

3. Plaintiff was examined as P.W.1. P.W.2 would speak that the collapsed building was not in a good condition. Ext. A-1 is a lawyer notice, Ext. A-3 series are the medical bills and Ext. A-2 is the medical certificate granted from the Medical Trust Hospital. Ext. A-4 is the copy of the publication of Mathrubhoomi daily dated 13.3.1986 carrying the news of the incident. The Defendants did not produce any document nor examined any witness.

4. The lower Court found that the Defendants were negligent in keeping the school building in safe, that the Plaintiff suffered injury and damages and decreed the suit as prayed for with future interest and costs. The above decree and judgment are challenged in this appeal.

5. The point that arise for consideration is whether the Plaintiff can claim any damages and if so what quantum.

6. The lower Court has proceeded on the ground that the collapsed building was old and not maintained properly and there was negligence on the part of the Defendants to that extent. It has not examined the intricate issues involved in the case. Of course, it is not disputed that Plaintiff sustained injury as a result of the incident and he had to be hospitalised and undergo treatment. It is submitted that Plaintiff lost his control over the left leg due to the spinal cord injury. Ext. A-3 bills cover a total amount of Rs. 7420.12. The evidence of the Plaintiff that he lost some of the bills. It is in the background of these facts, we have to decide the liability of the Defendants.

7. The most important fact to bear in mind is that neither the Plaintiff nor his father was entrusted with the work as such relating to the construction of the new building. Though the Plaintiff alleges that his father was a contractor who has undertaken to do the work, there is no case for him that his father submitted a tender or a work order was given in his favour. According to the Defendants, the work was done directly by the Government and Asst. Executive Engineer was in charge of the same. The P.T.A. was helping the Government to carry on this work, as is done in many places and for this purpose a committee was constituted. The Plaintiffs father being the President of P.T.A. was helping the Government to this limited extent. Plaintiffs case is that he went to the spot to help his father. It was a question of moral help to his father and not as an employee under him.

8. The larger question to be answered is whether the voluntary entry of the Plaintiff into the premises and his subsequent act of taking shelter in the old school building without any invitation or call of duty and the damages thus followed the incident will make the Appellants liable. It is expressed in one of the fundamental maxims of tort, "Volenti non fit injuria", that a person who consents to an act and suffers an injury cannot later on complain and claim damages for the same. If the Plaintiff was at the premises by invitation from the Defendants, expressed or implied, or on account of a call of duty, certainly there is a scope for the Plaintiff to claim damages. The only argument put forward by the learned

Counsel for the Respondent is that Plaintiff was helping his father and it must be deemed that there was an implied invitation on the part of the Defendants because they had not objected to his going into the premises till then. In other words, the argument of the learned Counsel is that in so far as, the Defendants did not object to the Plaintiff's entry into the premises to help his father, they must be deemed to have consented to the Plaintiff carrying on the work of supervision on behalf of his father. On analysis and reflection of the above argument, I am unable to agree whole-heartedly with such a reasoning in this case.

9. I will now refer to certain passages on the Law of Torts from two eminent authors. In "Salmond on the Law of Torts" 17th Edition. Page 267 mention about the position of an invitee and their rights in such a situation, it is mentioned:

At common law entry by permission of the occupier is of two kinds. The permission amounts either to an invitation or to a mere licence. A person invited to enter is commonly referred to as an invitee, or a licensee with an interest, while he who is merely licensed to enter is distinguished as a licensee, or bare licensee.

The learned author quotes Willes, J's observation in *Bowen v. Hall* 6 Q.B.D.333:

The class to which the customer belongs includes person who go not as mere volunteers, or licensees, or guests, or servants or persons whose employment is such that danger may be considered as bargained for, but who go upon business which concerns the occupier and upon his invitation, express or implied.

It is pointed out that:

The law then, rather paradoxically, requires something more than an express or implied invitation or enter upon premises to constitute the entrant an invitee. When that something more may be has been disputed. Salmond thought it sufficient if the occupier had a material interest in the visitor's presence. He denied an invitee as a person who enters on the premises by the permission of the occupier grant in the matter in which the occupier himself has some pecuniary or material interest. He is a person who receives permission from the occupier as a matter of business and not as a matter of grace. An invitation is a request to enter for the purpose of the occupier; a licence is a permission to enter for the purposes of the entrant himself.... But in *Person v. Lambeth B.C.* Asquith L.J. thought that it is more exact to say that an invitee is a person who comes on the occupier's premises with his consent on business in which the occupier and he have a common interest. This requirement of community of interest is to be found in many of the cases.

Again it is mentioned:

The duty owed to an invitee is limited to those places to which he might reasonably be expected to go, in the belief, reasonably entertained, that he was entitled or invited to do so, and to use of those premises in the ordinary way.

10. In Broom's Legal Maxims, 10th Edition at page 181 commentary on the maxim "Volenti non fit injuria" is explained. It is stated:

In actions founded on tort the leave and licence of the Plaintiff to do the act complained of usually constitutes good defence by reason of the maxim volenti non fit injuria; and, as a rule, a man must bear loss arising from acts to which he assented (Gould v. Oliver).

The maxim volenti non fit injuria has been often cited, and sometimes applied, in favour of Defendants sued for damages for personal injuries; for instance it was so applied against a man who was hurt by a spring gun while he trespassed in a wood after being warned by the owner that in it there were spring-guns set (Ilott v. Wilkes) in a manner which was not then illegal; and it seems that, as a rule, the application of the maxim is justifiable if the Plaintiff received his injuries under circumstances, leading necessarily to the inference that he encountered the risk of them freely and voluntarily and with full knowledge of the nature and extent of the risk; in other words, if the real cause of the Plaintiff running the risk and receiving the injuries was his own rash act. Whether the maxim ought to be applied in a particular case is often a question rather of fact than law. (Yarmouth v. France).

The learned author at page 182 gives an example which is extracted below:

If for example, a person goes to the aid of a driver endeavouring to pacify horse which has bolted into a field (Cutler v. United Diaries) or unnecessarily crosses a barrier to extinguish a cigarette which he sees smouldering near a leopard's cage (Sylvester v. Champan), and is injured, he cannot recover; he has voluntarily assumed a risk and brought the injury upon himself. On the other hand if, as a result of the negligence of the Defendant's servant, his horse bolts in a busy street, and a policeman is injured in stopping it, the Defendant is liable for the policeman's injuries (Haynes v. Harwood).

12. The argument that there was an implied invitation by the Defendant to the Plaintiff cannot be sustained in the circumstances of this case. Plaintiff volunteered to go there in order to help his father which was more for personal reasons than by any invitation or call of duty. Moreover he has stated that he does not know about the condition of the building. PW1 admitted that there was fitness certificate for the school which has collapsed. It is a Government institution. Though PW2, a retired supervisor was examined to prove that the building was an old and weak one, he had to retrace his steps because he admitted that he had no duty to examine it and he pretended ignorance. His duty was to supervise the work of the new building.

13. Even if we accept all the evidence of the Plaintiff in toto, his limited purpose was to go the work site of the new building to see his father. There is absolutely no reason for him to enter the premises of the old school from where he sustained injuries. Therefore, Plaintiff was a volunteer and he was not under any implied or express invitation or call of duty. Therefore, the Defendants cannot be

made liable for damages sustained by him.

14. The lower Court has given a decree for damages to the tune of Rs. 50,000. The documents produced cover only Rs. 7,000/ - and odd and there is only the oral evidence adduced regarding the treatment. The doctor concerned has not been examined and there is paucity of evidence on that aspect also. However, in view of the conclusion I have reached, it is not necessary for me to go into the question further.

In the result appeal is allowed, decree and judgment of the lower Court are set aside and the suit is dismissed. There will be no order as to costs in this Court as well as in the Court below.