

(1988) 07 KL CK 0038
In the High Court Of Kerala

State of Kerala

APPELLANT

Vs

Karthiyani

RESPONDENT

Date of Decision : 29-07-1988

Acts Referred:

Citation : (1989) 1 ACC 390 : (1989) ACJ 16 : (1989) 1 ILR (Ker) 297

Hon'ble Judges : P.K. Shamsuddin, J;Balakrishna Menon, J

Bench : Division Bench

Judgement

P.K. Shamsuddin, J.—This appeal has been preferred by the State of Kerala, the officials of Irrigation Department and the District Collector Ernakulam, who are defendants in O.S. No. 2 of 1985, on the file of the court of Subordinate Judge, Ernakulam.

2. The said suit was filed by the mother of one T.K. Jaison, who died on 7-10-1982 in an accident at the Minor Lift Irrigation Pump House situated on the banks of Muvattupuzha river at Kadathy Kare. Jaison was taking bath at about 1 p.m. near the pump house. On the western side of the pump house, there are stepping stones and people in and around the locality had free access to the steps and they used to take bath near the pump house. According to the plaintiff, at the time of occurrence, the pump operator started operating the pump without giving alarm or warning. Jaison was pulled with tremendous force towards the mouth of the pump and sustained grievous injuries and died. It was alleged in the plaint that in spite of the fact that the operation of the pump was dangerous to the public, especially those who take bath at the steps, no preventive measures were taken and that there was no fence in the area where the pump house was installed and no warning board was displayed anywhere giving caution to those taking bath near the pump house, that Jaison died as a result of the negligence and carelessness of defendants and that therefore the defendant Nos. 2 to 4 are liable to compensate the plaintiff for the premature death of her son. It was also alleged that since defendant Nos. 2 to 4 are employees under the first defendant, the 1st defendant is vicariously liable to compensate the plaintiff

and that the doctrine of *res ipsa loquitur* is applicable to the case. The deceased Jaison was aged 20 at the time of his death, and according to the plaintiff, he would have lived upto 80 years. She also alleged that he was conducting a bunk at Kadathy, very near to the Ernakulam-Muvattupuzha main road, and from that business, he was earning an income of not less than Rs. 600/- per mensem. He was of a good physique and had studied upto S.S.L.C. and was contributing an amount of Rs. 200/- per mensem towards maintenance and welfare of the plaintiff and was saving Rs. 50/- per mensem. Notice was sent to the defendants but no reply was sent to the same. She also averred that an amount of Rs. 2,000/- was paid after the incident, which was quite inadequate. She limited her claim to Rs. 48,000/- as compensation.

3. In the joint written statement, the defendants contended that the pump house was started 9.00 a.m. on the date of the accident and it was running till it came to a sudden stop with a noise at about 1 p.m. on 7-10-1980. Thereupon the operator in charge of the pump house inspected the motor board and found that the fuse was burnt. After rectifying the fuse, he came down to the suction side for doing priming which is a forerunner operation required for starting the motor and at that time he saw one cycle near the pump house and a pair of chappals near the suction pit. These aroused suspicion in his mind as to whether somebody was sucked into the pump. The pipes were dismantled in the presence of public and officials and a dead body was found in the intake pipe close to the pump which was identified as Jaison alias Unni. After post-mortem, the body was handed over to his relatives. It was also averred that there were steps on the river side of the pump house to facilitate operation of the pump and take materials to the suction pit. Those steps were not intended for public use but in spite of the objection from the pump operator, people used to take bath in this place. It was also alleged, warning boards installed were thrown away into the river and people used to abuse the operator whenever he cautioned them against the potential danger. It was also averred that on enquiry, it was gathered that Jaison had the practice of taking bath by standing on the suction pipe and basement adjacent to the pump house, and the accident had taken place as a result of the illegal act on the part of Jaison in trespassing into the premises of the pump house. The plaintiff's allegation regarding the income of Jaison and the dependency of the plaintiff on Jaison were also disputed. Finally, it was contended that the defendants are not liable to pay any compensation as the death was caused due to the sheer negligence on the part of Jaison.

4. The lower court found that the premises of the pump house were unprotected by fencing and the authorities had not taken any preventive measures to avoid accidents and no warning board was displayed anywhere in the pump house. The lower court also noticed that DW 1 admitted that if a compound wall had been constructed around the pump house, entry towards the pump house could be prevented and if fencing was made around the pump, entry of foreign materials into the pipe could have been avoided. In the circumstances, the court below found that this is a case where the doctrine of *res ipsa loquitur* is applicable, that

no precautionary measures were taken by the defendants to avoid the accident and that the death was caused on account of the negligence of the employees of the defendants. The lower court also found that Jaison was getting a net income of Rs. 15/- per day and if the shop run by the deceased will remain open for 25 days his monthly income would be Rs. 375/- per mensem, that the mother who was aged 50 years was solely depending upon the deceased who was making contribution of his earnings, that considering the age of the plaintiff, multiplier of 12 years could be adopted and after deducting 10 per cent towards the lump sum payment, Rs. 48,600/- could be fixed as the amount of compensation to which the plaintiff was entitled. Since Rs. 2,000/- was already paid to the plaintiff, a decree was passed for recovery of Rs. 46,600/-.

5. In this appeal, the learned Government Pleader raised three points: (1) There is no negligence on the part of the defendants and the incident took place as a result of the carelessness and negligence of deceased Jaison; (2) Even assuming that there was negligence on the part of the officials, the State was not liable to pay compensation; and the quantum of compensation awarded is excessive.

6. As observed by the lower court, the principle of *res ipsa loquitur* is applicable to the instant case. No warning board was displayed anywhere near the pump house and the premises of the pump house were not protected by fencing and the authorities had not taken any measures to avoid accidents by giving sufficient warning to the general public, who took bath in the river, of possible danger involved in taking bath in the river near the pump house. It was admitted by DW 1 that, if compound wall had been constructed around the pump house, entry towards the pump house could be prevented and if fencing was made around the pump, entry of foreign materials into the pump could have been avoided. There is no evidence to show that the accident took place as a result of negligence of Jaison. In the circumstances, the court below was perfectly justified in holding that the incident occurred as a result of the negligence on the part of the defendants.

7. The next contention raised by the learned Government Pleader is that the State was not liable to compensate for damages caused as a result of the negligent act of its officials. We are unable to accept the wide contention raised by the learned Government Pleader that the State can claim immunity from vicarious liability for any tortious act committed by its employees in the course of employment.

8. In *Kasturilal Ralia Ram Jain Vs. State of Uttar Pradesh*, the Supreme Court had occasion to consider the extent of vicarious liability of the State in relation to tortious act committed by its employees in the course of their employment. The Supreme Court cited the decision of the Supreme Court at Calcutta in the case of *Peninsular and Oriental Steam Navigation Co. v. Secretary of State for India-in-Council* 5 Bombay HCR App. A 1, and made the following observations in paragraph 21 of the judgment:

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 act 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 a claim for damages, the question to ask is : was the tortious act committed by the public servant in discharge of statutory functions which are referable to, and ultimately based on, the delegation of the sovereign powers of the State to such public servant? If the answer is in the affirmative, the action for damages for 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 Peacock, C.J. as early as 1861 has been recognised as a classic statement on this subject.

9. A similar question was considered in *State of Orissa v. Amruta Dei* 1987 ACJ 1046 (Orissa) In paragraph 7 of the judgment, the court observed:

The State is liable for the damages occasioned by the negligence of its servants by applying the principle of vicarious liability. Government, however, is not liable for the tortious act which has been committed by its servants in exercise of its sovereign powers, i.e., the powers that can be lawfully exercised by a sovereign or a person by virtue of delegation of sovereign rights. When the State pleads immunity against the claim for damages resulting from injury caused by the negligent act of its servants, the area of employment referable to sovereign power must be strictly determined before such a plea is upheld. In order to sustain the plea, it has to be found out that the impugned act was committed in course of an undertaking of an employment which is referable to the exercise of the delegated sovereign powers.

10. The court also quoted with approval the following observations of a Bench of the same court in *State of Orissa v. Padmalochan Panda* ILR 1974 Cut 103

(1) Sovereign powers mean powers which can be lawfully exercised only by a sovereign or by a person by virtue of delegation of sovereign powers.

(2) The sovereign function of the State must necessarily include the maintenance of the army, various departments of the Government for maintenance of law and order and proper administration of the country which would include magistracy and the police and the machinery for administration of justice.

(3) Where the employment in the course of which a tortious act is committed is

of such a nature that any private individual can be engaged in it, then such functions are not in exercise of sovereign power.

(4) Government is vicariously liable for tortious acts of its servants which have not been committed in exercise of sovereign functions.

(5) The Union and the State are liable for damages for injuries caused by their servants if such injuries would render a private employer liable.

(6) The Government is not liable for tort committed by its servants if the act was done in exercise of sovereign power.

11. In *Union of India Vs. Jasso and Others*, a Full Bench of the Punjab High Court considered the question of immunity of the State for tortious act committed by a driver of a military truck. It was held that the mere fact that the truck happened to be an army truck and the driver was a military employee cannot make any difference to the liability of the Government for damages for the tortious acts of the driver as such things could be obviously done by a private person also.

12. In *Surjit Singh Bhatia v. Segalla Ramulu* 1983 ACJ (P&H) 603 a military vehicle dashed against a motor cycle and caused injuries to the pillion rider. The Punjab and Haryana High Court rejected the plea of sovereign immunity. Similarly, in *Pushpa v. State of Jammu and Kashmir* 1977 ACJ 375 a truck under the use of the army knocked down a cyclist causing his death. At that time the truck was loaded with crushed barley for being used as a feed for the mules. It was held that the truck could not be said to be engaged in the performance of the act of sovereign function. Similarly, in *Fatima Begum v. State of Jammu and Kashmir* 1976 ACJ 194 the Jammu and Kashmir High Court rejected the defence plea of sovereign immunity when a truck belonging to the Government Transport Undertaking had knocked down a cyclist while it was engaged in transporting police personnel from the place of duty to their barracks holding that the act is not referable to exercise of sovereign function.

13. So also in *Union of India v. Savita Sharma* 1979 ACJ 1 a military truck had dashed against a tempo van from behind while it was carrying jawans from the railway station to unit headquarters. The Jammu and Kashmir High Court held that the act of carrying jawans could not be said to be in exercise of any sovereign function as that act could be performed by any individual.

14. A Division Bench of the Allahabad High Court in *Iqbal Kaur v. Chief of Army Staff* 1978 ACJ 403 had occasion to consider the extent of immunity by virtue of sovereign power. In paragraph 16 of the judgment the court made the following observation:

It is true that the State cannot be held liable for damages for any act done in exercise of its sovereign powers. Every act of a Government servant cannot, however, constitute an act done in the exercise of sovereign power. In the instant case, respondent No. 4 was going with the truck for imparting training in motor driving to new recruits. We do not think that that can constitute an act in

exercise of sovereign power.

15. The Madras High Court had occasion to consider a similar question in *State of Tamil Nadu v. M.N. Shamsudeen* 1981 ACJ 244. In that case, the death was caused by an ambulance belonging to the Government which was at the relevant time used for transporting a patient for emergent treatment. The Madras High Court rejected the plea of immunity on the ground that transporting of the patient to the hospital could be done even by private individuals.

16. In *Union of India v. Sugrabai Abdul Majid* 1968 ACJ 252 a Division Bench of the Bombay High Court considered the same question. In that case, a military driver drove a motor truck carrying a Records Sound Ranging Machine from military workshop to Military School of Artillery killed a cyclist on the road. The court observed that the Union of India would be liable for the tort of the driver since the act of the driver is not referable to exercise of delegated power by sovereign.

17. In our view, function of operation of the pump cannot be referable to exercise of a sovereign power. An analysis of the above decisions would show that it is only in the case of exercise of sovereign power the question of immunity from vicarious liability for the act committed by employees in the course of their employment will arise. In the circumstances, there is no merit in the contention that the State is not vicariously liable for the negligence of its officials in the instant case.

18. As regards the quantum of damage awarded by the lower court, we are of the view that having regard to the age of deceased, his income and the dependency of the plaintiff on him, an amount of Rs. 48,600/- is not in any way excessive.

19. In the result, there is no merit in the appeal and it is accordingly dismissed.