
(1970) 11 BOM CK 0004
In the Bombay High Court
Case No : A.F.A.D. No. 565 of 1963

State of Mysore

APPELLANT

Vs

Ramchandra Gunda and Another

RESPONDENT

Date of Decision : 24-11-1970

Acts Referred:

Constitution of India, 1950 — Article 300

Citation : AIR 1972 Bom 93 : (1971) 73 BOMLR 723 : (1972) ILR (Bom) 142 : (1973) MhLj 521

Hon'ble Judges : Wagle, J

Bench : Single Bench

Advocate : M.R. Kotwal, Asst. Govt. Pleader, for the Appellant; M.V. Paranjpe and V.V. Divekar, for the Respondent

Judgement

1. This is an appeal by the State of Mysore challenging the orders passed by the two lower Courts granting damages to the plaintiff for loss caused by reason of water overflowing from a reservoir constructed for the residents of Nipani.

2. In order to provide drinking water facilities to the town of Nipani, the State Government erected a reservoir adjoining Survey Nos. 92 and 93 at village Arjuni. Survey Nos. 92 and 93 belong to the plaintiffs. The construction of the reservoir was completed in 1954 by the Water Works Department. By a notification u/s 4 of the Land Acquisition Act issued on September 27, 1955, Government proposed to acquire part of the land belonging to the plaintiffs for the purpose of constructing a channel for carrying the overflow of water from the reservoir to the Nala which is at a distance of about 1500 feet from the waste - weir of the reservoir. By private negotiation possession of the necessary land was taken by the State Government on October 21, 1956. However, the channel was not constructed except to the extent of about 250 feet on the side of the Nalla. The construction of the channel was not attempted from the waste - weir towards the Nalla. On November 14, 1957, there was heavy rainfall of 2 - 1/2" in four hours and the water from the reservoir overflowed into the waste - weir

and thereafter flowed over the land belonging to the plaintiffs. Considerable damage was caused both to the land and to the crops. Plaintiffs therefore came to Court seeking damages for the loss occasioned to him by reason of the overflow of the water which had collected in the reservoir. Plaintiffs' case was that due to the negligence of the defendant in not taking proper precautions to guard against the overflow, the loss was caused to the plaintiffs.

3. The defendant - State did not dispute the following facts, namely that the reservoir was built, that there was overflow due to heavy rains in November 1957 and that the loss assessed at Rs. 3,000/- was caused. The defendant's stand, however, was that the Mysore Government through its Engineering Department had taken proper legal and timely action in this case and that adequate and proper compensation has been paid to the plaintiffs under the provisions of the Land Acquisition Act. It denied the contention of the plaintiffs that the plaintiffs had suffered loss to his land due to the negligent act of the servants of Government. Lastly it was contended that the Government was not liable for tortuous acts or negligent acts of its servants. It was their further contention that it was an act of God and therefore nobody was liable.

4. Before the trial Court plaintiffs examined plaintiff No. 1 and the defendant examined Balvant Appaji Chavan, an Overseer working at Nipani at the relevant period. The issues framed by the trial Court include the issue : "Does plaintiff prove that due to gross negligence of the employees of Defendant in Public Works Department in not challenging the excess water through especially built channel, damage was caused to the crops and the lands of the plaintiff?" This issue was answered in the negative and therefore the main claim of the plaintiffs about the damage to the land and crops was not allowed. A small decree for rent and damages to the standing crop was made. Against this decision the plaintiff's went in appeal and the appellate Court holding that there was negligence on the part of the servants of the defendant - respondent decreed the claim of the plaintiffs for damages to the extent of Rs. 2,700/-. Against this decision the defendant - State has filed this second appeal.

5. Mr. Kotwal arguing for the appellant, the State of Mysore, contended that the lower appellate Court had taken an erroneous view in regard to the liability of the State. It was also urged by Mr. Kotwal that loss which was due to the act of God could not be considered as due to the act of any State Department. His argument was that during the course of several years at no time had 2 -1/2"" rain fallen during four hours. It is not disputed that damage by overflow of water was caused because of the accumulation of water during the course of four hours heavy rain amounting to two and a half inches. Mr. Kotwal's argument therefore was that the heavy rain of 2 -1/2"" was an act of God and therefore since the flow of water was due to the act of God, the State should not be made liable for the loss occasioned thereby. It was also urged by Mr. Kotwal that the act of the State in constructing the reservoir was an act in the capacity as a sovereign capacity, a loss occasioned to any citizen could not be made a liability on the

State. The lower appellate Court considered the authorities cited before it and came to the conclusion that there was negligence on the part of the State in not constructing the channel in time and that even if it be held that the heavy rain was an act of God, still the negligence of the State is not wiped out by the said act of God.

6. The point whether heavy rainfall could be considered as Vise Major or act of God was considered by the House of Lords in *Greenock Corporation v. Caledonian Rly.* 1917 AC 556. There the question was as to the liability for the consequences resulting from works in alveoli fulminous whereby the natural avenues were filled up and the flow of water under the force of gravity thrown into a new channel at a new and higher level. Lord Wrenbury observed on this point as follows :

"In such a case the corporation is responsible. I conceive, for resultant damage howsoever arising. The responsibility to provide a substituted channel is not limited to providing a channel sufficient to meet all demands which might reasonably be anticipated, or even all demands (in excess of the ordinary) short of the act of God. The corporation must provide a substituted channel which will be equally efficient happen what will. Assuming an act of God, such as a flood, wholly unprecedented, the damage in such a case results not from the act of God, but from the act of man in that he failed to provide (as there was before) a channel sufficient to meet the contingency of the act of God. But for the act of man there would have been no damage from the act of God."

Relying upon these observations, the learned appellate Judge held that in spite of the heavy rain, the negligence of the State in not providing a proper channel for absorbing overflow of water was responsible for the damage caused to the land and crops of the plaintiffs.

7. Mr. Paranjape pointed out that by a letter dated May 17, 1957 (Exh. 46) this fact was brought to the notice of the State Government that there was a likelihood because of the heavy rains of overflow of water causing immediate danger to his land on the border. Even after this, according to Mr. Paranjape, sufficient precautions were not taken by the State Government to provide against a heavy overflow of water. In this connection the actions of the State Government may be considered. In 1954 the water works were completed but no provision was made for a channel for overflow of water from the Waste - weir to the Nalla which is at a distance of about 1500 feet. Such a possibility it seems was contemplated a little before September 1955 and a notification u/s 4 of the Land Acquisition Act was made for taking possession of the adjoining lands ostensibly for the purpose of creating a channel to absorb the overflow of water from the waste - weir to the Nalla.

8. It appears that as an emergent act, possession was taken by the State Government on October 21, 1956. Exh. 38 shows that this possession was taken from the owners of the land, two of whom were the plaintiffs themselves. Thereafter the evidence led by State shows that upto a distance of about 250

feet from the Nalla a channel was made adjoining the Nalla. The channel was 7 feet in depth and about 10 feet in breadth. But this channel was adjoining the Nalla and no such channel was constructed near the waste - weir so as to take the water from the waste - weir towards the Nalla. In this state of events, Exh. 46, dated May 17 1957, was sent by the plaintiff to the State Government. The receipt of this letter is not disputed. The cause for writing this letter appears in the letter itself. It is stated therein "During rains of 1956, his land outside the acquired area was damaged by the water flowing through the waste - weir of the said Dam". It is also stated therein that he had applied to higher authorities to improve the same and to dig a channel through acquired area of Survey Nos. 92 and 93 from Arjuni but that he was sorry to note that nothing had been done. It is further mentioned in this letter that the rains were heavy and there was a chance that the flow would begin soon causing immediate danger to his land. It is not as if the danger of the likelihood of the loss was not brought to the notice of the Government. In fact, by Exh. 46 it was specifically brought to the notice of the authorities that damage was caused in 1956 rains and that such events might recur in 1957 and thereafter.

9. The point, therefore, to consider is whether the State Government was negligent in that proper channel for the flow of overflow water from the waste - weir was constructed by it in time in order to see that loss by damage of crops is not occasioned to the adjoining lands. In the instant case it must be noted that a proposal was before Government for the construction of such channel and in 1957 in fact the proposals were taken in hand, but the proposal only went to the extent of construction of a channel about 250 feet in length but adjoining the Nalla. In these circumstances a question arises whether the damage that was caused to the land and the crops of the plaintiffs was due to an act of God or the negligence of the State. A further question that would arise is whether State would escape the liability on the ground that it was an act of God which led to the overflow if proof is given that the State was itself negligent on earlier occasion in not taking proper precaution. In the instant case, two things cannot be disputed, first, that a channel to provide for the flow of overflowing water from the waste - weir was not only contemplated but partly constructed by State Government and inference must therefore follow that the State Government must have considered that such a channel was necessary as a precautionary measure to guard the property of the adjoining land - owners. On this inference it must follow that the State Government was aware of the fact that if such a channel was not constructed, damage was likely to be caused to the adjoining owners of land. The State Government did not complete the channel. Intimation was received by it by Exh. 46 that an event which had taken place in 1956 of heavy rains might recur in 1957. The intimation was given in May 1957, that is before the rainy season started. In the rainy season it appears that no untoward incident of heavy rains occurred. But such heavy rains started on November 14, 1957 and within a period of four hours, there was two and a half inches rainfall.

10. As has been pointed out by Lord Wrenbury in 1917 AC 556, cited above,

assuming an act of God, such as a flood, wholly unprecedented, the damage in such a case results not from the act of God, but from the act of man in that he failed to provide a channel sufficient to meet the contingency of the act of God. But for the act of man there would have been no damage from the act of God. The observations of Lord Wrenbury are most telling in regard to the liability of loss due to the negligence of an individual or a corporation. If the reservoir was not built by the State, there would have been no occasion for the accumulation of water at a high level and overflow thereafter due to heavy rains. The damage, therefore, was due, firstly, to act of the State in having the reservoir built so that the danger always continued to exist. Whether subsequently the danger materialized by an act of God is not a matter which absolves the State from its liability for the earlier negligence in not taking proper precautions. The precautions were intended but were not fully taken. The fact that a channel about 7 feet in depth, about 10 feet wide and extending over 1500 feet was found necessary by the State is a justification for the proposition that precautions were necessary to avoid loss or damage by overflow of water. This jurisdiction (sic) itself justifies the claim made by the plaintiffs that because proper precautions were not taken as were to be taken by the State, the loss was occasioned to them.

11. Mr. Kotwal for the State, however, argued that the loss was occasioned solely by the act of God and not by any negligence of the State servants. He referred to certain authorities of the Supreme Court to point out that tortious act of servants cannot impose a vicarious liability on the State if the act of the State is done in its sovereign capacity. In *Kasturilal Ralia Ram Jain Vs. State of Uttar Pradesh*, a similar point was considered by their Lordships of the Supreme Court regarding the liability of the State for the tortious acts of its servants. It was observed by the Supreme Court that if the act of the State is done in its capacity as a sovereign, then there is no liability upon the State for the tortious acts of the employees in carrying out the act of State. Their Lordships, however, raised a distinction between the acts of Govt. in its capacity as sovereign and other acts of Govt. as non - sovereign acts. Sovereign acts were considered as those which related to maintenance of law and order. In the instant case, the State Government built up a reservoir for supply of water to the citizens. This act could at best be considered as welfare act but certainly not an act of the State Government in its capacity as a sovereign. It was not an act which the State Government had to commit as it was obliged to do so. An action of the State relating to law and order would stand on a footing different from the act of the State in its capacity as for the welfare of the subject. The act of the State for the purpose of welfare of the State cannot be considered as obligatory as the State Government could not be compelled to do so. Their Lordships, therefore, restricted the rule of vicarious liability of its servants upon State Government in respect of acts which were committed by State Government in pursuance of sovereign power of the State.

12. A similar proposition was laid down by their Lordships of the Supreme Court

in *The State of Rajasthan Vs. Mst. Vidhyawati and Another*, . The facts of this case were that a driver of a jeep, owned and maintained by the State of Rajasthan for the official use of the Collector of a District, drove it rashly and negligently while bringing it back from the workshop after repairs and knocked down a pedestrian and fatally injured him. The point was whether the State Government could be made vicariously liable for the loss occasioned to the plaintiff by reason of the tortious act of employee. It was held by their Lordships that the State can be made vicariously liable for the tortious act like any other employer. While considering the proposition about the vicarious liability of the State for the tortious acts of its servants, their Lordships observed in paragraph 10 as follows :

"In this connection it has to be remembered that under the Constitution we have established a welfare State, whose functions are not confined only to maintaining law and order, but extend to engaging in all activities including industry, public transport, the State trading, to name only a few of them. In so far as the State activities have such wide ramifications involving not only the use of sovereign powers but also its powers as employers in so many public sectors, it is too much to claim that the State should be immune from the consequences of tortious acts of its employees committed in the course of their employment as such. In this respect the present set up of the Government is analogous to the position of the East India Company, which functioned not only as a Government with sovereign powers, as a delegate of the British Government, but also carried on trade and commerce, as also public transport like railways, post and telegraphs and road transport business."

"It was in the context of those facts" observed their Lordships, "that the Supreme Court of Calcutta repelled the argument advanced on behalf of the Secretary of State." Their Lordships therein refer to the judgment of Chief Justice Peacock in the case of *Peninsular and Oriental Steam Navigation Co. v. Secretary of State for India* (1861) 5 Bom HCR 1. and quote with approval the following observations :

"There is a great and clear distinction between acts done in the exercise of what are usually termed sovereign powers, and acts done in the conduct of undertakings which might be carried on by private individuals without having such powers delegated to them."

Their Lordships held that the act of the driver in bringing the car after repairs from the garage was not an act which he was doing in the exercise of the part of the sovereign power of the State. Therefore, as has been laid down by the Supreme Court, a distinction had to be made between acts of the State in their sovereign capacity and acts of the State in non - sovereign capacity.

13. In the instant case it has not been pointed out that the act of State constructing the reservoir was an act in its sovereign capacity. At best it could be said to be an act of welfare State for the betterment of the people of a part of

the State. By no stretch of imagination can the act of the State constructing a reservoir for facilitating the supply of drinking water be considered as an act in exercise of sovereign power. In the instant case, therefore, the immunity for acts in the sovereign capacity cannot be made available to the defendant - State. The State therefore has no protection either because the damage was caused by the act of God or because of the immunity that was available to it if the act were in its capacity as a sovereign power. The ordinary rule of negligence has been accepted by the appellate Court as a finding of fact. I have also dealt with it channel was contemplated and the danger was brought to the notice of the authorities by the plaintiffs themselves by Exhibit 46, no action was taken by the State to prevent damage being caused by overflow of water even if excess of water was due to act of God. I, therefore, hold that the lower Court was justified in coming to the conclusion that the State was liable for the loss that was caused to the plaintiffs. So far as quantum of damage is concerned, the appellate Court has found as a fact the quantum of damage, and no further argument can lie on that point. In the result, the appeal has to be dismissed.

ORDER

14. The appeal is dismissed with costs.

15. Appeal dismissed.