

(1986) 12 OHC CK 0011
In the Orissa High Court
Case No : A.H.O. No. 13 of 1981

State of Orissa and Another

APPELLANT

Vs

Mst. Amruta Dei and Others

RESPONDENT

Date of Decision : 01-12-1986

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 35
Motor Vehicles Act, 1939 — Section 110B, 110D

Citation : (1987) ACJ 1046 : AIR 1987 Ori 217 : (1987) 63 CLT 54

Hon'ble Judges : H.L. Agrawal, C.J.; G.B. Patnaik, J

Bench : Division Bench

Advocate : R.K. Patra, for the Appellant; P.K. Misra, (2) for A.K. Padhi, for the Respondent

Final Decision : Dismissed

Judgement

H.L. Agrawal, C.J.—This appeal is directed against the judgment of a learned Judge of this Court awarding a sum of Rs. 74,834/- to the claimants in M.A. No. 51 of 1979 and a further sum of Rs. 49,680/- to the claimants in M.A. No. 52 of 1979 with interest " 6 per cent per annum.

2. The facts :

In the morning of 9-1-1977, the Regional Transport Officer, Sundargarh, proceeded to Purunapani via-Birmitrapur in the Government Jeep ORN 290, being driven by the office driver (F.W. 3) for checking of vehicles. He was accompanied by the Junior Motor Vehicle Inspector (O.P.W. 2) and Shri G. C. Patnaik, Enforcement Inspector. Deceased Lingaraj Behera and Bipin Behari Pradhan, both Office Assistants, and two Constables were also in the jeep.

After the day's duty, the party after taking their food at about 11.30 p.m. was returning. The Enforcement Inspector sat on the driving wheel asking the office driver to go to the back seat. When the jeep had reached 2-3-kilometres before Paramadihi, it dashed against a tree resulting in the instantaneous death of the

Enforcement Inspector and the two Office Assistants.

3. Before the Claims Tribunal, the State of Orissa, while admitting the fact of the accident, took a plea that the accident had taken place due to the bursting of the rear tyre of the jeep and, in any case, it was not liable for any damages as the accident took place while the jeep was engaged in discharging a sovereign function.

4. The Tribunal accepted the defence pleas and dismissed the claim petitions. The claimants filed appeals in this Court and on reference to the evidence on record, the learned Judge recorded the following findings :

(1) The Enforcement Inspector was driving the jeep in a rash and negligent manner;

(2) The accident occurred not as a result of the bursting of the tyre, but it took place on account of the impact of the jeep with the tree and the wheel going out the jeep; and

(3) It could not be said that the accident took place while the jeep was engaged in discharging the sovereign function.

The tortious act in question had been committed by the public servant in the discharge of duties assigned to him not by virtue of delegation of any sovereign power. He further found that after the amendment of Section 110 of the Motor Vehicles Act by the Amendment Act of 1956, the distinction between sovereign and non-sovereign act of the State no longer existed because all owners of vehicles were brought within the scope of this section. The claims were accordingly decreed in part to the extent indicated above.

5. The only argument that was advanced by Mr. Patra, learned Additional Government Advocate, was that since the accident took place while the vehicle was being used by the officers of the State Government while discharging the sovereign functions and powers of the State, the State was not liable for the damages.

6. Long arguments were advanced by learned counsel on both the sides and a series of decisions were cited which I shall presently discuss.

7. 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 cannot 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 or an employment which is referable

to the exercise of the delegated sovereign powers.

8. There is cardinal point of distinction between an ordinary sovereign act and sovereign functions. How far sovereign immunity is available in motor accident cases has however, been the subject-matter of consideration in a large number of cases of various High Courts as well as of the Supreme Court. In order, therefore, to determine the question as to whether the claim of immunity should or should not be allowed, the nature of the act, the transaction in course of which it is committed and the nature of employment of the person committing it have all to be considered. Let us now notice the relevant case laws on the subject.

9. In the case of *State of Orissu v. Padmalochan Panda* ILR (1974) Cut 103, a Bench of this Court on a reference to various decisions has culled out the following principles for determining the question of sovereign immunity and some of them which are relevant may be usefully extracted below : --

(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.

10. On a scrutiny of the various decisions rendered by the Courts in India, the principle that emerges is that by "sovereign" power what is meant, is power which cannot be lawfully exercised except by a sovereign or a private individual delegated by a sovereign to exercise the same. This principle has been succinctly laid down in the leading case on the subject by the Supreme Court in *Kasturilal Ralia Ram Jain Vs. State of Uttar Pradesh*, and thus it can be safely said that the law on this point is no more *res integra* and has been set at rest by the aforesaid lucid conclusion, if I may say so with great respect.

It was rightly observed by this Court in ILR (1974) Cut 103 (*supra*) that the real difficulty in a case of this nature, however, is the actual application of the principles laid down by the Supreme Court to the facts of each case.

11. I now propose to notice the facts of various cases considered by different High Courts which may throw some light on the subject so as to apply the correct principle to the facts of this case.

In *Union of India Vs. Jasso and Others*, a military driver while transporting coal to general head-quarters in Simla in discharge of his duties committed an accident. 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.

In *Surjit Singh Bhatia v. Segalla Ramulu*, 1983 ACJ 603 a military vehicle dashed against a motor cycle and caused injuries to the pillion rider. The Punjab & Haryana High Court rejected the plea of sovereign immunity.

In *Mrs. Pushpa v. State of Jammu & 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.

In *Fatima Begum v. State of Jammu & Kashmir* 1976 ACJ 194, the same 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.

In *Union of India v. Miss Savita Sharma* 1979 ACJ 1 a military truck had dashed against a tempo from behind while it was carrying Jawans from the railway station to unit headquarters. The above High Court again rejected the defence on the ground 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.

In *Smt. Iqbal Kaur Vs. Chief of Army Staff*, an accident occurred due to the negligent driving by a Sepoy of a Government truck while he was going for imparting training in motor driving to new recruits. It was held that this would not constitute an act in exercise of sovereign power, and the driver and the Union of India both were liable for damages.

The Madhya Pradesh High Court also took a similar view in the case of *Union of India v. Kumari Neelam* AIR 1980 NOC 60 (Madh Pra). There a military vehicle while bringing vegetables from the Supply Department for prisoners of war knocked down a girl on the road. It was held that no immunity was available for the accident as the activity was not a sovereign act.

State of Tamil Nadu v. M.N. Shamsudeen 1981ACJ 244 was a case where 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 disallowed the protection of immunity on the ground that transporting of the patient to the hospital could be done even by private

individuals.

A similar view was taken in the case of *Commandant of 74 Bn. B.S.F. v. Pankajini Kundu* 1984 ACJ 660, where a B.S.F. Truck had caused a death.

The Bombay High Court in *Union of India Vs. Sugrabai and Others*, , similarly overruled such a plea when a military driver driving a motor truck carrying a Records Sound Ranging machine from military workshop to military school of artillery killed a cyclist on the road. It was held that the driver was not acting in exercise of sovereign powers. I may usefully quote a small passage from this report.

"Sovereign powers are vested in the State in order that it may discharge its sovereign functions. For the discharge of that function one of the sovereign powers vested in the State is to maintain an army. Training of army personnel can be regarded as a part of the exercise of that sovereign power. The State would clearly not be liable for a tort committed by an army officer in the exercise of that sovereign power. But it cannot be said that every act which is necessary for the discharge of a sovereign function and which is undertaken by the State involves an exercise of sovereign power. Many of these acts do not require to be carried out by the State through its servants. In deciding whether a particular act was done by a Government servant in discharge of a sovereign power delegated to him, the proper test is whether it was necessary for the State for the proper discharge of its sovereign function to have the act done through its own employee rather than through a private agency."

A recent decision of the Bombay High Court in *Union of India and Another Vs. Hardeo Dutta Tirtharam and Others*, , where a driver of a military truck while collecting tents from outdoor training place and bringing them to the regiment knocked down a Subedar. The High Court took the view that since the particular duty the driver was carrying out in the military area could have very well been carried out by any other private truck, sovereign immunity could not be claimed.

The facts of the case in *Labanyabati Satpathy v. Orissa State Road Transport Corporation* ILR (1976) Cut 486, are very much similar to the facts of the present case. It was held therein that the Government was liable for damages.

The Supreme Court in *Kasturi Lal's case* (supra), while dealing with the act of negligence committed by the police officers in dealing with the property of the plaintiff which they seized in exercise of their statutory powers, laid down the cardinal principle in the following terms : --

".....The power to arrest a person to search him and to seize property found with him are powers conferred on the specified officers by statute and in the last analysis, they are powers which can be properly characterised as sovereign powers; and so the act which gave rise to the present claim for damages had been committed by the employee of the State during the course of his employment; but the employment in question being of the category which can

claim the special characteristic of sovereign power, the claim could not be sustained."

In *The State of Rajasthan Vs. Mst. Vidhyawati and Another*, it was held that the State can be made vicariously liable for the tortious act like any other employer. It was also observed that the State should be as much liable for tort in respect of a tortious act committed by its servants within the scope of his employment.

12. On an analysis of the principles and the law on the subject, it leaves no room for doubt that the plea of sovereign immunity can be available where the powers can be exercised only by a sovereign or a person by virtue of delegation of such powers to him. Carrying on a transport operation is in the nature of a commercial venture and by no stretch of imagination can be called a sovereign act, much less a sovereign function.

I have already said earlier that there is a clear distinction between acts done in the exercise of sovereign powers and acts done in the conduct of undertakings which might be carried on by private individuals without having such power delegated to them. Obviously, "sovereign powers" mean exercise of such power which cannot be lawfully exercised except by the sovereign or its delegate. Thus, the Government's immunity from actions in respect of the acts of its servants is limited to cases involving acts of State and cases involving the use of sovereign powers. Therefore, the Government is vicariously liable for the tortious acts of its servants or agents which are not proved to have been committed in the exercise of its sovereign functions or in exercise of the sovereign powers delegated to such public servants. 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 act.

To make the matter more clear, I may give some illustrations of the acts and functions which can be said to be in exercise of sovereign powers. Such cases may be making of laws, administration of justice, maintenance of law and order, defending the country etc. The activities of a welfare State and various measures in the field of socio-economic development undertaken by the State, in my view, cannot be included in the traditional "sovereign functions". I find full support for this view in the case of *Commandant of 74 Bn. B.S.F. and Others Vs. Pankajini Kundu*, .

13. Having thus understood the principles of law, it becomes apparent that the plea of immunity is not available to the appellants. In all the cases noticed above, which were on a much higher footing, the plea of immunity was rejected by the various Courts in India.

In the present case, at the time the accident took place, the employees of the State were not discharging any official duties assigned (to them by virtue of any delegation of powers and were returning at late hours of the night. Apart from that, the officer who took up the act of driving the jeep was certainly doing a wholly unauthorised act which could not be said to be a sovereign act. The act of

driving a vehicle by a Government servant which action is wholly unauthorised on his part must be a tortious act for which the employer, i.e., the State, cannot escape its vicarious liability.

14. It must, therefore, be held that the learned single Judge has taken the correct view of the matter and accordingly the present appeal is devoid of any merit.

15. The appeal, therefore, must fail and it is hereby dismissed. For taking an entirely frivolous defence and thus escalating the misery of the dependants of the deceased, the appellants are also saddled with costs of this appeal.

G.B. Patnaik, J.

16. I agree.