
(1972) 04 MP CK 0028

In the Madhya Pradesh High Court

Case No : Miscellaneous (First) Appeal No. 36 of 1966

The State of Madhya Pradesh

APPELLANT

Vs

Ram Pratap Singh and Others

RESPONDENT

Date of Decision : 13-04-1972

Acts Referred:

Constitution of India, 1950 — Article 300

Citation : (1972) ACJ 411 : AIR 1972 MP 219 : (1977) ILR (MP) 672 : (1972) JLJ 668 : (1972) 17 MPLJ 932 : (1972) MPLJ 932

Hon'ble Judges : R.J. Bhave, J;P.K. Tare, J

Bench : Division Bench

Advocate : M.V. Tamaskar, for the Appellant; J.S. Verma and K.B. Sinha, for the Respondent

Final Decision : Dismissed

Judgement

Bhave, J.

The State has preferred this appeal against the award of the Tribunal appointed under the Motor Vehicles Act (Additional District Judge, Rewa) awarding compensation to Rani Pratap Singh (respondent No. 1) for the injuries sustained by him in an accident.

The claimant's case was that on 4-8-1960 he was travelling in a bus No. M. P. A. 249. belonging to Sardar Gyan-singh, which was being driven by Rambhi-shal. The bus was proceeding from Chhatarpur to Mahoba. When the bus had proceeded for about three miles a truck belonging to the Public Works Department, bearing No. M. P. Z. 1092, came from the opposite direction. The truck was being driven with great speed by its driver Santhanam, a P. W. D. employee. Though the driver of the bus took the bus towards the left side, the P. W. D. truck dashed against the middle portion of the bus. as a result of which the claimant sustained the injuries, resulting in fracture of the right ulna and the humerus. The claimant says that even after treatment, he is not in a position, to straighten his

hand and cannot do any heavy work with it. Before the accident he used to drive his own tractor which he cannot do now. He had therefore, preferred a claim of Rs. 15,000/-. The State of Madhya Pradesh, the driver Santhanam as well as the owner and driver of the bus were made parties to the claim proceedings so also the Premier Insurance Company with which the bus was insured.

From the written statement filed by the owner of the bus it would appear that the accident was caused because of the negligent driving of the driver of the P. W. D. truck. The stand of the State, on the contrary, is that it was because of the negligent driving of the driver of the bus that the accident took place. The State has also raised the plea of contributory negligence on the allegation that the claimant had put his elbow outside the window and he got hurt when the truck passed by the side of the bus. It was also pleaded that the State could not be held vicariously liable for the negligent act of its driver, as the act was performed in the exercise of sovereign function.

The Tribunal found that it was because of the negligent driving of the driver of the P. W. D. truck that the accident took place; that there was no contributory negligence on the part of the claimant; and that he was entitled to damages amounting to Rs. 7,000/-. The State has, therefore, preferred this appeal.

In this particular case, no attempt was made to take photographs of the bus and the truck; nor was any map of the spot filed. The inspection-note of the head-constable is also quite vague. The claimant, however, produced oral evidence to show that as a result of the impact of the truck on the bus the middle portion of the bus was dented and some planks had come out. Though the evidence of an Overseer, who was travelling in the P. W. D. truck, was tendered in defence, he did not state that the truck had sustained any damage. From the evidence tendered on behalf of the claimant it would appear that some protruding angle iron attached to the truck hit against the elbow of the claimant resulting in the injuries, narrated above, and causing damage to the bus. From this evidence one fact is quite clear that the bus was damaged, while the truck remained untouched. This fact speaks for itself and shows that the truck or some protruding portion of it hit against the bus in the middle portion of it and caused the damage. This could only happen when the bus was swerved towards the left but the on-coming truck did not swerve towards the right and dashed against the bus. The conclusion that the accident was due to the negligence of the driver of the truck is, under the circumstances, inevitable.

It is an admitted fact that the windows of the buses carrying passengers are fitted with iron bars so as to prevent the passengers from putting their hands outside the windows. It is therefore, difficult to believe that the claimant had put his elbow outside the window. It is quite possible that he might have rested his elbow on the window and some protruding Dart of the truck, like an iron-angle fitted to the truck, hit him on the elbow, thus causing the fractures. There is thus no scope for holding that there was any contributory negligence on the Part of the claimant. On this finding it is not necessary to further discuss as to whether

the contributory negligence absolves the other party from its responsibility for damages and whether the damages are reduced proportionately.

The claimant has stated on oath that he cannot stretch his right hand and the movement from the elbow is restricted with the result that he cannot do any heavy work with his right hand and even in his daily personal work he is required to take the help of others. He has also stated that because of the deformity he is no longer in a position to drive a tractor or other vehicle which he used to do before the accident. Dr. Shri-vastava (P. W. 6) has also stated that the claimant has been subjected to permanent deformity. This evidence stands unrebutted. The claimant has also given evidence to the effect that he is required to pay Rs. 80/- per month to the driver engaged by him to drive his tractor and has produced some receipts to show that during the period of his illness he was required to spend about Rs. 1,200/- over his treatment and other expenses. If Rs. 1,000/- are taken to be damages for the pain suffered by the claimant and Rs. 1,200/- towards the expenses, the award of Rs. 4,800/- towards general damages for the permanent impairment of the right hand does not appear to be excessive. We, therefore, confirm the finding of the Tribunal that the claimant is entitled to compensation in the sum of Rs. 7,000/-.

This brings us to the most important question as to whether the State is absolved from vicarious liability, as the driver of the P. W. D, truck was engaged in discharging delegated sovereign function. Article 300 of the Constitution provides that the Union or the State can sue or be sued in relation to their respective affairs in like cases as the Dominion of India and the corresponding provinces might have sued or might have been sued. In *The State of Rajasthan Vs. Mst. Vidhyawati and Another*, their Lordships of the Supreme Court, after tracing the history from the days of the East India Company till Independence, came to the conclusion that the liability of the Union or the States in the matter of suing or being sued is the same as that of the East India Company. Their Lordships then referred to the case of *Peninsular & Oriental Steam Navigation Co. v. Secy. of State for India* (1861) 5 Bom 1 wherein it was held that the East India Company was exercising delegated sovereign power as well PS traded on its own account and for its own benefit. It was thus engaged in transactions partly for purposes of Government and partly on its own account which without any delegation of sovereign rights could be carried on by private individuals. It was, therefore held in that case :

"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."

On this reasoning it was further held that the Secretary of State could be sued for the acts of the Government servants if the servant was not acting in discharge of delegated sovereign power. This decision of Peacock, C. J., of the Supreme Court of Calcutta appears to have been accepted by their Lordships of

the Supreme Court in *The State of Rajasthan Vs. Mst. Vidhyawati and Another*, .

This question, again, came for their Lordships' consideration in *Kasturilal Ralia Ram Jain Vs. State of Uttar Pradesh*, . Their Lordships again relied on "the Calcutta case and observed:

"There is 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 acts 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."

Their Lordships proceeded to observe further :

"The significance and importance of making such a distinction has to be realised particularly at the present time when, in pursuit of their welfare ideal, the Government of the State as well as the Government of India naturally and legitimately enter into many commercial and other undertakings and activities which have no relation with the traditional concept of governmental activities in which the exercise of sovereign power is involved. It is necessary to limit the area of these affairs of the State in relation to the exercise of sovereign power, so that if acts are committed by Government employees in relation to other activities which may be conveniently described as non-governmental or non-sovereign citizens who have a cause of action for damages should not be precluded from making their claim against the State. That is the basis on which the area of the State immunity against such claims must be limited."

In that particular case, some gold was seized from the plaintiff but because of the negligence of the police officers it was lost from the Malkhana. On a claim for damages for the loss of the gold, their Lordships held that the act of negligence was committed by the police officers while dealing with the property of the plaintiff which they had seized in exercise of their statutory powers. 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 characterized as "sovereign powers" and so the acts which gave rise to the present claim for damages had been committed by the employee of the State during the course of its employment; but the

employment in question being of the category which can claim the special characteristic of sovereign powers, the claim could not be sustained.

From this decision it is clear that if the Government is carrying on commercial activities or activities which can be carried on by any individual without delegation of sovereign powers, the tortious act committed by a public servant shall make the State liable for damages. The question still remains as to what is traditional concept of governmental activity ? Defence of the State, maintenance of law and order provision for imparting justice and bringing the culprits to book are well-recognised traditional sovereign activities. But the question is : Does the list exhaust at that point ? Can the activities, such as, establishment of postal services, making provision for transport, maintaining health services, establishing educational institutions be included in the traditional sovereign activities ? No modern State, whether dedicated to the principle of welfare State or not, can shirk the responsibility of providing the services, mentioned above. It is, therefore, difficult to draw a line between the two activities --the sovereign and non-sovereign activities. The test of commercial activity is a plausible test. But what happens if the State takes a monopoly in public interest, not so much for earning profit but to stop exploitation by private traders or in the interest of rapid industrial growth of the country as a whole, or because it feels that some activities, such as, manufacture of arms, should not be allowed to remain in the hands of a private individual ? Can it be said that these activities still retain the commercial character ? In certain countries, like the United States of America, railways, telephone communications, broadcasting, manufacture of arms etc. are in the hands of private individuals or corporations, Can it, therefore, be said that in India also the governmental activity in that sphere comes within commercial activity ? In a recent case before the Bombay High Court in Union of India Vs. Sugrabai and Others, the test whether the activity in question could have been carried on by a private individual was applied. In that case, a Records Sound Ranging Machine and other equipment were being carried in a military truck from the Military Workshop to the School of Artillery and during the transit, due to rash and negligent driving, a person was killed who was riding a bicycle. Their Lordships of the Bombay High Court held that the transport of the Records Sound Ranging Machine and other equipment from the Military Workshop to the School of Artillery was necessary for the proper training of the army personnel, but it was not necessary to transport the said equipment through a truck driven by an employee of the Defence Department. The equipment could have been carried through a private carrier without any material detriment to the discharge by the State of its sovereign function of maintaining the army and training army personnel. On this view it was held that the driver was not exercising any delegated sovereign power of the State when he was transporting the equipment in the military truck and hence the Union was liable for the tort committed by him. It would thus appear that though the maintenance of the Defence Department is admittedly a sovereign function, it was held that the Union was not protected as the equipment could have been carried through a private truck

as well. In that case, the fact does not appear to have been taken into consideration that the military authorities may not think of entrusting sophisticated instruments to outsiders. The above case has been quoted by us only to show how the test, namely, whether the activity in question could have been carried on by a private individual, can be stretched. In *Kasturilal Ralia Ram Jain Vs. State of Uttar Pradesh*, the Supreme Court could have as well held that the gold seized could have been kept in a locker of a Bank or could have been entrusted to a *supratdar* and in that sense the act of the police officer in keeping it in the *Malkhana* and allowing it to be stolen was not included in the discharge of sovereign powers. But that is not what their Lordships of the Supreme Court did. Their Lordships found that inasmuch as the police officer was acting in the discharge of admittedly sovereign power, any negligence on his part would not result in exposing the Union or the State to damages. It would thus appear that it is very difficult to draw the line between "an activity in discharge of traditional sovereign function" and "an activity which can be carried on by a private individual." Whatever that may be, we are bound to apply the tests laid down by the Supreme Court.

The question, therefore, is whether the maintenance of a Public Works Department is in discharge of traditional sovereign function. Most of the activities carried on by the said department, such as construction of roads, buildings, bridges, canals, etc. can be carried on by private contractors as well. For that matter major governmental work of that department is carried on through contractors. In that sense it cannot be said that it is a traditional sovereign function which cannot be carried on by a private individual without delegation of sovereign power. In this view of the matter, it must be held that the truck engaged in carrying certain material belonging to the Public Works Department or carrying its officers was not engaged in discharge of any sovereign function of the State. We, therefore, hold that the State remains responsible for the damages arising out of tortious act of the driver of the P. W. D. truck.

In the result, the appeal fails and is dismissed with costs.