
(1972) 02 AHC CK 0020
In the Allahabad High Court
Case No : First Appeal No. 349 of 1962

The State of Uttar Pradesh	Vs	APPELLANT
The Hindustan Lever Ltd.		RESPONDENT

Date of Decision : 08-02-1972

Acts Referred:

Constitution of India, 1950 — Article 300(1)
Limitation Act, 1908 — Article 120, 36, 48, 49

Citation : AIR 1972 All 486

Hon'ble Judges : T.S. Misra, J; Satish Chandra, J

Bench : Division Bench

Advocate : Shanti Swarup Bhatnagar, for the Respondent

Final Decision : Dismissed

Judgement

Satish Chandra, J.—This is a defendant's appeal. It arises out of a suit for recovery of money.

2. Hindustan Lever Limited, the plaintiff-respondent, is a public limited company carrying on the business of manufacture and sale of, inter alia, vegetable oil products. It had to pay large amount of excise duty on these products to the Excise Department of the Union of India. In January, 1953, the plaintiff-company obtained sanction of the Assistant Collector, Central Excise, Meerut, to open an account with the Sub-treasury maintained by the State Government of U. P. at Ghaziabad in order to pay excise duty to the credit of the Collector of Central Excise, Allahabad. The plaintiff-company maintained a current account with the Punjab National Bank, defendant No. 1. On 14th July, 1955, the plaintiff instructed the defendant bank to deposit on behalf of the plaintiff and to the debit of the plaintiff's current account with, the bank, a sum of Rs. 50,000/- in the sub-treasury, Ghaziabad, to the credit of the Collector, Central Excise, Allahabad. On 18th July, 1955, the defendant bank addressed a letter to the plaintiff confirming deposit of Rs. 50,000/- in the sub-treasury at Ghaziabad to the credit of the Collector, Central Excise, Allahabad. The bank annexed to the

letter a challan No. 3 in duplicate dated 18th July, 1955, purporting to have issued by the sub-treasury and acknowledging the receipt of Rs. 50,000/- on 18th July, 1955. The plaintiff-company forwarded the duplicate of this challan to the Inspector, Central Excise, Ghaziabad, informing him of the payment of Rupees 50,000/- towards Central Excise.

On 28th July, 1955, the Inspector Central Excise, informed the plaintiff that the account of the Collector, Central Excise, at the Sub-treasury does not stand credited with the sum of Rs. 50,000/- alleged to have been deposited on 18th July, 1955. Thereafter the plaintiff corresponded with the defendant bank, the Central Excise authorities as well as the Government of U. P. in respect of the payment made into the sub-treasury at Ghaziabad. Since the Central Excise authorities did not acknowledge the payment, the plaintiff-company was forced to pay the Collector, Central Excise, a sum of Rs. 50,000/- all over again. Having made this payment, the plaintiff called upon the defendant bank to reimburse them of the sum of Rs. 50,000/- and to credit their current account with the bank accordingly. The defendant bank, however, refused to comply on the ground that it had made a valid and effective payment into the sub-treasury, Ghaziabad, and by doing so it had performed its obligations entirely. The challan issued by the sub-treasury bore the seal of the sub-treasury as well as the signatures of the accountant and the treasurer thereof. The challan represented valid deposit of Rupees 50,000/-.

Thereupon the plaintiff company served the statutory notice u/s 80, CPC upon the Union of India as well as the State Government and the Sub-Treasury Officer, Ghaziabad, and on 11th July, 1958, instituted the present suit praying that the defendant bank be ordered to repay to the plaintiff or credit to the plaintiff's current account with the bank Rs. 50,000/- as well as Rs. 10.9 the incidental charges debited to the plaintiff's account by the bank, and also a sum of Rs. 8,935.03 as interest by way of damages on the principal sum at 6 per cent per annum. It claimed future interest at 6 per cent by way of damages till payment. It was also prayed that if it was held that the defendant bank made a valid payment into the sub-treasury, the State Government be ordered to pay to the plaintiff the sum of Rs. 50,000/- together with interest by way of damages at 6 per cent.

3. The defendant bank as well as the State Government contested the suit. The defendant bank pleaded that in accordance with the instructions of the plaintiff company the bank on 18th July, 1955, deposited Rs. 50,000/- in the sub-treasury, Ghaziabad. The sub-treasury issued a receipted challan No. 3 bearing the signatures of the accountant and the treasurer of the Sub-treasury. The challan was issued in the regular course of business and in accordance with the practice that was being followed at the sub-treasury for a long time past. Having obtained the challan the bank debited the plaintiff's account with the sum of Rs. 50,000/- on 18th July, 1955. The challan represented a valid payment into the sub-treasury to the credit of the Collector, Central Excise, and thereby the bank

fully discharged their duty to the plaintiff. If for any reason the staff of the sub-treasury did not in their own books credit the sum of Rs. 50,000/- in the account of the Collector, Central Excise, Allahabad, the State Government which runs the sub-treasury at Ghaziabad is alone answerable to the plaintiff.

4. The State Government in its written statement stated that the alleged payment of Rs. 50,000/- on 18th July, 1955, is not entered in the sub-treasury account books. The challan issued by the sub-treasury does not bear the signature of the Sub-Treasury Officer, Ghaziabad, which is necessary under the treasury rules. On investigation it was found that the tehsildar (accountant) of the Government treasurer Reoti Raman had embezzled and misappropriated the sum of Rs. 50,000/-. He functioned to discharge duties imposed by law. The State Government was not vicariously responsible for the tortious acts of its officers. It was also pleaded that the suit was barred by time. It was urged on behalf of the defendants that Article 62 of the Limitation Act applied to the suit, under which the suit ought to have been filed within three years from 18th July, 1955, the date when the money was alleged to have been deposited.

5. The Trial Court repelled the Submission. It held that Article 62 applies to cases of payments to servants and agents. In the present case the payment was made for being credited to the account of the Collector, Central Excise, Allahabad, who was not the plaintiff's or the defendant bank's servant or agent. The Court further held that even if Article 62 applies, the suit was within time. It found that the tender of Rs. 50,000/- by the bank's representative to the treasurer at the sub-treasury, Ghaziabad, was clearly proved. It was established that the sub-treasury issued to the bank's representative a pre-receipted challan No. 3 in duplicate bearing the seal of the treasury and the signatures of the treasurer and the accountant of the sub-treasury. The challan did not bear the signature of the Sub-Treasury Officer, but in accordance with the long-standing, practice maintained, by the sub-treasury, Ghaziabad, the Sub-Treasury Officer did not sign such challans. They were signed only by the accountant and the treasurer. It was found that the bank had duly paid Rs. 50,000/- to the treasurer of the sub-treasury and was thereafter not responsible for the manner in which the treasurer handled the money inside the treasury. The fact that the treasurer or the accountant did not enter the money in their own books to the credit of the Collector, Central Excise, was an internal affair of the sub-treasury, for which the defendant bank was not responsible. The defendant bank had discharged its obligations to the plaintiff by making the deposit in accordance with the prevailing practice of the sub-treasury, Ghaziabad. The amount of Rupees 50,000/- deposited by the bank was embezzled by the treasurer in collusion with the accountant of the sub-treasury. The State Government had prosecuted these officers and they were convicted and sentenced.

6. On the question of the State Government's liability the Court below held that the treasurer was not performing statutory duties. He was a nominee of the Government treasurer to perform contractual duty and as such it cannot be said

that he embezzled the money in the discharge of duties imposed by law. On this ground the decisions of this Court in *Ram Gulam and Another Vs. Government of U.P., and United Provinces v. Kasturi Lal Ralya Ram* 1960 All LJ 529 were distinguished. Relying upon *The State of Rajasthan Vs. Mst. Vidhyawati and Another*, it was held that the State can be made vicariously liable for the tortious acts of its servants, like any other employer, if the tort is committed by the servant in the course of his employment. In the present case the accountant and the treasurer committed embezzlement during the course and in the scope of their employment, and as such, the State was liable. It was also held that the Punjab National Bank had not failed in its obligations to make a proper and effective payment of Rs. 50,000/- into the sub-treasury according to the plaintiff's instructions. The bank was absolved of all liability to the plaintiff while the State Government was held liable to reimburse the plaintiff with the sum of Rs. 50,000/-. The Court held that the plaintiff was entitled to get interest only from the date of service of the notice u/s 80, CPC because that was the first time when the plaintiff had made a demand for interest from the State Government.

7. It may be stated that soon after institution of the present suit the Punjab National Bank also instituted a suit against the State of U. P. for recovery of Rupees 60,000/-. Both suits were consolidated and tried together. On the findings mentioned above, the Court decreed the plaintiff's suit for recovery of Rs. 50,000/- with pendent's lite and future interest at 4 per cent per annum against the State of U. P., and dismissed it against the other defendants. The suit filed by the Punjab National Bank was dismissed. Aggrieved, the State Government has come to this Court in appeal.

8. The learned Advocate-General appearing for the State Government urged that the suit was barred by time. According to him Article 36 governed the suit. In the next place, it was urged that the State Government was not vicariously responsible for the tortious acts of its officers. The working of the sub-treasury at Ghaziabad is governed by statutory rules. The officers of the sub-treasury discharged their obligations under the law and so for their misconduct the State Government was not liable.

9. Article 62, Limitation Act, 1908, governs suit for money payable by the defendant to the plaintiff and for money received by the defendant for the plaintiff's use. In *Gorakpur Electric Supply Co. Ltd. Vs. R.E. Nariman and Co.*, a Bench of this Court interpreted this Article to provide for a case where money payable to the plaintiff is paid to the defendant and is recoverable on that account. It contemplates cases of payments to servants and agents. Clearly, the present suit is not of that nature. The learned Advocate-General, in our opinion, very rightly did not rely upon this Article. According to him the suit would be governed by Article 36, or in the alternative by Article 48 or 49 of the Act. Articles 48 and 49 apply to suits relating to specific movable property or compensation for injury or wrongful detention thereof. It is true that in *Rameshwar Chaubay v. Mata Bhikh*, (1883) ILR 5 All 341 a Bench of this Court

held that Article 48 Would apply to a suit for recovery of money on the ground that the plaintiff had given the defendant that amount to deliver to a relation of the plaintiff but the defendant tad not delivered that amount and had kept the money with himself. The correctness of this view was doubted by another Bench in Ram Lal v. Ghulam Husain, (1907) ILR 29 All 579.

Subsequently, another Bench in Jaganji Vs. Bandan, also doubted the correctness of this decision and observed that it may be open to argument whether a suit for money could properly be considered to be a suit for specific movable property. Another Bench of this court in Gorakpur Electric Supply Co. Ltd. Vs. R.E. Nariman and Co., expressed the opinion that Article 49 has no application to suits for recovery of money. It observed that Articles 48 and 49 contemplate suits provided for by Sections 10 and 11, Specific Relief Act (No. 1 of 1877). u/s 10, a person entitled to the possession of specific movable property may recover the same in the manner prescribed by the Code of Civil Procedure, and u/s 11 any person having the possession or control of a moveable property, of which he is not the owner, may be compelled to deliver it to the person entitled to its immediate possession under certain circumstances set out in the section. A claim for realisation of money where the specific coins or notes are not claimed or cannot be claimed under the specific Relief Act, cannot be a claim of the nature provided for by Article 49. The Bench, however, did not refer the decision in (1883) ILR 5 All 341 to a larger Bench because it held that even if Article 49 were applicable, the suit in that case was within time. With respect, we entirely agree with the observations made in Gorakpur Electric Supply Co. Ltd. Vs. R.E. Nariman and Co., .

We, however, do not consider it necessary to refer the matter to a larger Bench because this precise question has been considered by the Supreme Court in Raghunath Das Vs. Gokal Chand and Another, . In that case the suit was, inter alia, for recovery of the plaintiff's share of property including money in the form of G. P. notes. The Court observed that "specific movable property" mentioned in Articles 48 and 49, Limitation Act, cover a suit wherein the plaintiff can allege that he is entitled to certain specific movable property and/or of which he is presently entitled to possession in specie and which the defendant has wrongfully taken from him and/or is illegally withholding from him. So, Article 49 would apply to suits for recovery of money only where some particular coins or notes are claimed in specie. That is not the claim in the present case. The plaintiff does not demand back the same coins or notes which the Punjab National Bank deposited with the sub-treasury. In our opinion, Articles 48 and 49 have no application to the present suit.

10. Article 36 provides for a suit for compensation for any malfeasance, misfeasance or nonfeasance independently of contract. It provides for a period of limitation of two years which commences to run when the malfeasance, misfeasance or nonfeasance takes place. Nonfeasance is omission of some act which a man is by law bound to do. Misfeasance is the improper performance of

some lawful act, and malfeasance is the commission of some act which is in itself unlawful. Article 36 is a general Article for suits for compensation for torts. Evidently, it would apply to a suit where the person from whom compensation is claimed is alleged to be guilty of malfeasance, misfeasance or nonfeasance. The learned Advocate-General invited our attention to the decision of the Madras High Court in *Srinivasa Ayyangar v. Municipal Council, Karur* (1899) ILR 22 Mad 342. In that case the Municipal Council sued its Chairman to recover the amount lost by reason of the embezzlement by the Manager on the ground that the Chairman was the agent of the Manager. It was held that the relation of principal and agent was not established and Article 36 was applicable. The judgment gives no reason for the view taken. Moreover, that was a suit by the employer against the employee. That decision may have been helpful if the State Government had sued the treasurer for damages for loss occasioned, by the embezzlement of its agent working at the sub-treasury, but here the plaintiff is suing the State Government on the ground that it was responsible for the misconduct of its servant. The plaintiff does not allege any act of malfeasance, misfeasance or nonfeasance against the State Government. In our opinion Article 36 will not apply to, the present suit. In this situation the residuary Article 120 will be applicable and the suit having been filed within six years of the accrual of the cause of action, was within time.

11. The next question that requires consideration is whether the State Government is vicariously liable for the embezzlement of the money committed by the treasurer and the accountant.

12. On facts it is clear that the Punjab National Bank had on the instructions of the plaintiff-company deposited a sum of Rs. 50,000/- in the sub-treasury, Ghaziabad, for being credited to the account of the Collector, Central Excise, Allahabad. The bank deposited this money in the treasury along with the requisite challan in triplicate. The money was received by the accountant of the sub-treasury. The man of the bank who deposited the money was in return given back a receipted challan bearing the signatures of the treasurer and the accountant and the seal of the sub-treasury. The Court below found that the bank's treasurer paid the money to the accountant of the treasury who was authorised to receive moneys by the rules contained in the Treasury Manual. It was also found that for a long time the sub-treasury at Ghaziabad was not strictly following the procedure prescribed by the rules. Under the rules the Sub-Treasury Officer had to sign the challan, but in practice he never did so. For that reason the challan given back to the bank's treasury did not bear the signature of the Sub-Treasury Officer. It was further held that nonetheless the evidence of the State's witnesses itself showed that the money was received by the officer of the treasury authorised to do so. It was found that the accountant and the treasurer colluded and embezzled this deposit of Rs. 50,000/-. When the matter was discovered, the authorities put pressure upon the accountant who paid back a sum of Rs. 3,500/- to the Government out of this deposit of Rs. 50,000/-. The Court below held that under the prescribed rules the Government had appointed

Reoti Raman as the Government treasurer whose nominees were appointed as the treasurers and accountants at the treasury. Sri Bahadur Singh was the guarantor on behalf of the treasurer, to the Government. After this embezzlement the Government instituted a suit against the guarantor for recovery of money, but we were not informed as to what happened to that suit. The learned Advocate-General for the State did not challenge these findings of fact. The defendant's own evidence proves these various factual aspects.

13. The learned Advocate-General however, submitted that the State Govt. was not vicariously responsible for the misconduct of its officers in cases where the act of commission or omission is committed while the officer is exercising statutory functions. In this connection learned counsel invited our attention to Article 300(1) of the Constitution. This Article reads:

"The Government of India may sue or be sued by the name of the Union of India and the Government of a State may sue or be sued by the name of the State and may, subject to any provisions which may be made by Act of Parliament or of the Legislature of such State enacted by virtue of powers conferred by this Constitution, sue or be sued in relation to their respective affairs in the like cases as the Dominion of India and the corresponding provinces or the corresponding Indian States might have sued or been sued if this Constitution had not been enacted."

14. This provision came up for consideration before the Supreme Court in *Kasturilal Ralia Ram Jain Vs. State of Uttar Pradesh*, . After reading this provision and the corresponding provisions of Section 65 of the Government of India Act, 1858 Section 32 of the Government of India Act, 1915, and Section 176 of the Government of India Act, 1935, Gajendragadkar, C. J., observed that the liability of the Government of a State is co-extensive with the liability of the Secretary of State for India-in-Council prior to 1858. After an elaborate discussion of the leading case on the subject in *P & O. Steam Navigation Co. V. Secretary of State for India-in-Council* (1869) 5 BomCR 1 the learned Chief Justice summarised the legal position as follows:--

"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 of 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."

15. The learned Chief Justice then Observed that it is not difficult to realise the

significance and importance of making such a distinction particularly at the present time when, in pursuit of their welfare ideal, the Governments 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 Government 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-Government or non-sovereign, citizens who have a cause of action for damages should not be precluded from making their claim against the State. His Lordship cautioned that in dealing with Such cases, it must be borne in mind that when the State pleads immunity against claims resulting from injury caused by negligent acts of its servants, the area of employment referable to sovereign powers must be strictly determined. Before such a plea is upheld, the Court must always find that the impugned act was committed in the course of an undertaking or employment which is referable to the exercise of sovereign power, or to the exercise of delegated sovereign power.

16. In that case the act of negligence was committed by the police officers while dealing with the property of Ralia Ram which they had seized in exercise of the statutory powers. It was held that the powers 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. On this finding the claim for damages was dismissed.

17. It will be seen that the onus of establishing that the impugned act was committed in the course of an undertaking or employment which is referable to the exercise of sovereign power is upon the State. It is equally evident that functioning under statutory power is by itself not sufficient to claim immunity. The statutory functions must be referable to the traditional concept of Governmental activity in which the exercise of sovereign power was involved. So, even if the treasurer and the accountant of the sub-treasury at Ghaziabad functioning under the Treasury Manual, were functioning, as contended by the learned Advocate-General, in exercise of statutory powers, (because the rules under the Treasury Manual were framed in virtue of Section 151, Government of India Act, 1935), that will not afford the State Government any immunity, unless, it proves that the tort was committed by the public officers in the course of an activity which is referable to the traditional concept of Government activity in exercise of sovereign powers. The State must further establish that the activity was such which could not have been carried on by a person employed by a private individual for the same purpose.

18. In the P. & O. case, (1869) 5 Bom HCR App A-1 referred to by the Supreme Cour Kasturilal Ralia Ram Jain Vs. State of Uttar Pradesh, the servants of the Government who had been employed in the Government dockyard at Kidderpore

were carrying piece of iron funnel and the manner in which they were carrying the said funnel caused an injury to one of the horses that were drawing the plaintiffs carriage. The plaintiff claimed damages from the Government for the damages caused by the said act of its servants. The Calcutta High Court decreed the claim. It was observed that if the East India Company were allowed, for the purpose of Government, to engage in an undertaking such as the Bullock Tram and the conveyance of goods and passengers for hire (an activity done at the Kidderpore Docks) it was only reasonable that they should do so subject to the same liabilities as individuals.

19. In *The State of Rajasthan Vs. Mst. Vidhyawati and Another*, the suit for damages was in respect of a negligent act of a State employee driving a jeep car of the Collector from the workshop to the Collector's bungalow. It was held that the employment of a driver to drive a jeep car for the Collector's use was on a task or an undertaking which cannot be said to be referable to, or ultimately based on, the delegation of sovereign or Government power. The suit was decreed.

20. The decisions in *Shivabhajan Durga Prasad v. Secretary of State* (1904) ILR 28 Bom 314, *Om Prasad v. Secretary of State* AIR 1937 Lah 572 and *United Provinces v. Kasturi Lal Ralia Ram* 1960 All LJ 529 are all cases of embezzlement of property from the Government Malkhana kept there after seizing and recovering it from the plaintiffs. In these cases the officer in charge of the Malkhana defalcated the properties. In all these cases the suit was dismissed on the finding that the powers to arrest a person, to search him and seize property are sovereign powers.

21. On facts the position in the present case is that the Government was running a sub-treasury at which multifarious activities were undertaken. One of the activities was that the sub-treasury received moneys from private individuals for being credited to the account of the departments of the Central Government. The plaintiff had instructed its own bank to deposit a sum of Rs. 50,000/- in the sub-treasury for being credited to the account of the Collector, Central Excise, Allahabad maintained at the sub-treasury.

22. In our opinion, this is an ordinary banking business. Any private individual could run a banking business by employing accountants, and treasurers to receive money for being credited to the accounts of other individuals or even of State Departments by an agreement with them. It appears to us that this particular banking activity was not such as may be referable to a Government activity in which the exercise of sovereign power is involved. On the other hand, this is an activity which could be carried on by a private individual and so the liability of the Government would be the same as of a private individual. To hold otherwise would be inconsistent with commonsense and justice.

23. The Government had protected itself by appointing a Government treasurer, with a guarantor. It is well known that all commercial banks employ accountants

and treasurers on similar terms, namely with a guarantor. This also suggests that the particular activity in the course of which the accountant and the treasurer of the sub-treasury committed the defalcation was plainly a commercial activity not referable to the exercise of sovereign power of the State. In this view, the State Government could not validly invoke the doctrine of immunity for the tortious act committed by its servants. We agree with the finding of the Court below on this point.

24. On behalf of the plaintiff-respondent it was urged that in substance the suit is not for damages for tort but for return of money paid in the treasury but not credited to the account of the Collector, Central Excise, as directed by the plaintiff. On this basis it was urged that the plaintiff was entitled to an injunction directing the State Government to make the relevant entries crediting the account of the Collector, Central Excise, with the sum of Rupees 50,000/-. In this connection learned Counsel- relied upon *Mani Poullose Vs. State of Travancore-Cochin*, and *Union of India Vs. Jasso and Others*, We, however, are not disposed to elaborate this aspect because no such claim was specifically laid in the plaint. There the prayer was that the defendant be directed to repay to and/or credit the plaintiff's account with the sum of Rs. 50,000/-. That is something different than praying for a direction to credit to the account of the Collector, Central Excise.

25. In the result, the appeal fails and is accordingly dismissed with costs. The cross-objection was not pressed. It is dismissed with costs.