

(1967) 12 BOM CK 0016
In the Bombay High Court
Case No : F.A. No. 262 of 1965

Union of India

APPELLANT

Vs

Sugrabai Abdul Majid and others

RESPONDENT

Date of Decision : 04-12-1967

Acts Referred:

Penal Code, 1860 (IPC) — Section 304A

Citation : (1968) MhLj 468

Hon'ble Judges : V.M. Tarkunde, J;V.G. Wagle, J

Bench : Division Bench

Advocate : V.H. Gumaste, Govt. Pleader for State, for the Appellant; M.A. Rane for Respondents Nos. 1 to 7, for the Respondent

Judgement

V.M. Tarkunde, J.—On September 13, 1960, one Abdul Majeed was going on a bicycle from Bhagur to Deolali camp near Nasik. At that time defendant No. 1, who was a driver employed in the defence department, came in a military truck from the opposite direction. The military truck dashed against the bicycle of Abdul Majeed with the result that Abdul Majeed received severe injuries and died on the spot. He left behind his young wife and six minor children. The wife and the children filed a pauper suit for the recovery of damages estimated at Rs. 30,000 from defendant No. 1 and from the Union of India defendant No. 2. The plaintiffs alleged in the plaint that the accident occurred because of the rash and negligent driving of defendant No. 1, that defendant No. 1 was on Government duty when the accident took place, and that both the defendants were liable for damages. In his defence, defendant No. 1 denied that he was rash or negligent in driving the truck and further pleaded that the amount of damages claimed by the plaintiffs was excessive.

The Union of India took up the same defences and advanced a further plea that they were not liable for the tort alleged to have been committed by defendant No. 1 as the latter was in military service. On the evidence led before him the learned trial Judge found that the accident was occasioned by the rash and

negligent driving of defendant No. 1, that the amount claimed by the plaintiffs by way of damages was fair and proper, and that the Union of India was liable for the tort along with defendant No. 1. On these findings the learned Judge passed a decree for the payment of Rs. 30,000 and costs by the defendants to the plaintiffs. From this decree the Union of India has filed the present appeal. No appeal was filed by defendant No. 1.

2. Adequate evidence was produced at the trial to show that at the time of the accident the deceased Abdul Majeed was riding on his bicycle on the left side of the road, that defendant No. 1 came in his truck at great speed from the opposite direction, that he swerved to his right to pass a tonga, that he dashed the truck against the bicycle of the deceased, and that thereafter the truck went to a distance of 108 feet and struck against a tree. Defendant No. 1 was convicted by Court Martial u/s 304-A, Indian Penal Code for causing death by rash and negligent driving. In view of the evidence on record the learned Government Pleader, who appeared before us on behalf of the Union of India, did not find it possible to contest the trial Court's finding that the accident was occasioned by the rash and negligent driving of defendant No. 1.

3. Two contentions were advanced by the learned Government Pleader before us: (1) that the Union of India was wrongly held liable for the tortuous act of defendant No. 1, and (2) that the amount of damages allowed to the plaintiffs was excessive.

4. In deciding whether the Union of India is liable for the tort committed by defendant No. 1 it is necessary to notice the duty in which defendant No. 1 was engaged at the time of the accident. Defendant No. 1 was attached as a military driver to the School of Artillery conducted by the defence department of the Government of India at Deolali. A machine of the School of Artillery called "Records Sound Ranging" and some other equipment had been sent for repair to a military workshop, and after the work of repair was over defendant No. 1 was, at the time of the accident, transporting the machine and the other equipment in the military truck from the workshop to the School of Artillery. It is in evidence that Records Sound Ranging is a machine for locating enemy guns. The machine was to be used at the School of Artillery for giving training to military officers.

5. The principles which determine the immunity of the State in respect of torts committed by its servants during the course of their duty can now be taken as well settled. The extent of the immunity of the State is the same as the extent to which the East India Company was immune from liability for similar torts committed by its employees. The East India Company was not liable for a tort committed by its employee while performing a duty which amounted to the exercise of a sovereign power delegated to him. In other cases the vicarious liability of the East India Company was the same as the liability of an ordinary employer. It follows that the Union of India would be liable for the tort of defendant No. 1 unless it is found that defendant No. 1, while driving the truck from the military workshop to the School of Artillery, WAS doing a duty in

discharge of a sovereign power delegated to him,

6. The leading authority on the subject is the decision of the Supreme Court, Calcutta, given in 1861 in *P. & O.S. N. Co. v. Secy, of State for India* (1861) 5 Bom. H CR App. A. 1. In delivering the judgment of the Court Sir Barnes Peacock C. J., after pointing out that the East India Company was a trading Company to whom sovereign powers had been delegated, observed (p. 13):

...There is a great and clear distinction between seta dons 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." In the latter [Blockquote Missing]part of the judgment the learned Judge said (p. 14):

But where an net is done, or a contract is entered into, in the exercise of powers usually called sovereign powers, by which we mean powers which cannot be lawfully exercised except by a sovereign, or private individual delegated by a sovereign to exercise them, no action will lie.

7. The above principle was approved and adopted by the Supreme Court in two recent cases. In *The State of Rajasthan Vs. Mst. Vidhyawati and Another*, , a person employed as a motor driver by the State of Rajasthan had caused a fatal accident while driving a Government jeep car in a rash and negligent manner. The car was meant for the use of the Collector. It had been taken to a repair shop and was being driven after the repair to the Collector's residence when the fatal accident took place. The trial Court had held that the State of Rajasthan was not liable for the tort of the driver because the car was being maintained for the use of the Collector in the discharge of his official duties. The High Court of Rajasthan disagreed with the trial Court and held that the State of Rajasthan was liable because at the time of the accident the car was not being used in the exercise of any sovereign power of the State. The decision of the High Court was upheld by the Supreme Court. Delivering the judgment of the Supreme Court, Sinha C. J. said (p. 935):

Can it be said that when the jeep ear was being driven back from the repair shop to the Collector's place, when the accident took place, it was doing anything in connection with the exercise of sovereign powers of the State ? It has to be remembered that the injuries resulting in the death of Jagdishlal (the deceased in that case) were not caused while the jeep car was being used in connection with the sovereign powers of the State.

8. The other case in which the Supreme Court considered the extent of the vicarious liability of the State for torts committed by its servants was *Kasturilal Ralia Ram Jain Vs. State of Uttar Pradesh*, . In that case a quantity of gold was attached by police officers from one Ralia Ram, who was a partner of the plaintiff-firm, on suspicion that it was stolen property. The gold was kept at the police Malhana in the custody of a Head Constable who misappropriated the gold and filed to Pakistan. It was alleged by the plaintiffs that the loss was caused by the

negligence of police officers in not taking proper care of the attached property and this plea of the plaintiffs was upheld by the Supreme Court. The Supreme Court, however, came to the conclusion that the tortious act of the Police Officers was committed by them in the discharge of sovereign powers and the State was, therefore, not liable for the damage caused. The Supreme Court observed in this connection (p. 1048):

...Now, 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, there is no difficulty in holding that the act which gave rise to the present claim for damages has been committed by the employees of the respondent during the course of its employment, but the employment in question being of the category which can claim the special characteristic of sovereign power, the claim cannot be sustained.

Dealing with the general principle which determines the vicarious liability of the State in such cases, the Supreme Court referred to the aforesaid decision in *P. & O S. N. Co. v. Secy, of State for India* (1881) 5 Bom. HCR App. A 1 and went on to say (p. 1046):

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 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 powers, 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.

9. Although the principle which determines the extent of the vicarious liability of the State for torts committed by its servants is thus well settled, it is by no means easy to apply the principle to particular cases. Sovereign powers are vested in the State in order that it may discharge its sovereign functions. The ultimate sovereign function of the State which is relevant to the case before us is that of defence of the country. 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. The learned Government Pleader, however, wanted us to go much further than this. He argued that all acts which are necessary for the discharge of a sovereign function of the State and which are carried out by the concerned department of the State must be deemed to have been done in the exercise of the sovereign power delegated by the State. Thus, according to the learned Government Pleader, the training of army personnel requires the maintenance of machines used in the training, the maintenance of the machines requires that they should be kept in proper repair, the work of repairing the machine requires its transport from the workshop to the military school, and the transport of the machine is, therefore, a duty performed in the exercise of a sovereign power of the State. The learned Government Pleader argued that defendant No. 1 in the present case, while transporting the Records Sound Ranging machine and other equipment from the workshop to the School of Artillery, was thus exercising a sovereign power delegated to him and that the Union of India was, therefore, not liable for the tort committed in the course of that duty.

10. We are unable to agree that the immunity of the State for the torts committed by its servants can be extended in the manner suggested by the learned Government Pleader. In our view, there is a fallacy in the assumption 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. For instance, the army unit stationed at Deolali requires a regular supply of food. Foodgrains purchased for the army unit may be transported to the military camp in trucks belonging to a private agency. They may also be transported in military trucks driven by employees of the defence department. The fact that the army unit is maintained in the exercise of the State's sovereign power and the further fact that supply of food is essential for the maintenance of the army unit do not justify the conclusion that, if the food is transported to the army camp in military trucks instead of private trucks, the drivers of the military trucks exercise a sovereign power delegated to them by the State. To take another instance, the maintenance of military barracks is necessary for the maintenance of the army unit and the military barracks have to be kept in proper repair. If, instead of entrusting the work of repairing the barracks by private contractors, the State sets up a departmental unit for the purpose, the work done by the State employees in repairing the barracks cannot be said to have been done in the exercise of a delegated sovereign power, even if the work of repairing the barracks is essential for the maintenance of the army unit. It appears to us that 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. In the case before us the transport of the Records Sound Ranging machine and other equipment from the workshop to the School of Artillery was necessary for the proper training of army personnel, but it was not necessary to transport the said equipment through a military 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. It is easy to appreciate that in certain circumstances the transport of machines through military trucks can be regarded as an act done in the exercise of the State's sovereign power. The machines may have to be carried for the immediate use of an army engaged in active military duty. In such a case the transport of the machines through military trucks may be regarded as an exercise of the State's sovereign power. In the case before us the transport of the machine could have been arranged through a private carrier without any material detriment to the running of the School of Artillery. It must follow that defendant No. 1 was not exercising any delegated sovereign power of the State when he transported the equipment in a military truck and caused the fatal accident by his negligence.

11. What we have stated above appears to us to be in conformity with the approach adopted by the Supreme Court in *The State of Rajasthan Vs. Mst. Vidhyawati and Another*, . The car in that case was meant for the use of the Collector who must have been exercising some of the sovereign powers delegated to him by the State. The mere fact however, that the car was meant for the Collector's use and was required to be repaired was not held to justify the conclusion that its driver was exercising a delegated sovereign power when he caused the accident. The State was held liable for the tort of the driver because at the time of the accident the car was not being used in connection with the exercise of any of the State's sovereign powers. On the other hand, in *Kasturilal Ralia Ram Jain Vs. State of Uttar Pradesh*, the State was held not liable for the negligence of the police officers in failing to take care of the property attached by them, because it was the statutory duty of the police officers to seize the attached property and the Supreme Court held that the performance of this statutory duty amounted to an exercise of sovereign power. It will be recalled that in that case, with reference to the duties which are not assigned to public servants by virtue of any delegation of sovereign power, the Supreme Court observed that the act of the public servant in such cases is "an act of a servant who might have been employed by a private individual for the same purpose." We have found in the present case that the act of defendant No. 1 in transporting the equipment in the truck was an act of a servant who might have been employed by a private individual for the same purpose.

12. Considerable support to the view which we are inclined to take is found in the decision of a Full Bench of the Punjab High Court in *Union of India Vs. Jasso and Others*, . A reference to the Full Bench in that case was rendered necessary because of an earlier decision of a Division Bench of the Punjab High Court in

Union of India (UOI) Vs. Harbans Singh and Others, . In the Division Bench case, an accident was caused by the negligence of a driver of a military truck when it was being used in supplying meals to military personnel on active duty. The Division Bench held that the Union of India was not liable for the negligence of the driver. In the subsequent Full Bench case Union of India Vs. Jasso and Others, a fatal accident was caused by the negligence of a driver of a military truck which was carrying coal to Army General Headquarters in Simla, and the question referred to the Full Bench was whether the Union of India was liable to be sued in respect of the tort committed by the military driver. The Full Bench held that the tort was not committed during the exercise of a sovereign power and that the Union of India was liable to be sued in respect of the tort. After referring to the distinction between acts done in the exercise of sovereign powers and other acts, the Full Bench observed (p. 318):

Applying this test to the present case it is difficult to see how it can possibly be held that such a routine task as the driving of a truck loaded with coal from some depot or store to the General Headquarters' building at Simla, presumably for the purpose of heating the room, is something done in exercise of a sovereign power, since such a thing could obviously be done by a private person.

Referring to the Division Bench decision mentioned above, the Full Bench said (p. 318):

It can be said regarding that case that the truck was being driven for supplying the needs of army personnel engaged on military duties which could not be performed by civilians.

It is at any rate safe to say that that case cannot be regarded as an authority for the general proposition that in no case can an action for damages be brought against the Government merely because the vehicle involved in the accident is an army truck driven by a military employee in the performance of some duty or other.

13. A reference may also be made to a recent decision of the Delhi High Court in Satya Wati Devi Vs. Union of India and Others, . There an Air Force vehicle was engaged in carrying hockey and basket-ball teams to Indian Air Force Station, New Delhi, to play a match against a team of the Indian Air Force. After the match was over, the driver was going to park the vehicle when he caused a fatal accident by his negligence. On behalf of the Union of India it was argued before the Court that it was one of the functions of the Union to keep the army in proper shape and trim, that the hockey and basket-ball teams were carried by the vehicle for the physical exercise of Air Force personnel, and that the Union of India was therefore not liable for the tortious act of the driver of the vehicle. In rejecting the argument and holding that the Union of India was liable for the tort, the Court observed that carrying hockey and basket ball teams to play a match can by no process of extension be termed an exercise of sovereign power.

14. The learned Government Pleader cited several precedents to show that the

expression "sovereign power" has a wide connotation. In *The Secretary of State v. Cockcraft* 1914 I L R 39 Mad. 351, the plaintiff had sued the Secretary of State for India in Council for damages in respect of injuries sustained by him in a carriage accident which, was alleged to have been due to the negligent stacking of gravel on a military road maintained by the Public Works Department. It was held that the provision and maintenance of roads, especially a military road, is one of the functions of Government carried on in the exercise of its sovereign powers and is not an undertaking which might have been carried on by private persons and that the Secretary of State for India in Council was, therefore, not liable for the damages claimed by the plaintiff. In *Secy. of State Vs. Srigobinda Chaudhuri*, the Calcutta High Court dealt with a suit against the Secretary of State for India for loss caused to the plaintiff's property by the alleged mismanagement of managers appointed by the Court of Wards. The Court held that the plaintiff had no cause of action against the Secretary of State for India. The Court observed that the jurisdiction exercised by the Court of Wards under the Court of Wards Act, 1879, was essentially an exercise of a sovereign power. In *State of Andhra Pradesh Vs. Piniseti Ankanna*, the State of Andhra Pradesh was sued for damages alleged to have been caused by some illegal and malicious acts of certain officers engaged in the collection of land revenue. The Court held that the collection of land revenue is a sovereign function of the State and the State was, therefore, not liable for the alleged tortious acts.

15. These cases, though they show that the State may have sovereign powers of various types, are not helpful in deciding whether the duty which was performed by defendant No. 1 in the present case at the time of the accident amounted to an exercise of a sovereign power delegated to him. We find that the duty which was being performed by defendant No. 1 could have been entrusted to a private individual without any material detriment to the State's function of running the School of Artillery at Deolali and that, therefore, defendant No. 1 was not acting in the exercise of any sovereign power when he committed the accident.

16. Towards the end of the hearing before US the learned Government Pleader referred to a judgment delivered by Mr. Justice J. C. Shah (as His Lordship then was) in *Joseph Avagalus D'Souza v. The Dominion of India* (1952) O. S. Suit No. 2704 of 1948, decided by J. C. Shah J. on September 29, 1952 (Unrep.). That was a suit filed by the plaintiff to recover damages from the Dominion of India for injuries caused by the negligent driving of a motor vehicle by one Swami who was a motor driver employed in the military department. On a plea in the nature of demurrer raised by the defendants, the learned Judge dealt with the preliminary issue whether, on the allegations contained in the plaint, any cause of action was made out against the Dominion of India. No evidence was led before the learned Judge on the nature of the duty in which the motor driver Swami was engaged at the time of the accident. The learned Judge held that no cause of action was made out against the Dominion of India and dismissed the suit. He said in his judgment:

The maintenance of the military department is certainly not an undertaking which could be carried on by a private person, and the running of motor vehicles maintained by the military department being an activity which is incidental to the military department it must be held that even though there is no direct connection between the exercise of sovereign authority and running of a motor vehicle by an employee of the military department, the running of a motor vehicle belonging to the military department being for the performance of duties connected with the exercise of the sovereign authority, any injury caused to the plaintiff as a result of rash and negligent driving by an employee in that department will not sustain a suit for damages against the sovereign.

When this decision was given by the learned Judge, it was generally assumed, on a certain interpretation of the judgment in *P. & O. S. N. Co. v. Secy., of Slate for India* (1861) 5 Bom. H C R App, A, 1, that the functions of the Government can be classified into commercial and non-commercial functions and that the State is not liable for a tort committed by a servant in the course of his duty if the servant was employed in a non-commercial department. In view of the decision of the Supreme Court in *Vidhyawati's case* AIR 1963 S C 933, and in view of the observations of the Supreme Court in *Kasturi Lal's case* AIR 1966 S C 1039, this approach is no longer justified. It is clear from the judgments of the Supreme Court in these cases that the State is liable for a tort committed by an employee in any of its departments in the course of his duty, if it is found that the duty which was being performed by the employee at the time of the tort was not in exercise of a sovereign power delegated to him. With very great respect, therefore, we are unable to accept the" above decision of Mr. Justice J. C. Shah as laying down the correct law.

17. [The rest of the judgment is not material to this report.]