

(2008) 11 AHC CK 0154
In the Allahabad High Court

U.P. Power Corporation and Another	Vs	APPELLANT
Bijendra Singh		RESPONDENT

Date of Decision : 20-11-2008

Acts Referred:

Citation : (2009) 1 AWC 421

Hon'ble Judges : Amitava Lala, J;A.P. Sahi, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Amitava Lala, J.—This appeal has been preferred by the Uttar Pradesh Power Corporation Limited, the appellants herein, challenging the judgment and decree dated 23rd February, 2007 passed by the Civil Judge (Senior Division), Ballia in Original Suit No. 266 of 2004, Bijendra Singh v. U.P. Power Corporation Ltd. and Anr., whereby the suit filed by the plaintiff-respondent has been decreed and compensation to a tune of Rs. 7,00,000 alongwith interest at the rate of 6% has been awarded.

2. By consent of the parties, the appeal has been heard on the informal papers, however, upon exchange of affidavits.

3. The respondent, being plainff, instituted a suit for damages, being Original Suit No. 266 of 2004, Bijendra Singh v. U. P. Power Corporation Limited and Anr., before the appropriate Court on 4th November, 2004 and claimed compensation to a tune of Rs. 7,00,000 alongwith interest at the rate of 12% per annum on account of death of his elephant due to electrocution. The case of the plaintiff-respondent is that on 10th August, 2003 his elephant was brought to the public place by mahout (the elephant-driver) and other two persons sitting on his back for attending a religious procession, i.e., mahabiri jhanda. After completion of procession while the elephant was driven to come back by mahout and other two persons, a high voltage open wire of electricity of the U. P. Power Corporation Limited, which was hanging on the road and current was passing through it,

touched the body of either of the persons sitting on the back of elephant and by the shock all the three persons fell down from the elephant but the elephant, whose feet were in touch with the earth, succumbed to death on the spot. Due to aforesaid incident, the plaintiff-respondent, being owner of the elephant, filed the above suit for damages against the defendants-appellants, who flatly denied the cause of accident in the written statement by saying that there was no such wire hanging through which the electricity was passing. This explanation was given by the defendants-appellants with the support of the statement that in case wire breaks and detaches from the line, by automatic mechanism passing of current is stopped. In support of their contention, the defendants-appellants examined a sole witness, who was not eye-witness. He deposed that as because one person who was dancing on the back of the elephant came in touch of the wire, on account of which the accident took place. He also stated that he was neither present on the spot nor did he see how the elephant come in touch of electrical wire and further he was also not able to say as to how many days before the accident he saw that line on the spot. On the other hand, in support of the averments in the plaint not only the plaintiff but also two other eyewitnesses were examined, who have categorically deposed about cause of the accident. Ultimately, the court below held that negligence on the part of the defendants-appellants caused the death of elephant, therefore, they are liable to-pay compensation to the plaintiff-respondent and accordingly, decreed the suit awarding compensation, as above,

4. By preferring this appeal the defendants-appellants reiterated the facts, as stated before the court below, and further said that the evidence has not been properly appreciated and analysed by the court below, therefore, the conclusion arrived at by the court below is patently erroneous, illegal, incorrect and improper and as such is liable to be set aside by this Court.

5. According to us, there is a clear contradiction in the stand of the defendants-appellants as taken, in the written statement and deposition. The sole witness, who was not at all eye-witness to verify the truth, adduced the evidence before the court below by saying that as because one person who was dancing on the back of the elephant touched the electric wire and fell down, on account of which the elephant also came in touch and succumbed to death. On the other hand, it has been stated in the written statement that by automatic mechanism when electrical line is cut off and fallen down, the supply of the electricity will be stopped. These militating state of affairs cannot establish beyond doubt that there was no negligence on the part of the Power Corporation. According to us, to ascertain a negligence certain measures are required to be assessed. Who was diligent or who was more diligent, on the other hand, who was responsible or who was more responsible. As the public purpose is greater than the private purpose similarly public duty is greater than the private duty. A road is made for public. Therefore, a public duty emerges that all precaution should be presupposed. It is no matter whether a pedestrian is moving on the road or a cyclist or two wheelers or four wheelers or on the horse or elephant or bullock-

cart. The question is whether such persons passing through the public road are safe or not. If they are not safe for some reason or the other, a public body cannot avoid the responsibility. It is clear case of tort.

6. Some statutory duties are absolute in the sense that the obligation, whatever its meaning and effect, must be actually fulfilled and not merely that the person subject to the duty must do his best to fulfil it. The code of conduct required is conclusively fixed by the statute. In such a case there is not so much a duty to perform as responsibility for circumstances. At first sight, therefore, it might seem that these duties have little or nothing in common with the common law obligation to take reasonable care, which is in general measured by what is reasonably foreseeable in the circumstances. But the tendency of the decisions has been to introduce the notion of reasonable foreseeability in determining the true construction of the statutory obligation.

7. Other duties are not absolute, in the sense that the statute only requires what is "practicable" or "reasonably practicable" to be done. This is often treated as closely analogous to the common law obligation of an employer to his employee, but something more than reasonable care is required, and what is "practicable" may require a higher standard than what is "reasonably practicable," although not as high a standard as "possible". In general it may be said that the risk has to be balanced against the time, cost, efficiency, and trouble of remedial measures, but, under "practicable," questions of cost may be eliminated, though what is done must still be possible in the light of the relevant knowledge and resources at the time of the breach.

8. The plaintiff must prove (i) breach of duty, and (ii) that such breach caused the injury complained of. The ordinary standard of proof in civil actions applies, the plaintiff must make it appear that at least on a balance of probabilities the breach of duty caused or materially contributed to his injury. But it has also said that this must not impose too severe a burden on him, especially if the fault complained of is one of omission rather than commission. The onus of proving that safety measures were not reasonably practicable rests on the defendant, who must plead the defence and adduce evidence at the trial to support it.

There might be a defence of contributory negligence on the part of the appellants herein, i.e., the statutory authority, but it cannot be relieved of liability merely because the driver of the elephant was not so careful. Thus, onus is upon the defendants-appellants to prove that the plaintiffs contributory negligence was a substantial or material co-operating cause. It is not for the plaintiff to show exactly how the accident happened. Generally speaking, the person responsible for the cause is he who is in actual occupation or possession of them for the time being. For it is he who has the immediate supervision and control and the power of permitting or prohibiting the entry of other persons. It is a question of fact in each case whether the defendant/s has/have such control, but the Courts look at the matter broadly.

9. If an accident happens, defendant will not be heard to say that the plaintiff might have avoided it by care, because no such care was obligatory on him. There is in general no duty to anticipate that another will be negligent, and to avoid the effects of that negligence by anticipation. For example, so both the pedestrian and the motorist are entitled to proceed more or less upon the assumption that the drivers of all the other vehicles will do what it is their duty to do, namely, observe of rules regulating the traffic of the streets.

10. In *Rylands and Anr. v. Fletcher* (1861) 73 ALLER 1, the principle, which has been laid down, is as follows:

We think that the true rule of law is that the person who, for his own purposes, brings on his land, and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, he is *prima facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiffs default, or, perhaps, that the escape was the consequence of *vis major*, or the act of God ; but, as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule, as above stated, seems on principle just. The person whose grass or corn is eaten down by the escaped cattle of his neighbour, or whose mine is flooded by the water from his neighbour's reservoir, or whose cellar is invaded by the filth of his neighbour's privy, or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbour's alkali works, is damnified without any fault of his own ; and it seems but reasonable and just that the neighbour who has brought something on his own property which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows will be mischievous if it gets on his neighbour's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued, and it seems but just that he should at his peril keep it there, so that no mischief may accrue, or answer for the natural and anticipated consequences. On authority this, we think, is established to be the law, whether the thing so brought be beasts or water, or filth or stench.

(Emphasis supplied)

11. In *M.P. Electricity Board v. Shail Kumari and Ors.* 2002 (1) AWC 495 (SC) , the Supreme Court held as follows:

7. It is an admitted fact that the responsibility to supply electric energy in the particular locality was statutorily conferred on the Board. If the energy so transmitted causes injury or death of a human being, who gets unknowingly trapped into it, the primary liability to compensate the sufferer is that of the supplier of the electric energy. So long as the voltage of electricity transmitted through the wires is potentially of dangerous dimension, the managers of its supply have the added duty to take all safety measures to prevent escape of

such energy or to see that the wire snapped would not remain live on the road as users of such road would be under peril. It is no defence on the part of the management of the Board that somebody committed mischief by siphoning such energy to his private property and that the electrocution was from such diverted line. It is the look out of the managers of the supply system to prevent such pilferage by installing necessary devices. At any rate, if any live wire got snapped and fell on the public road, the electric current thereon should automatically have been disrupted. Authorities manning such dangerous commodities have extra duty to chalk out measures to prevent such mishaps.

8. Even assuming that all such measures have been adopted, a person undertaking an activity involving hazardous or risky exposure to human life, is liable under law of torts to compensate for the injury suffered by any other person, irrespective of any negligence or carelessness on the part of the managers of such undertakings. The basis of such liability is the foreseeable risk inherent in the very nature of such activity. The liability cast on such person is known, In law, as "strict liability". It differs from the liability which arises on account of the negligence or fault in this way, i.e., the concept of negligence comprehends that the foreseeable harm could be avoided by taking reasonable precautions. If the defendant did all that which could be done for avoiding the harm, he cannot be held liable when the action is based on any negligence attributed. But such consideration is not relevant in cases of strict liability where the defendant is held liable irrespective of whether he could have avoided the particular harm by taking precautions.

12. Despite the continuing dominance of fault liability, the English law of tort does contain certain limited principles of strict liability with regard to personal injuries. Some of these are of common law origin and of respectable antiquity, others have been the creation of modern statutes and have either been limited in their practical importance or of rather haphazard application. It is unlikely that any consistent policy has been followed in the creation of these areas of strict liability, though it is perhaps possible to discern behind some of them a very hazy idea of unusual or increased risk. However, the strictness of the liability varies considerably along a spectrum from near-absolute liability to little more than a reversed burden of proof, and in nearly every case the defendant may plead the contributory fault of the claimant as a defence or in diminution of damages. While there may be some merit in a system of strict liability for unusual risks it can hardly make much contribution to the accident compensation problem as a whole when common risks are left to the law of negligence. The exclusion of contributory negligence is very important because its retention would require the same kind of investigation into the facts of the accident as does the present law, and hence lose much of the advantage of strict liability. By contrast, our legislation on product liability retains contributory negligence. Those who believe that tort law has a deterrent role will object to the exclusion of contributory negligence, for logically it is necessary to give claimants as well as defendants the incentive to avoid accidents. Another problem is that if we make the

(realistic) assumption that strict liability would apply to identified activities rather than across the board, we end up attributing the cost of an accident to the strict liability activity when many accidents are the product of the interaction of more than one activity.

13. Liability in nuisance may be strict where the defendant himself or someone for whom he is responsible has created the nuisance. Liability for breach of a statutory duty is often not dependent on proof of negligence, and where an Act requires something to be done without qualification, contravention of the statute automatically establishes liability.

14. As to the law of tort, reasonableness is an essential ingredient in the law of negligence, whether that word be used to indicate an independent tort or a mental element in the commission of certain other torts and more will be said of this in the chapter on negligence. But there are many other torts in which, in one way or another, the idea appears.

If any broad sense can be extracted from the various significations of "reasonable conduct" it might be described as the behaviour of the ordinary person in any particular event or transaction, including in such behaviour obedience to the special directions (if any) which the law gives him for his guidance in that connection. The description of "reasonable" just given is, and can only be, a rough approximation to exactness. As was indicated in it, if the law gives special directions for the guidance of the ordinary person, he must regulate his conduct by them if his conduct is to be regarded as reasonable. Here the judicial method, being what it is, shows two rather conflicting tendencies. One is to get as near exactness as may be in the rules relating to what is regarded as reasonable. The other is to recognise that complete exactness is neither attainable nor desirable, nor is this all. The Judge has to decide that "reasonable" means, and it is inevitable that different Judges may take variant views on the same question with respect to such an elastic term.

15. This is a convenient point at which to outline the tort of misfeasance in a public office. It is not based upon breach of statutory duty, but a claim for it is not infrequently coupled with a claim for breach of statutory duty in an action against a public authority. The tort is traceable back to the 17th century, and was described in modern times by the Privy Council as "well-established" in *Dunlop v. Woollahra Municipal Council* (1982) AC 158. The law was comprehensively reviewed by the House of Lords in *Three Rivers D.C. v. Bank of England* (No. 3), (2001) UKHL 16 : (2003) 2 AC 1. The purpose of the tort is to give compensation to those who have suffered loss as a result of improper abuse of public power, it being based on the principle that such power may be exercised only for the public good and not for ulterior and improper purpose. It applies to an unlawful (that is to say, unauthorised) act by a person holding a public office, provided it is done with the requisite mental element. Although the mental element is restricted to intention or "recklessness" the tort has a considerable reach, for there is no requirement that the conduct should be actionable in damages in its

own right : it covers non-actionable breach of statutory duty and a decision which is taken contrary to the requirements of natural justice. The mental element relates both to the validity of the act and its effect upon the claimant. As to the first, the officer must act in bad faith, that is to say he must either be aware that his act is unlawful or be consciously indifferent as to its lawfulness—mere negligence is not enough. As to the effect on the claimant, there are two situations. The first is that has been called "targeted malice", that is to say, the case where the defendant acts with the purpose of causing harm to the claimant. Alternatively, the defendant will be liable if he is aware that his act will probably (or in the ordinary course of things) cause damage of the type in fact suffered by the claimant or he is consciously indifferent to that risk.

16. From the situation, as above, it appears to us that the defendants-appellants cannot eliminate themselves from the liability be it in the nature of strict liability or common law origin or in the nature of misfeasance. We repeat and say that there is in general no duty to anticipate that another will be negligent, and to avoid the effects of that negligence by anticipation. He who in possession of the property is responsible for the cause of accident to others. There is no proof of the case whether the current was passing through the wire hanging on the road or not excepting bare statement in favour of the defence. Even their sole witness did not say anything about the same. Hence, in association with the Supreme Court judgment in *M. P. Electricity Board (supra)* we are of the view that be it for human being as happened in the case therein or be it in respect of any animal or pet or articles of the sufferer, the principle applicable herein is that when one gets unknowingly trapped into it, the primary liability to compensate the sufferer is that of the supplier of the electric energy. Even the Supreme Court considered such liability as "strict liability" in the case of alleged pilferage. We are also enlightened by the judgment in *Quebec Railway, Light, Heat and Power Company, Limited v. Vandry and Ors.* LR 1920 (AC) 662, wherein the Privy Council held that the appellants therein were liable for damages without proof that they had been negligent, since they had failed to establish that they could not have prevented the escape of electric current; further that the appellants' statutory powers afforded no defence, since the escape of the current was not necessarily incident to the exercise of those powers. The aforesaid case was decided by the Privy Council when the high-tension and low-tension lines were broken down due to violent wind although a branch from a tree growing was about 28 feet away from the cables. This was not amounted to force majeure. In *M.C. Mehta and another Vs. Union of India and others*, it was held that the enterprise must be held to be under an obligation to provide that the hazardous or inherently dangerous activity in which it is engaged must be conducted with the highest standards of safety and if any harm results to anyone on account of an accident in the operation of such activity, it is absolutely liable to compensate, regardless of whether it is carried on carefully or not. Such liability is not subject to any of the exceptions which operate vis-a-vis the tortious principle of strict liability under the rule in *Rylands v. Fletcher (supra)*. If the enterprise is permitted to

carry on a hazardous or inherently dangerous activity for its profit or for earning revenue, the law must presume that such permission is conditional on the enterprise absorbing the cost of any accident arising on account of such activity as an appropriate items of its overheads.

17. However, since the electrocution being part of the activity of the Corporation, caused such death, no differentiation can be made in respect of such liability of the authority. The question of strict liability is inbuilt under the law to avoid any accident, if not, by other measures. Therefore, taking into account all aspects of the matter we are of the view that the defendants-appellants cannot avoid the liability. Hence, we uphold the judgment and order passed by the court below, impugned in this appeal.

18. Thus, the appeal is dismissed, however, without imposing any costs.