

# ALLAHABAD HIGH COURT

Mohammad Murad Ibrahim Khan

Vs.

Govt., of U. P

First Appeal No. 209 of 1945. against decision of Addl. Civil Judge, Aligarh  
(Raghubar Dayal and Brij Mohan Lall, JJ.)

29.09.1944. 24.08.1955

## JUDGMENT

**Brij Mohan Lall, J.**

1. This is an appeal by plaintiffs against a decree of the learned Civil Judge of Aligarh dismissing their suit against the Government of United Provinces (now Uttar Pradesh.) The plaintiffs are a son and a daughter of one Mohammad Farahim Khan. In 1923 they were minors and their grandfather, Haji Mohammad Yusuf Khan, was appointed their guardian under the provisions of the Guardians and Wards Act by the District Judge of Aligarh. One Anwarullah, who claimed to be their maternal uncle, moved an application before the learned District Judge of Aligarh on 2-7-1927.

In this application he pointed out that the minors were possessed of jewellery and that the guardian was indebted. He expressed an anxiety for the protection of the minors 'property and made several prayers to the learned Judge including a request that the guardian might be called upon to produce the jewellery before the Court and that the same might, for the sake of safety, be deposited in bank or at any place which the Court might deem proper. On 5-7-1927 the learned District Judge issued notice of this application returnable on 18-7-1927. Later on the guardian appeared before the learned District Judge and made a statement to the effect that "the ornaments might be deposited in bank and that he had no objection." We are not in a position to find out from the record the date on which this statement was made. Presumably it was on 18-7-1927. On 27-7-1927, the jewellery was produced before the learned District Judge. It was got weighed and a list was prepared. We find from the order sheet of that date that the said jewellery was "entrusted to Nazir after enquiry and inspection."

2. The duty of the Nazir, as laid down in para 2 of R. 9 of Chap. XII of the General Rules (Civil) of 1926, Vol. I (which were in force at that time), was to place the jewellery in a substantial box and this box was to be sent every evening to the treasury or to the Imperial Bank for safe custody and was to be brought back every morning from there. The Nazir, however, placed these items of jewellery in one of the two safes which were kept in his office.

Time rolled on for several years till the fateful night between the 26th and 27th of March, 1930

arrived. In the evening of 26-3-1930, the Nazir for reasons which do not appear from the record, failed to send the cash box to the treasury. This fact was perhaps noticed by others and a theft took place at night. Both the safes and the cash box were broken open in the Nazir's office and the contents were removed. They have not been traced so far.

3. The appellants' father, who had after the death of his father been appointed the minors' guardian, made a petition to the learned District Judge for the return of the jewellery. This application was rejected by the learned District Judge because the jewellery was no longer in his possession. The learned Judge, in his order dated 13-9-1941, said : "If he has any grounds he may file a regular suit. Nothing can be done for the present."

4. After the minors attained majority they instituted the suit which has given rise to this appeal for the return of the ornaments and, in the alternative, for the recovery of a sum of Rs. 25,000/- together with pendente lite and future interest in lieu of the said ornaments. They charged the District Judge and the Nazir with negligence in keeping the items of jewellery.

5. The defendant contested the suit and denied the allegation of negligence. Further, it was contended that the Government was not liable for the tortious acts of its servants. Lastly, it was pleaded that the jewellery was worth Rs. 4,666/10 only.

6. The learned Civil Judge held that both the District Judge and the Nazir were guilty of negligence. Further, he held that the jewellery was worth Rs. 4,666/10. But he was of the opinion that the defendant was not liable by virtue of the provisions of Section 38 of Bengal Regulation XI of 1822. On these findings he dismissed the suit with costs.

7. Dissatisfied with this decision the plaintiffs have come up in appeal. The finding of the learned Civil Judge, viz., that both the District Judge and the Nazir were guilty of negligence, has not been assailed before us. We, therefore, proceed on the assumption that both the District Judge and the Nazir were guilty of negligence in so far as they ignored the provisions laid down, by law for the safe custody of the ornaments.

8. The return of jewellery is, as already stated, impossible because the jewellery does not exist. The only question that arises for decision is whether the Government is liable to pay damages on account of the price of the said jewellery.

9. Learned arguments were addressed to us by the learned counsel on either side on the question of the maintainability of a suit against the Government. Reference was made to Article 300 of the Constitution, Section 176 of the Government of India Act, 1935, section 32 of the Government of India Act, 1919, and Section 65 of the Government of India Act, 1858. Reference was also made to the famous judgment of Peacock C.J. in the case of - *'Peninsular and Oriental Steam Navigation Co. v. Secy of State'*. and to numerous other authorities in which that judgment was commented upon.

After hearing the learned counsel on either side, we are of the opinion that it is not necessary for us in this case to decide whether or not a suit lies against the Government. We assume in the appellants' favour that a suit does lie. But that assumption does not mean that the suit is to be necessarily decreed, if brought. Even where a suit lies it is open to the defendant to plead facts and to contend that on findings of fact to be arrived at in that case or on principles of law the suit is not maintainable. In this case reliance has been placed by Mr. N.D. Pant, Junior Standing Counsel, on two principles of law. It is contended in the first instance that if a servant purports to perform duties which are imposed on him by law the master is not liable though the servant, in certain circumstances, may himself be. The second contention put forward before us by him is that the Government is not liable for damages for wrong done by orders passed by officers presiding over Courts of justice.

10. Taking up the first question, we find good deal of force in it. A master is ordinarily held liable for the acts of his servant because the presumption is that the servant acts under the master's direction and guidance and for his benefit. It is true that in certain cases the servant may go against the master's directions, and yet the law may hold the master liable because the master is supposed to control him. But where the servant acts in performance of the duties imposed upon him by law, the master has no right to control him nor to give him any instructions. He is obeying the law and not the master and naturally the master should not be held liable for anything which the servant does while carrying out the aforesaid duties.

11. In the present case, the Nazir's duty was to keep in safe custody the ornaments which were entrusted to him by the District Judge. He had to perform this duty in the manner laid down by para 2 of R. 9 of Chap. XII of General Rules (Civil), Vol. I. These rules had been made by the High Court with the previous approval of the Governor in exercise of the powers conferred on it by Section 107, Government of India Act, 1915, and Section 122, Civil Procedure Code. These rules had the force of statutory rules and in purporting to discharge the obligation imposed by these rules the Nazir was doing a duty imposed on him by law. If he committed a default in the performance of that duty and was guilty of negligence, he committed a tortious act in the performance of the duty imposed on him by law.

12. The rule of law enunciated above has the support of a long series of cases beginning from as early as 1864 in - *Tobin v. The Queen*<sup>2</sup>, That was a case in which a petition of right had been presented to the Queen of England for damages for an act of a Captain of Her Majesty's ship who had seized a vessel belonging to the applicant believing her to be engaged in slave trade. The petition was rejected on the ground, inter alia, that the Captain in seizing the vessel was not acting in obedience to a command from Her Majesty but in the supposed performance of a duty imposed upon him by an Act of Parliament.

13. The Indian Courts have also taken the same view. In the case of - *Shivabhajan Durgaprasad*

*v. Secretary of State*<sup>2</sup>, a suit was brought to recover damages against the Secretary of State for India on account of the negligence of a

<sup>2</sup>(1864) 10 LT (NS) 762

<sup>3</sup>28 Bom 314

chief constable with respect to goods seized. It was held that the suit was not maintainable inasmuch as the chief constable seized the goods not in obedience to an order of the Executive Government but in performance of a statutory power vested in him by the legislature.

14. Another case in which the same view was taken is that of - '*Ram Shankar v. Secretary of State*<sup>4</sup>', In that case an Official Receiver appointed by Government to perform certain duties failed to account for some money. The Secretary of State for India was sued for damages and he was held not accountable for the acts of the Official Receiver because the said acts were done by him (the Official Receiver) in performance of the duties imposed on him by law.

15. Recently there was the case of - '*Ram Ghulam v. Government of U.P.*<sup>5</sup>', In that case stolen property had been recovered by the police authorities and deposited in the Malkhana. After being deposited there it was again stolen from the Malkhana. A suit was brought by the owner of the property against the Government of U.P. Scth J. who wrote an elaborate judgment, concluded it by saying that the Government was not liable when the servant who was guilty of a tortious act was performing duty in the discharge of obligations imposed on him by law.

16. It is unnecessary to multiply precedents. We have come to the conclusion that in this case both the District Judge and the Nazir were functioning under certain provisions of law and in the performance of their duties they were negligent. Their employer, the U.P. Government, is therefore not liable for damages caused by their negligent acts.

17. The second contention put forward by the learned junior Standing Counsel is also sound. The Government is not liable for orders passed by Courts of justice. The reason is obvious. Although the presiding officers of the Courts of justice may be Government servants in the sense that their salaries are paid by Government and their appointment and removal rest with the Government, yet it goes without saying that once appointed they are independent of the Government. The Government cannot dictate, nor even suggest, to them in what manner they should decide a particular case. Since they are totally independent of the Government in the discharge of their duties, the Government is not liable for their acts on the ground that it cannot control the said acts. This principle has received statutory recognition in Section 38 of Bengal Regulation XI of 1822. It says that the Government is not and shall not be held liable for any error of irregularity which may have occurred, or shall occur, in any order, proceeding or decree of any Court of Judicature, whether a revenue or other officer of Government may or may not have been, or shall or shall not be, employed in giving effect to the order, proceeding or decree deemed to be erroneous or irregular.

18. Courts of law have also recognised the principle. In the case of - '*Panchayati Akhara Maha Nirbani v. Secretary of State for India in Council*<sup>6</sup>',

<sup>4</sup> AIR 1932 All 575

<sup>6</sup> AIR 1922 All 276

<sup>5</sup> AIR 1950 All 206

the plaintiff, who was in possession of certain articles as pawnee, delivered them to a police officer in connection with a certain case. After the termination of the case the officer presiding over the criminal Court directed the said ornaments to be returned to the original owner. The plaintiff thereupon sued the Government for damages. It was held that the Government was not liable for loss resulting from a wrong order of the Court. A similar view was taken in the Full Bench case of - '*Secy. of State v. Sukhdeo*<sup>7</sup>', The same principle was followed in the case of - '*Bateshwari Prasad v. Secretary of State*<sup>8</sup>',

19. In this view of the law, the Government is not liable for the order passed by the learned District Judge refusing to deliver the ornaments to the appellants.

20. It was next contended by the learned counsel for the appellants that the position of the District Judge was that of a bailee and therefore the Government is liable for the value of the jewellery. Bailment results from a contract between the parties. In the present case, there was no contract between the District Judge or his Nazir, on the one hand, and the appellants or their then guardian, on the other. The District Judge ordered the guardian to do something and the guardian obeyed. In our opinion, there was no contractual relationship between the parties and no contractual obligation arose.

21. Even if it is sought to make the Government liable on the basis of a contractual obligation, the appellants have to face another difficulty. All contracts made by Government have to be reduced to writing and have to be entered into by persons who are duly authorised on behalf of the Government to enter into such contracts. The District Judge or his Nazir is not a person who is authorised by Government to enter into any contract on its behalf. Therefore, the claim, even if it is pressed on the ground of contract, is bound to fail.

22. We are, therefore, of the opinion that there is no merit in this appeal. It is dismissed with costs.

Appeal dismissed.

<sup>7</sup>21 All 341 (FB)

<sup>8</sup> AIR 1937 All 158