

MADHYA PRADESH HIGH COURT

Nandram Heeralal

Vs.

Union of India

Misc. Appeal No. 115 of 1975
(G.L. Oza and G.G. Sohani, JJ.)

31.03.1978

JUDGMENT

Oza, J.

1. This appeal has been filed by the two appellants parents of deceased Santoshkumar, who died as a result of an accident on the Bombay Agra Road between Mhow and Manpur by a military vehicle driven by respondent No. 2 an army employee.
2. It was alleged by the appellants that they are residents of village Gawli Palasiya which is situated on the left side of the road while going towards Bombay. It was alleged that at the time of the incident this boy Santoshkumar who was of about six years of age was standing on the left side of the footpath by the side of the road. At that time an army vehicle of the College of Combat Mhow which was being driven by respondent No. 2 was coming from Manpur and was being driven at a high speed and in a negligent manner. This vehicle collided against the boy standing on the side of the road. After receiving injuries as a result of this accident the boy was taken to the hospital where he ultimately died.
3. In the joint written-statement filed by the driver as well as the Union of India it was admitted that respondent No. 2 was driving the vehicle at that time but it was denied that the vehicle was being driven either rashly or negligently. It was also pleaded that as respondent No. 2 was driving the vehicle on duty and on Government work and therefore the Union of India was not in any manner liable.
4. The learned Member of the Claims Tribunal after trial held that the vehicle was being driven negligently resulting in the accident. The learned Member also calculated

the amount of compensation and awarded Rs. 6000/- as compensation. As regards the liability of respondent No. 1 Union of India, the learned Member held that as the vehicle was being driven by respondent No. 2 who is in the army service and was discharging his duties by driving the military vehicle carrying military personnel for exercise the Union of India could not be held liable as according to the learned Member respondent No. 2 was discharging sovereign functions of the State. The learned Member only held respondent No. 2 liable for compensation. Against this the present appeal has been filed.

5. Learned counsel appearing for the appellants contended that the evidence indicates that the army officers were being brought back from the place where they had gone for army exercises and on this return journey the vehicle met with the accident resulting in the death of the boy. This according to learned counsel could not be said to be a sovereign function which could not be discharged by a private individual. According to learned counsel there is nothing in the evidence to indicate that going to the place for exercise and return is a matter of any army secret. It is also contended that it is not indicated in the evidence that it was not open to any officer even to have gone to the place for exercise in his own private vehicle or in any other private vehicle. According to learned counsel it may be a facility made available by the army authorities for the officers under training in the College of combat to go and come back from the place of exercise. But there is nothing on the basis of which it could be said that the function of bringing back the officers from the place of exercise to headquarters at Mhow was a function which could not be entrusted to a private individual. Consequently, according to learned counsel, applying the test laid down by their Lordships of the Supreme Court in *Kasturi Lal v. State of Uttar Pradesh*,¹ the Union of India ought to have been held liable. He also contended that the same principle has been reinforced by their Lordships of the Supreme Court in the decision in *Shyam Sunder v. State of Rajasthan*,²

6. Learned counsel appearing for the Union of India on the other hand contended that carrying the army officers from the College of Combat to the place of exercise and return necessarily involves the sovereign function of the State and in fact the officers were being carried in an army vehicle driven by army personnel - respondent No. 2. He also contended that although under the Indian Constitution the concept of sovereign functions may be difficult to justify, but under Article 300 of the Constitution their Lordships of the Supreme Court have accepted this principle and the

line of distinction drawn in AIR 1966 Supreme Court 1039 (supra) clearly indicates that where the functions are such which could not be entrusted to a private individual the liability could not be fastened on the Union of India. Learned counsel referred to a decision reported in *Bakshi Amrik Singh v. Union of India*,³ wherein all the decisions on the question have been considered although learned counsel frankly conceded that in the evidence and in the pleadings it was not made clear that the place of exercise or the visit of officers for exercise and return was a matter of army secret and was such which could not have been entrusted to any private individual. He also frankly conceded that the only plea raised was that as respondent No. 2 was army personnel discharging his duties liability could not be fastened against the Union of India. But he contended that in the circumstances of the case the learned Member of the Claims Tribunal was right in inferring that it was a function which could not be entrusted to a private individual and was therefore a sovereign function being discharged by an officer of the State and the view taken by the learned Member of the Tribunal therefore, according to learned counsel, is correct.

7. The learned Member of the Claims Tribunal while considering this question observed :

".....in such exercises there must necessarily be some secrecy, and therefore it would not be proper to cast the net wider so as to accept that anyone from the public could carry the military personnel to the place of training of combat exercises without having any regard to the secrecy of the act."

Apparently, the learned Member it appears has inferred that carrying of the officers from the College of Combat to the place of exercise was a matter of secrecy. The only witness examined on behalf of the Union of India is D. W. 1 Lt. Col. Bhuwanchand Khaduri who was one of the occupants of the vehicle, an officer in the College of Combat who had gone for training. But in his evidence he has nowhere stated that going of the officers like him from the College of Combat to the place of exercise and return was a matter of army secret and was therefore such which could not be entrusted to any one else. He only states that they had gone for the exercise in the morning and were returning in the vehicle in later part of the day. The other witness examined is the driver himself respondent No. 2 and he also nowhere in his deposition states that the carrying of the officers from the College of Combat to the place of exercise and their return after the exercise was kept secret and this was entrusted to

him. He only states that at the time of the incident he was putting on a uniform, probably to impress that he was discharging his official duties. Apparently therefore the conclusion arrived at by the learned Member of the Claims Tribunal about the secrecy of the movement of the army officers to the place of exercise and their return is not based on any evidence and this could not be accepted. The evidence only indicates that these officers of the College of Combat were taken by this vehicle for exercise at some place near Manpur and were being brought back after the exercise was over and the evidence does not indicate that this was in any way connected with the military operations or movements or that it was a matter of secrecy.

8. In AIR 1965 Supreme Court 1039 (supra) their Lordships of the Supreme Court considered the impact of Article 300(1) of the Constitution, although in a different context, and observed : (at p. 1046)

"Thus, it is clear that this case recognizes 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 discharging 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. 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. That is why the clarity and precision with which this distinction was emphasized by Chief Justice Peacock as early as 1861 has been recognized as a classic statement on this subject."

In this decision the distinction drawn by their Lordships was that the act of a public

servant committed by him during the course of employment is in this category of cases an act of a servant who might have been employed by private individual for the safe purpose and the State cannot escape the liability for the tortious act of the servant. Similarly, in AIR 1974 Supreme Court 890 (supra) their Lordships were considering the question of negligence in a case under the Fatal Accidents Act and Mathew J. in his judgment while considering the principle enunciated in AIR 1965 Supreme Court 1039 quoted above observed : (at P. 893 of AIR 1974 SC)

"Reliance was placed on the ruling of this Court in *Kasturilal v. State of U. P* ⁴ where this Court said that the liability of the State for a tort committed by its servant in the course of his employment would depend upon the question whether the employment was of the category which would claim the special characteristic of sovereign power. We do not pause to consider the question whether the immunity of the State for injuries on its citizens committed in the exercise of what are called sovereign functions has any moral justification today. Its historic and jurisprudential support lies in the oft-quoted words of Blackstone. Blackstone Commentaries (10th Edn. 1887).

'The king can do no wrong ...The king, moreover, is not only incapable of doing wrong, but even of thinking wrong; he can never mean to do an improper thing; in him is no folly or weakness'. In modern times, the chief proponent of the sovereign immunity doctrine has been Mr. Justice Holmes who, in 1907, declared for a unanimous Supreme Court; *Kawananakoa v. Polyblank* ⁵

"A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends".

Today, hardly any one agrees that the stated ground for exempting the sovereign from suit is either logical or practical.

We do not also think it necessary to consider whether there is any rational dividing line between the so called sovereign and proprietary or commercial functions for determining the liability of the State."

These observations clearly go to show that the concept of sovereign functions and the

immunity of the State from tortious liability is not accepted in the modern context. But it appears that still their Lordships after applying the test laid down in AIR 1965 Supreme Court 1039 (supra) held in the facts of that particular case that the famine relief work could not be said to be sovereign function of the State.

9. In *Bakshi Amrik Singh v. The Union of India* ⁶ a Bench of five Judges of the High Court of Punjab and Haryana at length considered all the decisions on the question and ultimately laid down 11 tests :-

"Though sovereign functions of a State have nowhere been exhaustively enumerated nor is there any authoritative definition of what constitutes the sovereign functions from a review of the ratio of the various authorities that have been noticed above, certain rules of guidance, which appear to be well settled emerge and they may be stated thus :

1. Under Article 300(1) of the Constitution of India, the Union of India and the states in our Republic have the same liability for being sued for torts committed by their employees as was that of the East India Company.

2. The nature and extent of this liability, as stated in *P. and O. Steam Navigation Company's case* and authoritatively settled by their Lordships of the Supreme Court in *Kasturi Lal's case* is that the Union of India and states are liable for damages occasioned by the negligence of servants in the service of the Government if the negligence is such as would render an ordinary employer liable.

3. That in view of the rule stated above Government is not liable if the tortious act complained of has been committed by its servant in exercise of its sovereign powers by which we mean powers that cannot be lawfully exercised except by sovereign or a person by virtue of delegation of sovereign rights.

4. The Government is vicariously liable for the tortious acts of its servants or agents which are not proved to have been committed in the exercise of its sovereign functions or in exercise of the sovereign powers delegated to such public servants.

5. The mere fact that the act complained of was committed by a public servant in course of his employment is not enough to absolve the Government of the liability for damages for injury caused by such act.

6. When the State pleads immunity against claim for damages resulting from injury caused by negligent act 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 an employment which is referable to the exercise of the delegated sovereign powers.

7. There is a real and marked distinction between the sovereign functions of the Government and those which are not sovereign and some of the functions that fall in the latter category are those connected with trade, commerce, business and industrial undertakings.

8. Where the employment in the course of which the tortious act is committed is such in which even a private individual can engage, it cannot be considered to be a sovereign act or an act committed in the course of delegated sovereign functions of the State.

9. The fact that the vehicle, which is involved in an accident, is owned by the Government and driven by its servant does not render the Government immune from liability for its rash and negligent driving. It must further be proved that at the time the accident occurred, the person driving the vehicle was acting in discharge of the sovereign function of the State, or such delegated authority.

Though maintenance of Army is a sovereign function of Union of India, it does not follow that the Union is immune from all liability for any tortious act committed by army personnel.

11. In determining whether the claim of immunity should or should not be allowed, the nature of the act, the transaction in the course of which it is committed, the nature of the employment of the person committing it and the occasion for it, have all to be considered."

10. It could not be disputed that their Lordships after analysing all the judgments on the question have laid down these 11 tests, and applying the relevant tests, i.e. Nos. 3 and 10, to the facts of the present case it could not be disputed that the act of driving the vehicle in bringing back the officers from the place of exercise to the College of Combat Mhow, was not an act which could not be lawfully exercised except by a sovereign or a person by virtue of delegation of sovereign rights. And therefore, although the maintenance of Army is a sovereign function of the Union of India, from it alone it does not follow that the Union is immune from all liability for any tortuous act committed by an army personnel.

11. From the evidence in the case there is nothing to indicate that when respondent

No. 2 was bringing the officers back from the place of exercise to the College of Combat he was discharging functions which could not have been discharged by any private individual. Consequently the conclusions arrived at by the learned Member of the Claims Tribunal that the Union of India is not liable cannot be maintained.

12. The appeal is therefore allowed. The award passed by the learned Member of the Claims Tribunal is modified and both the respondents are held jointly and severally liable for the compensation amount awarded by the learned Member of the Claims Tribunal in favor of the appellants. The appellants shall also be entitled to costs of this appeal from the contesting respondent. Counsel fee Rs. 200/- (Two hundred) if certified.

Appeal allowed.

Cases Referred.

1. AIR 1965 SC 1039
2. AIR 1974 SC 890
3. 1974 ACJ 105 (FB)
4. (AIR 1965 SC 1039)
5. (1906) 205 U. S. 349, 353
6. (1974 ACJ 105) (FB)