Prithwiraj Bhadani Vs State

Court: Calcutta High Court

Date of Decision: May 12, 1978

Acts Referred: Civil Procedure Code, 1908 (CPC) â€" Section 80
Constitution of India, 1950 â€" Article 300
Government of India Act, 1858 â€" Section 65
Government of India Act, 1935 â€" Section 176

Citation: (1979) CriLJ 96

Hon'ble Judges: R. Bhattacharya, J; Monoj Kumar Mukherjee, J

Bench: Division Bench

Judgement

Monoj Kumar Mukherjee, J.
This second appeal is at the instance of one of the two plaintiffs in a suit for restoration of certain properties,

in the alternative, for recovery of price thereof.

2. The facts, on which the suit is premised and not in dispute, are that the plaintiff No, 1, who is the appellant before us is the proprietor of a shop

at Mathabhanga. The plaintiff No. 2, the pro forma respondent herein is his son and also constituted agent holding a power of attorney on behalf of

the plaintiff No. 1. The plaintiff No. 1 had another son by the name of Malchand Bhadani who was murdered in the night of Dec. 18, 1956. In

connection with the case started over the said murder, the Investigating Officer seized certain articles and money, detailed in the schedule of the

plaint from the plaintiff No. 2 and granted a receipt therefore. The articles, so seized, were exhibited before the Sessions Judge, Cooch Behar

during the trial of the persons accused of the said murder. The trial ended on Sept. 21, 1957 with capital punishment of two of the accused

persons. For all intents and purposes the criminal proceeding terminated on Sept. 19, 1958 when their appeal before the Supreme Court failed.

The plaintiff No. 2 on behalf of the plaintiff No. 1, the owner thereafter filed an application before the Trial Court on April 27, 1960 for getting

back the money and articles seized from him and the learned Sessions Judge on June 1, 1960 passed an order directing their return. Having failed

to get back the articles and the money in spite of the order of the Court, the plaintiffs served a notice under S. of the civil P.C. upon the Collector

of Cooch Behar but any response. The plaintiffs prayed for restoration money and articles seized, in the alternative for recovery of a sum of Rs.

5,625/- in lieu thereof.

3. The suit was resisted by the defendant State of West Bengal solely on the ground that the cash money and the gold which were kept in the

Court Malkhana after seizure, were misappropriated by the Court Sub-Inspector, Ananta Court were Mazumdar, who was in-charge of the

Malkhana and the defendant was not liable for this act of misappropriation which was the unauthorised and outside the scope his employment.

4. The learned trial Court, on consideration of the various documents exhibited at the instance of the de- fendant and the oral evidence adduced

found that Ananta Mazumdar misappropriated the cash and the gold seized that negligence of some superior Police Officers in supervision of the

Malkhana provided all opportunities to Sri Mazumdar to misappropriate the goods. The only other question that fell for consideration before the

Trial Court was whether the defendant was liable to make good the loss caused to the plaintiffs by one of its such act was done by him outside the

employees. The finding of the Trial Court on this point was that the misappropriation committed by said Sri Mazumdar was outside the scope of

his employment and relying on a number different High Courts, held, that the State was not in any not way liable for loss caused to the plaintiff s by

one of its officers in absence of any proof of positive negligence on the State. On the above findings, the Trial Court held that the plaintiff was not

entitled to get equivalent cash and price of gold seized which were misappropriated by Mazumdar but he was entitled to get of back all the other

articles as mentioned in the schedule of the plaint, which were admittedly lying in the malkhana. Accordingly, the trial Court decreed the suit in part

in favour of the plaintiff No. 2, from whom the articles were seized, and directed the defendant to return the articles described in items Nos. 3 to

13 of the plaint schedule in the alternative, to pay Rs. 548/- to the plaintiff No. 2.

5. Aggrieved by the said judgment rejecting the principal part of the claim, the plaintiff No. 1 pr4eferred an appeal before the District Judge,

Cooch Behar. The learned Appellate Court concurred with the finding of the Trial Court that the money and gold articles seized from the pro

forma respondent were misappropriated by the Sub-Inspector, of Police, Shri Ananta Mazumdar, and this was possible due to negligence of the

supervisory staff. Since such misappropriation, according to the learned appellate Court, was not in any way connected with the official duty of Sri

Mazumdar, the respondent State was not vicariously liable for the wrongful acts of its officers. On such findings he dismissed the appeal and

confirmed the judgment and decree passed by the learned Subordinate Judge.

6. In View of the concurrent findings of fact of the learned Courts below that the seized articles were misappropriated by the Sub-Inspector of

Police, Ananta Kumar Mazumdar taking advantage of negligence of the Deputy Superintendent of Police, whose duty was to physically check and

verify the adamants lying in malkhanna from time to time, and that such act was done by him outside the scope of his employment, the questions

that fall for determiniation in this appeal are whether the respondent, State of West Bengal is liable for such acts of its employees and whether the

plaintiffs" Claim to the gold and cash, not returned, is sustainable.

7. The right to sue the Government, Central or State, the form of such suit and the matters to which the suits may relate are provided for in Article

300 of the Constitution of India. Under this Article the matters to which the suit may relate refer, in absence of any act of Parliament of Legislatures

of the State enacted by virtue of powers half page 98 is not complete conferred by the Constitution, to law which prevailed before the Constitution

of India. The position immediately before the Constitution is to be gathered from Section 176 of the Government of India Act, 1935, adopted and

modified by the Indian Independence Act, 1947, which provided that the Dominion of India and the Provincial Government may sue or be sued in

relation to their respective affairs in the like cases as the Secretary of State in Council might have sued or been sued if the Government of India Act

of 1935 had not been passed. The position prior to the Government of India Act, 1935, then again, is to be gathered from the Government of

India Act, 1915 as amended by the Act of 1919. Section 32 of the 1915 Act provided that every person shall have the same remedy against the

Secretary of State in Council as he might have had against the East India Company if the Government of India Act, 1858 and the Government of

India Act, 1915 had not been passed. The relevant provision of Section 65 of the Government of India Act, 1858 in its turn read as follows:Ã¯Â¿Â½

The Secretary of State in Council shall and may sue and be sued as well in India as in England by the name of the Secretary of State in Council as

a body corporate; and all persons and bodies politic shall and may have and take the same suits, remedies and proceedings, legal and equitable,

against the Secretary of State in Council of India as they could have done against the said Company; and the property and effects hereby vested in

Her Majesty for the purposes of the Government of India, or acquired for the said purposes, shall be subject and liable to the same judgments and

executions as they would, while vested in the said Company, have been liable to in respect of debts and liabilities lawfully contracted and incurred

by the said company.

8. It would thus appear from the various Government of India Acts that Article 300 of the Constitution of India, so far as it provides for the matters

to which the suits may relate, refers back to the position obtaining before the Government of India Act, 1858. In other words, in order to

determine whether a suit of a particular nature would lie against the Government, it is to be seen whether the suit is of such a character as would

have lain against the East India Company prior to the Government of India Act, 1858. Answer to this question was given by Sir Barnes Peacock,

Chief Justice, Supreme Court of Calcutta in the case of Peninsular and Oriental Steam Navigation Co. v. Secretary for State in India reported in

(1868) 5 Bom HCR Appendix A; P. 1 by laying down two basic principles, namely:Ã¯Â¿Â½

(i) Where an act is done, or a contract is entered into, in the exercise of powers usually called sovereign powers, by which is meant powers which

cannot be lawfully exercised except by a sovereign or a private individual delegated by a sovereign to exercise them, no action will lie against the

Government and

(ii) A suit will lie against the Government in regard to the acts done by its servants in the conduct of undertaking which might be carried on by

private individuals, without any delegation of sovereign right.

9. The above judgment was considered by our Supreme Court in the case of Kasturilal Ralia Ram Jain Vs. State of Uttar Pradesh, while deciding

the extent of the Government''s liability for acts of its servants. Since the facts of that case are somewhat similar to the facts of the case now under

consideration, it would be profitable to refer to the same in some details.

10. The appellant, M/s. Kasturi Lai Ralia Ram Jain was a firm which dealt in bullion and other goods at Amritsar. On Sept. 20, 1947 Raliaram,

one of the partners of the firm arrived at Meerut by the Frontier Mail about mid-night to sell gold, silver and other goods. Whilst he was passing

through the Bazar he was taken into custody by three constables. His belongings were then searched and he was taken to the Kotwali Police

station. He was detained in the Police lock-up there and his belongings including gold and silver were seized and kept in the Police Custody. On

Sept. 21, 1947 he was released on bail and thereafter the silver seized from him was returned to him. Raliaram then made repeated demands for

the return of the gold which had been seized from him and since he could not recover the gold from the Police Officer, he filed a suit against the

State of U. P. in which he claimed a decree that the gold seized from him should either be returned to him, or in the alternative, its value should be

ordered to be paid to him. The suit was resisted by the respondent State on several grounds. The respondent alleged that the gold in question had

been taken into custody by one Mohammad Amir, who was then the Head Constable, and it had been kept in the police Malkhana under his

charge. Mohammad Amir misappropriated the said gold and fled away to Pakistan on Oct. 17, 1947. It was also pleaded that it-was not a case of

the negligence of the Police Officers and that even if negligence was held proved against the said Police Officers, the respondent State could not be

said to be liable for the loss resulting from such negligence.

11. The Trial Court found that the Police Officers in question were guilty of negligence in the matter of taking care of the gold which had been

seized from Raliaram and that the respondent was liable to compensate the appellant for the loss caused to it by the negligence of the public

servants employed by the respondent. On such finding a decree was passed by the Trial Court in favour of the appellant. The Allahabad High

Court, in the appeal preferred against the said decree, found that no negligence had been established against the Police Officers in question and

even if it was assumed that the Police Officers were negligent and their negligence led to the loss of the gold that would not justify the appellant''s

claim for a money decree against the respondent. The Supreme Court concurred with the conclusion arrived at by the Trial Court that the loss

suffered by the appellant, on the failure of the respondents to return the gold seized, was based on the negligence of the Police Officers employed

by the respondent and posed the question whether the State was liable for such negligence.

12. On a conspectus of earlier decisions on the point, the Supreme Court found that the two basic principles enunciated by Sir Barnes Peacock,

C. J. have been consistently followed by judicial decisions in dealing with the question about the State''s liability in respect of negligent or tortious

act committed by public servants employed by the State and relying on the said principles observed (at p. 158 of Cri LJ):Ã¯Â¿Â½

It is not difficult to realize the significance and importance of making such a distinction particularly at the present time when, in pursuit of their

Welfare ideal, 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 governmental 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-governmental or non-sovereign, citizens who have a cause of action for damages

should not be precluded from making their claim against the State. That is the basis on which the area of the State immunity against such claims

must be limited, and this is exactly what has been done by this Court in its decision in the case of The State of Rajasthan Vs. Mst. Vidhyawati and

Another, .

and on the facts of the case presented before it hold :Ã¯Â¿Â½

In the present 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 their statutory powers. 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

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; and so, we inevitably hark back to what Chief Justice Peacock decided in 1861 and hold that the

present claim is not sustainable.

13. Though as an abstract proposition of law it has not been specifically laid down in the above decision that custody of the property so seized and

manner thereof pending its disposal is also relatable to sovereign powers, the Supreme Court ultimately dismissed the appeal accepting the defence

of the State that it was not liable for negligence of its officers while dealing with such property in their custody.

14. The extent of liability of the State Government for return of goods seized or confiscated and kept in its custody came up for consideration in

the case of State of Bombay (Now Gujarat) Vs. Memon Mahomed Haji Hasam, . In that case certain vehicles belonging to the respondent were

seized and ultimately confiscated by the customs authorities. Against such confiscation the respondent preferred an appeal and the Revenue

Tribunal set aside the order of confiscation and directed to return the said vehicles to the respondent. The respondent, thereafter, applied for return

of the said vehicles but was informed that they had been disposed of under an order of a Magistrate passed u/s 523 of the Cr.P.C. and that the

sale proceeds were handed over to a creditor of the respondent under an attachment order passed in his favour. The respondent, thereafter, filed a

suit for the return of the said vehicles, or in the alternative, for their value on the ground that pursuant to the order of the Tribunal, which in the

absence of any proceedings against it had become final, the State Government was bound to hand over the said vehicles. In resisting the suit the

State Government raised various pleas but did not raise any contention therein that it was not liable for any tortious act committed in respect of the

said goods and vehicles by anyone of its servants. The suit was decreed by the Trial Court and the appeal preferred by the State in the High Court

was also dismissed. In the Supreme Court it was contended on behalf of the State of Gujarat that since the goods were seized by a competent

officer, the seizure was lawful and that the utmost that could be alleged in the circumstances was that one or the other servant was guilty of

negligence and that the State Government was not liable for any tortious acts of its servants. The earlier decisions of the Supreme Court in The

State of Rajasthan Vs. Mst. Vidhyawati and Another, and Kasturilal Ralia Ram Jain Vs. State of Uttar Pradesh, were referred to in support of

such contention. In dismissing the appeal the Supreme Court firstly found that the seizure of the vehicles was carried out with jurisdiction and the

order of confiscation was also made by a competent officer with jurisdiction. It was also held by the Supreme Court that the appellant could

possibly contend that as the vehicles were sold pursuant to a judicial order no liability would be attached on the State Government for their

disposal by public auction and then observed (at p. 1888):

But between their seizure and the auction there was a duty implicit from the provisions of the Act to take reasonable care of the property seized,

This is so because the order of confiscation was not final and was subject to an appeal and a revision before the Home Member and later on

before the Revenue Tribunal after Junagadh merged in the State of Saurashtra in 1948-49, The appellant State was aware that the order of seizure

and confiscation was not final being subject to an appeal and was liable to be set aside either in appeal or in revision. It was also aware that if the

said order was set aside, the property would have to be returned to the owner thereof in the same state in which it was seized except as to normal

depreciation. In spite of this clear position, while the appeal was still pending before the Revenue Tribunal and without waiting for its disposal, it

allowed its police authorities to have it disposed of as unclaimed property. The State Government was fully aware, firstly by reason of the

pendency of the appeal and secondly because the application u/s 523 express- ly mentioned the person from whom the said vehicles were seized,

that the vehicles were and could not be said to be unclaimed property. In the circumstances, the State Government was during the pendency of the

appeal under a statutory duty to take reasonable care of the said vehicles which on the said appeal being decided Ã¯Â¿Â½against it were liable to be

returned to their owner.

15. The Supreme Court then proceeded to ascertain whether the appellant was in the position of a bailee in respect of the property and held that

the State had a legal obligation to preserve the property intact and also the obligation to take reasonable care of it so as to enable the Government

to return it in the same condition in which it was seized and the position of the State Government until the order of confiscation became final was

that of a bailee and on such finding held:Ã¯Â¿Â½

If that is the correct position, once the Revenue Tribunal set aside the order of the Customs Officer and the Government became liable to return

the goods the owner had the right either to demand the property seized or its value, if, in the meantime the State Government had precluded itself

from returning the property either by its own act or that of its agent or servants. This was precisely the cause of action on which the respondent''s

suit was grounded. The fact that an order for its disposal was passed by a Magistrate . would not in any way interfere with or wipe away the right

of the owner to demand the return of the property or the obligation of the Government to return it.

The Supreme Court, further, held:Ã¯Â¿Â½

Even if the Government cannot be said to be in the position of a bailee, it was in any case bound to return the said property by reason of its

statutory obligation or to pay its value if it had disabled itself from returning it either by its own act or by any act of its agents and servants. In these

circumstances, it is difficult to appreciate how the contention that the State Government is not liable for any tortious act of its servants can possibly

arise.

and lastly held that the two decisions referred to had no relevance in view of the pleading of the parties and the cause of action (emphasis ours) on

which the respondent''s suit was based.

16. The facts of the case of State Vs. Ganga Ram Kalita and Others, and of the case before us being almost similar, it would apparently lead to the

conclusion that the instant appeal is liable to be dismissed but there is one significant fact which, in our view, distinguishes the present case and

brings it nearer to the case of State of Bombay (Now Gujarat) Vs. Memon Mahomed Haji Hasam, . In the instant case the cause of action of the

plaintiff is based upon an order directing return of the goods by a competent court of law. In para 14 of the plaint it has been categorically stated

by the plaintiffs that the cause of action of the suit arose at Mathabhanga and in the town of Cooch Behar within the jurisdiction of the Court from

1-6-1960. the date of the passing of the order of the learned Sessions Judge for the return of the goods and also from 5-9-1961, after the expiry

of two months from the service of notice u/s 80 of the Civil P. C.

17. The order of the Sessions Judge passed u/s 517 of the Cr.P.C. 1898, in absence of any proceeding against it became final and the respondent

was bound to comply with the said order having been passed by a competent court of law in exercise of statutory powers. With the finality of the

order a statutory right accrued in favour of the plaintiffs to get back the goods and a corresponding statutory obligation devolved upon the

respondent to return the goods irrespective of their obligation as a bailee. When the cause of action is based on such statutory rights the defence of

the respondent State for its immunity for any tortious act of its servants can"" not arise as held by the Supreme Court in the case of the State of

Gujarat v. Memon Mahamed (supra). It is true that in that case unlike the present case, no defence was raised by the State that it was not liable for

any tortious act committed by its servants but then on going through the decision, we are of the view that the Supreme Court while laying down the

proposition of law did not rest its decision merely on absence of such pleading.

18. In consideration of the facts of the instant case, it must, therefore, be held that the respondent State was bound to return the goods by reason

of the legal obligation created by the order of the Court. The relief that was prayed for by the plaintiff in the suit was not for compensation for loss

caused by the negligence either of the State Government or any of its employees and the suit was founded on plaintiffs'' right to get back the seized

goods pursuant to the order of a competent Court of law. In view of the cause of action on which the plaintiff ''a suit is based, the defence of the

State Government that it was not liable for the negligence of its servants cannot arise nor can it be allowed to stand.

19. On the conclusions as above, the judgment of the trial court to the extent it disallowed the plaintiff''s claim for return of the gold and the cash

money seized and that of the appellate court below dismissing the appeal cannot be sustained. Since the seized currency notes and the gold have

already been misappropriated, the plaintiffs are entitled to the alternative claim of Rs. 5077/-.

20. In the result, the appeal is allowed and the judgment and the decree of the appellate Court and those of the trial Court rejecting the plaintiffs''

claim for seized cash and gold are hereby set aside. The plaintiffs shall get a further decree for Rs. 5,077/- being the value of the gold and seized

cash as claimed besides the decree already passed by the trial Court. The plaintiffs shall also get the costs of both the Courts below, and the costs

in this Court at ex parte rate as none appeared on behalf of the respondent State of West Bengal at the hearing of this appeal.

R. Bhattacharya, J.

21. I agree.