



2024/KER/10243

C. R.

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE SATHISH NINAN

MONDAY, THE 12TH DAY OF FEBRUARY 2024 / 23RD MAGHA, 1945

RFA NO. 3 OF 2010

AGAINST THE JUDGMENT IN OS 246/2000 OF II ADDITIONAL SUB COURT,
THIRUVANANTHAPURAM

APPELLANTS/DEFENDANTS :

- 1 STATE OF KERALA, REPRESENTED BY CHIEF SECRETARY,
SECRETARIAT, THIRUVANANTHAPURAM.
- 2 THE CHIEF SECRETARY, SECRETARIAT,
THIRUVANANTHAPURAM.
- 3 THE INSPECTOR GENERAL OF POLICE,
(LAW AND ORDER), OFFICE OF THE I.G. OF POLICE, (LAW
AND ORDER), THIRUVANANTHAPURAM.

BY SMT.K.B.SONY, GOVERNMENT PLEADER

RESPONDENT/PLAINTIFF:

SUDHEER KUMAR, [REDACTED]

BY ADVS.
SRI.M.R.ANANDAKUTTAN
SMT.M.A.ZOHRA
SRI.R.S.MADHU
SRI.MAHESH ANANDAKUTTAN

THIS REGULAR FIRST APPEAL HAVING COME UP FOR HEARING ON
12.02.2024, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:



2024/KER/10243

C. R.

SATHISH NINAN, J.

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R.F.A. No.3 of 2010

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Dated this the 12th day of February, 2024

J U D G M E N T

The decree in a suit for damages is under challenge by the defendants.

2. The plaintiff is an employee of Indian Coffee House. On 16.07.1999 at about 1.50 p.m., while the plaintiff was walking along the footpath in front of the Attakulangara Sub Jail, somebody threw an explosive at certain accused who were under judicial custody and were being brought to the jail. The plaintiff sustained severe injuries. Consequent on the explosion, one among the accused died. The other accused sustained severe injuries. Consequent on the injury, the plaintiff suffers 50% disability. The suit was laid claiming an amount of ₹10 lakhs as damages.

3. The defendants contended that there was no negligence on their part in maintaining law and order



and that they are not liable for any damages.

4. The trial court granted a decree for ₹ 5 lakhs.

5. I have heard the learned counsel on either side.

6. Relying on the judgments in *Hill (Administratrix of the Estate of Jacqueline Hill deceased) (A.P.) v. Chief Constable of West Yorkshire (1990) 1 WLR 946*, and *Robinson v. Chief Constable of West Yorkshire Police (2018) UKSC 4*, the learned Government Pleader would contend that, while analysing the question the court has to bear in mind the three tier test of duty of care, foreseeability and remoteness. Whether there was a duty of care, a reasonable foreseeability of such incident, and whether the damages was the direct consequence of breach of such duty of care are all matters to be considered, it is argued. The State had taken reasonable care by deputing two police constables with the accused who are in judicial custody. There was no intelligence report with regard to any apprehended violence. Therefore, the suit ought to be dismissed, it



is argued.

7. In Hill's case *supra*, one Jacqueline Hill was murdered by an unapprehended criminal. He had committed 13 murders. Her mother sued the police for damages on the ground of negligence. It was alleged that the police had a duty to apprehend such a hard-core criminal and that their failure led to her daughter's murder. The claim was rejected. It was held that, by common law police officers owe to the general public a duty to enforce the criminal law but it cannot be extended to individual members of the public without satisfying the test of foreseeability. It was held that, the foundation of the duty of care was said to be, reasonable foreseeability of harm. In Robinson's case (*supra*), Mrs. Robinson was knocked down in the course of a scuffle that occurred while two police men were apprehending a drug dealer. She suffered injuries due to the fall. She sued for damages. The claim was rejected by the Court.



The court referred to “the Caparo test” laid down in *Caparo Industries plc v. Dickman* [1990] 2 AC 605 that, “The court will only impose a duty where it considers it right to do so on the facts”. Answering the question as to what would the public think if the police, in the process of arresting criminals, could injure innocent members of the public with impunity it was answered that, if they act with reason, the public would prefer to see them doing their job and taking drug dealers off the street. It was observed, “If the police are not under a duty of care, then it is irrelevant to the issue whether they acted within reason or not. On the other hand if they act with reasonable care, then they will not be in breach of a duty of care, even if an innocent member of the public is injured”.

8. In *Smith v. Little Woods Organisation Ltd.*, (1987) 1 All ER 710, it was observed that, generally speaking, the law does not impose liability for mere omissions. Salmond on



Jurisprudence, 12th edition, p.352 states thus, “An omission consists in not performing an act which is normally expected of you either because you normally do it or because you ought to do it, and it is the latter type of omission with which the law is concerned. But while omissions incur legal liability where there is a duty to act, such a duty will in most legal systems be the exception rather than the rule, for it would be unduly oppressive and restrictive to subject men to a multiplicity of duties to perform positive acts”.

Ratanlal & Dhirajla on the Law of Torts, 26th edn., has summed up the issue thus, “There are four requirements necessary to establish a duty of care. They are (1) foreseeability of harm; (2) proximity in relationship, which implies that the parties are so related that (3) it is just and reasonable that the duty should exist; and (4) policy considerations do not negative the existence of duty”.



9. To explain the concept of “negligence” and “duty to take care”, the learned counsel for the respondent relied on the judgment of this Court in *Veeran v. T.V.Krishnamoorthy 1965 KLT 1172*. The Court held that negligence involves three ingredients (1) a legal duty to take care, (2) breach of that duty and (3) Consequential damage to the plaintiff. The Court proceeded to hold, “*Duty to take care is defined by Winfield as a restriction of the defendant's freedom of conduct, obliging him to behave as a reasonably careful man would behave in the like circumstances. In *Donoghue v. Stevenson (1932 App, Cas 562, 580)* Lord Atkin defined it thus :*

“You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, the, in law is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.”

The test of neighbourship in this definition is, Winfield pointed out, “not one of physical proximity but of foresight..... the fact that the defendant ought reasonably to have the plaintiff in contemplation when directing his mind to the acts or omissions which are called in question, i.e. the alleged acts of negligence themselves..... This does not mean, of course, that the plaintiff must be a person identifiable



by the defendant. What is required is that he should be one of a class within the area of foreseeable injury."

After many discussions as to whether the test of liability should be whether the accident was the natural or necessary or probable consequence of the defendant's act (this is called the test of probability) or whether the accident was a reasonably foreseeable consequence of his act (this is called the test of foreseeability), it has now been settled by the Supreme Tribunals in England, the Privy Council and the House of Lords, that the real find effective test is the foreeeability of the accident foreseeability not of the manner in which the accident happened hut of the occurrence of an accident of the kind. In the Wagon Mound case; Overseas Tankship (UK) v Morts Dock & Engineering Co., 1961 AC 388 at p. 422 the Judicial Committee, speaking through Viscount Simonds observed thus:

"It is a principle of civil liability . .. I that a man must be considered to be responsible for the probable consequences of his act. To demand more of him is too harsh a rule to demand less is to ignore that civilised order requires the observations of a minimum standard of behaviour "

(After referring to the test of probability the Judgment continued) But if it would he wrong that a man should be held liable for damage unpredictable by a reasonable man because it was 'direct' or 'natural', equally it would be wrong that he should escape liability, however 'indirect' the damage, if he have saw or could reasonably foresee the intervening events which led to its being done. Thus foreseeability becomes the effective test in reasserting this principle their Lordships conceive that they do not depart from, but follow and develop, the law of negligence as laid down by Baron Alder son in Blyth v. Birmingham Waterworks Co.. (1956) 11 Ex 781,784."

6. To determine breach of duty, the test, says Winfield. is laid down in the off-cited dictum of Baron Alderson:

"Negligence ia the omission to do something which a reasonable man, guided upon those considerations which



ordinarily regulation the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do." ((1856) 11 Ex 781 784)."

"Duty to take care", spoke Lord Macmillan in Bourhill v. Young, 1943 AC 92 at p. 104. "is the duty to avoid doing or omitting to do anything the doing or omitting to do which may have as its reasonable and probable consequence Injury to others, and the duty is owed to those to whom injury may reasonably and probably be anticipated if the duty is not observed". The noble Lord reiterated the same in Glasgow Corporation v. Muir, 1943 AC 448, 457 and added:

"The standard of foresight of the reasonable man is, in one sense, an impersonal test. It eliminates the personal equation and is independent of the idiosyncrasies of the particular person whose conduct is in question. Some persons are by nature unduly timorous and imagine every path beset with lions. Others, of more robust temperament, fail to foresee or nonchalantly disregard even the most obvious dangers. The reasonable man is presumed to be free both from over-apprehension and from over-confidence, but there is a sense in which the standard of care of the reasonable man involves in its application a subjective element. It is still left to the judge to decide what, in the circumstances of the particular case, the reasonable man would have had in contemplation, and what, accordingly, the party sought to be made liable ought to have foreseen."

To decide culpability we have to determine what a reasonable man would have foreseen and thus form an idea of how he would have behaved in the circumstances Lord Dunedin said in Kardon v. Harcourt-Rivington. (1932) 146 LT 391 and Lord du Parcq repeated in London Passenger Transport Board v. Upson, 1949 App. Case 155, 176).



"If the possibility of danger emerging is reasonably apparent, then to take no pre cautions is negligence: but if the possibility of danger emerging is only a mere possibility which would never occur to the mind of a reasonable man, then there is no negligence in not having taken extraordinary precautions."

As I have already said what is material here is foreseeability of danger and not of the manner in which the danger materialised in fact.

7. A reasonable man would so regulate his conduct as to avoid producing any undesirable consequences which he foresees as probable . That is the normal standard of careful conduct If the conduct in question falls short of that standard it is negligent Here, the question is not whether the defendant did actually foresee the consequences that happened as probable The question is only whether he as a reasonable man. ought to have foreseen them If the circumstances of the act are such that a reasonable man would have foreseen the probability of the accident, then the defendant, who failed to do likewise or who envisaged it and rejected it as too remote a chance, has to be regarded as having been negligent. It is unnecessary in law to prove that he actually foresaw the event or the consequences. It is enough If the circumstances are such that he. as a reasonable man, ought to have foreseen them. When the circumstances of the act indicate that certain consequences might ensue, the person must be held to have foreseen the consequences or at least ought to have foreseen them."

10. The learned counsel for the respondent plaintiff drew the attention of the Court to the decision of the Apex Court in *Samir Chanda v. Managing*



Director, Assam State Transport Corporation (1998) 6 SCC 605, where the respondent Transport Corporation was held liable for the damages caused to the appellant due to bomb blast inside a passenger bus. In that case, at the relevant time, the Assam agitation was in full swing and the conductor/driver of the bus was required to take extra care and were required to ply with police help. However, at the time of the incident, such police assistance was not there. It was in that background that the Corporation was held liable.

11. Yet another judgment relied on by the learned counsel for the respondent is that of the Delhi High Court in *Ashwani Gupta v. Government of India & others ILR (2005) Delhi 7*. In that case, the petitioner therein suffered injuries in a bomb blast that occurred during a procession. The Court held the respondent liable for damages. The Court discussed *in extenso* the duty of the State towards its citizenry in the Constitutional



background. It is necessary to refer to certain portions of the judgment. It reads thus,

“A State is the comity of individuals. The object is the existence of individuals governed by certain norms agreed to by the society. A duly constituted Government derives its authority and power from the governed. Democracy is the principle of governance where the persons to be governed elect the Government by the rule of majority.

2. *The classical theory of social contract highlights that the social contract is on account of the rules of conduct required by a just society. All persons are basically the same in terms of the innate human nature and the society is created and the norms are laid about the interaction between individuals amongst themselves. Since the people rationally foresee the consequences, they authorize a power to create a social environment in which the people adhere to their respective promises to govern the society. The most important aspect is the necessity of Government in the interest of all citizens where people are essentially free and live together with some laws to produce a more happy life than living in anarchy. The social contract, thus, establishes legal equality and encourages minimal restriction of individuals' freedom by the State. A cardinal principle underline the theory is the consent of the governed given to the Government on a basic premise - the promise of the Government to provide them security, safety and well being in return for minimal restriction of their rights and freedom. Edmund Burke said:*

“Government is a contrivance of human wisdom to provide for human wants. Men have a right that these wants should be provided for by this wisdom.”

The very basic want is security and safety of the individual person.”

The Court further held thus:-

“. . . . In terms of Article no person is to be deprived of his right to life and personal liberty except according to the procedure established by law. Judicial interpretation in an innovation has



extended the scope of Article 21 of the Constitution and, thus, it has been held to be a duty of the State to act and create conditions conducive for a life of dignity as opposed to a mere animal existence. None of the protections granted by Part III of the Constitution can really be enjoyed without the provision of safe, secure and protective environment in which a citizen of India may realize full potential of his existence. A person's right to life is, thus, not negotiable. The inability of the State to provide for such secure environment is, thus, clearly in breach of and in violation of the constitutional mandate and the privilege provided to a citizen of this country under the Constitution. The State must take all due care to uphold the Constitution. A natural consequence of this would be that if a person loses his life or suffers grievous injuries for no fault of his own, his Fundamental Rights under the Constitution are breached."

"20. This Court has the benefit of the judgment of Badar Durrez Ahmed, J. In Kamala Devi (Smt.) v. Government of NCT of Delhi 2005 ACJ 216 (Delhi). That was a case of death in a bomb blast occurred in April, 1996 in Pahar Ganj area in Delhi. A similar issue arose about the responsibility of the State and the consequential liability to pay as a result of the breach of the responsibility. In the said judgment, it was observed as under:

"4. There can be no doubt that in the death of Uday Singh consequent upon the bomb explosion a wrong has been committed and the fundamental right of protection of life and personal liberty enshrined in Article 21 of the Constitution has been violated. When such a thing happens the old and accepted maxim Ubi jus, ibi remedium (There is no wrong without a remedy) comes into play. But, where is the remedy? Surely, not the sum of Rs. 50,000/- ."

5. Let us see who are the persons responsible for the wrong. Primarily it is the terrorist who was assembling the bomb. Next, it is the State as it failed in living up to its guarantee that "no person shall be deprived of his life ... except according to procedure established by law". The State failed to prevent the terrorist from harming innocent citizens like Uday Singh. Terrorism itself is an indicia of the inability of the State to curb resentment and to quell



fissiparous activities. Social malaise in itself is a reflection of the State's inefficiency in dealing with the situation in a proper manner. Apart from the general inability to tackle the volatile situation, in this case, the State agencies failed in their duty to prevent terrorists from entering Delhi. It was their responsibility to see that dangerous explosives such as RDX were not available to criminals and terrorists. The incident occurred as there was a failure on the part of state to prevent it. There was failure of intelligence as they did not pick up the movement of this known and dangerous terrorist. So, it would be extremely difficult even to suggest that the State did not fail in its duty towards the late Uday Singh and his family.

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6. *A crime has been committed. A wrong has been done and a citizen has lost his life because the State was not vigilant enough. A fundamental right has been violated. But, mere declarations such as these will not provide any succour to the petitioner. She needs to be compensated.”*

“22. In a civic society, there is not only to be a punishment for the crime of violation of the laws of the society, but also for compensation to the victim of the crime. It is in this context that the concept of the State was discussed hereinabove. The very object of creating a State giving a Governor for governance of the society to adhere to the norms itself imposes a responsibility on the Governors. The inability to protect the life and limb of the citizen must result in a consequential remedy for the citizen to be paid by the Governors. It is no answer that the money is short. If this plea were to be accepted, it would hit the very substratum of the concept of creating a State for the benefit of the citizens and to protect their lives and limbs. ”

“23. In Bhajan Kaur v. Delhi Administration, 1996 III AD (DELHI) 333, learned Single Judge of this Court, Anil Dev Singh, as his Lordship then was, had the occasion to deal with the case of compensation for riot victims of 1984. The learned Single Judge observed that the State must



act in time so that the precious lives of the people are not destroyed or threatened, as otherwise Article 21 of the Constitution would remain a paper guarantee. Thus, the State has to enforce minimum standards of civilized behavior of its citizens so that the life, liberty, dignity and worth of an individual is protected and preserved and is not jeopardized or endangered. If it is not able to do all that then it cannot escape the liability to pay adequate compensation for the lives lost or extinguished in clear violation of Article 21 of the Constitution.

24. *There can be no doubt that what holds true for loss of life would equally apply to loss of limbs. This view is reinforced by the observations of the Supreme Court in S.S. Ahluwalia v. Union of India and Ors., 2001 (2) SCALE 495, which again dealt with 1984 riots in different States."*

"29. The failure of the State to protect the life and limbs of its citizens itself is sufficient to give rise to the liability. Nothing more needs to be said - res ipsa loquitur. Such sufferance goes against the very grain of creation of a State or comity of individuals. The individual has surrendered certain individual rights for such safety. Taxes are being paid for the functioning of a government. Safe environment is the very basic function. The citizens gave to themselves the Constitution of India and adopted a democratic polity. As Franklin Roosevelt said:

". . . Democracy, the practice of self government, is a covenant among free man to respect the rights and liberties of their fellows."

12. It is on such elaborate consideration of the Constitutional principles that the tortious liability of the State was analysed.

13. The learned counsel for the respondent placed reliance on the judgment of this Court in *State of Kerala and another v. K.Cheru Babu (AIR 1978 Ker.43)*, wherein this



Court referred to the observation of the Apex Court in *State of Rajasthan v. Mst. Vidhyawati, AIR 1962 SC 933* that, “The Court held that in an independent India, governed by a Constitution, there was no justification for upholding the principle of immunity which was based on an outmoded common law theory that no longer operated as such in the country of its birth”.

14. Bearing in mind the principles as above, the facts of the present case is to be analysed. It is not in dispute that the incident occurred at the front of the Attakulangara Sub Jail. Paragraph 19 and 20 of the plaint reads thus:-

“19. But on the other hand the person under custody, who was murdered, in that incident was a notorious criminal and gang leader and there is every reason to believe that the State police officials were fully aware of the danger and risk in taking him out at public places without proper security and care.

20. From the prosecution case which was proved before the Hon'ble District court by the State is that it is a chartered



out planned day-light murder at a public place. In that score it is abundantly clear that the State was careless in maintaining law and order and has failed to afford sufficient care, protection and security measures to the general public at public places. Much less, the State is guilty of negligence and the State and the concerned officials are liable to compensate the plaintiff by money as damages.”

15. In the written statement filed by the defendants the said allegations are controverted at paragraphs 9 and 10 thus:-

“9. para 19 is denied. The UT prisoner was taken to the court with proper security. This incident occurred due to personal enmity, totally isolated and no police intelligence report.

10. Para 20 is also denied there is no negligence and the official machinery was also alert in maintaining law and order situation.”

16. The plaint allegation that the under trial prisoner was a notorious criminal and gang leader is not denied. The plaint averment that, it was proved before the court that the incident was a chartered out plan day



light murder, is also not denied. It is not in dispute that there were more than one under trial prisoners who were being taken to the Sub Jail. The question would be, was there a duty of care cast upon the defendants, and a breach thereof. In considering the question of duty of care, as noticed in *Donoghue v. Stevenson* which is referred to in Veeran's case (*supra*), the "*test of neighbourship*" that is, whether the defendant reasonably ought to have the plaintiff in contemplation when directing his mind to the act of negligence. It is not necessary that the plaintiff must be a person identifiable by the defendant. It is sufficient if he is in the class which would fall within the area of foreseeable injury. While considering the same, the place of occurrence of the incident, the fact that the alleged under trial prisoners were notorious criminals and gang leaders; that they were under trial for offence charged under Sections 302, 307 and 324 IPC are all



relevant factors. The possibility of attack by rival gang cannot be said to be beyond reasonable foreseeability. The defendants had a duty to take reasonable care when such criminals were being brought into or taken out of the jail. As pointed by the trial court, it could not be said that it is an incident which is beyond foreseeability. It is not in dispute that, but for deputing two police constables to accompany the accused, no other precautions were taken especially at the site of ingress and egress to the jail. On the facts of this case, when notorious criminals alleged with murder and involved in gang rivalry are being taken into the jail, there was every reason for the defendants to take adequate precautions. It could only be held that there was a duty of care and an omission regarding the same. Hence the finding of the trial court with regard to the liability of the defendants warrants no interference.



17. As regards the quantum of damages, though the plaintiff claimed ₹ 10 lakhs, decree was granted for ₹ 5 lakhs. Considering the nature of the injuries suffered, the court awarded compensation for permanent continuing disability at ₹ 3 lakhs, compensation for loss of future earning power at ₹1 lakh, for loss of amenities at ₹70,000/-, and an amount of ₹30,000/- towards pain and suffering. It could not be established before this Court that the quantum granted is excessive. The court has awarded interest only at the rate of 6% per annum and that too from the date of decree. No interference is called for with regard to the quantum.

In the result, the appeal fails and is dismissed.
No costs.

Sd/-
SATHISH NINAN
JUDGE

kns/-

//True Copy//

P.S. to Judge