

HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

...

MA no.58/2018

Pronounced on: 13.02.2025

State of J&K and another

.....Petitioner(s)

Through: Mr Mohsin Qadri, Sr.AAG with

Versus

Yawar Ahmad Bhat (minor)

.....Respondent(s)

Through: Mr P. Imroz, Advocate

CORAM:

HON'BLE MR JUSTICE VINOD CHATTERJI KOUL, JUDGE

JUDGEMENT

1. This appeal has been directed against Order dated 11th July 2018, passed by 2nd Additional District Judge, Srinagar (for short "*Trial Court*") in an application under Order IX Rule 13 of the Code of Civil Procedure in File no.62/Misc titled as *Director General of Police v. Yawar Ahmad Bhat and another*, as also against *ex parte* judgement and decree dated 6th February 2017 passed in a Civil Suit for Declaration and Mandatory Injunction, bearing File no.16/COS titled as *Yawar Ahmad Bhat v. State of J&K and another*, and for setting-aside the same.
2. I have heard learned counsel for parties and considered the matter.
3. It is a submission of appellants that compensation/damages calculated by Trial Court has wrongly been computed inasmuch as it is exaggerated/inflated and completely even on higher side; that

impugned *ex parte* judgement and decree has been passed in hot haste by Trial Court without seeking and/or ensuring filing of written statement by defendants inasmuch as they have neither been summoned nor served in the manner provided under relevant provisions of the Code of Civil Procedure. Both disputed facts and questions of law have been raised and urged in the suit which required participation of defendants/ appellants so that issues provided under Order XIV Rule 1 CPC would have been framed; that the injury claimed to have been caused to plaintiff, Yawar Ahmad Bhat, had taken place as early as on 30th June 2009, allegedly by teargas shell, but suit was filed after about 3 ½ years and the Trial Court has not lost time in setting defendants *ex parte* on 22nd May 2014 that too without ascertaining as to whether defendants had knowledge of proceedings; that there is no record available showing that defendants were summoned and made known of pendency of proceedings; that in fact Trial Court seems to have been influenced by some report of SSP, Srinagar, allegedly accepting therein that plaintiff had received injuries due to teargas shell fired by police; that without commenting upon merits of the case/suit, appellants say and submit that they were not summoned in the manner provided under law; that Trial Court has not ascertained from Postal Department for verifying the fact if defendants were really served or not and before proceeding *ex parte* against defendants, the Trial Court has not appreciated that Acknowledgement Due (AD) was necessary requirement for service through registered post; that impugned judgement is bad in law as it has been passed without affording adequate and sufficient opportunity of hearing to appellants, which has

caused miscarriage of justice; that while holding that defendants had enough knowledge of pendency of suit as they were set *ex parte* after two years after summons were issued to them and that summons were duly served to defendants through S.O. Tamlat, the Trial Court has altogether brushed aside the fact that report of S.O. Tamlat dated 10th November 2012 clearly revealed that notices had in fact not been served upon defendants as their offices were operating at Jammu and as such it was duty of the Court to ensure that summons were served against proper receipt so that defendants got a chance to participate in the proceedings; that while dismissing application filed under Order IX Rule 13 CPC, the Trial Court has gone to the extent of holding that defendants were served through registered post as well on 7th November 2013 and 3rd February 2014, but the Trial Court did not appreciate the very important argument that the acknowledgement receipt may be called from the Postal Department for verifying the fact if defendants were really served or not; that the case involved in the plaint is of such nature that appellants are necessarily to be given a chance to defend their case because the matter involve not only disputed facts/material but also questions of law are required to be decided by framing issues.

4. A civil suit for declaration and mandatory injunction was filed by respondent/plaintiff before Trial Court, averring therein that when he was passing through a lane at Maisuma, Srinagar, police was trying to quell protestors, he was hit by a teargas shell on 30th June 2009, fired by police personnel, resultantly he suffered serious head injury. He was rushed to SKIMS for treatment where he remained hospitalized for about one month. SKIMS certified that he received 75% injuries. His

family had to spend whopping sum of money on his treatment and despite that condition of plaintiff kept deteriorating and he is now having only vegetative existence and he is confined to bed. Plaintiff in his plaint has made reference to report of SSP, Srinagar, dated 23rd October 2010, addressed to Deputy Commissioner, Srinagar, that plaintiff has received injuries when teargas shell fired by police first struck with a shutter of the shop near Ahli Hadees Masjid Gali Maisuma, Srinagar and then rebounded and hit plaintiff's head and that plaintiff got severely injured. Police report also mentions that plaintiff was not involved in any subversive activities. Plaintiff on the basis of case set up sought following relief:

- (A) A decree for declaration thereby declaring the plaintiff entitled to compensation/damages of Rs.50,00,000/- for the injuries caused to him due to negligence of police agencies by firing teargas shell which hit plaintiff;
- (B) Decree for mandatory injunction thereby commanding defendants to pay the damages and compensation to the tune of Rs.50.00 Lacs to plaintiff.

5. Perusal of impugned judgement reveals that when defendants did not turn up, they were set *ex parte*. Plaintiff, thereafter, produced evidence in support of his case. The Trial Court has held plaintiff entitled to compensation of Rs.10.55 Lacs with 6% interest.
6. Appellants herein moved an application under Order IX Rule 13 CPC to set-aside *ex parte* judgement and decree dated 6th February 2017, before the Trial Court. It was stated by appellants that summon was not duly served upon them as was evident from report submitted by process server as concerned department of appellant was functioning at Jammu due to Darbar Move and defendants/appellants were not aware about filing of the suit and, therefore, they could not cause their appearance

when the suit was called for hearing. It was also mentioned by appellants in their application that they had had knowledge of the case only when they received notice in execution petition served to their office. The Trial Court found that there were no justifiable grounds put forth in application for setting-aside *ex parte* judgement and decree and accordingly dismissed application.

7. Learned counsel for appellants submits there is no record available to show that appellants were summoned and made aware of pendency of proceedings inasmuch as they were never summoned in the manner as provided under law.

7.1. It is also averred by learned counsel for appellants that Trial Court has not ascertained from Postal Department to verify as to whether defendants were really served or not and before initiating *ex parte* proceedings, the Trial Court did not appreciate that ADs were necessary requirement for service through registered post and therefore, impugned judgement is bad in law as it has been passed without affording adequate and sufficient opportunity of hearing to appellants, which has caused miscarriage of justice.

7.2. Learned counsel also states that while holding that appellants had enough knowledge of pendency of suit as they were set *ex parte* after two years after summons were issued to them and that summons were duly served to appellants through S.O. Tamlat, the Trial Court has altogether brushed aside the fact that report of S.O. Tamlat dated 10th November 2012 clearly revealed that notices had in fact not been served upon defendants as their offices were operating at Jammu and as such it was duty of the Trial Court to ensure that summons were served

against proper receipt so that appellants got a chance to participate in the proceedings.

7.3. It is also contention of learned counsel for appellants that Trial Court while dismissing application filed under Order IX Rule 13 CPC, has held that appellants were served through registered post on 7th November 2013 and 3rd February 2014, but the Trial Court did not appreciate the very important argument that acknowledgement receipt could have been called from Postal Department to verify the fact whether appellants were really served or not.

7.4. These submissions of learned counsel for appellant have no force and are misconceived for the reasons delineated hereinafter.

7.5. I have gone through the Trial Court record. An application was filed plaintiff/respondent before the Trial Court on 2nd November 2012. The Trial Court vide Order dated 29th June 2013 directed its Chief Ministerial Officer, i.e., Nazir, to hold an inquiry into the means of plaintiff/respondent and submit its detailed report on or before 20th July 2013.

7.6. The Trial Court record further reveals that the Trial Court vide order dated 14th September 2013, after receipt of report from its Nazir, allowed respondent's application and permitted him to sue as an indigent person and treated application as plaint.

7.7. It is by this very order, viz. 14th September 2013, that summons were directed to be issued upon defendants/appellants to file statement and the matter was directed to come up on 6th October 2013.

7.8. Here it is worthwhile to mention that it was in terms of Order dated 14th September 2013 that summons were issued/served upon appellants

herein. Even if we admit contention of appellants that their office had been in Jammu in view of Darbar Move; still they cannot be heard saying that in the month of September and/or October 2013 their office had not been operating in Srinagar.

7.9. Even perusal of impugned order dated 11th July 2018 reveals that summons were issued by Trial Court, in the first instance, on filing of the suit on 2nd November 2012. These very notices had not been served upon defendants as reported by S.O. (Tameelat) dated 10th November 2012 as the offices of appellants were operating at Jammu and, therefore, it was rightly said by the Trial Court that the service could not be effected then. The Trial Court has rightly mentioned that it was not on the basis of said report of S.O. (Tameelat) dated 10th November 2012 that appellants were set *ex parte*, but it was two years thereafter that they were set *ex parte* and that too after fresh service twice. It has also been made clear by the Trial Court in terms of impugned order dated 11th July 2018 that appellant no.1 was served on 21st October 2013 and appellant no.2 was served on 24th October 2013 as per the report given by S.O. (Tameelat). It is also mentioned by Trial Court in impugned order that appellants were also served through registered post. Consequently, the Trial Court has rightly made reference to provisions of Section 27 of General Clauses Act.

7.10. Section 27 of General Clauses Act gives rise to a presumption that service of notice is effected when it is sent to the correct address by registered post. The Supreme Court has held that when a notice is sent by registered post and is returned with a postal endorsement refused or not available in the house or house locked or shop closed or addressee

not in station, due service has to be presumed [See: *Jagdish Singh v. Natthu Singh*, AIR 1992 SC 1604; *State of M.P. v. Hiralal and others* (1996) 7 SCC 523; and *V. Raja Kumari v. P. Subbarama Naidu and another*, (2004) 8 SCC 774]

- 7.11. Section 114 of the Evidence Act provides that the Court may presume existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business in their relations to the facts of the particular case. The Illustrations to Section 114 provide that the Court may, inter alia, presume: that judicial and official acts have been regularly performed; that the common course of business has been followed in particular cases. On Section 114, it has been held by the Supreme Court in *M/s Ajeet Seeds Ltd v. Gopala Krishnaiah*, AIR 2014 SC 3057 : 2014 (12) SCC 685 that it enables the Court to presume that in the common course of natural events, the communication would have been delivered at the address of the addressee inasmuch as Section 27 of the General Clauses Act gives rise to a presumption that service of notice has been effected when it is sent to the correct address by post and that it is not necessary to aver in the complaint that in spite of return of notice unserved, it is deemed to have been served or that the addressee is deemed to have knowledge of the notice. Unless and until the contrary is proved by the addressee, service of notice is deemed to have been effected at the time at which the letter would have been delivered in the ordinary course of business. Reference is also made to *C.C. Alavi Haji v. Palapetty Muhammed and another*. 2007 AIR SCW 3578 : 2007 (6) SCC 555.

8. Another contention of learned counsel for appellants is that compensation/damages has been wrongly calculated by Trial Court because it is exaggerated/ inflated and completely on higher side.

This submission is specious in view of discussions made below.

8.1. Before the Trial court, plaintiff had with his plaint annexed a report/ communication of SSP, Srinagar, bearing no.CRB/RC/01/SPE/F dated 23rd October 2010, in which he reported that plaintiff received injuries when teargas shell fired by police first struck with a shutter of a shop near Ahli Hadees masjid Gali Maisuma, and then rebounded and hit plaintiff's head. To substantiate this fact, plaintiff produced evidence- affidavit of witnesses, including that of Dr. Altaf Kirmani, who was then posted in SKIMS, in which he stated that plaintiff was brought for medical treatment to SKIMS, where he was admitted in the department of Neurosurgery on 30th June 2009 and that plaintiff was operated upon. One committee was also constituted to assess disability of plaintiff. The said committee has given disability certificate on 11th July 2011, certifying that plaintiff has suffered 75% disability. Plaintiff on the date of incident was minor. Taking an overall view of the matter, the Trial Court took notional income of plaintiff as Rs.30,000/-, i.e., Rs.2500/- per month. The Trial Court multiplied Rs.30,000/- with 18, which worked out to Rs.5,40,000/-, but the Trial Court granted Rs.4.05 Lacs on account of future prospects and earnings in favour of plaintiff. On account of pain and sufferings due to severe injury caused on the head of plaintiff, the Trial court has given Rs.3.00 Lacs in favour of plaintiff. On account of medical expenses, Rs.50,000/- has been given by the Trial Court. Rs.3.00 Lacs on account of loss of amenities of life has

been granted by the Trial Court. In total Rs.10,55,000/- has been granted as compensation by the Trial Court with 6% interest. On the said amount, plaintiff is to first pay court fee.

9. The grievous injuries to plaintiff have turned him vegetative for whole life. His right to life guaranteed under Article 21 of the Constitution of India has been violated. A wrong has been done and a citizen of India, plaintiff, has been disabled for whole of his life. Fundamental rights as enshrined under the Constitution of India have, thus, been violated. But, mere declarations, such as instant one, will not provide any succour to plaintiff. He needed to be compensated, which has rightly been granted by the Trial Court.

- 9.1. By aforesaid incident, which took place on fateful day, plaintiff has become victim thereof. He is incapacitated for whole of his life, to earn his livelihood muchless for his family. He is victim. He is certainly entitled to reparation, restitution and safeguard of his right(s). Criminal justice would look hollow if justice is not done to the victim of the crime. The subject of victimology is gaining ground. A victim of crime cannot be a forgotten man in the criminal justice system. It is he, who has suffered the most. His family is ruined, particularly in case of his being disabled for whole of his life. The shocking aspect of the matter is that petitioner is facing such a situation, which cannot be reduced in writing. Statement recorded of witnesses, including that of the doctor, would suggest that plaintiff has received 75% disability and he is now only having vegetative existence inasmuch as he is confined to bed and shows no signs of progress/recovery. Thus, plaintiff is unable to attend himself muchless his family. He cannot attend daily routine activities

muchless enjoy the life by participating in sports activities. He cannot have adventurous life. He cannot move around to watch and see beautiful places of the world.

9.2. The monetary compensation for violation of fundamental rights by the State has been consistently awarded by the Supreme Court to the victims and their relatives. Few decisions, amongst them, include *Rudul Sah v. State of Bihar*(supra); *Bhim Singh v. State of J&K*, (1985) 4 SCC 677; *Peoples' Union for Democratic Rights v. Police Commissioner, Delhi*, (1989) 4 SCC 730; *Mrs Sudha Rasheed v. Union of India*, 1995 (1) SCALE 77; *Inder Singh v. State of Punjab*, (1995) 3 SCC 702; *Malkiat Singh v. State of UP*, (1998) 9 SCC 351; *Ajab Singh v. State of Uttar Pradesh*, (2000) 3 SCC 521; and *Munshi Singh Gautam v. State of MP*, (2005) 9 SCC 631.

9.3. In the present case, healthy and happy life has been curtailed by negligence of respondents causing him serious and painful injuries. He has to live with a trauma and shall remain handicap for whole of his life. Petitioner has to go through inconvenience, hardship, discomfort, disappointment, frustration and mental stress throughout his life.

9.4. The Supreme Court in *R. D. Hattangadi v. Pest Control (India) Pvt. Ltd*, 1995 SCC (1) 551, has laid down the following principles to determine compensation for disability:

“9. Broadly speaking while fixing an amount of compensation payable to a victim of an accident, the damages have to be assessed separately as pecuniary damages and special damages. Pecuniary damages are those which the victim has actually incurred and which are capable of being calculated in terms of money; whereas non-pecuniary damages are those which are incapable of being assessed by arithmetical calculations. In order to appreciate two concepts pecuniary damages may include expenses incurred by the claimant: (i)

medical attendance; (ii) loss of earning of profit up to the date of trial; (iii) other material loss. So far non-pecuniary damages are concerned, they may include (i) damages for mental and physical shock, pain and suffering, already suffered or likely to be suffered in future; (ii) damages to compensate for the loss of amenities of life which may include a variety of matters i.e. on account of injury the claimant may not be able to walk, run or sit; (iii) damages for the loss of expectation of life, i.e., on account of injury the normal longevity of the person concerned is shortened; (iv) inconvenience, hardship, discomfort, disappointment, frustration and mental stress in life.”

9.5. The Supreme Court in *Rekha Jain v. National Insurance Company Limited and ors. (2013) 8 SCC 389*, have reiterated the following principles for granting compensation for personal injury:

“25. It is well-settled principle that in granting compensation for personal injury, the injured has to be compensated (1) for pain and suffering; (2) for loss of amenities; (3) shortened expectation of life, if any; (4) loss of earnings or loss of earning capacity or in some cases for both; and (5) medical treatment and other special damages. In personal injury cases the two main elements are the personal loss and pecuniary loss. Chief Justice Cockburn in Fair’s case, supra, distinguished the above two aspects thus:

“In assessing the compensation the jury should take into account two things, first, the pecuniary loss the plaintiff sustains by the accident : secondly, the injury he sustains in his person, or his physical capacity of enjoying life. When they come to the consideration of the pecuniary loss they have to take into account not only his present loss, but his incapacity to earn a future improved income”.

26. McGregor on Damages (14th Edition) at paragraph no. 1157, referring to the heads of damages in personal injury actions, states as under:

“The person physically injured may recover both for his pecuniary losses and his non-pecuniary losses. Of these the pecuniary losses themselves comprise two separate items, viz., the loss of earnings and other gains which the plaintiff would have made had he not been injured and the medical and other expenses to which he is put as a result of the injury, and the Courts have sub-divided the non-pecuniary losses into three categories, viz., pain and suffering, loss of amenities of life and loss of expectation of life”.

Besides, the Court is well-advised to remember that the measures of damages in all these cases 'should be such as to enable even a tortfeasor to say that he had amply atoned for his misadventure'. The observation of Lord Devlin that the proper approach to the problem or to adopt a test as to what contemporary society would deem to be a fair sum, such as

would allow the wrongdoer to ‘hold up his head among his neighbours and say with their approval that he has done the fair thing’, is quite apposite to be kept in mind by the Court in assessing compensation in personal injury cases.”

10. For all what has been said and stated above, the computations made by the Trial Court for grant of compensation in favour of respondent does not call for any interference and as a consequence whereof instant appeal is liable to be dismissed.

11. In view of above, the instant appeal is **dismissed** with connected CM(s).
Interim direction, if any, shall stand vacated.

(Vinod Chatterji Koul)
Judge

Srinagar

13.02.2025

Ajaz Ahmad, Secretary

Whether approved for reporting? Yes/No.

