

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **RFA No.413 /2001**

% **23rd February, 2011**

SHRI RAM NATH JAIN & ORS. Appellants

Through: None

VERSUS

SHRI HARI OM DEVI & OTHERS Respondents

Through: None

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether the judgment should be reported in the Digest?

VALMIKI J. MEHTA, J (ORAL)

1. This matter is on the Regular Board of this Court since 17.1.2011. Today, it is effective item no.5 on Regular Board. None appears for the appellant though it is 12:15 pm. I have therefore perused the record and am proceeding to dispose of the matter.

2. The challenge by means of this Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) is to the impugned judgment and decree dated 2.7.2001 whereby the suit for recovery of money of the appellants against the respondents was dismissed. The suit for

recovery of damages was filed on account of death of Sh. Sanjay Jain who was the son of the appellant No.1 and which death was said to have been caused on account of explosion in the gas cylinder kept by the respondent No.2 for the purpose of welding in his shop which pertained to repair of cycles and sale of second hand cycles.

3. The facts as pleaded in the plaint are that the deceased son of the appellant No.1/plaintiff No.1, namely, Sh. Sanjay Jain was passing by the shop which was owned, managed and operated by the defendants and in which shop since the respondent Nos.2 and 3/defendant Nos.2 and 3 were doing the work of welding rashly and negligently, a blast took place in the gas cylinder in the shop and on account of which incident late Sh. Sanjay Jain suffered grievous injuries and died on his way to the hospital. It was pleaded in the plaint that late Sh. Sanjay Jain was 20 years old at the time of his death and was helping the appellant No.1 in his electric shop. It was also pleaded that the deceased Sanjay Jain was an able bodied man keeping good health, was a champion of karate and was coaching karate in a club. The deceased Sanjay Jain had studied up to Class-X. The appellants/plaintiffs who are the father, sisters and brothers of the deceased Sanjay Jain claimed that the deceased would have survived for more than 50 years and would have earned more than Rs.20 lakhs, however, since they did not possess sufficient means of finance for affixing Court fee on a larger amount therefore a sum of Rs.95,000/- was claimed as damages. The

respondents/defendants filed a joint written statement and pleaded that there was no blast in the gas cylinder or the welding tank in the shop which belonged to the defendant No.2. It was pleaded that the defendant No.2 was a tenant under defendant No.1/his mother and that the defendant No.3/brother of defendant No.2 had nothing to do with the shop of the defendant No.2. It was pleaded that a chemical drum was lying outside the shop and with which respondent No.2 had no concern and which exploded as a result of extreme heat of the day and therefore the respondents/defendants denied the liability for the damages as claimed in the suit.

4. After the pleadings were complete, trial Court framed the following issues:

- “1. Whether the plaintiffs have no locus standi to file the present suit as alleged, if so, its effect? OPD
2. Whether there is no cause of action in favour of the plaintiff and against the defendants and the suit is liable to be dismissed U/o 7 Rule 11 CPC, as alleged, if so its effect? OPD
3. Whether the suit is bad for mis-joinder of defendants 1 & 3 as alleged, if so, its effect? OPD
4. Whether the suit has not been properly valued for the purpose of court fees and jurisdiction as alleged, if so, its effect? OPD
5. Whether the plaintiff is entitled to claim any damages, if so, to what amount and from which of the defendants? OPP
6. Relief”

5. The appellants in support of their case examined ten witnesses to prove: the FIR, the factum of death due to explosion in the gas cylinder which belonged to the respondents/defendants, the post mortem report with respect to the death and the other aspects as pleaded in the plaint. PW-1 Police Constable proved the FIR Ex.PW1/1, PW-2 was appellant No.1/plaintiff No.1 father of deceased Sanjay Jain. PW-3 was a passer by at the time of the incident and who knew the deceased Sanjay Jain as also the defendants. PW-4, Sh. Hemchand Jain was an important witness because he was an independent/neutral/impartial witness who was not in any manner related to the appellants and who in fact had given his cycle for repair at the shop of the defendant No.2 and was told by the defendant No.2 that the said cycle would be repaired after completing the job of welding already in hand. PW-5 was the brother of Sanjay Jain and PW-6 was the witness from the school where the deceased Sanjay Jain studied and who proved the age of the deceased by the School Leaving Certificate Ex.PW6/1. PW-7 was ASI Vijender Singh who proved the FIR Ex.PW1/1 by bringing the original record. PW-8 was the Record Clerk from Maulana Azad Medical College, New Delhi who proved the post mortem report as PW8/1 which was signed by Dr. Anil Aggarwal. Dr. Anil Aggarwal, himself, and who was the Professor of Forensic Medicines, Maulana Azad Medical College, New Delhi, was examined as PW-9 and PW-10 was the Ahlmad from the Court, who brought the file of the criminal case which was filed against respondent No.2/defendant No.2 and he proved the post mortem report as Ex.PW10/1 and the report under

Section 173 Cr.P.C. as Ex.PW10/2. The two witnesses from the side of the defendants were Sh. Shiv Kumar, respondent No.2/defendant No.2 and Sh. Shiv Shankar the brother of the respondent No.2/defendant No.2.

6. So far as issue No.3 is concerned, trial Court has held that respondent No.3 not liable as the shop was only of the respondent No.2/defendant No.2. I agree because the respondent No.2 had filed the rent receipts on record and got them exhibited as Exs.DW1/1 to DW1/4. The main issue in this case was/is issue No.5 as to the liability of the respondent No.2/defendant No.2 for the death caused of deceased Sanjay Jain on account of explosion of the gas cylinder. While dealing with this issue, the trial Court has arrived at a finding that the defendant No.2 was doing welding in his shop while the deceased Sanjay Jain was standing near him talking to him and in the meantime the tank/gas cylinder burst and a portion thereof struck against the head of the deceased Sanjay Jain. This finding, in my opinion, is clearly correct because testimony of PW-4 was rightly relied upon and who deposed that he had given his cycle for repairing the puncture to the defendant No.2 and who said that he would do so after completing the job of welding which was already in his hand showing that there did exist a gas cylinder. The trial Court has also rightly relied upon the admission of the defendant No.2 while examined as DW-1 that he was doing work of welding in the shop at the relevant time. The trial Court after arriving at the aforesaid finding of fact of Sh. Sanjay Jain dying due to explosion on account

of bursting of the gas cylinder and being hit by an object, being a part of the cylinder, however, held that what really happened was only “Vis Major” i.e. an act of god and an unforeseen event for which no one can be held responsible. The trial Court while dealing with the issue has held that welding with the help of a gas cylinder cannot be considered as a hazardous or inherently dangerous activity and that there was no negligence on the part of the respondent No.2 because there was no evidence on record as to what was the pressure of gas inside the gas cylinder and the distance of the gas cylinder from the deceased Sanjay Jain.

I have, for one, wholly failed to understand this reasoning of the trial Court, which causes injustice to the appellants/plaintiffs in light of detailed evidence of ten witnesses who have deposed with respect to the incident of the bursting of the cylinder and the death of Sh. Sanjay Jain on account of the blast caused by bursting of the cylinder. It would be appropriate to reproduce paras 38 to 42 of the impugned judgment which hold the respondent No.2 not guilty of negligence and the activity not being inherently dangerous and which paras read as under:-

“38. Now it has to be seen whether doing the work of welding in his shop can be said to a hazardous or inherently dangerous activity. I am of the opinion that the doing of welding with the help of gas cylinder cannot be said to be a hazardous and inherently dangerous activity.

39. Such type of job is done invariably by many persons in the shops. The principle of strict liability, is not applicable in the facts and circumstances of the present case as the act of doing of welding with the help of gas cylinder of tank cannot be said to be a

hazardous or inherently dangerous activity. Now it has to be seen whether there was any negligent act was committed by defendant No.2 while doing welding. It is established fact that defendant No.2 was doing welding work with the help of gas cylinder and in that process the gas cylinder burst and something therefrom hit against the head of deceased Sanjay.

40. There is no evidence in the present case as to which place exactly the gas cylinder/tank was kept. There is no evidence on record as to what was the pressure of the gas inside the gas cylinder/tank. There is nothing to show as to at what distance the gas cylinder/tank was kept when the defendant no.2 was doing the welding work.

41. Unless it is shown that the defendant no.2 was very close to the gas cylinder thereby having the possibility of the fumes emitting in the cylinder valve leading to burst no negligence cannot be attributed to him. It is also not the case of the plaintiff that the defendant no.2 was novice and was not doing the work of welding regularly. There is no evidence on record as to how much of the valve of the gas cylinder was open. Simply because the defendant No.2 was doing the welding work in his shop and the gas cylinder burst, it cannot be said that the negligence can be attributed to defendant No.2.

42. In view of my above discussion I hold that the plaintiff has failed to prove as to what was the real reason of the bursting the gas cylinder. As no negligence can be attributed to the defendant No.2 it can be said that he was instrumental in causing the accident. Rather in the facts and circumstances of the case it can be safely concluded that incident was 'Vis Major'."

7. The aforesaid conclusions and findings of the trial Court are wholly illegal and perverse because bursting of the cylinder and causing of death of Sh. Sanjay Jain will clearly be covered under the doctrine "*res ipsa loquitor*". This, I say so, because welding from a gas cylinder firstly should not take place where members of the public are found to visit or pass by or stand. It is established on record that the gas cylinder was kept in a place

which was open to the road i.e., the cylinder was kept in an open shop. Further, the explosion in a normal gas cylinder is not a normal event and thus, the respondent No.2 was bound to prove that the cylinder was of a proper ISI make and not defective and was pressurized only to a correct limit. The respondent No.2 only filed a certificate dated 29.5.1992 Ex.DW1/5, which showed the cylinder was purchased from one M/s. M.S. Traders however, the said certificate in no manner contains or proves the factum of the cylinder being a cylinder having been manufactured by an authorized manufacturer and being of the requisite ISI specifications. The Courts have repeatedly applied the doctrine "*res ipsa loquitur*" in cases where circumstances of the case so warrant. In the present case, the circumstances of the case warrant that this doctrine be applied to hold the respondent No.2 guilty of negligence for bursting of the gas cylinder which caused the death of Sh. Sanjay Jain at the age of about 20-21 years. The stand of the respondent No.2 that the death took place not because of bursting of gas cylinder but because of bursting of a drum containing some chemical lying unattended beside the shop which did not belong to respondent No.2 was clearly unbelievable in the facts and circumstances of the present case. The testimonies of the independent witnesses, especially PW-4 of respondent No.2 doing welding work, and which naturally would require the gas cylinder, admittedly proved that it was the respondent No.2 who was doing welding work by using the gas cylinder. I may, at this stage, note that the respondent No.2 appears to have been acquitted in the

criminal case filed against him, however, decision in a criminal case does not bind the Civil Court because whereas the civil case is decided on the balance of probabilities, a decision in a criminal case requires proof beyond doubt for conviction. I have therefore only to see the evidence as recorded in the present case to determine the negligence of the respondent No.2.

8. It is, therefore, held by applying the doctrine of "*res ipsa loquitor*" that death of Sh. Sanjay Jain took place on account of bursting of a gas cylinder which was lying in the shop of the respondent No.2 and which gas cylinder burst because either it was not of requisite quality or was not correctly pressurized or the same was negligently being used.

9. The next issue which arises for determination is the compensation which should be awarded to the appellants. It has been held in the case of ***M/s Grewal Vs. Deep Chand Sood 2001 (8) SCC 151*** that principles applied while deciding cases under the Motor Vehicles Act, 1988 can also be applied to deaths caused by negligence under the law of torts . In the recent decision by the Supreme Court in the case of ***Sarla Verma Vs. DTC 2009 (6) SCC 121*** the Supreme Court has exhaustively considered all the earlier decisions on the aspect of determination of the compensation which should be paid. The Supreme Court has laid down the ratio as to what multiplier is to be applied, what deductions are to be made and ultimately what compensation has to be awarded. Step one is to ascertain the income of the deceased per annum out of which deduction should be made for the

amount which the deceased would have spent on himself and which is a deduction of 50% in case of bachelors-deceased Sanjay Jain was a bachelor. Step two is to ascertain the multiplier and which multiplier is 18 in case the deceased is between 18 years to 25 years at the time of his death-deceased Sanjay Jain was 20/21 years of age at the time of his death. Step three is the actual calculation in which besides the compensation to be awarded on the basis of the income of the deceased, further amounts can be awarded towards loss of dependency, funeral expenses, medical expenses and so on.

Applying the ratio of the decision in the case of ***Sarla Verma (Supra)*** and the evidence which has been laid in the case of the deceased being about 20 years of age and helping his father in running his shop, and the father stating that he would in future have earned about Rs.10,000/- per month but in the cross-examination stating that the deceased was at the time of his death effectively earning about Rs.1,000/- per month, and the fact that in future a higher amount would have been earned, I find that the monthly income of the deceased should be taken at Rs.1500/- per month and annual income therefore comes to Rs.18,000/-. Out of the amount of Rs.18,000/- a sum of Rs.9000/- will have to be deducted towards the personal expenses of the deceased Sanjay Jain who was a bachelor. Since however there has to be reasonable guess work and estimate which has to be done by the Court considering that Sanjay Jain may have married late or never married and also whether the sisters would have married or when

married and also, considering all the other related facts and circumstances, I hold that the monthly income of the deceased Sh. Sanjay Jain should be taken at Rs.1,000/- per month instead of reducing the multiplier from 18 to a lower figure. Therefore the disposable income would be 500/- per month of the deceased after considering the deduction of 50% for his personal status as a bachelor. In the facts of the present case, therefore, the compensation which is liable to be awarded would be the income of Rs.6,000/- per year multiplied by 18 i.e. a sum of Rs.1,08,000/-, however, since the appellants have only claimed a sum of Rs.95,000/-, this amount is awarded in favour of the appellants and against the respondent No.2 with pendent lite and future interest @ 4% per annum till realization of the decretal amount.

10. Accordingly, a decree is passed in favour of the appellants and against the respondent No.2 for a sum of Rs.95,000/- with pendent lite and future interest @ 4% per annum simple till realization of the decretal amount. Parties are left to bear their own costs. Decree sheet be prepared. Trial Court record be sent back.

FEBRUARY 23, 2011
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VALMIKI J. MEHTA, J.