

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

% Judgment delivered on: 2nd February, 2011

+ W.P.(C) 5027/2010

GOPALPUR VICTIM ASSOCIATION Petitioner
Through Ms. Aruna Mehta, Advocate.

versus

DELHI JAL BOARD & OPRS. Respondent
Through Mr. N. Waziri, Standing Counsel.
Mr. Mohd. Arshad, Advocate.

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE SANJIV KHANNA

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

DIPAK MISRA, CJ:

In this writ petition preferred under Article 226 of the Constitution of India by Gopalpur Victim Association, the singular issue that emerges for consideration is whether the respondents, namely, the Government of National Capital Territory of Delhi and Delhi Jal Board should be saddled with the liability to pay compensation to the parents for the untimely death of four young children, namely, Narender, Atul, Vikas and Nitesh who were aged between 8-10 years.

2. As the assertion in the petition exposes, the said four children after

getting free from school went to play in a vacant land situated in village Gopalpur belonging/owned by Flood and Irrigation Department of Delhi handed over to Delhi Jal Board for laying of water pipelines. It is contended in the petition that on 5th March, 2010, the unfortunate incident took place and the four children while playing were drowned in a pit situated on the vacant land. An FIR was lodged by one of the relatives of four children and a case was registered under Section 304A of the Indian Penal Code, 1860 against unknown persons. It is put forth that the area in question was not fenced and the boundary walls were broken at various places, which led the children while playing to fall into the pit. The time was 7 p.m. in March. The darkness of summer evening in the real sense of the term was yet to set in and the children being children had played out of enthusiasm and eventually got into the large pit, which was deep and filled with water and had the capacity to swallow and devour the lives of children. Thus, in the ultimate eventuate got drowned and life span got extinct. In this backdrop, a prayer has been made for grant of compensation amounting to Rs. 12 lacs each along with costs and interest to each of the children.

3. A composite counter affidavit has been filed by the respondents 1 to 3 contending, inter alia, that the issue raised in the writ petition cannot

be adjudicated and the same are in the realm of disputed questions of fact; that it cannot be ruled out that the children were not mischievous; there is a possibility that the children had gone for swimming or had slipped in the dead of night cannot be brushed aside; that there is no explanation how the boys four in number can get themselves drowned simultaneously; that the area was not required to be protected like a prohibited area and was a waste land of the Flood and Irrigation Department; and that by no stretch of imagination neither the State nor the Delhi Jal Board can be saddled with the liability. To bolster the said stand, reliance has been placed on *Chairman, Grid Corporation of Orissa Ltd.(Gridco) and Others Vs. Sukamani Das (Smt) and Another* (1999) 7 SCC 298, *SDO Grid Corporation of Orissa Ltd. and Others. Vs. Timudu Oram* (2005) 6 SCC 156 and *Bharat Amratlal Kothari and Another Vs. Dosukhan Samadkhan Sindhi and Others* (2010) 1 SCC 234.

4. We have heard Ms. Aruna Mehta, learned counsel for the petitioner and Mr. Waziri, learned Standing Counsel appearing on behalf of the GNCTD, Flood and Irrigation Department as well as the Delhi Jal Board.

5. On a perusal of the writ petition and the counter affidavit, it is clear as noon day that where the four young children breathed their last by falling in the pit was a vacant land belonging to the Flood and Irrigation

Department, which had been handed over to Delhi Jal Board for laying down of pipelines. The stand in the return is that it was not necessary to protect the area in entirety like a prohibited area. It is the further stand that the possibility of children going for a swim or playing mischief in the dead of night cannot be ruled out. On a query being made whether at 7 p.m. in Delhi in the month of March can be described as dead of night, we must fairly say, Mr. Waziri, learned Standing Counsel conceded that it cannot be said dead of night as it can at best be described as twilight time. The stand that the children would have gone to swim in the pit seems to be a far from satisfactory explanation. It is not disputed that the area admeasures about 10 acres of land and it is unimaginable that the children would go to swim in a pit. The simultaneity of death does not suggest any kind of foul play by anyone. The children being children have the tendency to proceed in a singular mind set at times may be to save each other or may be trying to run but definitely it cannot be said that they were mischievous or went to swim. On that base of such a stance, it cannot be said that there is disputed questions of fact which cannot be adjudicated in exercise of power under Article 226 of the Constitution. Presently to the authorities that have been pressed into service by the respondent.

6. In *Sukamani Das and Another (supra)* the dispute related to death by an electrical wire and taking note of the fact of the situation the Apex Court held that there was a disputed question of fact. Similarly, in *Timudu Oram (Supra)* their Lordships clearly held that it is the duty of the Court to examine whether the loss was caused by negligence of the defendants and whether wire had snapped due to negligence of the appellant-defendant as a result of which the deceased came into contact with wire. In *Bharat Amratlal Kothari and Another (supra)* in paragraphs 40, 41 and 42 on which reliance has been placed by Mr. Waziri, really relate to a different scenario altogether inasmuch as the controversy arose to handing over the custody of certain animals and a factual dispute did emerge. In our considered opinion all the citations which have been commended to us are distinguishable on facts.

7. At this juncture, we may notice an authority in *Smt. Gunwant Kaur and Others Vs. Municipal Committee, Bhatinda and Others 1969(3) SCC 769* wherein this Court has held thus:-

“14.....The High Court is not deprived of its jurisdiction to entertain a petition under Article 226 merely because in considering the petitioners right to relief questions of fact may fall to be determined. In a petition under Article 226 the High Court has jurisdiction to try issues both of fact and law. Exercise of the jurisdiction is, it is true, discretionary, but the discretion must be exercised on sound judicial

principles. When the petition raises questions of fact of a complex nature, which may for their determination require oral evidence to be taken, and on that account the High Court is of the view that the dispute may not appropriately be tried in a writ petition, the High Court may decline to try a petition. Rejection of a petition in limine will normally be justified, where the High Court is of the view that the petition is frivolous or because of the nature of the claim made, dispute sought to be agitated, or that the petition against the party against whom relief is claimed is not maintainable or that the dispute raised thereby is such that it would be inappropriate to try it in the writ jurisdiction, or for analogous reasons.”

8. In *Century Spg. and Mfg. Co. Ltd. Vs. Ulhasnagar Municipal Council* (1970) 1 SCC 582, it has been held thus:-

“Merely because a question of fact is raised, the High Court will not be justified in requiring the party to seek relief by the somewhat lengthy, dilatory and expensive process by a civil suit against a public body. The questions of fact raised by the petition in this case are elementary.”

9. In *ABL International Ltd. and Another Vs. Export Credit Guarantee Corporation of India Ltd. and Others* (2004) 3 SCC 553 after referring to the decisions in *Smt. Gunwant Kaur and Others (supra)* and *Century Spg. and Mfg. Co. Ltd.(supra)*, a two-Judges Bench has opined thus:-

“Therefore, it is clear from the above enunciation of law that merely because one of the parties to the litigation raises a dispute in regard to the facts of the

case, the court entertaining such petition under Article 226 of the Constitution is not always bound to relegate the parties to a suit. In the above case of Gunwant Kaur this Court even went to the extent of holding that in a writ petition, if the facts require, even oral evidence can be taken. This clearly shows that in an appropriate case, the writ court has the jurisdiction to entertain a writ petition involving disputed questions of fact and there is no absolute bar for entertaining a writ petition even if the same arises out of a contractual obligation and/or involves some disputed questions of fact.”

10. The present factual matrix is to be decided on the anvil of the aforesaid authorities in the field. As is clearly demonstrable, there was no proper fencing and nothing was put prohibiting anyone to get into the said area. That apart, the stand, the children might have gone to swim, does not really deserve acceptance. As we perceive, the factual scenario as has been reflected do not warrant any inquiry by this Court. It can be stated that certitude that a dexterous attempt has been made to raise the disputed questions of fact. The same leaves us unimpressed and we are not inclined to throw the writ petition over-board on the ground that it involves disputed questions of fact.

11. That apart from what has been pleaded one aspect that has been brought to our notice in course of hearing a communication made by Executive Engineer of Flood and Irrigation Department of GNCTD to the SHO, Timarpur police station. Paragraph 2 of the said communication

reads as under:-

“The land under reference has been handed over to Delhi Jal Board to lay their pipe line and is under their control for carrying out their work, which has not been completed so far. Prior to allowing the Delhi Jal Board to lay their pipe line, gate fitted in boundary of southern side used to be locked by the chowkidars of this department. However, after accord of approval to Delhi Jal Board the same is controlled by their staff to have a free access to the site to carry their men, machinery and material as and when required.”

12. On a perusal of the same, there should be no shadow of doubt. It was obligatory on the part of the Delhi Jal Board to ensure that nobody enters into the said area. The said care was not taken. Care being not taken, the life span of four young children got extinguished. The plea advanced by the respondents, namely, GNCTD and Delhi Jal Board or its agency that children may have played mischief or gone for a swim is mercurial and specious in nature. For the sake of dispute, a question is not to be raised to bring it in the realm of disputed question of fact. In our considered opinion both the State and the Delhi Jal Board are vicariously liable for not maintaining the area in question. We may say with profit that the Delhi Jal Board may have engaged contractors/agencies for maintaining the area but there has been a failure. Hence, we can say without any iota of doubt both the State and Delhi Jal Board have failed to maintain the area as a consequence of which the children lost their lives.

As a sequitur compensation has to be awarded.

13. We have been apprised in course of hearing that a sum of Rs.1 lac has been paid by Delhi Jal Board as ex-gratia to the parents of the children. Regard being had to the totality of the circumstances, we are disposed to grant compensation of Rs.3.5 lacs and accordingly it is so advised. The balance Rs.2.5 lacs shall be paid by the respondent No.1, Delhi Jal Board by way of bank draft drawn on a nationalized bank on proper identification before the Registrar General of this Court within four weeks. The said amount shall be kept in a fixed deposit for a period of three years. The depositors would be entitled to avail the interest on the said amount. Delhi Jal Board is given liberty to proceed to realize the said sum after due inquiry from the persons who are responsible for such acts, including the contractors.

14. The writ petition is allowed to the extent indicated above without any order as to costs.

CHIEF JUSTICE

SANJIV KHANNA, J.

FEBRUARY 02, 2011
NA