

IN THE HIGH COURT OF DELHI AT NEW DELHI

W.P. (C) 8837/2009

Reserved on: 21st April 2011

Decision on: 3rd May, 2011

PUJA DUBEY

..... Petitioner

Through: Ms. Rekha Palli with
Ms. Punam Singh and Ms. Amrita
Prakash, Advocates.

Versus

UNION OF INDIA & ORS.

..... Respondents

Through: Dr. Ashwani Bhardwaj, Advocate for
R-1 to 3.

Ms. Jyoti Singh, Senior Advocate with
Mr. Dinesh Yadav, Advocate for R-4 to 12.

CORAM: JUSTICE S. MURALIDHAR

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

JUDGMENT
03.05.2011

1. Ansh Kumar Dubey, aged 12 years, son of the Petitioner Puja Dubey and Lt. Col. Ajay Kumar Dubey, died on 8th June 2007 during the Parasailing Camp organised by the Army Wives Welfare Association ('AWWA') conducted by the Jat Regimental Centre ('JRC') Bareilly. The Court of Inquiry ('COI'), constituted by the Station Headquarters Cell, in its Report submitted on 2nd July 2007 came to the conclusion that there does not

appear to be any case of willful negligence of specific nature and that the fatal accident took place as a result of the failure of the *ad hoc* safety pins getting hooked off/released in the Parasail.

2. In this writ petition, the first prayer is that the findings, opinions and directions of the COI held at Bareilly should be quashed and a fresh COI be held within a fixed timeframe in accordance with the Army Act, 1950 and Rules made thereunder by associating the Petitioner and her husband. The second prayer is for a direction to the Ministry of Defence ('MOD') (Respondent No.1) through the Chief of Army Staff ('COAS') (Respondent No. 2) and the Additional Director General ('ADG') Discipline and Vigilance ('DV'), Adjutant General's Branch (Respondent No.3), to impose a DV ban against Respondent Nos. 6 to 9, 11 & 12. The third prayer is for a direction to the MOD and COAS to pay the Petitioner token compensation as may be determined by this Court.

Factual background

3. The JRC at Bareilly planned a summer camp for children during summer vacations between 4th & 9th June 2007. The Camp featured various activities including parasailing for children in the age group of 12 to 15 years. The Petitioner's son Ansh Kumar Dubey who was 12 years and 11 months of

age applied for participation in the parasailing event which was held on 8th June 2007. At around 6 a.m. on 8th June 2007, parasailing was conducted at the JRC firing range. The Petitioner states that Ms. Roopali Bajpai, aged 18 years, was asked to go first. After having worn the half body harness half way, she refused to do the parasailing due to the poor condition of the harness. Thereafter, Ansh Kumar Dubey was asked. He had apparently parasailed earlier on four occasions; twice at Tejpur (Assam) at the age of 8 years and twice at Jammu at the age of 10 years. It is claimed that Ansh Kumar Dubey complained about the harness to the officer-in-charge as well as the staff. The briefing of the children was done by Respondent No. 12 Naik Lokesh Kumar. A demonstration was given by Recruit Maan Singh. The harness was fitted to Ansh Kumar Dubey by CHM Rajbal Singh (Respondent No.11). According to the Petitioner, as Ansh Kumar Dubey commenced parasailing, the half body harness along with the parachute slipped out of his body and he came down like a stone from a height of about 100 feet and hit the hard ground. The Petitioner later learnt that a covered LPT truck was used to carry Ansh to the hospital where he was declared brought dead. A COI was ordered on that very date. However, neither the Petitioner nor her husband nor their 9 year old daughter who had witnessed the entire event, were questioned by the COI. The Petitioner kept representing to the authorities for copies of the photographs of the event

and report of the COI. The Petitioner states that she was constrained to lodge an FIR No. 095740 dated 7th December 2007 in respect of six army personnel including Respondent Nos. 4 to 7 under Section 304-A IPC. It is stated that initially the charge sheet had been filed against two persons, i.e., Respondent Nos. 11 & 12 on 7th June 2008. However, a supplementary charge sheet was filed against four more officers, i.e., Respondent Nos. 6 to 9 on 3rd September 2008. Thereafter, the Petitioner wrote letters seeking imposition of DV ban against those named in the charge sheet but no action was taken by the authorities. Aggrieved by the filing of charge sheet against him, Respondent No. 11 filed a petition under Section 482 CrPC being Criminal Misc. Application No. 33936 of 2008 before the High Court of Allahabad. While directing notice to issue the Allahabad High Court stayed the proceedings in Criminal Case No. 1951 of 2008 before the Judicial Magistrate II, Bareilly.

4. Aggrieved by the non-supply of a copy of the report of the COI and the failure to impose a DV ban against the charge-sheeted officers, the Petitioner filed W.P. (C) No. 1607 of 2008 in this Court. On 10th July 2008, this Court recorded a statement made on behalf of the Respondents that all the documents of the COI including the photographs would be supplied to the Petitioner. The said order was further modified by the

learned Single Judge on 25th July 2008 by directing the Respondent to supply to the Petitioner the opinions and findings of the COI. This Court disposed of the petition observing that that there was no reason for not supplying the complete findings and the opinions of the COI to the Petitioner. Thereafter, the Petitioner was supplied with a copy of the report of the COI. Thereafter the present writ petition was filed.

Submissions of counsel

5. Ms. Rekha Palli, learned counsel appearing for the Petitioner at the outset submitted that the Petitioner is not interested at this stage in seeking compensation. Her endeavour was to persuade this Court to order a fresh COI to examine the factors leading to the untimely death of her son and fixing responsibility on the officers concerned. Ms. Palli assailed the Report of the COI on various grounds. It is submitted that several important pieces of evidence in particular those of Zarah Khan, Radha Chaudhary and Roopali Bajpai were not accounted for. These witnesses had supported the Petitioner's version of what transpired on 8th June 2007. She submitted that the evidence of the sister of the deceased had not been recorded and the Petitioner and her husband did not associate in the COI. Respondent No. 12, Naik Lokesh Kumar was not a qualified instructor as he was only a trainer. Lt. Col. Sanjay Bajpai addressed a letter to the Petitioner on 11th

January 2009 clarifying that the statements attributed to him in the report of the COI were incorrectly recorded. Ms. Palli referred statements dated 17th July 2008, 20th July 2008 and 31st July 2008 of Ms. Roopali Bajpai, Ms. Zarah Khan and Ms. Radha Chaudhary respectively standing by their version of what transpired at the parasailing camp on 8th June 2007. These three were participants in the camp and had deposed before the COI. Ms. Palli also assailed the convening order in which one of the members of the COI was from JRC Bareilly whereas as a rule, officers from other units were to be appointed to constitute a COI. Ms. Palli referred to specific findings in the Report of the COI which rendered its conclusions inconsistent with such findings. She pointed out that the COI had proceeded on the basis that no log books regarding the usage of the parasailing equipments were available whereas the Petitioner was able to obtain a copy of the log books through applications made under the Right to Information Act, 2005. Referring to the Notification dated 11th May 2005 concerning imposition of a DV ban, it is submitted that a charge sheet having been filed against Respondent Nos. 4 to 9, 11 and 12, there was no reason why a DV ban was not imposed on the officers. Instead, some of them had been granted promotions.

6. Ms. Jyoti Singh, learned Senior counsel appearing for the officers, i.e.,

Respondent Nos. 4 to 9, 11 and 12 raised a preliminary objection of maintainability of this writ petition in this Court. It is submitted that the event took place in Bareilly and no part of cause of action arose within the territorial jurisdiction of this Court. She submitted that the Petitioner has waited for six months after the report of the COI and thereafter filed the present petition. It was, therefore, barred by laches. It is submitted that the COI examined the evidence in great detail, and arrived at the most reasonable conclusion that was possible in the circumstances. There was no occasion for this Court to interfere with such findings in exercise of its writ jurisdiction under Article 226 of the Constitution. Ms. Singh questioned the purpose that would be served by ordering a fresh COI nearly four years after the event. She apprehended that any observation made by this Court on merits would prejudice the criminal proceedings against Respondent Nos. 4 to 9, 11 & 12. In this context, she referred to an order dated 20th November 2008 of the Allahabad High Court in Criminal Misc. Application No. 33936/2008 (*V.C. Goyal v. State of UP*).

7. Dr. Ashwani Bhardwaj, learned counsel appearing for Respondent No. 1 Union of India ('UOI') through the MOD, submitted that the decision on imposing the DV Ban had to be taken in terms of the policy of Respondent Nos. 1 to 3. He submitted that the non-examination of the daughter of the

Petitioner by the COI did not affect its conclusions since what the daughter could possibly have deposed before it was already taken note of by the COI. The COI based its findings on what a majority of the witnesses stated. It was pointed out that seven of the children stated that the harness was on the body when Ansh Kumar Dubey fell to the ground, whereas two of the children had stated that it was not. Dr. Bhardwaj also referred to the Indemnity Bond furnished by the Petitioner's husband waiving his right to claim any compensation or hold any person in the service of the Government liable in respect of any loss or injury suffered by his son during the camp.

Issues for consideration

8. The above submissions give rise to the following issues that require to be considered by this Court:

- (1) Whether this Court has the jurisdiction to entertain the writ petition?
- (2) Whether the writ petition is barred by laches?
- (3) Whether the Petitioner has made out any case for ordering fresh Court of Inquiry to investigate the incident of 8th June 2007 in which the Petitioner's son died?
- (4) Has the Petitioner made out a case for imposition of DV ban on Respondent Nos. 6 to 9, 11 & 12?

Maintainability

9. This is the second round of litigation. In the first round, the Petitioner filed W.P. (C) No. 1607 of 2008 in which the main grievance was that the Petitioner had not been supplied with a copy of the report of the COI. Initially, this Court on 10th July 2008 recorded the statement of learned counsel for the Respondents that they agreed to supply to the Petitioner a copy of the findings and opinion of the COI. Subsequently, however, the Respondents moved CM No. 10172 of 2008 seeking modification of the said order. Basically, the Respondents were resisting furnishing to the Petitioner a copy of the report of the COI. By its order dated 25th July 2008, this Court, after noticing those objections, directed the Respondents to supply to the Petitioner a copy of the report and recorded as under:

“For the reasons that the Court has directed respondents to supply opinion and finding of Court of Inquiry to the petitioner, petitioner wishes to withdraw the petition with liberty to file an appropriate petition and/or to take such remedy as may be available to her in accordance with law including such grounds as taken in the petition. Petition is withdrawn and liberty is granted.”

10. It is not clear whether at the above stage the Respondents raised any objection as to the territorial jurisdiction of this Court. No clarification was subsequently sought by the Respondents that the liberty granted to the

Petitioner did not mean that she could file a fresh petition in this Court. A second factor is that the affidavit in support of the counter affidavit in the present writ petition is by an officer stationed in Delhi. Clearly, therefore, there is no difficulty in Respondents defending the writ petition in this Court. Thirdly, it appears that the decision to impose a DV ban in terms of the Notification dated 11th May 2005 has to have the approval of the Adjutant General (AG) and the AG's Branch is located at the Army Headquarters in Delhi. For the aforementioned reasons, the preliminary objection taken by the Respondents to the maintainability of the writ petition in this Court is rejected.

Delay and laches

11. As regards laches, the Petitioner could not have assailed the report of the COI without it being supplied to her. Against this Court's order dated 25th July 2008 directing that she be provided with a copy of the report, the Respondents filed an appeal against the said order before the Division Bench. It is only after the dismissal of the appeal on 17th October 2008 that the report was furnished to the Petitioner under the cover of letter dated 5th January 2008 on 6th April 2008. In the circumstances, this Court does not find any merit in the Respondents' plea that the petition is barred by laches.

Case for a fresh Court of Inquiry

12. The powers and jurisdiction of the High Court in its writ jurisdiction are circumscribed. It cannot in exercise of its powers under Article 226 of the Constitution sit in appeal over the findings of the COI. However, it would interfere if the appreciation of the evidence by the COI is shown to be flawed and the conclusions are contrary to the record. The result of such finding would be to require the COI to adopt the correct legal approach and redo the fact finding exercise.

13. Having perused the report of the COI in light of the evidence before it, this Court is not satisfied with the explanation given for not associating the parents of the deceased, i.e., the Petitioner and her husband as well as sister of Ansh Kumar Dubey who was an eye-witness to the entire event in the COI. The only explanation offered is that the sister would have been too traumatized to make any statement. The proceedings of the COI have been examined by this Court. The observation in the report that there were no eye-witnesses and the statement in para 87 that “even though there is no eye witness account or photos or video recording as conclusive evidence”, are contrary to the record. The Petitioner has enclosed with the petition a statement dated 24th July 2008 of Ms. Radha Chaudhary, aged 15 years, who also attended the camp on 8th June 2007. Then we have the statements

of Ms. Roopali Bajpai and Ms. Zarah Khan . These subsequent statements given to the Petitioner reiterate their versions recorded by the COI. The discussion of the depositions of these eye witnesses by the COI is not satisfactory. The report simply states that detailed discussions were had with them. For instance, Ms. Roopali Bajpai stated before the COI:

“While Ansh was falling, I clearly noticed the helmet on him, but I did not see any sign of harness on his body. I feel that he fell without his harness of his body. Thereafter all officials collected/ran to him and immediately evacuated him to hospital. The children were kept away so I could not see the body. I remember the stretcher being called for and then being sent back without use. I was busy consoling his sister Miss Pujan who was also one of the participants in the camp. Then all of us were dispatched back.”

14. Ms. Bajpai further stated as under:

“Q-3. Why & how do you say that the seat type harness is unsafe?

Ans-3. During our theory class by Pulse Raisers, we were scientifically told that the seat harness cannot be relied upon for the balance of the CG and the centre of mass. Thus it is very easy for the person to flip in air. It is easy to get entangled in the ropes of the parachute in case one flips or mostly while landing.

Q-4. Were you constantly looking/observing Ansh Kumar Dubey?

Ans-4. Yes, I was constantly observing him from the time of his preparation to launch and then his flipping and falling down. The only time, I could not see him is his soaring up in the air as during the time, I was walking back to the tent/waiting area.”

15. Ms. Bajpai in her subsequent statement dated 17th July 2008 to the Petitioner, stated:

“At approximately 0500h, on the 8th of June 2007 we were picked up from the bus stop and taken to the JRC for breakfast after which we were taken to the Para sailing ground Ansh Kumar Dubey was also there with us. Having reached there, children were divided into two groups, 10 years and above, and 10 years and below. The group of children who were above 10 years were briefed by a Naik for about five minutes after which we were given a demo by another Naik who himself was doing this activity for the very first time. I was support to go first, but Maj Rao asked if someone had done Parasailing before and Ansh said he had so Maj Rao asked him to go first. Ansh complained about the equipment but he was reassured that this was also used in Para sailing. When the Naik who was getting Ansh ready he asked if he felt comfortable in the harness and Ansh asked him to adjust it again.

The takeoff was smooth but he had been in the air for a very short time when there was a jerk in the line and Ansh’s grip on the rope was loosened. His hands become completely free. He

flipped backwards 180 degree and slipped out of his harness. He fell face down to the ground. At first he was struggling in the air but halfway down he become limp. The children were asked to stay back as all the officers rushed to him and surrounded him. He was put on a stretcher but later removed from it as the stretcher did not fit in the gypsy that was there in place of the ambulance. The event was called off immediately. The prime mover vehicle was a 2.5 ton truck which is a covered vehicle. There was no proper ambulance or proper equipment for first aid in case of an accident.

Later in the afternoon we all were addressed by the senior officer, and the camp was, extended for three more days and the children were sent to Hempur, approximately 3-4 hours from Bareilly. During these three days maximum entertain activities were organized.

The above statement has been written by me in my own handwriting and I will stand by it. There is no lie in it.”

16. This Court does not wish to comment on the above statement but would like to observe that the evidence of this witness did not receive adequate attention at the hands of the COI. She was undoubtedly an important witness. Even to discard the evidence there had to be some discussion and reasons. It is not merely a matter of numbers of witness speaking about an incident but the quality of the evidence. Viewed from this angle, and in light of the statement of the witness subsequently given to the Petitioner,

the basic approach of the COI to the evidence of Ms. Bajpai appears flawed.

17. The sister of Ansh Kumar Dubey was a crucial eye-witness. Merely because she may have been traumatized soon after the incident, was not a good reason not to examine her even if it were some time after the incident. Likewise, not associating the parents of the deceased and parents of some of the other children who participated in the event renders the basic approach of the COI flawed. After all, the purpose of the COI was to find out how the mishap occurred. The evidence of every person who may have been present or who may have described it to another (like a participating child to her or his parent) would constitute a critical input.

18. The report of the COI does not show that it analysed the evidence in any great detail or drew the correct conclusion. One sample is the answer given by Respondent No. 12, Lokesh Kumar. When the COI asked him whether he had briefed the children about the safety pins, his answer was:

“Ans-17 Time allotted for the briefing was 5 to 7 minutes only. Therefore I gave briefing of main items and procedure which is of concern and importance to the children. Safety pin is an additional safety measure and it is for the trainer to ensure it at time of fixing the harness; which we have done. Thus telling the children about safety pin or any such items/issues is not

read within given time of 5 to 7 minutes as the theory class otherwise requires 4 days time.”

19. Then there is the noting in the medical case sheet of the Military Hospital at Bareilly where Ansh Kumar Dubey was brought at around 7.15 am on 8th June 2007 declared dead on arrival. Obviously the officer who accompanied the child narrated how the incident occurred to the Doctor who noted that “today during parasailing training at about 0645 hrs the retaining harness allegedly opened and the boy fell to ground from a height of about 100 feet.”

20. These may be separate pieces of evidence but their importance in reconstructing the sequence of events on 8th June 2007 was not correctly appreciated by the COI. The inescapable conclusion is that the COI failed to record the statements of witnesses who were present at the event and further failed to correctly appreciate the evidence on record. It is also significant that Lt. Col. Sanjay Bajpai wrote to the Petitioner on 11th January 2009 specifically disagreeing with some of the paragraphs of the Report of the COI. These are matters which deserve the attention of the COI. The relevance of the log book regarding the use of the parasailing equipment will also be required to be considered by the COI.

21. The indemnity bond given by the Petitioner's husband, who is a serving officer on 30th May 2007, may be relevant to the claim for damages but does not obviate a proper inquiry into the incident and the fixing of responsibility on those concerned with ensuring that all reasonable measures of safety for the parasailing event. Moreover as the Petitioner does not press the relief of compensation in this petition, the indemnity bond does not come in the way of the other reliefs prayed for in the petition.

22. The contention that the reconvening of the COI and the report that will be submitted by it will prejudice the criminal proceedings against Respondents 6 to 12 is misconceived inasmuch as the two proceedings are independent of each other. The effect that the report of the COI will have is for the court seized of the criminal proceedings to consider.

23. For the aforementioned reasons, the analysis and the findings rendered in the Report submitted on 2nd July 2007 by the COI convened on 8th June 2007 are hereby set aside. It is, however, clarified that the recommendations made by the COI in para 89 about the measures to prevent mishaps like the one that formed the subject matter of inquiry would remain. The evidence already recorded by the COI would also remain. In addition to the evidence already available on record, which will be looked into afresh by the COI

which will be reconvened in terms of this order, the COI will also take on record the statements of Ms. Roopali Bajaj, Ms. Zarah Khan and Ms. Radha Chaudhary that have been produced by the Petitioner along with this petition. The COI will give a further opportunity for any further evidence to be produced before it by the Petitioner and others in the form of sworn affidavits for which it will issue a public notice. The reconvened COI will give thirty days' time for the purpose. The COI can devise a flexible procedure to further examine any of the deponents of the affidavits by itself or by appointing commissioners. This exercise shall be completed by the reconvened COI within a period of three months after it re-assembles pursuant to the fresh convening order.

24. While this Court does not wish to express any view on the legality of the order dated 8th June 2007 convening the COI, it is advisable that while issuing a fresh convening order, the members of the COI are drawn entirely from outside the JRC Bareilly.

The DV Ban

25. Counsel for the Petitioner has stressed the need for Respondent No. 3 to implement its Notification dated 11th May 2005 and pass appropriate orders enforcing the DV ban on the officers against whom the charge sheet has

been filed in the criminal proceedings. In the counter affidavit filed by Respondents 1 to 3, there is no satisfactory reply except stating that “the action does not qualify for imposition of disciplinary and vigilance ban as per provision on the subject”. The criminal case which is the subject matter of the proceedings in CrI. MA 33936 of 2008 in the Allahabad High Court is independent of the proceedings before the COI. However, the fact that such a charge sheet has been filed is relevant for the purposes of examining whether a DV ban requires to be imposed. As long as there is such a charge sheet, Respondents 1 to 3 cannot avoid taking a decision on whether a DV ban is called for. Accordingly it is directed that the Respondents will take a decision on whether a DV ban in terms of the Notification dated 11th May 2005 ought to be imposed on all or any of the Respondents against whom the charge sheet has been filed. This decision shall be taken within a period of one month from today. A copy of the decision so taken will be communicated to the Petitioner within a further period of two weeks thereafter.

26. The writ petition is disposed of with the above directions.

S. MURALIDHAR, J

MAY 3, 2011
preeti/akg