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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment reserved on : 21.10.2016

Judgment delivered on : 03.11.2016

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W.P.(C) 1170/2007

URMILA DEVI

..... Petitioner

Through Ms. Aruna Mehta, Advocate

versus

MCD & ORS.

..... Respondents

Through Ms. Jyoti Taneja, Advocate for
GNCTD

+

W.P.(C) 1172/2007

MD.RAFIQUE & ORS.

..... Petitioners

Through Ms. Aruna Mehta, Advocate

versus

MCD & ORS.

..... Respondents

Through Ms. Jyoti Taneja, Advocate for
GNCTD

+

W.P.(C) 1176/2007

LAXMI NARAYAN & ORS.

..... Petitioners

Through Ms. Aruna Mehta, Advocate

versus

MCD & ORS.

..... Respondents

Through Ms. Jyoti Taneja, Advocate for
GNCTD

+

W.P.(C) 1177/2007

AMAR SINGH & ORS.

..... Petitioners

Through Ms. Aruna Mehta, Advocate

versus

MCD & ORS.

..... Respondents

Through Ms. Jyoti Taneja, Advocate for
GNCTD

+ W.P.(C) 1178/2007

PRATAP & ORS.

..... Petitioners

Through Ms. Aruna Mehta, Advocate

versus

MCD & ORS.

..... Respondents

Through Ms. Jyoti Taneja, Advocate for
GNCTD

CORAM:

HON'BLE MS. JUSTICE INDERMEET KAUR

INDERMEET KAUR, J.

These are five unfortunate incidents which had taken place with hapless victims. All these petitions raise a common question of law and shall accordingly be taken up together.

Facts of each case are distinct and are enumerated herein as under:

W.P.(C) 1170/2007

Petitioner Urmila Devi is the wife of Lalu Chauhan. The ganda nala in the area of Mangolpuri was uncovered, and there was no wall or barricading informing the residents of the area that this particular area was unsafe. The

earth near this ganda nala was slippery due to the negligent act of the respondent who had not performed their duty in maintaining the ganda nala. This ganda nala is situated in a thickly populated area. On 22.6.2005 when the deceased was coming back from the market he saw two small children drowning in the sewerage system as their rickshaw had disbalanced. In an attempt to rescue them he jumped into the ganda nala and managed to save one child namely Rahul. There was extreme filth and gases in the ganda nala. The deceased Lalu Chauhan (aged 25) along with the second child Sandeep, however succumbed to their death. The deceased was taken to Sanjay Gandhi Memorial Hospital where the doctor declared him dead. FIR was not registered deliberately by the police. The deceased was doing business of rickshaw pulling and earning Rs.5000/- per month. He was the only bread earner of his family. Rs.20,000/- was spent on his last rites. Had he lived his full life he would have supported his family and would have earned Rs.20,00,000/- in his life time. The wife of the deceased is entitled to be compensated as the negligent act of the respondent had led to the death of her husband.

W.P.(C) 1176/2007

This is a connected petition along with WP(C) 1170/2007. The child Sandeep who had succumbed to his injuries was the victim in the instant case.

This petition has been filed by the parents of the deceased namely Laxmi Narain and Leela Devi. Sandeep was 15 years of age at the time of his death. In this petition, it has been reiterated that the ganda nala in front of residential block did not contain any warning that it was uncovered. The earth near the sewerage system was slippery; this was because of the negligent act of the respondent. On the fateful day i.e. 22.6.2005 when Sandeep along with his friend Rahul was coming back in a rickshaw, the rickshaw got disbalanced; Sandeep and Rahul fell into the ganda nala which was filled with filth and gases. Sandeep was taken to the Sanjay Gandhi Memorial Hospital where the doctor declared him dead. The parents of the deceased spent Rs.20,000/- on his last rites. Had he lived his full life he would have qualified as a software engineer and would have supported his family up to the tune of Rs.20,00,000/-. Compensation has accordingly been claimed.

W.P.(C) 1172/2007

Mohd. Rafique and Bibi Ahmedi are the unfortunate parents of their 4 year child namely Niyazuddin. There was a ganda nala in front of their residential block. It was uncovered. No safety guards procedure had been undertaken by the respondent and this uncovered sewerage system had led to the unfortunate death of Niyazuddin (4 year old) as the earth near the

sewerage system was slippery. On 22.3.2005 when Niyazuddin along with his two brothers was coming back on a rickshaw, the rickshaw got disbalanced and the victim Niyazuddin fell into the drain. He was taken to the Sanjay Gandhi Memorial Hospital where the doctor declared him dead. FIR was not registered. Rs.20,000/- were spent on his last rites. The parents of the deceased wanted to make him an Engineer. Had the victim lived his full life he would have supported his family to the tune of Rs.20,00,000/-. Compensation has been claimed.

W.P.(C) 1177/2007

This petition has been filed by Amar Singh and Geeta, the parents of baby Dolly aged 4 years. There was a manhole in front of Raja Garden; lid was not placed upon the manhole; it was uncovered. This manhole is situated in a thickly populated area and children play and pass through this area; no safety guards have been deputed by the respondent. The earth near the manhole was slippery because of the negligent act of the respondent. Baby Dolly along with her brother Raju were playing near the said manhole; she unfortunately slipped inside the manhole. The manhole was filled with filth, water and there were gases emanating from it. Dolly died due to asphyxia. Had the deceased lived her full life, her aim was to become a teacher, she would have supported the petitioners up to the tune of

Rs.15,00,000/-. Compensation has been claimed.

WP(C) 1178/2007

The petitioners before this Court are Pratap Singh and Laxmi Devi, the parents of deceased Ganesh, aged 12 years who had died unfortunately by slipping into the ganda nala. This was on 07.8.2006. The deceased was playing along with other children near the said ganda nala which was in front of a thickly populated residential area; it was not barricaded and there was no safety signs informing the children that it was not safe to go near the ganda nala. The child Ganesh slipped and fell into the ganda nala while he was playing. The ganda nala was filled with filth and gases. The child died due to asphyxia. The family of the child spent 20,000/- on his last rites. His aim was to become a software engineer. Had he lived his full life he would have supported his family to the tune of Rs.20,00,000/-.

On behalf of the petitioners, learned counsel for petitioners has addressed common arguments. Her submission is that the facts are not disputed. They are admitted facts. It is admitted in all these cases that the death of the victims had occurred. It is admitted that these deaths had occurred by falling into the ganda nala or the manhole which the statutory bodies had to maintain and look after; the ganda nala and the area was covered with filth and gases; the fact that there was no safety guards

informing the innocent children about the danger of coming near the ganda nala is not disputed; the manhole where the death of Baby Dolly had occurred was also uncovered. All the victims had died because of the negligence on the part of the respondents.

On the rescue operation which had been conducted by Lalu Chauhan in WP(C) 1170/2007, learned counsel for the petitioner submits that a rescue case even otherwise has to be treated differently; it stand on a higher pedestal. In fact following the application of the doctrine of *volenti non fit injuria* i.e. where a person voluntarily rescues somebody from an imminent danger created by the wrongful act of the opposite party he cannot be met with the defence of *volenti non fit injuria*.

Learned counsel for the petitioner has also placed reliance upon a catena of judgments to support her arguments; submission being that in all these matters, the Court had thought it fit to grant compensation to the petitioners.

DEFENCE IN ALL THE WRIT PETITIONS

A common defence has been adopted by the respondents. It is stated that the FIR was not registered in these cases (except one) at the asking of the family of the petitioners. The dead bodies of the deceased were handed over to their family without post mortem. It was denied that the police had

hushed up the case. It is admitted that the death of the deceased persons was very unfortunate. It has been disputed that question of facts have arisen and the same cannot be taken care of in a writ petition.

Arguments have been heard. Record has been perused.

There is a plethora of case laws which has developed on this subject. In Kishan Lal Vs. Govt. of NCT of Delhi MANU/DE/8177/2007 there was a case of a 7 year old child falling into an open manhole. The Bench of this Court had held that the respondent/MCD had failed to demonstrate how death could have reasonably happened without negligence on its part; the cause of death was opined to be asphyxia which was a result of drowning; the factum that the dead body was recovered from the open manhole was admitted; the fact that this manhole was uncovered was admitted, the fact that it is the duty of the municipal bodies to maintain the manhole and keep it covered is also an admitted fact. In these circumstances, the plea of contributory negligence had been negated.

In Gupalpur Victim Association Vs. Delhi Jal Board and Ors. WP(C) 5027/2010, the Division Bench of this Court had held that where the four children who were playing near a vacant land drowned in a pit situated in the vacant land, it was a clear case of negligence qua the statutory Authority i.e.

the Delhi Jal Board; there was no proper fencing and no prohibiting sign was placed in that area; the Court was of the view that it was obligatory on the part of the Delhi Jal Board to have ensured that nobody enters in that area but no care had been taken. Vicarious liability on the State and the Delhi Jal Board has been upheld.

On the question as to whether factual disputes can be raised in a writ petition and whether questions of fact have in fact arisen in the instant case, the Apex Court in Century Spinning and Manufacturing Co. Ltd. Vs. Ulhasnagar Municipal Council (1970) 1 SCC held as under:

“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.”

In ABL International Ltd. and Another Vs. Export Credit Gurantee Corporation of India Ltd. and Others (2004) 3 SCC 553 after referring to the decision of Century Spinning (supra) a two Bench of this Court had opined as follows:

“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 question 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 involved some disputed questions of fact.”

FACTS OF EACH CASE:

WP(C) 1170/2007

Lalu Chauhan aged 25 years succumbed to his death. He was in a rescue operation trying to save two children who had fallen into the ganda nala in his presence as the mud in that area was slippery; the rickshaw got disbalanced because of this slippery mud; the children fell into the ganda nala which was filled with filth and gases. Lalu Chauhan managed to save one child Rahul but he along with the second child Sandeep had succumbed to his injuries. The fact that Lalu Chauhan had died in the aforementioned manner was not in dispute. It is not in dispute that in the course of this rescue operation he had succumbed to his death. This sewer drain/ganda nala had no barricading informing the residents that this area was unsafe.

The Municipal Corporation of Delhi had been deleted because it was brought to the notice of the Court that it was the Government of NCT of Delhi through its Irrigation and Flood Control Department which would be

liable. Pursuant to an order of this Court, the Government of NCT of Delhi through its Irrigation and Flood Control Department was impleaded as respondent no.2. They have filed a counter affidavit. The counter affidavit of respondent no.2 states that display boards informing the public not to go beyond the guard wall were erected at suitable places. However, no documents/photographs have been placed on record to substantiate this submission. The other submission which has been made is to the effect that it appears that the rickshaw which was carrying the children was also carrying goods which had led to its imbalance. At the cost of repetition, there was no document to substantiate this submission. The rejoinder filed by the petitioner had denied this submission. It had denied that the rickshaw was carrying any goods. It was stated that it was the duty of the public/statutory bodies to clean the road and ensure that there are no pits and trenches on the road due to which the rickshaw had got disbalanced.

In the present case, it is established that the factum of the deceased having fallen into the sewer drain was qua the negligence which is to be imputed to respondent no.2 as even as per the postmortem report death was due to asphyxia. The photographs filed by the petitioner clearly show that there was no barricading on the sewer walls; it was broken at various points.

Liability of respondent no.2 cannot be ruled out. Respondent no.2 is liable for this unfortunate incident.

W.P.(C) 1176/2007

The victim in this case was 15 year old Sandeep. This petition is in fact connected with W.P.(C) 1170/2007. In W.P.(C) 1170/2007 Lalu Chand was the person who had tried to save Sandeep but both of them succumbed to their death. The facts of their cases are identical. Sandeep had fallen from the rickshaw into the ganda nala which was filled with filth and gases. He was taken to Sanjay Gandhi Memorial Hospital where he was declared dead.

In the instant case as well, the MCD had made a submission that it was the Government of NCT of Delhi through its Irrigation and Flood Control Department which would be liable. Counter affidavit has been filed by them. At the cost of repetition, there is nothing on record to substantiate their stand that there was a Board warning the public not to enter into the aforementioned area. A bald submission has been made that the rickshaw which was carrying the children was also carrying goods which had led to its disbalance.

The rejoinder filed by the petitioner had denied this submission that photographs filed in the connected WP(C) 1170/2007 substantiate the stand

of the petitioner.

Liability of respondent no. 2 is unequivocal.

W.P.(C) 1172/2007

The unfortunate death of Niyazuddin (4 years old) had taken place pursuant to his falling into the ganda nala while he was travelling on a rickshaw and the rickshaw got disbalanced. He was taken to the Sanjay Gandhi Memorial Hospital where he was declared dead.

The MCD had shaken off its liability. It has been brought to the notice of this Court that the Delhi Government through its Irrigation and Flood Control Department would be responsible for the maintenance of the ganda nala. An identical counter affidavit in the instant case has also been filed. It is stated that the rickshaw was plying with goods. The submission in the counter affidavit is vague. There is no positive averment that the rickshaw was in fact carrying goods. This was specifically denied by the petitioner in the rejoinder. There was also nothing to substantiate the stand of the respondent that there were any display boards on the site warning the children not to go in this prohibited area as it was containing a ganda nala where such like incident could have taken place.

Liability of respondent no.2 is unequivocal.

W.P.(C) 1177/2007

The 4 year old girl child namely Dolly had succumbed to her death. She had fallen into a manhole. The fact that the manhole was uncovered and did not contain a lid was admitted. Her body was removed from the manhole. An FIR had also been registered under Section 304A of the IPC. The inquest proceedings had also affirmed that the death had occurred due to the victim falling into the manhole.

Counter affidavit of respondent no.2 i.e. the Delhi Police admits that the manhole did not have a cover and the girl fell into the manhole. The stand of respondent no.1/MCD was that the manhole falls within the jurisdiction of the Delhi Jal Board, who have to look after this site. The Delhi Jal Board has been impleaded as respondent no.3. Their counter affidavit has also been perused. Their stand is that on the date of the incident it was brought to their notice that the residents of that area were using the PWD land under the flyover as dumping ground/dustbin. MLA (Mr.Ramesh Lamba) of that area about 10 days ago had asked the PWD to clean up the area; the PWD had not bothered to intimate the Delhi Jal Board about the damaged manhole. The custodian of this land is PWD. It was not a play ground. It was the duty of the PWD to inform the Delhi Jal Board to repair the manhole.

Counter affidavit has been filed by PWD. Submission in the counter affidavit is that it was in fact the duty of the Delhi Jal Board to maintain the manhole. The stand of Delhi Jal Board being that it was the PWD who should have informed them of the non-maintenance of the manhole.

This appears to be wholly unjustifiable; a statutory body does not have to be informed of its duty; it was an obligation on the part of the statutory body to perform its duties. It does not lie in their mouth to say that somebody had to inform them about the non-maintenance of the manhole at the site. This is not a justifiable explanation.

An FIR had been registered; the postmortem of the deceased had opined the cause of death as asphyxia liability of respondent no.3 (DJB) is clear and unequivocal.

W.P.(C) 1178/2007

The victim in the case was a 12 year old child named Ganesh. He slipped into the ganda nala which was filled with gases and filth which had led to his death. He had died because of asphyxia. There was no warning sign or barricading informing the children not to play in that prohibited zone.

The counter affidavit filed by respondent no.1/MCD was to the effect that it was the Government of NCT of Delhi through its Irrigation and Flood Control Department which would be responsible. The MCD was

accordingly deleted.

The counter affidavit of respondent no.2/Delhi Police informs this Court that the dead body of two children had been fished out from the ganda nala which included Ganesh. The factum that he had succumbed to his death by falling into the ganda nala is admitted.

Liability of respondent no. 3 is clear.

The question which now arises for decision is, what is the quantum of compensation that each of the petitioners are entitled to? The age of the deceased in each of the cases has not been disputed. However, the proof of the income of the dependents/parents of the victim has not been disclosed. In the absence of proof of the same it would be appropriate to apply the principles as laid down in the Motor Vehicles Act, 1988. The law has been laid down by the Apex Court on this aspect.

In Manju Devi Vs. Mushafir Paswan VII (2005) SLT 257, the Apex Court had awarded compensation of Rs.2, 25,000/- in respect of the death of a 13 year old boy by applying multiplier and taking his notional income as Rs.15,000/- per annum which was as per the second Schedule of the of the Motor Vehicles Act. The Apex Court was of the view that as per the second Schedule since he was a non-earning person Rs.15,000/- was taken as his

annual income. In R.K.Malik vs. Kiran 2009 (8) Scale 451, the Apex Court was of the view that claimants were also to be entitled to compensation of Rs.75,000/- towards future prospects of such an unearning child; they were also entitled to non-pecuniary damages of Rs.75,000/-. Thus, the total compensation to which the claimants were entitled were held to be Rs.3,75,000/-(Rs.15,000/-x15+Rs.75,000/- towards future prospects +Rs.75,000/- as non-pecuniary damages).

RELIEF/COMPENSATION:

W.P.(C) 1170/2007

There is no proof of the income of the deceased. He was 25 years. Taking the minimum wages, as notified by the Government National Capital Territory of Delhi (Labour Department) on 01.02.2005, for an unskilled worker was Rs.3044/-. As per the judgment of Sarla Verma Vs. Delhi Transport Corporation AIR 2009 SC 3104, where the deceased was married and had 2 or 3 dependents as was so in the instant case (1/3rd of the income has to be deducted towards expenses) the multiplier of 17 would be applied as the victim in this case was aged 25 years (as specified in the second column of Schedule–II of the Motor Vehicles Act).

The computation of compensation qua the petitioner is as under:

$\text{Rs.}3044/- (\text{minimum wage}) - \text{Rs.}1014/- (1/3^{\text{rd}}) = \text{Rs.}2030/- \times 12 = \text{Rs.}24360/- \times 17 = 414120 + \text{Rs.}75,000/- (\text{future prospects} + \text{Rs.}75,000/- (\text{non-pecuniary damages}) = \text{Rs.}5,64,120/-.$

The petitioner (wife of the victim) is entitled to a compensation of Rs.5,64,120/-.

W.P.(C) 1176/2007

The victim in this case was 15 years. As per calculation, the petitioners (the parents of the victim) in the present case are entitled to Rs.3,75,000/- (Rs.15,000/-x 15 + Rs.75,000/- towards future prospects +Rs.75,000/- as non-pecuniary damages).

W.P.(C) 1172/2007

The victim in this case was 4 years. As per calculation, the petitioners (the parents of the victim) are entitled to Rs.3,75,000/- (Rs.15,000/-x 15 + Rs.75,000/- towards future prospects +Rs.75,000/- as non-pecuniary damages).

W.P.(C) 1177/2007

The victim in this case was 4 years. As per calculation, the petitioners (the parents of the victim) in the present case are entitled to Rs.3,75,000/- (Rs.15,000/-x 15 + Rs.75,000/- towards future prospects +Rs.75,000/- as non-pecuniary damages).

W.P.(C) 1178/2007

The victim in this case was 12 years. As per calculation, the petitioners (the parents of the victim) are entitled to Rs.3,75,000/- (Rs.15,000/-x 15 + Rs.75,000/- towards future prospects +Rs.75,000/- as non-pecuniary damages).

Petitions disposed of.

NOVEMBER 3rd, 2016
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INDERMEET KAUR, J

