

THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 15.04.2015

+ **W.P.(C) 2327/2008**

RADHEY SHYAM AND ORS.

.....Petitioners

versus

GOVT. OF N.C.T. OF DELHI AND ANR.

..... Respondents

AND

+ **W.P.(C) 7400/2008**

NAVEEN SHARMA & ORS.

.....Petitioners

versus

GOVT. OF N.C.T. OF DELHI

..... Respondent

Advocates who appeared in these cases:

For the Petitioners : Ms Aruna Mehta.

For the Respondents : Mr Vijay Chandra & Ms Sonia Sharma for
R-2 in W.P.(C) 2327/2008.

Ms Nandita Rao with Mr Srilina Roy with
Mr R. K. Saxena, AE Irrigation Department
in W.P.(C) 7400/2008.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. These petitions relate to two separate tragic incidents, which resulted in six minor children - two children in one incident and four in another – losing their lives by drowning in open drains. The parents of the deceased children have filed the present petitions, *inter alia*, alleging that the contesting respondent (Govt. of NCT, Irrigation and Flood Control

Department) have been negligent in performing their duty and seeking compensation for their loss.

2. On 17.05.2007, Amit aged about 11 years; Jitender aged about 12 years; Surjit aged about 11 years; and Firoz aged about 13 years, all students of a Government School, in Uttam Nagar were playing on the left bank of an open drain near Nangli Vihar Extension, New Delhi. According to the petitioners, two children slipped on the slope of the drain and slid into it. Two other children endeavored to rescue them but their efforts were in vain. They also drowned in the process. Two other children, who were standing on the banks, screamed for help. The hue and cry led people from the surrounding area to rush to the site and extricate the bodies from the drain. Apparently, several persons witnessed this incident and have given their statements. The statements also indicate that the police authorities took possession of the bodies of the four children as well as their bicycles.

3. The drain in question (i.e. the drain in which the children drowned) is a supplementary drain and runs parallel to the main drain - Najafgarh Nallah.

4. The parents of the deceased children claim a compensation for a sum of ₹20,00,000/- for loss of each child. During the course of the arguments, the learned counsel for the petitioners has restricted the said claim to a sum of ₹7,04,344/- for each child along with interest @7.5% per annum from the date of petition till its realisation.

5. In another incident, which happened less than two months thereafter, Gaurav and Guddu, two boys aged 12 and 11 years respectively, were

playing with a football on a piece of land adjacent to an open drain at Chander Vihar. Both these children were students of Government Boys Sr. Sec. School, Uttam Nagar. According to the petitioners, Gaurav felt the need to urinate and therefore went near the drain to ease himself. It is asserted that it had rained the previous evening and this had made the embankment of the drain slippery; Gaurav slipped and slid into the drain. Guddu heard the distress cry and attempted to rescue Gaurav. This endeavour failed and in the process Guddu also slipped into the drain. Both the children drowned. The incident was reported to the police post Nihal Vihar PS Nangloi and a DD entry No.39 dated 10.07.2007 was made. In the post mortem report, the doctors opined that the cause of death is asphyxia by inhalation of fumes due to obstruction to air passage.

6. The above incident occurred at about 4 P.M. on 09.07.2007 at a distance of about 200 meters from Vikaspuri Bridge opposite Chander Vihar, New Delhi. This was within a few miles from the site of the tragic incident involving the four children. The drain in question (i.e the drain in which Guddu and Gaurav drowned) is also a supplementary drain, which runs parallel to the main drain - Najafgarh *Nallah*.

7. The report submitted by the Executive Engineer of the contesting respondent on 16.04.2010 in compliance with an order passed by this Court indicates that there is a thirty-four meter wide strip of land on the left bank of the supplementary drain at the place where the above incident involving Gaurav and Guddu had occurred. A nine feet high wall has been built 3.5 meters from the edge of the slope on the left embankment of the supplementary drain. At the material time, when the incident occurred, this

wall was not in existence and was built thereafter. However, a wall existed at a distance of about 28.3 meters from the edge of the slope; parts of that wall still exist at the site.

8. The parents of Gaurav and Guddu (petitioners in W.P.(C) 2327/2008) contend that the death of Gaurav and Guddu were caused due to negligence on the part of the officials of the contesting respondent as the supplementary drain in question was not properly fenced or covered and adequate safety measures had not been put in place to prevent the tragic incident. The parents of the four children (petitioner in W.P.(C)7400/2008) also make similar allegations.

9. The learned counsel for the petitioners contended that contesting respondent had failed to maintain their public duty for the safety of the people and, therefore, the petitioners are entitled for compensation. It was further contended that the essential facts are not disputed and, therefore, the principle of *res ipsa loquitur* ought to be followed and compensation awarded.

10. The contesting respondent contended that there was no negligence on their part. The tracts of land on the left bank of the supplementary drains, where the children were playing, had been bounded by a boundary wall. Thus, the contesting respondent had taken adequate measures to restrain open access to the pieces of land in question. In addition, the contesting respondent has also produced a cross section of the design of the drains, which indicates that the slopes on the bank were designed and constructed in a manner so as to provide a berm (a flat land) of a width of 2 meters to

break the gradient of the slope. Clearly, the berm would prevent any person from sliding directly from the top of the bank into the drain.

11. Both the tragic incidents, which occurred within a span of two months from each other, pertain to supplementary drains that were constructed parallel to the Najafgarh drain. The facts obtaining in both the cases and the issues involved are similar. Therefore, these petitions were taken up together. However, the arguments in W.P.(C) 2327/2008 were concluded earlier.

12. At the outset, it is important to note that the supplementary drains in question are not narrow sewers but are wide canals, the width of the bed of drains is approximately 42.2 meters. The contesting respondent claim that the drains in question run for a length of about 34.5 kms and are designed to bear a discharge of 5000 cusecs of water. It is also not disputed that the drains in question were constructed prior to most of the unauthorized colonies in the vicinity that mushroomed thereafter. It is also not disputed that tracks of flat land on the banks of the drains are bounded by boundary walls, although, the petitioners alleged that the same were in a state of disrepair.

13. It is stated that in the year 1998-99, the contesting respondent had taken up the work of fixing a barbed wire fence with a RCC post over the brick wall of 0.6 meters high along with left bank of the supplementary drain from RD 34500 meters to RD 31670 meters This covers the land on which the four children involved in the earlier incident, were stated to be playing. The contesting respondent also produced the Agreement Register,

which indicates that the work for fencing had been awarded and completed. The RCC posts over the wall are still in existence and visible in the photographs produced. In 2003-04, the boundary wall from RD 33360 meters to RD 34500 meters was constructed and the height of the brick wall was increased to 0.9 meters along with 1.2 meters high with fence. It is stated that this wall was in existence at the time when the incident involving the four children occurred.

14. The facts pertaining to the site where the incident involving the two children – Gaurav and Guddu, is also similar. A seven feet high boundary wall had been constructed which enclosed the piece of land where Gaurav and Guddu were supposedly playing on the fateful day. The contesting respondent had also taken steps to plant trees on the tracts of land which are situated between the boundary walls constructed and the top of the slope of the supplementary drain in question. In 2007, when the incidents took place, the distance between the boundary wall and the top left of the slope of supplementary drain was more than 28 meters (at the site of both the incidents).

15. The learned counsel for contesting respondent submits that the boundary wall of the land where four children were playing, had been breached at places and domestic animals were brought to graze on the plants, which had been planted to green the area. It was stated that the contesting respondent had also taken steps to repair the breaches in the wall/fence from time to time. It was submitted that the children – Amit and his friends – had apparently scaled the boundary wall and had trespassed on the said land. It was contended that the contesting respondent could not be

stated to be negligent and had been infact struggling to prevent trespass on the government land. The learned counsel for the contesting respondent (in W.P. (C) 2327/2008) had further submitted that Guddu and Gaurav had climbed over the seven feet high wall which was intact at the material time. And, they had not slipped as contended by the petitioners but attempted to swim in the drain.

16. The photographs produced by the contesting respondent clearly show the walls that were also in existence in the year 2007. A higher wall has now been constructed at the edge of the left embankment of the supplementary drains and the pieces of land where children were stated to be playing are now situated between the two walls – one constructed at the edge of the drain and the boundary wall that was in existence in 2007.

17. The supplementary drains in question belong to the Govt. of NCT and are maintained by the Irrigation and Floor Control Department. Indisputably, it is their primary responsibility to ensure that proper safety measures are put in place to ensure that accidents are avoided. It is also not in dispute that a boundary wall was constructed by the contesting respondent to prevent trespass on the public land. Whilst the contesting respondent insist that at the material time the wall was in existence and the children had scaled the wall, the petitioners dispute the same; they assert that the wall had fallen in disrepair and was breached at a number of places.

18. However, it is conceded that the boundary was well defined. The petitioners contend that open area in the city has shrunk and, therefore, children end up playing in any open area they find. It is further asserted that

the fact that children had been using the lands in question as their play ground was known to the concerned authorities and thus the children could not be considered as trespassers but licensees. The petitioners have relied upon the decision of this court in **Kumari Alka v. Union of India & Ors.:** **AIR 1993 Delhi 267** in support their contention, wherein this court had noted the following passage from Law of Torts by Salmond & Heuston (1987 edition):

“When an occupier habitually and knowingly acquiesces in the trespasses of children. These children cease to be trespassers and become licensees, and the occupier owes to them a certain duty of care and protection accordingly. In *Cooke v. Midland Great Western Railway of Ireland* the plaintiff was a child between four and five years of age who was injured while playing with his companions on a turntable on the defendant company's railway premises. The turntable was kept unlocked and was close to a public road. The company's employees knew that children were in the habit of entering on the premises from the road for the purpose of playing with the turntable but no precautions were taken by the company, either to exclude the children or to lock the turntable, so as to prevent it from being an instrument of mischief. It was held by the House of Lords that there was evidence for a jury of negligence on the part of the railway company -- not on the ground that there is any duty of care towards trespassing children, but on the ground that the habitual acquiescence of the company was sufficient evidence to entitle the jury to find that the plaintiff was not a trespasser, but was on the railway premises with the leave and license of the company.”

19. In my view, the facts in ***Kumari Alka*** (*supra*) are materially different from the facts of the present cases. In that case the child – a girl aged 6 years – resided along with her family in a residential quarter, which was attached to a telephone exchange. All the children played in the compound,

without any objection from any person. On the contrary it was expected of children to play in the compound as the residential quarters were an extended part of it. A room housing an electric pump for pumping water to the quarters had been constructed. The said room, which was supposed to be attended, was left open and unattended. This had attracted the child to walk into the room. She touched the belt of the pump, which was in operation at the material time, and received severe injuries. The defendants in the said suit contended that the child was not supposed to go into the room and the defendants did not owe any duty to trespassers. This contention was not accepted. It was apparent that the children were expected to play in the compound and, in fact, were permitted to do so. This obliged the defendants to keep the grounds safe and leaving the pump room open and unattended did not conform to the standards of care that were required. It is in this context that the court observed that the children were not trespassers but licensees. The decision in ***Cooke v. Midland Great Western Railway of Ireland*** (*supra*) is also wholly inapplicable as in that case, the concerned owners knew that children played with the turntable and no precaution was taken by them to either exclude the children from the premises or lock the turntable.

20. In the present case, the contesting respondent had constructed a boundary wall and efforts were taken to exclude all from accessing the public lands in question; however, the same were in vain. Thus, the children were, undoubtedly, trespassing on public land. However, it is undisputable that open fields for children to play in have all but disappeared; they have been a casualty to the city's ever growing

population's voracious appetite for land. Thus, the contesting respondent ought to have foreseen the possibility of trespass by children and this knowledge could be imputed to the contesting respondent. The report annexed with the supplementary affidavit filed in W.P.(C) 7400 of 2008 also indicates that the contesting respondent was aware that the wall constructed to enclose the tract of land near where Amit and his friends met their tragic end, had been broken at places and barbed wire had been taken away. The report also indicates that the tract of land in question was being trespassed upon and was also used by children for their "play activities".

21. The learned counsel for the contesting respondent contended that it is well settled that an owner does not owe a duty to take reasonable care for protection of a trespasser. The decision in **Cherubin Gregory vs. State of Bihar**: AIR 1964 SC 205 supports this contention as the Supreme Court had held as under:-

"7. A trespasser is not an outlaw, a *caput lupinem*. The mere fact that the person entering a land is a trespasser does not entitle the owner or occupier to inflict on him personal injury by direct violence and the same principle would govern the infliction of injury by indirectly doing something on the land the effect of which he must know was likely to cause serious injury to the trespasser. Thus in England it has been held that one who sets springguns to shoot at trespassers is guilty of a tort and that the person injured is entitled to recover. The laying of such a trap, and there is little difference between the spring-gun which was the trap with which the English Courts had to deal and the naked live wire in the present case, is in truth "an arrangement to shoot a man without personally firing a shot". It is, no doubt true that the trespasser enters the property at his own risk and the occupier owes no duty to take any reasonable care for his protection, but at the same time the occupier is not

entitled to do willfully acts such as set a trap or set a naked live wire with the deliberate intention of causing harm to trespassers or in reckless disregard of the presence of the trespassers. As we pointed out earlier, the voltage of the current fed into the wire precludes any contention that it was merely a reasonable precaution for the protection of private property. The position as to the obligation of occupiers towards trespassers has been neatly summarised by the Law Reform Committee of the United Kingdom in the following words:

“The trespasser enters entirely at his own risk, but the occupier must not set traps designed to do him bodily harm or to do any act calculated to do bodily harm to the trespasser whom he knows to be or who to his knowledge is likely to be on his premises. For example, he must not set man-traps or spring guns. This is no more than ordinary civilised behaviour.”

Judged in the light of these tests, it is clear that the point urged is wholly without merit.”

(emphasis supplied)

22. However, the law relating to torts is not static and must complement the ever-changing socio-economic scenario. In the current situation, several unauthorized colonies have mushroomed and a significant section of the city's population is living in dwelling units constructed on encroached land not meant for residential purposes. Certain encroachers and trespassers have also been accorded statutory protection against eviction. Given this situation, it is difficult to accept that the State would have no obligation to care towards certain trespassers.

23. Even if it is accepted that an occupier/owner of land does not owe a duty of care to a trespasser, clearly, the said rule would not be applicable for children. Children will be children. Their sense to discern what is

dangerous and hazardous is not completely developed. A civilized society must provide for due care of its children irrespective of whether they are trespassers or not. However, this does not mean that an occupier/owner of land should be indiscriminately held liable for any accident involving a minor even though he may not be responsible for it. In United States of America, the law has developed to provide an exception in the cases of trespassing by children. This exception is known as the doctrine of attractive nuisance. This exception to the general rule that an owner/occupier of land had no obligation towards trespassers, except a duty not to inflict harm, was carved out by the US Supreme Court as early as in 1873 in *Sioux City & Pacific Railroad v. Stout*: 84 U.S. (17 Wall.) 657 (1873). Under this doctrine an owner/occupier of land would be liable for harm caused to trespassing children if he knew or ought to have known that children being attracted to the condition or object on the land, would trespass; yet the owner/occupier had failed to take due care. This doctrine of attractive nuisance has been stated in Section 339 of the Restatement (Second) of Torts. This embodies the principles enunciated by judges in several cases spanning several decades. The said section reads as under:-

“A possessor of land is subject to liability for physical harm to children trespassing thereon caused by an artificial condition upon the land if

(a) the place where the condition exists is one upon which the possessor knows or has reason to know that children are likely to trespass, and

(b) the condition is one of which the possessor knows or has reason to know and which he [or she] realizes or should realize

will involve an unreasonable risk of death or serious bodily harm to such children, and

(c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it, and

(d) the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved, and

(e) the possessor fails to exercise reasonable care to eliminate the danger or otherwise to protect the children.”

24. In my view, the above articulates the guiding principles, which are relevant for determining whether an occupier/owner of a property has discharged his duty of due care. Undoubtedly, the contesting respondent would be aware that the children would be trespassing on the open tracts of land on the banks of the drain. The open spaces have reduced to such an extent that children are bound to seek out open spaces – wherever they may so find them – for their activities. However, in order to hold that the contesting respondent failed in their duty to take adequate care, it would be necessary to arrive at a conclusion that the supplementary drain in question provided an unreasonable risk of harm to the children and be that the children were of an age where they would not, by reason of their youth, realize the risk involved.

25. The learned counsel for the petitioners has referred to several decisions which involve persons falling into an open drain. In **Kishan Lal v. GNCT of Delhi**: W.P.(C) 5072-73/2005, decided on 03.07.2007, a body of a young child was found in a drain. It was concluded that the minor had died due to falling in a manhole which had been left uncovered. In **Delhi**

Jal Board v. Raj Kumar: 125 (2005) DLT 120, a Division Bench of this Court had upheld the decision of a Single Judge in awarding compensation in respect of a fatal accident that had been caused because the manhole cover was not placed on the surface level of the road but three inches below. A rider on a scooter had, while driving over the manhole, met with an accident and lost his life. In **Rakesh and Anr. v. GNCT of Delhi and Anr.:** W.P.(C) 11018-19/2006, decided on 10.04.2012 and **Matlum Ahmed & Anr. v. GNCT:** W.P. (C) 11020/2006, decided on 10.04.2012, the Court had found the Municipal Corporation to be negligent as a sewer and drain passing through a congested area were left uncovered and minors had lost their lives by falling into the said drains.

26. In my view, the aforesaid decisions would have no application in the given facts of this case as, admittedly, the supplementary drains in question are not akin to narrow sewers but are in the nature of wide canals, which are clearly visible. The bed of the drains in question is about 42 meters wide and the drains are designed to carry a discharge of about 5000 cusecs of water. These canals/drains do not run through a thorough fare but are bounded by wide tracts of open land. The test of negligence to be applied in respect of these supplementary drains would be similar to that which is required to be applied for rivers and canals which run through towns and cities. The contesting respondent had already taken steps to build a boundary wall. Despite the same, the children had found their way on to the land. The drains were plainly visible to the children. The fact that the drains were deep and contained a large volume of water would be common knowledge.

27. According to the contesting respondent, a berm (a flat land) of a width of 2 meters had been constructed to prevent anyone from directly sliding into the drain. The gradient above the berm was also not as steep as the gradient below the berm. Thus, according to the contesting respondent, adequate safety measures had been put in place to ensure that a person does not unwittingly fall inside the drain. It was, thus, stoutly contended that it was not possible for the children, to accidentally slide into the drain.

28. Looking at the photographs and the cross section of the design of the canal/supplementary drain, which is not disputed, I am inclined to accept the contention that it is unlikely for any person to accidentally slide into the canal. The doctrine of attractive nuisance may be applied only in cases where the owner/occupier of a property has failed to protect the children from a danger, which they are unlikely to be aware of. It stands to reason that the age of the children as well as the nature of the danger would be vital in determining whether the owner of the property has failed to discharge the burden of due care.

29. For an unsupervised infant aged below five years, most of the public places would be dangerous. However, as a child grows older, he/she does become aware of the risks involved in the environment. A child discovers very early in life that elements like fire and water are inherently dangerous. The standards of care that may be applied in case of a five year old infant would not be the same for an adolescent or a seventeen year old minor. Rivers, canals and lakes are inherently dangerous specially for someone who does not know swimming; however, it is not uncommon to see children and even adults, taking a plunge in such water bodies. Several

cities are established on banks of rivers and on seashores. Would the authorities be necessarily negligent, if they fail to cover or fence such water bodies? I think not. The safety measures that need to be put in place would depend on the facts of each situation. In the present case, the supplementary drains did not represent a danger, which the children would be unlikely to be aware of. The contesting respondent insist that a two meter wide berm had been constructed to break the gradient of the slope of the embankment of the drains as a safety measure to protect any person from accidentally sliding into the drain. Given the nature and size of the drain, this safety feature, in ordinary circumstances, would be sufficient to prevent any person from accidentally slipping into the drain.

30. In my view, the question of negligence on the part of contesting respondent would also have to be viewed in the context of whether the danger involved was plainly visible or concealed. In cases where a person permits a dangerous condition to persist, which is likely to catch others unaware, he could be accused to failing to discharge his obligations of due care. The danger must be unknown, concealed or hidden. This would, clearly, be the case where a manhole in a public area is left uncovered. This would act as a trap and is most certainly likely to injure and bring grief to a person who is caught unaware. In ***Delhi Jal Board v. Raj Kumar*** (*supra*), a Division Bench of this Court upheld the decision to award damages where the manhole cover on a public road was not in line with its surface. The person driving a scooter at about 9 p.m. drove over the manhole, which was three inches below the regular surface of the road and met with an accident. It is apparent that in this case the fact that the manhole cover was three

inches below the surface of the road presented a dangerous condition that the rider was not expected to perceive. Similarly, in the case of ***Kishan Lal*** (*supra*), this Court awarded compensation where a minor had fallen in an open manhole and expired. Clearly, drains and uncovered manholes in places where persons regularly visit present a dangerous condition, which is likely to cause harm to an unwary person.

31. Although, a canal or a river may be dangerous for anybody who attempts to swim in it or intermeddle with it, the same does not present a hidden or a concealed danger. Therefore, an inference that leaving the same uncovered or unfenced indicates lack of due care does not necessarily follow specially when the slopes of the canal have an inbuilt feature that prevents a person from accidentally slipping into the drain.

32. The learned counsel for the petitioners contended that doctrine of *res ipsa loquitur* is applicable in the present case and the fact that the children had expired by drowning in the said drains, indicated that the contesting respondent were negligent. The doctrine of *res ipsa loquitur* has been explained in Clerk & Lindsell on Torts (16th Edition at pages 568 and 569) as under:-

“Doctrine of *res ipsa loquitur*. The onus of proof, which lies on a many alleging negligence is, as pointed out, that he should establish his case by a preponderance of probabilities. This he will normally have to do by proving that the other party acted carelessly. Such evidence is not always forthcoming. It is possible, however, in certain cases for him to rely on the mere fact that something happened as affording prima facie evidence of want of due care on the other's part: "*res ipsa loquitur* is a principle which helps him to do so." In effect, therefore,

reliance on it is a confession by the plaintiff that he has no affirmative evidence of negligence. The classic statement of the circumstances in which he is able to do so is by Erle C.J.:

“There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.”

It is no more than a rule of evidence and states no principle of law. "This convenient and succinct formula," said Morris L.J., "possesses no magic qualities: nor has it any added virtue, other than that of brevity, merely because it is expressed in Latin," It is only a convenient label to apply to a set of circumstances in which a plaintiff proves a case so as to call for a rebuttal from the defendant, without having to allege and prove any specific act or omission on the part of the defendant. He merely proves a result, not any particular act or omission producing the result. The court hears only the plaintiffs side of the story, and if this makes it more probable than not that the occurrence was caused by the negligence of the defendant, the doctrine *res ipsa loquitur* is said to apply, and the plaintiff will be entitled to succeed unless the defendant by evidence rebuts that probability. It is not necessary for *res ipsa loquitur* to be specifically pleaded.”

33. In **Klaus Mittelbachert v. East India Hotels Ltd.**: 65 (1997) DLT 428 this court has explained the conditions for the principle of *res ipsa loquitur* to be applicable. The relevant passage from the said judgment reads as under:-

“Under the doctrine of *res ipsa loquitur* a plaintiff establishes a *prima facie* case of negligence where (1) it is not possible for him to prove precisely what was the relevant act or omission

which set in train the events leading to the accident, and (2) on the evidence as it stands at the relevant time it is more likely than not that the effective cause of the accident was some act or omission of the defendant or of someone for whom the defendant is responsible, which act or omission constitutes a failure to take proper care for the plaintiff's safety. There must be reasonable evidence of negligence. However, where the thing which causes the accident is shown to be under the management of the defendant or his employees, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of Explanation by the defendant, that the accident arose from want of care. Three conditions must be satisfied to attract applicability of *res ipsa loquitur* : (i) the accident must be of a kind which does not ordinarily occur in the absence of someone's negligence; (ii) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (iii) it must not have been due to any voluntary action or contribution on the part of the plaintiff. (See Ratanlal & Dhirajlal on Law of torts, edited by Justice G.P. Singh, 22nd edition 1992, pp 499-501 and the Law of Negligence by Dr Chakraborti, 1996 edition, pp 191-192.)”

34. Applying the aforesaid principles in the facts of this case, it is clear that the first condition is not met. Drowning of children are accidents that should not have ordinarily occurred. However, the accidents in question may have been a result of several reasons and not necessarily because of any inherent fault in the construction of the canal/drain or for want of safety features. The third condition that the accident must not have been due to any voluntary action or contribution on the part of the plaintiff, also cannot be concluded with certainty. It is true that the degree of care that is expected of an adult cannot be expected of a minor. However, it is incorrect to suggest that contributory negligence can never be imputed to a minor. The degree of care expected from a minor would have to be considered

taking into account the danger presented as well as the age of the minor. In *Kishan Lal* (*supra*), this court observed as under:

“23. Although as a rule contributory negligence cannot be negated whenever children are involved, it has definitely to be tempered with the condition that the degree of care to be expected from a child is entirely different to the degree of care that could be expected of a reasonable adult. So, there is some element of proportionality based on the age of the victim in arriving at the expected degree of care.”

35. The children were aged from 11 years to 13 years and cannot be stated to be of an age where they would have been completely oblivious of the dangers of drowning or not taking care of themselves in the immediate vicinity of a river like drain. The age of a minor would have a bearing to determine whether the child is incapable of exercising the attention, perception, knowledge, experience, intelligence, and judgment that are necessary for perceiving a risk and realizing its dangerous character. In this context, it is also important to note that the petitioners' case is that the children accidentally slipped and slid into the drain. Thus, it is not their case that the children were oblivious of the danger of entering the canal, but that children accidentally slipped. Surely, children aged 11 to 13 years would be expected to be careful in approaching a canal/drain, which they know to be dangerous.

36. In *Henson v. International Paper Co.*: 650 S.E. 2D 74, the Supreme Court of South Carolina, United States of America considered a case where a 10 year old child had fallen into a canal maintained by International Paper Company. The Canal runs for 27 miles through Georgetown County. Four boys entered the canal property using a dirt path and found a pipe, which

spanned over the canal. The boys used pipe to cross over to the either side of the canal where they found a cast net. One of the boys aged about 10 entered the water holding on to the cast net. He slipped and was swept away by the current. The Jury held that the child was guilty to a large extent (75%) and the defendant's negligence was only to a minor extent (25%). In other words, the court held that even taking into account the child's age and his instincts, he was expected to take care for self preservation and not enter the canal. The Supreme Court of South Carolina upheld the decision of the Trial Court and did not find any fault with the jury being charged to consider the deceased child's age, childish instincts, and proclivities in determining liability. The Supreme Court of South Carolina held that *"These charges captured the distinctive characteristics of an attractive nuisance claim"*.

37. The petitioners contended that Gaurav had gone to the drain to ease himself and had accidentally slipped in it. However, there is no credible material to support this hypothesis. In case of the incident involving four children, there are statements made by witnesses who stated that they had seen two children slipping and two other children following them to save them. However, the witnesses have not been cross examined.

38. In my view, the principle of *res ipsa loquitur* – which, essentially, is a rule of evidence - cannot be used to impute negligence on the part of the contesting respondent in the facts of this case.

39. In my view, the present case also throws up several disputed questions of facts. The petitioners have alleged that the boundary walls

constructed by the contesting respondent had broken down and in the state of disrepair. Thus, presenting an open unhindered access to the children. Contesting respondent dispute this. Concededly, contesting respondent cannot be held guilty for negligence if it found that as a matter of fact the boundary walls had been climbed over by the children to play on the tracts of land adjoining the banks of the canal. According to the petitioners, the land on the banks of the drains was slippery and this had resulted the children accidentally slipping into the drain. The contesting respondent on the other hand have shown a cross section diagram of the canal, which indicates that a 2 meter wide berm had been constructed to avoid any incident of a person directly slipping into the drain. Clearly, if the drain was constructed in a manner as asserted by the contesting respondent, the question of the children accidentally slipping into the drain, would not arise. Further, the contesting respondent having provided a safety structure could not be held to be negligent. The petitioners have canvassed that the principle of *res ipsa loquitur* applies and this would absolve them from affirmatively establishing negligence on the part of the contesting respondent. As indicated above the said principle cannot be applied to the facts of the present case and it would have been necessary for the petitioners to establish negligence on the part of the contesting respondent in order to claim any compensation in that respect.

40. It is well settled that the claim under Article 226 of Constitution of India would not be maintainable in the event of disputed questions of fact and a clear denial of any tortuous liability by the contesting respondent and the claim would be maintainable only when there is negligence on the face

of it. The Supreme Court in **T.N. Electricity Board v. Sumathi: (2000) 4 SCC 543** held as under:-

“10. In view of the clear proposition of law laid by this Court in *Sukamani Das case* [(1999) 7 SCC 298] when a disputed question of fact arises and there is clear denial of any tortious liability remedy under Article 226 of the Constitution may not be proper. However, it cannot be understood as laying a law that in every case of tortious liability recourse must be had to a suit. When there is negligence on the face of it and infringement of Article 21 is there it cannot be said that there will be any bar to proceed under Article 226 of the Constitution.”

41. The Supreme Court in **Chairman, Grid Corpn. of Orissa Ltd. (Gridco) v. Sukamani Das: (1999) 7 SCC 298** held that in all the actions of tort, claimants were required to establish the negligence first and foremost and in view of the specific defences being raised and disputed questions of fact, the claim under Article 226 of the Constitution of India would not be maintainable. The relevant portion of the said judgment reads as under:-

“6. In our opinion, the High Court committed an error in entertaining the writ petitions even though they were not fit cases for exercising power under Article 226 of the Constitution. The High Court went wrong in proceeding on the basis that as the deaths had taken place because of electrocution as a result of the deceased coming into contact with snapped live wires of the electric transmission lines of the appellants, that “admittedly/prima facie amounted to negligence on the part of the appellants”. The High Court failed to appreciate that all these cases were actions in tort and negligence was required to be established firstly by the claimants. The mere fact that the wire of the electric transmission line belonging to Appellant 1 had snapped and the deceased had come in contact with it and had died was not by itself sufficient for awarding compensation. It also required to be examined whether the wire

had snapped as a result of any negligence of the appellants and under which circumstances the deceased had come in contact with the wire. In view of the specific defences raised by the appellants in each of these cases they deserved an opportunity to prove that proper care and precautions were taken in maintaining the transmission lines and yet the wires had snapped because of circumstances beyond their control or unauthorised intervention of third parties or that the deceased had not died in the manner stated by the petitioners. These questions could not have been decided properly on the basis of affidavits only. It is the settled legal position that where disputed questions of facts are involved a petition under Article 226 of the Constitution is not a proper remedy. The High Court has not and could not have held that the disputes in these cases were raised for the sake of raising them and that there was no substance therein. The High Court should have directed the writ petitioners to approach the civil court as it was done in OJC No. 5229 of 1995.”

(emphasis supplied)

42. The Supreme Court in **Subhashree Das v. State of Orissa: (2012) 9 SCC 729** held as under:-

“7. Having given due consideration to the contention advanced at the hands of the learned counsel for the appellant, we are of the view that the claim of the appellant under Article 226 of the Constitution of India before the High Court of Orissa, could not have been determined on the basis of disputed facts. In a case where a petitioner/appellant wishes to press his/her claim before a High Court under Article 226 of the Constitution of India, the claim raised by such a petitioner/appellant must be determined on the basis of the factual position acknowledged by the respondent. This is so because a High Court in exercise of jurisdiction under Article 226 of the Constitution of India, would ordinarily not adjudicate a matter, where the foundational facts are disputed. It is, therefore, apparent that the High Court would have ordinarily been fully justified in

determining the claim of the appellant by accepting the factual position depicted by the functionaries of the Police Department, namely, that the appellant was arrested at 3.00 p.m. on 15-1-2010. The High Court, however, chose not to fully rely upon the assertions made on behalf of the respondents. The High Court, in fact, personally verified the factual position from the case diary and on its scrutiny, arrived at the conclusion extracted above. We find absolutely no infirmity in the conclusion rendered by the High Court. In the absence of any material (relied upon by the appellant) to the contrary, we find no infirmity in the determination rendered by the High Court, insofar as the time of detention of the appellant is concerned.”

43. Accordingly, the petitions are dismissed. No order as to costs.

VIBHU BAKHRU, J

APRIL 15, 2015

RK

