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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment reserved on : 13.02.2017

Judgment delivered on : 17.02.2017

+ W.P.(C) 8896/2008

NARENDER SINGH

..... Petitioner

Through Ms. Aruna Mehta, Adv.

versus

GOVT. OF N.C.T. OF DELHI

..... Respondent

Through Ms. Jyoti Taneja, Adv. for GNCTD.
Mr. Nalin Tripathi, Adv for SDMC.

CORAM:

HON'BLE MS. JUSTICE INDERMEET KAUR

INDERMEET KAUR, J.

1 The petitioner Narender Singh and Nirmal Kaur are the unfortunate parents of master Lakhvinder Singh. On 14.6.2007 Lakhvinder Singh aged 10 years while playing cricket along with other children in B-Block, Tilak Vihar (adjacent to a drain) fell into the drain and succumbed to his death. This drain passes through the area of Tilak Vihar. Children of the locality of Tilak Vihar used to play cricket in the park. This park had no fencing. There was also no cover over the drain and no safety bracket around it. This was well within the knowledge of respondent nos.2 and 3 (PWD and the

Municipal Corporation) but no efforts were made to ensure that the boundary wall which was broken at various places around the drain is maintained.

2 On that fateful day while master Lakhvinder was playing cricket one boy hit the ball which fell near the slippery area; Lakhvinder went to retrieve the ball but the area being slippery he could not balance himself and slipped into the drain. Hue and cry was raised. Police party and the fire brigade reached the spot. Autopsy of the child was conducted. It was noted that the child had died due to asphyxia which was due to drowning in the drain.

3 Contention in this petition being that this incident has occurred due to the negligence of both respondent nos.2 and 3. Had they observed their duties and constructed a fencing around the drain this unfortunate happening could have been avoided. The falling of the child in to the drain occurred because of the callous attitude of respondent nos.2 and 3 which had led to his untimely death.

4 Additional submission being that Lakhvinder was an intelligent child studying in the 5th class in the MCD Primary School, Tilak Vihar, New Delhi. The respondents being liable for this negligent act which had led to his death, the petitioners by way of this writ petition have sought compensation from the respondents. It is stated that the victim being a bright

child would have most likely become a software engineer in the near future and would have earned Rs.80,000/- to Rs.1,00,000/- per month. Pecuniary as also non pecuniary damages have been claimed by the petitioners.

5 Learned counsel for the petitioner in support of her submissions has placed reliance upon a judgment of the Division Bench of this Court reported as 2011 (122) DRJ 428 Gopalpur victim Association Vs. Delhi Jal Board to support a submission that in similar circumstances where four children had fallen into an open manhole, because of the negligence of the Delhi Jal Board compensation had been awarded to the parents of the victims. For the purposes of calculation of compensation learned counsel for the petitioners has placed reliance upon a judgment of a Bench of this Court delivered in WP(C) No.5072-73/2005 Kishan Lal Vs. Govt. of NCT of Delhi decided on 03.7.2007; submission being that both the pecuniary and non pecuniary loss has to be taken into account in arriving at the amount of compensation to be payable to the petitioners. It is additionally pointed out that the question of contributory negligence should not weigh in the mind of the court while dealing with an incident where a child is involved as the degree of care to be expected from a child is entirely different from the degree of care that can be expected from a reasonable adult and a boy of aged 10 years cannot be held

guilty of any contributory negligence as was so in the facts of this case.

6 Counter affidavit of respondent no.3 i.e. MCD is relevant. It is admitted that the unfortunate incident had taken place in the Storm Water drain known as Subhas Nagar drain which originates from Block No.12, Subhash Nagar and ends at the Najafgarh Drain near Keshavpur Depot travelling via Rajouri Garden, Tilak Nagar and Sant Nagar. Its total length is 5500 metres with an average width ranging from 3 metres to 8 metres and average depth is 2 to 4 metres. It is admitted that there is an open land behind the residential flats of B-Block, Tilak Vihar which is owned by the Slum Department of the MCD. There was a boundary wall on the aforesaid land of the Slum Department but the same was gradually damaged at certain points by antisocial elements of the area to use it as a short cut route to pass over the Subhash Nagar drain through the pipe line of the Delhi Jal Board. The same is not permitted by the Authorities. The further stand of the Corporation is that boundary walls were constructed on both sides of the Subhash Nagar drain; the place where the children were playing was not meant for a playground but was unauthorizedly being used by the children as such. It was the duty of the parents of the children not to allow their children to play at a place which is not a playground; There can be no

negligence attributed to the respondent. Disputed questions of fact have arisen. Learned counsel for respondent no.3 has drawn attention to Annexure-R-1 which is the site plan annexed alongwith their counter affidavit. Photographs filed by the petitioner have also been relied upon by the respondent to support a submission that the boundary wall was intact and there was no damage to it. DD No.18 dated 15.6.2007 and the Inquest Report have been highlighted; submission is that the facts as emanating in this DD show that the child had died because of drowning into the drain; he had gone to fetch the ball and while he was sliding upon the pipe to cross the drain he had fallen into the drain. These documents are contrary to the averments made in the petition; there is no mention in the petition about the child have fallen into the drain while crossing over the pipe. There are thus disputed questions of fact. This writ petition is not maintainable.

7 The stand of respondent no.4/police is also noted. They have admitted that pursuant to this unfortunate incident a DD entry has been recorded. DD No.9 which was recorded by the PCR followed by DD no.18 which was recorded by the local police. Upon inquiry it had been revealed that master Lakhvinder had fallen into the drain while he was crossing the drain by sliding over and above the pipe. He had died because of asphyxia; which is

the case of death evident from the post mortem report. Inquest proceedings have also been highlighted. The stand of respondent no.4 is that he had no role to play in the matter as this case relates to respondent no.3. This fact is not disputed.

8 Arguments have been heard. Record has been perused.

9 Lakhvinder Singh had admittedly died as a result of asphyxia by falling into the drain which was passing through the Tilak Vihar area. The site plan (placed on record by respondent no.3) is relevant. This shows that alongside the drain there was an open land which was admittedly the area where the children were playing cricket including Master Lakhvinder. The local police from the police station Tilak Vihar, who had reached the spot in the first instance, in their counter affidavit stated that as per inquiry it was revealed that master Lakhvinder had fallen into the nala while he was crossing it through the pipe going through the nala. Information of the same had been given to the Fire Department. Dead body of Lakhvinder was recovered from the nala. The cause of death (as per the post mortem) was asphyxia as a result of ante mortem drowning. The final report of the SDM under Section 174 of the Cr.P.C. is also a part of the record. This report also shows that the boy had slipped from the pipe and had fallen into the drain.

The photographs filed along with the petition show that there is an iron pipe running through horizontal width of the nala. Admittedly, this nala/drain was not covered. It has not been argued before this Court that the nala/drain was required to be covered. Stand of respondent no.3 is that this storm water drain which originates from Subhash Nagar and ends at Najafgarh being about 5500 metres in length is not required to be covered. In view of this stand of respondent no.3, the contention of the petitioner that this storm water drain requires a cover has not been pressed.

10 Respondent no.3 (as is evident from paragraph 3 of the counter affidavit) clearly admit that there was a boundary wall in the aforesaid land which had got damaged at some places by some antisocial elements. This damaged portion was being used as a shortcut by these anti social elements to pass over the Subhash Nagar drain through the pipeline of the Delhi Jal Board.

11 This stand of respondent no.3 is quoted herein; its extract reads as under:

“3. That it may be pointed out that there is an open land behind the residential flats of B Block, Tilak Vihar which is owned by the Slum Deptt. of the MCD. There was a boundary wall on the aforesaid Land of the Slum

Deptt. but the same was gradually damages at certain points by the NT social elements of the area just to make it a short cut rout to pass over the Subhas Nagar drain through the pipe line of Delhi Jal Board, although the same was not permitted by the authorities concerned. It may be pointed out that there was no access to the open Subhash Nagar drain from Block 12 of Subhas Nagar. The photo annexed to the petition also shows that there walls constructed on the both sides of the Subhash Nagar Drain. It may be further be pointed out that the open Land of the Slum Deptt. was not meant for a playground but the same was unauthorizedly used as a playground by certain children of the locality. That the Subhash Nagar drain was maintained by the C.S.E. Deptt. It may be pointed out that it was the duty of the parents of the children not to allow their to play a place which not a playground. Of course the children are not supposed to visit the drain and peep into it. The mishap took place due to sheer negligence on the part of the parents who also did not properly guide and take care of their children.”

12 Respondent no.3 thus has candidly and fairly admitted that the boundary wall at some places had got damaged; this was then used as a bypass by the anti-social elements to reach the storm water drain. The photographs filed by the petitioner and especially the third photograph (page 34) shows the broken boundary wall. This was the place from where the child had accessed the drain to retrieve his ball and the area being slippery he had fallen into the drain as a result of which he had drowned and succumbed to his death. There is no doubt that the open area adjacent to the water drain

(as is evident from the site plan) is not a playground and has not been earmarked as such. This did not prevent the children from playing in this open area. Being an open piece of land; it was a tempting proposition for the children of that area to play in that field. The responsibility of respondent no.3/MCD to ensure that there was a proper fencing and the boundary wall is intact does not get abdicated; it was their duty and obligation to ensure that this wall was intact. Respondent no.3 has admitted that this boundary wall was damaged at various portions. The photographs (not denied) also speak volumes.

13 This Court is thus of the view that respondent no.3 knowing fully well and admitting that the boundary wall was not intact did not abide by its bounden duty to get the boundary wall repaired. The fact that there is a playground adjacent to this drain is an admitted position; it is also not denied that this open piece of land was being used by the children of the locality as a playground. This was a known fact. Thus the submission of respondent no.3 that it was the duty of the parents of the children to warn them not to play in this open area is misconceived.

14 The doctrine of *res ipsa loquitur* would be applicable. The negligence of the Department appears to be writ large. “things speak for themselves”.

Ordinarily an accident of such a nature would have occurred but for the absence of due care and caution on the part of respondent no.3 who had admittedly not ensured that the boundary wall alongside this deep drain is intact. It thus has to be concluded that that this accident was the result of the negligence on the part of respondent no.3/Department.

15 This Court having arrived at this conclusion, the next question which has to be decided is as to what compensation is payable to the parents of the victim?

16 This Court in an earlier writ petition {W.P.(C)1170/2007 Urmila Devi vs. MCD and Ors. (decided by it on 03.11.2016) had an occasion to consider the question of compensation qua the death of a child who had fallen into a ganda nala and had died because of asphyxia. The proof of the income of the parents of the victim has not been disclosed. In the absence of such a proof the principle laid down in the Motor Vehicles Act, 1988 had been applied.

17 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 of 15 and taking his notional income as Rs.15,000/- per annum which was as per the second Schedule of the

Motor Vehicles Act; since the child was a non-earning person Rs.15,000/- was taken as his annual income.

18 In R.K.Malik Vs. Kiran 2009 (8) Scale 451, the Apex Court was of the view that the claimants were also entitled to compensation of Rs.75,000/- towards future prospects of such an unlearning child; non-pecuniary damages were assessed at Rs.75,000/-. In that case, the total compensation granted to the claimants was Rs.3,75,000/- (i.e. Rs. 15,000 x 15 + Rs.75,000 towards future prospects and Rs.75,000/- as non-pecuniary damages).

19 Applying the same formula, this Court is of the view that the petitioners in the instant case are entitled to a compensation of Rs.3,75,000/-. This amount shall be paid by the respondent no.3 to the petitioners within a period of four weeks failing which respondent no.3 will be liable to pay interest @ 8% per annum till realization of the said amount.

20 Petition disposed of in the above terms.

INDERMEET KAUR, J

FEBRUARY 17th, 2017
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