
(2010) 08 DEL CK 0091

In the Delhi High Court

Case No : Writ Petition (C) No. 856 of 2010

Criminal Justice Society

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 02-08-2010

Acts Referred:

Constitution of India, 1950 — Article 21, 226, 32
Delhi Municipal Corporation Act, 1957 — Section 29, 324
Penal Code, 1860 (IPC) — Section 304A

Citation : (2012) ACJ 342 : AIR 2010 Delhi 194 : (2011) 7 RCR(Civil) 1728

Hon'ble Judges : Dipak Misra, C.J; Manmohan, J

Bench : Division Bench

Advocate : Raj Kamal, for the Appellant; Sonia Sharma and Ruchir Mishra for R-1, Maninder Acharya, for R-2, Mahesh Srivastava and Ashok Kumar Sharma for R-4, Shoib Haider, for N. Waziri for R-6, for the Respondent

Final Decision : Allowed

Judgement

Dipak Misra, C.J.—The seminal and centroidal issues that emanate for consideration in this public interest litigation preferred under Article 226 of the Constitution of India by Criminal Justice Society, is whether the wife of a septuagenarian is entitled to compensation for his accidental death caused due to the fall in a pit on the divider which was required to be covered by a barricade with warning signs meant for pedestrians by the contractor, the respondent No. 4 herein, engaged by the respondent No. 2 - Municipal Corporation of Delhi (for short "the MCD), and if the answer is in the affirmative, the further aspect that has to be dwelled upon is what should be the appropriate quantum, regard being had to the relevant factors like age of the deceased, the negligence of an agent of a statutory authority and the shock suffered by the helpless wife, who, we are obliged to presume, belonged to his living spirit despite he being nearly four scores and his life was "a sort of splendid torch" to her. The other pivotal issue that needs to be addressed to whether pits can be allowed to remain in such a stage to become hazards and death traps for the citizens and what remedial

measures are required to be taken without any pretence.

2. The facts that have been uncurtained are that on 28.8.2009 about 8.15 p.m one Trilok Nath Makan, aged about 77 years, a retired Additional Private Secretary of the Union of India stepped out of his house to buy groceries from the nearby shops. The area was dark because the power had been turned off while the streetlights were being installed. It is put forth that the pits on the Shivalik-Malviya Nagar stretch remained uncovered without barricades and sans warning sign board in place as a consequence of which the deceased fell into the pit. On 29.8.2009, the body of the deceased was spotted by the cashier of a grocery store who informed the police and thereafter his body was taken to All India Institute of Medical Sciences where he was declared to have been brought dead. The residents of Shivalik lodged a protest and the authorities had assured that the matter would be carried to its logical end.

3. An enquiry was ordered at the MCD level and one Assistant Engineer (Electrical) has been put under suspension for dereliction of duty. The contractor, has been issued a show cause notice and a criminal case u/s 304A of the Indian Penal Code has been registered. In this backdrop, it is urged that the wife of the deceased is entitled to compensation and further the MCD is obliged to follow the statutory mandate of Delhi Municipal Corporation Act, 1957 (for short the Act) which envisages precautions during repair of the streets. The compensation and damages which are claimed at Rs. 1 crore and Rs. 10 crores respectively.

4. A counter affidavit has been filed by the respondent No. 1 stating, inter alia, that the enquiry was conducted by the concerned Assistant Sub- Inspector of Police who had found that an old man had fallen into a pit dug up on the central verge / divider on Shivalik Road and when he was brought to AIIMS, he was declared dead. An autopsy was carried out in which it was found that the death was due to Asphyxia. It is also stated that as the pit was opened from all sides and there was no barrier / physical barricade or protector or warning. Regard being had to the facts and circumstances a case under 304A IPC has been registered against the director of the respondent No. 4.

5. A return has been filed by the respondent No. 2 - MCD contending inter alia that the work, namely, "upgradation of street lighting on roads in Delhi in preparation for the Common Wealth Games - 2010" was awarded to respondent No. 4, M/s Sweka Power-Tech Engineer Private Limited vide agreement dated 8.6.2009. During the execution of the aforementioned work by the said executive agency, some pits of size 750mm x 750mm x 1400mm of depth of 4.5 feet were dug on the Shivalik road stretch between Aurbindo College to Malviya Nagar on the central verge of the road. As per Item No. 29 of the work order, the temporary barricading, reflective signs, red colour lights, etc. were required to be provided by the executing agency. The said barricading was to be kept till the completion of the work and was not to be removed by the executing agency without the approval of the Engineer-in-charge. The Assistant Engineer (Electrical) inspected the Shivalik road on 20.8.2009 and found that some pits

unbarricaded, without any warning signs and reflective signs. The same was immediately brought to the notice of the competent authority of the executing agency vide letter dated 24.8.2009. Prior to four days of the incident, the executing agency was warned about the impending danger arising out of unbarricaded pits. After the incident occurred, a show cause notice was issued to the executing agency calling upon it to show cause why the two fold action mentioned in the agreement should not be taken against it for not having adhered to condition No. 29 of the schedule of the work. As set forth, an enquiry was caused at the level of the Commissioner of the MCD and in the said enquiry the executing agency was prima facie found guilty. It is also admitted that a criminal case u/s 304A has been registered at Malviya Nagar police station and, a director of the respondent No. 4 has been arrested. It is put forth that the no evidence has been found against the Electrical Engineer of the MCD. It is contended that the disputed questions of facts are involved and, therefore, the writ petition is not to be entertained.

6. A counter affidavit has filed by the respondent No. 4 stating that the respondent No. 4 had entered into a labour contract with M/s S.G. National Engineering Company in respect of providing labour for upgradation of street lighting and it was the duty of the labour contractor to provide the safety of its workforce, loss to third party, general public at whose premises the work is performed. It is the duty of the labour contractor to ensure barricading of all the open spaces with caution plates to avoid any kind of mishappening. It is put forth that all the barricading material was supplied by the respondent No. 4 to the labour contractor and all safety measures were taken by him but unfortunately the incident occurred. It is a stand of the respondent No. 4 that the incident occurred due to the negligence of the deceased while crossing the road as that part of the segment was not meant for crossing the road by the general public and the particular pit was basically far away from the footpath and very near to the divider and, therefore the deceased under normal circumstances would not have supposed to reach there. In a sense the factum of accident is denied and further the liability of the said respondent is disputed.

7. We have heard Mr. Raj Kamal, learned Counsel for the petitioner, Ms. Sonia Sharma, learned Counsel for the respondent No. 1, Ms. Manindra Acharya, learned Counsel for the respondent No. 2, Mr. Mahesh Srivastava, learned Counsel for the respondent No. 4 and Mr. N.Waziri, learned Counsel for the respondent No. 6.

8. On a perusal of the aforesaid pleadings, it is clear as noon day, that a 77 year old man fell into an unbarricaded pit without reflective signs and met his end. The counter affidavit filed by the MCD is crystal clear in that regard. What has been stated in defence is that the MCD is not liable to pay the compensation as it is the obligation of the respondent No. 4, the contractor, who was engaged for the work in question to compensate. It is also the stand that action has been taken against the said contractor. The stand of the respondent No. 4 is that

though the accident had occurred if eventually if any liability is fixed it has to be made good by the subcontractor.

9. The question that emerges for consideration is whether the shifting of the responsibility would deny the wife of the deceased whose cause has been espoused by the society. In this context, we may refer to Section 324 of the Act, which provides that the Commissioner shall, as far as is practicable, during the construction or repair of any public street, or any municipal drain or any premises vested in the Corporation caused the same to be fenced and guarded; take proper precautions against accident by shoring up and protecting and adjoining buildings and cause such bars, chains or posts to be fixed across or in any street in which any such work of construction or repair is under execution as are necessary in order to prevent the passage of vehicles or animals and avert danger. It also stipulates that the Commissioner shall cause such street, drain or premises to be sufficiently lighted or guarded during night while under construction or repair. There is also a stipulation that no person shall without the permission of the Commissioner or other lawful authority remove any bar, chain, post or shoring, timber, or remove or extinguish any light set up under this section. Thus, the provision casts a responsibility on the Commissioner of the MCD.

10. As is evincible, the Corporation has admitted in its counter affidavit that the respondent No. 4 did not fix the barricades or any reflective sign. A mercurial plea has been taken by the respondent No. 4 that it was the responsibility of the labour contractor engaged by him and expected measures were taken.

11. The learned Counsel for the MCD submitted that if any liability has to be fixed the same has to be determined against the respondent No. 4. There is no scintilla of doubt that the MCD had entered into a contract. Condition No. 29 of the schedule of the work clearly stipulates that if there is any violation of barricading, the owner has the power to deduct payment for nonbarricading of the pits and non-display of any warning sign including reflective lights and blacklist the firm and debar it from undertaking any work under MCD for a period of five years. True it is, the MCD has the power to take action under the contract against the respondent No. 4 but the fact remains whether it can advance a plea that it has no liability to pay any compensation to the wife of the deceased when the facts are clear. In this regard, we may note a few citations in the field.

12. In *Pushpabai Purshottam Udeshi and Others Vs. Ranjit Ginning and Pressing Co. (P) Ltd. and Another*, it has been held that when an act is committed by a driver in the course of employment or under the authority of the master, the liability would be that of the master.

13. In *State Bank of India (Successor to The Imperial Bank of India) Vs. Shyama Devi*, the Apex Court held that an employer is not liable for the act of the servant if the cause of the loss or damages arises without his actual fault or privity and without the fault or neglect of his agents or servants in the course of

their employment. Emphasis has been led on liability of a master for wrongs done by the servant if it is in the course of his employment.

14. In *State of Maharashtra and Others Vs. Kanchanmala Vijaysing Shirke and Others*, , where clerk in a Government Department was driving a vehicle under the authority of driver at the time of accident and the vehicle was used in connection with the affairs of State and for official purpose, it was held by the Lordships under the circumstances the State cannot escape its vicarious liability to pay compensation to the heirs of the victim.

15. In *Machindranath Kernath Kasar Vs. D.S. Mylarappa and Others*, their Lordships referred to the decision in *Sitaram Motilal Kalal Vs. Santanuprasad Jaishankar Bhatt*, wherein it has been held that law is well settled that a master is vicariously liable for the acts of his servant acting in the course of his employment. Unless the act is done in the course of employment, the servant's act does not make the employer liable.

16. In the case at hand the MCD admittedly has entered into a contract. There is a stipulation in the contract enabling the owner to take steps against the contract. Section 29 of the Act casts responsibility on the Commissioner what steps to be taken when there is construction or repair of any public street. Cumulatively understood, the liability of the MCD cannot be denied. The liability in our considered opinion would come within the domain of in public law remedy which covers grant of compensation when right to life under Article 21 of the Constitution of India is jeopardized.

17. In this regard, we may fruitfully refer to *Smt. Nilabati Behera alieas Lalita Behera Vs. State of Orissa and others*, wherein it has been held thus:

A claim in public law for compensation for contravention of human rights and fundamental freedoms, the protection of which is guaranteed in the Constitution, is an acknowledged remedy for enforcement and protection of such rights, and such a claim based on strict liability made by resorting to a constitutional remedy provided for the enforcement of a fundamental right is "distinct from, and in addition to, the remedy in private law for damages for the tort" resulting from the contravention of the fundamental right. The defence of sovereign immunity being inapplicable, and alien to the concept of guarantee of fundamental rights, there can be no question of such a defence being available in the constitutional remedy. It is this principle which justifies award of monetary compensation for contravention of fundamental rights guaranteed by the Constitution, when that is the only practicable mode of redress available for the contravention made by the State or its servants in the purported exercise of their powers, and enforcement of the fundamental right is claimed by resort to the remedy in public law under the Constitution by recourse to Articles 32 and 226 of the Constitution.

18. Dr. A.S. Anand J., (as his Lordship then was), in his concurring opinion, expressed thus:

...Convicts, prisoners or under-trials are not denuded of their fundamental rights under Article 21 and it is only such restrictions, as are permitted by law, which can be imposed on the enjoyment of the fundamental rights by such persons. It is an obligation of the State to ensure that there is no infringement of the indefeasible rights of a citizen to life, except in accordance with law, while the citizen is in its custody.

The public law proceedings serve a different purpose than the private law proceedings. The relief of monetary compensation, as exemplary damages, in proceedings under Article 32 by the Supreme Court or under Article 226 by the High Courts, for established infringement of the indefeasible right guaranteed under Article 21 is a remedy available in public law and is based on the strict liability for contravention of the guaranteed basic and indefeasible rights of the citizen. The purpose of public law is not only to civilize public power but also to assure the citizen that they live under a legal system which aims to protect their interests and preserve their rights. Therefore, when the court moulds the relief by granting "compensation" in proceedings under Article 32 or 226 seeking enforcement or protection of fundamental rights, it does so under the public law by way of penalizing the wrongdoer and fixing the liability for the public wrong on the State which has failed in its public duty to protect the fundamental rights of the citizen. The payment of compensation in such cases is not to be understood, as it is generally understood in a civil action for damages under the private law but in the broader sense of providing relief by an order of making "monetary amends" under the public law for the wrong done due to breach of public duty, of not protecting the fundamental rights of the citizen. The compensation is in the nature of "exemplary damages" awarded against the wrongdoer for the breach of its public law duty and is independent of the rights available to the aggrieved party to claim compensation under the private law in an action based on tort, through a suit instituted in a court of competent jurisdiction or/and prosecute the offender under the penal law.

19. In *Sube Singh Vs. State of Haryana and Others*, , a three-judge Bench of the Apex Court, after referring to its earlier decisions, has opined as follows:

It is thus now well settled that award of compensation against the State is an appropriate and effective remedy for redress of an established infringement of a fundamental right under Article 21, by a public servant. The quantum of compensation will, however, depend upon the facts and circumstances of each case. Award of such compensation (by way of public law remedy) will not come in the way of the aggrieved person claiming additional compensation in a civil court, in enforcement of the private law remedy in tort, nor come in the way of the criminal court ordering compensation u/s 357 of Code of Civil Procedure.

20. The aforesaid citations also cover the vicarious liability of a principal in respect of the act of the agent on certain conditions. In the case at hand, the MCD is the principal and the executing agency is the agent. Reading the statutory provisions in conjunction with the terms and conditions of the contract,

the inescapable conclusion is that the MCD is primarily liable to make good the loss and thereafter, it may proceed to realise the amount after causation of enquiry from any of its officers and if found responsible, take such action for recovery from the respondent No. 4 with which it had the privity of contract.

21. Presently to the quantum of compensation, the deceased retired from the services as an Additional Secretary. He was less than four scores. His children, as set forth, have pre-deceased him. The wife is the lone survivor. The society as pro-bono-publico has taken up the cause. The plight and misery of the wife can be well imagined. In old age the husband and wife become each other's companion and friend. Very rarely a person can feel comfortable with loneliness. The dreariness of winter of loneliness corrodes the marrows of life. The silence of loneliness can be quite killing. Every human being desires to belong. One ordinarily always intends to open oneself and that is the greatest function of companionship. It should be borne in mind from the innermost core, as one grows older, one seeks company. That adds to meaning of life. The memory of one may sometimes be a source of existence but it can never substitute the cherished companionship. The marital bliss matures into a total sweet dependence and respectable friendship. It is worth noting that the husband was able to go to the market and purchase the grocery. That would indicate his state of mind and the activity he was capable of undertaking. In a way, he was sustaining his wife. By the unfortunate accident his life spark got extinguished. The wife has become a loner and loneliness is the breeding place for melancholia. The agony and anguish is understandable. Regard being had to these aspects, we determine the compensation at Rs. 5 lacs to be initially paid by the MCD to the wife of the deceased and thereafter proceed to enquire about the responsibility of any officer involved in the work and take appropriate action against the respondent No. 4 within the realm of privity of contract between the two. The amount shall be paid by way of a bank draft drawn on a nationalised bank within a period of four weeks.

22. The other issue that also has been raised deserves to be dealt with. The MCD cannot afford to enter into contract of this nature and leave the citizens to their fate. It has the statutory obligation and, therefore, a sacred duty to see that such kinds of accidents are not caused due to negligence of a contractor. Hence, we direct the Commissioner MCD to constitute a task force which would be responsible to see that the contractors carry out the safety measures to the optimum level, so that no hazard is caused to any person and it would be easy on the part of the MCD to fix the responsibility on its task force rather than entering into an unnecessary labyrinth.

23. Resultantly, the writ petition is allowed in part. There shall be no order as to costs.