

(2013) 01 DEL CK 0387
In the Delhi High Court
Case No : LPA 1187 of 2007

Delhi Development Authority

APPELLANT

Vs

Bhagwan and Ors

RESPONDENT

Date of Decision : 17-01-2013

Acts Referred:

Constitution of India, 1950 — Article 226, 32

Citation : (2013) 4 ACC 645

Hon'ble Judges : D. Murugesan, C.J;V.K. Jain, J

Bench : Division Bench

Advocate : Ajay Verma, for the Appellant; S.K. Bhaduri, for the Respondent

Final Decision : Disposed Off

Judgement

1. Vineet Pawar, a child aged 7 years and studying in class II died on 13.11.2004, when the iron gate installed in a park maintained by the appellant DDA fell on him. The parents of the child filed a writ petition alleging therein that their child had died on account of negligence on the part of the DDA. Their case was that had the appellant/DDA been vigilant and had the gate been properly fixed, their son would have been alive. The learned Single Judge, vide impugned order dated 18.7.2007 directed payment of compensation amounting to Rs. 12,78,509/- to the petitioners/respondents along with interest on that amount with effect from 13.11.2004. It is by now settled legal proposition that the High Court, in exercise of its jurisdiction under Article 226 of the Constitution can award compensation in a case of loss or damage on account of failure to perform a public duty. In Nila-Bati Behera vs. State of Orissa 1993 Cri. Law Journal 2899, the Apex Court held that award of compensation in proceedings under Article 32 and Article 226 of the Constitution is a remedy available in public law, based on strict liability for contravention of fundamental rights. In D.K. Basu vs. P.A. Narayan 1998 1 SCR 899 the Supreme Court awarded compensation amounting to Rs. 2 lacs to the appellant for the death of his wife, who was returning by a local train from her office when she was criminally assaulted and robbed of her

ornaments and wrist watch. When she pulled the alarm chain, the railway guard and the attendant did not stop the train. The wife of the appellant later succumbed to her injuries. The Apex Court, holding the railways guilty of breach of duty of taking reasonable care, awarded compensation to the appellant. In *Darshan and Others (Smt.) Vs. Union of India and Others*, , a Division Bench of this court found dereliction of duty on the part of the respondents in leaving the manhole uncovered, which resulted in untimely death of a person on account of his falling in the manhole and awarded compensation on account of breach of public duty by the instrumentality of the State.

Therefore, in the case before us, if a dereliction of duty or negligence on the part of the appellant or its officials is found, grant of compensation in exercise of the writ jurisdiction cannot be faulted.

2. It is an admitted position that the park where the gate in question was installed and where the child of the petitioners died on 13.11.2004 was under the care and management of DDA. Doctrine of *res ipsa loquitur* therefore clearly applies to an incident of this nature where the cause of accident is primarily within the knowledge of respondent. This maxim is stated as under in its classic form:-

Where the thing is to 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.

With respect to the aforesaid maxim Supreme Court in *Shyam Sunder and Others Vs. The State of Rajasthan*, inter alia observed as under:-

The maxim is only a convenient label to apply to a set of circumstances in which the 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. The principal function of the maxim is to prevent injustice which would result if a plaintiff were invariably compelled to prove the precise cause of the accident and the defendant responsible for it, even when the facts bearing on the matter are at the outset unknown to him and often within the knowledge of the defendant....

The maxim is based on common sense and its purpose is to do justice when the facts bearing on the causation and on the care exercised by defendant are at the outset unknown to the plaintiff and are or ought to be within the knowledge of the defendant (see *Barkway v. S. Wales Transport* [1950]1 AER 392)....

The plaintiff merely proves a result, not any particular act or omission producing the result. If the result in the circumstances, in which he proves it, makes it more probable than not that it was caused by the negligence of the defendant, the doctrine of *res ipsa loquitur* is said to apply, and the plaintiff will be entitled

to succeed unless the defendant by evidence rebuts that probability....

Over the years, the general trend in the application of the maxim has undoubtedly become more sympathetic to plaintiffs. Concomitant with the rise in safety standards and expanding knowledge of the mechanical devices of our age less hesitation is felt in concluding that the miscarriage of a familiar activity is so unusual that it is most probably the result of some fault on the part of whoever is responsible for its safe performance (see John, G. Fleming, *The Law of Torts*, 4th ed., p. 260).

In the case before Supreme Court, the engine of a truck caught fire on the way and the deceased, in order to prevent himself, jumped out of the truck and died. It was a driver of the defendant who was driving at that time. Holding the defendant liable to pay damages, Supreme Court held as under:-

It is clear that the driver was in management of the vehicle and the accident is such that it does not happen in the ordinary course of things. There is no evidence as to how the truck caught fire. There was no explanation by the defendant about it. It was a matter within the exclusive knowledge of the defendant. It was not possible for the plaintiff to give any evidence as to the cause of the accident. In these circumstances, we think that the maxim *res ipsa loquitur* is attracted.

3. It was contended by the learned counsel for the appellant that in the morning of 13.11.2004 when this incident took place, the residents of nearby village Shahpur Jat, who had been opposing installation of the iron gate at the park gathered together, tried to break open the said iron gate which at the time was lying closed and shook the said gate with the intention of breaking it open, but since the iron gate was sufficiently strong, no apparent damage was caused to it. He further submitted that these facts surfaced during the course of a local enquiry conducted by DDA after this incident had happened.

4. There is absolutely no material before us which would show, even *prima facie*, that the residents of village Shahpur Jat gathered at the park on the date this incident happened and had tried to remove the gate, resulting in it becoming weak, without showing any apparent damage to it. Had there been any such incident, the matter would have been reported to the police or at least to their superior, by DDA officials who were on duty in the park. No such report has been filed by the appellant before us. Though the case of the appellant is that an enquiry was conducted by DDA to verify the circumstances in which this incident had taken place, no such enquiry report has been placed on record. In the absence of any such report being placed on record, we cannot accept the submission with respect to such an enquiry having been held and the finding arrived therein.

5. During the course of arguments, we asked the learned counsel for the appellant as to whether this incident was reported to the police. The learned counsel provided a copy of the FIR which had been lodged with the police in

respect of this incident. A perusal of the FIR would show that on receipt of the information regarding this incident, S.I. Sushil Kumar of Police Station Hauz Khas reached the spot and made a local enquiry. It was revealed during the enquiry that the iron gate of DDA had fallen on the child Vineet. In this FIR, there is no reference to any attempt made by the residents of Shahpur Jat in the morning of 13.11.2004 to remove the gate which had fallen on deceased Vineet. Had any such incident actually taken place, it would have been brought to the notice of the police officer when he made local enquiries on the spot on that date.

6. We are, therefore, of the view that falling of the gate on the child cannot be attributed to any act on the part of the residents of the village Shahpur Jat. Consequently, the only reason for the iron gate falling on the child could be the defect or negligence in installation of the said gate by DDA, either directly or through the Contractor which it had employed for the purpose. It is stated in the appeal that the gate in question was installed on 9.9.2003 i.e. about one year before this incident took place. Had the gate been properly installed and all reasonable care been taken in its installation, there is no way it could have fallen upon the child just one year after its installation. The park in question being a public park frequented not only by adults but also by children of tender age, it was imperative for the appellant to ensure that the gates in the park are properly fixed and are regularly maintained so that there is no possibility of any visitor getting injured on account of its poor upkeep and maintenance.

7. It would be immaterial whether the gate was installed directly by respondent or by the Contractor employed by it. This is a matter between DDA and the Contractor by whom the gate was installed. If the contract between DDA and the Contractor so provides, DDA can claim reimbursement from the Contractor for the compensation it would pay to the respondents, but it cannot escape its liability qua the respondent on the ground that the gate was installed by the Contractor and not directly by DDA officials. In any case, even while getting the gate installed through a contractor, the officers of DDA were under an obligation to supervise the work and ensure that the gate was properly installed.

8. We now come to the quantum of damages awarded to the respondents. In *R.D. Hattangadi Vs. M/s. Pest Control (India) Pvt. Ltd. and Others*, , Supreme Court held that while fixing the amount of compensation payable to a victim of an accident, the damage have to be assessed separately as pecuniary damages and special damages. Pecuniary damages are those which the victim has actually incurred and which are capable of being calculated in terms of money; whereas non-pecuniary damages are those which are incapable of being assessed by arithmetical calculations. In order to appreciate to concepts pecuniary damages may include expenses incurred by the claimant: (i) Medical attendance; (ii) loss of earning of profit up to the date of trial; (iii) other material loss. So far non-pecuniary damages are concerned, they may include (i) damages for mental and physical shock, pain and suffering, already suffered or likely to be suffered in future; (ii) damages to compensate for the loss of amenities of life which may

include a variety of matters i.e. on account of injury the claimant may not be able to walk, run or sit; (iii) damages for the loss of expectation of life, i.e., on account of injury the normal longevity of the person concerned is shortened; (iv) inconvenience, hardship, discomfort, disappointment, frustration and mental stressing life.

Similar view was taken in *Lata Wadhwa and Others Vs. State of Bihar and Others*, where the court in respect of an accident which took place in the year 1989, awarded non-pecuniary damages amounting to Rs. 50,000/-. 10. We notice that the learned Single Judge, taking the base amount of Rs. 50,000/- in the year 1989, arrived at standard non-pecuniary compensation amounting to Rs. 1,53,509/- after applying the Consumer Price Index for industrial workers. As regards pecuniary compensation, the learned Single Judge noted that the father of the child was earning about Rs. 1,50,000/- per year and assumed that the child, when an adult would have earned at least that much amount if not more. After adjusting half of the aforesaid incomes towards personal expenditure of the child, the learned Single Judge worked out the figure of Rs. 75,000/- and applying multiplier of 15 came to the figure of Rs. 11,25,000/- as the pecuniary compensation. The total amount of the compensation, therefore, came to Rs. 12,78,509/-. The learned counsel for the appellant has not been able to show any fault in the methodology adopted by the learned Single Judge and the quantum of compensation arrived at by him. We, therefore, see no reason to interfere with the quantum of compensation to the respondents.

For the reasons stated hereinabove, we find no merit in the appeal and the same is hereby dismissed. Out of the compensation amounting to Rs. 12,78,509/- awarded by the learned Single Judge, the appellant deposited Rs. 6,00,000/- pursuant to an interim order passed by this Court on 3.9.2007. The aforesaid amount be released, unless already released, to the respondent, forthwith along with the interest, if any, which has accrued on that amount. The balance principal amount of Rs. 6,78,509/- along with interest @ 6% per annum (i) with effect from 13.11.2004 till the date of deposit of Rs. 6,00,000/-, on the amount of Rs. 12,78,509/- and (ii) with effect from the date of the said deposit till date of payment of the balance amount on Rs. 6,78,509/- shall be paid to the respondents within eight weeks from today.

The appeal stands disposed of.