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**(2013) 07 GUJ CK 0023**  
**In the Gujarat High Court**

**Case No :** First Appeal No. 2292 of 2003 and Cross-Objection No. 138 of 2005 in F.A. No. 2292 of 2003

K.D. Resort

APPELLANT

Vs

K.T. Nanainh Decd. Through the L.Rs.

RESPONDENT

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**Date of Decision :** 02-07-2013

**Acts Referred:**

**Citation :** (2014) ACJ 1425 : (2013) 3 GLR 2605

**Hon'ble Judges :** R.D. Kothari, J

**Bench :** Single Bench

**Advocate :** S.K. Patel, for the Appellant; Kirtidev R. Dave, for the Respondent

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## **Judgement**

R.D. Kothari, J.—One Timmy, a boy aged around 15 years, had died by drowning at water resort. The father of deceased Timmy had filed a suit for compensation against the appellant. The said suit was partly decreed. Hence, the present appeal. The incident has occurred on 8-6-1995. Deceased Timmy along with his younger brother had gone to appellant's resort situated at Vijaynagar, Bhuj. The appellant's resort has swimming pool facility. The deceased had said to have filled up the form for entry in the swimming pool. The deceased Timmy joined the others in the swimming pool. The incident has occurred at about 5-00 p.m. As the deceased did not know how to swim, felt uncomfortable and frightened after some time. The coach available came to his rescue. Timmy was brought out of the swimming pool and was taken to hospital. Later on, at about midnight, he died. The father has lodged the complaint before city police. Same was registered as I - C.R. No. 145 of 1996. It is the say of the plaintiff that later on, police had filed the charge-sheet against the responsible persons. The present suit for compensation was filed on 1-5-1996.

2. The appellant-original defendant had filed detail written statement and they disputed the claim of the plaintiff alleging that there is no negligence on the part of the appellant and all the care and caution was taken by the appellant.

3. Before the learned trial Court, the plaintiff himself and friend of the deceased, viz., Sandeep are examined as witness and on behalf of the appellant, owner of the resort and one coach, viz., Nanda are examined as witness. The parties have also produced relevant documentary evidence in support of their respective contentions.

4. The learned trial Court, upon appreciating the oral evidence and other material on record and considering the submissions made by learned Advocates for the parties, has partly decreed the suit, as observed above.

5. The findings of the learned trial Court on material respect are as under:

(i) That the deceased Timmy has died due to drowning;

(ii) Theory advanced by the appellant that deceased died due to water-beating is not possible to accept nor it is possible to accept that in case of death by drowning, death would occur instantaneously;

(iii) Referring and relying on text-book of Medical Jurisprudence, in extenso, the Court has concluded that merely because there is a time gap of about 5 to 6 hrs between occurrence of incident and occurrence of death, it cannot be said that plaintiff's assertion as to cause of death etc. and his evidence requires to be discarded;

(iv) That deceased was a minor at the time of incident. Relying upon the certificate issued by the school authorities, birth date believed by the Court is "23-10-1981". The incident has occurred on 8-6-1995. Thus, the deceased was aged less than 15 years.

(v) That Rules of the appellant's resort itself provide that in case of minor, consent of parents/guardian is necessary. No such consent was obtained in this case.

(vi) That the deceased Timmy was not a regular or permanent member of the swimming pool of the appellant's resort, and therefore, no identity card was issued to the deceased. The deceased has visited as a guest member.

(vii) The appellant has produced the form filled up by the deceased while applying for entry into the swimming pool (Exh. 82). This form is not duly proved by the defendant. Assuming that it is duly proved, even then the deceased being minor at the time of incident, a contract entered into with the minor is a void contract.

(viii) On negligence, evidence of plaintiff and the owner of the resort is discarded on the ground that either of them were not present at the time of incident.

(ix) Relying on evidence of Sandeep, negligence on the part of the appellant is believed by holding that the plaintiff has discharged initial burden of proof, and therefore, onus shifts on appellant and appellant has failed to discharge onus rested on it.

(x) Theory of death due to water-beating is discarded only on the ground that this theory is not set up by the appellant in its pleadings.

(xi) On compensation, monthly notional income was believed at Rs. 3,000/- and applying multiplier of 15, Rs. 3,70,000/- was awarded.

6. At the time of hearing, learned Advocate Shri S.K. Patel for the appellant has submitted that learned trial Court has committed serious error of law and fact in partly allowing the plaintiff's suit. It was submitted that learned trial Court has wrongly discarded the evidence of the owner. Shri Patel submitted that safety measures provided by the resort are clearly stated by the owner and the learned trial Court has seriously erred in rejecting the evidence of owner only on the ground that owner was not present at the time of incident. It was submitted that negligence aspect is not properly considered by the learned trial Court. Elaborating this submission, Shri Patel has submitted that negligence in the present case can be considered at 3 stages: (i) at the entry point, (ii) whether the appellant has taken care to provide safety measures or not, and (iii) whether the appellant provides for the facility of guard, swimming coach etc. or not. It was submitted that had the trial Court properly appreciated the aspect of negligence, the learned trial Court would not have recorded the finding against the appellant. Shri Patel has also drawn attention to relevant documents on record and evidence of witnesses. It was also submitted that in the alternate, compensation awarded by the learned trial Court is on higher side, and therefore, on the issue of compensation, interference at the hands of this Court is required.

7. Learned Advocate Mr. Kirtidev Dave for the respondent submitted that no interference is called for in the judgment of learned trial Court. He pointed out that on careful reading of the evidence, it would appear that there is a negligence on the part of appellant. It was submitted that it is obligatory on the part of the appellant, in case of minor applying for swimming, to ask for consent of the parents/guardian. In the present case, the deceased was a minor, though the form filled up shows the age of the deceased as 18? years. This form is not reliable inasmuch as this form was not brought to the notice of the plaintiff at the time of recording of plaintiff's evidence. Further, it is the say of the coach that so far as the formalities of form etc. is concerned, the Manager is the proper authority. However, the appellant has not examined the Manager, Referring to the evidence of coach, it was pointed out that if the coach was very much present at the swimming pool when the deceased was feeling uncomfortable and frightened - as per the say of the coach - he was about 5 ft. away from the deceased - life of the deceased could have been saved. It was submitted that evidence of coach is not reliable.

8. It would appear that learned trial Court has devoted considerable part of discussion to the extensive quoted from the text-book of Medical Jurisprudence. Learned Advocate Mr. Dave is right in his submission that discussion of the learned trial Court on the point of negligence is not satisfactory.

9. Exhibit 82 is the form said to have filled up by the deceased while seeking entry in the appellant's swimming pool. It is a printed form. The applicant-deceased was required to fill up the name, age and gender in the form. The applicant-deceased was also required to sign the form. It is the say of the appellant that deceased had stated his age as 18½ years. Therefore, they were not required to ask the deceased to obtain the consent of the parents. It may be stated that the swimming pool has 4 different depth level. Initial area is of 3 ft. level of depth, second is 4 ft. level, third is 5 to 6 ft. level and final depth is of 14 ft. The swimming pool has length of 80 ft. and width of 40 ft. The deceased did not know the swimming. The coach-Nanda says that the incident has taken place after about 5 minutes after the deceased has jumped into the swimming pool. He also says that deceased has entered in the pool by 4 ft. level. He further says that he do not know when the deceased has moved from 4 ft. to deeper depth of the pool. From his evidence, it appears that the deceased was in 7 to 10 ft. of area of depth and he has jumped in swimming pool to save him. In the circumstances of the case, absence of due care on the part of appellant is almost apparent. The submission of learned Advocate for the appellant about absence of negligence is not possible to accept in the circumstances of the present case. For instance, it is true that safety measures are taken by the appellant by providing for requirement of filling up the form from the applicant, who intends to seek entry in the swimming pool. This by itself cannot be taken as sufficient. This Court is not considering the issue as any Administrative Authority or such like Authority, who verifies proper register etc. kept or not and whether there is procedure to fill up the form or not etc. In the present case, it would appear that very casual approach is adopted in filling up and accepting the form. The learned trial Court is right when it observed that said form is not duly proved by the appellant. Mere exhibiting the document does not seal the submission on appreciation of evidence. Besides, the form is not duly proved as required under law, otherwise also form herein has hardly any strength to save sinking case of the appellant. In the form in column of age, 18 and 1/2 years is mentioned. Assuming that form is not filled up with the assistance of the appellant and deceased himself has mentioned the age i.e. wrong age in the form, even then appellant ought to have some method or system by which cases wherein age mentioned is on the boarder line of attaining majority then claim of those applicants gets duly processed. That would avoid the situation that has arisen in the present case. Accepting the ipse dixit what applicant alleges in the form reduces importance of the requirement of filling up the form. If, later on, some disputes or trouble arises wherein age of the applicant - whether he is major or not - becomes issue, then the authority providing the facility would be in difficulty. The burden would be on such authority - as appellant herein - to establish correctness of the assertion made in the form. Learned Advocate for the respondent has rightly pointed out that this form (Exh. 82) was never brought to the notice of the plaintiff. Further, the Manager of appellant, who looks after the filling up forms etc. is not examined by the appellant. It may be stated that it is the say of the plaintiff that they - plaintiff, deceased etc. - do not

know the Gujarati language. The form is in Gujarati. None would have ever apprehended occurrence of such a horrible incident and it is more likely that filling up the form must have been treated in casual and formal manner. The appellant cannot successfully avoid its liability by relying on form (Exh. 82).

10. Coach Nanda says that he was at about 5 to 7 ft. distance from the deceased. This appears to be clear exaggeration. A coach is expected to be available at the swimming pool. If, really, he was just at 5 to 7 ft. distance, he would have immediately come to the rescue of the deceased and it is most likely that this unfortunate incident would not have occurred. On the other hand, Sandeep, who is a regular member of the swimming pool, says that as the deceased moved towards deeper level, he was in process of drowning and some of them had started shouting and coach had come thereafter. He says that he was at the swimming pool when deceased Timmy and other boys came there at that time. When they came at swimming pool, coach was not there.

11. In the circumstances of the case, neither the evidence of coach nor the belief of the appellant that the deceased was a major boy is possible to accept. The owner of swimming pool that has depth of 14 ft. can hardly afford to allow the minor boy to use the swimming pool without the consent of the parents. A guest member - as in this case - who happens to be minor as the case herein - if moves to deeper area of swimming pool and if he is novice to the swimming, owner of swimming pool - appellant herein - would be drowned in trouble.

12. What is negligence? Raising another question would give us answer to it. What are the causes of accident? The accident has occurred because the appellant has no satisfactory system or method to check the entry of a minor guest member, who does not know how to swim. Rule emerges from the facts of the present case is, any reasonable man, who is engaged in providing facility of swimming pool to the public, would have foreseen such kind of occurrence. It cannot be denied that appellant has failed to take such ordinary care in this behalf or to be precise, care taken by the appellant is not satisfactory or sufficient to absolve him. Hence, for the reasons discussed above, there is a negligence.

13. Now, about the compensation. The learned trial Court has believed monthly income of deceased at Rs. 3,000/-. Referring to 2nd Schedule of the M.V. Act, learned Advocate for the appellant submitted that annual income of the deceased ought to be believed at Rs. 1,500/-. The 2nd Schedule of the M.V. Act is of 1994. The incident in the present case has occurred in 1995. Learned Advocate for the respondent has submitted that monthly income should be believed at Rs. 2,000/- per month. Considering the submissions of learned Advocates for the respective parties, annual income of the deceased may be believed at Rs. 15,000/- and applying multiplier of 15, loss of dependency to the plaintiff would be Rs. 2,25,000/-. The learned trial Court has awarded Rs. 10,000/- as conventional amount. This appears to be just and proper. The respondent is entitled to same. The appeal, is therefore, partly allowed to the above extent. Decree be modified

accordingly. R. & P. be sent back to the trial Court concerned. In view of above conclusion, Cross-Objection No. 138 of 2005 must fail. Disposed of accordingly.