

(2015) 07 DEL CK 0046

In the Delhi High Court

Case No : Writ Petition (C) 8528 of 2008

Quamuddin and Others

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 08-07-2015

Acts Referred:

Constitution of India, 1950 — Article 226
Railways Act, 1890 — Section 124A, 13, 13(c), 147

Citation : (2015) 3 ACC 914

Hon'ble Judges : Vibhu Bakhru, J

Bench : Single Bench

Advocate : Aruna Mehta and Sanjeev Mehta, for the Appellant; Jagjit Singh and Shivanshu Bajpai, Advocates for the Respondent

Final Decision : Dismissed

Judgement

Vibhu Bakhru, J.—The petitioners are parents of children - Najruddin, aged about 11 years; Sajruddin, aged about 10 years; Saddam, aged about 14 years; and Arun, aged about 11 years - who were run over by a train and have filed the present petition seeking compensation for the loss of lives of their respective children. The children lost their lives in a tragic incident that occurred on 15.08.2007; they were run over by a train near Street No. 10- 12, Ajit Nagar, Shahdara, New Delhi while trying to catch the "cut off kites". The parents of the deceased children claim a compensation of a sum of Rs. 11,00,000/- for the death of each child.

2. The petitioners allege that the death of their children was caused due to negligence on the part of the officials of the respondent, as the railway tracks were not properly fenced and adequate safety measures had not been put in place despite the knowledge that children regularly played in vicinity of the tracks at the site of the incident.

3. The principal question to be addressed is whether the respondent is liable to pay compensation/damages to the petitioners for the loss of lives of their

respective children?

4. The learned counsel for the petitioners contended as under :-

4.1 That contesting respondent had failed to perform its public duty of ensuring the safety of the people and, therefore, the petitioners are entitled to compensation.

4.2 That operation of railways is inherently dangerous and therefore, the respondent would be liable to pay compensation, irrespective of whether the railway authorities were negligent or not.

4.3 That the essential facts are not disputed and therefore, the principle of *res ipsa loquitur* ought to be applied and compensation be awarded.

4.4 That the deceased children were minors. Therefore, the defence of contributory negligence was not available to the respondent.

5. The learned counsel for the respondent controverted the submissions of the petitioners and contended as under:

5.1 That the petition was not maintainable and the appropriate remedy for the petitioners was to file a suit.

5.2 That the respondent was not negligent in any manner and, therefore, was not liable to pay any damages or compensation.

5.3 That crossing or trespassing on railway tracks is not only dangerous but also a punishable offence under Section 147 of the Railways Act, 1989.

5.4 That the parents of the deceased children were well aware of the risks involved in playing near the railway tracks and despite that, they allowed their children to play near the railway tracks. Therefore, the parents of the deceased children were negligent and hence, they were responsible for the incident.

5.5 That the respondent was unaware that the children used to play near the railway tracks.

5.6 Insofar as fencing and other safety measures near the railway tracks is concerned, the respondent submitted that the network of railway tracks spans the length and breadth of the country and has not been fenced. It was submitted that, over-bridges, fencing and manned gates have been erected only at such places where there is a road crossing a railway track. It was further contended that as a precautionary measure, the railway tracks at the incident site have been laid at an elevated level to avoid any untoward incident. In addition, the railway authorities have been advertising extensively to educate people about the dangers of trespassing on railway tracks.

Discussion and conclusion

6. There is little dispute as to the essential facts. The tragic incident took place

on 15.08.2007, when the nation was celebrating the 60th anniversary of its Independence. It is common knowledge that in Delhi and certain other areas, Independence Day is celebrated by flying kites. This also involves kite fighting contests between kite flyers, in which kite flyers endeavor to cut the string of the kites of their opponents; the kites of the losing participants drift away and are collected by children. It is customary for the kite runners to retain the collected kites as their own. On the fateful date, the deceased children rushed on to the railway tracks to collect kites that had been cut down and in their excitement they failed to take notice of the approaching train.

7. I am not inclined to accept the respondent's contention that the present petition is not maintainable. As stated above, there is a little dispute as to the facts. It is well established that in given cases, compensation can be awarded even in proceedings under Article 226 of the Constitution of India.

8. Having stated the above, it is difficult to accept the petitioners' contention that the principles of strict liability must apply in the present case and irrespective of any negligence on the part of the railway authorities, compensation should be awarded. The principle as enunciated in the case of *Rylands v. Fletcher*: (1868) LR 3 HL 330 is not applicable in the facts of the present case. In that case the Court laid down the principle that if a person brings on his land and collects and keeps anything which is likely to do harm and such thing escapes and does damage to another, he would be liable to pay damages. Plainly, these conditions are not met in this case. The decision in the case of *M.C. Mehta and another Vs. Union of India and others*, (1987) 1 ACC 157 : (1987) ACJ 386 : AIR 1987 SC 1086 : (1987) 1 CompLJ 99 : (1987) 1 JT 1 : (1986) 2 SCALE 1188 : (1987) 1 SCC 395 : (1986) 1 SCC 562 Supp : (1987) 1 SCR 819 which was relied upon by the petitioners is also inapplicable in the facts of the present case. In that case *Oleum* gas had escaped from the factory of *Shriram Foods and Fertilizer Industries*, which caused harm to certain persons. The Court had held that "an enterprise which is engaged in a hazardous or inherently dangerous industry which poses a potential threat to the health and safety of the persons working in the factory and residing in the surrounding areas owes an absolute and non-delegable duty to the community to ensure that no harm results to anyone on account of hazardous or inherently dangerous nature of the activity which it has undertaken." This principle would, clearly, not be applicable in cases, where a trespasser by his own negligence intervenes in the activity of another and is harmed in the process.

9. The learned counsel for the petitioners has also relied on the decision of the Supreme Court in *Union of India (UOI) Vs. Prabhakaran Vijaya Kumar and Others*, (2008) ACJ 1895 : (2008) 4 JT 598 : (2008) 9 SCALE 182 : (2008) 9 SCC 527 and contended that operation of railways has been considered as an unnatural and hazardous activity, falling within the ambit of the rule of strict liability. In my view, this contention is also without merit. In that case, the Court was, *inter alia*, considering the provisions of Section 124A of the Railway Act,

1989 which expressly provides for payment of compensation on account of any untoward incident, resulting in injury or death of a passenger, irrespective of whether there has been any wrongful act, negligence or default on the part of the Railway Administration. It is in the context of the aforesaid provision that the Supreme Court observed that Section 124A of the Railway Act, 1989 laid down the principle of strict liability or no fault liability in cases of railway accidents. The said decision is not an authority for the proposition that railways would be liable to pay compensation for all accidents relating to trains or operation of railways even though the same does not fall within the scope of section 124A of the Railway Act, 1989.

10. The principal question to be considered is whether in the given facts, it is established that the respondent had been negligent or had failed to discharge its duty of care.

11. It was contended on behalf of the respondent that the railway authorities did not owe any duty for protection of trespassers and the incident had occurred while the children were trespassing on railway land. The principle that an occupier does not owe a duty to care towards a trespasser was also observed by the Supreme Court in *Cherubin Gregory Vs. The State of Bihar*, AIR 1964 SC 205 : AIR 1963 SC 205 : (1964) 4 SCR 199 in the following manner:-

"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 spring guns 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 wilfully 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)

12. Whilst it is settled that an occupier does not have any obligation to protect trespassers, the principle is not without exceptions. Plainly, this principle would not hold good where children are involved. It is difficult to imagine a civilized society which does not care for its children. Further, as held by the Supreme Court in *Union of India (UOI) Vs. United India Insurance Co. Ltd. and Others*, (1997) 2 ACC 589 : (1998) ACJ 342 : AIR 1998 SC 640 : (1997) 8 JT 653 : (1998) 118 PLR 248 : (1997) 6 SCALE 497 : (1997) 8 SCC 683 : (1997) 4 SCR 643 Supp : (1997) 2 UJ 827 : (1998) AIRSCW 245 : (1997) 9 Supreme 69 it is expected that Railway Administration would take necessary protective measures.

13. The learned counsel for the petitioners contended that the deceased children were minors and thus it could not be held that they were guilty of contributory negligence. She submitted that the respondent was fully aware and/or in any event ought to have known that children cross the railway tracks which are inherently dangerous. She submitted that in the circumstances, the Railway authorities owe the duty to properly fence the tracks to prevent such incidents.

14. In *Mirza Mahboob Ali Baig Aslam Vs. Union of India (UOI)*, (1996) ACJ 1314 , the Single Judge of the High Court of Andhra Pradesh Court had traced the law in regard to the duty to care for trespassing minors, as developed in United Kingdom. In *Cooke v. Midland Great Western Railway of Ireland*: 1909 AC 229, the railway company had kept a turntable unlocked. The evidence indicated that the children were in habit of entering and playing on the turntable. A child of about five years was seriously injured while playing with the turntable. The Court concluded that the unlocked turntable, which was undisputedly dangerous, presented an allurements to unsuspecting children and the court held the railway company liable for compensation. In *Robert Addie and Sons (Collieries) Ltd. v. Dumbreck*: 1929 AC 358, a four year old boy was killed by a horizontal iron wheel of a haulage system belonging to a colliery company. The Court held that the boy was a trespasser and there was no legal duty cast upon the colliery company to afford any protection to him. The claim for compensation was rejected. In *British Railways Board v. Herrington*: 1972 AC 877, a child aged about eight years was injured by a live electrified wire of a railway line. The court considered the earlier decisions and articulated the position of law as under:-

"So it appears to me that an occupier's duty to trespassers must vary according to his knowledge, ability and resources. It has often been said that trespassers must take the land as they find it. I would rather say that they must take the occupier as they find him.

So the question whether an occupier is liable in respect of an accident to a

trespasser on his land would depend on whether a conscientious humane man with his knowledge, skill and resources could reasonably have been expected to have done or refrained from doing before the accident something which would have avoided it. If he knew before the accident that there was a substantial probability that trespassers would come, I think that most people would regard as culpable failure to give any thought to their safety. He might often reasonably think, weighing the seriousness of the danger and the degree of likelihood of trespassers coming against the burden he would have to incur in preventing their entry or making his premises safe, or curtailing his own activities on his land, that he could not fairly be expected to do anything. But if he could at small trouble and expense take some effective action, again I think that most people would think it inhumane and culpable not to do that. If some such principle is adopted there will no longer be any need to strive to imply a factious licence.

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...One would have to look at his (occupier's) problem as a whole and ask whether it would have been humane or decent of him to do nothing. That may sound a low standard but in fact I believe that an occupier's failure to take any preventive steps is more often caused by thoughtlessness than by any shirking of his moral responsibility. I think that current conceptions of social duty do require occupiers to give reasonable attention to their responsibilities as occupiers and I see nothing in legal principle to prevent the law from requiring them to do that."

15. The above passage succinctly explains the obligation of an occupier towards a trespasser. Thus, it would not be open for the respondent to contend that it has no obligation to take reasonable care.

16. At this stage, it is necessary to refer to Section 13 of the Indian Railway Act, 1890 which reads as under:-

"13. Fences, screens, gates and bars.-The Central Government may require that, within a time to be specified in the requisition, or within such further time as it may appoint in this behalf,-

(a) Boundary-marks or fences be provided or renewed by the railway administration for the railway or any part thereof and for roads constructed in connection therewith;

(b) any works in the nature of a screen near to or adjoining the side of any public road constructed before the making of a railway be provided or renewed by a railway administration for the purpose or preventing danger to passengers on the road by reason of horses or other animals being frightened by the sight or noise of the rolling-stock moving on the railway;

(c) suitable gates, chains, bars, stiles or hand-rails be erected or renewed by a railway administration at places where a railway crosses a public road on the level;

(d) persons be employed by a railway administration to open and shut such gates, chains, or bars."

17. Thus, in cases where the Central Government requires that fences be placed, the Railway Administration would be obliged to do so. In the present case, no fences were erected. However, the railway land had been clearly demarcated. The question whether compensation could also be payable for non exercise of such statutory power is no longer *res integra*. In *Union of India v. United India Insurance Co. Ltd.* (supra), the Supreme Court considered the issue as to the Common Law to take reasonable care and the statutory duty under Section 13 of the said Act, in the context of an incident involving a collision of a bus and a train at an unmanned railway crossing. The Court referred to a decision of House of Lords in *Stovin v. Wise*: (1996) 3 WLR 388 and quoted the following passage from the aforesaid judgment:-

"Reliance or dependence in this case is in general on the product of the grant (and exercise) of powers designed to prevent or minimise a risk of personal injury or disability recognised by the legislature as being of such magnitude or complexity that individuals cannot, or may not, take adequate steps for their own protection. This situation generates on one side (the individual) a general expectation that the power will be exercised and on the other side (the authority) a realisation that there is a general reliance or dependence on its exercise of power to act.... The control of air traffic, the safety inspection of air craft and the fighting of a fire in a building by a fire authority may well be examples of this type of function."

18. After noting the aforesaid principle, the Supreme Court concluded that the aforesaid special duties as referred to in *Stovin* (supra) would also be applicable to Railways and held as under:-

"..The running of trains by the railways, as pointed out by the Privy Council in *Commissioner for Railways v. Mc. Dermott* 1966 (2) All E.R. 162 has been recognised as inherently perilous and, in our view, certainly creates, in the minds of the public a general expectation that safety measures - which the public cannot otherwise afford, have been taken by the railway administration. In our opinion, the steps mentioned by the legislature in the various clauses of Section 13 of the Railways Act, 1890 are in the words of Mason, J. steps which, even according to the legislature, individual members of society cannot afford to take and are not capable of taking, having regard to the expense or expertise involved or for the reason that these steps have to be taken in or in respect of the property of the railways. Applying the principle laid down by Lord Hoffman, in *Stovin v. Wise*, (1996) 3 WLR 388, there is, in our opinion a clear indication in Section 13(c) and (d) of the Railways Act itself that the affected parties are intended to be compensated because of the non-exercise of the aforesaid statutory powers by the railways. Thus the second condition as to a statutory intent of providing compensation is also satisfied.

41. Once the two pre-conditions laid in *Stovin v. Wise* (1996) 3 WLR 388 are satisfied both as to the non-exercise of statutory powers which was irrational and as to the statutory intent of payment of compensation for injury or death due to running inherently dangerous services in respect of which individuals cannot afford to protect themselves, the conclusion is irresistible that the non-exercise of public law or statutory powers under Section 13(c) and (d) did create a private law cause of action for damages for breach of a statutory duty. The case falls within the exception where a statutory "may" give rise to a "common law" "ought".

19. Thus, in cases where it is found that the Railways were in breach of their duty to take adequate measures for safety, the railway authorities could be held liable for payment of damages.

20. However, the Supreme Court further clarified that the decision of *Stovin* (supra) was not to be readily applied in every case of non exercise of statutory powers and that the court should not be understood to have held that all unmanned level crossing should have gates with a watchman and that it would all depend on the volume of traffic at the point as well as applicability of other principles.

21. Thus, the only issue that remains to be addressed is whether the respondent had taken the necessary measures for prevention of accidents.

22. The respondent has filed photographs of the railway tracks at site which clearly indicate that the tracks at the site are at an elevated level. A bare look at the photographs indicates that it is not easy for anyone to run on to the tracks. The slope of the embankment of the elevated tracks is steep. It is also evident that there is no regular path for crossing the tracks where persons are expected to cross the tracks regularly.

23. In *Shankerrao Laxman Rao Vs. Union of India* (UOI), AIR 1959 MP 128 : (1959) 4 MPLJ 289 , a Division Bench of the Madhya Pradesh High Court examined the issue regarding the obligation of the railway administration to erect a gate or post a gateman at a level crossing. The Court held that the requirement to erect a gate or post a watchman would depend on the volume of traffic. The relevant extract of the said decision reads as under:-

"(20) However, the question before us is what should be the degree of care required in the present case, where there is no statutory duty cast upon the railway administration to erect a gate or to post a gateman at the level crossing. Should we impose that standard of degree of care by applying the common law rule to the Indian circumstances? On one matter, we are clear that the degree of care would certainly be more than that required at accommodation crossings.

As the learned Law Lords indicated in 1956-3 All ER 291 (Supra), the standard of degree of care should be - "As the danger increases, so must the precautions increase". In cases of footways, it may not be necessary to put a whistle board

or a warning board. In cases of accommodation crossings, the erection of a whistle board near the railway track and a warning board near the public road may be sufficient. In cases of public highway crossings, the erection of a gate and a posting a gateman may be necessary under certain circumstances even in the absence of any statutory obligation.

(21) In our opinion, the question of erecting a gate and posting a watchman would depend upon the extent of traffic on the railway and on the public road. In the present case, there is no evidence on record about the extent of traffic on the public road. Regarding railway traffic, there is evidence that one train only per day goes and returns on this siding. It is, therefore, clear that the rail traffic is insignificant, while we are unable to gather any idea of the road traffic. The level crossing, undoubtedly, is a public level crossing.

(22) In *Liddiatt v. Great Western Railway Co.*, 1946-1 ALL ER 731, the learned Law Lords held that it was not necessary for the railway administration to erect a gate and keep a watchman at footways or accommodation crossings. Ordinary precautions, such as a sign board indicating a warning to the passers-by and a whistle-board would serve the purpose. But a greater degree of care would be required at a highway crossing.

This being a level crossing, where a public highway crosses the railway line, we think that the degree of care to be taken by the railway administration ought to be greater than that required for an accommodation crossing. We also feel that it may be necessary in some cases to erect a gate even at an accommodation crossing, if the rush of traffic be heavy. On the other hand, if the traffic be insignificant or negligible, it may not be necessary to erect a gate and post a gateman even at a public level crossing.

No hard and fast or absolute rule can be laid down in this behalf. The question of erecting a gate would depend on the situation of the crossing, visibility of the rail track from the road, any sharp turns or curves and the extent of the road traffic etc. In view of the paucity of evidence on these points in the present case, we are unable to hold that the failure of the railway administration to erect a gate and post a gateman amounted to an actionable negligence by itself."

24. In the present case, the tragic incident did not take place on a level crossing or at a place where the railway tracks crossed a well used path. Thus, there is no question of any frequent traffic at the site of the accident. If the petitioners' contention is accepted then it would be necessary for the railways to fence the entire length of tracks across the country, especially tracks through populated areas.

25. Clearly, there is no obligation on the respondent to fence the entire length of railway tracks and the question whether non-fencing of railway tracks amounts to negligence or a failure to take due care would depend on the probability of persons crossing the tracks and also the number of persons so crossing the tracks. In cases of accidents on an unmanned railway crossing, the duty of care

expected of the railway administration is much higher as compared to tracks at other places because public are expected to cross the railway track at level crossings. The same standard of safeguards, as required in an unmanned crossing, are not necessary to be placed across the entire length of the tracks, since public are not permitted to cross the tracks except at the designated crossing.

26. The learned counsel for the petitioners contended that the deceased children were minors and it could not be held that they were guilty of contributory negligence. Therefore, she reasoned, that the respondent would be liable to pay damages/compensation. I am unable to accept this contention, first and foremost for the reason that even if it is assumed that minors cannot be held guilty of contributory negligence, it does not necessarily follow that the railway administration was negligent.

27. In the present case, it is apparent that the children were negligent and had rushed on to the tracks without looking for ongoing rail traffic. In the case of *Madras and Southern Maratha Railway Co. Ltd. Vs. Jayammal*, AIR 1925 Mad 304, a Division Bench of the Madras High Court set aside the decree of damages awarded in respect of an incident where a girl of seven years of age was run over by a locomotive engine and lost her right arm and her right leg. The Division Bench held that "the engine was an obvious danger, capable of being perceived even by a child of tender years". The Court further held that "the danger of being run over by a passing engine, when crossing the railway lines imposes a necessity for the utmost caution on all persons walking on or near the track. Persons who cross an open railway line at an unrecognized crossing do so at their own peril."

28. As indicated above, in the present case, the railway authorities had taken the necessary precautions by sufficiently demarcating the railway land, as well as elevating the railway tracks, thus, making them difficult to access. Yet the children had run on to the tracks without taking the necessary precaution of looking for the oncoming trains. Hence, the respondent cannot be held liable for the negligence of the children/parents.

29. Secondly, whilst it is true that the degree of care that is expected of an adult cannot be expected of a minor, 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 and Ors. v. GNCT of Delhi and Ors.*: W.P.(C) 5072-73/2005, decided on 03.07.2007, 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."

30. In the present case, the children were aged between 11 years to 13 years and cannot be stated to be of an age where they were unaware of the dangers of trespassing on to railway tracks. The respondent has been regularly issuing advertisements warning the public of the dangers involved in trespassing onto railway tracks. The children were not of an age where they could not understand the risks involved in rushing on to the railway tracks.

31. 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 were mowed down by a train, indicates that the respondent was negligent.

32. In *Klaus Mittelbachert Vs. East India Hotels Ltd.*, (1999) ACJ 287 : (1997) 2 AD 23 : AIR 1997 Delhi 201 : (1997) 65 DLT 428 : (1997) 40 DRJ 147 , this Court has explained the conditions required for the applicability of the principle of *res ipsa loquitur*. 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 and 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.) "

33. In the present case the above tests would not be satisfied as the children were negligent in rushing on to tracks before an oncoming train.

34. In my view, in the facts of this case, 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.

35. The respondent cannot be held to have failed in its duty to take adequate care, unless it is concluded that the railway tracks at the site provided an

unreasonable risk of harm to the children and that the children were of an age where they could not, by reason of their youth, realize the risk involved.

36. The learned counsel for the petitioners relied upon the decisions of this Court in Kumari Alka Vs. Union of India and others, (1995) ACJ 1254 : AIR 1993 Delhi 267 : (1993) 25 DRJ 560 : (1993) ILR Delhi 303 : (1993) 105 PLR 24 , Kishan Lal (supra) and Delhi Jal Board Vs. Raj kumar and Others, (2005) 4 ACC 746 : (2006) ACJ 1025 : AIR 2006 Delhi 75 : (2005) 125 DLT 120 : (2006) 142 PLR 33 . In addition, the petitioners also relied upon the decision of the Supreme Court in H.S.E.B. and Others Vs. Ram Nath and Others, (2004) 5 SCC 793 , in support of their contention that the respondent had a duty of care and since tracks had not been fenced, the respondent had failed to discharge the said duty and, thus, was liable to pay compensation.

37. In my view, none of the aforesaid decisions would be of assistance to the petitioners. In Kishan Lal (supra), a body of a young child was found in a drain. The Court concluded that the manhole had been left uncovered and consequently the child had fallen into the drain and died. In Delhi Jal Board v. Raj Kumar (supra), a Division Bench of this Court upheld the decision to award compensation in respect of a fatal accident which was caused because the manhole cover was not aligned to the surface of the road but was 3 inches below. This had resulted in an accident where a rider of a scooter lost his life. In H.S.E.B (supra), the Supreme Court upheld the award of compensation and held that it was the duty of the Electricity Board to ensure that unauthorized structures near its installation were removed and that electricity wires were at a safe distance from any building, even if it were unauthorized or illegal. In all of the aforesaid cases, the Court had found the concerned authorities to be negligent and failing in their duty.

38. In the present case, the railway tracks have been laid at an elevated level. The respondent had ensured that the tracks are not at the ground level and had thus taken the necessary safety measure to ensure that the tracks are not accessible in the normal course. The railway authorities have been advertising extensively cautioning the public of the hazards of trespassing on the railway tracks. The tracks also do not present a hidden trap. In the circumstances, it is difficult to apportion any blame on the railway authorities for the tragic incident.

39. Accordingly, the petition is dismissed. No order as to costs.