

(2004) 10 DEL CK 0071
In the Delhi High Court
Case No : WP (C) 2443 of 1998

Smt. Chitra Chary and Others

APPELLANT

Vs

Delhi Development Authority and Others

RESPONDENT

Date of Decision : 27-10-2004

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2004) 3 ACC 866 : (2006) ACJ 864 : (2004) 114 DLT 693

Hon'ble Judges : Pradeep Nandrajog, J

Bench : Single Bench

Advocate : Charandeep Kaur, for the Appellant; Lovkesh Sawhney, for Respondent No.1, for the Respondent

Judgement

Pradeep Nandrajog, J.—This is an unfortunate case in which a young and sole bread earner of the family was lost on account of a tragic mishap occasioned due to negligence of the contractor engaged by DDA that left the petitioner No.1, a young widow and 2 minor children to defend for themselves. Even in the hour of sorrow and grief, petitioner No.1 showed courage and a social commitment; seen rather as an exception in this country; her late husband was pronounced brain dead. She took a courageous decision and donated his organs, giving a chance for a better life to the recipients. It was a sterling example of the gift of life.

2. A sensitive and responsive state apparatus was expected to respond with compassion towards the petitioners. The deceased was no millionaire. He was aged 38 years when he died. Employed with M/s. Jindal Photo Films Limited as a Marketing Executive, he was earning a basic pay of Rs. 4,075/- p.m.

3. Undisputed and disputed facts be noted. DDA had awarded the work of construction of peripheral storm water drain in Sector 15, Rohini to a private contractor, Sh. Vijay Kumar Goel. Term of the contract required the contractor to, amongst others; take:

""Adequate care shall be taken to put up corrugated sheets around the area and

also warning sign boards in order to give warning to the users about the work of deep drain under execution. Warning lights should also be installed in order to give proper warning to pedestrians and vehicles. Detailed instruction issued in this regard vide circular No.121 of LG, Delhi should be followed very strictly and nothing extra shall be paid on this account.'"

4. The work required digging of trenches before storm water drain could be constructed. Work commenced in December, 1996. By 25.10.1997 it had reached the 20 feet wide road near Block A-8, Sector 15, Rohini between Block A and Block G.

5. On 25.10.1997, at around 7 P.M. husband of petitioner No.1 and father of petitioners 2 and 3, late Sh. Arvind Chary while on way to the creche to fetch certain articles of his children had to pass along the road. He fell into the trench which had been dug up. He was hospitalised on the same day. On 3.11.1997 he died at about 7.15 p.m.

6. Aforesaid are the undisputed facts.

7. The disputed facts are that the petitioners claim that the site of the trench was not barricaded, much less by any corrugated sheets. There were no warning sign boards nor warning lights. Being rainy season, site was slippery. Deceased slipped and fell inside the pit. He suffered spinal injuries. He was directly taken to hospital. DDA refutes by stating that barricades were put up. Deceased was rescued by people who had gathered. He walked home. Complications surfaced when at home and from there deceased was taken to hospital. DDA states that deceased fell in the trench as an electric cable caught fire. As is usual with people in Delhi, a curious crowd gathered. Somebody pushed the deceased and as a result of the push, he fell in the trench.

8. Claim of the petitioners is based on various judgments passed by the Hon'ble Supreme Court to the effect that where a citizen suffers injury or death due to negligence of the State, compensation can be awarded in a writ proceeding. Duty of the State pleaded, is that all reasonable care when work of the kind is carried out by or on behalf of the State was not followed. defense of the DDA is that highly disputed questions of fact arise for consideration. Claim if any, had to be against the contractor if at all negligence was established. As per DDA, pleadings require evidence and Therefore, present petition is not the appropriate remedy. As noted above, on merits DDA denies any negligence and has given its version of the incident.

9. Certain contemporaneous events on which neither either party had any control may be noted. These to my mind bring out the truth of the rival versions.

10. When deceased fell into the trench, information was received by H.C. Gaj Raj Singh vide DD.No.32. He Along with Constable Uday Veer Singh reached the spot. With the help of public, deceased was taken out from the trench. Deceased made the following statement to him which he recorded:-

""Statement of Sh. Arvind Chary, S/o Sh. V.S. Chary, R/0 A-5/104. Sector-15, Delhi, aged 35 years.

It is stated that I Along with my family stay at above said address. Today at about 6.50 p.m, I was going to G-15 pocket, Sector-15 from my residence to collect my children. When I reached in front of A-8/30,31 Sector-15 there is digging for the sewer and there is a deep ditch being dogged in which I slipped and has fallen in the ditch and I have got injuries. This accident has occurred due to negligence of the contractor, who dogged the ditch, by not putting the gate or light signal which is V.K.Goyal contractor's negligence. Against him legal action be taken and my examination from doctors be carried out. Statement has been heard and correct.""

11. Immediately below the statement aforesaid made by the deceased at the spot, H.C. Gaj Raj Singh has recorded that he reached on receipt of information vide DD No.32. He saw the deceased lying in the pit. Deceased was taken out of the pit with the help of the public and his statement was recorded. In CATS Van, deceased was sent to a government hospital.

12. Contemporaneous record of events by an independent agency belies the version of the DDA and affirms the version of the petitioners that the deceased was directly taken to hospital when rescued from the trench. Deceased never came home.

13. Contemporaneous statement of the deceased records that there was neither any barricade nor any light signal. This statement of the deceased as to the cause and circumstances of his fall was made at the spot.

14. Be that as it may, petitioners state that after the accident, site was photographed. Photographs have been filed Along with the writ petition. Photographs do not show any fencing or barricading of the site by putting up corrugated sheets. Photographs do not reveal warning lights. The said photographs corroborate what the deceased stated as the cause of the accident.

15. Counter affidavit filed by DDA, in the context of the photographs, pleads as under:-

""7. The residents of the area gathered on the spot to check what was happening. After sometime despite the barricades and despite warnings from the working staff present the residents pushed their way through the barricades for a closer look and did no heed the warnings of the working staff. The petitioner's husband was one of the residents who went past the barricades for a closer look.""

16. Further version of the DDA is to be found in para 10 of the preliminary submissions in the counter affidavit wherein reference has been made to letter dated 12.11.1997 written by one Sh. K.L. Garg, President of the Resident Welfare Association. The said letter reads as under:-

""The Executive Engineer Rohini Sub Division-5 enquired into an incident which took place on 25.10.97 in Sector-15 that a person fell into a pit, which report is as under:-

On 25.10.96 around 5.45 p.m the work of laying a pipe was going on, all of a sudden the Delhi Vidyut Board light went off in the area due to fault in DVB cable. So many people gathered there to see the burning and faulty cable. The DDA personnels who were present there were trying to warn the public to be away from the pit, but instead of it, many removed the barricading and came forward towards the pit, as a result they proceeded to see the burning cable into a pit and thus all of a sudden one personnel into the pit which was approx.7.5 feet deep. The said person was removed from the pit and then sent to his house nearby by the people. So many persons collected around him. At that time the said person was not appearing abnormal.

Sd/_

(K.L. Garg, J.)

President.""

17. Stand of the DDA and the letter dated 12.11.1997 relied upon by it is ex facie false. It requires hardly any proof to bring out the aforesaid. Firstly, K.L. Garg does not state that he was at site. Secondly K.L.Garg records that people removed the petitioner from the trench and sent him home. It is contrary to what Head Constable Gaj Raj Singh recorded at site when he reached pursuant to D.D entry no.32. Further falsity in the letter dated 12.11.1997 is when it records that persons of DDA were present at site. DDA was not executing the work directly. It was the contractor who was on the job. Incident took place at 7 p.m. Letter wrongly records that it took place at 5.45 p.m. Probably, a false time has been stated because every one knows that government offices work upto 5.30 p.m. Maker of the letter tried to introduce facts to probablise presence of person from DDA. If there were barricades, and had the public pushed the same, to satisfy their curiosity to see the burning cable as alleged by DDA, the barricades would have been reflected in the photographs filed by the petitioner. Further in its counter affidavit, DDA does not state that its officers were present at site.

18. The facts on record, being the photographs filed by the petitioners; DD entry No.32; statement recorded at site by HC.Gaj Raj Singh; entry recorded by HC Gaj Raj Singh beneath the statement of the deceased are all conclusive of the fact that there were no barricades at the site. Petitioner was rescued from the trench and sent straight to the hospital.

19. Cause of death of the deceased as recorded in the post mortem report was not challenged by the DDA. Post mortem report reveals that the deceased died "brain death". Cause of death was, coma due to head injury caused by blunt force which could be "fall in mud traffic accident".

20. Facts as noted aforesaid reflect the general cynical irrelevance towards safety norms to be followed as one notices everyday whenever municipal agencies carry out construction work either by themselves or through a contractor. The facts evidence the usual mood of complacency seen each day. What is listed as a safety measure is observed more in breach and less in compliance. This Court has witnessed construction of flyovers in Delhi, digging of roads for sewer, repair work etc. Safety norms are found not being adhered to. It is the bounden duty of municipal agencies to ruthlessly require adherence to the safety norms in their minutest details and in their exacting requirements. Evidence on record conclusively establishes breach of putting barricades for safety of the passers by.

21. Any activity under authority of the State has to be reckoned as that of the State itself. The State has to be held vicariously liable.

22. Would the petitioners be entitled to relief under Article 226 of the Constitution of India is the question which needs to be answered next.

23. Remedy under Article 226 is not a matter of right. It is a discretionary jurisdiction. Equity plays a vital role in any action under Article 226. Fair, just, moral and ethical considerations permeate exercise of writ jurisdiction. Developed system of law in various countries has introduced the assistance of discretionary power to do justice in particular cases where strict rules of law may cause hardship. Principles of justice and conscience are the bed rock of equity jurisdiction. Where a common law remedy is onerous or beyond the means of a litigation, relief can be granted under Article 226 of the Constitution of India, more so when the cause is predicated on gross negligence or a patent violation of law by the State.

24. tortious liability arises from the breach of duty primarily fixed by law, duty being towards persons generally. Breach of duty is redressable by an action for unliquidated damages.

25. There is a common law duty of taking reasonable care. Duty of taking reasonable care is attached when a person carries out excavation work resulting in the formation of a trench duty of care requires public warning signals notifying the passers by that there is a trench ahead. Additionally, duty of reasonable care would require putting into place all safety measures, being at least 2 in number. Firstly site of the trench must be barricaded and secondly the barricades must be seen.

26. In the decision *Bhim Singh, MLA Vs. State of Jammu & Kashmir and Others*, ¹, their Lordships of the Supreme Court held that where a State tramples upon the legal right of a citizen, victim can be compensated by awarding suitable compensation in appropriate cases. In *A.S. Mittal and Another Vs. State of U.P. and Others*, ², it was observed that where safety norms are breached by the State or a person acting under authority of the State, compensatory relief can be granted under writ jurisdiction. It was held that where a tortious act is committed by a person acting under the authority of the State, the State would be

vicariously liable.

27. There are various decisions evidencing grant of compensation in writ jurisdiction. I need not catalogue all. In the decision reported as P.A. Narayanan Vs. Union of India (UOI) and Others, , noting that a passenger traveling by train was criminally assaulted and holding that there was a common law duty of taking reasonable care attached to all carriers including the railways, Hon"ble Supreme Court granted damages inasmuch as breach of their duty was held to be writ large. This Court, in the decision Dharamvir Kataria (Col.) Vs. Union of India and Others, , awarded compensation to the husband of the deceased who died in a lift in a building owned by the Government. It was held that claim in public law for compensation for deprivation of constitutionally guaranteed right to life and liberty was enforceable under Article 226 of the Constitution of India. A Division Bench of this Court in the judgment Darshan and Others (Smt.) Vs. Union of India and Others, awarded compensation in writ jurisdiction where the deceased died by falling in an uncovered man hole. Principal of rest ipsa liquitor was applied.

28. The Allahabad High Court in the decision The Municipal Board, Jaunpur Vs. Brahm Kishore and Another, held that non-barricading and not putting danger signaling and light at the site of a trench was a tortious act.

29. Petitioners are accordingly held entitled to damages against DDA.

30. Averments in the petition pertaining to the income of the deceased are supported by documentary evidence, being certificates issued by the employer. I have no reason to disbelieve the same. Unfortunately, petitioners have not stated the age of petitioner No.1 and that of petitioners 2 and 3.

31. Deceased was aged 38 years. I would presume that first petitioner was younger to him. Photograph of the family stated to have been taken just prior to filing of the petition shows the two minor sons being petitioners Nos. 2 and 3 to be between 4 and 8 years of age. Petitioner No.1 would be depending upon her husband for support all her life. Petitioners 2 and 3 would be dependent on their father till at least the age of 23 years. Income of the deceased, evidenced by the certificates issued by the employer, at the time of death was Rs. 4,075/- per month. Medical allowance admissible was Rs. 339/- per month. Employer was to contribute 12% of the basic salary towards provident fund. Deceased was entitled to ex gratia payments depending upon profits earned by the employer. He was entitled to gratuity, leave encashment and yearly increments.

32. Taking into account the aforesaid factors and totality of the circumstances, a fair, just and reasonable compensation has to be worked out. Taking gross monthly salary at Rs. 5,000/-, 1 unit for deceased, 1 unit for wife and 1 unit for the 2 minor children, the monthly figure for the family comes to Rs. 3300/-. Yearly increments was 15% of the basic salary. In 10 years income would have doubled. Deceased had 20 years of service left. A fair and a reasonable compensation would be Rs. 10 lacs. Ordered accordingly. Petitioners would be

entitled to interest thereon from the date of filing of the petition till date of realisation. Interest rates have fallen since the year 1998. A Scheduled bank on a fixed deposit was giving interest of 12% when deposit was of more than 3 years in 1998. Currently the rate of interest has fallen to 5.75%.

33. 7% interest per annum would Therefore be a fair and reasonable rate of interest.

34. Mandamus is issued to DDA to pay to the petitioners a sum of Rs. 10 lakhs together with interest at the rate of 7% per annum w.e.f. 12.5.1998 till date of payment. The sum of Rs. 10 lakhs together with interest would be paid as under:-

Petitioner No.1 Rs. 6 lakhs.

Petitioners 2 and 3 Rs. 2 lakh each.

35. Petitioners would in addition be entitled to costs against DDA quantified in the sum of Rs. 10,000/-