

(2005) 11 NCDRC CK 0002

In the National Consumer Disputes Redressal Commission

Vimalchandra D Desai

APPELLANT

Vs

PUNE MUNICIPAL CORPORATION

RESPONDENT

Date of Decision : 16-11-2005

Acts Referred:

Citation : 2005 4 CPJ 659

Hon'ble Judges : B.B.VAGYANI , Anjali Karadkhedkar J.

Judgement

1. THE complainants who are parents of deceased Master Parimal, have filed this case against the O.Ps. for grant of compensation of Rs. 20 lakhs. In brief the facts giving rise to the complaint are as under.

2. O .P No. 1 is Municipal Corporation established under the provisions of B.P.M.C. Act and is the owner of the swimming pool wherein unfortunate mishap of drowning of the only son of complainants took place. The swimming pool is known as Nande Swimming Pool admeasuring 25x12 mtrs. The resolution came to be passed by the Standing Committee of Pune Municipal Corporation to give Nande Swimming Pool to Aundh Sports Club on contract for a period of five years commencing from 12.3.1998. In pursuant to the resolution of the Standing Committee a written contract was executed between Pune Municipal Corporation and Aundh Sports Club on 16.7.1998. The possession of swimming pool was handed over to Aundh Sports Club for the purpose of running the swimming pool. Pune Municipal Corporation however retained the power of supervision and control over the swimming pool. As per terms and conditions of the contract the Corporation retained the right of inspection and supervision. The Corporation used to do periodical inspection of swimming pool. The water of the swimming pool was tested in the laboratory. By virtue of the terms and conditions of the contract the Aundh Sports Club was authorised to collect and recover the fees from the members. Aundh Sports Club had agreed to pay annual instalment of Rs.

3. ,88,328 TO the Corporation. Aundh Sports Club was TO pay in all five instalments TO the Corporation. Liability arising out of accident was taken by the

contractor. 4. The deceased Parimal enrolled his name for morning batch commencing from 7 a.m. He paid a cash amount of Rs. 112.50 TO Aundh Sports Club. Aundh Sports Club issued a receipt TO Master Parimal for having received from him monthly fee of Rs. 112.50ps. Master Parimal went TO Nande Swimming Pool at 6.45 a.m. on 20.4.2000. He did not return home within a reasonable time. Out of anxiety father of Parimal went TO the swimming pool. Mr. Sambhus who was present at the entrance of the swimming pool, met the father of Parimal and asked TO identify the clothes lying near the pool. He also Told the father of Parimal that one dead body was lying at the botTOM of the swimming pool. Intimation was already given TO the police. Police Officer along with Panchas arrived at the spot. Dead body was taken out of the swimming pool. It was the dead body of Parimal. Police prepared Panchanama at 3.45 p.m. on 20.4.2000. FIR was lodged. Crime under Section 304A read with 34, Indian Penal Code was registered. The dead body of Parimal was sent for the purpose of post -mortem examination. Post -mortem examination was carried out on the dead body of Parimal. The cause of death of Parimal was due TO asphyxia due TO drowning. No external injuries were noticed on the body of Parimal. The parents of the deceased Parimal attributed gross negligence TO the contractor as well as Pune Municipal Corporation. They served legal notice dated 29.7.2000 on the O.Ps. O.P. Nos. 3, 5 and 9 sent their replies. Thereafter complainants filed complaint on 7.10.2000. O.P. Nos. 1 and 2 filed their common written statement. O.P. Nos. 9 and 12 filed their common written statement. O.Ps. 3 TO 8, 10, 11 and 13 filed common written statement.

4. PUNE Municipal Corporation contended in the written statement that there was no privity of contract between the deceased and the Corporation and, therefore, consumer complaint is not maintainable in law. It is specifically contended in the written statement that privity of contract was between the deceased Parimal and Aundh Sports Club and this being the position, Pune Municipal Corporation is not in any way liable to pay any compensation to the complainants. It is also contended in the written statement that Pune Municipal Corporation has not provided any service so as the swimming pool is concerned. The O.Ps. raised the following defences in their written statement: (1) Complainants are not consumers. (2) Complaint filed by the parents of the deceased Parimal does not fall within the ambit of provisions of Consumer Protection Act, 1986. (3) Consumer Forum has no jurisdiction to entertain and decide the complaint. (4) Life savers were engaged at the swimming pool at the relevant time indicating thereby that there was no deficiency in service. (5) Death of Parimal was accidental and, therefore, none of the O.Ps. is liable to pay any compensation to the complainants. (6) So long as criminal case is pending the consumer complaint is not maintainable.

5. VOLUMINOUS material is placed on record. We heard Advocate Ms. Geeta Mulekar for the complainant and Advocate Mr. V.G. Mujumdar for Pune Municipal Corporation. Rest of the O.Ps. did not advance oral submission.

6. BY virtue of the pleadings of the parties and legal submissions advanced at the Bar, following points arise for our consideration. (i) Whether the complaint filed by the parents of deceased Parimal falls within the ambit of provisions of Consumer Protection Act, 1986? (ii) Whether State Commission has jurisdiction to entertain and decide the complaint filed by the complainants? (iii) Whether complaint filed by the complainant is well within time? (iv) Whether complainants prove that there was deficiency in service? (v) Whether complainants are entitled to get compensation? Our findings are as under : (i) Yes (ii) Yes (iii) Yes (iv) Yes (v) Yes

Reasons : It is tried to be argued on behalf of the Municipal Corporation that no service was provided by the Pune Municipal Corporation. Copy of the contract is placed on record. Nande Swimming Pool is owned by Pune Municipal Corporation. It is clearly mentioned in the contract that the Standing Committee accorded sanction to give the swimming pool to Aundh Sports Club on contract basis for financial benefits and for convenience of citizens of Pune. Under the circumstances it cannot be said that Pune Municipal Corporation is not a service provider. The swimming pool was given to Aundh Sports Club for a period of 5 years. The Corporation was to get in all five instalments of Rs. 4,88,328 each. On the basis of terms and conditions of the contract, Aundh Sports Club was to recover daily and monthly fees from the members and in turn was supposed to give annual instalment of Rs. 4,88,328 to the Pune Municipal Corporation. It is admitted fact that the deceased Parimal gave monthly fees of Rs. 112.50 to the Aundh Sports Club. Copy of the receipt is placed on record. Monthly fees paid by Parimal to Aundh Sports Club was consideration for use of swimming pool. Parimal died in the swimming pool. Post -mortem report would show that cause of death was asphyxia due to drowning. Spot Panchanama prepared by Police would also go to show that dead body of Parimal was recovered from the swimming pool. Parents of deceased Parimal, therefore, can file consumer complaint before State Commission. Aundh Sports Club was acting as an agent of Pune Municipal Corporation. Terms and conditions of the contract would clearly go to show that Pune Municipal Corporation had retained with it the supervisory control over the swimming pool. Under the circumstances Pune Municipal Corporation cannot escape its liability when the swimming pool belonging to the Corporation was given to Aundh Sports Club on contract. Pune Municipal Corporation provided the swimming pool facility through Aundh Sports Club to the citizens of Pune. Pune Municipal Corporation earned money through Aundh Sports Club. Pune Municipal Corporation allowed the Aundh Sports Club to recover and collect daily and monthly fees from the members. Under the circumstances we do not find any difficulty in holding that Pune Municipal Corporation provided service to the citizens of Pune through Aundh Sports Club. Under the circumstances we hold that the complaint filed by the complainants in which deficiency is attributed to the O.Ps. falls within the ambit of provisions of Consumer Protection Act, 1986. We, therefore, answer point No. (i) in the affirmative. Before amendment Act of 2002, the jurisdiction of the State

Commission was limited exceeding Rs. five lakh to twenty lakh. This complaint was filed in the year 2000. The claim does not exceed Rs. twenty lakh. Therefore, the State Commission has every right to entertain and decide the consumer complaint in which serious allegations of negligence are attributed to the O.Ps. Accordingly we answer point No. (ii) in the affirmative.

7. PARIMAL died on 20.4.2000. The parents of Parimal filed the complaint on 7.10.2000. The consumer complaint is to be filed within a period of two years from the date of cause of action. Consumer complaint filed by the complainant is well within limitation. We, therefore, answer point (iii) in affirmative.

8. ON 25.9.1998 the Officer of Pune Municipal Corporation found that there was one Life Guard present at the site of swimming pool though two Life Guards were required then. The Pune Municipal Corporation, therefore, served notice on Aundh Sports Club on 28.9.1998 and pointed out short falls. On 20.3.1999, the Officer of Pune Municipal Corporation had issued another notice to Aundh Sports Club wherein number of instructions were given. By letter dated 18.3.2000 Pune Municipal Corporation asked Aundh Sports Club to keep first aid box at the swimming pool. By the said notice Aundh Sports Club was also asked to reduce the crowd and not to permit more than 25 persons at a time. Documents on record clearly show that water was not tested periodically and at times water in the swimming pool was not fit for swimming. The father of deceased Parimal has placed on record his affidavit. He was not present at the time of occurrence and, therefore, he has no personal knowledge about the mishap. Affidavit of one Pravin Bagade is placed on record. On perusal of the affidavit it is revealed that Pravin Bagade was present along with his son at the swimming pool on 20.4.2000 for morning batch commencing from 7 a.m. He has specifically made statement that he was present at the swimming pool when Master Parimal died because of drowning. There was so many persons allowed to swim in the swimming pool and the number was excessive. He has made a positive statement in his affidavit that Life Guards were cleaning the floor and were not attending the duties allotted to them. The complainants have placed on record copy of Panchanama. Copy of the Panchanama is death blow to the defence raised by the O.Ps.

9. FROM the Panchanama dated 20.4.2000, it is seen that the dead body of Parimal was found in deep water. The Police and Panchas did not find Iron Bar fixed to the side of the swimming pool. In emergency presence of such iron bar plays important role. The Panchas and Police did not find life saving instrument nearby the swimming pool. They did not find first -aid box. The Panchas and Police did not see bottom of the swimming pool clearly. The water in the swimming pool was merky.

10. AT this juncture we would like to refer the quality tolerance for water in the swimming pool as per Indian standard. We are inclined to reproduce the relevant clause - 3. Tolerances 3.1 Physical 3.1.1 Clearness "The water shall be clear odourless and colourless and shall be sufficiently clear at all times when the pool

is in use to pass the following test: Place a black disc, 150 mm in diameter and fixed to a white background, on the bottom of the pool at the deepest point. The disc shall be clearly visible from the side walks of the pool at all distances up to 9 metres in a line drawn across the pool through the said disc."

The dead body of Parimal was not clearly visible when the Panchanama was prepared. Water in the swimming pool was not upto the standard and it was not sufficiently clear when the swimming pool is in use. This is a serious deficiency on the part of Aundh Sports Club. Pune Municipal Corporation did not exercise its control over the activities of Aundh Sports Club properly.

11. THE Royal Life Saving Society is one of the largest water safety and life saving education organisations in the world, being active in over 40 countries. The life saving movement began in England in 1891 as a means of overcoming the considerable loss of life due to drowning. In 1924 the Society was granted a Royal Charter by King George V and a Supplemental Charter was granted by Queen Elizabeth II in 1959.

12. IT is now recognised that those who are responsible for patrolling any locality, beach, pool, lake and river require additional skill and knowledge over and above those required by general saver. A special training programme for the professional and development of those involved in life guarding is also prescribed. The training should include observations, emergency action skills, the use of specialised equipment such as oxygen resuscitation equipment and any other which they are required to operate.

13. REGULAR training will reveal the hazards and features relevant to specific environments and increase knowledge of operational procedures and the emergency action plan.

14. WHILE on duty, Life Guards must show skilled performance, physical; capabilities, knowledge, understanding of potential emergencies, appropriate procedure and good judgment. A life saver is trained to react to the various situations. The Life Guard promptly and reasonable has to inspect and to take steps to prevent accidents. The Life Guards should be dressed in appropriate clothing so as to be easily recognizable to the public and instantly ready for action.

15. THE Life Guard should wear a bathing costume with shorts or skirts, closed toe footwear for protection and to permit safe mobility poolside and a Life Guard shirt.

16. IT is strongly recommended that the shirt be predominantly red and yellow and appropriately labeled with the word "LIFE GUARD" ensuring easy identification. To ensure effective supervision of the entire swimming pool following factors are required to be taken into consideration: 1. Number of Life Guards on duty 2. Anticipated number of patterns and their potential behaviour or activities. 3. The ability of Life Guards to see patrons, danger areas, other

guards, the bottom of water area. 4. The ability of Life Guards to respond efficiently in an aquatic emergency. 5. The size and shape of the venue being supervised. 6. Desire to have as many perspective as possible on any given zone or areas. Chances of drowning are increased by a combination of failure to recognise a person in difficulty, intrusion of non -Life Guard duties on the primary task and distraction from surveillance duties.

17. IT is material to note that Master Ramesh Chaudhari was also drowned in Nande Swimming Pool on 14.2.2000. Aundh Sports Club did not take precautionary measures to avoid recurrence. Nande Swimming Pool proved to be a death trap for young children. After incident of 14.2.2000, Corporation could have terminated the contract. But, Pune Municipal Corporation did nothing. The following are the common reasons why swimming pool accident occurs. Improperly designed or constructed pool. Failure to secure pools from children Failure to maintain the pool in safe condition Lack of Life Guards Inadequate warnings Absent or unreadable markings and Lack of safety covers.

18. THERE is nothing on record to show that minimum requirements as discussed above were available at the swimming pool on 20.4.2000. We have pointed out the lapses of the contractor. There is nothing on record to show as to how many Life Guards were on duty on 20.4.2000 and who was in charge of morning batch commencing from 7 a.m. to 8 a.m. First -aid box was not near by the swimming pool. There was crowd at the swimming pool on 24.4.2000. Life Guards were not doing their duty assigned to them. Iron bar was not in the deep water which could be used in emergency. The water in the swimming pool was murky which prevented easy visual scan of the pool bottom. The body of Parimal was not clearly visible because of murky water. Under the circumstances we hold that Aundh Sports Club and Pune Municipal Corporation failed to provide proper service. They were grossly negligent. There was deficiency in the service provided by them. Honble Supreme Court in the Case of Ravneet Singh Bagga v. KLM Royal Dutch Airlines, III (1999) CPJ 28 (SC)=(2000) 1 SCC 66, observed that inefficiency, lack of due care, absence of bona fides, rashness, haste or omission and the like may be the factors to ascertain the deficiency in rendering the services.

19. AFTER examination of the entire material on record we conclude that the Aundh Sports Club and Pune Municipal Corporation were not efficient in discharging their legitimate duties. There was total lack of care. Aundh Sports Club was negligent in providing proper service. The Gujarat State Commission in the case of Purushottam V. Murjani v. Vadodara Municipal Corporation, Complaint No. 21 of 1994 decided on 23rd September, 2002 has held that in such type of cases res ipsa loquitur is applicable. The spot Panchanama would clearly go to show the inefficient service and lack of due care. In case of City of Belgaum represented by its Commissioner v. Shri Siddagonda Annappagonda Patil, reported in 2002 (1) CPR 23 (NC). Award in the sum of Rs. 2,50,000 was made against Corporation of City of Belgaum on account of death of son of complainant

in the swimming pool maintained by the Corporation. The District Forum/State Commission held deficiency in service by Corporation as also Belgaum Aquatic Club in not properly maintaining the swimming pool and not offering proper service for training. National Commission did not interfere with the said award in the revision preferred by the Corporation finding that there was no case for exercising revisional jurisdiction.

20. HONBLE Supreme Court in the case of *Rajkot Municipal Corporation v. Manjulaben Jayantilal Nakuma*, reported in II (1997) ACC 1 (SC)=1997 (9) SCC 552, has observed that the public authority is liable for the negligent acts of its servants or agents in carrying out their duties of exercising their powers, within the operational area although performance of their duties or exercising their powers involves the exercise of discretion. Aundh Sports Club and Pune Municipal Corporation failed to carry out its legitimate duties. Aundh Sports Club was found negligent in discharging its duties. The Pune Municipal Corporation also failed to exercise its supervisory duties in an effective manner. Therefore, Aundh Sports Club and Pune Municipal Corporation are liable to pay compensation to the complainants. O.Ps. have contended in the written statement that Parimal on his own came to swimming pool and because of accident he died in the swimming pool for which none of the O.Ps. is liable to pay compensation to the complainants. Parimal had paid Rs. 112.50 to the Aundh Sports Club, therefore, he became consumer. Monthly fee was consideration. Because of gross negligence and carelessness of Life Guards, Parimal lost his life. The death of Parimal is the direct result of gross negligence and deficiency in service provided by Aundh Sports Club and Pune Municipal Corporation. We, therefore, answer Point Nos. (iv) and (v) in the affirmative.

21. IT is further contended by O.Ps. that civil action is not maintainable because of pendency of criminal case. This contention does not appeal to reason. In criminal case accused will be punished if offence is proved beyond reasonable doubt. In case of deficiency in service claimant is entitled to get compensation as per provisions of Consumer Protection Act, 1986. Consumer case has nothing to do with criminal case. Both the proceedings are maintainable in law. Both the proceedings, therefore, can be proceeded with simultaneously. There is no legal bar for the consumer complaint.

22. THIS takes us to consider the quantum of compensation to be paid to the complainants. Parimal was a bright student. He was only son of the complainants. In S.S.C. he secured 89.46% of marks. He secured 89% marks in XI standard. He used to participate in extra curricular activities. He was taking interest in other subjects. The Supreme Court in the case of *General Manager, Kerala State Transport Corporation v. Susamma Thomas & Ors.*, reported in I (1994) ACC 346 (SC)=AIR 1994 SC 1631, has observed that multiplier method is appropriate method for calculating just compensation. The choice of the multiplier is determined by two factors viz. rate of interest appropriate to a stable economy and age of deceased or the claimant whichever is higher, the

ascertainment of multiplicand is a more difficult exercise. In the said case the Supreme Court has held that appropriate multiplier can be upto 16 years. In the case of U.P. State Transport Corporation & Ors. v. Trilok Chandra & Ors., reported in I (1996) ACC 592 (SC)=1996 ACJ 831, the Supreme Court held that the multiplier cannot exceed 18 years. The parents have not disclosed their ages. Parimal was a student and was taking education. He was not earning. Therefore, we need not go for multiplier. Suffice it to say that Parimal was a bright student and only son of the complainants. He would have completed his education successfully and would have earned lot of money in future. He would have contributed lot of money to the parents. Quantum would have been reduced after his marriage. After all this is a guess work. Taking into consideration all the relevant factors and well settled legal principles in the matter of determination of compensation, we are inclined to award lump sum compensation of a sum of Rs. 4,00,000 to the complainants. In the result, we pass the following order. ORDER 1. Complaint is partly allowed. 2. O.P. Nos. 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 and 13 are hereby directed to pay compensation of Rs. 4,00,000 to the complainant Nos. 1 and 2 together with interest at the rate of 9% p.a. from 20.4.2000 till the date of realisation within eight weeks from the date of receipt of this order. 3. Out of total amount of compensation including interest to be paid to the complainants, O.P. No. 1 Pune Municipal Corporation is directed to pay Rs. 50,000 to the complainants. Rest of the amount is to be paid by O.P. Nos. 3 to 13. 4. O.Ps. 3 to 13 are further directed to pay Rs. 2,000 to the complainant by way of cost of the proceedings. 5. Office to furnish copies of the order to the parties. Complaint partly allowed. -