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IN THE HIGH COURT OF ORISSA AT CUTTACK

W.P.(C) No.24882 of 2012

Jambeswar Naik and another .... ***Petitioners***
Mr. P.K. Das, Advocate

-versus-

State of Odisha and others .... ***Opposite Parties***
Mr. M.S. Sahoo, Additional Government Advocate

CORAM:
THE CHIEF JUSTICE
JUSTICE B.P. ROUTRAY

ORDER
30.09.2021

Order No.

05. ***Dr. S. Muralidhar, C.J.***

1. The present writ petition under Article 226 of the Constitution of India has been filed by the fathers of two innocent young children who died in tragic circumstances in an Anganwadi Centre (AWC) operating in the premises of a Government School in Angul District on 7th September, 2012. The prayers in the present petition are as follows:

(i) For conducting an inquiry, fixing responsibility and ensuring initiation of criminal proceedings against those responsible for the tragic death of the two young children;

(ii) To pay compensation of Rs.10 lakhs to each Petitioner;

(iii) To issue a set of guidelines/directions with regard to safety of children while undertaking construction work in the premises of the School.

2. The background facts are that Monalisa Naik, the daughter of Jambeswar Naik (Petitioner No.1) and Priyanka Das, the daughter of Pitabas Das (Petitioner No.2), both the children aged 4 years, went to the AWC operating in the premises of the Tentulihata Project Upper Primary School (hereafter 'the School') under the Banarpal Block in Angul District on 7th September, 2012. When the children failed to return after the AWC closed, the Petitioners tried to search for them. They learnt that the bodies of the two children were found by the students of the School in the waterlogged pits excavated in the premises of the School. The bodies were then recovered and sent to the local nursing home where they were declared brought dead by the doctor. The photographs of the deceased children and the water filled pits have been enclosed with the petition.

3. It is pointed out by the Petitioners that the pits that were excavated within the school premises were left un-barricaded by the school authorities. These pits had been excavated for laying the foundation for new classrooms. On account of the failure to put in place any protective measure, the tragic incident occurred. It is submitted that two precious young

lives were lost on account of the grave negligence of the Scholl authorities in keeping the pits filled with water unguarded. Invoking Article 21 of the Constitution for violation of the right to life of the two little children, their respective parents have filed the present petition seeking the aforementioned reliefs. It is pointed out that apart from a sum of Rs.20,000/- paid to each of the families by the local District Administration, no other relief has been granted. It is pointed out that both the Petitioners belong to the Scheduled Castes and are among the economically weaker sections.

4. In response to the petition, the District Social Welfare Officer (DSWO), Angul has filed a counter affidavit. The fact that both children died on 7th September 2012 due drowning in the pits excavated inside the School campus is not denied. It is stated that the School Managing Committee (Managing Committee) of the School was undertaking construction of additional classrooms for which the pits had been excavated. It is pointed that the work was halted on account of heavy rain fall. Both pits had been filled with rain water upto a depth of 4.5 feet. Both girls admittedly fell inside the pits and died due to drowning. At around 2.30 pm, the dead bodies were recovered from the water pits and sent to the local nursing home where they were declared brought dead.

5. In a weak attempt at shifting the blame, it is sought to be suggested by the DSWO that the incident occurred beyond the working hours of the AWC i.e. 9 am to 12.30 pm and during that time, the children were in the custody of their respective parents. Further, it is sought to be alleged that there is a footpath to move from the house to the main road, but the family members as well as the deceased girls normally used to move through the school campus to reach the main road. This way the parents are sought to be assigned with contributory negligence.

6. The DSWO states that the Headmaster of the School had been placed under suspension on 11th September, 2012. Instructions are said to have been communicated to all concerned on 7th September 2012 itself for taking appropriate measures to prevent such incidents.

7. Interestingly, the said letter dated 7th September 2012, a copy of which has been enclosed as Annexure-B to the affidavit dated 23rd April 2013 of the District Social Welfare Officer, encloses a copy of a letter dated 27th August 2012 of the Director, Social Welfare, Odisha asking that appropriate steps should be taken for implementing the guidelines of the Supreme Court and seeking an action taken report to be sent for compliance to the National Commission for Protection of

Child Rights (NCPCR) within a week's time. This letter dated 27th August 2012 was addressed to all Collectors and enclosed the order passed by the Supreme Court of India in Writ Petition (C) No.36 of 2009 along with a copy of a letter dated 26th July 2012 of the NCPCR. This letter of the NCPCR enclosed an order dated 11th February 2010 of the Supreme Court of India in Writ Petition (C) No.36 of 2009 (***In Re: Measures for prevention of fatal accidents of small children due to their falling into abandoned bore wells and tube wells v. Union of India & Ors***). The NCPCR reminded the State Governments that the guidelines set out in the order "are to be strictly adhered to by the concerned Departments/Authorities of the State Governments/UT Administrations in the best interest of the children." The NCPCR sought "coherent Action Plan" prepared by the State for implementing the Supreme Court guidelines and also setting up the complaints/grievances redressal mechanism at the State, District, Block and Panchayat levels and to give wide publicity to the same through the print and electronic media.

8. On 8th March 2013, the Superintendent of Police, Angul and the Officer-In-Charge, Banarpal Police Station filed their joint counter affidavit confirming the incident. This affidavit correctly mentions the names of two deceased children as Kumari Monalisha Naik and Kumari Priyanka Naik both

aged four years. The inquiry in the U.D. Case No.13 dated 7th September 2012 registered at Banarpal Police Station revealed the cause of death of the two children as "their accidental fall in the excavated pits logged with rain water" in the premises of the School. The postmortem report is stated to have determined the cause of death as "asphyxia and shock (laryngeal spasm)." It is stated that the Assistant Surgeon of the District Headquarters, Angul has in a subsequent report clarified that "death may be due to drowning (dry drowning)." Copy of the postmortem report has been enclosed with the affidavit.

9. The present petition was listed once on 31st January 2013, when notice was issued and next on 15th March 2021 when this Court directed its final hearing to take place on 11th May, 2021. Finally, the hearing concluded and orders were reserved on 9th September, 2021.

10. Mr. P.K. Das, learned counsel appearing for the Petitioners has relied on this Court's decision in ***Prabir Kumar Das v. State of Odisha 2013 (I) OLR 154*** where while dealing with death of seven children below five years due to the collapse of the wall of an AWC, this Court directed the State to pay Rs.5 lakh to the parents of each of the deceased children and issued a set of directions. Mr. Das has pointed out that the said judgment was delivered on 20th

November 2012 around two months after the tragic incident of death of two little children forming the subject matter of the present petition.

11. Mr. Sahoo, learned Additional Government Advocate for the State-Opposite Parties has not disputed the basic facts. However, he has contended that there could be contributory negligence on the part of the parents since the children who had fallen into the pits at a time beyond the normal working hours of the AWC.

12. The Court finds that the basic facts are not in dispute. Importantly, there is no denial of the fact that the three pits had been excavated in the school premises for construction of additional classrooms and that the 4 ½ feet pits were left open without any barricade. The photographs enclosed with the present petition show that the rainwater filled pits were left unguarded. There is no warning sign anywhere. The counter affidavits by the DSWO and the Police do not deny that the excavated pits were fully filled with water on account of the rain and are unbarricaded. What is also not in dispute is that both the young children fell into the pits and drowned to their death.

13. It is not possible for the Court to accept the suggestion of the Opposite Parties that there was an element of

contributory negligence of the parents in the death of the two little children. One of the children appears to have been enrolled in the AWC. The fact is that the children did go to the AWC operating in the School premises. The affidavit filed by the Police setting out the above facts is as a result of a detailed inquiry. It does not suggest that the deaths occurred beyond the working hours of the AWC or that there was any contributory negligence of the parents.

14. While it is possible to envision that the School provided a convenient passage to the main road, the fact remains that the two children went to the School only because the AWC was operating there. With there being no barricades, no warning boards or signs, there is no way the two young children would have known that there were water filled pits, of 4 ½ feet which they had to avoid stepping into. The lack of barricading of the pits or any warning sign appears to be the reason why they met with a tragic death. There can be no doubt therefore that there was gross negligence on the part of the School Management/Administration and for that matter the District Administration in not barricading these pits. The School authorities owed a duty of care to all those who were likely to visit its premises and with the AWC being located therein, it was expected that the School authorties would be conscious that young children were bound to visit it.

15. Turning to the order passed by the Supreme Court on 11th February 2010 in Writ Petition (C) No.36 of 2009 (**In Re: *Measures for prevention of fatal accidents of small children*** (*supra*), it appears to have addressed the problem of the dangers posed to the life and safety of young children by abandoned bore wells and tube wells. However, the order did underscore the duty of care owed by State authorities to unwary wayfarers, of young age, who might unknowingly get trapped in the unguarded drilled well left abandoned. The safety norms that have been put in place and formed part of the order of the Supreme Court read thus:

> "SAFETY NORMS
>
> 1. Construction of Cement/concrete platform measuring 0.50 x 0.50 x 0.6m (0.3 m above ground level and 0.3 m below ground level) around the well casing.
> 2. Capping of well assembly by welding steel plate.
> 3. Erecting a chain link fence of 3 x 3m around the well.
> 4. Filling up the mud pits and channels after completion of drilling operations.
> 5. Filling up of abandoned bore wells by boulders/pebbles.
> 6. Erection of sign-board near the well with detailed address at the time of construction of well."

16. The above norms would obviously apply to any similar pits or holes excavated for the purposes of construction or any allied activity which can attract the children even out of

curiosity and who may meet with tragic accidents for no fault of theirs. In the present case, there was a complete absence of any standard of care or even anticipation of the likely danger posed by an unguarded excavated pit 4 ½ feet of depth.

17. As part of the right to education of young children, it is within the ambit of Article 45 of the Constitution, which requirs the State to "endeavour to provide early childhood care and education for all children until they complete the age of six years" that a safe and secure environment is provided even to children attending AWCs. On a conjoint reading of Article 21, 39(f) and Article 45 of the Constitution read with Section 11 of the Right to Education Act it appears that the right to life and the right to education of children encompasses all elements that comprise the receiving of education in a healthy and safe enviroment. There is a corresponding duty and responsibility of the State on a collective reading of Articles 45 and 21 of the Constittuion of India to make necessary arrangements for early childhood care and education for all children till they attain the age of six years and to prepare children above three years for elementary education.

18. The liability of the State to provide reparation for constitutional torts arising from acts of omission and

commission of state entities has been recognised by the Supreme Court of India and the High Courts in a series of decisions beginning with ***Rudul Sah v. State of Bihar AIR 1983 SC 1086*** followed by ***Smt. Nilabati Behera @ Lalita Behera v. State of Orissa AIR 1993 SC 1960***; ***Consumer Education and Research Centre v. Union of India AIR 1995 SC 922*** and ***Paschim Banga Khet Mazdoor Samity v. State of West Bengal AIR 1996 SC 2426***.

19.1 In ***Nilabati Behera v. State of Orissa*** *(supra)*, the Supreme Court explained the principle on which the liability of the State arises in such cases for payment of compensation and the distinction between this liability and the liability in private law for payment of compensation in action on tort. The Court said:

> "It may be mentioned straightway that award of compensation in a proceeding under Article 32 by this Court or by the High Court under Article 226 of the Constitution is a remedy available in public law based on strict liability for contravention of fundamental rights to which the principle of sovereign immunity does not apply, even though it may be available as a defense in private law in an action based on tort. This is a distinction between the two remedies to be borne in mind which also indicates the basis on which compensation is awarded in such proceedings."

19.2 After referring to the decision of the Privy Council in *Maharaj v. Attorney-General of Trinidad and Tobago (No.*

2), (1978) 2 All ER 670, the Supreme Court in ***Nilabati Behera*** held:

> "It follows that a claim in public law for compensation 'for contravention of human rights and fundamental freedoms, the protection of which is guaranteed in the Constitution, is an acknowledged remedy for enforcement and protection of such rights, and such a claim based on strict liability made by resorting to a constitutional remedy provided for the enforcement of a fundamental rights is distinct from, and in addition to, the remedy in private law for damages for the tort' resulting from the contravention of the fundamental right. The defense of sovereign immunity being inapplicable, and alien to the concept of guarantee of fundamental rights, there can be no question of such a defense being available in the constitutional remedy. It is this principle which justifies award of monetary compensation for contravention of fundamental rights guaranteed by the contravention made by the State or its servants in the purported exercise of their powers, and enforcement of the fundamental rights is claimed by resort to the remedy in public law under the Constitution by recourse to Articles 32 and 226 of the Constitution. This is what was indicated in Rudul Sah and is the basis of the subsequent decisions in which compensation was awarded under Articles 32 and 226 of the Constitution, for contravention of fundamental rights."

19.3 In the same decision, the Supreme Court explained that public law proceedings serve a different purpose than the private law proceedings. It observed:

> "The relief of monetary compensation, as exemplary damages, in proceedings under Article 32 by this

> Court or under Article 226 by the High Courts, for established infringement of the indefeasible right guaranteed under Article 21 of the Constitution is a remedy available in public law and is based on the strict liability for contravention of the guaranteed basic and indefeasible rights of the citizen. The purpose of public law is not only to civilize public power but also to assure the citizen that they live under a legal system which aims to protect their interests and preserve their rights. Therefore, when the court moulds the relief by granting "compensation" in proceedings under Article 32 or 226 of the Constitution seeking enforcement or protection of fundamental rights, it does so under the public law by way of penalizing the wrongdoer and fixing the liability for the public wrong on the State which has failed in its public duty to protect the fundamental rights of the citizen. The payment of compensation in such cases is not to be understood, as it is generally understood in a civil action for damages under the private law but in the broader sense of providing relief by an order of making 'monetary amends' under the public law for the wrong done due to breach of public duty, of not protecting the fundamental rights of the citizen. The compensation is in the nature of 'exemplary damages' awarded against the wrong doer for the breach of its public law duty and is independent of the rights available to the aggrieved party to claim compensation under the private law in an action based on tort, through a suit instituted in a court of competent jurisdiction or/and prosecute the offender under the penal law."

19.4 Again in ***Nilabati Behera***, the Supreme Court it was explained that the remedy under Article 32 or 226 would be granted once it was established that there has been an

infringement of fundamental rights of the citizen and no other form of appropriate redressal by the Court in the facts and circumstances of the case is possible. It was emphasised that "this remedy in public law has to be more readily available when invoked by the have nots who are not possessed of the wherewithal for enforcement of their rights in private law, even though this exercise is to be tempered by judicial restraint to avoid circumvention by private law remedy when more appropriate."

20. The dictum in ***Nilabati Behera*** has been consistently applied in later cases, the prominent among which is ***D.K. Basu v. Union of India AIR 1997 SC 610***. Therefore, applying these principles, and considering the fact that there is no dispute as to how and in what circumstances the two children died, there is no difficulty in this Court holding the State officials liable for the death of the two helpless little children of the two Petitioners, and requiring the state authorities to pay compensation for violation of the fundamental right to life of the two children.

21. The undisputed facts are that the two children fell into rainwater filled pits of 4 ½ feet depth and drowned. That the deaths were on account of the sheer negligence of the Scholl authorities in leaving the pits unbarricaded and with no warning signs stands established in the police inquiry as well

as the post mortem reports that have been placed on record. In the considered view of the Court, this is a case where apart from the principle of strict liability the principle of *res ipsa loquitur* would also apply.

22.1 In ***Municipal Corporation of Delhi v. Subhagwanti AIR 1966 SC 1750***, the facts were that the legal heirs of three persons, viz., Shri Ram Parkash, Shrimati Panni Devi and Sant Gopi Chand who died as a result of the collapse of the Clock Tower situated opposite the Town Hall in the main Bazar of Chandini Chowk, Delhi belonging to the Municipal Corporation of Delhi (MCD) filed three suits for damages. The question that arose was whether the MCD was negligent in looking after and maintaining the Clock Tower and was liable to pay damages for the death of the persons resulting from its fall? The contention of the MCD that the fall of the Clock Tower was due to an inevitable accident which could not have been prevented by the exercise of reasonable care or caution and that there was nothing in the appearance of the Clock Tower which should have put the MCD on notice with regard to the probability of danger was rejected by the Supreme Court. It was observed;

> "It is true that the normal rule is that it is for the plaintiff to prove negligence and not for the defendant to disprove it. But there is an exception to this rule which applies where the circumstances

surrounding the thing which causes the damage are at the material time exclusively under the control or management of the defendant or his servant and the happening is such as does not occur in the ordinary course of things without negligence on the defendant's part. The principle has been clearly stated in Halsbury's Laws of England 2nd Edn., Vol. 23, at p. 671 as follows:

> An exception to the general rule that the burden of proof of the alleged negligence is in the first instance on the plaintiff occurs wherever the facts already established are such that the proper and natural inference immediately arising from them is that the injury complained of was caused by the defendant's negligence, or where the event charged as negligence tells its own story of negligence on the part of the defendant, the story so told being clear and unambiguous. To these cases the maxim *res ipsa loquitur* applies. Where the doctrine applies, a presumption of fault is raised against the defendant, which, if he is to succeed in his defense, must be overcome by contrary evidence, the burden on the defendant being to show how the act complained of could reasonably happen without negligence on his part.

In our opinion, the doctrine of res ipsa loquitur applies in the circumstances of the present case."

22.2 In the same decision, the Supreme Court further considered whether the MCD as the owner of the Clock Tower abutting the highway was bound to maintain it in

proper state of repair so as not to cause any injury to any member of the public using the highway and whether the MCD was liable "whether the defect is patent or latent." It answered the issue thus:

> "The finding of the High Court is that there is no evidence worth the name to show that any such inspections were carried out on behalf of the appellant and, in fact, if any inspections were carried out, they were of casual and perfunctory nature. The legal position is that there is a special obligation on the owner of adjoining premises for the safety of the structures which he keeps besides the highway. If these structures fall into disrepair so as to be of potential danger to the passers-by or to be a nuisance, the owner is liable to anyone using the highway who is injured by reason of the disrepair. In such a case it is no defense for the owner to prove that he neither knew nor ought to have known of the danger. In other words, the owner is legally responsible irrespective of whether the damage is caused by a patent or a latent defect."

22.3 In conclusion, it was held by the Supreme Court that the MCD was "guilty of negligence because of the potential danger of the Clock Tower maintained by it having not been subjected to a careful and systematic inspection which it was the duty of the appellant to carry out." This was followed in ***Sham Sunder v. State of Rajasthan AIR 1974 SC 890*** where it was held:

> "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 these matters are at the outset unknown to him and often within the knowledge of the defendant.
>
> 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."

23. In ***Darshan v. Union of India 1999 (79) DLT 432*** the Delhi Court was dealing with a claim by the widow and minor children of a bus driver who had fallen into an open manhole and died of drowning. On the facts of the case, it was held that it was a case of *res ipsa loquitur*, and therefore compensation could be awarded under Article 226. The Court:

> "Compensation had also been awarded by this Court as well as by the Apex Court in writ jurisdiction in several cases of custodial deaths. Coming to instant case, it is one of res ipsa loquitur, where the negligence of the instrumentalities of the State and dereliction of duty is writ large on the record in leaving the manhole uncovered. The dereliction of duty on their part in leaving a death trap on a public road led to the untimely death of Skattar Singh. It deprived him of his fundamental right under Article 21 of the Constitution of India. The scope and ambit of Article 21 is wide and far

> reaching. It would, undoubtedly, cover a case where the State or its instrumentality failed to discharge its duty of care cast upon it, resulting in deprivation of life or limb of a person. Accordingly, Article 21 of the Constitution is attracted and the petitioners are entitled to invoke Article 226 to claim monetary compensation as such a remedy is available in public law, based on strict liability for breach of fundamental rights."

24. In the present case too, the Court finds that the death of two little children was entirely avoidable and would not have occurred if barricades had been erected around the excavated pits. A clear case is made out for grant of compensation for violation of the constitutional right to life of the two young children resulting in their needless deaths at a very young age. Keeping in view all of the above circumstances, the Court directs that a sum of Rs.10,00,000/-(ten lakh) be paid to each of the Petitioners for the deaths of their two little children in the capacity as their respective fathers. The amount shall be paid by the District Administration within a period of four weeks from today and compliance affidavits shall be filed in the Court on or before 1st November, 2021. If there is non-compliance with this direction the Registry will list this matter before the Court for appropriate orders. A copy of this order shall be sent to the Collector, Angul to ensure that the compensation amount is disbursed to both the Petitioners forthwith.

25. Additionally, directions are issued to the Collectors of all the thirty districts in Odisha to ensure strict compliance with the directions of the Supreme Court ***In Re: Measures for prevention of fatal accidents of small children*** (*supra*) and extend those MEASURES not just to bore wells or tube wells, but even construction sites and other places where it is likely that young children might meet with fatalities for lack of awareness and adequate safety measures. A copy of this order shall also be sent to the Odisha State Commission for Protection of Child Rights (OSCPCR) and the National Commission for Protection of Child Rights (NCPCR) for information.

26. The writ petition is disposed of in the above terms.

27. Urgent certified copy of this order be granted as per rules.

(Dr. S. Muralidhar)
Chief Justice

(B.P. Routray)
Judge

S.K. Guin