* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ LPA 2451/2005

Date of decision: 28th October, 2005

DELHI JAL BOARD ..... Appellant
Through Mr.Sandeep Aggarwal

versus

RAJ KUMAR & ORS. ..... Respondents
Through None.

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE MADAN B. LOKUR

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether the judgment should be reported in the Digest ?

MARKANDEYA KATJU, CJ (Oral)

CM 15360/05

Allowed subject to just exceptions.

LPA 2451/05 & CM 15359/05

1. Heard learned counsel for the appellant.

2. This appeal has been filed against the impugned judgment of a learned Single Judge dated 30th September, 2005. The facts in detail

have been mentioned in the judgment of the learned Single Judge and hence it is not necessary for us to repeat the same except where necessary.

3. There is no dispute that one Vikas Gupta who was driving a scooter on 20.4.2003 at about 9 p.m. drove over a manhole which was three inches below the regular surface of the road and met with an accident. In para 5 of the writ petition it is alleged that there was no caution/sign board put at the site. Vikas Gupta received fatal injuries as a result of the accident. His right eye was crushed. There was bleeding from ear and nose. The flesh of his face scattered on the grill of the road divider. His teeth, blood and flesh scattered on the road. Due to the said injuries, Shri Vikas Gupta died on the spot. It is stated in paragraph 9 of the counter affidavit of Delhi Jal Board that:

> "Admittedly, the manhole of the sewer line was covered properly, but the upper surface level of the manhole cover was not in tandem with the road surface level and this was the exact reason for the said fatal accident. That as far as the responsibility of levelling the road surface is concerned, the same lies with the MCD. It is the responsibility of MCD to raise the plinth of the existing manholes, as and when, the plinth of the existing level of the road is raised by fresh carpeting."

4. Thus the Delhi Jal Board itself has admitted in paragraph 9 of the counter affidavit that the upper surface level of the manhole was

not in tandem with the road surface level and this was the reason for the fatal accident.

5. The proper construction and maintenance of a manhole is undisputedly the function of the Delhi Jal Board.

6. In para one of the counter affidavit it is stated that:

> "However, it is submitted that the answering respondent No.3 is only responsible for maintenance of sewer and and water system in Delhi and is not responsible for maintenance of roads."

7. Delhi Jal Board has thus itself admitted that it is responsible for maintenance of the sewer system. A man hole is part of the sewer system.

8. In fact Section 9 (e) and Section 14 of the Delhi Water Board Act, 1998 mention that the laying and maintenance of the sewer system is the function of Jal Board.

9. When power is given to do some act it is often coupled with the duty to do that act properly. In Grovers v Wimborne (1898) 2 QB 402 it was observed that an Act which gives power to dig up soil on streets for making a drain etc. impliedly casts on those thus empowered 'the duty of filling up the ground again and of restoring the street to its original condition'. Similarly in Forbes v Lee Cons Board (1879) 4 Ex D 116 it was observed that a public authority

authorised to make a bridge and take tolls is impliedly bound to keep it in proper repair (See also 'N.S.Bindra's Interpretation of Statutes' 9th Edition p. 1300)

10. It is well settled that when a power is given to a public authority that power is often coupled with a duty. In the classic observation of Lord Cairns in Julius v. Lord Bishop of Oxford, (1874-80) All ER Rep 43, p.47 (HL) it was stated:

> "There may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty and make it the duty of the person in whom the power is reposed to exercise the power when called upon to do so".

11. The same view was taken by the Supreme Court in State (Delhi Administration) v. I.K.Nangia,AIR 1979 SC 1977 (vide para 15); Tara Prasad Singh v. UOI, AIR 1980 SC 1682 (vide para 14) ; Ambica Quarry Works v. State of Gujarat, (1987) AIR 1987 SC 1073 (vide para 13); Superintending Engineer, Public Health v. Kuldip Singh, AIR 1997 SC 2133, p.2137.

12. Moreover, in our opinion, the principle of strict liability will apply in this case.

13. The theory of strict liability for hazardous activities can be said to

have originated from the historic judgment of Blackburn, J. in. Rylands v. Fletcher, (1866) LRI Ex 265.

14. Before this decision the accepted legal position in England was that fault, whether by an intentional act or negligence, was the basis of all liability (see Salmond on 'Tort', 6th Edn P. 12) and this principle was in consonance with the then prevailing Laissez Faire Theory.

15. With the advance of industrialization the Laissez Faire Theory was gradually replaced by the theory of the Welfare State, and in legal parlance there was a corresponding shift from positivism to sociological jurisprudence.

16. It was realized that there are certain industrial activities which though lawful are so fraught with possibility of harm to others that the law has to treat them as allowable only on the term of insuring the public against injury (vide American Jurisprudence, 2nd Edn. Vol. 74 P. 632). As stated above, the origin of this concept of liability without fault can be traced back to Blackburn, J's historic decision in Rylands v. Fletcher (supra).

17. The facts in that case were that the defendant, who owned a mill, constructed a reservoir to supply water to the mill. This reservoir was constructed over old coal mines, and the millowner had no reason to

suspect that these old diggings led to an operating colliery. The water in the reservoir ran down the old shafts and flooded the colliery. Blackburn J. held the mill owner to be liable, on the principle that "The person who for his own purposes brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape." On appeal this principle of liability without fault was affirmed by the House of Lords (per Cairns, J.) but restricted to non-natural users vide (1968) LR 3 HL 330.

18. Rylands v. Fletcher in fact created a new legal principle (the principle of strict liability in the case of hazardous activities), though professing to be based on analogies drawn from existing law. The judgment is noteworthy because it is an outstanding example of a creative generalization. As Wigmore writes, this epoch making judgment owes much of its strength to 'the broad scope of the principle announced, the strength of conviction of its expounder, and the clarity of his exposition.'

19. Strict liability focuses on the nature of the defendants' activity rather than, as in negligence, the way in which it is carried on (vide

'Torts' by Michael Jones, 4th Edn. P. 247). There are many activities which are so hazardous that they may constitute a danger to the person or property of another. The principle of strict liability states that the undertakers of these activities have to compensate for the damage caused by them irrespective of any fault on their part. As Fleming says "permission to conduct such activity is in effect made conditional on its absorbing the cost of the accidents it causes, as an appropriate item of its overheads (see Fleming on 'Torts', 6th Edn. P. 302).

20. Thus in cases where the principle of strict liability applies, the defendant has to pay damages for injury caused to the plaintiff, even though the defendant may not have been at any fault.

21. The basis of the doctrine of strict liability is two fold (1) The people who engage in particularly hazardous activities should bear the burden of the risk of damage that their activities generate, (2) it operates as a loss distribution mechanism, the person who does such hazardous activity (usually a corporation) being in the best position to spread the loss via insurance and higher prices for its products (vide 'Torts' by Michael Jones 4th Edn. P. 267).

22. As pointed out by Clerk and Lindsell (see 'Torts', 14th Edn.) "The fault principle has shortcomings. The very idea suggests that compensation is a form of punishment for wrong doing, which not only has the tendency to make tort overlap with criminal law, but also, and more regrettably, implies that a wrongdoer should only be answerable to the extent of his fault. This is unjust when a wholly innocent victim sustains catastrophic harm through some trivial fault, and is left virtually without compensation."

23. Many jurists applaud liability without fault as a method for imposing losses on superior risk bearers. Their argument is that one who should know that his activity, even though carefully prosecuted, may harm others, should treat this harm as a cost of his activity. This cost item will influence pricing, and will be passed on to consumers spread so thin that no one will be seriously effected (vide Article by Prof. Clarence Morris entitled 'Hazardous Enterprizes and Risk Bearing Capacity' published in Yale Law Journal, 1952 P. 1172.

24. The Rule in Rylands v. Fletcher (1868 LR 3 Ex 330) was subsequently interpreted to cover a variety of things 'likely to do mischief' on escape, irrespective of whether they were dangerous per se e.g. water, electricity, explosions, oil, vibralious, noxious fumes,

colliery spoil, poisonous vegetation, a flagpole, etc. (see 'Winfield and Jolowicz on 'Tort', 13th Edn. P. 425) vide National Telephone Co. v. Baker, (1893) 2 Ch 186, Eastern and South African Telegraph Co. Ltd. v. Cape Town Tramways Co. Ltd., (1902) AC 381 ; Hillier v. Air Ministry, (1962) CLY 2084, etc. In America the rule was adapted and expressed in the following words "one who carries on an ultra hazardous activity is liable to another whose person, land or chattels the actor should recognize as likely to be harmed by the unpreventable miscarriage of the activity for harm resulting thereto from that which makes the activity ultra hazardous, although the utmost care is exercised to prevent the harm" (vide 'Restatement of the Law of Torts, Vol. 3, P. 41).

25. Rylands v. Fletcher (1868 LR 3 Ex 330) gave English Law one of its most creative generalizations which, for a long time, looked destined to have a successful future. Yet, after a welcome start given to it by Victorian Judges the rule was progressively emasculated, until today it has almost become obsolete in England. According to Dias and Markesins (see Tort Law' 2nd Edn. P. 355) one reason for this may well be that as a generalization justifying a shift from fault to strict liability it may have come prematurely. The 19th Century had not yet fully got over laissez faire, and it was only in the 20th Century

that the concepts of social justice and social security, as integral parts of the general theory of the Welfare State, were firmly established. As already mentioned above, the rule of strict liability laid down by Blackburn J. In Rylands v. Fletcher was restricted in appeal by Lord Cairns to non-natural users, the word 'natural' meaning 'that which exists in or by nature, and is not artificial', and that was the sense in which it was used by Lord Cairns. However, later it acquired an entirely different meaning i.e. that which is ordinary and usual, even though it may be artificial' vide Rickards v. Lothian, (1913) AC 263 followed in Read v. Lyons, (1947) AC 156. Thus the expression 'non-natural' was later interpreted to mean 'abnormal', and since in an industrial society industries can certainly not be called 'abnormal' the rule in Rylands v. Fletcher was totally emasculated in these subsequent rulings. Such an interpretation, as Prof. Newark writes, 'would have surprised Lord Cairns and astounded Blackburn, J'. (see article entitled 'Non-natural User and Rylands v. Fletcher,' published in Modern Law Review, 1961, Vol. 24, P. 557).

26. In Read v. Lyons (1947 AC 156) (supra), which was a case of injury due to a shell explosion in an ammunitions factory, Lord Macmillan while rejecting the claim of the plaintiff made further restrictions to the rule in Rylands v. Fletcher by holding that the rule

"derives from a conception of mutual duties of neighbouring landowners", and was therefore inapplicable to personal injuries. He also held that to make the defendant liable there should be escape from a place under the defendant's control and occupation to a place outside his occupation, and since the plaintiff was within the premises at the time of the accident the injury was not due to escape therefrom. In this way Read v. Lyons destroyed the very spirit of the decision in Rylands v. Fletcher by restricting its principle to the facts of that particular case, instead of seeing its underlying juristic philosophy.

27. Apart from the above, some other exceptions carved out to the rule in Rylands v. Fletcher are (1) consent of the plaintiff; (2) Common benefit; (3) Act of Stranger; (4) Act of God; (5) Statutory authority; (6) default of plaintiff, etc.

28. In Dunne v. North Western Gas Boards, (1964) 2 QB 806 Sellers L.J. asserted that the defendant's liability in Rylands v. Fletcher (1868 LR 3 HC 330) "could simply have been placed on the defendants' failure of duty to take reasonable care," and it seems a logical inference from this that the Court of Appeals considered the rule to have no useful function in modern times. As Winfield remarks, the

rule in Rylands v. Fletcher, by reason of its many limitations and exceptions, today seldom forms the basis of a successful claim in the Courts (see Winfield and Jolowicz on Tort, 13th Edn. P. 442), and it seems that the rule "has hardly been taken seriously by modern English Courts", vide Att. Gen. v. Geothermal Produce (N.Z.) Ltd., (1987) 2 NZ1R 348.

29. As Winfield remarks, because of the various limitations and exceptions to the rule "we have virtually reached the position where a defendant will not be considered liable when he would not be liable according to the ordinary principles of negligence" (see Winfield on Tort, 13th Edn. P. 443).

30. This repudiation of the principle in Rylands v. Fletcher is contrary to the modern judicial philosophy of social justice. The injustice may clearly be illustrated by the case of Pearson v. North Western Gas Board, (1968) 2 All ER 669. In that case the plaintiff was seriously injured and her husband killed by an explosion of gas, which also destroyed their home. Her action in Court failed, in view of the decision in Dunne v. North Western Gas Board (1964 (2) QB 806) (supra). Thus the decline of the rule in Rylands v. Fletcher left the

individual injured by the activities of industrial society virtually without adequate protection.

31. However, we are now witnessing a swing once again in favour of the principle of strict liability. The Bhopal Gas Tragedy, the Chernobyl nuclear disaster, the crude oil spill in 1988 on to the Alaska coast line from the oil tanker Exxon Valdez, and other similar incidents have shocked the conscience of people all over the world and have aroused thinkers to the dangers in industrial and other activities.

32. In England, the Pearson Committee recommended the introduction of strict liability in a number of circumstances (though none of these recommendations have so far been implemented, with the exception of that related to defective products).

33. In India the landmark Constitution Bench decision of the Supreme Court in M.C. Mehta v. Union of India, AIR 1987 SC 1086 has gone much further than Rylands v. Fletcher in imposing strict liability. The Court observed "if the enterprize is permitted to carry on any hazardous or inherently dangerous activity for its profit the law must presume that such permission is conditional on the enterprise absorbing the cost of any accident arising on account of such hazardous or inherently dangerous activity as an appropriate item of

its overheads." The Court also observed that this strict liability is not subject to any of the exceptions to the rule in Rylands v. Fletcher (1868 LR 3 HL 330).

34. The decision in M.C. Mehta's case (supra) related to a concern working for private profit. However, in our opinion the same principle will also apply to public corporations or local bodies which may be social utility undertakings not working for private profit.

35. It is true that attempts to apply the principle of Rylands v. Fletcher against public bodies have not on the whole succeeded vide Administrative Law by P.P. Craig, 2nd Edn. p. 446), mainly because of the idea that a body which acts not for its own profit but for the benefit of the community should not be liable. However, in our opinion, this idea is based on a misconception. Strict liability has no element of moral censure. It is <u>because</u> such public bodies benefit the community that it is unfair to leave the result of a non-negligent accident to lie fortuitously on a particular individual rather than to spread it among the community generally.

36. In America the U. S. Supreme Court in Lairds v. Nelms, (1972) 406 US 797, following its earlier decision in Dalehite v. U.S., (1953) 346 US 15, held that the U. S. was not liable for damages from

supersonic booms caused by military planes as no negligence was shown. Schwartz regards this decision as unfortunate (see Schwartz 'Administrative Law', 1984). However, as regards private enterprizes the American Courts awards huge damages (often running into millions of dollars) for accidents due to hazardous activities or substances.

37. In France, the liability of the State is without fault, and the principle of strict liability applies (see C. J. Hanson "Government Liability in Tort in the English and French Legal Systerms").

38. In India, Article 38(1) of the Constitution states "The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life."

39. Thus, it is the duty of the State under our Constitution to function as a Welfare State, and look after the welfare of all its citizens.

40. In various social welfare statutes the principle of strict liability has been provided to give insurance to people against death and injuries.

41. Thus Section 3 of the Workmen's Compensation Act 1923 provides for compensation for injuries arising out of and in the course

of employment, and this compensation is not for negligence on the part of the employer but is a sort of insurance to workmen against certain risks of accidents, vide AIR 1938 Nagpur 91.

42. Similarly Section 82A of the Railways Act, 1890 (corresponding to Section 124 of the 1989 Act), Section 140 of the Motor Vehicles Act, 1988, etc. incorporate the principle of strict liability.

43. The Public Liability Insurance Act, 1991 is a step in the same direction.

44. However, apart from the principle of strict liability, in our opinion, we have to develop new principles for fixing liability in cases like the present one.

45. It is recognised that the Law of Torts is not stagnant but is growing. As stated by the American Restatement of Torts, Art 1; D.L.Loyd, Jurisprudence;-

> "The entire history of the development of the tort law shows a continuous tendency, which is naturally not uniform in all common law countries, to recognise as worthy of legal protection, interests which were previously not protected at all or were infrequently protected and it is unlikely that this tendency has ceased or is going to cease in future."

46. There are dicta both ancient and modern that the known categories of tort are not closed, and that novelty of a claim is not an absolute defence. Thus, in Jay Laxmi Salt Works (P) Ltd v. The State of Gujarat, J.T. 1994(3) S.C. 492 (vide para 7) the Supreme Court observed:

> "Law of torts being a developing law its frontiers are incapable of being strictly barricaded."

47. In Ashby Vs. White, (1703) 2 Ld. Raym 938 it was observed (vide Pratt C.J.)

> "Torts are infinitely various, not limited or confined."

48. In Donoghue Vs. Stevenson, (1932) AC 562 (619) (HL) it was observed by the House of Lords (per Macmillan, L.J.):

> "The conception of legal responsibility may develop in adaption to altering social conditions and standards. The criterion of judgment must adjust and adapt itself to the changing circumstances of life."

49. The above view was followed in Rookes Vs. Barnard, (1964) AC 1129 (1169)(HL) and Home Officer Vs. Dorset Yacht Co.Ltd (1970) 2 All ER 294 (HL).

50. A modern example of final recognition of a new tort of intimidation is furnished by Rookes Vs. Barnard (1964) AC 1129

(1169) (HL). Recent advances in the field of negligence have recognised new duty situations, Donoghue Vs. Stevenson, (1932) AC 562 (619) (HL). It has been held in Home Officer Vs. Dorset Yacht Co.Ltd.(1970) 2 All ER 294 (HL) that there are not a number of separate torts involving negligence each with its own rules as was thought at the beginning of this century and that the general principle behind the tort of negligence is that "you must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour", vide Donoghue Vs. Stevenson, (1932) AC 562 (619) (HL), and a new duty situation may be recognised on this principle provided it is just and reasonable to do so, vide Governors of the Peabody Donation Fund Vs. Sir Lindsay Parkinson & co. Ltd., (1984) 3 All ER 529 (534) (HL).

51. When a manhole is constructed the DJB must see to it not only that it is properly covered but also that the manhole is in line with the surface of the road. If the manhole is only covered but the cover is below the surface of the road it is likely to cause an accident, particularly if a person is driving a two wheeler in insufficient light and there is no caution sign. It is the duty of the Delhi Jal Board to construct and maintain manholes properly, and not at its whims and fancies. Maintaining a manhole with a cover which is below the

surface of the road, in our opinion is wholly improper and hazardous and in violation of the duty of the Jal Board. The Delhi Jal Board cannot pass on its responsibility in this connection to the MCD, which is only responsible for maintaining the roads and not manholes.

52. In view of the above, we are not inclined to interfere with the judgment of learned Single Judge.

53. We fully agree with the reasoning given by the learned single Judge while adding our own reasoning and dismiss the appeal. Appeal dismissed.

M. Katju

CHIEF JUSTICE

Madan Lokur

MADAN B. LOKUR, J

OCTOBER 28, 2005
da