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

\+ W.P.(C) 6415/2006

JAIPUR GOLDEN GAS VICTIMS ASSOCIATION ..... Petitioner

Through: Ms. Aruna Mehta, Advocate.

versus

UOI & ORS. ..... Respondents

Through: Mr. D.R. Thadani, Advocate for R-5.
Mr. V.K. Tandon, Advocate for R-2 & 4.
Mr. Mukesh Gupta, Advocate for R-3.

Reserved on : 17th September, 2009

% Date of Decision : 23rd October, 2009

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE MANMOHAN

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

J U D G M E N T

MANMOHAN, J :

1. Present writ petition has been filed by petitioner-Association in public interest under Article 226 of the Constitution of India for issuance of an appropriate writ, direction or order inter alia directing respondents to pay victims of Jaipur Golden fire tragedy suitable amount of compensation for loss of lives and injuries suffered. Petitioner-Association has also prayed for identification and

prosecution of erring officials who were responsible for Jaipur Golden fire tragedy as well as for implementation of recommendations of earlier committees to prevent future tragedies in Delhi like the Jaipur Golden fire tragedy.

CASE OF PETITIONER

2. Ms. Aruna Mehta, learned counsel for petitioner-Association stated that on 4th April, 2004 at about 10.30 p.m. there was a huge fire in the godown of respondent no. 5 at Mitra Wali Gali, Roshnara Road, Delhi. She stated that in the said godown, respondent no. 5 had stored a consignment of rodent killing pesticides which contained Aluminum Phosphate and Zinc Phosphate. She further stated that the officials of respondent no. 5 along with fire brigade officials poured water over the fire in a bid to extinguish it. According to Ms. Mehta, due to pouring of water, Aluminum Phosphate and Zinc Phosphate reacted with water resulting in emission of highly poisonous *Phosphine gas* which continued to emit till 7th April, 2004. She stated that due to inhalation of the aforesaid gas, about thirty five persons living in the neighbourhood of respondent no. 5's godown were taken unwell and were rushed to the hospital with symptoms of breathlessness, pain in chest, vomiting, diarrhea, nausea and stomach ache. While most of sick persons were admitted in Hindu Rao Hospital for a period of a few days, a 19 years old boy, namely, Akash died in the morning of 7th April, 2004.

3. According to Ms. Mehta, subsequently three more persons, namely, Babu Lal (40 yrs.), Ved Prakash @ Raju (25 yrs.) and Poonam (18 yrs.) died due to exposure to chemical gases that were emitted during the fire in respondent no. 5's godown. In the case of Babu Lal, Ms. Mehta referred to the discharge slip prepared by Hindu Rao Hospital wherein it was stated that he had been treated for irritant gas inhalation. She also referred to prescriptions issued by Chest Clinic, Gulabi Bagh to Babu Lal to show that he had been treated for respiratory distress on account of gas inhalation. An affidavit of widow of Babu Lal was also relied upon by Ms. Mehta. In the said affidavit it was stated that though Babu Lal was suffering from initial stages of Pulmonary Tuberculosis, his condition deteriorated due to inhalation of gas that leaked from the godown of respondent no. 5 for a continuous period of four days and he subsequently died on 8th January, 2007.

4. In the case of Ved Prakash @ Raju, Ms. Mehta referred to Hindu Rao Hospital's medical record to show that he had been admitted in the said hospital on 7th April, 2004 on account of chemical smoke exposure. Though Ved Prakash @ Raju was discharged on the next day, his mother has filed an affidavit in the present proceedings stating that his pulmonary tuberculosis got aggravated to a great extent due to inhalation of gas and he ultimately expired on 14th April, 2007. In the said affidavit his profession and his monthly salary have also been mentioned.

5. In the case of deceased Poonam, Ms. Mehta once again referred to the medical record of Hindu Rao Hospital which showed that she had been admitted in the hospital on account of inhalation of phosphine gas. She also referred to an affidavit filed by deceased Poonam's mother which stated that Poonam was not suffering from any ailment and it was only due to ill-effects of gas leak that she died on 3rd November, 2005. Poonam's monthly income has also been mentioned in the said affidavit.

6. Though Ms. Mehta admitted that Babu Lal and Ved Prakash @ Raju were suffering from early stages of Tuberculosis, she stated that prognosis of Tuberculosis was excellent and in recent years death rate had declined from 25% to 2.5%. In this regard, she referred to an article on Tuberculosis published by Healthline Network as well as to the statement of Health Minister, Government of NCT of Delhi published in the Tribune newspaper.

7. Ms. Mehta stressed upon the fact that respondent no. 5 had neither taken any precautions nor obtained any prior licence from the Municipal Corporation of Delhi as mandated by Section 417 of Delhi Municipal Corporation Act, 1957 (hereinafter referred to as "DMC Act").

8. Ms. Mehta reiterated that petitioner is an Association which was formed by victims of the fire tragedy as well as the next of kith and kin

of those who had died due to inhalation of phosphine gas. She stated that petitioner-Association is headed by one Shri Raj Kumar Jain, who had been authorised by its members to file and pursue the present writ petition and to seek compensation on behalf of gas victims as well as to ensure that the erring officials are prosecuted for non-performance of their statutory duties.

9. Ms. Mehta stated that some of the poor victims are still suffering from the after-effects of emission of poisonous gases that had escaped from respondent no. 5's godown. According to her, as the gas victims belonged to the poor section of the society, this Court should grant a fair and just compensation to them by applying the principle of strict liability as enunciated in ***M.C. Mehta and another Vs. Union of India and others*** reported in ***1987 (1) SCC 395*** and ***Association of Victims of Uphaar Tragedy and Others Vs Union of India and Others*** reported in ***2003 III AD (Delhi) 321***.

10. In this context, Ms. Mehta claimed the following compensation for the four deceased in accordance with the Motor Vehicles Act 1988:

A. **Babu Lal**

Compensation should comprise two parts

I) Pecuniary loss of dependency.
II) Non pecuniary loss i.e. standard compensation or conventional amount for losses such as loss of consortium, loss of parents, pain and suffering and loss of amenities of life.

For pecuniary loss

Age: 40 yrs. Carpenter
Income Rs.4,000/- per month.

Deducting 1/3rd for personal expenses of the deceased Rs.1,333/-.

Dependency comes out to be Rs.2,667/- per month.

Multiplier 15 at the age of 40 yrs.

Rs.2,667 x 12 x 15 = Rs.4,80,060/-.

For non pecuniary loss

This Court in ***Kamla vs. Govt. of NCT*** reported in ***2005 ACJ 216*** and in ***Kishan Lal & Ors. vs. Govt. of NCT & Ors. W.P.(C) 5072/2005*** decided on ***3rd July, 2007*** has calculated the non pecuniary loss by taking the consumer price index for industrial worker (CPI(IW) (source labour bureau Govt. of India) with base year 1982 (=100)m the average CPW(IW) for the year 1989 was 171 and for January 2005 was 526. Due to inflation corrected value of Rs.50,000/- in 1989 would work out to Rs.1,53,801 in January, 2005.

Hence non pecuniary loss can be taken as Rs.1,53,801/-.

Total compensation works out to Rs.4,80,060 + Rs.1,53,801 = Rs.6,33,861/- along with interest at the rate of 7.5% per annum from the date of petition till realization.

B. **Ved Prakash @ Raju**

Pecuniary loss :-

Age: 25 yrs.
Income Rs.5000/- annual income Rs.60,000/-.

Deducting 1/3rd for personal expenses of the deceased dependency comes out to Rs.40,000/-.

Multiplier 17

Rs.40,000 x 17 = Rs.6,80,000/-.

Non-pecuniary loss as discussed above Rs.1,53,801/-.

Total Rs.6,80,000 + Rs.1,53,801/- = Rs.8,33,801/- along with interest at the rate of 7.5% per annum from the date of petition till realization.

C. **Poonam**

Age : 18 yrs.

Income : Rs.3000/-.

Deducting 1/3rd for personal expenses of the deceased dependency comes out to be Rs.2000/- per month or Rs.24,000/- per annum.

Multiplier 13 as per the age of mother

Rs.24,000 x 13 = Rs.3,12,000/-.

Non-pecuniary loss as discussed above Rs. 1,53,801/-

Total 3,12,000/- + Rs. 1,53,801/- = Rs.4,65,801/- along with interest at the rate of 7.5.% per annum from the date of petition till realization.

D. **Akash**

Age of deceased : 19 yrs. Age of father : 55 yrs.
Income: 5000/- per month so annual income Rs.60,000/ - per annum. Skilled

Future Prospects: Not claimed.

Deducting 1/3rd for personal expense of the deceased dependency comes out to be Rs. 40,000/-.

Multiplier 11 as per age of the father
Rs. 40,000 x 11 = Rs.4,40,000/-.

Non pecuniary as discussed above Rs.1,53801/-.

Total Rs.4,40,000/- + Rs.1,53,801/- = Rs.5,93,801/- along with interest at the rate of 7.5% per annum from the date of petition till realization.

CASE OF MCD

11. Respondent-MCD in its counter-affidavit has stated that as soon as they got information of the incident, they inspected the property in

question and found that the respondent no. 5 had stored pesticide boxes which caused fire in the godown. It has been further stated in the said affidavit that in order to prevent recurrence of such incidents, the property was sealed on 9th April, 2004 under the orders of the Competent Authority.

CASE OF RESPONDENT NO.5

12. On the other hand, Mr. D.R. Thadani, learned counsel for respondent no. 5 stated that the said respondent had been using the aforesaid godown since 1998. He further stated that despite an application for licence having been filed on 04th December, 1998 by respondent no.5, respondent-MCD took no action. According to him, respondent no. 5 was constrained to file a writ petition being CWP No. 1346/2004 before this Court, which was disposed of on 10th March, 2004 by a learned Single Judge of this Court after recording MCD's undertaking that respondent no. 5's representation would be disposed of within three weeks.

13. Mr. Thadani stated that despite respondent no. 5 filing all the requisite papers, respondent-MCD did not take any action in pursuance to this Court's order dated 10th March, 2004.

14. Though Mr. Thadani admitted the fact that on 4th April, 2004 there was an incident of fire in respondent no. 5's godown and as a

consequence of the said fire, about 34 persons were admitted on 7th April, 2004 in Hindu Rao Hospital, he did not admit that fire was caused due to negligence attributable to any official of respondent no.5. In this connection, he relied upon a report prepared by the Loss Prevention Association of India Ltd. for respondent no. 5's insurance company. According to him, the said report concluded that an electrical spark in all probability was the cause of the fire.

15. He further submitted that ***M.C. Mehta***'s case (supra) was not applicable to the present facts as opening of a godown could not by any stretch of imagination be said to be an inherently dangerous and hazardous activity.

16. On merits, Mr. Thadani submitted that there was no conclusive evidence that death of Babu Lal, Ved Prakash @ Raju and Poonam was attributable to inhalation of gas released. Mr. Thadani repeatedly emphasised that Babu Lal and Ved Prakash @ Raju were already suffering from Tuberculosis and, therefore, it could not be said with certainty that '*but for'* emission of gas from godown of respondent no. 5, they would have survived.

17. Mr. Thadani raised a number of preliminary objections to maintainability of the present writ petition. He submitted that petitioner-Association had no locus standi to maintain the present public interest writ petition inasmuch as petitioner-Association was not

a registered body and further the Minutes of the petitioner-Association Meeting held on 2nd May, 2005 indicated that it had been formed at the instance of the Advocates appearing for the Association. Mr. Thadani submitted that its advocates cannot take up the cause of people by way of a public interest litigation. In this regard, he relied upon ***Chhetriya Pardushan Mukti Sangharsh Samiti Vs. State of U.P. and others*** reported in ***AIR 1990 SC 2060*** wherein the Supreme Court held as under:

> *"8. Article 32 is a great and salutary safeguard for preservation of fundamental rights of the citizens. Every citizen has a fundamental right to have the enjoyment of quality of life and living as contemplated by Article 21 of the Constitution of India. Anything which endangers or impairs by conduct of anybody either in violation or in derogation of laws, that quality of life and living by the people is entitled to be taken recourse of Article 32 of the Constitution. But this can only be done by any person interested genuinely in the protection of the society on behalf of the society or community. This weapon as a safeguard must be utilised and invoked by the Court with great deal of circumspection and caution. Where it appears that this is only a cloak to "feed fact ancient grudge" and enemity, this should not only be refused but strongly discouraged. While it is the duty of this Court to enforce fundamental rights, it is also the duty of this Court to ensure that this weapon under Article 32 should not be misused or permitted to be misused creating a bottleneck in the superior Court preventing other genuine violation of fundamental rights being considered by the Court. That would be an act or a conduct which will defeat the very purpose of preservation of fundamental rights."*

18. Mr. Thadani strenuously urged that as respondent-MCD as well as deceased and injured claimants were silent spectators to running of respondent no. 5's godown for a period of six years, they could not file the present writ petition claiming compensation.

19. According to him, present writ petition was also barred by limitation as it had been filed two years after the incident of fire which occurred on 4th April, 2004 and further the impleadment application had been filed only on 17th March, 2009 on behalf of legal heirs of deceased Babu Lal, Ved Prakash @ Raju and Poonam. In any event, according to him, no writ petition for monetary claim was maintainable.

20. Mr. Thadani further submitted that present writ petition was also not maintainable as no writ petition lies against a private company like respondent no. 5. Moreover, according to him, in view of the voluntary settlements having already been executed between respondent no. 5 and the claimants, this Court could not award any compensation. Mr. Thadani pointed out that on 19th May, 2004, respondent no. 5 entered into contracts with affected persons and paid them compensation under concluded contracts.

21. In the context of the aforesaid settlement agreements, Mr. Thadani referred to a judgment of the Supreme Court in ***Punjab National Bank Vs. Virender Kumar Goel and others*** reported in ***(2004) 2 SCC 193*** wherein the Supreme Court held as under :-

> *"16. We make it clear that the sentence, "accepted a part of benefit under the scheme", which appeared in our direction as noticed above, would include the withdrawal of the benefit and utilisation thereof. By no stretch of imagination, unilateral deposit of a part of benefit under the scheme into the bank account that too after withdrawal of the application, would construe as to have accepted the part of the benefit under the scheme, when the same was neither withdrawn nor utilised by the employee concerned.*

xxxxx xxxxxx xxxxx

19. I.A. No. 14 has been filed by an employee of the bank sought to clarify/modify our order dated 17.12.2002. In this case, admittedly, the benefit of the Scheme had been withdrawn by the applicant on 27.2.2001. The applicant had clearly admitted, in ground E of the application, withdrawal of the amount so credited in his account albeit compelling financial constraints.

xxxxx xxxxxx xxxxx

21. As noticed in our judgment, having accepted the benefit under the Scheme by withdrawing and utilisation thereof they are not permitted to approbate and reprobate.

22. Mr. Thadani also submitted that the writ petition should not be heard at the present stage as criminal case against officers of respondent no. 5 was pending and any detrimental order in the present writ petition would adversely affect the course of justice in the said criminal case.

UNDISPUTED FACTS

23. Having heard the parties and having perused the papers, we are of the view that the admitted position is that respondent no. 5 was using the premises at Roshnara Road as a godown without any prior mandatory statutory permission. In fact, in the present case, the undisputed position was that there had been violation of Section 417 of the DMC Act. The relevant portion of the said Section is reproduced hereinbelow :-

"417. Premises not to be used for certain purposes without license-

(1) No person shall use or permit to be used any premises for any of the following purposes without or otherwise than in conformity with the terms of a license granted by the Commissioner in this behalf, namely:-

(a) any of the purposes specified in Part I of the Eleventh Schedule;

(b) any purpose which is, in the opinion of the Commissioner dangerous to life, health or property or likely to create a nuisance;….."

24. Moreover, the incident of fire and emission of gases on 4th April, 2004 in respondent no. 5's godown wherein pesticides were stored was not disputed. It was also not denied that as a consequence of the fire and inhalation of chemical gases, thirty four persons were hospitalised. In fact, death of Akash due to inhalation of poisonous phosphine gas immediately in the aftermath of the fire incident was also not disputed.

25. In this connection, we may refer to first DD entry and FIR No. 123/2004 lodged by police at Subzimandi Police Station, Delhi. The said DD entry reads as under :-

"DD No.30-A dated 4-4-04 PS Subzi Mandi Delhi.

Information received through PCR and Departure

Time 10.40 PM the Wireless Operator N. 61 from P.S. informed through intercom that from PCR, ASI Beni Arun, he received message that there is a fire at Jaipur Golden Godown and requested for sending police. The message was recorded and SI Rajiv Kumar was informed at Wire Less Set SM-1. For necessary action.

ASI

True as per original.

Sir DO Sahab, PS Subzi Mandi, Delhi, it is submitted that I, SI on receipt of DD No. 30-A along with my companion Ct. Tejpal No. 1256/N went to the place of occurrence at Roshnara Road, Jaipur Golden Tpt Company Godown where there was an incident of very big fire and the fire brigade was engaged in extinguishing the fire. Apparently the fire broke out due to inflammable and combustible chemicals stored in the godown and there was fear and possibility of the fire spreading to the nearby localities and there was also danger of loss of lives and

property, which was due to the godown owners storing combustible chemicals in the godown without taking any precaution, which constitutes an offence under Section 285/336 IPC. Ct. Tejpal was sent to P.S. for lodging an FIR in this regard and I S.I. is present at the place of occurrence.

Date 4-4-04 at about time unknown.
Jaipur Godlen Tpt Company Godown, Roshnara Road, Delhi.
5-4-04 at 12.55 AM.

Sd/-
SI Rajeev Kumar
No. D/1172
P.S. Subzi Mandi
Dated 5-4-04."

(emphasis supplied)

26. The FIR lodged by the police reads as under :-

FIRST INFORMATION REPORT

1. District North P.S. Subzi Mandi Year 2004
FIR No. 123 date 7.4.04
2. Act IPC Section : 284/337/304A

3. Occurrence of
Offence Day : Wednesday Date from 7.4.04
Date to : 7.4.04

Time from 0330 Hrs. Time to 0330 hrs.

(b) Information received at P.S.
Date 7.4.04 Time 07.35 hrs.

(c) General Diary
Reference Entry No. D.D. No. 7A Time 07.35 hrs.

4. Type of information :

5. Place of occurrence :
(a) Direction and distance from PS 1/2 KM West Side

Beat No. 8

(b) Address : H.No. 4801 Gali Mitra, Arya Pura, Subzi Mandi, Delhi.
6. Complainant/Informant
(a) Shri Duli Chand

(b) Father's Name: Shri Dhalu Ram
(c) Date/year of birth 55 years Nationality : Indian
Occupation : Baildari
Address : H.No.4801 Gali Mitra Sabzi Mandi Delhi
7. Details of known/suspected accused
8. Reasons for delay in reporting No Delay by me

STATEMENT OF DULI CHAND S/O. late Shri Dhadhu Ram, R/O.House No.4801 Gali Mitra Roshanara Road, Sabzi Mandi Delhi-7 aged 58 years who stated that I am residing at the above said address along with my family members and does the work of a labourer. In his street, there is a godown of Jaipur Golden Transport Company. It was set to fire. This godown was full of chemicals, clothes and cartons. Carton of tin were having poisonous pills which lost due to fire and poisonous smoke came out of the pills. Today in the morning my son Akash due to inhailing of poisonous smoke started vomiting and diarrhea and at about 3.30 in the night his condition deteriorated so I took him to Hindu Rao Hospital where the doctor on duty declared him as brought dead. Thereafter I took the dead body at home. The condition of the other neighbourers of the vicinity also became worsen due to the above said smoke which was coming out from the said godown. The treatment of all the neighbourers are continued in Hindu Rao Hospital. This mishappening took place to the negligency of the owner of Jaipur Golden Transport Company as he preserved poisonous things in his godown and did not take precautionary measures to avoid such incidences. The necessary action may kindly be taken against him. I have read my statement which is correct.

Sig. in Hindi
Attested by Jai Kumar
A.S.I. P.S. Sabzi Mandi
7.4.04

Sir,

It is submitted to the Duty Officer, P.S. Sabzi Mandi, that I ASI after receiving the D.D. No. 6A along with Constable Amarjit No. 919/N visited Roshnara Road House No. 4801 Gali Mitranwali Subzi Mandi where one person's dead body named as Akash son of Duli Chand was lying there where the father of the deceased, Duli Chand got recorded his statement. Thereafter I ASI with the Constable visited Hindu Rao Hospital and took the MLC of the injured. From the facts and circumstances the case is made out under Section 284/337/304A IPC against the accused. I sent the case for registration of rukka through Constable Amarjeet Singh No. 919/N who will inform him after registration of the case.

I am busy at the spot.

Date and time of accident : 7.4.04 at about 3.30 p.m.
Place of incident : House no. 4801 Gali Mitranwali, Subzi Mandi : Delhi
Date and time of departure : 7.4.04 at 7.25 AM

Signature in English Jai Kumar
ASI No. 28740594

13. Action taken

Name of IO Jai Kumar Rank ASI No. 2406/D PIS No. 28740594

Sd/- Signature of Officer
Incharge/Duty Officer, P.S.
Name : Manrakhan
Rank HC No. 417/N
RO&AC *PIS No. 28850255*

Sd/- Duli Chand
15. Date and time of departure to the court : *By Dak.*

(emphasis supplied)

27. The fact that Mr. Akash died due to inhalation of poisonous gases, is confirmed by the FSL report dated 30th September, 2004 which concluded that exhibits tested positive for presence of Aluminum Phosphide and Zinc Phosphide. The said report is reproduced hereinbelow:-

FORENSIC SCIENCE LABORATORY
GOVT. OF NCT OF DELHI
MADHUBAN CHOWK, ROHINI SECTOR-14, DELHI-110085

REPORT No. FSL…..2004/C-1019 *Dated 30/09/04*

Please quote the Report (Opinion) No. & Date in all future correspondence & Summons.

To

The Station House Officer
PS Subzi Mandi
Distt. North,
Delhi-7

Your letter No. 1021/SHO/S.Mandi Dated 25.05.2004 regarding six parcels in connection with case FIR No. 123/04 dated 07.04.04 U/S 284/337/304A IPC P.S. Subzi Mandi duly received in this office on 25.05.2004.

DESCRIPTION OF PARCELS & CONDITIONS OF SEAL/S

The Parcels six in numbers marked '1A', '2A', '2B', '3A', '3B' & '3C' which were sealed and tallied with specimen seal impression forwarded.

DESCRIPTION OF ARTICLES CONTAINED IN PARCEL

Parcel-1 : One wooden box sealed with the seals of 'KLS SUBZI MANDI MORTUARY AAA HOSPITAL, DELHI' labeled as PMR No. 497/04 Viscera of Akash. It was found to contain exhibits '1A', '1B' & '1C'.

Exhibit-1A: Stomach and piece of small intestine with contents kept in a sealed jar.

Exhibit-1B : Pieces of liver, spleen and kidney kept in a sealed jar.

Exhibit-1C : Lung pieces kept in a sealed jar.

Parcel-2A : One sealed glass vial sealed with the seal of 'hrh' labelled as MLC No. 3171. It was found to contain exhibit '2A'.

Exhibit-2A : Blood sample vol. 1 ml approx. of Ankush.

Parcel-2B: One sealed glass vial sealed with the seal of 'hrh' labelled as MLC No. 3184/04. It was found to contain exhibit '2BA'

Parcel-3A: One cloth parcel sealed with the seals of 'JK'. It was found to contain exhibit '3A'.

Exhibit-3A : Dark Grey coloured tablets, kept in the sixteen metallic container, kept in a tin container labelled as ALUMINUM PHOSPHIDE 56% W/W SANPHOS. Manufactured by SANDHYA ORGANIC CHEMICALS PVT. LTD.

Parcel-3B : One cloth parcel sealed with the seals of 'JK'. It was found to contain exhibit '3B'.

Exhibit-3B : Black colour powder substance, kept in plastic packet labelled as RODENTICIDE ZINC PHOSPHIDE RATIL Manufactured by SANDHYA ORGANIC CHEMICALS PVT. LTD.

Parcel-3C : One cloth parcel sealed with the seals of 'JK'. It was found to contain exhibit '3C'.

Exhibit-3C : Dark Grey coloured tablets kept in a metallic container.

RESULTS OF EXAMINATION

On chemical examination (i) Exhibits '1B', '1C', '2A' & '2B' gave positive tests for the presence of phosphide.

(ii) Exhibits '3A' & '3C' gave positive tests for the presence of aluminum phosphide.

(iii) Exhibit '3B' gave positive tests for the presence of zinc phosphide.

(iv) Metallic poisons, ethyl and methyl alcohol, cyanide, phosphide, alkaloids, barbiturates, transquillizers and insecticides could not be detected in exhibit '1A'.

Note : Remnants of the exhibits have been sealed with the seal of APS FSL DELHI.

Sd/-
(AMARPAL SINGH)

(emphasis supplied)

28. The subsequent opinion given by a doctor of Aruna Asaf Ali Government Hospital, Delhi confirmed that Mr. Akash died due to respiratory distress caused as a consequence of phosphide poisoning. The relevant portion of the said report is reproduced hereinbelow:-

"Subsequent Opinion

Reference page ante, written application of Police I.O and FSL report No. FSL. 2004/C-1019 dated 30-09-04 which gave positive test for phosphide in pieces of lungs, liver, kidneys and spleen, the subsequent opinion is as follows :-

"The cause of death is respiratory distress, asphyxia and myocardial anoxia as a result of phosphide poisoning.

Sd/-
Dr. Kulbhushan Goyal
Senior Medical Officer
Aruna Asaf Ali Govt. Hospital
Delhi.

(emphasis supplied)

29. It is pertinent to mention that Dr. K.S. Narayan Reddy in his book *"The Essentials of Forensic Medicine and Toxicology"* has stated as under:-

ALUMINUM PHOSPHIDE

Aluminum phosphide (ALP) is a solid fumigant pesticide, insecticide and rodenticide. In India it is available as white tablets of Celpnos, Alphos, Quickphos, Phostoxin, Phosphotex, etc., each weighing 3 g. and has the capacity to liberate one gram of phosphine (PH_3). On coming in contact with moisture ALP liberates phosphine. Phosphine is a systemic poison and affects all organs of the body. The chemical reaction is accelerated by the presence of HCL in the stomach. ALP has garlicky odour. It is widely used as grain preservative. Phosphite and hypophosphite of aluminum which are non-toxic residues are left in the grains.

***Absorption and Excretion** : Phosphine is rapidly absorbed from the GI tract by simple diffusion and causes damage to the Internal organs. It is also rapidly absorbed from the lungs after inhalation. After ingestion, some ALP is also absorbed and is metablised in the liver, where phosphine is slowly released accounting for the prolongation of symptoms. Phosphine is oxidized slowly to oxyacids and excreted in the urine as hypophosphite. It is also excreted in unchanged form though the lungs.*

***Action** : Phosphine inhibits respiratory chain enzymes and has cytotoxic action. It acts by inhibiting the electron transport resulting from preferential inhibition of cytochrome oxide.*

***Inhalation** : Mild inhalation exposure produces irritation of mucous membranes and acute respiratory distress. Other symptoms are dizziness, easy fatigue, tightness in the chest, nausea, vomiting, diarrhea and headache. Moderate toxicity produces ataxia, numbness, paraesthesia, tremors, diplopia, jaundice, muscular weakness, incoordination and paralysis. Concentration of PH_3 in air higher than 03 ppm causes severe illness. Severe toxicity produces adult respiratory distress syndrome, cardiac arrhythmias, congestive heart failure, pulmonary oedema, convulsions and coma."*

30. According to the *New Jersey Department of Health and Senior Services' Hazardous Substance Fact Sheet*, contact with Aluminum

Phosphide can irritate the skin and eyes and its repeated exposure can damage lungs, kidneys and liver. The Fact Sheet further states that Aluminum Phosphide reacts with water or moisture to release highly toxic and flammable *Phosphine gas*, which is a highly reactive chemical and a dangerous fire and explosion hazard.

31. The website of BOC Gases states that release of phosphine gas can aggravate pre-existing respiratory, kidney and nervous system disorders.

LIMITATION OBJECTION

32. We fail to understand as to how a writ petition can be said to be barred by limitation inasmuch as no period of limitation has been statutorily prescribed for filing a writ petition under Article 226 of the Constitution. In fact, writ petitions are dismissed on account of delay on the ground of laches and not as barred by limitation. The test to be applied is whether laches on the part of the Petitioner are such as to hold that petitioners by their act or conduct have given a go-by to their rights. On perusal of the present case we find that present writ petition was filed in about two years' time from the date of fire and delay in filing the present petition was on account of the fact that victims of the fire and gas tragedy were extremely poor and not organized. In any event the alleged delay, if any, has not prejudiced the rights of any third party including that of respondent no.5.

33. As far as allowing of the impleadment application in 2009 is concerned, we find that by virtue of the said application, legal heirs of three deceased victims were brought on record. In fact, two out of three deceased had died after filing of the present writ petition. Consequently, plea of limitation is without any merit and is accordingly rejected.

LOCUS-STANDI OBJECTION

34. Respondent no. 5's objections that petitioner-Association has no locus standi to maintain the present writ petition as it is an unregistered body, is without any merit. In fact, the earlier narrow concept of person aggrieved and individual litigation has become obsolete and Courts are today even converting letter petitions into Public Interest Litigations. The Supreme Court in ***Akhil Bharatiya Soshit Karamchari Sangh (Railway) vs. Union of India & Ors.*** reported in ***AIR 1981 SC 298*** held as under:

> *"63. A technical point is taken in the counter-affidavit that the 1st petitioner is an unrecognized association and that, therefore, the petition to that extent, is not sustainable. It has to be overruled. Whether the petitioners belong to a recognized union or not, the fact remains that a large body of persons with a common grievance exists and they have approached this Court under Article 32. Our current processual jurisprudence is not of individualistic Anglo-Indian mould. It is broad-based and people-oriented, and envisions access to justice through 'class actions', 'public interest litigation' and 'representative proceedings'. Indeed, little Indians in large numbers seeking remedies in courts through collective proceedings, instead of being driven to an expensive plurality of litigations, is an affirmation of participative justice in our democracy. We have no hesitation in holding that the narrow concept of 'cause of action' and 'person aggrieved' and individual litigation is becoming obsolescent in some jurisdictions."*

35. Respondent no.5's further plea that Advocates were behind the petitioner-Association, is contrary to facts and untenable in law. In any event, Advocates have in the past filed many public interest litigations including those seeking compensation. In this context, we may refer to a judgment of Karnataka High Court in ***P.A. Kulkarni & Anr. vs. State of Karnataka & Anr.*** reported in ***AIR 1999 Karnataka 284*** wherein it was held as under:

> *"Careless conduct and casual approach adopted by the respondent-State in the matter of fundamental right dealing with life and safety forced the petitioners, belonging to a noble profession of advocates to put off their robes and stand before us as litigant seeking justice for the legal heirs of the dead and compensation for the injured. The deaths and injuries are admitted to have been caused on account of the collapse of a building constructed by the builders by using substandard material besides ignoring the structural guidelines and protections. The rolling tears and the soar wailing cries of the victims of the tragedy did not affect the mighty and careless State but did touch the tender hearts of the petitioners, who initiated this action in public interest with prayer for granting appropriate relief to the needy and deserving."*

PENDENCY OF CRIMINAL PROCEEDINGS IS NO BAR TO MAINTAINABILITY OF PRESENT WRIT PETITION

36. Mr. Thadani's plea that any decision in the present writ proceedings would prejudicially affect the criminal trial, is untenable in law as in the present proceedings we are not holding anyone criminally liable. In fact, we are only considering application of the principle of strict liability according to which those engaged in certain activities have to compensate for the damages caused by them irrespective of any fault on their part. Consequently, Mr. Thadani's aforesaid objection is without any merit.

'SILENT SPECTATORS' OBJECTION

37. Respondent no.5's plea that as the deceased and injured were silent spectators to running of a godown by respondent no. 5 for six years, they could not claim compensation, is only to be stated to be rejected. If this plea were to be accepted it would amount to placing a premium on dishonesty and any infringer of law would claim that he is not liable to pay any compensation as he had not been prevented prior in time from violating the law.

VOLUNTARY SETTLEMENT'S PLEA

38. Respondent no. 5's further plea that in view of the voluntary settlement having been executed, they were not liable to pay any compensation is equally untenable in law. One of the sample agreements executed between respondent no. 5 and an affected party is reproduced hereinbelow for ready reference :-

AGREEMENT

This agreement is made at Delhi on this 3rd day of May 2004 between Shri Sumer Chand S/o. Shri Faquir Chand R/o. 4808, Gali Mitra, Arya Pura, Delhi (hereinafter called the FIRST PARTY AND Jaipur Golden Trasnport Co. (Pvt.) Ltd. through its Jt. Managing Director, Shri V.L. Bahri having its registered office at 4736/41, Roshnara Road, Delhi, hereinafter called the SECOND PARTY.

WHEREAS the expressions FIRST PARTY AND SECOND PARTY shall mean and includes their respective heirs, successors, assigns etc.

WHEREAS the SECOND PARTY M/s. Jaipur Golden Transport Co. (Pvt.) Ltd. is running the business of transportation, all over the India and is having it one of godown at 4776, Roshnara Road, Delhi.

AND WHEREAS the First Party is living in House No. 4808 which is situated adjacent to the same Godown.

AND WHEREAS an unfortunate fire broke out in the above stated godown on the night of 4th April, 2004 and resulting into loss of the entire consignments lying in the same.

AND WHEREAS the first party has approached the second party seeking the compensation in terms of money to the tune of Rs. 5000/- (Rupees Five Thousand only), as he has stated that he suffered simple suffocation due to smoke which emanated from the fire in the Godown.

AND WHEREAS both the parties have also arrived to this conclusion that the same fire was an accidental fire which took place due to short circuit and there was no negligence on the part of the Second Party.

AND WHEREAS keeping in view its pride and reputation and also the fact that the First Party is the neighbourer to the Second Party, the Second Party, without prejudice to its rights and contentions that the same fire took place due to an accident, beyond the control and powers of the Second Party, has voluntarily offered to pay as a goodwill gesture, a sum of Rs. 5000/- (Rupees Five Thousand only) by way of Cash towards the full and final satisfaction of the First Party, which amount is also acceptable to the First Party.

NOW THIS DEED WITNESSETH as under :

1) That the First Party has made this claim on the contention that he suffered simple suffocation due to smoke and by making this contention he has not concealed the material facts and further has not concocted any false story.

2) That the First Party has accepted the amount of Rs. 5000/- (Rupees Five Thousand only) in (cash) and the First Party undertakes not to claim any amount whatsoever from the Second Party and the First Party hereinafter also undertakes & not to file any legal proceedings and/or to file any other claim/case against the Second Party.

4. That this Agreement has been arrived at between the parties with their free consent and consciences as no pressure or coercion has been applied upon.

IN WITNESS WHEREOF both the Parties have signed this Agreement on the day and date mentioned above in presence of the following witnesses.

First Party Suresh Chand
S/o. Faquirchand
R/o. 4808, Gali
Mitra, Delhi

(Seal)For Jaipur Golden Transport Co. (P) Ltd.)
Second Party Sd

Witnesses :
1) Rajiv Khanna
S/o. SH. K.L. Khanna,
R/o. 34/505, Kang Roshnara Appt.
Sec-13, Rohini, Delhi – 85

39. A chart filed by Mr. Thadani indicating the list of persons with whom respondent no. 5 had executed settlements is reproduced hereinbelow :-

LIST OF PERSONS WHO WERE ADMITTED TO THE HOSPITAL, SHOWING THEIR DATE ADMISSION & DATE OF DISCHARGE AS FILED BY THE PETITIONER

S. NO.	*NAME OF PERSON*	*DATE OF ADMISSION*	*DATE DISCHARGE*	*REMARKS*
1.	*Duli Chand*	*05/05/2004*	*13/5/2004*	*Father of Akash- deceased*
2.	*Babu Lal*	*07/04/2004*	*12/04/2004*	***All persons paid Rs. 4000/- or Rs. 5000/-***
3.	*Raju S/O Anna Ram*	*07/04/2004*	*08/04/2004*	
4.	*Jai Devi*	*07/04/2004*	*08/04/2004*	
5.	*Tejwati*	*07/04/2004*	*10/04/2004*	
6.	*Jitender S/o Davi Lal*	*07/04/2004*	*19/04/2004*	
7.	*Anil*	*08/04/2004*	*10/04/2004*	
8.	*Suman Chand*	*07/04/2004*	*08/04/2004*	
9.	*Tej Pal*	*07/04/2004*	*08/04/2004*	
10.	*Doli*	*07/04/2004*	*08/04/2004*	
11.	*Raju*	*07/04/2004*	*08/04/2004*	
12.	*Davi Lal*	*07/04/2004*	*08/04/2004*	
13.	*Sanjay*	*07/04/2004*	*08/04/2004*	
14.	*Vishal*	*07/04/2004*	*10/04/2004*	
15.	*Ruby*	*07/04/2004*	*10/04/2004*	
16.	*Ankush*	*07/04/2004*	*10/04/2004*	
17.	*Mangal*	*07/04/2004*	*08/04/2004*	
18.	*Birju*	*07/04/2004*	*17/04/2004*	

19.	*Gango Devi*	*07/04/2004*	*10/04/2004*	
20.	*Deepa*	*07/04/2004*	*08/04/2004*	
21.	*Moni Devi*	*07/04/2004*	*08/04/2004*	
22.	*Ravi Devi*	*07/04/2004*	*08/04/2004*	
23.	*Poonam*	*07/04/2004*	*08/04/2004*	
24.	*Seema Jain*	*07/04/2004*		
25.	*Shanti Devi*	*07/04/2004*	*10/04/2004*	
26.	*Kailash*	*07/04/2004*	*08/04/2004*	
27.	*Phoolwati*	*07/04/2004*	*08/04/2004*	
28.	*Brijesh*	*07/04/2004*	*12/04/2004*	
29.	*Sohan Lal*	*07/04/2004*	*08/04/2004*	
30.	*Radha Devi*	*07/04/2004*	*08/04/2004*	
31.	*Parmanand*	*07/04/2004*	*12/04/2004*	
32.	*Sohan Lal S/o Prabu Dayal*	*07/04/2004*	*08/04/2004*	
33.	*Meena*	*07/04/2004*	*08/04/2004*	
34.	*Nanhaee*	*07/04/2004*	*12/04/2004*	

40. The insignificant compensation as well as the standard format of agreements leaves no room for doubt that the said agreements are unfair, unreasonable, unconscionable, opposed to public policy and consequently void. (See: ***Central Inland Water Transport Corporation Limited & Anr. vs. Brojo Nath Ganguly & Ors. (1986) 3 SCC 156, paras 89 and 93***).

PRESENT WRIT PETITION IS MAINTAINABLE

41. As far as the maintainability of present writ petition against respondent no. 5 is concerned, it is submitted that Article 226 of Constitution makes no distinction between a public function and a private function. In ***U.P. State Cooperative Land Development Bank Ltd. Vs. Chandra Bhan Dubey and Ors.*** reported in ***1999 1 SCC 741*** the Supreme Court held as under :-

> ***"27.*** *……When any citizen or person is wronged, the High Court will step in to protect him, be that wrong be done by the State, an instrumentality of the State, a company or a cooperative society or association or body of individuals, whether incorporated or not, or even an individual. Right that is infringed may be under Part III of the Constitution or any other right which the law validly made might confer upon him. But then the power conferred upon the High Courts under Article 226 of the Constitution is so vast, this Court has laid down certain guidelines and self-imposed limitations have been put there subject to which the High Courts would exercise jurisdiction, but those guidelines cannot be mandatory in all circumstances……"*

42. Moreover, in our opinion, the present writ petition is maintainable as undoubtedly respondent-MCD has been remiss and negligent in discharging its statutory obligations and in ensuring that a citizen's fundamental right to health and pollution free environment was not infringed. Consequently, present writ petition is maintainable.

MONETARY RELIEF CAN BE AWARDED IN THE PRESENT WRIT PETITION

43. As far as respondent no. 5's submission that no writ petition for money claim is maintainable is concerned, we are of the view that the same is untenable in law. In our opinion, the Constitution does not place any fetter on the exercise of extra ordinary jurisdiction of the Court and reliefs to be granted under such extra ordinary jurisdiction is left to the discretion of the Court in the light of facts and circumstances of each case. Moreover in the present case what has been sought is award of compensation and not payment of monetary claim.

COMPENSATION CAN BE AWARDED IN ARTICLE 226 PROCEEDINGS

44. It is further well settled that proceedings under Article 226 of the Constitution of India, enable the courts, to reach out to injustice, and make appropriate orders, including directions to pay damages or compensation. The Supreme Court in ***Dwarka Nath Vs. Income-Tax Officer & Anr.*** reported in ***AIR 1966 SC 81*** held as under :-

> *"(4)……This article is couched in comprehensive phraseology and it ex facie confers a wide power on the High Courts to reach injustice wherever it is found. The Constitution designedly used a wide language in describing the nature of the power, the purposes for which and the person or authority against whom it can be exercised. It can issue writs in the nature of prerogative writs as understood in England; but the scope of those writs also is widened by the use of the expression "nature", for the said expression does not equate the writs that can be issued in India with those in England, but only draws in analogy from them. That apart, High Courts can also issue directions, orders or writs other than the prerogative writs. It enables the High Courts to mould the reliefs to meet the peculiar and complicated requirements of this country. Any attempt to equate the scope of the power of the High Court under Art.226 of the Constitution with that of the English Courts to issue prerogative writs is to introduce the unnecessary procedural restrictions grown over the years in a comparatively small country like England with a unitary form of Government to a vast country like India functioning under a federal structure. Such a construction defeats the purpose of the article itself. To say this is not to say that the High Courts can function arbitrarily under this Article. Some limitations are implicit in the article and others may be evolved to direct the article through defined channels. This interpretation has been accepted by this Court in T. C. Basappa v. Nagappa, 1955-1 SCR 250: (AIR 1954 SC 440) and Irani v. State of Madras, 1962-(2) SCR 169 : (AIR 1961 SC 1731)."*

45. Further the Supreme Court in ***Air India Statutory Corporation*** reported in ***1997 (9) SCC 377*** held that, *"the Founding Fathers placed no limitation or fetters on the power of the High Court under Article 226 of the Constitution except self-imposed limitations. The arm of the Court is long enough to reach injustice wherever it is found. The Court as sentinel on the qui vive is to mete out justice in given facts."*

46. The concept of compensation under public law, for injuries caused due to negligence, inaction or indifference of public functionaries or for the violation of fundamental rights is well known. In ***Nilabati Behera v. State of Orissa, (1993) 2 SCC 746*** at page 762, the Supreme Court held as under:

> *"17. ……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 right 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 defence of sovereign immunity being inapplicable, and alien to the concept of guarantee of fundamental rights, there can be no question of such a defence being available in the constitutional remedy. It is this principle, which justifies award of monetary compensation for contravention of fundamental rights guaranteed by the Constitution, when that is the only practicable mode of redress available for the contravention made by the State or its servants in the purported exercise of their powers."*

47. In ***Chairman, Railway Board Vs. Chandrima Das*** reported in ***(2000) 2 SCC 465*** Supreme Court emphasised the obligation of the

State to protect women from violence, including rape and held that this right is a part of Right to Life guaranteed under Article 21 of the Constitution. In that case, the aggrieved party was a victim of rape committed in a railway compartment. The court rejected the Central Government's disclaimer of liability, and declared that the right of the victim under Article 21 had been violated. It awarded Rs.10 lakhs as pubic law damages. It is pertinent to mention that the court did not examine who was the perpetrator, or what duty he owed to the Government. It was held sufficient that a wrong had occurred in a railway coach, which was under the control of the railway authorities.

48. It is pertinent to mention that this Court has also awarded compensation in writ jurisdiction in ***Raj Kumar vs. Union of India (2005) 125 DLT 653***, ***Delhi Jal Board vs. Raj Kumar (2005) 8 AD (Delhi) 533, Chitra Chary vs. DDA (2005) 1 AD (Del) 29, Shri Chand vs Chief Secretary 2004 (112) DLT 37, Shobha vs. GNCTD (2003) IV AD (Delhi) 492, Shyama Devi vs. GNCTD (1999) 1 AD (Cr) Delhi 549, All India Lawyers' Union (Delhi Unit) vs. Union of India AIR 1999 Del 120, B.L. Wali vs Union of India (2004) VIII AD (Delhi) 341, Ram Kishore & Ors. Vs. Municipal Corporation of Delhi 2007 VII AD (Delhi) 441, WP(C) 5072-73/2005*** titled as ***Kishan Lal Vs. Govt. of NCT of Delhi*** decided on ***3rd July, 2007, Kamla Devi Vs. Govt. of NCT of Delhi & Anr. 2005 ACJ 216, and WP(C) 3370/2000*** titled as ***Master Dheeru Vs. Govt. of NCT of Delhi & Ors.*** decided on ***9th February, 2009.***

IN ARTICLE 226 PROCEEDINGS, THE COURT CAN ALWAYS MOULD THE RELIEF

49. The power of the High Courts and the Supreme Court under Article 226 and Article 32 respectively, to mould the relief so as to compensate the victim has been affirmed by the Supreme Court on numerous occasions including ***Common Cause***, ***A Registered Society v. Union of India (1999) 6 SCC 667***, ***Chairman Railway Board v. Chandrima Das (2000) 2 SCC 465 Delhi Domestic Working Women's Forum v. Union of India (1995) 1 SCC 14***, ***D.K. Basu v. State of W.B (1997) 1 SCC 416 and Rudul Sah v. State of Bihar (1983) 4 SCC 141***.

APPLICATION OF RULE IN RYLAND VS. FLETCHER

50. The principle of liability without fault was enunciated in ***Ryland Vs. Fletcher*** reported in ***(1868) LR 3 HL 330***. Facts of the said case were that defendant, who owned a mill, constructed a reservoir to supply water to the mill. This reservoir was constructed over old coal mines, and the mill owner 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 at his peril, and if he does not do so, he 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.

51. To oppose the application of *Ryland Vs. Fletcher rule* the only submission advanced by respondent no. 5 before us was that running of a godown *per se* is not an inherently dangerous or hazardous industry and further the cause of fire could not be attributed to negligence of respondent no. 5.

52. But the fact is that the Rule in ***Rylands v. Fletcher*** (supra) 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 Jolowiez 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 3 81 ; Hillier v. Air Ministry, (1962) CLY 2084, etc. (See: ***Delhi Jal Board vs. Raj Kumar*** reported in ***ILR (2005) 2 Del 778***).

53. Consequently, in our view, the submission of respondent no. 5 that running of a godown would not attract the rule enunciated in *Ryland Vs. Fletcher* is untenable in law.

54. Moreover, in our opinion, the dispute raised with regard to cause of fire is irrelevant for attraction of the rule in *Ryland Vs. Fletcher* inasmuch as one has only to see as to whether a person has put the land to a non-natural use and whether as a consequence of such use, some damage has been caused to the public at large. In the present instance, the above test is admittedly satisfied as respondent no. 5's premises was situated in a residential area which could not have been used as a godown and further as a consequence of fire in the godown containing consignment of pesticides, gas escaped which caused loss of lives and injuries to people living in the neighbourhood. Accordingly, the rule in *Ryland vs. Fletcher* is attracted in the present case.

APPLICATION OF PRINCIPLE EVOLVED IN M.C. MEHTA'S CASE

55. In any event, storage of chemical pesticides was certainly an inherently dangerous and/or hazardous activity and, therefore, the principle evolved by the Supreme Court in ***M.C. Mehta and another Vs. Union of India and others*** reported in ***1987 (1) SCC 395*** would apply. In the said judgment, Supreme Court held as under :-

> *"31. We must also deal with one other question which was seriously debated before us and that question is as to what is the measure of liability of an enterprise which is engaged in an hazardous or inherently dangerous industry, if by reason of an accident occurring in such industry, persons die or are injured. Does the rule in Rylands v. Fletcher apply or is there any other principle on which the liability can be determined? The rule in Rylands v. Fletcher was evolved in the year 1866 and it provides that a person who for his own purposes brings on to his land and collects and keeps there anything likely to do mischief if it escapes must keep it at his peril and, if he fails to do so, is prima facie liable for the damage which is the natural consequence of its escape. The liability under this*

rule is strict and it is no defence that the thing escaped without that person's wilful act, default or neglect or even that he had no knowledge of its existence. This rule laid down a principle of liability that if a person who brings on to his land and collects and keeps there anything likely to do harm and such thing escapes and does damage to another, he is liable to compensate for the damage caused. Of course, this rule applies only to non-natural user of the land and it does not apply to things naturally on the land or where the escape is due to an act of God and an act of a stranger or the default of the person injured or where the thing which escapes is present by the consent of the person injured or in certain cases where there is statutory authority. Vide Halsbury Laws of England, Vol. 45 para 1305. Considerable case law has developed in England as to what is natural and what is non-natural use of land and what are precisely the circumstances in which this rule may be displaced. But it is not necessary for us to consider these decisions laying down the parameters of this rule because in a modem industrial society with highly developed scientific knowledge and technology where hazardous or inherently dangerous industries are necessary to carry part of the developmental programme. This rule evolved in the 19th Century at a time when all these developments of science and technology had not taken place cannot afford any guidance in evolving any standard of liability consistent with the constitutional norms and the needs of the present day economy and social structure. We need not feel inhibited by this rule which was evolved in the context of a totally different kind of economy. Law has to grow in order to satisfy the needs of the fast changing society and keep abreast with the economic developments taking place in the country. As new situations arise the law has to be evolved in order to meet the challenge of such new situations. Law cannot afford to remain static. We have to evolve new principles and lay down new norms which would adequately deal with the new problems which arise in a highly industrialised economy. We cannot allow our judicial thinking to be constricted by reference to the law as it prevails in England or for the matter of that in any other foreign country. We no longer need the crutches of a foreign legal order. We are certainly prepared to receive light from whatever source it comes but we have to build up our own jurisprudence and we cannot countenance an argument that merely because the law in England does not recognise the rule of strict and absolute liability in cases of hazardous or inherently dangerous liability or the rule as laid down in Rylands v. Fletcher as developed in England recognises certain limitations and exceptions, we in India must hold back our hands and not venture to evolve a new principle of liability since English courts have not done so. We have to develop our own law and if we find that it is necessary to construct a new principle of liability to deal with an unusual situation which has arisen and which is likely to arise in

future on account of hazardous or inherently dangerous industries which are concomitant to an industrial economy, there is no reason why we should hesitate to evolve such principle of liability merely because it has not been so done in England. We are of the view 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. The enterprise must be held to be under an obligation to provide that the hazardous or inherently dangerous activity in which it is engaged must be conducted with the highest standards of safety and if any harm results on account of such activity, the enterprise must be absolutely liable to compensate for such harm and it should be no answer to the enterprise to say that it had taken all reasonable care and that the harm occurred without any negligence on its part. Since the persons harmed on account of the hazardous or inherently dangerous activity carried on by the enterprise would not be in a position to isolate the process of operation from the hazardous preparation of substance or any other related element that caused the harm the enterprise must be held strictly liable for causing such harm as a part of the social cost of carrying on the hazardous or inherently dangerous activity. If the enterprise is permitted to carry on an 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 over-heads. Such hazardous or inherently dangerous activity for private profit can be tolerated only on condition that the enterprise engaged in such hazardous or inherently dangerous activity indemnifies all those who suffer on account of the carrying on of such hazardous or inherently dangerous activity regardless of whether it is carried on carefully or not. This principle is also sustainable on the ground that the enterprise alone has the resource to discover and guard against hazards or dangers and to provide warning against potential hazards. We would therefore hold that where an enterprise is engaged in a hazardous or inherently dangerous activity and harm results to anyone on account of an accident in the operation of such hazardous or inherently dangerous activity resulting, for example, in escape of toxic gas the enterprise is strictly and absolutely liable to compensate all those who are affected by the accident and such liability is not subject to any of the exceptions which operate vis-a-vis the tortious principle of strict liability under the rule in Rylands v. Fletcher (supra).

(emphasis supplied)

56. A Division Bench of this Court in the case of ***Association of Victims of Uphaar Tragedy and Others Vs Union of India and Others*** reported in ***2003 III AD (Delhi) 321*** held that where an accident occurs at an enterprise engaged in a hazardous or inherently dangerous activity, then the said enterprise would be strictly and absolutely liable to compensate all those who are affected by the said accident and such liability is not subject to any of the exceptions which operate under the *Rylands Vs. Fletcher Rule*. In the said case, each injured was directed to be paid a compensation of rupees one lakh for mental pain, shock and agony suffered by them.

57. In fact, the Supreme Court in ***Union of India (UOI) Vs. Prabhakaran Vijaya Kumar and Ors.*** reported in ***2008 (9) SCC 527*** referred to *Ryland Vs. Fletcher* rule and after pointing out its limitations, reiterated the principle of strict liability in M.C. Mehta case (supra) as under:

> *"21. Rylands v. Fletcher (supra) 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'.*
>
> *22. 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).

23. 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.

24. The basis of the doctrine of strict liability is two fold (i) The people who engage in particularly hazardous activities should bear the burden of the risk of damage that their activities generate and (ii) 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).

25. 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"……

xxxxx xxxxx xxxxx

33. 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).

34. This repudiation of the principle in Rylands v. Fletcher (supra) 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 was 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. Thus the decline of the rule in Rylands v. Fletcher (supra) left the individual injured by the activities of industrial society virtually without adequate protection.

35. 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, in modern society.

36. 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).

37. 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

> *"31…… if the enterprise 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".*

58. In ***Jay Laxmi Salt Works (P) Ltd. Vs. State of Gujarat*** reported in ***(1994) 4 SCC 1*** the Supreme Court held as under :

"9……What is fundamental is injury and not the manner in which it has been caused. 'Strict liability', 'absolute liability', 'fault liability, and neighbour proximity', are all refinements and development of law by English courts for the benefit of society and the common man. Once the occasion for loss or damage is failure of duty, general or specific, the cause of action under tort arises. It may be due to negligence, nuisance, trespass, inevitable mistake etc. It may be even otherwise. In a developed or developing society the concept of duty keeps on changing and may extend to even such matters as was highlighted in Donoghue v. Stevenson (1932 AC 562: 1932 All ER Rep 1) where a manufacturer was held responsible for injury to a consumer. They may individually or even collectively give rise to tortuous liability. Since the appellant suffered loss on facts found due to action of respondent's officers both at the stage of construction and failure to take steps even at the last moment it was liable to be compensated."

59. In ***Research Foundation for Science (18) Vs. Union of India*** reported in ***(2005) 13 SCC 186*** the Supreme Court held as under :

> *"32……Law cannot afford to remain static. The Court cannot allow judicial thinking to be constricted by reference to the law as it prevails in England or in any other foreign country. Though the Court should be prepared to receive light from whatever source it comes but it has to build up its own jurisprudence. It has to evolve new principles and lay down new norms which would adequately deal with the new problems which arise in a highly industrialized economy. If it is found that it is necessary to construct a new principle of liability to deal with an unusual situation which has arisen and which is likely to arise in future on account of hazardous or inherently dangerous industries which are concomitant to an industrial economy, the Court should not hesitate to evolve such principle of liability because it has not been so done in England. 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. The enterprise must be held to be under an obligation to provide that the hazardous or inherently dangerous activity in which it is engaged must be conducted with the highest standards of safety and if any harm results to anyone on account of an accident in the operation of such activity resulting, for example, in escape of toxic gas the enterprise is strictly and absolutely liable to compensate all those who are affected by the accident as a part of the social cost for carrying on such activity, regardless of whether it is carried on carefully or not. Such liability is not subject to any of the exceptions which operate vis-a-vis the tortuous principle of strict liability under the rule in* ***Rylands v. Fletcher.*** *If the enterprise is permitted to carry on a 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 activity as an appropriate items of its overheads. The enterprise alone has the resource to discover and guard against hazards or dangers and to provide warning against potential hazards."*

60. The Law Commission of India Report No. 186 (September, 2003) regarding the proposal to constitute environment courts in

Chapter 3 – The Constitutional Mandate and Survey of Supreme Court's judgments on Environmental Issues states:-

> *"In 1987, the Court laid down principles of strict liability in the matter of injury on account of use of hazardous substances. Under the rule in Rylands vs. Fletcher (1868) LR 3 HL 330, absolute liability for negligence could be imposed only for non-natural use of land and for 'foreseeable damage'. However, such exceptions were held by the Court as no longer available in the case of injury on account of use of hazardous substances. Hazardous industries which produced gases injuring the health of the community took a beating in M.C. Mehta vs. Union of India AIR 1987 SC 1086 (the Oleum gas leak case) where the rule in Rylands vs. Fletcher was modified, holding that the 'enterprise which is engaged in a hazardous or inherently dangerous industry which poses a potential threat to the health and safety of 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…the enterprise must be absolutely liable to compensate for such harm and it should be no answer to the enterprise to say that it had taken all reasonable care and that the harm occurred without any negligence on its part…The larger and more prosperous the enterprise, greater must be the amount of compensation payable for the harm caused on account of an accident in the carrying on of the hazardous or inherently dangerous activity by the enterprise."*

61. From the undisputed facts, it is apparent that respondent no. 5 was engaged in an inherently dangerous or hazardous activity as it had stored chemical pesticides and consequently, its duty of care was absolute. Accordingly, the exceptions to strict liability as evolved in *Ryland Vs. Fletcher* rule are not applicable. Therefore, respondent no.5 is liable to compensate the victims of the gas and fire tragedy in accordance with the strict liability principle evolved by the Supreme Court in *M.C. Mehta case* (supra).

MCD IS ALSO LIABLE

62. In the present case, MCD was remiss and negligent in discharging its statutory obligations and in ensuring that a citizen's fundamental right to health and pollution free environment was not infringed.

63. In fact, the present case was not the first incident of gas leak or fire in Delhi which occurred due to storage of hazardous substances. In this context, we may refer to the following extract of P.P. Chauhan Committee's report:-

> *"REPORT OF SHRI P.P. CHAUHAN, COMMISSIONER, MUNICIPAL CORPORATION OF DELHI REGARDING ADMINISTRATIVE REVIEW OF THE FIRE INCIDENT IN GANDHI GALI, TILAK BAZAR, DELHI ON THE NIGHT OF 23RD JUNE, 1987.*
>
> xxxxx xxxxxx xxxxx
>
> *The congested areas of the walled city are being used for storage of chemicals and other highly hazardous inflammable materials. There have been fire incidents in the past also. The remedy lies in shifting of such hazardous and chemicals godowns from the congested areas of the walled city. The Department of Industries, Delhi Administration had conducted a survey of the entire walled city area and had suggested shifting of hazardous industries from the entire walled city area and had suggested shifting of hazardous industries and godowns to the outskirts of the city. Unless immediate steps are taken to shift such hazardous units and godowns storing highly inflammable material from the walled city, the people inhabiting this area would continue to face danger and risk to their life and property.*
>
> *The following short term remedial measures are suggested with a view to overcome the present situations :-*
>
> *A. Grant of licences for storage of chemicals and other inflammable materials.*
>
> *(i) Grant of further Adhoc licences for storage of chemicals and other inflammable materials etc. should not be*

permitted. Any attempt at establishing new trade units including godowns etc. in these congested areas should be dealt with firmly. The Adhoc licencing policy has been, to a large extent, responsible for mushrooming growth of such units. It should be made abundantly clear that no adhoc licences shall be sanctioned in future in the contested areas of the walled city.

(ii) For the existing units, any violation of the conditions of licence should be dealt with severely including sealing of premises which the Chief Fire Officer considers hazardous or risky form the first point of view. The limit of fine of Rs. 5000/- provided in the DMC Act should be enhanced substantially.

(iii) Storage of hazardous and dangerous substances without licence should be made a cognizable offence.

(iv) Assistance of the market/residents association of the katras etc. should be sought in providing adequate fire safety measures.

(v) Strict enforcement of the various provisions of the various acts mentioned in the annexure IV should be ensured through a concentrated and coordinated action of all the implementing agencies."

64. This Court in ***C.W.P. No. 3678/1999*** titled as ***All India Lawyers Union (Delhi Unit) Vs. Union of India & Ors.*** decided on ***6th May, 2002*** gave directions to MCD to ensure that hazardous substances are not stored in Delhi. The relevant extract of the said judgment is reproduced hereinbelow :

"1. A fire broke out at Lal Kuan on 31st May, 1999 in a godown of New Aligarh Transport Company, which was a devastating one.

xxxxx xxxxxx xxxxx

3. After this Court entertained the writ petition, a Committee was constituted. A magisterial enquiry was ordered purported to be in terms of Section 174 of the Code of Criminal Procedure (hereinafter referred to as 'Cr. P.C.')

4. The report of the Committee suggests that the incident occurred due to negligence on the part M/s. New Aligarh Transport Company in handling highly explosive chemicals

stored in the godown. It further appears that the whole of the walled city is lined with booking offices and godowns of transporters. Consignments are kept by the transporters outside their respective offices/godowns allegedly because of paucity of space causing traffic congestion. In the godowns there existed no storage facility for Chemicals and other hazardous substances. It was noted that having regard to the fact that the walled city is a congested area it was not desirable to allow storage and transport of such hazardous substance. Such activities were recommended to be shifted to the peripheral areas of Delhi where safety measures can be ensured. Apprehensions were raised that similar other incidences may take place. While holding that the said transporter is responsible for the incident, the following suggestions had been made:

> *1) Area should be declared 'No Traffic Zone'. In case that is not feasible, then traffic should be strictly regulated and all steps taken to reduce traffic congestion.*
>
> *2) The wholesale Chemical Trading Market should be shifted out to peripheral areas of NCT of Delhi.*
>
> *3) Till the time the market is shifted, no unauthorized trading in dangerous or hazardous chemicals should be allowed by the regulatory authorities like MCD or Delhi Police.*
>
> *4) The booking offices/godowns of transporter must be shifted out of the walled city to peripheral areas to reduce congestion on the roads and to minimize fire and other hazards.*
>
> *5) A vigorous campaign should be launched against unauthorized construction and conversion of residential houses into markets, to reduce traffic congestion and unauthorized storage of hazardous material, thereby endangering public safety.*
>
> *6) A massive public awareness campaign should be launched to educate the public regarding preventive measures to be taken to minimize the risk of fire. Adequate fire safety measures should be insisted to be adopted by the traders.*

5. It was recorded that in past, several such major fires had taken place, as a result whereof, 55 persons in total were killed and several shops were gutted. Despite

recommendations made by the Committee afore-mentioned, no action had been taken. This Court, keeping in view the urgency of the matter, from time to time issued various direction. A direction was also issued to the Municipal Corporation of Delhi (in short 'MCD') to conduct survey in order to evict the occupiers from the premises where there were unauthorized storage of hazardous substance and chemicals.

xxxxx xxxxx xxxxx

15. The matter relating to storage of hazardous substance is covered by the provisions of Section 417 of the Delhi Municipal Corporation Act, 1957 (in short the 'DMC Act').....

16. The afore-mentioned provisions does not show that storage must be made only by the traders and not by the transporters. Such storage may be temporary in nature, but when it comes to storage of hazardous substances, the law must strictly be complied with. It will not be out of place of notice that the Apex Court in ***Shriram Foods & Fertilizer Industries and another v. Union of India and others*** *reported in* ***AIR 1987 SC 965*** *evolved a principle that those who manufacture hazardous substance, in the event an accident takes place, must show they took all the precautionary measures to prevent the same.*

17. When Court is faced with a question of law arising out of a fire accident caused owing to negligence of the owner of he premises who did not take adequate precautions in preventing the same, not only the strict liability for the payment of compensation may imposed, steps must be taken to prevent recurrence of such accident. It is in this situation, we wonder as to why the authority of the MCD did not take recourse to the precautionary principles which must be viewed with grave concern.

18. The Commissioner of MCD was present in Court on 6th March 2002. He assured us that the Director of Vigilance MCD would conduct an enquiry so as to ascertain the individual liability of the concerned officers, if any. It must be done with expedition and a report in this regard must be submitted within four weeks from the date. So far as items of hazardous goods are concerned, MCD must issue an appropriate list identifying those goods and take adequate steps for publishing thereof including furnishing of copies thereof to the learned counsel for the parties appearing for the transporters and shops owners, who in turn should communicate the same to their respective clients. All steps must be taken as expeditiously as possible and not later than three months from date. By that date all concerned are directed to see that transporters shift their business to the newly allocated area. They for no reason whatsoever should be permitted to transport or store hazardous substances. In the event, it is found that hazardous substances are stored in

violation of the provisions of the statute the authorities of the MCD must take adequate steps for proceeding against the defaulters without any delay whatsoever.

19. We may notice that in the survey report dated 2nd August 1999, it is stated:

> *11. The issue of shifting of Chemicals market is still pending before the Government. A high level meeting under the Chairmanship of Hon'ble L.G. was held on 1/6/99 following the Lal Kuan fire incident. Chief Minister, Delhi was also present in this meeting. Chief Secy., Delhi, Vice Chairman DDA, Commissioner Police, Chief Fire Officers Delhi, Divisional Commissioner, Delhi were among the highest officers present in the meeting. The Dy. Com. (City) represented the Commissioner, MCD in the said meeting. It was consciously decided to shift the godowns of non-pharmaceutical and inflammable trades from the congested residential and commercial areas of the capital in accordance with the Master Plan of Delhi. A Committee headed by Divisional Commissioner of Delhi has been constituted to identify the Chemicals trade which need to be shifted and to evolve principles and procedures of such shifting. A detailed survey of the dealers of the Chemicals was decided to be carried out to identify those who will be eligible to provide with space in the new complex.*
>
> *12. In this meeting, various measures and modalities for shifting of all Chemical godowns/shops dealing in inflammable material and stores from the city to the freight complex to be developed at Ghazipur by DDA were discussed. The Vice Chairman of DDA informed the Hon'ble L.G. that it would take about a year to develop a new complex Along with the peripheral facilities before the physical shifting of the trade is possible.*
>
> *13. The Law Secretary of the Delhi Got. Has been entrusted with the responsibilities of examining the existing legislation for storage and shifting of Chemicals and suggest amendments in case this was found inadequate.*

20. We do not know what action had been taken by the National Capital Territory of Delhi (in short 'NCT of Delhi') in this regard. An appropriate action to fill up the lacuna, if any, is expected to be taken by the MCD as expeditiously as

possible, although no direction in this behalf can be granted by us.

21. We, therefore, direct that appropriate steps be taken by the respondents to remove all occupants dealings in hazardous substances. The transporters may keep their offices but they shall not store any hazardous substances in Lal Kuan area. Arrangement for storage of such hazardous substances shall be made in the area allotted. While handling, transporting or storing hazardous substances appropriate rules operating in the field as also the provisions of other relevant statutes must strictly be complied with. All exercises must be undertaken and completed within a period of three months from date.

Writ petition is accordingly disposed of."

65. However, despite the aforesaid categorical directions, respondent-MCD failed to take any precautions and/or remedial measures.

66. Moreover, the Supreme Court in ***Vellore Citizen Welfare Forum Vs. Union of India & Ors.*** reported in ***(1996) 5 SCC 647*** has held that in view of constitutional and statutory provisions, the *Precautionary Principle* and *Polluter Pays Principle* are part of the environmental law of the country. The Supreme Court in the said judgment held as under:-

"11. ……We are, however, of the view that "The Precautionary Principle" and "The Polluter Pays Principle" are essential features of "Sustainable Development". The "Precautionary Principle" – in the context of the municipal law – means :

(i) Environmental measures – by the State Government and the statutory authorities – must anticipate, prevent and attack the causes of environmental degradation.

(ii) Where there are threats of serious and irreversible damage, lack of scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

(iii) The "Onus of proof" is on the actor or the developer/industrialist to show that his action is environmentally benign.

12. "The Polluter Pays Principle" has been held to be a sound principle by this Court in Indian Council for Enviro-Legal Action v. Union of India, J.T. [(1996) 3 SCC 212]. The Court observed : (SCC p. 246, para 65),

> *"....we are of the opinion that any principle evolved in this behalf should be simple, practical and suited to the conditions obtaining in this country".*

The Court ruled that : (SCC p. 246, para 65)

> *"……once the activity carried on is hazardous or inherently dangerous, the person carrying on such activity is liable to make good the loss caused to any other person by his activity irrespective of the fact whether he took reasonable care while carrying on his activity. The rule is premised upon the very nature of the activity carried on".*

Consequently the polluting industries are "absolutely liable to compensate for the harm caused by them to villagers in the affected area, to the soil and to the underground water and hence, they are bound to take all necessary measures to remove sludge and other pollutants lying in the affected areas". The "Polluter Pays Principle" as interpreted by this Court means that the absolute liability for harm to the environment extends not only to compensate the victims of pollution but also the cost of restoring the environmental degradation. Remediation of the damaged environment is part of the process of "Sustainable Development" and as such polluter is liable to pay the cost to the individual sufferers as well as the cost of reversing the damaged ecology.

13. The Precautionary Principle and the Polluter Pays Principle have been accepted as part of the law of the land. Article 21 of the Constitution of India guarantees protection of life and personal liberty……"

67. Consequently, we are of the view that in the present case MCD has breached the precautionary principle and is also liable to pay damages to the fire and gas victims.

MATERIAL CONTRIBUTOR AND NOT "BUT FOR" TEST WILL APPLY IN THE PRESENT CASE

68. Mr. Thadani's argument that "but for" test is applicable in the present case is not correct. Undoubtedly, the "but for" test remains the starting point in tort, and in the case of single cause it is likely to be determinative of the factual aspect of causation, but if there is more than one cause, provided that the cause under consideration is a material contributor, it will satisfy the factual test.

69. In ***Heskell v. Continental Express Ltd. & Anr.*** reported in **(*1950)* 1 All ELR 1033**, Devlin, J said:

> "*Where the wrong is a tort, it is clearly settled that the wrongdoer cannot excuse himself by pointing to another cause. It is enough that the tort should be a cause and it is unnecessary to evaluate competing causes and ascertain which of them is dominant... In the case of breach of contract the position is not so clear."*
>
> *(emphasis supplied)*

70. In ***Fairchild v. Glenhaven Funeral Services Limited & Ors.*** reported in ***(2002) UK HL 22***, the claimant had contracted mesothelioma after being exposed – in breach of duty – to significant quantities of asbestos dust at different times by more than one employer or occupier of premises, but in circumstances where he could not prove on the balance of probabilities which period of exposure had caused or materially contributed to the cause of the disease. The House of Lords held that the claimant could nevertheless succeed, on the basis that the

defendant's conduct in exposing the claimant to a risk to which he should not have been exposed should (in the words of Lord Bingham) be treated as,*"making a material contribution to the contracting of the condition against which it was the defendant's duty to protect him."*

71. The difficulties facing claimants in proving causation in cases of industrial disease have persuaded the courts to relax the causal rules in some instances. The claimant does not have to prove that the defendant's breach of duty was the sole, or even the main, cause of his damage, provided he can demonstrate that it made a material contribution to the damage. The origin of this approach is the decision of the House of Lords in ***Bonnington Castings Ltd. Vs. Wardlaw*** reported in ***1956 A.C. 613*** in which the plaintiff contracted pneumoconiosis from inhaling air which contained silica dust at his workplace. The main source of the dust was pneumatic hammers for which the employers were not in breach of duty (the "innocent dust"). Some of the dust (the "guilty dust") came from swing grinders for which they were responsible by failing to maintain the dust-extraction equipment. There was no evidence as to the proportions of innocent dust and guilty dust inhaled by the plaintiff. Indeed, such evidence as there was indicated that much the greater proportion came from the innocent source. On the evidence the plaintiff could not prove "but for" causation, in the sense that it was more probable than not that had the dust-extraction equipment worked efficiently he would not have contracted the disease. Nonetheless, the House of Lords drew an

inference of fact that the guilty dust was a contributory cause, holding the employers liable for the full extent of the loss. The plaintiff did not have to prove that the guilty dust was the sole or even the most substantial cause if he could show, on a balance of probabilities, the burden of proof remaining with the plaintiff, that the guilty dust had materially contributed to the disease. Anything which did not fall within the principle *de minimis non curat lex* would constitute a material contribution. *Bonnington Castings* is significant for two reasons. First, it was an express departure from the normal requirement to prove "but for" causation. Despite recovering damages in full in respect of the disease the claimant was not required to prove that the defendant's breach of duty caused the disease, merely that it contributed to its onset. Secondly, and perhaps more significantly, was the fact that the Court was willing to draw an inference that there must have been a material contribution in circumstances where the connection between the "guilty dust" and the plaintiff's medical condition was, in reality, little more than speculation.

72. In ***McGhee Vs. National Coal Board*** reported in ***(1973) 1 W.L.R. 1, HL*** the plaintiff contracted dermatitis from the presence of brick dust on sweaty skin. Some exposure to brick dust was an inevitable result of working in brick kilns in respect of which there was no breach of duty by his employers. But his employers negligently failed to provide washing facilities at the site so that the plaintiff cycled home every day coated with abrasive brisk dust. Medical evidence

established that brick dust caused the dermatitis but it was impossible to prove whether it was the additional "guilty" exposure to dust which triggered dermatitis in this plaintiff or whether he would have developed the disease in any event as a result of the "innocent" exposure during the normal working day. At best it could be said that the failure to provide washing facilities materially increased the risk of the plaintiff contracting dermatitis. The House of Lords held the defendants breach of duty made the risk of injury more probable even though it was uncertain whether it was the actual cause. By a majority judgment the Court treated a "material increase in the risk" as equivalent to a material contribution to the injury. Lord Simon, for example, said that *"a failure to take steps which would bring about a material reduction of the risk involves, in this type of a case, a substantial contribution to the injury."*

73. In ***Jon Athey v. Ferdinando Leonati & Kevin Johnson*** reported in ***(1996) 3 S.C.R. 458 (British Columbia),*** the Plaintiff had a history of "minor back problems" since 1972. He was then involved in two motor vehicle accidents injuring his back in both of them. As he recovered from the second accident his physician encouraged him to get back to his exercise program. While stretching, he heard a "pop". He was unable to move having suffered from a herniated disc that required a discectomy. He was disabled from his position doing heavy lifting as an auto body repairman and took a lesser job, which caused economic loss. The Trial Judge awarded 25% responsible of Mr. Athey's

damages finding that the motor vehicle accidents were 25% responsible for his back problems and that his preexisting condition was 75% of the cause of his disc herniation. The Court of Appeal for British Columbia agreed with that decision. Both were reversed by Mr. Justice Major of the Supreme Court of Canada. While reconfirming the traditional "but for/material contribution" test, Mr. Justice Major confirmed that causation need not be determined by scientific precision. It is essentially a practical question of fact to be answered by ordinary common sense. At paragraph 17 of the decision he said as follows:

> *"It is not now necessary, nor has it ever been, for the plaintiff to establish that the defendant's negligence was the "sole cause" of the injury. There will frequently be a myriad of other background events which were necessary preconditions to the injury occurring…. As long as the defendant is part of the cause of an injury, the defendant is liable, even though his act alone was not enough to create the injury."*

At paragraph 19 of the decision he says:

> *"The law does not excuse a defendant from liability merely because other causal factors for which he is not responsible also helped to produce the harm… It is sufficient if the defendant's negligence was a cause of the harm."*

At paragraph 20 he went on to say:

> *"If the law permitted apportionment between tortuous causes and non-tortuous causes, a plaintiff could recover 100% of his or her loss only when the defendant's negligence was the sole cause of the injuries… This would be contrary to the established principles and the essential purpose of tort law, which is to restore the plaintiff to the position he or she would have enjoyed but for the negligence of the defendant."*
>
> *(emphasis supplied)*

74. In *Resurfice Corp. v. Hanke* reported in *[2007] 1 S.C.R. 333*, the Supreme Court of Canada held that material contribution test can be applied if two requirements are met. "First, it must be impossible for the plaintiff to prove that the defendant's negligence caused the plaintiff's injury using the "but for" test. The impossibility must be due to factors that are outside of the plaintiff's control; for example, current limits of scientific knowledge. Second, it must be clear that the defendant breached a duty of care owed to the plaintiff, thereby exposing the plaintiff to an unreasonable risk of injury, and the plaintiff must have suffered that form of injury."

75. In the present case, we find that respondent no. 5 breached the duty of care owed to the fire and gas victims, thereby exposing them to an unreasonable risk of injury. In fact, the loss of lives and injury falls within the ambit of risk created by respondent no. 5's breach. In our opinion, it would also offend the basic notion of fairness and justice to deny liability by applying a "but for" approach in the cases of Babu Lal and Ved Prakash.

'EGG-SHELL SKULL' RULE (YOU TAKE YOUR VICTIMS AS THEY CAME) APPLIES

76. It is further an established principle of law that a party in breach has to take his victim *talem qualem*, which means that if it was reasonable to foresee some injury, however slight, to the claimant, assuming him to be a normal person, then the infringing party is answerable for the full extent of the injury which the claimant had

sustained owing to some peculiar susceptibility.

77. In ***Marconato v. Franklin*** reported in ***[1974] 6 W.W.R. 676 (B.C.S.C.)*** while on the road, Franklin (defendant) crashed into Marconato, causing her to incur some mild physical injuries. But Marconato had some paranoid tendencies and the accident caused her to develop a debilitating syndrome of psychological problems. *Thin skull rule was applied and that means you take your victims as they come*. Although the damage is remote and not reasonably foreseeable, the accident operated on plaintiff's pre-existing condition and the defendant must pay damages for all the consequences of her negligence. This doctrine applies only when the claimant's pre-existing hypersensitivity is triggered into inflicting the injury complained of, or an existing injury is aggravated by the infringing party's act. A clear example of the hypersensitivity type of case is that of persons suffering from hemophilia or *"egg-shell"* skulls. MacKinnon L.J. said that *"one who is guilty of negligence to another must put up with idiosyncrasies of his victim that increase the likelihood or extent of damage to him: it is no answer to a claim for a fractured skull that its owner had an unusually fragile one*. (See: ***Owens vs. Liverpool Corporation (1939) 1 K.B. 394 at 400-401***).

78. In ***Smith v. Leech Brain & Co. Ltd. & Anr.*** reported in ***(1962) 2 Q.B. 405***, a workman, who was working with molten metal, suffered a burn on his lip when a fleck of metal splashed onto it. His employers

were at fault in not having provided him with a proper shield. The burn eventually turned cancerous and the man died. It was proved that he had a predisposition to cancer, but this condition might never have become malignant were it not for the burn. The defendants were held liable for his death. Nervous shock cases are also consistent with this principle. The rule is that if injury from nervous shock is reasonably foreseeable to an ordinarily strong-nerved person situated in the position of the claimant, the defendant is liable for the full extent of the shock. Hypersensitivity to shock may prevent there being any initial liability; but once that is established by showing that even a strong nerved person would have suffered some shock, the defendant is liable for the full extent of the shock actually suffered by the plaintiff. [See ***Clerk & Lindsell on Torts (Eighteenth Edition)***].

79. Consequently, Mr. Thadani's arguments that Babu Lal and Ved Prakash @ Raju are not entitled to any compensation as they were already suffering from Tuberculosis is not tenable in law.

80. Accordingly, keeping in view the medical record of deceased Babu Lal and Ved Prakash @ Raju as well as the affidavits filed by their wife and mother respectively and the fact that their Pulmonary Tuberculosis got aggravated due to inhalation of phosphine gas and they died at a premature age, we are of the opinion that they are entitled to full compensation along with deceased Akash.

RELIEF

81. In view of the aforesaid discussion, the following compensation is payable to victims of Jaipur Golden fire and gas tragedy:-

(i) Legal heirs of Akash are entitled to a sum of Rs.5,93,801/- as mentioned in para 10 of the present petition along with interest @ 7.5% per annum from the date of filing of the present petition upto the date of payment.

(ii) Legal heirs of Babu Lal are entitled to a sum of Rs.6,33,861/- as mentioned in para 10 of the present petition along with interest @ 7.5% per annum from the date of filing of the present petition upto the date of payment.

(iii) Legal heirs of Ved Prakash @ Raju are entitled to a sum of Rs.8,33,801/- as mentioned in para 10 of the present petition along with interest @ 7.5% per annum from the date of filing of the present petition upto the date of payment.

(iv) Victims mentioned at serial nos. 4 to 34 of the chart furnished by Mr. Thadani and extracted in para 39 hereinabove are entitled to a compensation of Rs.50,000/- each on account of pain and suffering along with interest @ 7.5% per annum from the date of filing of the present petition upto the date of payment.

82. The aforesaid compensation shall be paid to the extent of 85% by respondent no.5 and 15% by Municipal Corporation of Delhi. Both the parties shall make payment to the victims or legal heirs of the victims as the case may be by Account Payee cheques in their names. The said cheques would be paid within a period of twelve weeks from today.

83. Since criminal proceedings arising out of the Jaipur Golden fire tragedy incident are already sub judice, no further order can be passed for identification and prosecution of those involved and responsible for the said incident.

84. However, the petitioner association shall be entitled to costs of Rupees one lac payable by respondent no.5.

85. Consequently, the present petition stands allowed in the above terms.

MANMOHAN, J

CHIEF JUSTICE

OCTOBER 23, 2009
rn/js