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

Judgement reserved on 28.07.2022

% *Judgement pronounced on 09.12.2022*

\+ **LPA 382/2019, CM Nos.26594/2019 & 33521/2020**

M/S BANK OF BARODA & ANR. ..... Appellants

Through: Mr Neeraj Kumar Jain, Sr Adv with Mr Krishan Kumar, MR Nitin Pal, Mr Atul Sheopuri, Mr Kartik S., Advs.

versus

MAHESH GUPTA & ORS. ..... Respondents

Through: Mr Santosh Krishanan with Ms Deepshikha Sansanwal, Advs., Advs. for R-1.
Mr Amit Singh Chauhan, Standing Counsel for R-2/MCD.

LPA 569/2019

MAHESH GUPTA ..... Appellant

Through: Mr Santosh Krishanan with Ms Deepshikha Sansanwal, Advs.

versus

BANK OF BARODA & ORS ..... Respondents

Through: Mr Neeraj Kumar Jain, Sr Adv with Mr Krishan Kumar, MR Nitin Pal, Mr Atul Sheopuri, Mr Kartik S., Advs. for R-1.
Mr Tushar Sannu, Standing Counsel with Ms Priyansha Sinha and Ms Pooja Gupta, Advs. for MCD.

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

HON'BLE MS. JUSTICE TARA VITASTA GANJU

[Physical Hearing/Hybrid Hearing (as per request)]

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RAJIV SHAKDHER, J.:

Preface:

1. These are two cross-appeals preferred against the judgment of the learned Single Judge dated 08.04.2019. Letters Patent Appeal (LPA) No. 382/2019 has been preferred by the Bank of Baroda [hereafter referred to as "the Bank"] while LPA No. 569/2019 was instituted at the relevant time by one Mr Mahesh Gupta, who after his death, which occurred on 21.02.2022, is now represented by his legal representatives (LRs). The deceased Mr Mahesh Gupta, hereafter, will be referred to as the "deceased writ petitioner" unless the context requires otherwise.

2. The deceased writ petitioner, who suffered a head injury as a result of the Bank's sign board falling on his head, had sought compensation through a writ action i.e., WP(C) 499/2014, which led to the passing of the impugned judgment.

2.1 It is important to note that the writ petition has not been disposed of, as the learned Single Judge had issued directions for constituting a Medical Board to evaluate the bills tendered by the deceased writ petitioner concerning his medical treatment and the expenses that he would have had to incur during his life span. The second limb of this direction, as is obvious, has been rendered redundant given the writ petitioner's death during the pendency of the proceedings.

Background:

3. Before we proceed further, it is relevant to briefly set out the broad facts which led to the deceased writ petitioner approaching this court by way of a petition under Article 226 of the Constitution.

4. The deceased writ petitioner who ran a modest broking business concerning the sale and purchase of immovable assets, on the fateful day i.e., 22.05.2011, at about 04.00 p.m., suffered a severe head injury while proceeding on foot to his tailor's shop. The path which the deceased took abutted the building in which the Bank was housed. On the facade of the building hung a signboard, which fell down and thus caused the deceased writ petitioner to suffer severe head injuries.

4.1 As a result, the petitioner was admitted to Jai Prakash Narayan Apex Trauma Centre of AIIMS on that very date.

5. The incident was also investigated by the police, which led to FIR No. 144/2011 being registered against unknown persons. In the first instance, the FIR was registered under Section 337 of the Indian Penal Code, 1860 [in short 'IPC']. The accused was, however, ultimately charged under Section 338 of the IPC.

6. The deceased writ petitioner had to undergo brain surgery and was ultimately discharged from AIIMS after 38 long days on 28.06.2011. The discharge report described the nature of the injury suffered by the deceased writ petitioner as *"RT Frontal contusion, acute subdural hematoma and tracheal stenosis".*

7. The writ petitioner's physical and mental agony continued even after he was discharged from AIIMS; between 22.05.2011 [i.e., the date when he was injured] and 02.06.2013, he, was admitted to the hospital nearly ten

times for a cumulative period of hundred (100) days.

8. It is this which triggered the writ petitioner's resolve to institute, in and about 10.10.2013 a petition in this court. As noticed above, the writ petition was numbered WP(C) 499/2014.

9. The aforementioned broad facts are, largely, not in dispute and, as is evident, in particular, concerning the incident which caused injury to the writ petitioner. That said, there are certain facts which are tied in with the incident and hence, are required to be noticed for the adjudication of the instant appeals.

(i) The first fact that is required to be noticed is that a day after when the incident took place i.e., on 23.05.2011, a major daily newspaper i.e., the Hindustan Times published a report that Delhi had faced the brunt of high-velocity winds on the date of the incident i.e., 22.05.2011. The Bank propped up this fact as a defence to the accusation of negligence levelled against it. The Bank's say, both before the Single Judge and before us, is that this was an act of God i.e., a *vis major* event and hence, it could not be held liable for the injuries caused to the deceased writ petitioner due to its signboard falling on his head.

(ii) The FIR resulted in a criminal case being lodged, in which the Manager of the Bank was arrayed as the accused. The criminal case i.e., CC No. 2032958/2016 ended up in the Bank Manager's acquittal. The trial court gave the benefit of doubt to the accused and thus held that the incident could have occurred due to reasons other than the negligence of the accused. The judgment acquitting the Bank manager was rendered by the trial court on 07.12.2018.

(iii) The Bank had preferred two interlocutory applications before the

learned Single Judge i.e., CM No.12613/2019 and CM No. 12649/2019. *Via* CM No.12613/2019 the Bank had sought the impleadment of an entity going by the name Adworld Graphics Ltd. [hereafter referred to as "AGIPL"]; the entity responsible for fixing the signboard, which fell on the deceased writ petitioner's head causing injuries. The other application i.e., CM No.12649/2019 was filed by the Bank to have the files of the criminal case placed before the learned Single Judge. Both these applications were dismissed by the learned Single Judge *via* order dated 18.03.2019 on the ground that the Bank had taken an unreasonably long time in preferring the said applications. It is a matter of record that on the date when the applications were dismissed, the learned Single Judge reserved judgment in the matter i.e., in WP(C) 499/2014.

Submissions of the Counsels:

10. It is against this backdrop that arguments were advanced on behalf of the Bank by Mr Neeraj Jain, learned Senior Counsel, while submissions on behalf of the LRs of the deceased writ petitioner were made by Mr Santosh Krishnan.

11. Mr Jain's submission broadly ran on the following lines :

(i) First, the issue concerning negligence and award of compensation involved disputed questions of fact requiring evidence and perhaps, expert opinion and hence, could not have been decided in a writ action.

(ii) Second, the object which fell on the deceased writ petitioner was a signboard and since it did not advertise the business carried on by the Bank there was no obligation cast on the Bank to seek prior permission of the Municipal Corporation under Section 143 of the Delhi Municipal Corporation Act, 1957 [in short, "DMC Act"]. An advertisement constitutes

a large-size notice or announcement, placed in the public domain concerning the product and/or service offered by the advertiser or an event held by an advertiser. Advertising is a form of marketing communication which employs an openly sponsored, non-personal message to promote or sell a product, service or idea. On the other hand, a signboard which is relatively smaller in size displays the name or logo of a business or product and is ordinarily fixed on the facade of the building in which the place of business is located. The signboard which fell on the writ petitioner's head was not an advertisement and hence, as stated above, did not require prior permission of the Municipal Corporation under the DMC Act.

(iii) Third, the doctrine of *res ipsa loquitur* would have no application in this case as the accident occurred because of an act of God. There was material on record in the form of a newspaper report which established that on the date when the incident occurred, the residents of Delhi were exposed to high-velocity winds. The signboard came down because of the high-velocity winds and hence, the Bank could not be held liable for negligence.

(iv) Fourth, the writ was framed as a tort action and hence in defence all that the Bank had to place before the court was a reasonable explanation for the incident in issue, which was equally consistent with the presence as well as the absence of negligence. Thus, once such a reasonable explanation was furnished by the Bank, the learned Single Judge could not have invoked the doctrine of *res ipsa loquitur* to conclude that the Bank was negligent. The burden of proving negligence in the affirmative, rested, at the relevant time, on the writ petitioner. This burden had not been discharged by the deceased writ petitioner and hence, the Bank could not have been held liable for the injuries caused to the deceased writ petitioner due to its signboard falling on

his head. The signboard fell due to high-velocity winds; which was an act of God and thus, should have resulted in absolving the Bank of the charge of negligence levelled against it. The judgment of the trial court in the criminal case *inter alia*, held that the prosecution was unable to prove that the injury suffered by the deceased writ petitioner was the result of the rash and negligent act of the accused (the accused in that case being, as noticed above, the Bank Manager). The learned Single Judge failed to take into account this facet while rendering his judgment.

(v) Fifth, the Bank had outsourced the job of fixing the signboard. For this purpose, it hired an agency, namely, AGIPL. The said agency had taken due care while putting up the signboard. Therefore, the Bank could not be held liable for negligence in the given circumstances.

(vi) Sixth, the deceased writ petitioner was unable to prove that his medical condition had a direct relationship with the injury suffered by him. It is for this reason that the learned Single Judge had directed the constitution of a Medical Board to evaluate the bills submitted by the petitioner at the relevant time, for quantification of pecuniary damages claimed by him.

(vii) Seventh, the record shows that the deceased writ petitioner received treatment from more than one hospital. Therefore, it cannot be ruled out that the deceased writ petitioner had a pre-existing ailment which added to his sufferance. Thus, the medical records produced by the deceased writ petitioner cannot form the basis for awarding compensation to the deceased writ petitioner. The records produced by the deceased writ petitioner span over three years post the injury suffered by him. The allegations made by the deceased writ petitioner concerning his health, which is attributed to the

accident, remain unsubstantiated.

(viii) Eighth, the prayers made in LPA 569/2019 for the grant of *pendente lite* and future interest cannot be granted at the appellate stage. Since the issue concerning interest was not agitated before the learned Single Judge, the question concerning its rejection did not arise. In any event, *pendente lite* interest on compensation cannot be awarded till it is finally adjudicated. Given the fact that compensation stands deposited with the Registry of this Court, in case the Bank were to fail in its appeal, the said amount would be released to the beneficiaries along with accrued interest.

(ix) Ninth, the Bank has filed its application for being allowed to tender additional documents including Annexures A-3, A-5 and A-6. The Bank was unable to file its documents with the counter-affidavits before the learned Single Judge as they were not available at the relevant time. The learned Single Judge ought to have allowed the application as in any event the issues in the writ petition were adjudicated based on affidavits.

12. In support of his submissions Mr Jain relied upon the following judgments:

(i) ***SPS Rathore v. State of Haryana*** 15 **(**2005) 10 SCC 1

(ii) ***V. Kishan Rao v. Nikhil Super Speciality Hospital & Another***. (2010) 5 SCC 513

(iii) ***Syad Akbar v. State of Karnataka*** (1980) 1 SCC 30

13. Mr Krishnan, on the other, had made the following broad submissions:

(i) The learned Single Judge had correctly applied the doctrine of strict liability i.e., *res ipsa loquitur*, as the material facts which led to the deceased writ petitioner being injured were not in dispute.

(ii) There is no bar against courts entering into the realm of disputed facts in a writ action. Parties are relegated to suits only where the court concludes that prolix material by way of evidence would have to be tendered by contesting parties.

(iii) Courts have in the past granted compensation in writ action.

(iv) The act of God, defence, can only be sustained where the occurrence is "unprecedented and unforeseeable". No such material was placed on record by the Bank. Even if it is presumed that Delhi was exposed to high-velocity winds on the day of the incident i.e., 22.05.2011, the court can and had rightly taken judicial notice of the fact that such occurrences were a regular feature in Delhi, in May, each year.

(v) The acquittal of the Bank Manager in the criminal case can have no impact on the writ action, which is a civil proceeding. A judgment rendered in a criminal case is not a relevant piece of evidence for adjudicating a civil liability. [See Section 43 of the Indian Evidence, 1872 (in short 'Evidence Act'.)] Assuming without admitting that the judgment rendered by the trial court in the criminal case was relevant, it needs to be noticed that the acquittal was granted by extending the benefit of the doubt to the accused; such a finding by the trial court cannot absolve the Bank of its civil liability.

(vi) The documents sought to be placed along with the application i.e. CM No. 26597/2019 ought not to be considered as they have been filed too late. The Bank had attempted to slip in the documents without disclosing the fact that two applications filed for the same purpose i.e., CM No. 12613/2019 and CM No. 12649/2019 were dismissed by the learned Single Judge on 18.03.2019, i.e. when the matter was reserved by the learned Single Judge for rendering a decision in WP(C) 499/2014.

(vii) The compensation granted by the learned Single Judge both for pecuniary and non-pecuniary damages is reasonable. Furthermore, in a tort action, award of interest, both for *pendente lite* and future period is the norm that is followed. It is in these circumstances that LPA 569/2019 has been preferred.

13.1. In support of his submissions, Mr Krishnan has relied upon the following judgements:

(i) ***Namrata Singh and Ors. v. Director General Civil (DGCA) and Ors.*** AIR 2017 (NOC 692) 236

(ii) ***Harinder Kaur v. Add. District & Sessions Judge & Ors.***; (2012) 131 DRJ 63

(iii) ***Subramanium and Anr. v. Delhi Metro Rail Corporation and Ors.*** 2014 ACJ 1908; (2013) 4 TAC 706

(iv) ***Darshan and Ors. (Smt.) v. Union of India & Ors***. 1999 (49) DRJ 655 (DB)

(v) ***Divisional Controller, KSRTC v. Mahadeva Shetty & Anr.*** (2003) 7 SCC 197.

(vi) ***Vishnu Dutt Sharma v. Daya Sapra*** (2009) 13 SCC 729

(vii) ***Abati Bezbaruah v. Dy. Director General, Geological Survey of India and Anr.*** (2003) 3 SCC 148

(viii) ***Thazhathe Purayil Sarabi & Ors. v. Union of India & Anr.*** (2009) 7 SCC 372

Reasons and Analysis:

14. Having perused the material on record and heard submissions of the counsels appearing for the contesting parties i.e., the Bank and the LRs of the deceased writ petitioner, the following facts have been brought to the

fore, over which there is no dispute:

(i) The incident which led to the deceased writ petitioner being injured occurred on 22.05.2011.

(ii) The deceased writ petitioner suffered injuries due to the Bank's signboard which was fixed on the facade of the building (in which the Bank was located) coming off and falling on the deceased writ petitioner's head.

(iii) The signboard which fell on the deceased writ petitioner bore the following measurements: 36 feet x 4 feet x 4.6 feet.

(iv) As a result of the injury, the deceased writ petitioner had to undergo neurosurgery and was discharged from the hospital after 38 days.

(v) The discharge summary report issued by AIIMS categorized the nature of the injury as "*RT Frontal contusion, acute subdural hematoma and tracheal stenosis*".

15. The aforesaid facts clearly reveal that the impact of the signboard caused the deceased writ petitioner to suffer contusion in the area described as the right frontal lobe. The frontal lobe of the head, *inter alia*, helps a person to perform various cognitive functions including sequencing, complex movements, speech, language, memory, reasoning and judgment. Injury to the frontal lobe can have a ripple effect on other parts of the brain, i.e., the cerebellum.

16. The fact that the impact had caused subdural hematoma would show that blood had collected because of the injury between the brain and its outermost covering. It is, in effect, a type of bleed which occurs within the skull, but in the area falling outside the person's brain. Tracheal stenosis is a condition which leads to the narrowing of the trachea, i.e., the windpipe, which can result, *inter alia*, because of an injury.

17. These facts, to our minds, are sufficient to demonstrate that the deceased writ petitioner suffered a severe head injury on account of the signboard falling on his head.

18. Up until this stage, there is no real dispute as to the facts. The defence that the Bank has set up is that the signboard came off the facade of the building because of high-velocity winds, which, being an act of God, no negligence could be attributed to it for the injuries suffered by the deceased writ petitioner.

18.1 To the accusation levelled against the Bank that it did not seek permission from the municipal corporation before putting up the signboard, it is asserted on behalf of the Bank that the signboard was not an advertisement and, hence, did not require the permission of the concerned officer [i.e., the Commissioner] as envisaged under Section 143 of the DMC Act.

19. To answer the defence of *vis major*, i.e., act of God, one would have to segregate causes, although natural [i.e., which occur without human intervention], that are foreseen and those that are extraordinary and cannot be reasonably anticipated. In support of this contention, the Bank has relied upon a newspaper report dated 23.05.2011 which is suggestive of the fact that on the date of the incident, i.e., 22.05.2011, Delhi had experienced high-velocity winds.

19.1 The learned Single Judge has repelled this defence on the ground that each year, in May, Delhi frequently experiences these high-velocity winds. In this regard, the learned Single Judge has taken notice of a judgment of a coordinate bench of this Court, rendered in ***Harinder Kaur v. Add. District and Sessions Judge & Ors.*** (2012) 131 DRJ 63.

20. A perusal of the impugned judgement would show that the Learned Single Judge has not only taken recourse to the principle of *res ipsa loquitur* [if it can be called one[1]] but also the principle of strict liability in concluding that the Bank was guilty of negligence. *Res ipsa loquitur* is a Latin phrase which, simply put, means that if the facts and circumstances concerning an accident are taken into account, it would establish *prima facie* that the defendant was negligent. Thus, while in an action concerning the tort of negligence the aggrieved person is required to prove negligence, in certain circumstances, it is presumed that the fact that the accident occurred is attributable to the defendant's fault. There is, thus, in a sense, a presumption in law, of the absence of due care on the part of the defendant and/or his agents. However, before one can hold a defendant guilty of negligence by invoking the principle/maxim known as *res ipsa loquitur*; firstly, it would have to be ascertained whether or not the defendant had control over the thing or object, the escape of which caused the mischief i.e., injury to the plaintiff. Secondly, whether the accident of the type which occurred, would not have normally occurred without the defendant's fault. This principle is exemplified by the observations of Earle CJ in ***Scott v London & St Katherine Docks Co***. (1865) 3 H&C 596.

21. The said principle/maxim has also found resonance in the following cases:

21.1. ***Manindra Nath Mukkerjee v Mathuradas Chaturbhuj*** MANU/WB/0104/1945; AIR 1946 Cal 175 was a case where an advertising banner fell from the roof of the defendants' premises causing injury to the

[1] See ***Syad Akbar v. State of Karnataka*** (1980) 1 SCC 30.

plaintiff. The banner measured 12 feet by 3 and a half feet and was accompanied by a wooden frame. In an action for damages on account of the injuries suffered by the plaintiff on account of the banner falling on him, the defence taken was that the plaintiff was not struck by the banner but by a corrugated iron sheet, which, in turn fell because of stormy weather. The court not only applied the principle/maxim described as *res ipsa loquitur* but also the common law principle of absolute liability, as set forth in ***Rylands v Fletcher***[2]. The following observations in the said case, being relevant, are extracted below:

> *"28.* ***I shall refer now to cases which illustrate the strict rule of liability enunciated in (1868) 3 H. L. 330 Rylands v. Fletcher (1868) 3 H. L. 330 : 37 L. J. Ex. 161: 19 L. T. 220 and in some of which the maxim res ipsa loquitur also has generally been applied.*** *Before I do so, however, I will call attention to what, I think, are the essential features of the cases in which the rule of strict liability of which (1868) 3 H. L. 330 Rylands v. Fletcher (1868) 3 H. L. 330 : 37 L. J. Ex. 161: 19 L. T. 220 is a type has been applied. They are expressed in the following words: By Lord Moulton in (1913) A. C. 263 Rickards v. Lothian (1918) 1913 A. C. 263 : 82 L. J. P. c. 42 : 108 L. T. 225 at p. 280: "It must be some special use bringing with it increased danger to others....." By Atkin L. J. in (1920) 2 K. B. 487 Belvedere Fish Guano Co. v. Bainham Chemical Works (1920) 2 K. B. 487 : 89 L. J. K. B. 631 : 123 L. T. 211 at p. 502:*
>
> *Where a person brings upon land of which he is in de facto possession for purposes of his business dangerous materials which would not naturally be upon the land, he is under an obligation to keep those materials under control, so as not to cause mischief to his neighbours.*
>
> *29. By Scott L. J. in (1938) 1 ALL E.R. 579 Hale v Jennings (1938) 1 All E. R. 579:*
>
> *"**The fundamental rule of the principle is that the***

[2] John Rylands and Jehu Harrocks v Thomas Fletcher (1868) 3 H.L.330

liability attaches because of the occupier of land bringing on to the land something which is likely to cause damage if it escapes."

30. These observations cover the cases of articles potentially dangerous, that is to say such as are likely to cause injury upon escaping, or while in the process of escaping from their places of confinement.

31. ***In (1876) 1 Q. B. D. 314 Tarry v. Ashton (1976) 1 Q. B. D. 314 : 45 L. J. Q. B. 260: 34 L. T. 97, the defendant was the occupier of a house from which a lamp projected over the street, and he had employed a competent person who was not his servant to put it in repair. The lamp fell and injured the plaintiff. It was found as a fact that there had been negligence on the contractor's part and that the lamp had fallen because of the decayed condition of the attachment of the lamp to its bracket, which had escaped notice. Lush and Quinn JJ. held that the defendant was liable on the ground that although he had employed an apparently competent person to repair the lamp, yet that did not excuse him from his duty to maintain it in a safe condition. This view is undoubtedly an application of the rule in (1868) 3 H. L. 330 Rylands v. Fletcher*** *(1868) 3 H. L. 330 : 37 L. J. Ex. 161: 19 L. T. 220. In Beven on Negligence (Edn. 4, p. 22) the case is cited as an illustration of the proposition that, if*

the injury had arisen from an ordinary casualty of the highway, negligence in addition to accident would have to be proved to affect the defendant with liability. So soon as it is clear that the accident is not one of those incident to the highway, the occurrence of it raises a presumption of the defendant's default.

32. This observation has to be borne in mind in connection with some of the cases cited by Mr. Mukerjee for the defendant which are cases in which injury had resulted from street accidents.

33. In (1921) 1 A.C. 521 Attorney General v. Cory Brothers & Co. (1921) 1 A. c. 521 : 90 L. J. Ch. 221 : 125 L. T. 98, a colliery company had deposited colliery debris on a hill side under licence from the owners of the land. After heavy rain a landslide occurred. As the evidence showed that the landslide

was caused by the weight of the debris, the colliery company were found liable under the rule in (1868) 3 H.L. 330 Rylands v. Fletcher (1868) 3 H. L. 330 : 37 L. J. Ex. 161: 19 L. T. 220 for damage caused by the escape of the debris. (1936) 1 ALL E. R. 557 ***Shiffman v. Venerable Order of St. John Jerusalem (1936) 1 All E. R. 557 was a case in which the Order of St. John of Jerusalem had, on the occasion of a national holiday, erected a casualty tent in a public park where large crowds gathered. Outside the tent they had put up a flag pole which was insecurely kept in position by guy ropes. As the result of children, who could not be kept away, swinging from the ropes, the pole fell and injured the plaintiff. In holding that the defendants were liable to pay damages on the ground of negligence, Atkinson J. said:***

> ***"I do not think it is necessary to decide it, but there is another ground upon which I think liability may well rest. I cannot myself see why this is not within the rule in (1868) 3 H. L. 330 Rylands v. Fletcher (1868) 3 H. L. 330 : 37 L. J. Ex. 161: 19 L. T. 220. The defendants erected something exceptional, something which would be easily caused to fall, and something which, if it fell, was likely to do mischief to others, for if it fell it was certain to fall on land of which they were not in occupation, and upon which the public had a right to be."***

The italics, which are mine, bring out points of close resemblance with the facts out of which the present action has arisen.

34. ***In (1938) 1 ALL E. R. 579 Hale v Jennings (1938) 1 All E. R. 579 the defendant had erected in a public amusement park an apparatus similar to a roundabout called a Chair-O-plane. While this was in the process of rotation, one of the chairs became detached and struck and injured the plaintiff who was the proprietor of a neighbouring shooting-gallery. In holding that the defendant was liable on the fundamental principle enunciated in (1868) 3 H.L. 330 Rylands v. Fletcher (1868) 3 H. L. 330 : 37 L. J. Ex. 161: 19 L. T. 220 the Court of Appeal found that the Chair-O-plane was an inherently dangerous thing in the sense that it was likely to cause damage if it escaped. (1868) 3 Q. B. 733 Jones v. Festiniog Rly. Co. (1868) 3 Q. B. 733 : 37 L. J. Q. B. 214 : 18 L. T. 902 : 17 W. R. 28 at p. 736 was a case***

of damage caused by sparks from a railway engine. Blackburn J. in this case said:

"The general rule of common law is correctly given in (1865) 1 Ex. 265 Fletcher v. Rylands (1865) 1 Ex. 265 : 35 L. J. Ex. 154 : 14 L.T. (N. S.) 523 : 14 W. R. 799 that where a man brings or uses a thing of a dangerous nature on his own land he must keep it in at his peril; and is liable for the consequences if it escapes and does injury to his neighbour. Here the defendants were using a locomotive engine with no express parliamentary powers making lawful that use, and they are therefore at common law bound to keep the engine from doing injury, and if the sparks escape and cause damage, the defendants are liable for the consequences, though no actual negligence be shown on their part."

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*59….**This, in my judgment, is a case in which the indisputable facts attract the rule in (1868) 3 H. L. 330 Rylands v. Fletcher (1868) 3 H. L. 330 : 37 L. J. Ex. 161: 19 L. T. 220, and that being so, the defendant is called upon to answer his liability for the injury caused to the plaintiff by the falling banner not by merely showing that due care was exercised but in one of modes which alone constitute a defence to liability in cases of the Rylands v. Fletcher Rylands v. Fletcher (1868) 3 H. L. 330 : 37 L. J. Ex. 161: 19 L. T. 220 type. One of these is the defence of act of God or vis major, and the defendant has in fact raised it by contending that the fall of the banner was caused by a storm of unusual severity. The evidence adduced in support of this contention will have to be examined for the purpose of seeing whether it proves that, such a storm took place as would amount to act of God or vis major as that concept has been understood in the Law of Torts. Therefore before approaching the evidence regarding the weather which prevailed at the time when the banner fell, it will be necessary first to consider the cases in which act of God or vis major has been discussed.*

*60. **Professor Winfield, following Pollock, has defined act of God as "an operation of natural forces so unexpected that no human foresight or skill could reasonably be expected to anticipate it."***

In (1917) A. C. 556 Greenock Corporation v. Caledonian Railway (1917) 1917 A.C. 556: 86 L. J. P. C. 185: 117 L. T. 483 at p. 581, Lord Parker said:

> *"(1868) 3 H. L. 330 Rylands v. Fletcher (1868) 3 H. L. 330 : 37 L. J. Ex. 161: 19 L. T. 220 saved the question whether the act of God might not have afforded a defence, and this question was answered in the affirmative in (1876) 10 Ex. 255 Nichols v. Marsland (1875) 10 Ex. 255 : 44 L. J. Ex. 134 : 33 L. T. 265 : 23 W. R. 693 in which the act of God had been established by the finding of the jury, though I have some doubt whether that finding was correct."*

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62. ***With reference to the view taken of act of God*** *in (1876) 10 Ex. 255 Nichols v. Marsland (1875) 10 Ex. 255 : 44 L. J. Ex. 134 : 33 L. T. 265 : 23 W. R. 693 Fry J. said, in (1878) 9 Ch. D. 503 Nitro-Phosphate and Odam's Chemical Manure Co. v. S. London & St. Katherine Docks (1878) 9 Ch. D. 503 : 39 L. T. 433: 27 W. R. 267 at p. 516 :*

> *"**In order that the phenomenon should fall within that rule, it is not in my opinion necessary that it should be unique, that it should happen for the first time; it is enough that it is extraordinary, and such as could not reasonably be anticipated. That appears to me to be the view which has been taken in all the cases, and notably by Lord Justice Mellish in the recent case in (1876) 10 Ex. 255 Nichols v. Marsland (1875) 10 Ex. 255 : 44 L. J. Ex. 134 : 33 L. T. 265 : 23 W. R. 693."***

*....**In (1917) A. C. 556 Greenock Corporation v. Caledonian Railway (1917) 1917 A.C. 556: 86 L. J. P. C. 185: 117 L. T. 483 Lord Finlay observed:***

> ***"It is true that the flood was of extraordinary violence, but floods of extraordinary violence must be anticipated as likely to take place from time to time."***

and on this point Lord Dunedin said :

> ***"The appellants argue that.....if they can show that this***

> ***rainfall was much in excess of what had been previously observed in Greenock that is enough. I do not think that you can rightly confine your view to Greenock alone. No one can say that such rainfall was unprecedented in Scotland; and I think the appellants were bound to consider that some day Greenock might be subjected to the same rainfall as other places in Scotland had been subjected to…"***
>
> [Emphasis is ours]

21.2. The other case is a judgement of the Supreme Court rendered in ***Municipal Corporation of Delhi v Subhagwanti and Ors.*** (1966) 3 SCR 649. This is a case where appeals were carried to the Supreme Court against damages returned in favour of the LRs of three persons who died as a result of the collapse of the clock tower situated in the town hall which belonged to the appellant-corporation. The Supreme Court noted that the main question which presented itself for determination was whether the appellant-corporation was negligent in looking after and maintaining the clock tower and if found so was liable to pay damages for death caused on account of its fall.

21.3. *Inter alia,* the defence taken by the appellant-corporation was that the fall of the clock tower occurred due to an "inevitable accident" that could not have been prevented by the exercise of reasonable care and caution. It was also submitted on behalf of the appellant-corporation that there was nothing in the appearance of the clock tower which would have put it to notice that it represented a probable danger to those who were co-located. The Supreme Court rejected this defence and while doing so, made the following crucial observations:

> *"4. ….We are unable to accept the argument of the appellant as correct.* ***It is true that the normal rule is that it is for the plaintiff to prove negligence and not for the defendant to disprove it. But there is an exception to this rule which applies***

> ***where the circumstances surrounding the thing which causes the damage are at the material time exclusively under the control or management of the defendant or at the material time exclusively under the control or management of the defendant or his servant and the happening is such as does not occur in the ordinary course of things without negligence on the defendant's part.*** *The principle has been clearly stated in Halsbury's Laws of England, 2nd Edn.,Vol.23,atp. 671 as follows:*
>
> *"**An exception to the general rule that the burden of proof of the alleged negligence is in the first instance on the plaintiff occurs wherever the facts already established are such that the proper and natural inference immediately arising from them is that the injury complained of was caused by the defendant's negligence, or where the event charged as negligence tells its own story of negligence on the part of the defendant, the story so told being clear and unambiguous. To these cases the maxim res ipsa loquitur applies. Where the doctrine applies, a presumption of fault is raised against the defendant, which, if he is to succeed in his defence, must be overcome by contrary evidence, the burden on the defendant being to show how the act complained of could reasonably happen without negligence on his part."***
>
> ***In our opinion, the doctrine of res ipsa loquitur applies in the circumstances of the present case. It has been found that the Clock Tower was exclusively under the ownership and control of the appellant or its servants.*** *It has also been found by the High Court that the clock tower was 80 years old and the normal life of the structure of the top storey of the building, having regard to the kind of mortar used, could be only 40 or 45 years."*
>
> [Emphasis is ours]

21.4. Furthermore, the court also discussed, at some length, the duty of care placed on the owner of a structure, in this case, a clocktower, abutting a highway to maintain the structure in a proper state so that it does not cause injury to a member of public using the highway. In this context, the court also considered the appellant-corporation's defence that since the defects which led to the collapse of the tower were latent, it could not be held guilty of negligence. The observations made in this context are set forth hereafter:

"5. *.... The finding of the High Court is that there is no evidence worth the name to show that any such inspections were carried out on behalf of the appellant and, in fact, if any inspections were carried out, they were of casual and perfunctory nature.* ***The legal position is that there is a special obligation on the owner of adjoining premises for the safety of the structures which he keeps besides the highway. If these structures fall into disrepair so as to be of potential danger to the passers-by or to be a nuisance, the owner is liable to anyone using the highway who is injured by reason of the disrepair. In such a case it is no defence for the owner to prove that he neither knew nor ought to have known of the danger. In other words, the owner is legally responsible irrespective of whether the damage is caused by a patent or a latent defect. In Wringe v. Cohen [(1940) 1 KB 229] the plaintiff was the owner of a lock-up shop in Proctor Place, Sheffield, and the defendant Cohen was the owner of the adjoining house. The defendant had let his premises to a tenant who had occupied them for about two years. It appears that the gable end of the defendant's house collapsed owing to a storm, and fell through the roof of the plaintiff's shop. There was evidence that the wall at the gable end of the defendant's house had, owing to want of repair, become a nuisance i.e. a danger to passers-by and adjoining owners. It was held by the Court of appeals that the defendant was liable for negligence and that if owing to want of repairs premises on a highway become dangerous and, therefore, a nuisance and a passer-by or an adjoining owner suffers damage by the collapse the occupier or the owner if he has undertaken the duty of repair, is answerable whether he knew or ought to have known of the danger or not. At p. 233 of the report Atkinson, J. states:***

"By common law it is an indictable offence for an occupier of premises on a highway to permit them to get into a dangerous condition owing to non-repair. It was not and is not necessary in an indictment to aver knowledge or means of knowledge: *see Reg. v. Watson, ((1703) 2 Ld. Raym. 856).* ***In Reg. v. Bradford Navigation Co., ((1865) 6 B. & Section 631, 651) Lord Blackburn (then Blackburn, J.) laid it down as a general principle of law that persons who manage their property so as to be a public nuisance are indictable. In Attorney-General v. Tod Heatley, ([1897] 1 Ch. 560) it was clearly laid down that there is an absolute duty to prevent premises becoming a nuisance. 'If I were sued for a nuisance', said Lindley L.J. in Rapier v. London Tramways Co., ((1893) 2 Chapter 588, 599), 'and the nuisance is proved, it is no defence***

> ***on my part to say and to prove that I have taken all reasonable care to prevent it'.***
>
> *The ratio of this decision was applied by the Court of appeals in a subsequent case in Mint v. Good [(1951) 1 KB 517] and also in Walsh v. Holst and Co. Ltd. [(1958) 1 WLR 800]* ***In our opinion, the same principle is applicable in Indian law. Applying the principle to the present case it is manifest that the appellant is guilty of negligence because of the potential danger of the Clock Tower maintained by it having not been subjected to a careful and systematic inspection which it was the duty of the appellant to carry out."***
>
> [Emphasis is ours]

21.5. A similar conclusion was reached by the Supreme court in another matter i.e., ***Municipal Corporation of Delhi v Sushila Devi (Smt.) and Ors.*** (1999) 4 SCC 317. This was a case where a person riding pillion on a scooter died on account of a branch of a tree maintained by the Municipal Corporation of Delhi [hereafter referred to as "MCD"] falling on him. The Supreme Court found the MCD guilty of negligence and, in that context, held that it had failed to discharge the duty it owed to road users of periodically inspecting trees so that the road remained safe for those who plied on them. The following observations of the court bear out this aspect of the matter:

> ***"8.*** *...****The Division Bench has upheld the finding recorded by the learned trial Judge that the Horticulture Department of the Corporation should have carried out periodical inspections of the trees and should have taken safety precautions to see that the road was safe for its users and such adjoining trees as were dried and dead and/or had projecting branches which could prove to be dangerous to the passers-by were removed. This having not been done, the Municipal Corporation has been negligent in discharging such duty as is owed to the road-users by the adjoining property-owners, especially the Municipal Corporation. The*** *finding has been arrived at on appreciation of evidence by the learned trial Judge as also by the Division Bench and we find ourselves in entire agreement with the said finding.*

9. *The law is stated in Winfield and Jolowicz on Torts (13th Edn., 1989, p. 415) in these words:*

*"**If damage is done owing to the collapse of the projection on the highway or by some other mischief traceable to it, the occupier of the premises on which it stood is liable if he knew of the defect or ought, on investigation, to have known of it. At any rate this is the rule with respect to a thing that is naturally on the premises e.g. a tree**."*

10. *In Clerk and Lindsell on Torts (16th Edn., 1989, at pp. 546-547, para 10.122) the law on trees is summarised as follows:*

*"**The fall of trees, branches and other forms of natural growth is governed by the rules of negligence. When trees on land adjoining a public highway fall upon it, the owner is liable if he knew or ought to have known that the falling tree was dangerous. He is not bound to call in an expert to examine the trees, but he is bound to keep a lookout and to take notice of such signs as would indicate to a prudent landowner that there was a danger of a tree falling … the landowner was held liable when the tree which fell had been dying for some years before and had become a danger which should have been apparent to an ordinary landowner."***

11. *In Charlesworth & Percy on Negligence (8th Edn., 1990, at p. 668) the law is stated in these terms:*

"… when a tree, which had been dying for some years and should have been known to be dangerous by an ordinary landowner, fell and caused damage, the owner was held liable. (Brown v. Harrison [1947 WN 191 : 63 TLR 484])

13. *…**The duty of the owner/occupier of the premises by the side of the road whereon persons lawfully pass by, extends to guarding against what may happen just by the side of the premises on account of anything dangerous on the premises. The premises must be maintained in a safe state of repair. The owner/occupier cannot escape the liability for injury caused by any dangerous thing existing on the premises by pleading that he had employed a competent person to keep the premises in safe repairs."***

[Emphasis is ours]

22. Therefore, the principles that can be enunciated from the aforesaid cases

are the following.

1. First, once it is shown that an accident has occurred and the surrounding circumstances show that its occurrence was due to the thing or object or a being (say, for example, an animal) under the control and management of the defendant, the presumption would be that the defendant was guilty of negligence. The thing or object escaping should be of a kind, if it were to escape, would be potentially dangerous. In ascertaining whether the object or thing can morph into a potentially dangerous article, *inter alia*, its size, shape, material, position and, like in the instant case, the height from which the object/thing falls.

2. In cases of persons using public pathways and passages, the law presumes that the owners of structures and buildings which abut such pathways, highways or roads have a duty of care to the passer-by to periodically inspect and maintain such structures. Therefore, objects which form part of the structure or are fastened to such a structure or building, if not periodically inspected or maintained, cause an injury to a passer-by by coming off the façade of the building, would result in the defendant and/or his agents being held liable under the tort of negligence.

23. Applying the aforesaid principles to this case, there is no doubt in our mind that the Bank was guilty of the tort of negligence. The fact that the signboard fell on the deceased writ petitioner's head causing severe injuries is not in dispute; there is no averment either in the counter-affidavit or the Bank’s appeal that the Bank had entered into a maintenance or supervision

contract with AGIPL which was responsible for putting up the signboard. In the application preferred before the Learned Single Judge i.e., CM No.12613/2019, which was closed, there is vague assertion about AGIPL being given the task of installation and maintenance of the signboard. If that was so, surely, the Bank would have material available with it to back this assertion. This assertion is completely bald. As a matter of fact, no submission in this behalf was made even before us during the hearings conducted in the matter. More particularly, there is no defence taken that the Bank itself carried out a periodical inspection of the signboard put up on the façade of the building. The deceased writ petitioner was a passer-by who met with the accident while exercising his right of passage on a public pathway which abutted the building in which the Bank was housed.

24. The only defence that the Bank has taken centres around the doctrine/maxim of Act of God or *vis major*. This defence is generally available where the common law principle of absolute/strict liability enunciated in ***Rylands v Fletcher*** is applied. The rule enunciated in ***Rylands v Fletcher*** is that whoever collects on his land anything, which, if it escapes, is likely to cause mischief or injury, is answerable for damages which is a natural consequence of escape of such thing or object. In such circumstances, the defendant can have himself excused if the escape of such a dangerous or hazardous thing was a consequence of act of God or *vis major* or because of the default of the plaintiff i.e., the one who has brought the action. The limitation of the defence of act of God, as noted in ***Mahindra Nath Mukkerjee's*** case, is that it should not be an event which is anticipated or is likely to take place from time to time. The test is not that the natural event was extraordinary, but that it could not be reasonably

anticipated. In other words, the defence would be that the natural event, such as rain, high-velocity winds, snow, landslides etcetera. were so unexpected that no human foresight or skill could reasonably have anticipated the event. As noted by the learned Single Judge and as observed by us hereinabove, the high-velocity winds in the month of May each year are a foreseeable event given the geographical location of Delhi. Therefore, in our opinion, in the facts and circumstances of the case, this defence would not be available to the Bank.

Signboard/Advertisement:

25. This brings us to the other argument advanced on behalf of the Bank that the object which caused the respondent to suffer injury was a signboard and not an advertisement and, therefore, it was not required to take written permission from the Commissioner in accordance with the provisions of the DMC Act and the bye-laws framed thereunder. In other words, the argument advanced is that Section 143 of the DMC Act has no applicability in the instant case.

25.1. The Bank's argument, in our opinion, qua this aspect is too broad, that is, anything which is a signboard cannot fall in the category of an advertisement within the meaning of Section 143 of the DMC Act.

25.2. To our minds, this submission is not tenable for the following reason: Section 143 of the DMC Act adverts to the expression "advertisement" which is nothing but a mode of communication directed towards the public at large or a particular set of people [in this case, customers] to, *inter alia*, convey the kind of business the advertiser is involved in and to promote its business and commercial interest. In certain cases, the nomenclature or a name under which the business is conducted acts as an advertisement,

whereas in other cases where the business is conducted under a random name which has nothing to do with the kind of business being operated by the advertiser, the advertiser may have to use different mediums to promote its business interests, which could include billboards, hoardings, electronic media, social media platforms or print media to reach its target customers/consumers.

25.3. For example, airlines which fly under different names convey to their target customers/consumers the kind of business they are in. The only distinguishing feature is, perhaps, the country with which they are aligned i.e., the country in which their main hub is located. Illustratively, the names which immediately come to mind are airlines such as Singapore Airlines, British Airways, American Airlines, Malaysian Airlines, Japan Airlines, etcetera. The signboards of such entities would convey to the public at large the nature of their business.

25.4. The mere fact that the signboard bears the name of the entity without extolling its strengths would not in every case take it out of the purview of Section 143 of the DMC Act. Much would depend on the facts and circumstances that subsist in each case. Say for instance, if an entity has signboards installed bearing only its name in multiple locations of a city, one could argue that such a signboard is an advertisement as it increases visibility and enhances the recall factor. Add to it another dimension; each signboard carries the address of its branches. Such a "Signboard" could convey a lot to the customers [both existing and prospective] of such an entity. To appreciate this aspect further, one may advert, once again, to certain examples in the airline industry. There are entities whose names do not convey the nature of their business; these are entities which have chosen

random names. Examples of such entities are Indigo, Virgin Atlantic, Emirates, etcetera.

25.5. In the banking business, more often than not, the name itself conveys the nature of the entity's business. Examples which come to mind are the State Bank of India, United Commercial Bank, HDFC Bank, ICICI Bank, Bank of America, Barclays Bank, etcetera. These entities may not necessarily require a more overt form of communication with their customers.

25.6. Therefore, entities which convey the nature of their business *via* their names or nomenclature could fall, in our opinion, within the provisions of Section 143 of the DMC Act, if facts and circumstances obtain in a case which suggests that there is an intent to draw potential customers and/or consumers to the place of business and/or to consume or receive services offered by the advertiser. Thus, if signboards bear the name of the entity, which is descriptive of the entity's business are put up in various parts of the city, they could, in a given case, be treated as an advertisement. Likewise, the size of the signboard and what is stated therein, apart from the name of the entity, could also in certain circumstances lead to the conclusion that the entity is seeking to promote its business interests. Say, for instance, a bank's signboard carries its name along with the acronym "ATM" and such signboards are put up in different locations, could it then be said that they are simpliciter signboards and not advertisements?

25.7. Thus, it cannot be said that every signboard is excluded from the purview of Section 143 of the DMC Act.

26. In this case, what seems to have impressed the learned Single Judge while ruling that the signboard fell within the provision of Section 143 of the

DMC Act is its size. Concededly, the permission of the Commissioner of the Municipal Corporation, as envisaged under Section 143 of the DMC Act, was not taken by the Bank.

26.1. The relevant observations, in this regard, are contained in paragraph 16 of the impugned judgment, which, for the sake of convenience, are extracted hereafter :

> *"16. Admittedly, BoB had taken no permission from the concerned municipal corporation for fixing the said board. It is, however, contended on behalf of BoB that no such permission was required, since the board in question was a signboard and not an advertisement board.* ***Considering the dimensions of the said board, it is difficult to accept that the board in question was merely a signboard of BoB's branch and not an advertisement display board. The board was four feet thick and was lit. The nature of the Board was in the nature of display of advertisement and therefore, permission of the Commissioner of the concerned Municipal Corporation was required in terms of Section 143 of the Delhi Municipal Corporation Act, 1957****."*
>
> [Emphasis is ours]

26.2. Notably, the learned Single Judge did not rest his conclusion, which is, that the Bank was negligent, on the failure of the Bank to obtain the permission of the Commissioner before putting up the signboard on the facade of the concerned building, as required under Section 143 of the DMC Act.

26.3. Therefore, to our minds, not much will turn on this aspect of the matter. Thus, even if we assume, for the moment, that the Bank was not required to take permission under Section 143 of the DMC Act, it would, in our view, not absolve the Bank of the charge of negligence levelled against it.

27. In an action for the tort of negligence, the claimant has to prove that there was a duty of care owed to him [which arose not because of the

contract obtaining between the parties but otherwise] and that the breach of this duty had caused an injury which made the defendant liable for paying damages.

28. As alluded to hereinabove, the undisputed fact is that the deceased writ petitioner suffered an injury because the Bank's signboard fell on his head. The Bank's defence that the signboard came off the façade of the building due to high-velocity winds and was, thus, an act of God has not impressed us for the reasons given hereinabove. As observed in the earlier part of the judgment, high-velocity winds in Delhi, each year, in May, are a regular feature. The Bank ought to have foreseen that the signboard, which was fixed to the façade of the building, could cause harm to a passer-by if it came off due to a natural cause such as high-velocity winds. The Bank, to obviate the occurrence of such eventuality, was obliged to monitor the maintenance of the signboard to ensure, *inter alia*, that it was securely fastened to the façade of the building. Having failed to do so, the Bank has rightly been held to have committed a tort of negligence.

29. Thus, as adverted to hereinabove, the doctrine/maxim of *res ipsa loquitur* and/or strict liability would apply in this case. The explanation given by the Bank, contrary to the undisputed facts that have emerged in the instant case, leads us to conclude that the Bank was guilty of negligence. The record shows that the deceased writ petitioner discharged the initial burden placed on him as to how he had suffered a head injury. It was thereafter, incumbent upon the Bank to demonstrate as to why it should not be held guilty of having committed a tort of negligence. We may note, in this context, that the Bank was unable to demonstrate that after AGIPL had fixed the signboard, there was a protocol in place to ensure that it was

securely fastened to the façade of the building. Concededly, there is not even an assertion made in this regard by the Bank in the counter-affidavit filed before the learned Single Judge or even in the appeal filed by the Bank i.e., LPA 382/2019.

30. The submission advanced on behalf of the Bank that because the deceased writ petitioner received medical treatment from more than one hospital, one could not rule out that he was suffering from a pre-existing ailment, to our minds, is an argument of desperation. A perusal of the writ petitioner's medical record clearly establishes a substantial linkage between the injuries suffered by him and the treatment accorded to him. Apart from the bald assertion, the Bank has not been able to place any material on record which would demonstrate that the deceased writ petitioner suffered from a pre-existing ailment.

30.1. The argument that because the learned Single Judge directed the constitution of a medical board for evaluation of the bills submitted by the deceased writ petitioner should lead to a conclusion that the deceased writ petitioner was unable to demonstrate that his medical condition had a causal link with the head injury suffered by him, deserves to be rejected at the very threshold. The learned Single Judge has, perhaps, taken recourse to this methodology to rule out the possibility of the pecuniary claim being padded, inadvertently or otherwise. The constitution of the medical board is not, as is sought to be suggested, to determine a causal link between the tortious act and the injuries suffered by the writ petitioner; that determination has already occurred. What has not occurred as yet is the quantification of the claim made by the deceased writ petitioner towards money expended by him on medical treatment. This exercise, as is evident, the learned Single Judge

would do after he receives a report from the medical board.

31. Insofar as the argument advanced on behalf of the Bank concerning the rejection of the plea for acceptance of additional documents is concerned, the same is completely unsustainable in the given facts of the case. As noted hereinabove, the application was filed at the nth hour while the submissions in the case were being heard by the learned Single Judge. The learned Single Judge, thus, proceeded to dismiss the application filed for taking on record additional documents. This order was passed on 18.03.2019, which is also the date when the judgment in the writ petition was reserved. We find nothing wrong in the approach adopted by the learned Single Judge. It is not the case of the Bank that the documents (other than the acquittal order dated 07.12.2018) which were sought to be placed on record were not in its power and possession before it proceeded to file a counter-affidavit before the learned Single Judge.

31.1. Before us as well, an application has been filed to being on record additional documents, which are adverted to as Annexures A3, A5 and A6. Pertinently, these documents have not been filed with the application; one can only presume that these are the very same documents which are appended to the appeal. Except for the document, which is referred to as Annexure A5, there is no averment in the body of the application concerning the other two documents, as to what these documents are all about.

31.2. To avoid repetition and prolixity, we will deal with the relevance and impact, if any, of the documents, had they been made available to the learned Single Judge, keeping in mind submissions made on behalf of the Bank by placing reliance on them.

31.3. The document referred to as Annexure A5 is the judgment dated

07.12.2018 rendered by the Trial Court in the criminal case lodged against the manager of the Bank. Concededly, the manager was acquitted *via* the said judgment. The Trial Court concluded that the prosecution had failed to prove that the Bank manager had committed an offence under Section 338 of the IPC. The Bank cannot turn around and say it did not know of the judgement without saying how it acquired knowledge and whether the manager continued to remain an employee of the Bank while the Trial was on.

31.4. Since this document, as noted above, is a judgment of the court concerning the same incident which led to the deceased writ petitioner suffering head injuries, we heard arguments *qua* the issue as to whether or not it could have any impact on the conclusion arrived at by the learned Single Judge *via* the impugned judgment. It was sought to be argued on behalf of the Bank that since the Bank's manager had not been found guilty of negligence under Section 338 of the IPC, the learned Single Judge had erred in reaching a contrary conclusion.

31.5. In our opinion, the submission is misconceived as the standard of proof in a criminal action is different from that which is required to be reached in a civil action. The prosecution in a criminal case has to establish beyond reasonable doubt that the accused is guilty of the offence with which he/she is charged. On the other hand, in a civil action, the standard of proof that is required to be reached is the preponderance of probability. Therefore, merely because the Bank's manager was acquitted in the criminal case could not by itself be the reason for holding that the finding of negligence returned by the learned Single Judge *qua* the Bank was flawed. [See ***Vishnu Dutt Sharma v. Daya Sapra*** (2009) 13 SCC 729]

31.6. We may also note that the attempt of the Bank to shift its liability onto AGIPL must also fail. In support of this plea, during arguments, reference was made to an [illegible] invoice dated 28.04.2005 submitted by AGIPL for apparently fabricating and installing the signboard. This document is appended to the appeal and is, incidentally, marked as Annexure A6.

31.7. The fact that AGIPL was instrumental in fabricating and installing the signboard would not absolve the Bank of its liability as AGIPL can only be treated as the agent of the Bank. A perusal of the bill shows that the signboard was fabricated and installed by AGIPL; possibly in and around April 2005. There is nothing on record to show, as noticed above, that a contract for maintenance of the subject signboard was awarded to either AIGPL or any other entity. In fact, there is not even an averment to that effect in the counter-affidavit or the appeal filed by the Bank before us. The time gap between the date when the signboard was fabricated and installed and the date when the incident occurred would show that six years had elapsed, and, therefore, due to normal wear and tear the nuts and bolts used to fix the signboard may have been rusted and, perhaps, become loose.

31.8. Likewise, the reliance on the news report of 23.05.2011 [which is marked as Annexure A3 and is appended to the appeal] only establishes that Delhi had experienced high-velocity winds on 22.05.2011, i.e., the date of the incident. Since we have upheld the view taken by the learned Single Judge that this was a foreseeable event given the geographical location of Delhi and the period during which the event occurred, this document will not help in shoring up the defence offered by the Bank that it was an act of God and, hence, it could not be held guilty of having committed a tort of negligence.

32. This brings us to the judgments cited on behalf of the Bank in support of its pleas advanced before us.

33. The first judgment that was cited by Mr Jain was the ***SPS Rathore*** case. This judgment was cited in support of the submission that the learned Single Judge ought not to have entertained the writ petition as the allegations concerned a tortious act which was best adjudicated in a suit action. It was the submission of Mr Jain that since disputed questions of facts were involved, a writ court was not an appropriate forum for adjudicating the allegations levelled against the Bank.

33.1. A perusal of the facts obtaining in ***SPS Rathore's*** case discloses that an appeal was preferred to the Supreme Court against a direction issued by the High Court in the exercise of its powers under Article 226 to have the concerned District Judge conduct an inquiry for determination of compensation to be awarded to a person against whom several car-theft cases had been lodged, which, upon investigation had been dropped. [This person was arrayed as respondent no.5 before the Supreme Court]. The concerned High Court had triggered *suo motu* action against the appellant, i.e., SPS Rathore, based on a news report and the judgment of the Chief Judicial Magistrate, Panchkula [in short, "CJM"] whereby respondent no.5 and his associate were discharged in car-theft cases lodged against them. The Supreme Court noted that the allegation against SPS Rathore, a former police officer, was that he had pressured the local police to lodge false cases against respondents no.5 and 6. It was suggested that the trigger for lodging false theft cases was the complaint filed by the sister of respondent no.5 against SPS Rathore under Section 354 of the IPC. The complainant had alleged that SPS Rathore had molested her. The incident occurred on

12.08.1990. Since an FIR was not registered, the mother of the complainant filed a writ petition which was allowed on 21.08.1998, which, ultimately, resulted in the registration of an FIR against SPS Rathore under Sections 354 and 509 of the IPC. In the interregnum, six FIRs were lodged against respondent no.5. He was arrested on 25.10.1993 and released on 29.12.1993; i.e., the very day on which the complainant committed suicide.

33.2. The Supreme Court noted that in the impugned judgment, the High Court had observed that mere filing of FIRs against respondent no.5 did not necessarily lead to the conclusion that he had been falsely implicated in criminal cases; however, since the allegations were serious and if they were found true, it was a fit case for awarding compensation to respondent no.5. It is in this backdrop that the High Court had directed the concerned District Judge to conduct an inquiry, based on which a decision had to be taken as to whether or not compensation should be awarded to respondent no.5.

33.3. The Supreme Court, as noted above, quashed this direction since there was nothing available to the High Court for triggering a *suo motu* action, as neither the news report nor the judgment discharging respondent no.5 and his associate or any other material available on record, that would suggest SPS Rathore's involvement in the lodgement of false cases against respondent no.5.

33.4. It is in this background that the Supreme Court ruled that the power to issue such directions under Articles 32 or 226 should be used "sparingly".

33.5. Interestingly, the Supreme Court, in the very same judgment, also noticed the view taken in an earlier judgment rendered in ***Tamil Nadu Electricity Board v. Sumathi and Ors.*** (2000) 4 SCC 543, which, *inter alia*, held that it is not as if a writ action under Article 226 would not lie for a

tortious act and that in every case, the aggrieved person should be relegated to a suit action.

33.6. The judgment in ***SPS Rathore's*** case is clearly distinguishable. The Supreme Court found fault with the approach adopted by the High Court in triggering a *suo motu* action under Article 226 when there was no underlying material available with it.

34. The next judgement on which Mr Jain places reliance is ***V. Kishan Rao's*** case. This case dealt with the issue as to whether or not while dealing with complaints lodged before consumer forums concerning medical negligence, the aggrieved person in every case is required to adduce expert evidence. A challenge was laid to the order passed by the National Consumer Disputes Redressal Commission [in short, "NCDRC"] whereby it had sustained the judgment of the State Commission, *inter alia*, on the ground that no expert opinion had been produced by the aggrieved person to establish the charge of medical negligence levelled against the concerned hospital. The facts, as noted in the judgment, show that the appellant's wife had been treated by the respondent hospital for typhoid, although, it was found that she was suffering from malaria. The negligence of the respondent hospital ultimately led to the death of the appellant's wife. Since the material placed on record revealed that the appellant's wife was found to be afflicted with malaria for which she had not received treatment, the Supreme Court ruled that unless it was a complicated case, consumer forums were not required to insist on the production of expert evidence. Given these facts, the Supreme Court found that negligence was evident and therefore the doctrine/maxim described as *res ipsa loquitur* was applicable in the said case.

34.1. Mr Jain relied upon the observations made in paragraphs 38 and 50 of the judgment to buttress his submission that in a complicated case, evidence was required, and, therefore, the writ court was not the appropriate forum for adjudicating the *lis* in the instant case.

34.2. In our opinion, the judgment, in a certain sense, supports the case of the deceased writ petitioner, inasmuch as where primary facts are not in dispute, finding *qua* negligence can be arrived at based on affidavits. It is exactly this that the District Forum had done and found the concerned hospital guilty of negligence. The error, according to the Supreme Court, had been committed by the State Commission and NCDRC in insisting on the production of expert opinion when primary facts concerning the ailment and the wrong line of medical treatment were not in dispute.

34.3. In the instant case, as noted above, the primary facts are not in dispute, and, therefore, the learned Single Judge has correctly concluded that the Bank had committed a tort of negligence.

35. The last judgment cited on behalf of the Bank was rendered in ***Syed Akbar's*** case. Broadly, the facts, in this case, were the following:

35.1 The appellant, who was a bus driver, had been convicted by the Trial Court for an offence said to have been committed by him under Section 304A of the IPC. The allegation against the appellant was that he had run over a child while she was crossing the road. The prosecution had produced four eyewitnesses, all of whom turned hostile. Consequently, the Public Prosecutor sought and obtained leave to cross-examine the said witnesses. It appears that the Public Prosecutor did not confront the witnesses with the statement made by them before the police concerning the fact that the subject vehicle was proceeding at a slow speed and that the child who died

in the incident suddenly came in front of the vehicle and, despite the appellant swerving the vehicle away from her, he was unable to save her. Evidently, the witnesses were confronted with only that part of their statement made before the police, which alluded to the fact that the accident had taken place due to the negligence of the appellant. Given this state of the evidence, the appellant's defence before the Trial Court was that he was unable to avoid the accident despite having taken every possible measure. The Trial Court, however, concluded that the witnesses were not speaking the truth; in appeal, the Session's Judge agreed with this view of the Trial Court. The Session's Judge, thus, while convicting the appellant applied the Doctrine of *res ipsa loquitur*. The High Court, in revision, confirmed the view taken by the Session's Judge.

35.2. The Supreme Court, while disagreeing with the view taken in the impugned judgment, observed that the courts below had committed an error in disregarding the fact that the credibility of the witnesses on material points had not been shaken. In other words, certain parts of the testimony of the witnesses who turned hostile remained intact and, hence, could not have been brushed aside, i.e., the fact that the vehicle was moving at a slow speed and that despite the appellant swerving the vehicle to the right, had failed in saving the child. What also emerged from the material on record is that if the appellant had swerved the vehicle further to the right, it would have fallen in a ditch which would have endangered the lives of the passengers who were travelling in the vehicle.

35.3. As to the application of the principle/maxim described as *res ipsa loquitur*, in a criminal action, the Supreme Court, after examining the law on the issue, made the following crucial observations :

> *"**28.** In our opinion, for reasons that follow, the first line of approach which tends to give the maxim a larger effect than that of a merely permissive inference, by laying down that the application of the maxim shifts or casts, even in the first instance, the burden on the defendant who in order to exculpate himself must rebut the presumption of negligence against him, cannot, as such, be invoked in the trial of criminal cases where the accused stands charged for causing injury or death by negligent or rash act. The primary reasons for non- application of this abstract doctrine of res ipsa loquitur to criminal trials are: Firstly, in a criminal trial, the burden of proving everything essential to the establishment of the charge against the accused always rests on the prosecution, as every man is presumed to be innocent until the contrary is proved, and criminality is never to be presumed subject to statutory exception. No such statutory exception has been made by requiring the drawing of a mandatory presumption of negligence against the accused where the accident "tells its own story" of negligence of somebody. Secondly, there is a marked difference as to the effect of evidence, viz., the proof, in civil and criminal proceedings. In civil proceedings, a mere preponderance of probability is sufficient, and the defendant is not necessarily entitled to the benefit of every reasonable doubt; but in criminal proceedings, the persuasion of guilt must amount to such a moral certainty as convinces the mind of the Court, as a reasonable man beyond all reasonable doubt. Where negligence is an essential ingredient of the offence, the negligence to be established by the prosecution must be culpable or gross and not the negligence merely based upon an error of judgment. As pointed out by Lord Atkin in **Andrews v. Director of Public Prosecutions** (1937) 2 All ER 552 : 1937 AC 576, "simple lack of care such as will constitute civil liability, is not enough"; for liability under the criminal law "a very high degree of negligence is required to be proved. Probably, of all the epithets that can be applied 'reckless' most nearly covers the case"*

35.4. Furthermore, the court, in the very same case, also took note of the fact that as to the application of the maxim *res ipsa loquitur*, there were possibly two approaches adopted by the court. The first approach exhorted that where the maxim applied, it operated as an exception to the general rule that the burden of proof of the alleged negligence is, in the first instance, on

the plaintiff. The other approach tended to opine that *res ipsa loquitur* is not a special rule of substantive law and that functionally it is only an aid in the evaluation of evidence.

35.5. To our minds, given the fact that the impugned judgment does not arise out of a criminal action, whichever approach is adopted, the principle/maxim described as *res ipsa loquitur* would apply in the instant case. The fact that there is no dispute that the deceased writ petitioner suffered an injury because of the sign board coming off the façade of the building which housed the Bank and given the fact that the Bank's defence that the signboard fell because of high-velocity wind [a foreseeable event] having been rejected, in our opinion, the principle/doctrine of *res ipsa loquitur* would apply.

35.6. Since the Bank, as noticed above, had control over the signboard which fell on the deceased writ petitioner's head, causing serious injuries and it had neither periodically inspected nor put in place a protocol for monitoring the maintenance of the signboard which was fixed on the façade of the building, the occurrence of the accident, in law, was attributable, in this case to the defendant.

36. Furthermore, the coming off of the signboard, given its size and location, had the potentiality of causing harm and injury to a passer-by who crossed the public pathway which abutted the building. As noted above, in that sense, the Bank owed a duty of care to every passer-by, which was breached as it failed to aver that it had periodically carried out inspections and monitored the maintenance of the signboard.

37. Besides this the defence of act of God/*vis major* available to ward off the strict liability cast under the common law principle enunciated in ***Rylands v***

Fletcher was also not available since the hazard presented by a signboard coming off the façade of the building was a foreseeable event given the fact that Delhi experiences high-velocity winds, in May, each year.

Conclusion:

38. Therefore, for the foregoing reasons, we find no merit in the appeal preferred by the Bank. Accordingly, LPA No.382/2019 is dismissed.

39. Insofar as the cross-appeal is concerned, i.e., LPA No.569/2019, the grievance articulated therein concerns the failure on the part of the learned Single Judge to grant interest. In this context, it is pertinent to note that the deceased writ petitioner had not sought any direction for payment of interest. It appears that this aspect of the matter was not argued before the learned Single Judge, possibly, because there was neither any averment to that effect, nor was any relief prayed for. Therefore, we are unable to find any error with the impugned judgment on this score, at this juncture.

39.1. Since, the writ petition is still pending adjudication, the best course, perhaps, available at this juncture to the legal representatives would be to approach the learned Single Judge with an appropriate application. We may make it clear that if such an application is filed, it will be decided in accordance with the law, after giving due opportunity to the Bank to resist the same. Consequently, LPA No.569/2019 is closed with the aforesaid observations.

39.2. We may also note that the Bank has deposited Rs.18,09,244/- with the Registry of this Court as per the order dated 29.05.2019 passed during the pendency of the appeal. Since the Bank's appeal i.e., LPA 382/2019 fails, the Registry is directed to release the amount deposited, along with accrued interest, to the LRs of the deceased writ petitioner.

40. Costs shall follow the result in LPA No.382/2019.

(RAJIV SHAKDHER)
JUDGE

(TARA VITASTA GANJU)
JUDGE

DECEMBER 9, 2022