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

Reserved on: 24.01.2014
Pronounced on : 30.05.2014

\+ **RFA (OS) 75/2011, C.M. APPL. 15966/2011**

INDIA TOURISM DEVELOPMENT CORPORATION LIMITED .....Petitioner

Through: Sh. K.T.S. Tulsi, Sr. Advocate with Sh. R.S. Mathur and Sh. Amitabh Marwah, Advocates.

Versus

MISS SUSAN LEIGH BEER ……..Respondents

Through: Sh. Madan Bhatia, Sr. Advocate with Sh. Anup Kumar Sinha, Advocate.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE SUDERSHAN KUMAR MISRA

MR. JUSTICE S. RAVINDRA BHAT
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1. The unsuccessful defendant (i.e. the appellant India Tourism Development Corporation, hereafter called "ITDC") challenges the judgment and decree of the Learned Single Judge of this court, who had held it liable to the extent of ₹ 1,82,00,000/- (Rupees one crore eighty two lakhs) with simple interest thereon @ 6% per annum w.e.f 22.01.1982 till the date of the decree and future simple interest on that amount @ 10% per annum till its realization.

2. The brief facts are that the plaintiff (hereafter "Susan" or "the plaintiff" or "the respondent") claimed a decree for ₹ 2,00,00,000/- (Rupees two crores) as damages and interest @ 18% p.a. on the said

amount from the date of presentation of the plaint till actual payment. The claim was on the basis of a swimming pool injury suffered by the plaintiff on 05.05.1978 at (the erstwhile) Akbar Hotel ("the hotel"), managed and maintained by the ITDC. Susan was staying in the hotel with her parents and brother at the time she suffered the injury, which resulted in her becoming a quadriplegic. Susan alleged that the injury was due to the negligence of the ITDC in the maintenance of the swimming pool. ITDC did not deny that the plaintiff was injured on 05.05.1978 in the swimming pool; it alleged, however that the injury was on account of the plaintiff's negligence for which it could not be held liable.

The pleadings: Suit averments

3. The suit alleged that in May, 1978, Susan, whilst on vacation in India with her parents stayed in the hotel, which was managed by ITDC. On 05.05.1978, during her stay, she went to the swimming pool at about 5:15 PM for a swim. Susan was an experienced swimmer, a Queensland (Australia) under-age champion and a member of the Queensland Women's Water Polo Team for several years. She was, in the beginning of 1978, invited to join the Australian Women's Water Polo Team and was expected to travel to Germany with the Australian team in August, 1979. On the fateful day, i.e., on 05.05.1978, at about 5:15 PM, she jumped from the shallow end, into the swimming pool opposite the diving board. Susan relied on an implied representation by the swimming pool owner that the pool floor would not be slippery and would be safe for users to stand on without slipping. The plaint

alleged negligence on the part of ITDC in covering the pool floor with glazed and consequently slippery tiles, as well as in not properly cleaning and maintaining the pool floor leading to growth and accumulation of slime on the tiles. Resultantly, when Susan jumped into the water and her feet touched the pool floor, she slipped, resulting in loss of control. She fell backwards and her head hit against the wall of the pool. This fall led to Susan suffering serious head and back injuries and being unable to swim out of the pool. Her father and brother sensing that she was injured and upon noticing blood in the water, immediately swam to Susan's assistance and lifted her out of the pool carefully. Subsequently, she was removed by ambulance to the Holy Family Hospital, Okhla, New Delhi where she was treated by Dr Arjun Sehgal and Professor Ramamurthi, who had come from Madras.

4. According to the plaint, Dr Sehgal diagnosed that Susan had suffered a head injury with fracture dislocation of the cervical dorsal column causing paralysis of the four limbs and loss of sphincter control. Dr Sehgal later advised that Susan should be transported to her home in Brisbane, Australia. After a prolonged hospitalization in Delhi, accompanied by a neurosurgeon and another doctor, she was flown to Australia. From 16.06.1978 to 27.10.1978 she remained in the Spinal Unit of Princess Alexandra Hospital, Brisbane and from 13.11.1978 to 18.11.1978 in the Spinal Unit of Royal North Shore Hospital, Sydney, Australia. It is further alleged that despite sustained medical treatment, Susan was unable to recover from the spinal

injuries which are of a permanent character and have physically incapacitated her for the rest of her life. She is now permanently confined to a wheel chair, being a quadriplegic.

5. It is alleged in the plaint that apart from the physical agony and mental anguish which the plaintiff underwent during her treatment, the plaintiff also suffered emotional and psychological pain which will live with her as long as she lives. Susan alleged that she had a very bright and fruitful future ahead of her which was cut-short by permanent disability suffered by her due to the utter negligence and carelessness of ITDC, its employees and agents. It was alleged that ITDC was under a duty to keep its swimming pool safe for swimmers. The suit alleged that the incident speaks for itself and the plaintiff is entitled to the benefit of the maxim *res ipsa loquitur*. ₹ 2 crores was claimed in the suit, as damages computed as under:-

i) Expenses incurred by the plaintiff on medical treatment and care in India and Australia – ₹ 20,00,000/-

ii) Damages on account of physical pain, mental anguish and psychological anguish and loss of education – ₹ 50,00,000/-

iii) Damages on account of loss of earnings for the rest of her life – ₹ 1,30,00,000/00 (Rupees one crore and thirty lakhs)

Total – ₹ 2,00,00,000/- (Rupees two crores)

Consequently, a decree for ₹ 2 crores along with interest at the rate of 18% p.a. from the date of presentation of the plaint till realization was claimed by the plaintiff.

The Written Statement:

6. ITDC firstly objected that the plaint was not filed by a duly authorized person as it was signed and verified by Mr. Geoffrey Beer, alleged attorney of Susan. That document was not filed with the suit, nor was any reference made to it in the pleadings. ITDC also states that the plaint is not duly signed as required by Order XXXIII, Rule 2 of the Civil Procedure Code, as Susan has not been proven to be an indigent person. It was also urged that the suit was to be rejected for non-joinder of a necessary party, the New Delhi Municipal Council ("NDMC"), the owner of the premises, which had been leased to ITDC.

7. ITDC contested that there was any express or implied obligation on the part of the hotel in this regard. It was admitted that Susan and her family stayed in the hotel as claimed by her; however as guests, the use of the swimming pool was entirely at their risk and responsibility. The hotel merely permits the guests to swim if they so choose, out of their own volition, without any charge for it or without consideration. Merely because a guest chooses to swim at the pool, a separate contract does not arise; no contractual relationship is involved in this regard and no question of any breach of contract arose at all. Any guest of the hotel, who uses the pool, does so on an "as is" basis. Furthermore, parents are entirely responsible for their children's safety in the pool. ITDC urged that according to the rules, it did not accept any responsibility for any accident. It was also contended that as regards the construction of the swimming pool, the same had been

done by the NDMC and that it conformed to the well-accepted and well-recognized standards. ITDC further argued that Susan did not observe the rules in regard to swimming pool usage and was wholly negligent and, in any event, no claim could lie against it.

8. The written statement argued that Susan should not have jumped into the pool from the shallow end and that swimmers should use the diving board and dive into the deep end of the swimming pool. Jumping or diving at the shallow side by Susan was wholly wrong, negligent and contrary to the well accepted norms of swimming and also violated rules. ITDC stated that there are fixed stairs built for getting into the swimming pool and Susan did not enter the swimming pool through those stairs – an act that is wholly negligent. She was negligent in jumping into the pool from the shallow end even assuming, without admitting that she had jumped into the pool as alleged by her.

9. ITDC disputed the suit averments with regard to description of the incident, denied that the bottom of the pool was slippery and also denied that Susan slipped in the pool as alleged. Her statement of having jumped into the swimming pool as alleged in the suit was denied. According to ITDC, the swimming pool was cleaned in compliance with well-recognized standards and on the date of the incident too, the pool had been cleaned and was not slippery. The defendant stated that as a matter of fact, the injury to Susan could not have been suffered as a result of her jumping and slipping in the swimming pool as alleged. ITDC argued that swimming pools with

glazed tiles are well-accepted; it denied that the tiles covering the pool floor at Hotel Akbar were slippery and further denied that it did not keep the pool floor clean or properly maintained.

10. ITDC's written statement alleged that Susan and her brother were playing in and around the swimming pool and suddenly the accident happened. It was denied that her feet had touched the pool floor and slipped resulting in loss of control of the plaintiff and that her head hit against the pool wall. The written statement alleged that the injury caused to Susan resulted in her not remembering facts in respect of what had actually happened. Even the parents and brother of Susan could not describe the accident when ITDC made enquiries in this behalf from them, after the accident, before they left the hotel. It was stated that there was a lifeguard in attendance who had immediately gone to rescue the plaintiff after seeing the sudden accident and that the pool was well-marked indicating the depth of water at different places. The plaintiff was entirely responsible for the incident.

11. Paragraph 11 of the written statement admitted that Susan did not swim out of the pool, after suffering the injury. It further alleged that the hotel pool attendant was responsible for bringing Susan out of the water. ITDC alleged that Susan's parents were not close to the pool but were at a distance relaxing in the chairs. Her brother, however, was close to the pool but he was dazed at that point of time and could not say what had happened. ITDC denied that Susan's parents saw the incident or that they had rescued her. ITDC denied

that Susan had suffered any spinal injury of a permanent character or that she was physically incapacitated. It was even alleged that:

> "It is clear that the injuries whatever they were, did not affect the mobility of the plaintiff which is evident also from the fact that she had been found fit to travel soon after the accident and she could have travelled even earlier than she did."

12. ITDC claimed that it had a daily routine for cleaning of the swimming pool according to standard procedure and processes; there was neither any chance of the swimming pool being slippery and unsafe, nor was it slippery or unsafe. ITDC alleged that it provided the help and lifeguard assistance, notified the conditions subject to which the pool could be used as licensees, displayed information regarding different depths of the water at different places by markings in bold English letters. ITDC contended that the incident was the result of violation of the conditions for use of the pool on Susan's part and her negligence. Applicability of res ipsa loquitur was denied as were the allegation of damages or losses.

13. On the basis of the averments pleadings, the following nine issues were framed for trial:

1. Whether the suit has been filed by duly authorized person?

2. Whether New Delhi Municipal Committee was owner of the building of Akbar Hotel and was a necessary party?

3. Whether the tiles covering the floor of the swimming pool were slippery?

4. Whether the floor of the swimming pool was not clean and had not been properly maintained, resulting in the growth and accumulation of slime on the tiles?

5. Whether the plaintiff suffered injuries on account of the nature and condition of the bottom of the pool and due to negligence of the hotel? If so, what injuries were suffered by her?

6. Whether the plaintiff was required to observe any rules in the use of swimming pool and she did not observe the said rules and was herself negligent for the injuries suffered, if any?

7. Whether the swimming in the pool was at the risk and responsibility of the plaintiff (the guest) and there was no obligation on the hotel in this behalf?

8. Whether the defendant was in legal duty to keep the swimming pool safe for swimming of guests and the plaintiff was entitled to the benefit of the maxim res ipsa loquitur?

9. To what amount, if any, the plaintiff is entitled?

14. The plaintiff examined 22 witnesses; including PW1 (the plaintiff herself), PW2 Mr G.L. Beer (the plaintiff's father), PW4 Dr J. A. Smith (Neurosurgeon-- expert witness), PW8 Mr G. L. McDonald (expert witness), PW14 Mr K. R. Dobson (expert witness), PW18 Mr L. I. Sly (expert witness), PW19 Mrs P. J. Beer (the plaintiff's mother) and PW22 Dr Arjun Dass Sehgal (the doctor who initially treated the plaintiff at Holy Family Hospital). The Learned Single Judge recorded that apparently that there was some error in the assigning of numbers to these witnesses. This was that Mrs P. J. Beer, shown at Sl. No. 19 of the list of witnesses, was assigned the number -PW19. Dr Arjun

Dass Sehgal, who is shown at serial No. 22 of the list of witnesses, was also assigned the description PW19. Therefore, the Single Judge treated Mrs P. J. Beer as PW19 and Dr Arjun Dass Sehgal as PW22. The ITDC examined two witnesses, namely, DW1 Dr G. G. Manshramani and DW2 Balram Verma (the lifeguard at Akbar Hotel).

Findings of the Single judge

15. On appreciation of the arguments and evidence, the Learned Single Judge found, on Issue 1, that the power of attorney had not been filed along with the plaint and was filed on 25.11.1991 out of inadvertence. In any event, the plaintiff had clearly ratified the filing of the plaint and there was no question of the plaintiff's father misrepresenting himself to be an authorized agent. Moreover, the Learned Single Judge held that procedural defects which do not go to the root of the matter, cannot be permitted to defeat a just cause that a party may advance and that a curable procedural irregularity cannot be used to defeat a substantive right. Issue 2 was not argued by the defendant during the hearing, and was thus not ruled on.

16. On Issue Nos. 3-8 the learned Single Judge found from the evidence that the injuries were a fracture of the C6 and C7 vertebrae with anterior sliding of the 7th vertebra under the 6th vertebra leading to quadriplegia. As regards ITDC's argument that Susan had dived into the pool and not jumped, the Single Judge found that Susan's version of events (i.e. that she jumped in feet first) stood corroborated by other witnesses and that nothing in the cross-examination shook

their testimonies regarding how the incident took place. Further, the nature of injuries established was consistent with Susan's claim about how she entered the pool. ITDC had only adduced evidence as to the theory that Susan had dived and not jumped, without pleading that in its written statement. The Court could not therefore, render judgment on a fact not pleaded. Finally, the Learned Single Judge found that the pool floor could have been slippery, due to its glazed tiling, aggravated by algae growth, often invisible in pools. The testimony of Susan and her parents and the absence of evidence on the part of ITDC to refute the suit claim led the Single Judge to conclude that the pool was not properly maintained. The Learned Single Judge held, consequently, that by application of the maxim res ipsa loquitur, ITDC failed in discharging its burden of proof as regards the possible explanation for the plaintiff's injury.

17. On Issue No. 9, the Learned Single Judge awarded Susan, damages amounting to ₹1,82,00,000 (i.e. ₹ 5,00,000 for medical expenses, ₹ 50,00,000 for pain and suffering, and ₹ 1,27,00,000 for loss of earnings) along with interest at the rate of 6% per annum w.e.f. 22.01.1982 till the date of decree and 10% per annum till the date of payment, on the decretal sum.

ITDC's submissions in appeal

18. ITDC, in its grounds of appeal and submissions, argues preliminarily that first, the suit was wrongly permitted to be instituted by Susan as an indigent person and second, that the power of attorney

was not validly executed in favour of her father. It was argued by Shri K.T.S Tulsi, Learned Senior Counsel for ITDC, that the suit ought to have been rejected as not maintainable because it was filed by a person not authorized by the plaintiff; the signature upon the plaint was that of the plaintiff's father. However, the power of attorney authorizing him to institute proceedings were not on record when the suit was filed. The Learned Single Judge, it was submitted fell into error in regard to findings on this issue.

19. On merits, the Counsel for ITDC argued that Susan dived and did not jump into the pool. Counsel for ITDC urged first, that Susan could not have sustained the particular injuries that she did, by jumping into the pool. The submission is that a burst fracture is an unstable fracture that can result when heavy pressure is exerted on upper part of the skull. The compression of the spinal cord in a burst fracture causes paralysis. Since the respondent's injury was a combination of flexion and compression, it was argued that heavy compression is needed to fracture the C6 and C6 vertebrae. This compression, it was urged, is lessened by the buoyant force of water when one jumps into the pool, feet first. Thus it is urged that the respondent could have only dived, causing her head to strike the bottom of the pool. It is submitted that cervical spinal fractures cannot occur when the injury is to the back of the head; the injury is required to be on the top of the head with high force, to fracture the C6 and C7.

20. Learned Senior Counsel for ITDC submitted, on the basis of documentary evidence (in the form of hospital records PW 19/2, PW

19/3, PW 19/4, PW 19/5, PW 19/6, Ex. 2/34, the report of the Princess Alexandra Hospital dated 12.11.1978, case summary and discharge record of Holy Family Hospital) that the injury was caused by diving and not jumping, as the doctors described it thus while writing out these records. ITDC also submits that the oral evidence of Susan's expert witnesses PW 4, Dr. JA Smith and PW 19, Dr. Arjun Sehgal, the amateur swimming coach PW7, Mr. EJ King, and appellant's expert witness DW1, Dr. Manshramani and DW 2 - Mr. Balram Verma also indicate that the respondent did not jump into the pool. Learned senior counsel argued that neither Susan nor her parents disputed the hospital records as being fabricated when put to them in cross examination. It was submitted that Susan admitted that the doctors prepared the report of what was being told to them in her presence and that the records of the Holy Family Hospital were accurate; likewise Susan's parents, in their testimonies confirmed the accuracy of the hospital records. These, argued Counsel, clearly, were consistent with the other records that Susan had dived into the pool. Given the nature of this overwhelming evidence, the suit claim that she slipped after jumping into the pool feet first, was not only improbable, but unbelievable. ITDC's Senior Counsel argued that the Learned Single Judge fell into error in holding that the injury occurred in the circumstances alleged by the plaintiff.

21. Learned Senior Counsel for ITDC also argued that there was absence of evidence adduced by Susan to establish that the swimming pool was not maintained properly and that there were algae on the

floor, based on the depositions of witnesses. It was submitted that the photographs and materials produced were in respect of the state of affairs which existed much after the incident and were consequently unreliable. It was also argued that the most reliable evidence were the hospital records produced in the case, which established that the Susan had dived into the swimming pool; there was no question, therefore, of her having suffered any flexion injury, as was found in the impugned judgment; the nature of the injuries on the head clearly indicated a "burst" fracture and a resultant compression injury. It was argued that this conclusion is manifest on a plain reading of the testimonies of PW-4 and PW-22.

22. It was submitted that the Learned Single Judge fell into error in overlooking that the plaintiff had equivocated and even indulged in falsehood during the cross examination as to the circumstances which led to the injury; in this situation, the maxim or rule of evidence res ipsa loquitor was not attracted.

23. It was submitted that the medical witness, Dr. J.A. Smith, a Neurosurgeon produced by the plaintiff admitted in cross examination that for the injuries in the C-6 and C-7 vertebrae, there had to be vertical compression and flexion alone was insufficient to produce force to damage those vertebrae. It was emphasized that the plaintiff had sustained a lacerated and contused wound on the crown of the head, one inch long. The witnesses account, submitted Counsel, could not be considered reliable because he was informed about what transpired, and he deposed on that basis and on his appraisal of the x-

Ray reports. Counsel also pointed out what according to him were inconsistencies and improbabilities in the plaintiff's case. He also argued that even the testimony of Dr. Arjun Sehgal supported the ITDC, rather than the plaintiff.

24. Mr. Tulsi argued that the best evidence available was in the form of the contemporaneous medical records and record of examination of the plaintiff by various doctors. The best evidence being a written record was the most trustworthy and conclusive as to its contents. These documents undermined the plaintiff's claim altogether, as they established that she had dived headlong into the pool and sustained the injuries, which could not be attributed to ITDC's actions or alleged omissions. No evidence to the contrary, especially oral evidence, could be given preference, in view of Section 91 of the Evidence Act. Reliance was placed on the ruling of the Supreme Court in Roop Kumar v Mohan Thedani 2003 (6) SCC 595 and Duli Chand v Jagmender Das 1990 (1) SCC 19. Likewise, reliance was placed on Gurnam Singh v Surjit Singh 1975 (4) SCC 404. Counsel stressed that no amount of oral evidence to contradict documents that are required to be maintained in terms of Section 91, could have been given weight by the Court. He argued that the Learned Single Judge fell into error in doing so.

25. Learned Senior Counsel for ITDC also submitted that the findings in the impugned judgment regarding the glazed tiles being slippery on account of faulty maintenance, was contrary to the record. Here it was argued that the impugned judgment erred in not giving

credence to the testimony of DW-2. It was argued that the testimony of PW-14, based on the photographs Ex. PW-7/2 to 7/11 could not be of help because the photographs were taken four years after the incident. Moreover, argued Counsel, Susan's father admitted in his evidence that he made no complaint about lack of cleanliness or the pool floor being slippery at any time whatsoever. In the circumstances, the findings of the Learned Single Judge were unsustainable.

Arguments on behalf of Susan

26. Senior Counsel for the plaintiff, Susan, Shri Madan Bhatia, had urged that Susan was aggrieved by the duration of the protracted litigation given that the suit for damages was filed in January 1982 and that the hearings in the appeal were ongoing even as of January 2013. It is argued first, that the absence of pleadings in the written statement as regards Susan having dived and not jumped indicates that ITDC is advancing its case based on conjecture, second, that it has not challenged the material findings of the Learned Single Judge, third, that the grounds of appeal were based on falsehoods; fourth, that ITDC's case that the Plaintiff dived and did not jump was contrary to the facts on record. Susan also filed cross objections under Order XLI, Rule 22 stating that the loss of earnings claimed by the respondent was ₹1,30,00,000 but the learned Single Judge had decreed only ₹ 1,27,00,000 for loss of earnings.

27. It is also stated that the interest rate claimed was 18% on the decreed amount from the date of filing of the plaint till the date of

payment in Susan's favour, whereas the Learned Single Judge decreed an interest rate of 6% from the date of institution of plaint till the date of decree and then a rate of 10% thereon till the date of payment.

28. Finally, it is argued that Susan did not contemplate that the litigation would take more than 29 years (i.e. Jan 1982 to Feb 2011) to be completed. This delay, it is alleged, was caused by delaying tactics employed by ITDC, while the plaintiff was diligent in pursuing the litigation with great diligence, having completed recording all evidence in 1991. The expenses of the litigation were borne entirely by Legal Aid, Government of Queensland. Further, the damages awarded were estimated in Australian Dollars ("AUD") and then converted into the Indian Rupee ("INR") at the prevailing rate in 1982, of 1 AUS = ₹ 9. Due to the drastic decline in the exchange rate of the Australian Dollar, any award of damages in INR will be a paltry sum once converted to AUD for use in Australia by the respondent.

Points for determination

29. The following points arise for decision:

(1) Whether the plaint was filed by duly authorized persons?

(2) Whether the suit was wrongly allowed to be filed as a suit in forma pauperis under Order XXXIII of the Civil Procedure Code?

(3) Whether res ipsa loquitur applies in this case?

(i) Whether there was an injury? If yes, what type of injury was it?

(ii) Whether the nature of the injury and the manner in which it was sustained was established by the plaintiff, so as to create a presumption of negligence on the part of the ITDC?

(iii) Whether the question of the respondent having jumped or dived is a relevant question to be decided? If so, whether disregarding the hospital records is permissible under Section 92 of the Evidence Act?

(iv) Whether the floor of the swimming pool was slippery? Whether the swimming pool floor had algae and other slippery material on it due to lack of maintenance?

(4) Whether, if any, compensation is to be paid?

(5) Whether the finding as to the interest rate by the Learned Single Judge merits interference?

Point No. 1: whether the plaint was filed by duly authorized person

30. ITDC argued that Mr. G. L. Beer did not have the requisite power of attorney which was filed on 15.11.1991 because *first*, the procedure that Mr. Beer claims to have followed is contrary to the procedure in Chapter IV of the Delhi High Court (Original Side) Rules, 1967 and *second*, the power of attorney filed is not notarized by anyone and does not bear the endorsement of the Court official to whom it was submitted. The Learned Single Judge held that

procedural irregularities that do not go to the root of the matter cannot be a reason to deny substantive rights of parties and that Courts, under the Civil Procedure Code, have the power to ensure that injustice is not done to parties with a just cause. The Single Judge relied on *United Bank of India v. Naresh Kumar* (1996) 6 SCC 660 in holding so.

31. This Court however, notices that ITDC has not challenged these findings of the Learned Single Judge in relation to filing of the suit by an authorized person, or the due institution of the action, in the present appeal. During the hearing, Learned Senior Counsel for the ITDC merely reiterated the averment in the plaint that so long as the suit was filed without authority, it cannot be deemed to have been instituted on the file of this court. By the time the relevant authorisation was produced, the time granted by law had expired. Since the findings of the Learned Single Judge are unchallenged in the appeal, these findings continue to stand. In any event, this Court finds that both the objections raised by ITDC on this point are procedural objections that do not go to the root of the matter in the plaint, i.e. the questions of *culpability for negligence* - whether ITDC breached a duty of care to avoid reasonably foreseeable injury to the Susan and *causation of negligence* - whether the Susan's injury and quadriplegia was a reasonably foreseeable consequence of the ITDC's acts or omissions. Therefore, this finding of the Learned Single Judge, as to maintainability on the ground of whether it was instituted by a duly authorized person is sound and does not call for interference.

Point No. 2: Whether the suit was wrongly allowed to be filed as a suit in forma pauperis *under Order XXXIII of the Civil Procedure Code?*

32. IPA 1/82 (application to sue *in forma pauperis*) was admitted as a suit *in forma pauperis* by way of the order dated 24.09.1982 of the Learned Single Judge, in which it was observed that ITDC had repeatedly sought adjournments. After notice of the IPA was issued on 24.02.1982 to the defendant's counsel and the Standing counsel for the Government, time was sought for filing replies, which was allowed with an adjournment till 5.04.1982. Reply was filed on 18.03.1982 but on 5.04.1982, and several successive dates (10.05.1982, 5.08.1982 and 22.09.1982) permission was sought by the Government Pleader and on the last date, by ITDC, to make enquiries regarding the financial status of the plaintiff. Time was granted and ultimately on 22.09.1982, the Court refused further extension of time, declining a request for adjournment. ITDC on the same day sought, in the alternative, to examine Susan, under Order XXXIII, Rule 6. The Learned Single Judge, having granted three adjournments refused to grant another adjournment and allowed the IPA and directed it to be registered as a suit on 24.09.1982. That order observes that even after a suit is admitted *in forma pauperis*, the ITDC continues to have a right under Order XXXIII, Rule 9 to show that the plaintiff is not indigent.

33. Keeping in mind this history, it is the opinion of this Court that the appellant was granted several chances from 5.04.1982 to adduce evidence and be heard under Order XXXIII, Rules 6 and 7. ITDC however chose to forsake this by instead, waiting for the report of the

Government of NCT pleader, thus delaying the process by 7 months. As noted in *A. Prabhakaran Nair vs K.P. Neelakantan Pillai* AIR 1988 Ker 267:

> *"The application of Rule 6 of Order 33 comes into play only when the court finds no reason to reject the application on any of the grounds mentioned in Rule 5. Notice contemplated in that rule to the opposite party and the Government Pleader is only to receive the evidence and hear the same on the question of indigency. In this case notice was issued to the Government Pleader, but he did not submit any report. Even though the enquiry regarding indigency is not exclusively a matter between the plaintiff and the State alone and the opposite party, is also vitally interested and entitled to participate and adduce evidence, the question of realisation of court-fee is essentially a matter between plaintiff and the state. Notice to the Government Pleader is intended as notice to the state which may be in possession of materials and information regarding indigency or sufficient means. That notice is only to alert the state to file a report or raise objection if it so chooses. Nothing in the rule provides that there must be a report from the Government Pleader or the question of indigency could be decided only on the basis of such a report. At any rate the opposite party is not in any way concerned with the issue of notice to the Government Pleader on the report, if any, filed by him. The court need only consider the materials furnished under Rule 7. On the ground that no notice was issued to the Government Pleader, or no report was filed by him, the opposite party will not get any right to challenge the order especially when he got a fair chance of contesting the matter. This aspect was considered in the decision in Balakrishnan v. Narayanan Nair, 1984 Ker LT 374."*
> [emphasis supplied]

34. ITDC, thus continued to have a right under Order XXXIII, Rule 9 under which provision the Court can withdraw permission to file as

an indigent person even after an IPA is admitted. At the relevant time of enquiry, it was granted sufficient opportunity to enter its opposition as to why the suit should not be treated as one having been filed *in forma pauperis.* Moreover, Rules 10, 11 and 11-A of Order XXXIII make it amply clear that the scheme of Order XXXIII is merely to defer and not to altogether cancel the liability to pay court fee.

35. For these reasons, this Court is of the opinion that there is no infirmity in the admission of the suit *in forma pauperis*.

Point No. 3: Does res ipsa loquitur *apply in this case?*

36. In the common law of negligence, the doctrine of *res ipsa loquitur* (Latin for "the thing speaks for itself") states that the elements of duty of care and breach can be sometimes inferred from the very nature of the accident, even without direct evidence of how any defendant behaved. Although modern formulations differ by jurisdiction, the common law originally stated that the accident must satisfy two conditions. Upon a proof of *res ipsa loquitur*, the plaintiff need only establish the remaining two elements of negligence—namely, that the plaintiff suffered injury/damage, of which the accident was the immediate cause.

37. Indian tort law views the principle of *res ipsa loquitur* as one that shifts the burden of proof onto the defendant if *first*, the fact of injury is shown to have occurred by the plaintiff, *second*, the plaintiff is unable to establish the causation for the injury, *third*, the fact of the incident causing injury itself justifies the inference that the cause is

primarily within the knowledge of the defendant. See *Syad Akbar v. State of Karnataka*, (1980) 1 SCC 30; *Shyam Sunder v. State of Rajasthan,* (1974) 1 SCC 690; *Pushpabai Purshottam v. Ranjit Ginning & Pressing Co.,* (1977) 2 SCC 745. In *Shyam Sundar* (supra) the Court held that:

> *"The maxim is stated in its classic form by Erle, C.J. [See: Scott Vs. London & St. Katherine Docks (1865) 3 H & C 596, 601]:*
>
> > *'.... where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence in the absence of explanation by the defendants, that the accident arose from want of care…..'*
>
> *Res ipsa loquitur is an immensely important vehicle for importing strict liability into negligence cases. In practice, there are many cases where res ipsa loquitur is properly invoked in which the defendant is unable to show affirmatively either that he took all reasonable precautions to avoid injury or that the particular cause of the injury was not associated with negligence on his part. Industrial and traffic accidents and injuries caused by defective merchandise are so frequently of this type that the theoretical limitations of the maxim are quite over shadowed by its practical significance."*

In *Syad Akbar* (supra), the Supreme Court noted that the cases in which it is appropriate to employ *res ipsa loquitur* are those in which the event or accident is of a kind that it *"does not happen in the ordinary course of things if those who have the management and*

control use due care". The burden then shifts on the defendant to show that the accident is not a consequence of the negligence of the defendant or that the accident could not have been avoided by exercise of ordinary care and caution on part of the defendant. The Court elaborated on this, in the following manner:

> *"According to the other line of approach, res ipsa loquitur is not a special rule of substantive Law; that functionally, it is only an aid in the evaluation of evidence, "an application of the general method of inferring one or more facts in issue from circumstances proved in evidence". In this view, the maxim res ipsa loquitur does not require the raising of any presumption of law which must shift the onus on the defendant. It only, when applied appropriately, allows the drawing of a permissive inference of fact, as distinguished from a mandatory presumption properly so-called, having regard to the totality of the circumstances and probabilities of the case. Res ipsa is only a means of estimating logical probability from the circumstances of the accident. Looked at from this angle, the phrase (as Lord Justice Kennedy put it(3) only means, 'that there is, in the circumstances of the particular case, some evidence which, viewed not as a matter of conjecture, but of reasonable argument, makes it more probable that there was some negligence, upon the facts as shown and undisputed, than that the occurrence took place without negligence.... It means that the circumstances are, so to speak, eloquent of the negligence of somebody who brought about the state of thing which is complained of." 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.."*

In view of the above discussion, it is held that the applicability of *res ipsa loquitor* is a fact-based, contextual determination. Since the rule is one of evidence, and not a dogma which relieves the plaintiff from the burden of proving his or her claim, the principle that emerges is that *res ipsa loquitor* can be applied, once it is held that the plaintiff established the injury; the onus then would shift on the defendant/ITDC to explain the circumstances and whether it took the requisite care to avoid a foreseeable event.

Issue 3 (i): Did the plaintiff suffer injury as she alleged

38. PW 2/33, the investigation report prepared on the date of discharge of the plaintiff, (Susan) i.e. 13.6.78 at the Holy Family Hospital was drawn up by Dr. Arjun Sehgal, PW 19. PW 19/1, the admission and discharge report was also signed by Dr. Sehgal. These indicate that Susan suffered a fracture of the C6 and C7 with slight anterior sliding of C7 under C6. PW 4/1 written by Dr. JA Smith indicates that she suffered a fracture of C7 vertebral body with an anteriorly detached bone fragment. As a consequence of the fracture of her cervical column, Susan suffered quadriplegia as documented in PW 2/33, PW 19/1, PW 4/1.

39. PW 19/2, medical report signed by Dr. Midha; PW 19/3 is a case summary and discharge recorded signed by some other doctor, PW 19/4 is a history sheet signed by some other doctor; PW 19/5, PW 19/6 and other consultation records forwarded by Dr. Sehgal to Dr. Rana, Dr. Pant, Dr. Ramamurthy, Dr. Mathur, and Dr. Singh respectively. None of the doctors who recorded these documents were examined

before the Court. *State of Maharashtra v. Damu s/o Gopinath Shinde*, AIR 2000 SC 1691 is an authority for the proposition that without examination of such doctors, the Court cannot accept the version of events recorded in the hospital records marked at PW 19/2-19/6. It has been held in *Damu* (supra) that:

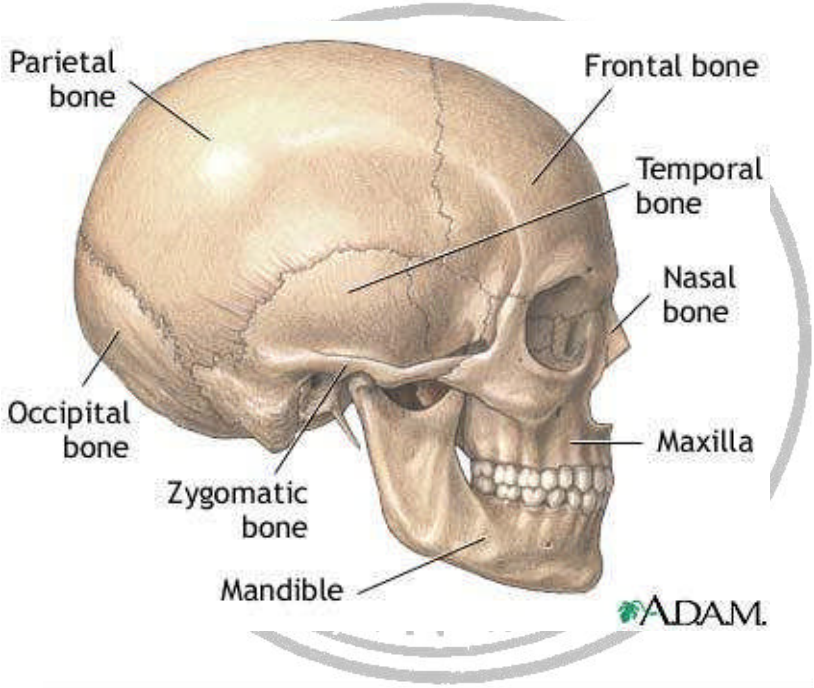
> *"The affidavits of the experts including the doctors can be taken as evidence. Thereafter, if cross-examination is sought for by the other side and the Commission finds it proper, it can easily evolve a procedure permitting the party who intends to cross-examine by putting certain questions in writing and those questions also could be replied by such experts including doctors on affidavits. In case where stakes are very high and still a party intends to cross-examine such doctors or experts, there can be video conferences or asking questions by arranging telephonic conference and at the initial stage this cost should be borne by the person who claims such video conference. Further, cross-examination can be taken by the Commissioner appointed by it at the working place of such experts at a fixed time".*

No such procedure was adopted in the present case; therefore, the hospital records, though contemporaneous, cannot be given such importance as to prevail over the testimonies of the doctors who deposed in court as experts – especially those who treated the plaintiff, immediately after the accident.

40. The injury was described as being *"a small cut on the back"* of Susan's head (Plaintiff depositions, vol. 1, p.7). On being shown hospital records in which the injury was recorded as having been a "contused lacerated wound one inch long in left parietal area just

along mid-line" (Plaintiff docs, vol.1, p. 94), Susan agreed that the injury occurred at the area being pointed to by Mr. Tulsi i.e. *"on the crown and is approximately an inch long going forward from the crown"* and *"slightly to the left of the midline"*.

41. For a better appreciation of the nature of the injury, an image of the human skull with description of its distinct parts or regions is reproduced below:



(Referred to https://www.google.co.in/search?q=parietal+area+of+skull&source=lnms&tbm=isch&sa=X&ei=S8GBU8qyIIWKuAT_kIHoDw&ved=0CAYQ_AUoAQ&biw=1103&bih=501#facrc=_&imgrc=FBdrFqRIz6kV4M%253A%3Bm8FBIdtA8ZzxPM%3Bhttp%253A%252F%252Fimg.dictionary.com%252Fparietal-171762-400 320.jpg at 15:51 PM on 25-05-2014)

42. Dr. Arjun Sehgal, PW-19, expert witness for the Plaintiff, and neurosurgeon, stated in his chief examination that Susan's x-rays indicated that she had a fracture of the cervical 7th vertebra which he termed to be a *"compression fracture of cervical seven vertebrae" and "a flexion injury."* In his cross-examination he stated that:

> *"This injury cannot be sustained only by compression alone. Compression alone cannot cause the fracture of the sixth vertebra. There would be a compression when a person jumps into the pool, slips and hits the head. It would depend upon the impact and extent of compression at the time of slipping."*

Dr. JA Smith in his cross examination by Mr. Tulsi states that the injury in the instant case was one of flexion (p. 178). It is pertinent to extract from Dr. JA Smith's chief examination by Mr. Bhatia (p. 175):

> *"The compression injury which you have now mentioned, is this different from flexion injury of the cervical spine? – By definition it is, and once again, one would have to define the ways in which we are going to describe these injuries. Because if one considers a flexion injury then there is some degree of compression occurring in that type of injury and that degree of compression is usually in the anterior portions of the vertebral bodies. So that you can't always say that it is this sort of injury or that sort of injury. But it's a matter of describing what one sees on the x-rays in correlation with what happened clinically. Maybe I should add to try and clarify what may be going through your mind and that is that if this was a true vertical compression injury, then one might expect that the features would be that of a burst fracture."*

While PW-4 Dr. Smith maintained, throughout his chief and cross examination that a *fracture like the one in the instant case always has*

some degree of compression, he is categorical in his statement that the injury in this case is largely a flexion injury.

43. DW-1 Dr. Manshramani states in his chief examination on viewing the x-rays that PW 1/14 and PW 1/13 indicates fracture of C6 and C7 (Def. docs p. 169). He terms the fracture an *"unstable one caused by compression and flexion forces"* and states that fragment indicates *"severe compression"* (p. 169). He states that PW 1/16 shows the fragment of vertebra as well, the significance of which is that it indicates an unstable fracture which causes paralysis of the limbs (Def docs p. 161). The Learned Single Judge did not take into account the evidence of DW-1 for two reasons. The first was that he was seen to be an interested witness, who accompanied the ITDC team to Australia, when deposition was recorded on behalf of the plaintiff; he assisted in the process on behalf of the defendant ITDC. The second was that DW-1 could not be considered as an expert, given the nature of his discipline and lack of experience whatsoever in the relevant field. This Court is of the opinion that Dr. Manshramani cannot be considered an expert in terms of Section 45 of the Evidence Act. He practiced as a consultant physician, and neither as a neurologist nor an orthopedic surgeon. When asked in his cross examination what his special subject of study was in M.D., Mr. Manshramani states *"Medicine as a whole. All systems of body excluding skin."* Section 45 of the Evidence Act, 1872 may be reproduced here for convenience:

> *"45. Opinions of experts.- When the Court has to form an opinion upon a point of foreign law, or of science, or art, or as to identity of handwriting or finger impressions, the opinions upon that point of persons specially skilled in such foreign law, science or art, or in questions as to identity of handwriting or finger impressions are relevant facts. Such persons are called experts.*

The threshold for the evidence of an expert witness is that of special skill in the area foreign to the Court (Ref. *State of Himachal Pradesh v. Jai Lal and Ors.*, (1999) 7 SCC 280; *Ramesh Chandra Agrawal v. Regency Hospital Ltd and ors.*, (2009) 9 SCC 709). The Supreme Court in *Jai Lal* (supra) has interpreted the meaning of this provision:

> *"An expert witness is one who has made the subject upon which he speaks a matter of particular study, practice or observation; and he must have a special knowledge of the subject. …therefore in order to bring the evidence of a witness as that of an expert it has to be shown that he has made a special study of the subject or acquired a special experience therein or in other words that he is skilled and has adequate knowledge of the subject."*

Dr. Manshramani, DW-1 neither studied neurosurgery nor orthopedics as a matter of particular study or practice, and he did not possess special knowledge of the subject. His exposure to neurosurgery extended to teaching the subject in the University he was employed in. On this count, this Court is of the opinion that Dr Manshramani's evidence cannot be considered as opinion of an expert witness under Section 45 of the Evidence Act.

44. This Court thus concludes that the injury suffered by Susan was a fracture of the cervical 6th and 7th bones - a flexion injury with some degree of compression, resulting in quadriplegia. This injury was caused when Susan jumped into the swimming pool, with her feet first. On making contact with the floor of the pool, her feet slipped forwards, causing her to fall backwards and hit her head to the side of the pool.

Point No. 3(ii): Whether the nature of the injury and the manner in which it was sustained was established by the plaintiff, so as to create a presumption of negligence on the part of the ITDC?

45. This Court is of the opinion that Susan's injury leading to quadriplegia is one that does not happen in the ordinary course of things, on jumping into the shallow end of the pool, especially given her status and background as a champion swimmer. For the sake of a complete appreciation of whether the evidence proved what she alleged, the following extracts of her cross examination, conducted in Australia, on behalf of ITDC on 24-10-1991 during the commission executed for the purpose:

> *"Now, Miss Beer, if I may state that the place of the head injury as we have now agreed cannot be caused by striking against the wall of the pool. What is your answer?*
>
> (Ans) *My answer is that I was injured in the way that I remember and the way that told you yesterday that the injury occurred. I jumped in and my feet slipped on the bottom of t pool and I fell back striking my head against the side of the pool. Now, whether it was actually the edge f the pool or the side of the pool I'm not in a*

position to say with any certainty. It happened in a fraction of a second.

I further put it to you that it is impossible to receive this injury by striking against the wall or the edge of the pool?

(Ans) *I say to you that the accident happened as I remembered and told you.*

I put it to you that you could only have sustained this injury if you had struck your head against the bottom of the pool?-

(Ans) *My head was nowhere near the bottom of the pool. I jumped in feet first."*

In the cross examination, Susan was asked to respond to an entry in the medical records of the Princess Alexandra Hospital, which mentioned *inter alia*, that she had sustained an injury in a "diving" accident. She replied, that she was *"never interviewed by Dr. Davies or any other doctor at the Princess Alexandra Hospital. I was never asked with regard to my injury and how it occurred….I the Holy Family Hospital in India I was not asked. I was not in a position to be asked how I sustained the injury."* Later, the same day, i.e on 24-10-1991, Susan asked to be shown the report, while answering the question put forth by Mr. Tulsi; her further statement reads as follows:

"In this report in this paragraph was referred to, the wording is such that, the facts are this young woman was admitted. That is a fact. It says that the accident was said to have occurred. She was said to have dived in. She was said to have floated. It says here, she was not conscious. Now that is an out and outright lie. I was conscious all the time. I remember being lifted out the water. I remember being on the side of the pool. I remember

going to the hospital. I remember being in the examining room. I clearly remember jumping into the water, my feet slipping on the slippery tiles when my feet touched the bottom of the pool and falling back. I place no respect to this document by Dr. Davies at all…."

Susan was also asked whether she changed her version at the time of filing of the suit for damages into having jumped and not dived into the pool. To this suggestion, she replied:

"When I was admitted to Holy Family Hospital I was in no position to be asked how the accident occurred. I was taken into the examination room and I was sedated for the skeletal tong traction. I was not asked then nor any other time in any other hospital how the injury occurred…."

Further a pointed suggestion was given by the ITDC counsel, which was emphatically denied:

"you entered the pool in a grossly negligent manner by diving into the shallow side with greater force than the depth of the pool would accept?—(Ans) *That is not true.*

And you suffered an injury on account of - wholly on account of your own negligence?_ (Ans) *That is not true.*

You have fabricated the manner of accident at the stage of filing of the suit which is contradictory to the medical reports relied upon by you?---- (Ans) *That is not true. It is not contradictory to any medical reports.*

Being an expert swimmer, you would have been able to make an accurate guess with regard to the depth of the shallow side; is that not so?— (Ans) *That's true; yes. I could see that it was shallow water. I could see that it was clear sparkling water and I umped in and my feet slipped on the tiles on the bottom of the pool as I have*

said. I have been jumping into pools all my life. I learnt to swim when I was about five or six years old."

In view of the above discussion and the state of evidence, it is held that the plaintiff established the facts and circumstances relating to the manner in which the injury was sustained. The burden consequently shifted on to ITDC to show either exercise of due care and caution and thus absence of negligence on its part, or that the injury of the respondent was not a result of the its negligence.

46. The Learned Counsel for ITDC submitted that the burden of proof to prove negligence lies on the plaintiff/respondent drawing from *Subhash Chander v. Ram Singh* 1972 ACJ 58, *Aswini Kumar v. UT of Tripura* AIR 1969 Tripura 26, *Champalal Jain v. BP Venkataraman*, 1966 ACJ 224, *Kundan Bai Agarwala v. Skh Safdar Ali*, AIR 1960 Pat 266 Para 4, 5. However, this Court is of the opinion that none of these cases finds application since the conditions for triggering application of the maxim *res ipsa loquitur* are fulfilled in this case. Thus, this Court is not persuaded by the submission of the ITDC that the burden in the instant matter to prove negligence lay on the plaintiff.

47. Once the presumption of defendant's negligence begins to operate, the burden of proof is on the defendant to pursue two courses of action available to him, as laid out in *Shyam Sunder* (supra):

"13. The answer needed by the defendant to meet the plaintiff's case may take alternative forms. <u>Firstly, it may</u>

consist in a positive explanation by the defendant of how the accident did in fact occur, of such a kind as to exonerate the defendant from any charge of negligence.

14. It should be noticed that the defendant does not advance his case inventing fanciful theories, unsupported by evidence, of how the event might have occurred. The whole inquiry is concerned with probabilities, and facts are required, not mere conjecture unsupported by facts. As Lord Macmillan said in his dissenting judgment in Jones v. Great Western [1930] 47 T.L.R. 39:

The dividing line between conjecture and inference is often a very difficult one to draw. A conjecture may be plausible, but it is of no legal value, for its essense is that it is a mere guess. An inference, in the legal sense, on the other hand, is a deduction from the evidence, and if it is a reasonable deduction it may have the validity of legal proof. The attribution of an occurrence to a cause is, I take it, always a matter of inference. The cogency of a legal inference of causation may vary in degree between practical certainty and reasonable probability. Where the coincidence of cause and effect is not a matter of actual observation there is necessarily a hiatus in the direct evidence, but this may be legitimately bridged by an inference from the facts actually observed and proved.

15. In other words, an inference is a deduction from established facts and an assumption or a guess is something quite different but not necessarily related to established facts.

16. Alternatively, in those instances where the defendant is unable to explain the accident, it is incumbent upon him to advance positive proof that he had taken all reasonable steps to avert foreseeable harm.

[emphasis supplied]

48. ITDC, in the instant case attempted both courses of action by *first* submitting that the incident in fact occurred because Susan dived, and did not jump in to the pool, thus not as a result of its negligence and *second*, by attempting to adduce proof to show that the floor of the pool was not slippery and did not have algae, thus not as a result of a breach of their duty of care.

49. However, prior to entering the question of ITDC's discharge of the burden of proof, this Court is compelled to observe that the evidence of the expert witnesses cannot be used to infer the *manner in which the injury was sustained by Susan*, i.e. whether she dived or jumped into the pool for two reasons. *First*, the submission of ITDC that the injury was an unstable burst fracture is contradicted by the ITDC's own witness DW-1 Dr. Manshramani in his testimony and *second*, any attempt to infer the manner in which Susan entered the pool, from the nature of injury she suffered, would merely be conjectural. These reasons are elaborated upon below.

50. During examination, when asked whether the degree of compression reflected in the x-rays of the Susan's injury could have resulted if one were to hypothetically miscalculate the depth of the pool and dive in thus crashing *"straight onto the floor"*, PW-4 Dr. JA Smith replied in the negative. He states *"I think it's much more likely that this would have produced what we call a burst fracture"*. PW-4 also stated that a true compression injury would most likely have resulted if the Susan had dived into the pool from the shallow end of the pool where the water was three feet deep, if her head struck the bottom of the pool causing an injury to the centre of the top of the

head. Both Dr. Arjun Sehgal, and Dr. JA Smith, deposed in their cross examination and chief examination respectively that a burst fracture would have resulted from a true vertical compression injury. Both these expert witnesses having examined the plaintiff at the earliest point in time, deposed such was not injury in the x-rays of this case. Thus, both these expert witnesses for the plaintiff deposed that the injury was not a burst fracture i.e. true compression injury.

51. ITDC's submission is that the injury suffered by Susan is an unstable fracture causing paralysis. Its witness DW-1, after viewing x-Rays PW 1/7 to PW 1/16, deposed that the x-rays indicate an unstable fracture which causes paralysis of the limbs. In the submissions of ITDC, it is argued that heavy pressure on the upper part of the skull causes unstable fracture of the cervical, which compresses the spinal cord to cause paralysis. It is also the case of the ITDC, that a burst fracture is an unstable fracture and that diving is a way to cause burst fracture. It is argued that unless there is heavy pressure or compression on the C6 and C7 vertebrae, an unstable burst fracture cannot be caused. DW-1 also stated that the compression force resulting from someone slipping and hitting the back of his or her head to the wall of a pool is not sufficient to cause the fracture of C6 and C7 vertebrae, as in the instant case, because when one hits his or her head on the back, the chin hinges forward and makes contact with the upper part of the chest, thus preventing an injury to the C6 and C7.

52. At the outset, this submission of the appellants falls as their expert witness DW 1, Dr. Manshramani in the cross-examination

states, when asked if he sees any evidence of burst fracture in any of the x-rays of Susan: *"Burst fractures cannot be seen in x-rays"*. By virtue of this glaring inconsistency in ITDC's case and its evidence, this Court is not swayed by its arguments with respect to the nature or type of injury.

53. Moreover, this Court is also not persuaded by this ITDC's submission as it is clear that *only the nature and type of the injury can be established by the evidence of the doctors in their testimony, and that the version of events leading to the injury cannot be established through expert witnesses*. Only the account of events from the plaintiff/plaintiff's eye witnesses or direct contradicting testimony from the eye witnesses on behalf of the defendant can be used to discern the manner in which an injury of this nature could have resulted. *Any other evidence is necessarily hypothetical and conjectural*. This is also evident from Dr. Smith's statement after recounting Susan's version of events:

> *"…if that is the state of events, then she could have sustained such an injury when her head hit the side of the pool. But then if she subsequently fell into the pool and her head was going downwards, then the back of her head could also have hit the bottom of the pool. And in that way there could have been a flexion injury. Now, what the truth is, I don't know."*

Dr. Sehgal also stated that

> *"The injury which the Respondent has suffered could have been caused from the description given to me of the accident"*

These witnesses are only able to state that the injury of Susan was a *plausible consequence of her having jumped into the pool, feet first*. Even DW-1 Dr. Mansharamani, the expert witness for ITDC, stated in his cross-examination that:

> *"It is correct that if a person jumps into the pool slips and falls backwards and his head hits a wall at the back with great force, his head may suffer both flexion and compression injuries. – It will mainly be a flexion injury."*

For the above reasons, this Court is of the opinion that the expert testimony on the nature of the injury (i.e. that it is a largely flexion injury with some degree of compression) cannot be relied upon in order to establish the manner in which the injury was suffered.

54. During the hearing of the appeal – as well as during the trial, Learned Counsel for the ITDC laboured to establish that the nature of the injuries can be used to infer the manner in which the injury occurred. The submission was that the nature of the injury indicated an unstable burst fracture and a compression injury, *which could only result from diving, head first in to the pool*. Apart from the fact that this line of reasoning is entirely conjectural, as observed earlier, this effort was entirely dissimulative to say the least. On the point of the manner in which the injury was sustained, the deposition of PW-1 and PW-2 were clear as to what transpired on the fateful day; the re-creation of the incident was coherent and clear. ITDC's cross examination and attempts to discredit these depositions and the references to the expression "jump" in various documents, to somehow show that Susan dived into the pool head first at the shallow

end were baseless. In the cross examination of PW-19, Dr. Sehgal (who deposed that he was the first doctor to examine the plaintiff on the date of the incident, after she was taken to the hospital) a suggestion was put to him more than once that Susan had not jumped but dived. At each stage, he deposed that the account received by him was that she jumped into the pool – Susan too had told him that. ITDC places great emphasis on two documents, including one recorded by Dr. Sehgal, which refer to the plaintiff having dived, resulting in the incident. The concerned doctor, Dr. Middha, was not examined; moreover, Dr. Sehgal stated that even though at one place, the expression "dived" was used, the same day, in a note, Ex. PW-2/34 he had expressly recorded that the plaintiff was said to have "jumped" into the pool. The first document in this regard also stated that the plaintiff is 'alleged' to have dived into the pool.

55. This Court is of the opinion that the terms "jumping" or "diving" cannot be over-emphasized on behalf of the Defendant/ITDC to derive semantic hairsplitting mileage. Here, it would be useful to notice that in the suit, the plaintiff had stated that as soon as she *"jumped into the water and her feet touched the floor of the pool, they slipped resulting in loss of control of the plaintiff and the plaintiff fell backwards and her head hit against the wall of the pool."* After stating at two places in the written statement that the plaintiff did not jump into the pool in the manner alleged by the plaint, it was averred by the ITDC that:

> *" Apparently, the plaintiff fell into the swimming pool otherwise than as alleged and suffered injury because of her own negligence and failure to take due care. As a matter of fact, the plaintiff and her brother had indulged in some abrupt play and shockingly all of a sudden the Plaintiff was seen later in the swimming pool before any one of those present at the swimming pool could have known what was happening and helped her. The accident happened suddenly and in such a manner that no one could have avoided the accident."*

From paragraphs 7 and 9 of the written statement, it is clear that the ITDC merely states by way of conjecture that the respondent had "fallen" into the pool otherwise than as claimed by her without advancing any averment on how Susan had fallen into the pool. Moreover, in para 6, *the ITDC has itself used the terms jumping and diving loosely and interchangeably, claiming that either method of entering the pool was wrong*. Thus, it is clear from their averments in the written statement that their case never hinged on how Susan was negligent by "diving" as opposed to "jumping".

56. As regards DW2's testimony as to the manner in which the injury was sustained, ITDC denied that the plaintiff's relatives took her out of the pool; it averred that one of its attendants, Balram Verma, DW-2, brought Susan out of the pool. However, this Court is constrained to disregard the evidence of DW-2 on the manner in which the injury was injured, due to the several inconsistencies in his depositions. He stated there was a bump on Susan's head (at p. 245 defendant documents) and that it had become "redish". This is patently false given that both parties in this dispute agree that Susan's

lacerated wound was around the crown of head, covered by hair, and there was no injury to any part of her head that could have become reddish. Likewise, while the written statement of the ITDC itself states in paragraph 11 that the parents of Susan were relaxing in the chairs near the pool, DW-2 contradicts these statements by stating that Susan's mother was not in the vicinity of the accident (p. 285) and father was at the counter near the register (p. 259). The single judge observed in relation to DW-2 in the impugned judgment:

> *"DW2 Mr Balram Verma was stated to have been posted at Akbar Hotel as a lifeguard. According to him, he had joined ITDC on 10.03.1978. Mr Verma stated that on 05.05.1978 he was present at the swimming pool in his lifeguard gear and the manager was sitting with him. One elderly man accompanied by two children, one of whom was a boy and the other was a girl, came to the pool, in a playful mood and they kept their towels near the very first umbrella on the pool. The boy and the girl were playing the game of catching each other. While doing so, the girl suddenly took a vertical dive in the shallow portion of the swimming pool. According to this witness, he immediately ran on seeing this incident and the other guests also shouted. The other guests, who were from Aeroflot, also helped him in holding the girl. According to him, he placed the girl on the floor on the edge of the pool and he found that there was a bump on the middle of the head of that girl and it had become reddish. He stated that he obtained ice and bandage from his office where first-aid articles were kept and then he applied ice and bandage on the head of that girl. He stated that he as well as the girl's father asked her to shake her leg but she was not able to move her leg and she started weeping.*
>
> *49. If this witness is to be believed, the plaintiff took a vertical dive in the shallow portion of the swimming pool. In his cross-examination, he was asked as to what was the*

distance between the wall of the pool and the place on the floor where the girl struck her head. His answer was ---—two feet. I am straightaway inclined to agree with Mr Madan Bhatia, the learned senior counsel who appeared on behalf of the plaintiff, that this would be a virtual impossibility. From the edge of a pool at the shallow end where the water was only 2' 6" to 2' 9" deep, it would be impossible for any person to take a vertical dive and hit his or her head within two feet of the wall. According to the evidence on record, the plaintiff was about 5' 6" in height. If she was standing on the edge of the pool in a stationary position, she would probably have to jump six feet into the air to enable her body to turn so that it could make a vertical impact with the water in the pool. This could not have been done and in fact was not done as no witness has testified to this. Apart from that, Mr Verma stated that the girl and boy were running and they were playing the game of catching each other and it was then that she took a vertical dive in the shallow portion of the swimming pool. When a person is in motion, it would be impossible for that person to have hit his head on the floor of the swimming pool within two feet of the edge. The momentum would take that person much ahead. Therefore, the theory propounded by this witness is only to be stated to be rejected."

Given the inconsistencies in his depositions, this court thus finds no infirmity with the approach and conclusions of the Learned Single Judge as regards DW-2's account of the manner in which the injury was sustained.

57. Having not pleaded anywhere in the written statement that the plaintiff dived headlong into the swimming pool (discussed in greater detail under Point no. 3(iii)), ITDC could not have taken advantage of that ambivalence and theorized, during the trial that Susan in fact dived head first. Its efforts to somehow establish that the injuries

sustained by Susan could be explained only as a result of a burst stable fracture, i.e. implying a vertical impact on the head due to a headlong fall, are speculative afterthoughts. For these reasons, this Court observes that Susan has established the nature and the manner in which the injury was sustained, thus creating a presumption of negligence on the part of the ITDC.

Point No. 3(iii): Can the question of the Respondent having jumped or dived be decided at this stage and if so, whether disregarding hospital records was impermissible under Section 92 of the Evidence Act

58. It would be useful in the context of the question to be considered, to extract the findings in the impugned judgment, which discuss the direct evidence as to what happened, more particularly the testimonies of the plaintiff, Susan (PW-1) and her father Geoffrey Beer (PW-2). As to Susan's deposition, the Learned Single Judge noticed, *inter alia*, that:

> *"33. The plaintiff further stated in her testimony that she had gone to take a swim on 05.05.1978 in the swimming pool at Akbar Hotel at about 5 O'clock. According to her, it had been a hot day and they had gone down to the pool; her father, mother, her younger brother and herself. When they got to the pool side area, her father, brother and mother went ahead to get into the pool and she stopped at the edge of the pool to take off her robe and her sandals. Thereafter, she stated that she remembered that her hair got tangled in the strap of her swimming costume. She took time to fix that up and to untangle it. Then she walked over to the shallow end of the pool and she jumped into the pool. She stated that when she jumped in the pool she felt that her feet touched the bottom of the pool and immediately they slid forward throwing her backwards against the side of the pool. She*

felt her head strike the side of the pool. Then her brother and father came over and supported her in the pool and they, with the help of another person, whom she did not know, lifted her on to the side of the pool. She stated that she remembered that her father was being very careful in lifting her and he supported her very gently but very strongly and her head was very stable in the lifting. She stated that when her feet touched the bottom of the pool, she found it to be very slippery and immediately both her feet slid forward. She stated that her body was tingling at that time, right from her shoulders down to her feet. And, then her body started to go numb. She stated that she also had a small cut on the back of her head where it struck the side of the pool and there was a bit of blood in the water of the pool. She stated that while they were waiting for the ambulance, they transported her on a stretcher-like thing to the manager's room where they waited for about two hours. Thereafter, she was transported to Holy Family Hospital in the said ambulance. Dr Arjun Sehgal was present at Holy Family Hospital and he took charge of the case. He arranged to have the X-rays taken etc.

34. This part of her testimony has gone unchallenged. From the above evidence, it is clear that the plaintiff has been able to establish that she had gone to take a swim along with her family members in the swimming pool at Akbar Hotel at about 5 pm on 05.05.1978. That when she jumped into the pool from the shallow end, her feet, on touching the floor of the pool, slid forward as the same was slippery. Because of this, her head hit the side of the swimming pool. Consequent thereupon, she suffered the injuries to her cervical spine and the lacerated injury on her head. The injury caused to the cervical spine and particularly the 6th and 7th vertebra, as indicated above, resulted in her ultimately becoming a quadriplegic, i.e., not having any sensation below her neck. In layman's language, she was paralyzed neck downwards. It is also clear from the

testimony of PW4 Dr J. A. Smith that there was no chance of her recovery and the injury sustained by her was for life."

PW-2's testimony was, likewise, discussed in the following manner:

"With regard to the manner in which the incident took place, PW2 Mr G. L. Beer stated that his son entered the pool just before his wife and himself. His wife entered through the ladder because she did not like immersing quickly. He walked past the ladder and as he had an injured knee at that time and was on a crutch, he sat on the edge of the pool and then slipped into the water so as to avoid any jar to his knee, which would be caused by jumping in. He stated that the plaintiff entered the pool after them. He said that she removed her gown and sandals while his wife and he swam to the centre of the pool and their son was possibly half way from the centre of the pool. He stated that they watched the plaintiff walk down the edge of the path where she had draped her gown and sandals. She came straight from the bottom of the path at the shallow section and jumped into the water from the edge of the pool. The water was about 2' 6'' deep at that point. He then saw her slip backwards and disappear under the water. He believed that she may have struck her head. Then, he stated that his wife was obviously also watching because she called out -"Sue's hurt". He then immediately swam where the plaintiff was. His son Nicholas had also obviously seen the incident and he reached the plaintiff before him (Mr G. L. Beer). The said witness positively stated that he saw the plaintiff slipping backwards. He stated that although he did not see her head striking against anything, but she disappeared under the water and he feared that she struck her head under the wave trap.

41. He further stated that when he reached the place where the plaintiff was, his son Nicholas was supporting her. She was on her back, face upwards and she had a small cut on the top of her head which he estimated was between half and three quarters of an inch long. He stated that there was

a little bit of blood coming out of the cut and it is then that he realized that she had struck her head on the edge of the pool.

42. PW2 Mr G. L. Beer further stated that the plaintiff was quite conscious, but dazed and he went around the other side of her. His son Nicholas was on that side. He asked a bystander to help him lift her from the pool. With great care they lifted her and slid her over the edge of the pool. He stated that he was conscious that his foot slipped on the glazed tiles on the floor of the pool. He knelt beside her and she said- "Oh no please". He asked her to gently move her toes and fingers and found to his horror that she could not move them. He then asked a bystander to get the manager of the hotel and a doctor. It is further stated by the said witness that after some time two men arrived, one with a portmanteau and he turned out to be Dr Chowdrah and the other, he presumed, was the manager of the hotel. The said witness was angered by the fact that the said doctor merely said that the plaintiff was suffering from concussion and that she should be taken to the hospital for the night in the hotel car. He demanded that an ambulance be called with a specialist doctor. The manger suggested that the plaintiff be lifted but the witness Mr G. L. Beer absolutely refused to allow her to be moved. However, they gently moved her on to a lylo because it was very hot at the pool side. According to this witness the ambulance took about two hours to arrive which was an incredibly long time. Thereafter, she was taken to Holy Family Hospital. A doctor was attending, whose name was later found to be Dr Arjun Sehgal. He required X-rays to be taken. The doctor told him that her daughter had suffered a spinal injury and she was paralyzed from the chin down."

59. The Learned Counsel for the ITDC argued that the Learned Single Judge erred in rejecting the submission that the plaintiff had dived and not jumped in to the pool, a finding that is argued to be

contrary to the evidence on record. The Counsel submits on evidence, *first*, that the oral evidence of the respondent cannot be allowed as it contradicts the hospital records in PW 19/2 and 19/4, history sheets signed in the hand of PW 19, Dr. Arjun Sehgal, thus violating Section 92, Evidence Act; *second*, that the Single Judge ignored the evidence of E.J. King, PW 7, Susan's swimming coach who stated that the usual entry into the pool is not to jump but to dive, and that swimmers are trained to program themselves subconsciously to dive; *third*, that the Single Judge has not considered that Susan's doctor himself states that it was a case of diving and not jumping. The Counsel for the ITDC also argued that the nature of the injury indicates that Susan must have dived as such an injury could not have resulted from jumping into the pool feet first.

60. However, the Learned Single Judge had observed in Para 45 of the impugned judgment that the alleged fact of diving not having been pleaded in the written statement, cannot be introduced in evidence by the ITDC. The appellant ITDC has not challenged this finding of the Learned Single Judge in their grounds of appeal, and as such, this finding continues to stand. Rule 2 of Order VIII of the Civil Procedure Code may be reproduced for convenience:

> *"New facts must be specially pleaded – The defendant must raise by his pleadings all matters which show the suit not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence as, if not raised, would be likely to take the opposite party by surprise or would raise issues of fact not arising out of the plaint, as, for instance,*

> *fraud, limitation, release, payment, performance, or facts showing illegality."*

The meaning of this Rule is elaborated upon in *Udhav Singh v. Madhav Rao Scindia,* AIR 1976 SC 744, paragraph 22 that:

> *"If the plea or ground of defence 'raises issues of fact not arising out of the plaint', such plea or ground is likely to take the plaintiff by surprise, and is therefore required to be pleaded. If the plea or ground of defence raises an issue arising out of what is alleged or admitted in the plaint, or is otherwise apparent from the plaint itself, no question of prejudice or surprise to the plaintiff arises. Nothing in the Rule compels the defendant to plead such a ground, nor debars him from setting it up at a later stage of the case, particularly when it does not depend on evidence but raises a pure question of law turning on a construction of the plaint. Thus, a plea of limitation that can be substantiated without any evidence and is apparent on the face of the plaint itself may be allowed to be taken at any stage of the suit"*

61. It is a settled principle of law that the decision of a case cannot be found on grounds outside the pleadings of the parties. See *Trojan and Co. v. Nagappa* AIR 1953 SC 235, *Kalyan Singh Chouhan v. CP Joshi*, (2011) 11 SCC 786. Evidence in absence of pleadings in that regard and evidence produced by the parties at variance with the pleadings cannot be considered or relied upon. See *Union of India v. Ibrahim Uddin*, (2012) 8 SCC 148, ¶62; *Kashi Nath through LRs. v. Jaganath* (2003) 8 SCC 740; *Ram Sarup Gupta through LRs v. Bishun Narain Inter College,* AIR 1987 SC 1242.

62. The plaint states at paragraph: "*That the plaintiff jumped into the pool from the shallow side opposite the diving board.*" The

Plaintiff in her chief examination also states that as soon as she jumped into the pool, her feet slid forward throwing her backwards against the side of the pool, thus causing her head to strike the side of the pool. During her cross-examination, the Plaintiff reiterates that she *"jumped in"* and her *"feet slipped on the bottom of the pool"* and she *"fell back"* and struck her head. When told that she could have only sustained this injury by striking against the wall or the edge of the pool, she replied *"My head was nowhere near the bottom of the pool. I jumped in feet first."* On re-examination, she stated:

> *"If, as the defendants say, I had dived into the pool from the shallow end I would have struck the bottom of the pool first with my hand because you always dive with your hands extended to break the water before your head hits the water. If I had dived and struck the bottom of the pool, my hands would have struck first and then the front part of my face or my forehead would have struck the bottom of the pool."*

63. ITDC's Written Statement at no point advanced the argument that Susan had in fact, dived and not jumped in to the pool. It would be relevant to extract the relevant parts of the written statement:

> *"6. As regards para 6 of the plaint, the Appellant denies the same as stated. The plaintiff is not aware of the averments made therein…The Respondent should not have jumped into the pool from the shallow side. For jumping into the swimming pool, the swimmers have necessarily to use the diving board and dive on the deep side into the swimming pool. The water below the diving board is deep and not shallow and jumping or diving into the swimming pool is permitted only from the diving board accordingly. The jumping or diving on the shallow*

side by the Respondent was wholly wrong, negligent to and contrary to the well accepted norms of swimming and in violation of the laid down Rules. …There are fixed stairs built into the swimming pool for going into the swimming pool for swimming and obviously the Respondent did not enter the swimming pool through the stairs which was a wholly and negligent act on her part instead of getting into the swimming pool through the built in stairs. Obviously, therefore, the Respondent had indulged in wrong and negligent act of jumping into the pool from the shallow side even assuming without admitting that she had jumped into the pool, as alleged by her, although the incident was clearly otherwise and not as alleged.

7. …The Respondent had obviously fallen into the swimming pool otherwise than as alleged by her and not even jumped into the swimming pool as alleged by her.

9. …Apparently, the Respondent fell into the swimming pool otherwise than as alleged and suffered injury because of her own negligence and failure to take due care.

10. …As regards the safety or otherwise of jumping on the shallow side of the pool, it depends upon how the person may jump into the pool inspire of the fact that it is not to be done and if it is done it necessarily means that the entire responsibility for consequences would be of the swimmer.

64. As briefly mentioned earlier, from paragraphs 7 and 9, it is clear that the ITDC merely states by way of conjecture that Susan had "fallen" into the pool otherwise than as claimed by her, without advancing any averment on how Susan had fallen into the pool. Moreover, the extract of paragraph 6 of the written statement indicates that the ITDC only avers that Susan ought not to have jumped into the

pool in the shallow side. Further, in para 6, the ITDC has *itself* used the terms jumping and diving loosely and interchangeably, claiming that either method of entering the pool was wrong. This averment in the written statement thus *clearly does not hinge on whether diving was particularly negligent as against jumping.*

65. That Susan "took a vertical dive" was raised for the first time by the ITDC in evidence, in the statement of DW 2, Shri Balram Verma, lifeguard on duty (whose testimony has been held to not be credible, under Point 3(ii)). The theory that Susan dived and did not jump in to the pool was then put forth as a hypothetical question to Susan in her cross examination. In fact, in the cross-examination of plaintiff's expert witness Mr. JA Smith, on behalf of ITDC, the Learned Counsel for Susan objected that ITDC's "initial case" during his cross examination was that the respondent's supposed dive was at an angle of 45 degrees, after which he has shifted his case to 60 or 70 degrees. To this, ITDC's counsel responded categorically (p. 191 of the commission's procedings) stating: *"I've not put my case. All these are hypothetical."* Subsequently (p. 192), Mr. Tulsi on behalf of ITDC also clarified to Dr. AJ Smith, PW-4 that *his hypotheticals were not with respect to the Respondent's specific incident* (p. 192).

66. The Counsel for ITDC sought to argue that had Susan dived and not jumped into the pool, thus sustaining an injury that could not possibly have resulted from jumping. However, no pleadings regarding the alleged diving were advanced in the written statement. This theory of diving arose only in ITDC's evidence and in the cross-examinations of Susan's witnesses, and subsequently in the arguments

of the ITDC. This Court is mindful that in *Shyam Sundar* (supra), the Supreme Court (citing Lord Macmillan's dissent in *Jones v. Great Western* – quoted at paragraph 48 in this judgment) noted the difference between a defendant advancing a case by conjecture and one by inference from the adduced evidence. The latter, it was observed, was permissible. This Court holds that *even if ITDC sought to advance its case by inference from the established evidence, it ought to have pleaded that case in its written statement*. This Court thus agrees with the findings of the Learned Single Judge in this regard. In absence of pleadings in this regard in ITDC's written statement, this Court is of the opinion that the question of whether the respondent dived or jumped into the pool cannot be considered in the appeal.

67. This being the case, the further question is whether documentary hospital records were permitted to be contradicted by oral evidence of PW 19 contrary to Section 92 of the Evidence Act does not even come up for consideration. Notwithstanding this, a few observations on this submission are apposite. Counsel for ITDC tried to argue that the contents of the hospital records indicate that the respondent has "dived into the pool", and that Dr. Arjun Sehgal, PW 19 has contradicted the content of documents PW 19/2, PW 19/4 in his oral evidence by stating that that the respondent "jumped" into the pool in oral evidence. Learned Counsel had placed reliance on Section 92 of the Evidence Act, the "best evidence rule" and on *Duli Chand v. Jagmender Dass*, 1990 1 SCC 19, *Roop Kumar v. Mohan Thedani*, 2003 6 SCC 595 *Pradip Buragohain v Pranati Phukan*, (2010) 11

SCC 108, and *Gurnam Singh v. Surjit Singh and Ors.*, 1975 (4) SCC 404 to advance his argument. This Court finds that this argument is not persuasive.

68. Section 91 of the Evidence Act reads:

> *"91. Evidence of terms of contracts, grants and other dispositions of property reduced to form of document.- When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.*
>
> *Exception 1.-- xx*
>
> Section 92 reads:
>
> *"92. Exclusion of evidence of oral agreement.- When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms:*
>
> *Proviso xxx"*

Section 92, like Section 91, is based on the "best evidence rule" as noted in *Bai Hira Devi and Ors v. The Official Assignee of Bombay*, AIR 1958 SC 447. In *Bai Hira Devi* (supra), it was held that:

> *"The normal rule is that the contents of a document must be proved by primary evidence which is the document itself in original. Section 91 is based on what is sometimes described as the "best evidence rule". The best evidence about contents of a document is the document itself and it is the production of the document that is required by s. 91 in proof of its contents. In a sense, the rule enunciated by s. 91 can be said to be an exclusive rule inasmuch as it excludes the admission of oral evidence for proving the contents of the document except in cases where secondary evidence is allowed to be led under the relevant provisions of the Evidence Act."*

69. The need to prove contents of a document by producing it is elaborated upon by the Supreme Court in *Roop Kumar* (supra), which judgment the Learned Counsel for appellants himself has placed reliance upon. The Court observed there that the principle underlying this provision is to integrate all elements of a jural act namely, (a) the enaction or creation of the act. (b) its embodiment in a single memorial when desired; (c) its solemnization on fulfillment of the prescribed form if any; and (d) the interpretation or application of the act to the external objects affected by it. The consequence of integrating all elements of a jural act into a single written expression, is to deprive of legal effect all other utterances as regards the jural act. In the Court's words:

> *"16. …when a jural act is embodied in a single memorial all other utterances of the parties on the topic are legally immaterial for the purpose of determining what are the terms of their act. This rule is based upon an assumed intention on the part of the contracting parties, evidenced by the existence of the written contract, to place*

themselves above the uncertainties of oral evidence and on a disinclination of the Courts to defeat this object. When persons express their agreement in writing, it is for the express purpose of getting rid of any indefiniteness and to put their ideas in such shape that there can be no misunderstanding, which so often occurs when reliance is placed upon (SIC) statements. Written occurs presume deliberation or the part of the contracting parties and it is natural they should be treated with careful consideration by the Courts and with a disinclination to disturb the conditions of matters as embodied in them by the act of the parties. (see Mc Kelvey's Evidence p. 294).

17. It is likewise a general and most inflexible rule that wherever written instrument are appointed, either by the requirement of law or by the contract of the parties, to be the repositories and memorials of truth, any other evidence is excluded from being used either as a substitute for such instruments, or to contradict or alter them. This is a matter both of principle and policy."

70. This Court is compelled to observe that the record of an injury does not comprise a jural act that ought to be reduced into writing so as to deprive all other occurrence towards the act of any legal or jural effect. No rule, statutory enactment or compulsion that enacts an obligation to record so, as to exclude all other versions, was brought to the notice of the Court. Thus, to use the framework of Section 91 and 92 and the best-evidence rule in the context of hospital records recording injuries is misguided.

71. Furthermore, the words *"or any matter required by law to be reduced to the form of a document"* in Section 92, albeit present in Section 91 of the Act, do not carry the same meaning as those in Section 91. This is so because Section 92, unlike Section 91, states

that *"no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest"*. This indicates that the matters *"required by law to be reduced to the form of a document"* under Section 92 are necessarily matters which are reduced into instruments between *"parties"* to the instrument. This view finds support in Sarkar on Evidence, 15th ed. Rep. 2004, vol. 1, p.1311-1311 which states:

> *"… the words "as between the parties … interest" are to be read along with the words "contract, grant or other disposition of property" and also along with the words "or any other matter… of a document". The words as "between the parties to any such instrument" further point out that s 92 applies only to dispositive documents ie documents by which rights are disposed of, eg: "contract, grant or other disposition of property". Those words naturally apply to dispositive documents between contracting parties or parties to whom any property is transferred.*
>
> *… Thus words "any matter" in the phrase "any matter required by law to be reduced to the form of a document" have therefore reference to such matter as creates dispositive documents, such as "contract, grant or other disposition of property." Taken together, the words therefore mean, any matter required by law to be in writing, and which is a "contract, grant etc." ie the words "any matter required by law…document" are* ejusdem generis *with "contract, grant or other disposition of property." Documents other than dispositive documents required by law to be reduced to writing do not come within the section."*

72. The omission of these words from Section 91 is that even a third party to a document embodying a jural act between others can

prove the said jural act only by producing the document. This view finds support in *Roop Kumar* (Supra), and *Bai Hira Devi* (supra). *Bai Hira Devi*, also held:

> *"Like s. 91, s. 92 also can be said to be based on the best evidence rule. The two sections, however, differ in some material particulars. Section 91 applies to all documents, whether they purport to dispose of rights or not, whereas s. 92applies to documents which can be described as dispositive. Section 91 applies to documents which are both bilateral and unilateral, unlike s. 92 the application of which is confined only to bilateral documents. Section 91 lays down the rule of universal application and is not confined to the executant or executants of the documents. Section 92, on the other hand, applies only between the parties to the instrument or their representatives in interest. There is no doubt that s. 92 does not apply to strangers who are not bound or affected by the terms of the document. Persons other than those who are parties to the document are not precluded from giving extrinsic evidence to contradict, very, add to or subtract from the terms of the document. It is only where a question arises about the effect of the document as between the parties or their representatives in interest that the rule enunciated by s. 92 about the exclusion of oral agreement can be invoked. This position is made absolutely clear by the provisions of s. 99 itself. Section 99 provides that "persons who are not parties to a document or their representatives in interest, may give evidence of any facts tending to show a contemporaneous agreement varying the terms of the document." Though it is a only variation which is specifically mentioned in s. 99, there can be no doubt that the third party's right to lead evidence which is recognized by s. 99 would include a right to lead evidence not only to vary the terms of the document, but to contradict the said terms or to add to or subtract from them."*

73. Since hospital records are neither conclusive of rights nor are instruments as between parties, this Court is of the opinion that the argument that PW 19's oral evidence contradicts hospital records, thus violating Section 92 is untenable.

74. Thus, this Court is of the opinion that the question of whether the plaintiff dived or jumped cannot be gone into in this appeal, since it was not pleaded in the written statement. The question of whether the oral evidence contradicts hospital records, regarding Susan having allegedly "dived", and thus violating Section 92 of the Evidence Act consequently need not be answered. In any event, it is found that hospital records, not being documents that are dispositive of any rights, do not fall within Section 92 of the Evidence Act.

Point No. 3(iv): Was the floor of the swimming pool and did it have algae and other slippery material on it due to lack of maintenance

75. By the maxim *res ipsa loquitur,* the burden rests on ITDC to show that it has exercised due care and caution and was thus not negligent.

76. Towards this, ITDC had brought DW-2, Mr. Balram Verma as the witness to depose on the cleaning measures undertaken in the swimming pool. Mr. Balram Verma deposed in his chief examination regarding the procedure for cleaning the pool with bleaching powder and alum, in order to settle the dust particles on the floor of the pool. On the following day, the brush attached to the section sewer cleans the dust and the dirty water is pumped out of the pool. He also stated the cleaning procedure he was required to follow to check whether the

pool was adequately chlorinated, and that if at any point he found the pool floor to be unclean, he would ask the engineer to get that part of the floor cleaned. During the cross examination he deposed:

> *"if there is dirt or algae on the floor of the pool, it is visible to the person standing on the pool"*.

77. In his cross examination, nevertheless, the witness was unable to state what *algae* looked like by colour and under what circumstances algae gets deposited on the floor of the pool. Thus, even assuming that he executed the engineer's instructions regarding cleaning procedure, this Court *cannot infer that the algae deposits from the floor of the pool were cleaned as a consequence*.

78. It is pertinent to note that Mr. K R Dobson, the plaintiff's expert witness who was examined on pool maintenance, categorically stated that algal growth can have occurred in a pool even though the water in the pool may be clear. This happens when the algae are still growing either if the chlorine levels drop or during warm weather. Mr. Dobson also states that chlorine is consumed faster when the temperature rises; in temperatures above 25 degrees Celsius, he states that chlorine levels ought to be checked two times daily; finally, he states that even with low levels of algal growth, the floor of the pool can be slippery.

79. Admittedly, Susan found the water in the pool clear and sparkling. The ITDC also argued that Susan admitted that the water was clear and sparkling and that, per the opinion of Mr. KR Dobson, pool consultant, if the water is both sparkling and clear and has no deposits, the presumption is that the pool is properly maintained. However, this Court cannot infer that ITDC discharged the duty of

care towards maintenance of the pool from the mere fact of sparkling water, since algal growth can take place even when the water is clear.

80. The existence of liability for negligence depends on whether a duty of care was owed to the plaintiff by the defendant. A duty of care exists when it is reasonably foreseeable to the defendant that the plaintiff would suffer injury or damage by the act or omission of the defendant. This rule emerges from Lord Atkin's ruling in *Donoghue v Stevenson* [1932] AC 562:

> "*You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then in law is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."*

Thus, the duty of care depends on *first*, proximity of plaintiff to defendant and *second*, reasonable foresight of harm to the plaintiff. In *Caparo Industries plc v. Dickman*, [1990] 2 AC 605- a judgment which reviewed and restated the law after an extensive survey of the authorities, it was held that:

> *"What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of 'proximity' or 'neighbourhood' and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope on the one party for the benefit of the other."*

In *Rajkot v. Manjulben Jayantilal Nakum*, (1997) 9 SCC 552, these principles were reiterated. This Court observes that both these conditions are fulfilled in the instant case. Guests at the swimming pool are closely and directly affected by acts or omissions of those responsible for the maintenance of a pool; proximity of the respondent to appellant thus existed in this case. It is reasonably foreseeable that algal growth on the floor of the pool is likely to make the floor slippery, thus likely to injure guests at the pool.

81. The standard of the duty of care required to be met by ITDC was defined in *Rajkot* (supra, para 53), drawing from *Bolton v. Stone,* (1951) AC 850 which in turn draws from *Bourhill v. Young,* [1943] AC 92. The duty of care must be such reasonable care so as to avoid the risk of injury to such person who, the defendant can reasonably foresee, may be injured by failure to apply such care. It would be appropriate to quote from Lord Macmillan opinion in *Bourhill* (supra):

> *"The duty to take care is the duty to avoid doing or omitting to do anything the doing or omitting to do which may have as its reasonable and probable consequence injury to others, and the duty is owed to those to whom injury may reasonably and probably be anticipated if the duty is not observed."*

In *Mitchell v Glasgow City Council,* 2009 UKHL 11, the Court explained the nature of obligation cast upon owners and occupiers, in relation to risk assessments that they can reasonably expect:

> *"The requisite additional feature that transforms what would otherwise be a mere omission, a breach at most of a moral obligation, into a breach of a legal duty to take reasonable steps to safeguard, or to try to safeguard, the person in question from harm or injury may take a variety of forms. Sometimes the additional feature may be found in the manner in which the victim came to be at risk of harm or injury. If a defendant has played some causative part in the train of events that led to the risk of injury, a duty to take reasonable steps to avert or lessen the risk may arise. Sometimes the additional feature may be found in the relationship between the victim and the defendant: (e.g employee/employer or child/parent) or in the relationship between the defendant and the place where the risk arises (e.g a fire on the defendant's land as in Goldman v Hargrave). Sometimes the additional feature may be found in the assumption of responsibility by the defendant for the person at risk of injury (see Smith v Littlewoods). In each case where particular circumstances are relied on as constituting the requisite additional feature….the question for the court will be whether the circumstances were indeed sufficient for that purpose or whether the case remains one of mere omission".*

82. The standard of care clearly then is reasonable care to do or refrain from doing anything, to prevent injury that is a reasonable and probable consequence of omitting to do, or doing said act. What then is the standard of care expected of a swimming pool owner or service provider? For the owners of a swimming pool, the standard of care required to be met is reasonable care towards maintenance to prevent injury that would probably result from guests jumping into the pool in the shallow end. Some of the duties resulting would include ensuring that the pool is well maintained and does not pose dangers to the

unwary user; that lifeguards are provided or available; that a doctor is at hand in the premises; that both the surface area surrounding the pool and the pool floor are well maintained so as not to pose a hazard; that the use of building and other materials should be in accordance with normal practice applicable in such cases, as would not facilitate any accident or aggravate or increase its chances.

83. A number of reported cases in UK courts have examined, in the context of swimming pool injury claims, the duties of occupiers, hotel owners and travel agencies. These cases suggest that the defendant owes no duty of care, only when the risk is obvious and inherent in the activity undertaken by the plaintiff. In *Daniel John McCarrick v Park Resorts Ltd* [2012] EWHC B27 (QB) it was held as follows:

> *"61. The first defendant in this case chose to impose conditions. Knowing that the pool was too shallow to dive into and that it was dangerous to do so and that the results of doing so could be catastrophic and that it was simple and cheap to protect against that risk, it chose to decide to impose conditions, (namely to prohibit diving), to warn users, (it chose to deploy signage) and to supervise them (it chose to use lifeguards). On the factual findings that I have made, the risk was not an obvious one to the claimant in this pool in these circumstances: a fact specific finding.*
>
> *62. In my judgment, the first defendant having the knowledge that it had and having made the decisions that it made based upon that knowledge, it is then illogical to say that on those findings there was no duty to prevent or at least protect against the risk of diving. Otherwise, what is the point of the knowledge and the decisions? It cannot be said in my judgment that there was no duty. Therefore, it is a question of what was the*

scope of that duty. It is only if and to the extent that the defendants establish that there was a danger inherent in the activity that either the claimant had actual knowledge of or was so obvious that he ought to have had or, alternatively, there was a risk that he consented to run, making what Richards LJ described in Evans as "a genuine and informed choice" or Coulson J described in Geary as a voluntary assumption of an obvious and inherent risk, that a defendant may be able to exculpate himself and then only subject to the claimant establishing, if he or she can, that there was nonetheless an assumption of responsibility by the defendant. Thus I conclude that there was a duty and its scope was to prevent or at least protect against the risk of diving. There was not a voluntary assumption of an obvious or inherent risk based on, as there would have to have been, a genuine and informed choice and there was, in the alternative, an assumption of responsibility."

[emphasis supplied]

84. In an earlier judgment, i.e *Tomlinson (FC) v. Congleton Borough Council and Others* [2003] UKHL 47 the claimant had dived into a lake, which he knew well. His head collided with the sandy bottom of the lake and suffered serious injuries. Although he was permitted to be in the lake, swimming (and therefore diving) in the lake was prohibited and his claim was ultimately before the court under the Occupiers Liability Act 1984. The court placed particular weight on the importance of the exercise of free will where the risk was inherent in the activity undertaken:

"44. The second consideration, namely the question of whether people should accept responsibility for the risks they choose to run, is the point made by Lord Phillips of

Worth Matravers MR in Donoghue v Folkestone Properties Ltd [2003] 2 WLR 1138 – 1153 and which I said was central to this appeal. Mr Tomlinson was freely and voluntarily undertaking an activity which inherently involved some risk. By contrast, Miss Bessie Stone, to whom the House of Lords held that no duty was owed, was innocently standing on the pavement outside her garden gate at 10 Beckenham Road, Cheetham when she was struck by a ball hit for 6 out of the Cheetham Cricket Club ground. She was certainly not engaging in any activity which involved an inherent risk of such injury. So compared with Bolton v Stone, this is an a foriori case.

45. I think it will be extremely rare for an occupier of land to be made under a duty to prevent people from taking risks which are inherent in the activities they freely choose to undertake upon the land. If people want to climb mountains, go hang gliding or swim or dive in ponds or lakes, that is their affair. Of course the landowner may for his own reasons wish to prohibit such activities. He may think that they are a danger or inconvenience to himself or others. Or he may take a paternalist view and prefer people not to undertake risky activities on his land. He is entitled to impose such conditions, as the Council did by prohibiting swimming. But the law does not require him to do so."

[emphasis supplied]

85. In the recent cases, UK Courts have, while considering specific incidents, accepted that any risk assessment is necessarily subjective in the first instance (the choice made by one to dive into the shallow lake or swimming pool, for example). An objective judicial assessment is called for when a claimant seeks redress in tort. The *creator* of the causal risk (i.e. the occupier) would, generally be liable for the harm. However, *creation* of the risk must, Courts indicate, be distinguished from assumption of the risk that is inherent in the act

undertaken (as would be the case with the defence of consent or *volenti non fit injuria*). The operation of this defence requires that the claimant/ victim of the accident has *full knowledge of the relevant risks and consequences and has made an informed decision to accept both*. If this is the case, the creator owes no duty to the injured claimant and no damages can be recovered. (See *Ratcliffe v McConnell* [1999] 1 WLR 670, *Tomlinson v Congleton Borough Council* [2004] 1 AC 46, [2003] UKHL 47; *Rhind v Astbury Water Park Ltd* [2004] EWCA Civ 756; *Evans v Kosmar Villa Holidays plc* [2007] EWCA Civ 1003). In other words, therefore, potential claimants seeking redress for injuries suffered as guests or users of facilities will need to show that it *was a risk created by the occupier which remained the primary cause of their injury*, not a risky activity undertaken by themselves and outside the boundaries of the activities permitted, encouraged or facilitated by the occupier. In relation to the latter case, the loss will lie with the claimant, who cannot sue for damages.

86. With this standard of care, ITDC as owner of the pool cannot argue that the mere fact that the water was sparkling and clear indicated that the pool was properly maintained. This is because algal growth is known to occur even when the water is clear, particularly in warm temperatures as is the case during May in Delhi, when this incident took place. There was no evidence to show what the maintenance regime was, except the testimony of DW-2 that chlorine was used routinely and that he used to report silt or any foreign

substance sometimes, for cleaning. Nothing was brought on record, either in documentary evidence or orally to substantiate that the tiles used by ITDC in its pools were not slippery; no tile was sent for expert examination, nor was any expert produced in its support. Likewise, whether the floor tiles used were in conformity with standards, and what were the prevailing standards, was not produced or made known. Thus, this Court agrees with the findings of the Learned Single Judge that ITDC had not fulfilled its duty of care towards maintenance of the pool.

87. ITDC had contended that Susan did not adduce any evidence to show that there was algal growth on the floor of the pool. As discussed earlier, this submission postulates the burden of proof upon the plaintiff to establish negligence. It also sought to prove and contend that the plaintiff had done something inherently risky, i.e. dive into the shallow side of the pool; as discussed earlier, that effort is unsuccessful. This Court is not persuaded by the argument that the plaintiff had to establish negligence, in the circumstances of the case. By the maxim *res ipsa loquitur*, the plaintiff need not show causation between the injury and the defendant's act. The plaintiff need only show the fact of injury; the mere fact of the injury justifies the inference that the knowledge of causation lies with the defendant. Thus the onus was on the defendant to refute causal link to its acts, by showing either that the injury was not due to its negligence or that it had exercised reasonable care. ITDC however failed to prove that it took due care and precaution to avoid the accident, which was

foreseeable. It was therefore, at fault. The findings of the learned single judge are therefore justified on the pleadings and evidence.

Point No 4: Whether, if any, compensation is to be paid? If so, under what heads is compensation payable?

88. On the question of compensation, ITDC submitted *first*, that this incident falls within the definition of an "accident" i.e. an unintended and unexpected event, especially when the cause is not known. For this, reliance is placed on *Shakuntala Chandrakant Shreshti v. Prabhakar Maruti Garvali* (2007) 11 SCC 668 and *Hira Devi v. Bhaba Kanti Das*, 1977 ACJ 293. *Second*, the ITDC submits, drawing from *Syed Basheer Ahmed v Mohammed Jameel*, (2009) 2 SCC 225, that the claimants to compensation must show data to establish a reasonable nexus between the loss incurred by them and the compensation prayed for. The onus lies on the claimant to prove earnings lost by leading reliable and cogent evidence and mere assertions in the plaint are insufficient to discharge this onus. The compensation should be fair and reasonable by accepted legal standards. The appellant also draws support from *Gobald Motor Service Ltd. v. RMK Veluswami*, AIR 1962 SC 1 to argue that the Court must balance the pecuniary loss to the aggrieved party against the pecuniary advantage that accrues to them consequent to the injury.

89. Once the existence of liability for the tort of negligence is established, the extent of liability i.e. whether a particular damage is recoverable is to be decided. Damages to be recoverable, should not be remote. The test to determine remoteness of damage, especially

when the question is one of unintended consequences of a wrongful act, was established in *Overseas Tankship Ltd. v. Morts Dock and Engineering Co. Ltd., "The Wagon Mound" case*, [1961] A.C. 388. It was held that damage is not too remote if it was a reasonably foreseeable consequence of the negligent act. The *Wagon Mound* in holding thus, overruled the test laid down in in *Re Polemis*. [1964] 2 QB 292 for determining remoteness of damage i.e. whether the damage was a direct or natural consequence of the negligent act, so as to avoid the "never-ending and insoluble problems of causation". In doing so, *Wagon Mound* also effectively renders the tests for existence of liability and extent of liability the same. (*See* McGregor on *Damages*, 4-002 – 4-007).

90. In *Hughes v. Lord Advocate*, [1963] A.C. 837, 858 the distinction between degree of damage and kind of damage was enunciated. It was observed that if a type or kind of damage is a reasonably foreseeable consequence of a negligent act, then the defendant is liable for that type of damage to whatever degree it occurs. Thus, the defendant is liable to make good any damage even if the degree of damage is more than is anticipated or foreseen by the defendant, so long as the kind of damage is foreseeable. These principles have been assimilated by Indian Courts (Ref *Rajkot Municipality*, [supra] and *Jai Bhagwan v Laxman Singh* 1994 (5) SCC 5).

91. This Court is not persuaded by ITDC's argument that this incident falls within the category of "accidents" by virtue of being an unintended and unexpected event whose cause was unknown. The fact

that the cause was unknown is irrelevant since extent of liability does not depend on causation after *Wagon Mound.* The requirement to establish extent of liability is the reasonable foreseeability of a *type* of damage, regardless of degree of damage. This Court is of the opinion that the type of damage i.e. feet slipping forwards and falling backwards to hit one's head against the wall of the pool, when one jumps into a pool, is a reasonably foreseeable consequence of the floor of the pool being slippery, either on account of algal growth or due to use of slippery tiles- a conclusion that could have been countered or dispelled by material that was, and should have been within the exclusive control of ITDC. This being the case, ITDC cannot contest the foreseeability of the damage on the ground that the respondent suffered a fracture of the C6 and C7, and consequent paralysis by quadriplegia. This is because ITDC is responsible for damage even at a degree that was not anticipated by it, so long as the type of damage was reasonably foreseeable.

92. As regards computation of damages, this Court is in agreement with the ITDC's submission that the claim for medical expenses incurred must be based on evidence adduced before the Court. The burden to establish the quantum of damages lies on the claimant. This flows from Section 101 of the Indian Evidence Act and *Syed Basheer Ahmed v Mohammed Jameel*, (2009) 2 SCC 225.

93. Pecuniary damages awarded for medical expenses must thus be restricted to only those amounts which can be proved by the plaintiff/respondent in evidence. From the bills and receipts provided by Susan, the Learned Single Judge of the Delhi High Court found

that the medical expenses incurred were of the amount $5513.80 in Australian Dollars and ₹ 74249.05 in Indian Rupees. Susan's father, PW2, Mr. GL Beer however, had in his testimony stated that he has in fact incurred about AUD 1,50,000 as medical expenses for her care after the onset of quadriplegia. Since the plaintiff was unable to adduce bills to show for these expenses, this Court is of the opinion that only those expenses for which bills have been produced may be used in computation of damages under the head of "medical expenses".

94. However, the Court is of the opinion that the Learned Single Judge erred in converting the pecuniary damages (both under medical expenses and lost earnings) using the exchange rate as prevalent in 1982 i.e. 1 AUD = 9 INR.

95. The allied questions of a) the appropriate currency to award damages in when the claimant incurred expenses or suffered losses in a foreign currency and b) the appropriate date for conversion of a decretal sum from a foreign currency to the Indian Rupee was answered in *Forasol v. ONGC*, 1984 Supp (1) SCC 263. The Court, drawing from several English cases on breach of contract and from *Owners of M.V. Eleftherotria v. Owners of M.V. Despina*, L.R.[1979] A.C. 685 on tortious liability (which was also relied upon by the Counsel for respondents) noted that the reasoning in common law was that:

> *"…it was fairer to give judgment in the currency in which the loss was sustained than in its sterling equivalent at the date of the breach or loss, the principles to be applied in ascertaining the currency of the loss being those of*

restitutio in integrum and reasonable foreseeability of the plaintiff using a particular foreign currency to purchase the necessary currency to meet the immediate and direct expenditure caused by the defendant's tort or breach of contract."

The Court held that this principle cannot be applied directly in India, since no Court can order a party to do anything contrary to the law on foreign exchange, and that there was a likelihood that the defendant may not receive requisite permissions from the foreign exchange authorities to make a payment in foreign currency. To account for this contingency, the Court held that the decree must provide in the alternative, for payment of a sum of money in Indian Rupees equivalent to the decretal amount in the foreign currency.

96. At this juncture, the Court was also required to answer the question of the appropriate date for fixing the exchange rate for converting the foreign currency amount into Indian rupees. The Court (paragraphs 22-53) considered five possible dates for fixing the exchange rate at which the foreign currency amount has to be converted:

1. the date when the amount become due and payable i.e. the date the cause of action arose;
2. the date of the commencement of the action i.e. date of institution of suit;
3. the date of the decree;
4. the date when the court orders execution to issue; and
5. the date when the decretal amount is paid or realized

97. The fourth date i.e. date on which execution is ordered was ruled out by the Court as considerable time would elapse between the date on which execution is ordered by the court and the date of final realization of payment, as the process of execution entails attachment of the judgment debtor's property, possible third party claims to the attached property, and compliance with Order XXI, Rule 68 of the Civil Procedure Code etc. This period would be susceptible to fluctuations in exchange rate. Moreover, execution can only be ordered for a specific sum that constitutes the judgment debt. Thus, it would be impossible for the court to order execution of a decree for a sum that is to be ascertained by the executing court.

98. The fifth date i.e. date of realization of payment albeit seemingly most fair and just was also ruled out by the Court because suit valuation for court fees cannot be undertaken with reference to a future possible exchange rate. Similarly, an assessment of the pecuniary limit of jurisdiction of courts cannot be undertaken in a money suit in which the amount claimed is in a foreign currency. Moreover, execution of decree cannot be ordered for a sum that is to be ascertainable as due upon the decree by the executing court as of the date of payment.

99. The Court then considered the first, second and third dates i.e. date of cause of action, date of institution of suit and date of decree. It noted that the duration between these dates and the date of decree or final disposal/final realization of payment would be susceptible to fluctuations in the exchange rate. Should the exchange rate fluctuate to the plaintiff's prejudice, then the plaintiff will not be put in the same

position as he would have been prior to the defendant's breach of duty owed to him, in keeping with the principle *restitutio in integrum*. This possibility would be aggravated by the duration of litigation in India owing to overcrowded dockets in courts and consequent protraction of litigation. However, given that neither that the fourth and fifth dates i.e. date of execution nor the date of realization of payment can be used to fix the exchange rate, the Court held that the principle of *restitutio in integrum* would be best served by the latest of the dates between date of cause of action, date of institution of suit, and the date of decree. Thus, the position of law as it stands today is that the date of final disposal of the suit (which is to be considered the date of decree, per paragraph 43 of *Forasol*) i.e. the date of judgment and decree would be the date on which the exchange rate must be fixed for conversion of the foreign currency decretal sum to Indian rupees.

100. This Court is mindful of the position in *United India Insurance Co. Ltd. v. Patricia Jean Mahajan and Ors.*, (2002) 6 SCC 281 at para 38, in which the Court considered the position in *ONGC* (supra) and distinguished it on the grounds that although the deceased was an American citizen settled in the United States, and thus had adduced proof of earnings in American Dollars, the prayer was for a sum in Indian Rupees which figure the claimant had arrived at by employing the exchange rate of 1 USD = 30 INR. The Motor Accident Claims Tribunal had granted compensation using the exchange rate employed by the claimant. The Single Judge on appeal used the prevalent exchange rate of 1 USD = 47 INR, but the Division Bench set aside this finding and restored the rate to 1 USD = 30 INR on the ground

that the compensation amount had already been withdrawn. Thus, the Court found that it would not be permissible for the claimants to claim that the then prevalent rate of ₹47 was applicable. Thus, the Court held that given the prayer, the Court was right in awarding a compensation amount on the terms on which the prayer was claimed i.e. at ₹ 30. The Court further held:

> *"There is no occasion to convert the amount of decree in Rupees into Dollars applying Rs. 30 as rate of conversion and then re-convert it in Rupees at the rate of Rs. 47. The claimants cannot ask for more than what was prayed for in the claim petition. We are therefore not inclined to accede to the request made for calculation of the amount of award at the conversion rate of Rs. 47."*

101. This Court is in agreement that the respondents cannot claim an amount greater than prayed for in the plaint. However, in deference to this requirement, the principle of *restitutio in integrum* cannot be compromised. In order to restore Susan to the position she was in prior to the injury, it is imperative to grant her damages to an amount that is equivalent to the amount spent on medical expenses/lost earnings in her currency. If an amount is granted in Indian Rupees that is not equivalent to the amount she spent in Australian Dollars in the present day in the Australian economy, then the respondent will be denied her right to restitution in monetary terms. In order to reconcile these two requirements, this Court is of the opinion that the exchange rate prevalent as of the date of disposal of this appeal should be the date applicable for conversion of the sums in Australian Dollars to Indian

Rupees. This amount must, at the same time, be circumscribed by the amount claimed in the claim petition.

88. Thus, the amount for medical expenses incurred:

= ₹ (AUD 5513.80 x 45.46) + ₹74,249.05
= 2,50,657.348+ ₹ 74,249.05
= ₹ 3,24,906.39 where,

medical expenses incurred in Australia in AUD = $5513.80,
medical expenses incurred in India in INR = ₹74,249.05
exchange rate on 03.03.2011 (date of judgment and decree in suit): 1 AUD = 45.46 INR (on the basis of information gathered from http://www.freecurrencyrates.com/exchange-rate-history/AUD-INR/2011 on 27-05-2014 at 10:40 PM).

102. For loss of earnings, since the respondent was a minor and thus still completing her education when she was injured, this Court must rely upon the depositions of the Plaintiff. The Learned Single Judge found that Susan could only commence employment at age 26 years, while the ordinary age of employment was 21 years, and that she could only work till the age of 45 years after her handicap, while ordinarily, one can work till the age of 65 years. After her handicap, she was able to earn $30,000 per annum, whereas ordinarily, the respondent could have earned on average, $45,000. Using these figures, the Learned Single Judge found that the loss of earnings would be:

= 45000 x (65-21) - 30,000 x (45-26)
= 19,80,000 – 5,70,000
= AUD $14,10,000

Thus, the amount in Indian Rupees is:

=14,10,000 x 45.46
= ₹ 6,40,98,600/-

Where exchange rate on 03.03.2011: 1 AUD = 45.46 INR

The Court's approach in this regard is supported by the reasoning and judgment in *Nizam Institute of Medical Sciences Vs. Prasanth S. Dhananka & Ors* (2012) 12 SCC 274. There, the Court awarded damages towards loss of earnings for a 40 year old claimant, for 30 years. The claimant had suffered from acute paraplegia.

103. However, since the Plaintiff cannot be granted damages in excess of the amount claimed in the suit, this Court is of the opinion that the full amount claimed in the plaint may be awarded as damages in respect of the claimant's loss of earnings resulting from the injury, i.e. ₹ 1,30,00,000/-.

104. On the question of non-pecuniary damages for pain and suffering, as well as loss of amenities – discretion is to be exercised by the Court, as there is no constant principle followed by Indian courts, which are guided by principles of justice, equity and fairness. The exercise of such discretion is mainly fact dependent. (Ref *K Suresh v. New India Assurance Co.* 2012 (12) SCC 274 and *Nizam Institute of Medical Sciences* (supra). On this ground, this Court upholds the non-pecuniary damages granted by the Learned Single Judge i.e. ₹ 50,00,000/-

105. As far as the submission of ITDC that the general method for computation of pecuniary loss is *"by balancing on the one hand the loss to the claimants of the future pecuniary benefit and on the other any pecuniary advantage which from whatever source comes to them by reason of the death"* (as held *Gobald Motor Service Ltd. v. R.M.K.*

Veluswami, AIR 1962 SC 1, para 17), this Court is of the opinion that this principle operates in a different context. As evident from *Gobald* and all the English cases relied upon by that Court, this principle has so far been applied in cases of fatal accidents by motor vehicles, in which the family/dependents of the deceased claim compensation for the death of the deceased. The benefit accruing that must be balanced against the losses resulting from death is a reference to the interests in the estate of the deceased person that accrues to the dependents as heirs. (Ref Paragraphss 11-16 of *Gobald*). This principle clearly centers on the link between the advantage ensuing to the claimant and the injury or death i.e. only those benefits that result as a specific consequence of the death or the injury can be benefits deductible from the pecuniary damages awarded. Benefits that would have resulted regardless of the death or injury would not be deductible from the pecuniary damages. This link was enunciated in *Patricia Jean* (supra), in which the Supreme Court cited *Hodgson v. Trapp*, [1988] 3 All ER 870, p. 873:

> *".....the basic rule is that it is the net consequential loss and expense which the Court must measure, if, in consequence of the injuries sustained, the plaintiff has enjoyed receipts to which he would not otherwise have been entitled, prima facie, those receipts are to be set against the aggregate of the plaintiff's losses and expenses in arriving at the measure of his damages."*

The Court proceeded to hold that:

> *"24. … From the above passage it is clear that the deductions are admissible from the amount of compensation in case the claimant receives the benefit as a consequence of injuries sustained, which otherwise he*

would not have been entitled to. It does not cover cases where the payment received is not dependent upon an injury sustained on meeting with an accident.

34. …We are in full agreement with the observations made in the case of Helen Rebello (supra) that principle of balancing between losses and gains, by reason of death, to arrive at amount of compensation is a general rule, but what is more important is that such receipts by the claimants must have some co-relation with the accidental death by reason of which alone the claimants have received the amounts. … According to the decisions referred to in the earlier part of this Judgment, it is clear that amount on account of social security as may have been received must have nexus or relation with the accidental injury or death, so far to be deductible from the amount of compensation. There must be some co-relation between the amount received and the accidental death or it may be in the same sphere, absence the amount received shall not be deducted from the amount of compensation. Thus the amount received on account of insurance policy of the deceased cannot be deducted from the amount of compensation though no doubt the receipt of the insurance amount is accelerated due to pre-mature death of the insured."

[emphasis supplied]

106. This Court is thus of the opinion that insurance and pension and like benefits that may accrue to the respondent, regardless of her injury, are not deductible from the pecuniary damages awarded herein. As regards the medical aids and equipment provided by the Queensland Department of Health, it is clear from PW 18/1 and PW 18/2 that the Department would seek a reimbursement of the costs it

has incurred, should this claim for damages be successful. This matter is to be resolved between Susan and her home Government.

Point No.: 5 Did the finding as to the interest rate by the Learned Single Judge call for interference

107. On this aspect, the plaintiff in her cross-objections claimed that a rate of interest of 18% be awarded on the damages awarded from the date of filing of the suit till the date of realization. It was argued that ITDC is engaged in delaying tactics and protracted the litigation for over 30 years, while she pursued the litigation diligently. It was also argued that ITDC will have to convert the granted damages from INR to AUD after the appeal is disposed of, whereas the exchange rate used in computation of the damages was the prevailing rate in 1982 (1 AUD = 9 INR) and lastly, the damages and interest awarded would not cover the loss suffered by Susan.

108. The learned single judge had granted simple interest at 6% per annum, on the decreed amount. The award of interest is discretionary and usually would not call for interference. Yet, this court is constrained to observe that the learned single judge seems to have not given much importance to the 29 years pendency of the case, and the intervening events which saw interest rates, which were more or less stable during the decade 1980-1990, fluctuate at varying levels. The Court, in these circumstances, should perform some averaging attempt to arrive at what could be the most reasonable mean interest rate, which would sub-serve the ends of justice. The Reserve Bank of India's website

(http://www.rbi.org.in/scripts/PublicationsView.aspx?id=12765 visited on 27-05-2014 at 09:35) contains a table (No.74) indicating fixed deposit rates of various banks from the year 1971-72 onwards. In the present case, the suit was filed in 1982; it was decreed in 2011. The proceedings were pending on the file of the court for 29 years. The average interest rate for fixed deposits, notified by the RBI for the years 1982-83 to 2010-11 (29 years) works out to 9.17% p.a. This Court is thus of opinion that the rate of interest of 9.17% should be applied in this case, in substitution of 6% p.a *pendente lite* interest awarded by the learned single judge.

Conclusion and Directions

109. The appeal, as is evident from the above discussion, is bereft of merit. This Court is constrained to observe that the pendancy of the suit was largely due to the stand of ITDC in carrying out a long and protracted exercise of recording the deposition of witnesses. One wonders about the objective behind the groundless objections and the almost surrealistic nature of questioning resorted on behalf of ITDC. The attempts to prove that plaintiff was a liar despite clear and convincing answers from her end, shows a stubborn desire to somehow wrest arguing points for the final hearing. The transcript of oral depositions - a reading of which was at once revealing and disconcerting, highlighted the futility of the process in this case. The line of questioning also showed ITDC in a poor light as callous and insensitive. That it is a public sector organization only aggravates the disregard for the suffering undergone by the plaintiff.

110. In the light of the above discussion, it is held that the findings of the Learned Single Judge do not call for interference on the question of liability of ITDC and its breach of duty of care. The findings recorded in the previous portions of the judgment with regard to the award on medical expenses incurred mean that the decree has to be modified; instead of ₹ 5,00,000/- awarded by the impugned judgment and decree, the correct sum, i.e ₹ 3, 24,906.39/- shall stand substituted. Likewise, the decree in respect of the head "loss of earnings" shall be substituted - instead of ₹ 1,27,00,000/- the sum on account of loss of earnings for the rest of the plaintiff's life shall be substituted by ₹ 1,30,00,000/- (Rupees one crore and thirty lakhs). The damages awarded shall thus be:

Pecuniary damages on account of medical expenses -	₹ 3, 24,906.39/-
Pecuniary damages on account of loss of earnings -	₹ 1,30,00,000/-
Non-pecuniary damages on account of pain and suffering -	₹ 50,00,000/-
Total	₹ 1,83, 24,906.39

The total decretal sum shall thus be modified to ₹ 1,83, 24,906.39 (Rupees one crore eighty three lakhs twenty four thousand, nine hundred and six and paise thirty nine only). The interest rate, for the reasons discussed earlier, shall be 9.17% per annum from date of suit (22.01.1982) till the date of the decree (03.03.2011) and 10% future

simple interest. The appellant ITDC had deposited the amounts during the pendancy of the present appeal; the plaintiff, Susan shall be entitled to withdraw them. A modified decree shall be drawn; ITDC shall make good the balance amount within four weeks. ITDC shall bear the costs of the present appeal, quantified at ₹ 75,000/- also to be paid to the plaintiff within the said four weeks.

111. The appeal is dismissed and the cross objections are allowed, to the extent indicated above.

S. RAVINDRA BHAT
(JUDGE)

SUDERSHAN KUMAR MISRA
(JUDGE)

MAY 30, 2014