

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No.725 of 2015

[Mazhar Ali versus

M/s Park Avenue Owners/Occupants Welfare Association and others]

- Date of hearing : 05.04.2019 and 09.04.2019.
- Date of Decision : 08.10.2019.
- Plaintiff : Mazhar Ali, through Mr. Faraz Faheem, Advocate.
- Defendant No.2 : Anwar Javed Khan, through M/s. Muhammad Hanif Qureshi and Zakia Ashraf, Advocates.
- Defendants 1, 3&4 : Nemo.

Case law relied upon by Plaintiff's Counsel

1. 2015 S C M R page-1406
[*National Logistic Cell v. Irfan Khan and others*]
2. 2011 S C M R page-1836
[*Islamic Republic of Pakistan through Secretary, Ministry of Railways and others v. Abdul Wahid and others*]
3. 2017 Y L R Note page-451
[*Shama Norin and 5 others v. Karachi Transport Corporation through Chairman and another*]
4. 2014 M L D page-149
[*Sikander Shah and 5 others v. Dr. Nargis Shamsi and 2 others*]
5. 2017 M L D page-1174
[*Shamsheer Khan through L.Rs. and others v. Gul Khan and 2 others*]

Case law relied upon by Defendant's Counsel

Other precedent

1. 2016 C L D page-1983
[*Premier Insurance Company of Pakistan and another v. Karachi Shipyard and Engineering Works Ltd. and another*]
2. 2006 S C M R page-207
[*Punjab Board Transport Corporation v. Zahida Afzal and others*] – Punjab Transport Case
3. 2015 M L D page-1401
[*Islamic Republic of Pakistan through Secretary Ministry of Defence and others v. Numair Ahmed and 2 others*] – Numair Case
4. 2006 M L D page-19
[*Mushtari v. Islamic Republic of Pakistan through Secretary, Ministry of Planning and Development Islamabad and 2 others*] – Pakistan Steel Case
5. 1993 S C M R page-848

[Pakistan Steel Mills Corporation Limited and another v. Malik Abdul Habib and another]

- Law under discussion:**
1. Fatal Accidents Act, 1855.
 2. Qanun-e-Shahadat Order, 1984; Evidence Law.
 3. Civil Procedure Code, 1908 (“CPC”)

JUDGMENT

Muhammad Faisal Kamal Alam, J: - The present action at law has been preferred by Plaintiff under Fatal Accident Act, 1855 (the “**Governing Law**”), because as per the averments of plaintiff, Mazhar Ali, the son of Plaintiff (Muhammad Juman) died in a lift accident on 03.05.2014, due to technical fault in the lift, which was not properly maintained by Defendants. Defendant No.1 is a registered Association of multistorey building – ‘Park Avenue’. The deceased used to work in one of the offices located in the building at fifth floor. It is further pleaded that deceased was an educated person and a young man of 28 years of age, keeping good health. Plaintiff contains the following prayer clause_

- “a. Pass a Decree in the sum of Rs.4,34,36,000/- (Four Crores Thirty Four Lacs and Thirty Six Thousand only) against the defendants jointly and severally to pay the said sum of damages/compensation to the plaintiff or any other amount this Honourable Court may deem fit in circumstances of the case.*
- b. Grant Profit / markup at the rate of 12% per annum on the amount claimed in clause (a) above from the date of the filing of the suit till the date of realization of the decretal amount which the plaintiff would have earned had the defendants paid the said amount.*
- c. Cost of the suit may be awarded to the plaintiffs.*
- d. Any other relief or relief’s that this Honourable Court may deem just and proper under the circumstances of the case be granted.*

2. Notice of the suit was issued to the Defendants. Defendant No.2 filed his Written Statement and contested the claim of Plaintiff, while Defendants No.1, 3 and 4 neither filed their Written Statement(s) nor contested the suit, therefore, vide orders dated 24.04.2016 and 17.10.2016, they were declared *ex parte*.

3. The main defence setup by Defendant No.2 in his Written Statement, besides stating that accident occurred due to negligence of deceased, is that he (Defendant No.2) has been wrongly impleaded in the proceeding, because at the relevant time, he and other elected members were not given the charge of Defendant No.1 – Association and in this regard his litigation with other members of Defendant No.1 was *sub judice*. To substantiate his stance, the record of another Suit No.222 of 2014, *inter se*, the Defendant No.1 has also been produced.

4. From the pleadings of parties, following Issues were framed on 27.03.2017 as Court Issues_

- “1. Whether it is the negligence of the defendant occasioning the unnatural death of deceased?**
- 2. Whether the defendants No.1 to 3 are responsible for commonly and contributory negligence which caused the death of the deceased?**
- 3. Whether the defendants No.1 to 3 jointly and severally liable to pay compensation to the plaintiff as detailed in suit?**
- 4. What should the decree be?”**

5. On 22.09.2017, Commissioner was appointed for recording evidence of the parties. Attorney of Plaintiff, namely, Akhtar Ali, was examined as Exh-P.W.-1. He filed several documents as Exh.P/1 to Exh.P/13. He was cross-examined by learned counsel for Defendant No.2. Plaintiff's another witness, namely, Ali Raza was examined as Exh-P.W-2. He also produced

documents as Exh.P/15 to Exh./P/16 and 17. He was also cross-examined by learned counsel for Defendant No.2. Defendant No.2 examined himself as Exh-D.W.-1 and filed several documents as Exh-D/1 to Exh.D/24.

ISSUE NO.1:

6. Akhtar Ali (P.W.-1), being real brother of deceased and son of Mazhar Ali, produced Special Power of Attorney as Exhibit P/2. In his deposition, the Plaintiff's witness has very specifically explained the date and the facts about incident in which deceased (Mazhar Ali) lost his life. The witness has stated that on 03.05.2014, the lift, in which the deceased and other persons of the building were there, had malfunctioned after reaching second floor. Said P.W.-1 deposed that *"on 3rd May 2014 at around 13:30 after having lunch the Deceased in Question was coming back to his office where he worked as he boarded the lift from ground floor along with several other persons the lift while going up till 2nd floor suddenly started to move downwards, due to malfunction then stopped at mezzanine floor where some persons jumped off then again lift moved with a shock further downwards and stopped at basement as the remaining people along with the Deceased in Question quickly started to evacuate the lift it suddenly moved upwards and Deceased in Question who was half way out of the lift got stuck in the door as the lift was struggle to move upwards it was further crushing the Deceased in question as the people started to scream the management of building heard the cries and switched off the lift and released the body of deceased in question from door of lift and was later taken to hospital but sadly Deceased in question was not able to survive the shock of gruesome accident and expired. The said accident also caused injury to many persons mentioned in charge sheet."* The deceased was in the employment of a Company – Al-Farooq Traders having office in the said Building and to evidence this fact the witness has produced salary

slip of Al Farooq Traders as Exh.P/11 (07.02.2014) showing the net salary as Rs.21,500/- per month. Deceased was a Data Entry Operator and an educated person; he was 28 years old and was keeping a good health and it has been testified by the said Plaintiff's witness, that the family history of deceased and Plaintiff shows that they have a long life span, *particularly*, considering present advancement in medical facilities and climatical condition of the area from where Plaintiff, deceased and their family members belong.

7. The said P.W.-1 has produced educational credentials of deceased as Exh.P/5 to P/9. Plaintiff's side has quantified their claim in the pleadings as well as in their Affidavit-in-Evidence / Examination-in-Chief, which is as follows_

- i. Rs.21,500/- per months and Rs.5000/- increment per year;**
- ii. Rs.500,000/- as an aggregate claim from the parents of deceased on account of loss of better care, nourishment, support and shelter. Basically, this claim falls within the category of 'loss of consortium';**
- iii. Rs.20,000/- on account of funeral expenses;**
- iv. the life expectancy of deceased has been mentioned as 70 years;**
- v. accumulative claim of Rs.4,34,36,000, has been sought against the Defendants jointly and severally.**

8. P.W.-1 was not cross-examined on the material assertions made by him and discussed in the foregoing paragraphs. The cross-examination was mainly to the extent that Defendant No.2 is impleaded at the instigation of his rivals; the incident took place in the cargo lift and not in passenger lift; that other persons inside the lift were not injured. P.W.-1 has convincingly denied the suggestion that the accident took place due to mistake of the deceased.

9. The second witness of Plaintiff is Ali Raza son of Ghulam Rasool (P.W.-2). He used to work in the same office with deceased and mainly corroborated the evidence of P.W.-1. He has not denied in his cross-examination that on 15.05.2014 his services ended with the Company in which the Deceased and P.W.-2 were working. Similarly, he accepted the suggestion that there was some dispute *inter se* the Defendant No.1 Association. However, he has specifically denied the suggestion that the 'deceased Mazhar Ali died due to his own negligence whereas other passengers left lift safely'. No question was put to this witness – P.W.-2 with regard to his testimony about the incident and non-maintenance of lift by the Defendant No.1, even though a handsome amount to the extent of Rupees Eight Million was collected per month by Defendant No.1.

Main portion of the testimony of both witnesses in which they have stated that death of deceased was caused by the Defendants jointly due to breach of duty and care, could not be falsified during cross-examination. Similarly, the testimony of P.W.-2 that Defendants No.1, 2 and 3 were reluctant to carry out the repairs of lift and were negligent in not maintaining the lift properly as another accident occurred few days back, was never challenged.

10. On the other hand in his cross-examination, Defendant No.2 has accepted that lift was partially out of order. The said witness has further admitted that due to internal dispute of Association / Defendant No.1, there was no proper maintenance of the lift. The said witness has further acknowledged that the Defendant No.1 was collecting maintenance charges up to April and May 2014; that is, when the accident took place on 03.05.2014, Defendant No.1 had collected the maintenance charges from the offices / units of the said Building. The said defence witness did not deny the suggestion that Defendant No.1 is also collecting rent from mobile

towers, which are installed at the roof of the said Building. In his cross-examination he has candidly accepted that the Defendant No.1 is **“directly, indirectly and vicariously responsible of all the acts, omissions of her office bears being employees being employer”**. However, the said D.W.-1 has denied that he was President or in Charge of Defendant No.1 at the time of incident / accident.

11. It is not disputed that the incident took place on 03.05.2014, in which due to malfunctioning of lift in the said Building, Plaintiff's son lost his life. Medical Certificate is exhibited as P/12 (and original whereof is exhibit L), mentions the cause of death as respiratory arrest due to chest injury (blunt trauma). No question was put by Defendant on this document.

Mr. Faraz Faheem, Advocate representing the Plaintiff, has relied upon the case law mentioned in the opening part of this decision to augment his arguments that the accident in question, in which precious life of deceased was lost, is also a result of composite negligence and not an act of any particular individual, whereas, M/s. Muhammad Hanif Qureshi and Zakia Ashraf, Advocates representing Defendant No.2 have vehemently denied the stance of Plaintiff.

12. The appraisal of the above evidence can be done on the basis of four reported decisions; of the Honourable Supreme Court **2006 S C M R page-207** (Punjab Transport case); one of our learned Division Bench in the Numair case, **2015 MLD page-1401**; Mushtari Case – **2006 M L D 19** and Pakistan Steel case - **1993 S C M R page-848**. Crux of the above decisions is, that maxim *res ipsa loquitur* (things speak for themselves) has been explained, and it is held that if an accident / incident resulting in death of a person, itself is not disputed by the Defendants, then the onus to prove that a person died not because of negligence or wrongful act of the Defendant is on the latter (the Defendants) and not on the Plaintiffs, in order to succeed

in claim for damages. If the defence set up is that death of deceased caused by his own negligence, then, defendant has to produce evidence that machine was in perfect order and there was no defect in it, but, it was negligence of deceased resulting in his death. In other words, to disprove the causation of death, onus is on Defendant(s). [**Underlined to add emphasis**].

13. As already stated in the preceding paragraphs, that Defendants No.1, 3 and 4 did not contest the case, *whereas*, the main defence setup by Defendant No.2 is that he is not responsible for any of the acts of Defendant No.1 (Park Avenue Owners / Occupants Welfare Association), because at the relevant time, the charge was not handed over to Defendant No.2 and in this regard litigation was pending between Defendant No.2 and other office bearers of Defendant No.1. This plea is immaterial, for the reason that the record of case produced in the evidence by the Defendant No.2, shows that the said Defendant No.2 himself had sought declaration about his Panel to be duly elected Executive Body of Defendant No.1 and though the plaint of the Suit No.222 of 2014, was rejected, but the ultimate result of the above litigation was not disclosed by the Defendant No.2. Order dated 12.04.2016 rejecting the plaint is exhibited (produced by D.W.-1) as Exh.D/24. **Secondly**, the election dispute within the Defendant No.1 – Association cannot have material affect on the merits of present case, except to the extent of shared responsibility and duty to care. The testimony of Plaintiff with regard to the occurrence of the accident that resulted in the death of deceased Mazhar Ali, has not been dislodged, rather admitted. Therefore, Issue No.1 is answered in affirmative that due to negligence of the Defendants, the deceased met with the fatal accident.

ISSUES NO.2 AND 3:

14. Both Issues are interlinked, therefore, decided together.

15. The case law cited by the Plaintiff's Counsel is relevant. The Honourable Supreme Court in the case of National Logistic Cell (*Supra*) [2015 S C M R page-1406], has discussed the concept of composite negligence, which means *“where the wrong, damage or injury is caused by two or more persons, in such cases each of the wrongdoer is jointly and severally liable to make good the loss to the claimant.....”*.

The undisputed record and the evidence adduced by the parties, concludes that Defendants and particularly Defendant No.1 was responsible for causing the death of the deceased Mazhar Ali, because despite collecting enormous amounts towards maintenance charges each month from different offices/Units in the said Building, the elevators / lifts were not maintained properly. Negligence rather callousness of Defendant No.1 in particular, is also proved from the undisputed fact that no remedial measures were taken even after another incident preceding the one of the present *lis*, in which a person was injured due to fault in one of the lifts (in the said Building).

16. If the age of the deceased at the time of his death, that is, 28 years, is considered for calculation of damages, then the deceased would have lived for another 42 years. Obviously, for that long period of time, his salary and other emoluments would have also been increased; therefore, the amount of damages is mentioned as follows:

- i. For the first two years his salary is taken as Rs.21,500/-, which has been proved in the evidence itself.
- ii. For next five years, an average salary of Rs.30,000/- has been taken with an increase of rupees ten thousand after each five years.
- iii. Total amount which the deceased would have earned comes to Rs.3,17,16,000/- {Rupees Three Crore Seventeen Lacs Sixteen Thousand only}.

- iv. Similarly, the amount claimed on behalf of Parents towards loss of better care and support in the sum of Rs.500,000/- (Rupees Five Hundred Thousand only), since has not been disputed, is also awarded to Plaintiffs.
- v. Total amount which the Defendants are jointly and severally are liable to pay to Plaintiff comes to Rs.3,22,16,000/- (Rupees Three Crore Twenty Two Lacs Sixteen Thousand only), but in what ratio is answered in the Issue No.4 below.

17. It is also pertinent to mention that by now it is an established rule that in such type of accidents the employer is vicariously liable for the tortious liability of his/its employees. Thus the reported decisions cited by the Plaintiff's legal team in respect of the above rule of vicarious liability and calculation of compensation considering the fact that deceased was an educated person and on job, is fully applicable to the facts of present *lis*.

ISSUE No.4

18. The extent of liability is to be determined, because it is one of those unique cases in which admittedly the Lifts in the said Building were / are operated by Defendant No.1, which is directly responsible for their (Lifts / Elevators) upkeep and maintenance. In this regard the said Defendant No.1 is collecting and receiving millions of rupees per month. More so, to an extent, defence set forth by Defendant No.2 has some merits, that he is not individually liable, because primarily to maintain Lifts was / is the obligation of Defendant No.1. A reported case of **Premier Insurance Company (*ibid*) [2016 C L D page-1983]** is relevant.

19. The forgoing discussion justifies that the decree should be apportioned in the following manner_

- (i) The Defendant No.1 - M/s Park Avenue Owners / Occupants Welfare Association is liable to pay a sum of Rs.25,772,800/- (Rupees Two Crores Fifty Seven Lacs Seventy Two Thousand Eight Hundred only) to the Plaintiff, *and*

- (ii) Defendants No.2, 3 and 4 are liable to pay Rs.6,443,200/- (Rupees Sixty Four Lacs Forty Three Thousand Two Hundred only) to the Plaintiff jointly and severally.
- (iii) The above mentioned decretal amounts shall carry a component of 10% [ten percent] mark-up from the date of decision in the suit till realization of the amount. However, parties are left to bear their own costs.

Judge

Karachi Dated: 08.10.2019.

Riaz / P.S.