

IN THE SUPREME COURT OF PAKISTAN

(Appellate Jurisdiction)

Present:

Mr. Justice Nasir-ul-Mulk, HCJ

Mr. Justice Gulzar Ahmed

Mr. Justice Mushir Alam

Civil Appeal No.1000 of 2006

Against judgments dated 26.04.2006 of High Court of Sindh at Karachi, passed in HCA No.329, of 2005.

National Logistic Cell

Appellant(s)

VERSUS

Irfan Khan & others

Respondent(s)

For the Appellant(s):

Mr. Anis-ud-Din, ASC

Mr. Rifaqat Hussain Shah, AOR

For Respondents#1-3:

Mr. Nasir Maqsood, ASC

For Respondents#4-6:

Ex-parte

Date of Hearing:

30.01.2015

JUDGMENT

Mushir Alam, J- This appeal is directed against judgment dated 26.04.2006, whereby a learned Division Bench of High Court of Sindh at Karachi dismissed the appeal (***HCA No.329 of 2005***), filed by the appellant-NLC, with slight modification in the judgment & decree of 16.05.2005 passed in Suit No.612 of 1994.

2. Facts of the case appear to be that the deceased Sher Azam Khan, a driver on PIA Van on the fateful day i.e. 11.04.1993 was on his way from Karachi Airport towards City to drop the crew members to their homes, when he reached near Muhammad Ali Housing Society, at about 5.30 A.M early in the morning, all of a sudden one NLC Trailer, appeared in a rash and negligent manner from the opposite side, in a bid to overtake other vehicles, dashed into the PIA van causing severe accident that took the life not only of the driver Sher Azam Khan but, of the three air hostesses as well.

3. Respondents No. 1 to 3, all minors of 2 to 6 years at that time, through their mother being legal heirs of the deceased driver on 09.08.1994 filed a suit bearing No.612/1994 under the Fatal Accident Act, 1855 for the recovery of compensation in the sum of Rs.35,00,000/- against the appellant-NLC, its driver Naik Muhammad Arif, (driver of offending NLC-trailer), Respondent No.5 herein, and Karachi Development Authority (succeeded by City District Government (CDGK/KDA)), Respondent No.6 herein, and another. It was the case of Respondents No.1 to 3 that the road repairing work of one track of Shahrah-i-Faisal was being carried out by the KDA; on the track meant for vehicular traffic flowing from Karachi Airport towards the City, which was closed for vehicular traffic. Other track was being used by the traffic of both ways. Case against the CDGK/KDA as pleaded in the plaint was that as an executing agency for the road repair, the KDA neglected to take due care to install any caution signs, nor they installed any bifurcating device, as is required of an ordinary prudent person, thus defaulted in performance of their duty that also contributed in the unfortunate accident that took lives of four persons.

4. Suit was contested by the defendants, written statements were filed. Out of the pleadings of the parties, following issues were framed:-

- “1. Whether the death of the deceased Sher Azam Khan was caused by the composite negligence and wrongful act of the defendants, if so, its effect?
2. Whether the defendants are liable to pay the compensation to the plaintiffs and other legal heirs, if so, to what extent?”

5. To substantiate the claim in the suit, Mst. Naseem Akhtar, widow of the deceased driver and, mother of the minor plaintiffs, examined herself as **EX.P/1**, and produced various documents to prove the accident. She also examined an eyewitness of the accident namely Muhammad Ihsanul Haq **EX.2/1**, Muhammad Iqbal, ASI of Police Station Bahadurabad, as **EX.P/3**, who produced inspection report, site sketch of the place of incident, etc and Abdul Razzak Shaikh, Accountant of PIA to prove employment of the deceased with PIA and his emoluments. All the witnesses corroborated the plea of the Plaintiff, as to the factum of accident, negligence of the NLC driver and non provision of warning

and cautionary measures by the CDGK/KDA and quantum of damages and liability of the defendants.

6. The appellant-NLC and Respondent No.5 cross-examined the plaintiff's witnesses but were unable to shatter the case of Respondents No.1 to 3 on any count. They chose not to lead any evidence in rebuttal and or in support of their defense plea of contributory negligence on the part of deceased driver or sole responsibility of the KDA/Respondent No.6 for failing to perform public duty. Likewise, KDA/Respondent No.6 neither cross-examined the Plaintiff, her witnesses nor led any evidence in rebuttal that they had not taken any precautionary measures to warn public of any road diversion and or repair, etc nor did they advance any argument either before the Courts below or before this Court.

7. On preponderance of the evidence, issue No.1 was decided in favour of the Respondents No.1 to 3 and against the Appellant-NLC, as well as rest of the respondents. Finding against the CDGK/KDA, is contained in paragraph 13 of the judgment dated 16.05.2005 of the learned Single Judge, who in Chambers after in-depth examination of evidence on issue No.1 concluded as follows:-

“13. from the above evidence it is clear that one side of Shahra-i-Faisal road was being repaired by the defendants No.4 through contractor therefore it was closed for traffic. The traffic was diverted to the other side of the road. Under the circumstances the defendants No.4 were required to make proper arrangements for the smooth flow of the traffic and to make adequate arrangements to caution the traffic flow by affixing barricades, flicker lights with standby generators, diversion signboards fixed on either end of the intersections of the road, also barricades and flicker lights in the middle of the road for smooth flow of the traffic on the road and for the guidance of the dual traffic on one side of the road and should have also deployed traffic constables on the road. The eyewitness Muhammad Ihsanul Haq clearly admitted that no such signs or lights were available on the road for the guidance of the traffic. The evidence of the witness went unchallenged as the defendants No.4 did not cross-examine him on the above points of his evidence nor the defendants No.4 that defendants Nos.4 and 2 are also liable to pay compensation.”

8. As regards the factum of accident, negligence, liability of the Driver/Respondent No.5 and vicarious liability of the Appellant-NLC., there was no serious contest nor, any evidence was led in rebuttal to the case of Respondents No.1 to 3. Evidence of the star eyewitness of the accident Muhammad Ihsanul Haq **EX.2/1**, who

was driving another PIA van just behind the ill-fated van and had witnessed the accident within his sight had not only gone unchallenged but, the Appellant-NLC, as noted above, also failed to adduce or lead any evidence in rebuttal even the driver of the of offending NLC Trailer was also not produced.

9. On the strength of evidence on record, the Appellant-NLC, the Respondent No.4, Respondent No.5 (Driver of offending vehicle) and the Respondent No. 6 CDGK/KDA, were held jointly liable for the accident. The learned Single Judge in paragraph 15 of his judgment dated 16.05.2005, found them liable in the following terms:-

"15. From the above position it is clear that the defendants No.4 and defendants Nos. 2 and 3 were negligent and the accident took place due to their negligence therefore it is a case of normally styled in the legal parlance as composite negligence. The principles of composite negligence are that the victim has a choice of proceeding against all or any one or more than one of the wrong doers and every wrong doer are liable for the whole damages if it is otherwise made out. Reliance is placed on Andhora Marine Exports {P} Ltd. V. P. Radhakirshina. AIR 1984 Madras 358 and Vanguard F. & G.I. Co. V. Sarla Devi, AIR 1959 Punjab 297."

10. Consequently, issue No.2 as to quantum of liability was also decided in favour of the Plaintiffs/Respondents No.1 to 3 and against the Appellant, and rest of the Respondents. They were jointly and severally held liable to the Respondents No.1 to 3 in the sum of Rs.27,097,43.62/- with profit/mark up at rate of 15% per annum from the date of judgment till recovery of the amount with costs. The amount of compensation so decreed also included compensation of Rs.300,000/- for each of the minor plaintiff.

11. This judgment was challenged by the Appellant-NLC only, through High Court Appeal No.329 of 2005 and a learned Division Bench of the High Court maintained the judgment and decree with modification and the additional compensation awarded to the minor children of the deceased at Rs.300,000/- per child, which was considered to be on higher side, was revised to Rs.100,000/- per child. Hence, this appeal.

12. Learned ASC for the appellant took serious exceptions to the impugned judgment passed in the High Court Appeal. It was

contended that the accident occurred due to sheer negligence of Respondent No.6 KDA/CDGK, who failed to perform its public duty, in as much as, it failed to install dividers as ought to have been done, they failed to take due care as an ordinary prudent person would have taken. It was urged that death of the deceased was caused by actionable negligence, default and wrongful act of the KDA/CDGK. It was urged that if at all, the suit should have been decreed against the respondent No.6 KDA/CDGK which was mainly responsible for the accident and not against the Appellant-NLC. According to the learned ASC, the Appellant cannot be saddled with the liability for the neglect in performance of duties by the CDGK/KDA, which was responsible to carry out repair and maintenance of the road, and while repairing work was underway, it was their duty to take all precautionary measures for the diversion of the traffic, putting dividers and installing warning lights, signs and other safety measures as a person of an ordinary prudence would have taken, had such measure been taken accident could be averted.

13. Mr. Nasir Maqsood, learned counsel for the respondents No.1 to 3 contended that there is no denial of the unfortunate accident that took the life of sole bread earner of Respondents No.1 to 3. He has drawn our attention to the evidence of Mst. Naseem Akhtar, **EX.P/1** widow of the deceased driver, who in response to a suggestion in cross examination stated that *"As matter of fact the accident took place on account of negligence on the part of defendant No.4 (CDGK/KDA), as well as defendant No.2 i.e. the appellant herein (NLC). He also drew attention of the Court to the deposition of eyewitness of the incident, Muhammad Ihsanul Haq (Ex 2/1), who was driving another PIA Van and was just behind the ill-fated Van of the Sher Azam Khan since deceased, had categorically stated "that the vehicle driven by the defendant of the NLC emerged from the wrong side in a high speed and collided with Van of deceased and hit him resulting into the death of driver and three Airhostesses as well". His testimony on such a vital aspect proving negligence of the Driver of the Appellant had gone rebutted.*

14. Mr. Nasir Maqsood, learned ASC contended that the Appellant cannot shift its burden on the shoulder of other wrongdoer/tortfeasor. It was urged that it is a case of joint or

composite negligence, Appellant is vicariously liable for the wrongful act of its driver; they cannot be totally absolved of their liability, which is joint and several with driver/Respondent No.5 and the Civic Agency namely CDGK (KDA)/Respondent No. 6 herein who were also negligent and failed to take due care and caution as is expected from a person of an ordinary prudence. He further urged that the driver of the offending vehicle was not produced by the Appellant, withholding such an important witness and wrongdoer by the Appellant, negative inference is to be drawn. It was, therefore, contended that the Appellant and Respondents No.4 to 6 are jointly and severally liable for the composite negligence, which resulted in loss of valuable life of the deceased driver. He relied on a large number of cases from Pakistan and Foreign jurisdiction, including the one reported as Karachi Transport Corporation v. Latif-Ur-Rehman and others (1993 SCMR 1149) to urge that Courts have invariably deprecated the trend prevailing with the public functionaries, of contesting and prolonging the fatal accident cases, denying the bereaved families of their due rights and compensation, by raising frivolous pleas and dragging the citizens to highest Courts in appeals on frivolous and untenable grounds, thus adding salt to the injury of such persons.

15. We have heard the arguments and perused the record. We have noted that the accident that took life of the driver of PIA Van was caused due to the negligence of the Respondent No.5/driver of the appellant-NLC coupled with negligence of CDGK/KDA for failure to take precautionary and preventive measures to avert any untoward happening. In fact, the appellant on one hand not only failed to cross examine any of the Plaintiff's witness on material aspect of the case and secondly failed to lead any evidence to rebut the claim in suit and lastly, in the instant Appeal the Appellant-NLC have tried to shift the entire blame of the accident and of the liability to compensate on Respondent No.6 CDGK (KDA) alone. Both the learned Single Judge in Chambers and the learned Division Bench have appreciated the evidence. Suit was decreed in the sum of Rs.27,09,743.62/- jointly and severally with profit/markup at the rate of 15% per annum from the date of judgment till the recovery. The compensation included Rs.300,000/- for each of the three minors. In Appeal, however, the learned Division Bench on proper

consideration modified the judgment and decree to the extent of revising the compensation from Rs. 300,000/- to Rs. 100,000/- for each of the three then minor plaintiffs and such finding of fact is based on proper appraisal of the evidence on record. No error of misreading or non reading of the evidence has been pointed out by the learned counsel for the appellant.

16. Now adverting to the contentious assertion of the learned ASC for the Appellant that the Respondent No.6 CDGK (KDA) is solely responsible for the unfortunate incident, therefore, suit should have been decreed against such Respondent alone. Arguments were considered. As regards joint and several liabilities of two wrongdoers namely the NLC/Appellant and the driver of NLC offending trailer and KDA/CDGK, the Civic Agency responsible for the repair work, they were held liable by the learned Single Judge, who aptly dealt with the contention as raised before us thoroughly in paragraph 15 of the impugned judgment, reproduced hereinabove.

17. Finding against the CDGK (KDA), Respondent No.6, the agency for executing road repairs is as follows;

“13. from the above evidence it is clear that one side of Shahra-i-Faisal road was being repaired by the defendants No.4 through contractor therefore it was closed for traffic. The traffic was diverted to the other side of the road. Under the circumstances the defendants No.4 were required to make proper arrangements for the smooth flow of the traffic and to make adequate arrangements to caution the traffic flow by affixing barricades, flicker lights with standby generators, diversion signboards fixed on either end of the intersections of the road, also barricades and flicker lights in the middle of the road for smooth flow of the traffic on the road and for the guidance of the dual traffic on one side of the road and should have also deployed traffic constables on the road. The eyewitness Muhammad Ihsanul Haq clearly admitted that no such signs or lights were available on the road for the guidance of the traffic. The evidence of the witness went unchallenged as the defendants No.4 did not cross-examine him on the above points of his evidence nor the defendants No.4 that defendants Nos.4 and 2 are also liable to pay compensation.”

18. There is no statutory definition of the word **“negligence”**. However, in Oxford Dictionary (Volume-VII of 1933), it is defined to mean “(1) want of attention to what ought to be done or looked after; carelessness with regard to one’s duty or business; lack of necessary or ordinary care in doing something; (2) an instance of inattention or carelessness; a negligent act, omission,

or feature; and (3) a careless indifference, as in appearance or costume, or in literary or artistic style; in later use esp. with suggestion of an agreeable absence of artificiality or restraint" and in Black's Law Dictionary (Ninth Edition), it is defined as "failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation; any conduct that falls below the legal standard established to protect others against unreasonable risk of harm, except for conduct that is intentionally, wantonly or willfully disregarding of others' rights". In claims arising out of wrongful or tortuous act, most common defence taken by the tortfeasor or wrongdoer is against the injured or the victim of tortuous act, is contributory negligence on the part of such person who has suffered loss, injury or fatality has himself failed to take due care that has resulted and or contributed to the loss, injury or fatality to such person or his property (for further discussion on contributory negligence one may see *Ena Pearl Nance v. British Columbia Railway* PLD 1951 PC 47) . In appeal in hand, the appellant has not blamed the deceased driver of the contributory negligence rather they have tried to shift the liability of negligence on the CDGK/KDA, which according to the learned ASC for the appellant, failed to perform its duty of care as is required to be taken by person of an ordinary prudence, in as much as, while undertaking road repair or maintenance work no precautionary measures were taken, no warning signs were affixed, at the site of work, to caution commuters that could have averted the unfortunate incident.

19. Plaintiffs/Respondents No.1 to 3 have claimed damages from the Appellant being vicariously liable for the act of its driver and against the CDGK/KDA, jointly and severally and had built up a case of joint or composite negligence. By composite negligence, it 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 who suffered at the hands of such tortfeasors. It is the prerogative of the plaintiff to proceed against any or all such wrongdoers. It is not the plaintiff who is saddled with responsibility to establish separate liability against each of the tortfeasor nor is it considered the responsibility of the Court to ordinarily determine liability of each tortfeasor

separately, proportionately and or independently in absence of any such issue at the trial. The distinction between 'composite negligence' and contributory negligence' was aptly noted in the case referred to as T.O. Anthony vs. Karvarnan & Ors **(2008) 3 SCC 748** as affirmed in the case of Pawan Kumar & Anr. v. Harkishan Dass Mohan Lal & Ors. [2014 (3) SCC 590]. It was laid down by the Indian Supreme Court that 'composite negligence' refers to the negligence on the part of two or more persons. Where a person is injured as a result of negligence on the part of two or more wrongdoers, it is said that the person was injured on account of the composite negligence of those wrongdoers. In such a case, each wrongdoer is jointly or severally liable to the injured for payment of the entire damages and the injured person has the choice of proceeding against all or any of them. On the other hand, where a person suffers injury, partly due to his own negligence, then the negligence on the part of the injured which contributed to the accident is referred to as his contributory negligence.

20. Instant case is not a case of contributory negligence on the part of deceased driver but, of joint/composite negligence of two wrongdoers. In a case where plaintiff sues a civic agency or a person for its failure or neglect to perform its duty of care resulting any damage to his person and or property, initial burden is on the Plaintiff to plead and show such negligence and failure to perform duty of care by such person or agency. In the instant case, it is noted that Plaintiff herself and through her witnesses established that CDGK/KDA failed to perform its duty of care as there was no light and or cautionary signs forewarning or putting commuters on lookout of any potential hazard nor, any divider or fence was placed to make road travel safe for the commuters.

21. In a case reported as Municipal Corporation of Delhi v. Sushila Devi **(AIR 1999 SC 1929)** a person passing by the road died because of a fall of branch of a tree standing on the road, on his head. The Municipal Corporation Delhi was held liable as its Horticultural Department failed to carry out periodical inspections of trees and to trim and or remove the out grown/dried branches of tree protruding or hanging out that could be dangerous for the passers-by, failure and or neglect to perform such duty was

considered sufficient to make them liable to compensate the family of bereaved passerby. In another case reported as Municipal Corporation of Delhi v. Subhagwanti (AIR 1966 SC 1750); a clock-tower in the heart of Chandni Chowk, collapsed causing the death of a number of persons. The structure was 80 years old whereas its normal life was 40-50 years. The Municipal Corporation of Delhi having the control of the structure failed to take care and was therefore, held liable. In a case reported as Madhu Kaur Vs Government of N.C.T. of Delhi and another (AIR 2010 (NOC) 395 Del (full text of judgment may be retrieved from link <http://indiankanoon.org/doc/181916184/>). In last cited case, it had come on record that tarcol and concerts on the road surface were badly eroded, which had created a pit (khadda) of about 3 to 4 inch deep and about one square foot in area on the road. The investigation revealed that the motorcyclist when struck the pit fell and succumbed to multiple skull injuries. It was held by the Court that failure on the part of the State authorities to maintain road & display caution notice in respect of a pit created on surface of road amounts to negligence. It is the duty of the State to see that contractor performs assigned work properly, and accordingly the State was held liable to pay compensation. In Paragraph 16 of the cited case, it was held as under:-

"The respondent authorities should be conscious and aware of their duty to maintain roads and ensure that the road surface does not have any pits or khada so as to cause accidents, thus resulting in injuries and even loss of life. It is the obligation and responsibility of the road owning agencies to ensure that the roads are maintained properly and repairs undertaken. Even if they have entered into third party contracts for road maintenance, road users should not suffer injuries fatal or otherwise because of lack of maintenance, proper care and repairs. In case road is found to be damaged, necessary caution board/sign boards or barricades should be fixed. In case accidents take place as a result of negligence and failure to maintain roads, damages can always be awarded to persons who have suffered or lost a near and dear one. Loss of life because of negligence of state instrumentalities results in violation of right to life and liberty under Article 21 of the Constitution".

22. In the instant case as well, the Plaintiff led evidence to establish that the accident was caused by the wrongful act of the Driver of Appellant-NLC, thus it was vicariously liable. Evidence was further led to show that the CDGK/KDA contributed in the unfortunate accident as they neglected in performance of their duty

of care to display any cautionary signs, warring lights cautioning commuter of the closure of one track and or divergence of traffic and, further failed to put fences, barricade or dividers making it safe for the two way traffic on the same track of the road, such evidence had gone unchallenged. As noted above, it is not the Plaintiff's concern as to assess and seek inter-se proportionality of wrong and or liability of each of the tortfeasor, nor does the Court ordinarily enter into such controversy, in absence of any issue, necessitating such determination between the joint tortfeasors inter-se. In case of composite negligence by two or more persons each of the tortfeasor is jointly and severally liable to make good the loss to the persons who have suffered loss of beloved one or suffered injury or damage to his person or property. It does not lie in the mouth of one of the joint tortfeasor to turn around and shun his liability and pass on the entire liability on the other joint tortfeasor/wrong doer (*See Irfan Khan v Islamic Republic of Pakistan 2005 MLD 1409, Marine Exports (P) Ltd. V.P.Radhakrishan and others AIR 1984 Mad. 358*). It is the prerogative of the Plaintiff, who has suffered loss or injury to recover the entire amount from either or any of the solvent tortfeasor, who may in turn seek recovery of proportionate or whole amount from the other tortfeasor in appropriate proceedings, after making good the compensation to the decree holder.

23. For what has been discussed above, we do not find any substance in the contentions of the learned counsel for the appellant-NLC to interfere in the well reasoned finding recorded by the learned Court of plenary jurisdiction and as maintained in the High Court Appeal through impugned judgment dated 26.4.2006.

24. The appeal is accordingly dismissed with costs throughout.

Chief Justice

Judge

Judge

ISLAMABAD, THE

30.01.2015

Not Approved For Reporting