

JUDGMENT

**FEDERAL GOVERNMENT EMPLOYEES HOUSING FOUNDATION through
Director General, Islamabad and others---Appellants**

Versus

EJAZ AHMED KHAN and 3 others---Respondents

Regular First Appeals Nos. 50 and 59 of 2017, decided on 3rd August, 2022.

SARDAR EJAZ ISHAQ KHAN, J.---

Summary

This case wouldn't have existed if it weren't for a fake Siddique, who appeared in the 2nd link of a chain of 4 transactions of the suit plot, and then vanished in thin air. The Federal Government Employees Housing Foundation (the Foundation) discovered this 2 years after the 2nd transaction of transfer was sanctioned by it with an allotment letter to the 3rd owner, and cancelled the 1st and the 2nd transfers, restoring the 1st allotment. The Foundation's defence in the suit rests on its employees' complicity in, what the Foundation calls but the plaintiff disputes, the fraudulent transfer to the fake Siddique. The trial Court set aside the suit plot's cancellation letter, and restored the plot to the 3rd owner. This appellate judgment, while satisfied with the evidentiary analysis by the learned trial Court, finds that the conclusions drawn therefrom and remedies awarded were, respectfully, not correct. This appellate judgment upholds the cancellation of the suit plot, restores the plot to the original allottee, and awards compensation payable by the Foundation to the 3rd owner.

The background transactions

2. In September 2003, the Foundation, then a company under the Companies Ordinance, 1984, allotted the plot No. 18, street No.94, sector G-13/1, Phase-III, Category-IV, Islamabad, measuring 25x40 square feet (the suit plot), to Muhammad Siddique (Siddique), a naib qasid. This was the 1st transaction. It was between Siddique qua original allottee and the Foundation as the housing foundation, which acquires land and then allots them to those entitled.

3. In May 2004, the Foundation processed and consummated the transfer of the suit plot by Siddique to Salim Ahmed Chohan (Salim), vide transfer letter dated 31.05.2004 in favour of Salim. This was the 1st transfer, with the transferee recorded as the allottee, for which a new transfer/allotment letter was issued. The Foundation's case has been that this transfer of the suit plot, from Siddique to Salim, wasn't genuine, as a fake Siddique, and not the original Siddique, appeared before the Foundation's transfer officers to act as the transferor, got his credentials verified, and signed the papers. Whether the fake Siddique actually exists, nobody knows. Each party blames the other for being responsible for pretending the existence of the fake Siddique, if there was one at all, but this much stands established on evidence that the fake Siddique wouldn't have brought about the 1st transfer to Salim without the complicity of the Foundation's officials; this much the Foundation itself admits, rather strives to prove by asking this Court to believe that the 1st transfer was fraudulent.

4. Salim floated the suit plot in the open market for sale. A year later, in July 2005, the plaintiff, Ejaz Ahmad Khan (Ejaz), a contractor in Skardu, bought the suit plot from Salim.

The transfer application by Salim to Ejaz was duly processed and approved by the Foundation, and the Foundation issued a certificate of transfer dated 06.08.2005 to Ejaz as his document of title after recording him as the lawful owner of the suit plot in the Foundation's records. This

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was the 2nd transfer of the suit plot.

5. Three years later, Ejaz received a bolt from the blue by way of a letter of cancellation of the suit plot dated 02.08.2008 issued by the Foundation, cancelling Ejaz's allotment by transfer, and, resultantly, his ownership of the suit plot (the cancellation letter). The cancellation letter stated that "It has been established that the subject plot was transferred by fraud and impersonation", and that, as a result both the 1st transfer to Salim, the predecessor-in-interest of Ejaz, and the 2nd transfer to Ejaz were cancelled.

6. Ejaz filed a suit before the civil court at Islamabad, impleading the Foundation as defendant No.1, his predecessor Salim as defendant No.2, and Siddique the original allottee of the plot as defendant No.3. While the suit was progressing, it transpired that Siddique had claimed to have sold the suit plot to Faysal Shehzad (Faysal) and resultantly Faysal was also impleaded as defendant No.4. The trial progressed. The parties led their evidence. The judgment was rendered finding that the cancellation of the suit plot was not valid, that the sale by Siddique to Faysal was also not valid as a bona fide transaction, and the decree was passed that the plaintiff Ejaz was a bona fide purchaser of the suit plot and that the cancellation letter dated 02.08.2008 was illegal and unlawful and that accordingly the suit plot was to be restored in the name of the plaintiff Ejaz.

7. Regular First Appeal No. 50/2017 is filed by the Foundation and R.F.A. No.59/2017 is filed by the legal heirs of Siddique, against the impugned judgment and decree. The trial court framed 10 issues and, later on when Faysal was added as a defendant, added 2 further issues which are as follows:

1. Whether the plaintiff is entitled for decree for declaration to the effect that the plaintiff is lawful transferee, bona fide purchaser of suit plot? OPP
2. Whether the cancellation of suit plot vide letter of cancellation dated 02.08.2008 is justified? OPP
3. Whether the plaintiff is entitled for recovery of Rs.92,25,000/- as an alternate relief against the defendants? OPP
4. Whether the plaintiff is entitled for mandatory and permanent injunction as prayed for? OPP
5. Whether the plaintiff has concealed the material facts from the court? OPP
6. Whether the plaintiff has no prima facie case against the defendants? OPD
7. Whether the plaintiff has come to the court with unclean hands? OPD
8. Whether the suit of the plaintiff is liable to be dismissed with special cost under section 35-A, C.P.C.?OPD
9. Whether the plaintiff has no locus standi about above captioned suit? OPD
10. Relief.
 - 4A. Whether the defendant No.4 is a bona fide purchaser of the suit plot? OPD4
 - 4B. Whether the transfer of suit plot in the name of defendant No.4 by the defendant No.3 is based on mala fide and concealment of facts and to deprive the plaintiff from

his claim in suit? OPD

The plaintiff's evidence

8. Ahmed Khan, the plaintiff's father and attorney, appeared as PW-1. He produced his power of attorney as Ex-P1 in evidence. He reiterated in substance the claim per the plaint and added that, before the plot's purchase by Ejaz, the estate agent acting for Ejaz had visited the Foundation's office and satisfied himself as to the genuineness of the transfer allotment to Salim. He specifically stated that the responsibility lay on the Foundation. In cross-examination his stance that the suit file record at the Foundation was checked by his estate agent could not be rebutted by the Foundation's counsel. He was cross-examined as to the signatures on the plaint and power of attorney not matching, but that is quite insignificant because the plaintiff himself appeared in the witness box and substantially narrated the contents of the plaint in his examination in chief. Ahmed Khan was also questioned as to his knowledge of the inquiry by NAB against the alleged fake transfer but the relevance of this question is completely lost on one given that at the time that the transfer took place there was admittedly no NAB inquiry.

9. Salim Jahangir estate agent appeared as PW-2 and confirmed that he had visited the Foundation's office and did not find any lacunas in the suit plots record at the Foundation. He also confirmed that the plot price of Rs.2,925,000/- was duly paid through him to Salim defendant No.2. He was cross-examined on the point that the sale agreement between Ejaz and Salim had not been produced in evidence, but questioning on this line was irrelevant because the Foundation duly processed the transfer application to issue the certificate of transfer; at the time the transfer procedures required the presence of both the transferor and the transferee, and only upon satisfying itself the Foundation would issue the certificate of transfer. Therefore, the Foundation now cannot be allowed to go behind that transaction and question whether it took place at all.

10. PW-3 is another property dealer who assisted the PW-2 in the transaction.

11. Ejaz Ahmed the plaintiff appeared as PW-4. He substantially narrated the substance of the plaint and testified that, after the requisite due diligence into the plot file at the Foundation offices through his property dealers, he purchased the said plot for Rs.2,925,000./-. He went on to add that he would seek compensation as an alternative relief if the court comes to the conclusion that the plot was allotted to him by a fraud perpetrated by his predecessor in interest Salim. In cross-examination he was also questioned about the absence of any agreement, to sell. He denied any knowledge that the transfer by Siddique to Salim was a result of a fraud. He accepted that the NAB inquiry was in process, but stated that he only came to know about the inquiry 5 years later when the proceedings in the suit commenced. He denied that his claim lay only against Salim and reiterated that his claim actually lay against the Foundation. He admitted that he had signed an indemnity bond in favour of the Foundation which was exhibited as Ex-D1/1.

12. PW-5 Zaheer Ahmad was the assistant record keeper of the Foundation. He produced an inquiry report of the Foundation as Ex.P-2. This inquiry report is pivotal in this case and will be addressed in further detail later. He also produced the cancellation letter as Ex.P-3. He also produced as Ex.P-4 the transfer application and other related documents for transfer of the suit plot by Siddique in favour of Faysal (the 3rd transfer). He also admitted that there was no record

in relation to the NAB inquiry nor in relation to the Foundation's own inquiry in the suit file.

Defence evidence

13. Basit Khan, Deputy Director Law of the Foundation, appeared as DW-1. He sought to produce various allotment letters from the record, all were allowed to be produced under objection, without stating the reason for the objection, but it appears by the cross-examination to be that they were not certified copies of official record. He admitted in cross-examination that there were no documents in relation to the inquiry available with him, nor was he aware of them, and said that they might be available in some other file. He also admitted that there was no record of any notice of inquiry sent to any of the parties to the suit who would be directly affected by the inquiry; that is to say, he accepted that the inquiry was conducted without associating Salim and the plaintiff in the said inquiry. He also accepted that NAB too had not sent any communication in relation to the completion of the inquiry. He also accepted that both the parties had to appear before the Foundation, for their identification and for verification of the transfer application, and only thereafter the transfer application was approved. The suggestion was put to him, though denied, that the transfer by Siddique to Faysal was during the pendency of the suit and in violation of the stay order issued by the trial court.

14. Siddique, the original allottee, appeared as DW-2. He stated that he was allotted the suit plot for being an employee of the CDA. In 2006, when he heard that his plot had been sold, he moved several applications before the Supreme Court, the NAB, Ministry of Finance, etc., and as a result of his applications an inquiry was conducted by the Foundation which went on for many years and consequently his plot was restored. In his cross-examination he denied any knowledge whether the plaintiff was ever summoned for the said inquiry. He accepted that he had not produced any application for the inquiry, moved by him and explained it by saying that he had given all those documents to his lawyer. Most interestingly, he said that after the restoration, he sold the suit plot for Rs.10,00,000/- in 2013 to Faysal defendant No.4. He also admitted that he had not produced any document pertaining to the sale to defendant No.4. He denied the suggestion that he, in league with the Foundation, had procured the cancellation of the plaintiffs plot. Neither the Foundation nor Faysal's lawyer cross-examined Siddique.

15. Faysal Shahzad defendant No.4 appeared as DW-3 and stated that he had purchased the suit plot from Ejaz the plaintiff for Rs.10,00,000/-. In his cross-examination he stated that he was a property dealer and that he purchased the plot on 20.02.2014. He denied that the price of the plot in 2014 was not less than Rs.80,00,000/-, which he bought for a paltry sum of Rs. 10,00,000/-. He said that he had checked the suit file in the records of the Foundation and that there was no litigation pending then (the suit was instituted on 04.11.2013). He also admitted that he had not produced any agreement to sell in relation to the purchase of plot from "Ejaz Ahmed".

Analysis of the Trial Court's judgment

16. The learned trial court analyzed the evidence in considerable detail and concluded that the plaintiff was a bona fide purchaser for value without notice. This finding has been contested by the Foundation by relying mainly on the absence of the sale agreement between Ejaz and Salim, and by claiming, for which there is no evidence on record, that Ejaz the plaintiff was a party to the fraud perpetrated by the fake Siddique on the real Siddique.

17. It does not appeal to reason that why an intermediary Salim would be required for Ejaz

to perpetrate the alleged fraud, if Ejaz were to be the direct beneficiary of the fake Siddique's acts. Suppose the plot had changed 10 hands earlier, then would it mean that all the 10 in the chain would have been party to the fraud? The fraud would have been perpetrated by the plaintiffs predecessor in interest, who then sold the plot to him and then disappeared from the scene. If the plaintiff was a party to the fraud, it is not clear why he continued to own the plot for 2 years all the way until it was cancelled. Salim however sold the plot as soon as he got it and disappeared, which makes the allegation of fraud against him sounder.

18. The learned trial court found, and I agree, that the fraud alleged by the Foundation was not sufficiently proved. At paragraph 39, the learned trial court observed that the defendants were bound to produce cogent and substantial evidence to demonstrate fraud. This is also the correct legal position. The defence witnesses could not produce any evidence in relation to the conduct of a proper inquiry and only relied on the two-pager inquiry report produced in evidence. Learned counsel for Ejaz asserts that the inquiry report was a sham, no documents preceding the inquiry report were produced in evidence, the reference to the NAB inquiry was also a sham as no documents in relation thereto were produced, and both PW-4 the record keeper and DW-3 the Deputy Director Law admitted that there was no other record available with the Foundation in relation to either the inquiry or the NAB proceedings, nor the applications given by Siddique, and therefore it can be concluded that the inquiry itself had not been sufficiently proved. It is settled law that the allegation of fraud has to be proved by unimpeachable evidence. On this key finding, the learned trial court disbelieved the allegations of fraud against the plaintiff and found him a bona fide purchaser for value and also disbelieved that the inquiry report per se established the participation of the plaintiff in the alleged fraud. The learned trial court therefore allowed the prayer of declaration and injunction and directed the Foundation to restore the suit plot.

19. The learned trial court also found that defendant No.4 Faysal was not a bona fide purchaser of the suit plot. It rested this finding on that defendant No.4 Faysal stated that he had purchased the plot from Ejaz the plaintiff in 2014, whereas Siddique defendant No.3 had stated in his testimony that he had sold the plot to Faysal in 2013 for a sum of Rs.10,00,000/- only. Accordingly, in paragraph No. 59, the learned trial court observed that

In the instant case though defendant No.4 appeared in the witness box but he failed to establish that he's a bona fide purchaser because firstly he was unaware of the fact from whom he purchased the said plot.... Furthermore as per defendant No.3, who appeared in the witness box as DW-2 he had sold the suit plot to the defendant No.4 in year 2013 against a sale consideration of Rs.10,00,000/-, while as per defendant No.4 he had purchased the suit plot from the plaintiff on 20.02.2014. Furthermore he also failed to produce on record any agreement through which he had purchased the suit plot from the plaintiff. There are contradictions in the stance of defendants Nos.4 and 3 taken in the written statement and in the evidence therefore his plea of bona fide purchaser is not confidence inspiring.

20. At paragraph No. 65, answering issue No.4-B, the learned trial court observed as follows:

A person who claimed to be a bona fide purchaser of the suit plot in the instant case does not even know the name of seller of the suit plot. Furthermore there is contradiction in the statements of DW-2 and DW-3 regarding the year in which the suit

plot was purchased by the defendant No.4. Another interesting fact which came on record is that plaintiff purchased the suit plot in year 2005 against the sale consideration of Rs.29,25000/- while defendant No.4 after a passage of 8 years, purchased the same plot from the defendant No.3 against the sale consideration of Rs.10,00,000/- that is much less than the actual rate of suit plot... The above circumstances show that, defendant No.3 had sold the suit plot to defendant No.4 at a lower price with a mala fide intention just to deprive the plaintiff from its valuable rights, resultantly this issue is decided in favour of plaintiff and against the defendants.

Judgment in Appeal

21. Mr. Nazir Jawad Advocate appearing in R.F.A. No. 50 on behalf of the Foundation laid much emphasis on the existence of the inquiry report and the finding therein that a fake person impersonating as the original allottee Siddique had appeared and procured the transfer in favor of Salim. He also hinted that both Salim the transferee of the fake Siddique and the plaintiff were all parties to a fraud perpetrated on Siddique.

22. As for the question of the sanctity of the inquiry report and its findings, his reference to the proceedings of the inquiry and the NAB inquiry are not borne out on the record as no record whatsoever pertaining to inquiry was produced except for the 2-pager inquiry report. This omission was capitalized on by Mr. Shajjar Abbas Advocate appearing for Ejaz the plaintiff by saying that it was actually the Foundation and its officials who, as he called them, were a mafia who contrived together to deprive the plaintiff of his plot by referring to a sham inquiry, by failing to produce any documents supporting the findings of the inquiry report, and above all by a transfer pendente lite of the plot to defendant No.4 Faysal for a sale price which was far less than its prevalent price in the year 2013/2014.

23. I am afraid Mr. Nazir Jawad's submissions of Ejaz's complicity in the fake 1st transfer do not find favour with this Court. Firstly, the inquiry report, as observed by the learned trial court, is not proved with the degree of provenance which is required to prove allegations of fraud. Secondly, there is no credible evidence on record to conclude that Ejaz the plaintiff was a party to that fake 1st transfer.

24. I find that there is no evidence of fraud in which Ejaz is complicit, that fraud is not proved in any event with the degree of proof required, and that the Foundation is vicariously liable for the negligence of its employees causing financial loss to the plaintiff Ejaz.

25. The findings stated in the inquiry report brought on record as Ex.P2 (which are not reproduced here but any reader of this judgment is invited to refer to its contents), though not sufficient (for reasons stated hereinabove) to prove fraud, are nonetheless sufficient to conclude gross negligence. The inquiry report acknowledges unequivocally² that the Foundation's officials were responsible for not carrying out the requisite transfer procedures meant to secure the transaction as well as provide protection against abuse. Though the inquiry report claims fraud, which is not found to be proven for the evidence not coming up to the substantially higher threshold of proof for fraud, the contents of the inquiry report suffice to prove negligence, and though some purists might object to the use of any adjectival characterisation of the tort of negligence, I do not hesitate to call this a case of gross negligence. A deliberate or reckless (per the Foundation, fraudulent) failure to verify the credentials of the transferor and the transferee is unequivocally demonstrated by the evidence

led by the Foundation itself.

Vicarious Liability

26. At the relevant time that this transaction occurred, the Foundation was a company incorporated under the Companies Ordinance 1984. Its status changed to a statutory body much later in 2019. It is settled law that a company is vicariously responsible for loss occasioned by the negligence of its employees (barring some exceptions, which are not applicable in this case). This is the doctrine of vicarious liability. It has a good commercial rationale. The Foundation is a company that charges transfer fees. It issues a document of title. It holds out to the world at large that its document of title is one on the basis of which the titleholder can transact the plot. The results would be monstrous if it can turn around tomorrow and disclaim its title document as bereft of any credence.

- i) In *A M Mohamud v. WM Morrison Supermarkets PLC* (2016 SCMR 963), the Supreme Court of the United Kingdom took the occasion to elaborate the concept of vicarious liability of corporate bodies for the acts of its employees. The question in that case concerned an employer's vicarious liability in tort for an assault carried out by an employee. Though specific to assault, the tracing of the history of evolution of the doctrine of vicarious liability makes for illuminating reading and for the doctrine to apply to other categories of tort also, including negligence in commercial affairs being the proximate cause of the plaintiff's loss. The judgment starts with a statement of law on vicarious liability as follows:

Vicarious liability in tort requires, first, a relationship between the defendant and the wrongdoer, and secondly, a connection between that relationship and the wrongdoer's act or default, such as to make it just that the defendant should be held legally responsible to the claimant for the consequences of the wrongdoer's conduct. In this case the wrongdoer was employed by the defendant, and so there is no issue about the first requirement. The issue in the appeal is whether there was sufficient connection between the wrongdoer's employment and his conduct towards the claimant to make the defendant legally responsible. (emphasis supplied)

- ii) The UK Supreme Court then went on to trace the origins and history of the doctrine of vicarious liability in the common law. The original conception was that a master was only liable for acts done by his servant at his command. (I should like to think that Pakistan too can claim a sufficient level of evolution in its jurisprudential maturity since the times of King Henry IV in the early 15th century when this doctrine held sway.) The UK Supreme Court, attributing the development of the doctrine of vicarious liability to Holt J, commensurate with the growth in commerce and industry in the 18th century, cited approvingly the passage that:

The master at his peril ought to take care what servant he employs; and it is more reasonable that he should suffer for the cheats of his servant than strangers and tradesmen.

- iii) The judgment then went on to cite the case of House of Lords in the landmark case of *Lloyd v. Grace, Smith & Co* [1912] AC 716, where a law firm was found liable for the fraud when its clerk, entrusted by the defendant firm with managing its conveyancing department, defrauded the plaintiff, who had come to the firm for advice about two

properties left to her by her late husband. At para 25, the law report reads as follows :

In 1907 Salmond published the first edition of his text book on the Law of Torts. He defined a wrongful act by a servant in the course of his employment as "either (a) a wrongful act authorised by the master or (b) a wrongful and unauthorised mode of doing some act authorised by the master", with the amplification that a master is liable for acts which he has not authorised if they are "so connected with acts which he has authorised, that they may rightly be regarded as modes - although improper modes --- of doing them (pp 83-84).

The UK Supreme Court continued to trace the history. At para 36, it noted the following:

In *Central Motors (Glasgow) Ltd v Cessnock Garage and Motor Co* 1925 SC 796, 802, Lord Cullen said:

"The question is not to be answered merely by applying the test whether the act in itself is one which the servant was authorised or ordered or forbidden to do. The employer has to shoulder responsibility on a wider basis; and he may, and often does, become responsible to third parties for acts which he has expressly or impliedly forbidden the servant to do. ... It remains necessary to the master's responsibility that the servant's act be one done within the sphere of his service or the scope of his employment, but it may have this character although it consists in doing something which is the very opposite of what the servant has been intended or ordered to do, and which he does for his own private ends. An honest master does not employ or authorise his servant to commit crimes of dishonesty towards third parties; but nevertheless he may incur liability for a crime of dishonesty committed by the servant if it was committed by him within the field of activities which the employment assigned to him, and that although the crime was committed by the servant solely in pursuance of his own private advantage.

(emphasis supplied)

- v) The most relevant citation for our present purpose appears in paragraph 41.

In *Dubai Aluminium Co. Ltd. v. Salaam* 2002] UKHL 48; [2003] 2 AC 366, the House of Lords applied the *Lister* approach to vicarious liability in a case of commercial fraud. Lord Nicholls (with whom Lords Slynn and Hutton agreed) said:

"22.... [I]t is a fact of life, and therefore to be expected by those who carry on businesses, that sometimes their agents may exceed the bounds of their authority or even defy express instructions. It is fair to allocate risk of losses thus arising to the businesses rather than leave those wronged with the sole remedy, of doubtful value, against the individual employee who committed the wrong. To this end, the law has given the concept of 'ordinary course of employment' an extended scope.

23. If, then, authority is not the touchstone, what is? ...Perhaps the best general answer is that the wrongful conduct must be so closely connected with acts the partner or employee was authorised to do that, for the purpose of the liability of the firm or the employer to third parties, the wrongful act may fairly and properly be regarded as done by the partner while acting in the ordinary course of the firm's business or the employee's employment

25. This 'close connection' test focuses attention in the right direction. But it affords no guidance on the type or degree of connection which will normally be regarded as sufficiently close to prompt the legal conclusion that the risk of the wrongful act occurring, and any loss flowing from the wrongful act, should fall on the firm or employer rather than the third party who was wronged.

26. This lack of precision is inevitable, given the infinite range of circumstances where the issue arises. The crucial feature or features, either producing or negating vicarious liability, vary widely from one case or type of case to the next. Essentially the court makes an evaluative judgment in each case, having regard to all the circumstances and, importantly, having regard to the assistance provided by previous court decisions.

- vi) The Court then concluded with a restatement of the law on vicarious liability upholding the "close connection" test entailing a two-step inquiry which the Court summarised in paragraphs 44 and 45 as follows:

44. In the simplest terms, the court has to consider two matters. The first question is what functions or "field of activities" have been entrusted by the employer to the employee, or, in everyday language, what was the nature of his job. As has been emphasised in several cases, this question must be addressed broadly.

45. Secondly, the court must decide whether there was sufficient connection between the position in which he was employed and his wrongful conduct to make it right for the employer to be held liable under the principle of social justice which goes back to Holt. To try to measure the closeness of connection, as it were, on a scale of 1 to 10, would be a forlorn exercise and, what is more, it would miss the point. The cases in which the necessary connection has been found for Holt's principle to be applied are cases in which the employee used or misused the position entrusted to him in a way which injured the third party. (emphasis supplied)

27. I now apply these two tests to the case at hand, and find that there was a "close connection" between the negligent act of the Foundation's employees and the financial loss of the plaintiff, for:

- i) the inquiry report acknowledges that the Foundation's employees failed to ensure that proper verification of the transferor and transferee, the former more critical, was carried out. That is, the employees 'field of activities' was ensuring the authenticity and genuineness of the transfer process, leading to a new title document - the "transfer letter" -- being issued by the Foundation which would do the rounds in the open market for the intending purchasers to rely on. I therefore find that the Foundation's employees were acting within their field of activities; and
- ii) applying the second limb of the test, the Foundation's employees were grossly negligent in the exercise of the duties entrusted to them which was the direct and proximate cause of Ejaz's loss.

28. If the 18th century England can find social justice a useful guide to hold employers liable for their employees' negligence or fraud, and if the 21st century Courts in England can continue to agree with that principle, I do not wish to encounter embarrassment in insisting

that the Pakistani Courts should continue to adhere to the medieval principle of the 15th century that a master is liable only for the acts of his servant done at his command.

The indemnity

29. The reliance by learned counsel for the Foundation on the indemnity signed by Ejaz does not avail the Foundation at all. An indemnity is, first and foremost, a contract. Its validity is dependent on all the ingredients of a valid contract. A misrepresentation vitiates 'free-consent', and the contract tainted by a misrepresentation is voidable at the instance of the party whose consent was caused by misrepresentation: section 19 of the Contract Act, 1872. The very act of suing the Foundation and claiming compensation as alternative relief is tantamount to the plaintiff announcing the indemnity as void from the date the suit was filed. The evidence establishes that the requisite 'ordinary diligence', per the Exception to section 19 of the Contract Act, was duly carried out by Ejaz through his estate agent. The Foundation's misrepresentation consisted in the transfer allotment letter of Salim, Ejaz's predecessor-in-interest, being a valid and genuine document, which misrepresentation continued when the Foundation processed Ejaz's transfer application on the basis of Salim's title and issued a transfer allotment letter to Ejaz. It is noteworthy that section 18(1) of the Contract Act, enumerating the ingredients of misrepresentation, makes the actual knowledge of the person making the representation of it being untrue irrelevant - so even if the Foundation as a corporate body did not know at the relevant time that Salim's transfer letter was not genuine, its employees, per the inquiry report, knew so, and their acts are vicariously attributable to the Foundation. To agree with the Foundation's submissions for its absolution in reliance on the indemnity would mean for this Court to assume that Ejaz would have replied "yes" if he were asked on the day he signed the indemnity that "do you consent to indemnify the Foundation even if you knew what the Foundation's employees and its record are telling you about Salim's allotment transfer to be all false"; I am afraid this assumption is not only absurd, it is also contrary to the evidence on the file.

The original allotment stands

30. Regardless of my agreement with Mr. Nazir Jawad that setting aside the inquiry report would be highly unfair to the original allottee Siddique who was deprived of his allotment for no fault of his, having found that the fraud per se is not proved, while negligence is, the original allotment could not have been cancelled. The Foundation's entire case rests on its inquiry report, and it must be held to it, neither against Ejaz nor against Siddique for the reasons discussed earlier, but against the Foundation itself. I therefore set aside the judgment in the first instance directing restoration of the plot to Ejaz, uphold the Foundation's cancellation letter, and declare that Siddique remains the owner of the suit plot.

Compensation to Ejaz

31. Award of damages against corporates for negligence is not a concept alien to Pakistan law. The tort of negligence can result in personal injury or financial loss. Both are recognised and enforced in our jurisprudence.

- i) *Mian Nisar Elahi v. Lahore Stock Exchange(G) Limited and 4 others* (2007 CLD 376) was a case where the plaintiff's pledged shares, in custody of the Central Depository Company (CDC), were sold unlawfully by the Lahore Stock Exchange (LSE) which would not have been possible without the complicity and/or negligence of CDC. That

case largely turned on the specific statutory framework applicable to CDC, but one of the grounds was CDC's negligence. His Lordship, Justice Jawwad S. Khawaja (when at the Lahore, High Court), on finding that the CDC had acted negligently in letting the plaintiff's pledged securities to be converted into LSE's name, awarded damages with interest to the plaintiff. The law report, referring to IBL V. Coussens [1991] 2 All ER 133, notes at paragraphs 85 and 86 as follows:

85.... Of the three learned Judges on the Bench, two have given their separate reasons for the Court's decision. Both have relied on the dictum of Brandon LJ in the case of *Godschrnidht & Co. Ltd. v. Western Transport Ltd.* where he said:

"Damages in tort are awarded by way of monetary 'compensation for a loss or losses which a plaintiff has actually sustained, and the measure of damages awarded on this basis may vary infinitely according to the individual circumstances of any particular case.

86. Although the case of *IBL Ltd. v. Coussens*, supra, was a case under the Torts (Interference with Goods) Act, 1977, the rule recognized therein as generally applicable in cases of torts furnishes a good starting point for determining the factors which may be relevant for arriving at the quantum of damages.

ii) His Lordship followed this train of reasoning and held at para 99 as follows:

A fair basis would be to take the average closing price of the said shares over the last 30 working days preceding the date of this judgment. In my humble view, this would be the most appropriate method of calculating the value of the shares and consequently the amount to be awarded to the plaintiff.

ii) The Court then awarded a decree in favour of the plaintiff in "the amount equivalent to the average closing price of the pledged shares over the 30 working days at the LSE immediately preceding the date of this judgment". Further, the Court also awarded interest on the decretal sum at the rate of 12 per cent per annum from the date of the decree until the payment of the decretal amount.

32 Resultantly, I set aside the judgment and decree under appeal and hold that:

- i) the plaintiff Ejaz, having carried out his due diligence of the plot files at the Foundation's offices, was entitled to rely on the transfer letter qua title document issued by the Foundation to his predecessor-in-interest Salim;
- ii) the Foundation was entitled to cancel the plot, once it found out that the transfer letter was issued to Salim as a result of, what the Foundation calls a fraud in which its employees were complicit with either the fake Siddique or Salim, and what I find to be an instance of gross negligence;
- iii) the Foundation is vicariously liable for the negligent acts of its employees per its inquiry report, and is liable to compensate Ejaz. Ejaz has in any event claimed compensation as alternative relief. This Court can grant him the alternative relief even if he had not specifically prayed for it. What is a fair measure of his compensation? In assessing his compensation, I have to factor in the fact that he stood deprived of his plot since 2008, and still doesn't have the plot nor the price thereof. Relying on Mian

Nisar above, I find that a fair measure of his compensation is the current market value of the plot. Now the plot prices vary by a fair margin due to their specific location and other peculiar attributes, and therefore an objectively verifiable method must be used. The "DC rate" is good for this purpose. Accordingly, the Foundation is liable to pay the DC rate for the suit plot prevalent on the date of this judgment to the plaintiff within 30 days of this decision. Further, for each day of delay in payment after the aforesaid 30 days for payment, I award interest at 12% per annum, prorated for each day, under section 34, C.P.C. using the following formula:

interest per day = (DC Rate Price * 12%) / 365;

- iv) Siddique's allotment as a result must remain intact, as no valid title flowed in favour of Salim and, therefore, nor to Ejaz. The permanent injunction in the first-instance judgment and decree to restore Ejaz's allotment is set aside; and
- v) regardless of Faisal being a bona fide purchaser from Siddique, that is a matter between Siddique and him. In the suit, both Faisal and Siddique's target was the allotment and transfer to Ejaz; their inter-se disagreement, if any, was not. The Court need not concern itself with the mechanics of a transaction carried out by the original allottee Siddique and Faisal.

Office is directed to issue a decree sheet accordingly.

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