IN THE HIGH COURT OF SINDH AT KARACHI

HCA No. 332 of 2019

[Anwar Javed Khan ….v. Mazhar Ali & others]

Present
Mr. Justice Irfan Saadat Khan.
Mr. Justice Zulfiqar Ahmad Khan.

Date of Hearing	:	29.08.2023
Appellants through	:	M/s. Muhammad Hanif & Zakia Haneef, Advocates.
Respondent through	:	M/s. Masjood A. Memon and Faraz Faheem Siddiqui Advocates for respondent No.1. Mr. Arjumand Saeed, Advocate for respondent No. 2 to 4.

O R D E R

Zulfiqar Ahmad Khan, J:- The Appellant through this High Court Appeal has impugned Judgment dated 08.10.2019 and Decree dated 16.10.2019 ("Impugned Judgment & Decree") passed by learned Single Judge in Suit No 725/2015, whereby, the suit filed by respondent No.1 under the provisions of Fatal Accident Act, 1855 ("Act, 1855") was decreed.

2. The facts necessary for the disposal of the instant HCA are that the respondent No.1 filed a suit under the provision of Act, 1855 alleging therein that his son Mazhar Ali ("deceased") died in a lift accident on 03.05.2014 which lift was installed in a building being run by the Respondent No.2. The learned Single Judge having admitted the suit, issued summons and notices to the contesting parties to procure their attendance but only appellant herein filed his written statement, whereas, the other defendants/ respondents were declared *ex parte* vide orders dated 24.04.2016 and 17.10.2016. The

learned Single Judge having examined the record and proceedings framed the following issues:-

> "1. Whether it is the negligence of the defendant occasioning the unnatural death of deceased?
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> 2. Whether the defendants Nos. 1 to 3 are responsible for commonly and contributory negligence which caused the death of the deceased?
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> 3. Whether the defendants Nos. 1 to 3 jointly and severally liable to pay compensation to the plaintiff as detailed in suit?
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> 4. What should the decree be?"

3. Having recorded the evidence, the learned Single Judge heard the contesting parties and decreed the suit in favour of the respondent No.1 in the following terms:-

> "(i). The Defendant No.1 Messrs Park Avenue Owners/Occupants Welfare Association is liable to pay a sum of Rs.25,772,800/- (rupees Two Crores fifty Seven Lacs Sevent Two Thousand Eight Hundred only) to the Plaintiff, and
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> (ii). Defendants Nos. 2, 3 and 4 are liable to pay Rs.6,443,200/- (Rupees Sixty Fours Lacs Forty Three Thousand Two Hundred only) to the Plaintiff, and
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> (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."

4. Stance of the Appellant as set up in the memo of instant appeal and reflected through his counsel's argument sums up that the unfortunate incident took place on account of negligent act of the deceasd himself as many other passengers who also boarded in the lift on the fateful day survived. It is introduced on record that appellant is alien to the present proceedings for the reasons that the

alleged incident took place on 03.05.2014 at which date the appellant was not holding charge of the Respondent Association, therefore, the appellant was wrongly impleaded in the suit, hence not liable to pay any compensation to the deceased family under the Act, 1855 and that the learned Single Judge failed to take into consideration facts as well as circumstances pleaded by the appellant and passed the impugned Judgment and Decree in a slipshod manner which is liable to be set aside and annulled by this Court under its appellate jurisdiction.

5. M/s. Masjood A. Memon and Faraz Faheem Siddiqui advocated the case of the respondent No.1 and premised their case on the arguments that a young boy lost his life in a gruesome way due to the negligent acts of the appellant. Learned counsel added that the witness of the respondent No.1/plaintiff testified that appellant and respondent association were collecting millions of rupees every month for maintaining the Building and its allied facilities including the lift but they failed to diligently fulfilled their obligations and duties resultantly the lift installed in the building which was malfunctioning as admitted by the appellant in his deposition was let to be used. During the course of arguments, representative of the appellant went through the testimony as well as cross-examination of the appellant in which the appellant admitted that lift was out of order and due to the dispute between the members over the funds and monthly maintenance collection repairs work of the Building as well as maintenance of the lift was not undertaken properly, which fact was duly considered by the learned Single Judge who considered all the aspects of the case including negligent act of the appellant as

well as that of the other respondents/defendants and awarded compensation to the respondent No.1/plaintiff in accordance with law and there is no misreading or non-reading of evidence, as alleged by the appellant, therefore, the appeal in hand be dismissed with exemplary cost.

6. Cross-objections were filed by the Respondent Nos. 2 to 4 under the provisions of Order XLI Rule 22 CPC. It is considered expedient to illustrate here that Ms. Arjumand Saeed, Advocate appeared on 09.12.2019 on behalf of these objectors and sought time for preparation but, the cross-objections were presented by her only on 10.01.2020. The prescriptions of Order XLI Rule 22 CPC clearly connotes that cross-objections ought to be filed within thirty days from the date of notice or from the date when time was granted to do so. It is considered pertinent to reproduce Rule 22 of Order XLI CPC hereunder:-

> 22. Upon hearing, respondent may object to decree as if he had preferred separate appeal:-- (1). Any respondent, though he may not have appealed from any part of decree, may not only support the decree on any of the grounds decided against him in the Court below, but take any cross-objection to the decree which he could have taken by way of appeal, provided he has filed **such objection in the Appellate Court within one month from the date of service or within such further time as the Appellate Court may see fit to allow**.
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> Form of objection and provisions applicable thereto.--- (2) Such cross-objection shall be in the form of a memorandum, and the provisions of rule 1, so far as they relate to the form and contents of the memorandum of appeal, shall apply thereto.
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> (3) ----------
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> (4) ----------
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> (5) ----------

7. It is gleaned from appraisal of the foregoing that the cross objections ought to be filed within thirty days of the notice of appeal issued under Section 43 CPC or when the Court awarded time for doing so. It is an admitted fact that learned counsel for the respondent Nos. 2 to 4 represented these respondents on 09.12.2019 (having already been served previously) and sought time for preparation and the cross-objections were presented on 10.01.2020 beyond the date of statutory period as mandated under the above quoted provision of CPC, therefore, the cross-objections in our humble view are time barred as well as the stance that courts were observing vacations is not substantial one as even there is no request made for the extension of time as prescribed by Section 5 of the Limitation Act 1908, but still these aspects are considered in the following part of the judgment.

8. We have heard the respective learned counsel at length and have also appreciated the documentation and allied material towards which our attention was drawn. The pleadings of the present appeal circumscribe the scope of the determination as to whether the findings rendered in the Impugned Judgment and Decree are sustainable or not. With the assistance of the record and proceedings, the appeal was heard at length to adjudicate the following points for determination are framed in pursuance of Order XLI, rule 31, C.P.C:-

> i. whether the findings of the learned Single Judge rendered in the Impugned Judgment & Decree are sustainable?
>
> ii. Whether the appellant successfully set forth the case of the misreading and nonreading of evidence

> by the learned Single Judge to set aside the impugned Judgment & Decree?

9. In our considered view, the point Nos. 1 & 2 are inextricably linked, based upon similar evidence and record, therefore, it would be advantageous to discuss those simultaneously. It is an admitted fact that the deceased Mazhar Ali was a young workman who met the painful unnatural death. It is considered pertinent to reproduce hereunder the excerpt of the Impugned Judgment and Decree enumerating the fact and circumstance in which the the deceased Mazhar Ali died in the following:-

> "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".

10. It is gleaned from appraisal of the foregoing that the deceased met an unnatural death as mentioned in the medical certificate. Now the question remains as to the extent of liability. So as to strengthen the factum of alleged incident and the negligent act as well as apathy of the appellant and respondents/defendants, the respondent No.1/plaintiff produced two witnesses namely PW-1 Akhtar Ali and PW-2 Ali Raza who during their examination-in-chief, disclosed the factum of the alleged incident. Both the witnesses were put to the test of lengthy cross-examination by the appellant's counsel during the course of evidence but both remained persistent on the fact that the appellant as well as respondents/defendants are responsible for the unfortunate incident and death of the deceased. Learned Single Judge discussed the evidence of both the parties in the impugned

Judgment and Decree and it would be worth to reproduce the relevant crux hereunder:-

> "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**.
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> 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**.
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> **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 Nos.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.**
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> **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".**

11. Perusal of testimony of the appellant (defendant No.2 in suit) unequivocally shows that the appellant had accepted that the lift was partially out of order and due to internal dispute of Association/respondent No.2, there was no proper or regular maintenance of the lift. The appellant during his testimony introduced on record that the Respondent No.2 Association was collecting maintenance charges from the offices/units of the said Building, as well as the appellant also admitted to have installed a mobile tower on the roof top of the said building and the fact they were collecting the monthly rent from the cellular company too in the intervening period, and further admitted that Respondent No.2 is directly, indirectly and vicariously responsible for all the acts, omissions of her office bearers being his employees. Learned counsel for the appellant during the course of arguments introduced on record that the appellant at the time of incident was neither holding the office of the association nor its part, therefore, he is not responsible for the death of the lift user. To meet with the said submissions, we observe here that the learned Single Judge also discussed this aspect of the case in the impugned Judgment in details thus we reproduce the relevant excerpt of the impugned Judgment to reach to a just conclusion:-

> "13. As already stated in the preceding paragraphs, that Defendants Nos. 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 effect 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."

12. Apart from above, the principle of "res ipsa loquitur" would also be applicable which means that "things speak for themselves". The said maxim applies as the real cause of death was solely within the knowledge of the appellant and respondents/defendants and deceased[1]. The "res" speaks because the facts stand unexplained, and, therefore, the natural and reasonable, not conjectural, inference from the facts shows that what has happened was reasonably attributable to some act of negligence on the part of present appellant and respondents/defendants having failed to

[1]Razia Khatoon v. Province of NWFP & others (2002 MLD 539), Muhammad Yaseen v. Medicare Clinic Ltd., (1988 CLC 139) and Punjab Road Transport Corporation Lahore v. J.V. Gardner and 2 others (1998 CLC 199).

perform the duty of care as clearly no loss is caused to the appellant and the objectors as it was the deceased who lost his life and faced brutal injuries (Chest Injury, Blunt Trauma as per Medical Certificate available at page 341, Exh. P/12 of the evidence file) due to the faulty lift installed in the subject building and more particularly on the ground that it was out of order as admitted by the present appellant in his cross-examination, but was still permitted to be plyed.

13. Furthermore, it is well established principle that loss of human life cannot be measured in terms of money, however, the Fatal Accident Act, 1855 was enacted to provide compensation to the bereaved families for loss occasioned by the death of a person caused by actionable wrong. According to the preamble of the Act, 1855, the said law was enacted to provide compensation to families for loss occasioned by the death of a person caused by actionable wrongs since no action or suit was otherwise maintainable in any court against a person who by his wrongful act, neglect or default which may have caused the death of another person, and it was considered expedient that the wrong-doer in such cases be made answerable through damages for the injury so caused by them.

14. To assess the quantum, it is useful to refer to the judgment of the Hon'ble Supreme Court handed down in the case of Punjab Road Transport Corporation v. Zahid Afzal and others (2006 SCMR 207) and towards another judgment of the Division Bench of this Court in the case of Ehteshamuddin Qureshi v. Pakistan Steel Mills (2004 MLD 361), wherein, not only the earlier principles established in such cases have been reiterated, but the same time also have been further

expounded. It would be advantageous to reproduce herein below the relevant paragraphs of the above Supreme Court Judgment:

> “10. The superior Courts laid down following principles to be kept in view while awarding damages in case a person has died on account of accident due to the negligence of the driver of the petitioner's vehicle, which causes death of the victim:
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> (i) the position of each dependent of the deceased should be considered separately;
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> (ii) the damages are not to be given as solatium but should be calculated with reference to a reasonable expectation pecuniary benefit, from the continuance of the life of the deceased. Damages claimed by dependents for their own pain and suffering or for the loss occasioned to them due to the death of the deceased which is not referable to the expectation of any such pecuniary benefit is outside the scope of the Act;
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> (iii) the deceased need not be earning or the dependents need not be actually deprived of benefit. Reasonable expectation of such earning or benefit is enough;
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> (iv) the pecuniary loss due to the death should stem not from a mere speculative possibility of pecuniary benefit from the continuance of the life of the deceased but only from a reasonable possibility of such benefits;
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> (v) where the actual extent of such pecuniary loss cannot be ascertained accurately, the sum may be an estimate or partly a conjecture;
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> (vi) in assessing the damages all circumstances which may be legitimately pleaded in diminution of the damages should be considered;
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> (vii) the pecuniary loss of each dependent should be ascertained by balancing on the one hand the loss to him of future pecuniary benefits and on the other any pecuniary advantage which from whatever source comes to him by reason of death.
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> 11. The Constitution of a country is a kind of social contract which binds people, society and a State. The terms of the contract foster feelings of interdependence of belonging to an entity and of adherence to law. An honest commitment to the

> goals set out in the Constitution ensures promotion of nationhood and stability of the system. In view of Article 4 read with Article 5(2) of the Constitution, it is the duty of each and every organ of the State and people of Pakistan to work within the framework of Constitution and law as law laid down by this Court in the following judgments:--
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> (1) Ch. Zahoor Elahi's case PLD 1975 SC 383 and (2) Zahid Rafique's case PLD 1995 SC 530."

15. Right to life is the very fundamental right protected by all laws and Constitutions, which cast duty on everyone including courts to arrest all unfortunate acts leading to un-natural deaths of one at the hands of other. As in the present case admittedly the appellant and the Respondent Association failed to maintain the passenger lift installed in the building causing fatal injuries to the innocent young man who lost his life at the prime of his youth.

16. In view of the rationale and deliberations delineated above, we are of the considered view that the impugned Judgment and Decree neither suffers from any illegality or irregularity nor any case of misreading and non-reading of evidence has been established by the appellant. Resultantly, instant High Court Appeal is dismissed.

17. To safeguard lives and properties of those using passenger and cargo lifts we take this unfortunate opportunity to propose that laws at the Federal as well as Provincial levels be promulgated to regulate issuance of licenses and permits by some statutory body which upon technical inspection of lifts would be responsible to issue licenses (to be displayed in each lift), so that passengers could use lifts with the understanding that appropriate regulatory authority has already permitted operations of such lifts after complying with all technical and safety protocols. In this regard, reference could be made to the

U.K law titled 'Lifting Operations and Lifting Equipment Regulations 1998' which prescribes duties and responsibilities of owners as well as operators of the lifts as well as require that all lifting equipment must be properly planned by a competent person, appropriately supervised and used in a safe manner.

18. For these reasons let a copy of this Judgment be sent to the Federal as well as Provincial Secretaries of Law for information and necessary law making.

JUDGE

JUDGE

Karachi
Dated:19.09.2023

Aadil Arab