

IN THE HIGH COURT OF SINDH AT KARACHI**High Court Appeal No. 256 of 2005**

Present:

Mr. Justice Muhammad Shafi Siddiqui

Mr. Justice Omar Sial

Karachi Electric Supply Corporation **Appellant**

through Mr. Danial Shaikh, Advocate

vs

Batool Fatima **Respondent**

through Syed Nadeem-ul-Haque, Advocate

Date of hearing : 16th January, 2024Date of judgment : 30th January, 2024**JUDGMENT**

OMAR SIAL, J.: Batool Fatima, through her sons Shaukat Ali and Javed Iqbal, owned and operated a woven labels manufacturing unit in the Baldia Town area of Karachi. Due to no fault of the owners, K-Electric (then known as Karachi Electric Supply Company Limited) disconnected the power supply to the manufacturing unit for 291 days. Power was restored on the orders of this Court. On 17.03.1999, Batool Fatima filed Suit No. 414 of 1999 against K-Electric, claiming Rs. 6.25 million as damages. The Suit was decreed in Batool Fatima's favor on 16.05.2005, and it was ordered that K-Electric pay the Rs. 6.25 million with mark-up from the date of the Suit till realization. K-Electric has filed this appeal against the judgment and decree passed by the learned Single Bench of this Court.

2. We have heard the learned counsels for both parties and perused the record. The individual arguments of the counsel are not being reproduced but are reflected in our observations and findings, which are as follows.

3. It is an admitted position that when the electricity supply of the manufacturing unit was disconnected, no dues were outstanding against the manufacturing unit, nor was there any other default on its part, nor was a disconnection notice issued to the manufacturing unit. This fact was also acknowledged by K-Electric's Deputy Chief Controller at trial and re-confirmed by K-Electric's counsel during the hearing of this appeal. Hence, it was established that the supply to the manufacturing unit was disconnected without any logical or lawful reason and no fault on the part of the manufacturing unit.

4. We will first address the preliminary objection raised by counsel for K-Electric that the appeal is barred by limitation. The record reflects that the impugned judgment was announced on 16.05.2005. A certified copy was applied for on 21.05.2005. The copy was ready on 04.06.2005 and obtained on the same date (a Friday). The court was on summer vacation from 06.06.2005 up to 07.08.2005. The appeal was filed on 08.08.2005, i.e., on the first working day after vacation. Section 4 of the Limitation Act, 1908 provides that where the period of limitation prescribed for any suit, appeal, or application expires on a day when the Court is closed, the suit, appeal, or application may be instituted, preferred, or made on the day that the Court re-opens. Given the foregoing, the appeal is not time-barred.

5. An aspect of this case we have closely examined is the quantum of damages awarded. The heads and the quantum against each head of the awarded damages were as follows:

Loss of business at the rate of Rs. 14,330 per day	Rs. 4,170,030
Loss of reputation	Rs. 417,003
Loss of clientage	Rs. 417,003
Loss on account of expected increase in the earnings and other invisible losses	Rs. 834,006
Damages for mental torture	Rs. 417,003
TOTAL	Rs. 6,255,045

6. Learned counsel argued that Batool Fatima provided no satisfactory evidence at trial to substantiate her claim that she had suffered the abovementioned losses. The record reveals that K-Electric has been negligent and took a very casual approach towards this litigation. A Commissioner to record evidence was appointed on 01.10.2001. Notices were issued to both parties to file their respective affidavit-in-evidence on 13.10.2001. K-Electric's counsel remained absent on that date. The case was next fixed on 30.01.2002 when too K-Electric's counsel was absent. Batool Fatima's evidence was recorded, but nobody from K-Electric appeared to cross-examine her despite repeated notices. No remedial measures were taken subsequently by K-Electric when the Plaintiff's side was closed without the witness being cross-examined.

7. K-Electric continued its dismal performance and did not produce its witnesses to testify. The High Court extended the time for recording evidence on 04.03.2002, yet again, K-Electric did not do what was needed. On 05.08.20003, after levying costs on K-Electric, the High Court permitted them to record their evidence. The order of the High Court was not complied with for nearly a year. On 31.05.2004, the High Court sought an explanation from K-Electric for the non-compliance and also recorded that K-Electric had not paid the Commissioner his fee, thus causing more delay. Compliance was made after a few months, and consequently, K-Electric was allowed to lead evidence. Again, K-Electric did not produce its witness. On 30.08.2004, once again, another opportunity was given to K-Electric. An affidavit-in-evidence of its witness was filed, but the witness failed to appear to testify. Finally, on 08.12.2004, the witness was examined. In this appeal, too, the case diary reveals that K-Electric has shown very little or no interest.

8. In her affidavit-in-evidence, sworn in March 1999, Javed Iqbal (as attorney of Batool Fatima) had listed the damages caused to her, which were in line with what was finally awarded to her. Many opportunities were given to K-Electric, but it failed to cross-examine the witness, Javed Iqbal. In essence, it was negligence and apathy on the part of K-Electric that led to

Batool Fatima's claim not being challenged. It is settled that a material point of the statement of a witness not cross-examined is deemed to have been admitted by the other side. Reference may be made to **Muhammad Rafiq and another vs. Abdul Aziz (2021 SCMR 1805)**, **Sikandar Hayat and another vs. Sughran Bibi and 6 others (2020 SCMR 214)**, **Farzand Ali and another vs Khuda Bux and others (PLD 2015 SC 187)**, **Hafiz Tassaduq Hussain vs Lal Khatoon and others (PLD 2011 SC 296)**.

9. The damages claim in the present case arises from K-Electric's negligence. As is well settled now, negligence is a tort involving the breach of a legal duty of care causing loss by a failure to the party to whom the duty is owed. The loss must not be too remote. There appears to be little debate that K-Electric owed a duty of care to the owners of the manufacturing unit. It was also established at trial that that duty was breached as the power supply was disconnected for no apparent reason. The alleged loss to the owners of the manufacturing unit, which was caused due to the disconnected power supply, must, however, be looked at closely, irrespective of the fact that K-Electric's counsel did not cross-examine the manufacturing unit's representative. The High Court, acting as an appellate court, cannot be oblivious of the risks involved in casually permitting damages on the sole ground that the factory representative at trial said that the business had incurred such losses.

10. It is clear from the heads of damages sought by the manufacturing unit owners that the loss they complain of is an economic loss. While it would be easier to calculate economic loss that originates from injury to a person or property, calculating pure economic loss, i.e., economic loss not arising from damage to the person or property, is generally more challenging to claim under negligence. Pakistan is a common law country, and pre-dominantly, our courts follow the common law principles developed over centuries by the English courts. In English common law, claims of damages for pure economic loss have been disallowed successively for at least the last four decades. Reference may be made to

Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd [1973] 1 QB 27

We are persuaded by the policy reasons for the English courts to deny such claims. Claims of damages based on pure economic loss must necessarily be restricted. There has to be a cut-out line. Otherwise, the chain of claims can be limitless, leading to the "floodgates" theory. In the famous words of the Cardozo, C.J. of the United States, made in **Ultramares Corporation v Touche 174 N.E. 441 (1932)**, the law should not admit "to a liability in an indeterminate amount for an indeterminate time to an indeterminate class."

11. To justify the quantum of damages sought, Javed Iqbal, in his affidavit-in-evidence, claimed that he had ten looms installed and that each loom would work 22 hours. The daily earnings from each loom was Rs. 28,660 per day, but half of that amount, Rs. 14,330 per day, was being claimed for the 291 days. The calculations given by Javed Iqbal were however arbitrary and not backed by any historical record of inventory, production or manufacturing. Javed Iqbal put on record eight purchase orders, which prima facie showed that goods to be supplied when supply was disconnected were for an aggregate amount of Rs. 42,078.5. The latest order had to be delivered by 27.03.1997. There was no further record provided. An illusory, arbitrary, presumptive claim for damages for loss of expected profits and invisible losses was made. No evidence of loss of reputation or mental anguish was provided at trial. We have looked at the claim made with a degree of leniency, considering that the manufacturing unit's witness was not cross-examined. Yet, it does not appeal to a prudent mind that solely because the manufacturing unit's witness was not cross-examined would mean that unproved and unsubstantiated damages claimed could be granted. The claim made by the manufacturing unit should have been backed by a record that would provide a benchmark for what was claimed. It was not. We believe that the learned trial judge erred by awarding the manufacturing unit damages as claimed by it.

12. Given the above, the appeal is partially allowed. Batool Fatima would be entitled to recover Rs. 42,078.50 for being unable to meet orders which were in the pipeline when power supply was disconnected. There is no yardstick to measure mental anguish; however, keeping in view the suspension of business, it would be reasonable to award symbolic damages of Rs. 100,000 for mental anguish and Rs. 100,000 for loss of reputation. The remaining damages claimed are disallowed for the reasoning in the preceding paragraphs. The total amount of damages of Rs. 242,078.50 will be paid to Batool Fatima with a 10 percent markup from 17.03.1999 till the date payment is made, within thirty days of this judgment.

JUDGE

JUDGE