JUDGMENT SHEET

IN THE HIGH COURT OF SINDH, KARACHI

IInd Appeal No.40 of 2019

Water & Power Development Authority
& another .... Appellant

Versus.

Kadir Bakhsh & another ....Respondents

Date of hearing: **21.11.2024**
Date of decision: **06.12.2024.**

M/s Shahanshah Hussain & Ahmed Ali Ghumro Advocates for the appellants.
M/s Khalid Javed, Munwar Juma and Farkhunda Shaheen, advocates for respondent No.1.

J U D G M E N T

MUHAMMAD IQBAL KALHORO, J:- This second appeal is directed against judgment and decree dated 09.10.2018 passed by learned 1st Additional District Judge, Thatta dismissing Civil Appeal No.38/2018 filed by appellants against judgment dated 24.04.2018 and decree dated 30.04.2018 rendered by learned Senior Civil judge Thatta in F.C. Suit No.83/2008.

2. As per brief facts, respondent No.1 Kadir Bukhsh filed aforesaid suit in the court of Senior Civil Judge, Thatta against appellants for recovery of Rs.1,32,60,000/- as damages stating that he was owner of a plot bearing S.No.121 Deh Thatta National Highway, Thatta on which he planned to establish a charitable hospital with the name and style of "Al Shafi Hospital" for which he had created a welfare trust. He obtained a building plan duly approved by Thatta Municipality which was to consist of ground plus first floor, each with covering area of 16000 Sq. Ft. When he visited the site for starting construction work, he found high tension electricity wires installed by respondent No.2 HESCO/WAPDA Makli Thatta passing through over his plot from road side. He, therefore, contacted HESCO for removing the said wires but in vain. He meanwhile started construction work of the ground floor which in due time was completed. He however could not complete construction work of first floor due to dangling of the said wires dangerously low

posing a threat/danger to the lives of the workers engaged in construction work. Then he in order to sort the matter out started legal proceedings against appellant No.2 for removal of the said wires from his plot which went up-to the Supreme Court of Pakistan. And finally, on the directions of the Supreme Court, in the month of July 2007 the wires were removed from his plot. It was only thereafter he filed a suit for recovery of damages of the amount as stated above on account of increase in the cost of construction, increase in the price of medical equipment, furniture and fitting, mesne profits and mental torture. The said suit was resisted by appellants, who filed written statement.

3. Before the trial court, in the suit, respondent examined himself in support of his case and produced documents covering his title over the subject land, legal notice etc. He also examined three witnesses namely Muhammad Bachal, a mason; Muhammad Umar Memon, Manager of Cement Depot; Muhammad Iqbal, site supervisor; and Naqi Ali Mirza, an architect. On the other hand, appellant No.2 examined himself to rebut his claim in the suit.

4. The suit was decreed by a judgment and decree on 27.11.2012 which appellant No.1 challenged in Civil Appeal No.21/2013 before learned District Judge, Thatta. The appeal finally landed up before learned II-Additional District Judge, Thatta who dismissed the same vide judgment and decree dated 24.10.2014. The appellant, thereafter filed second appeal before this court, decided vide judgment dated 29.01.2018 whereby the suit was remanded to the trial court with directions to allow the parties to lead their respective evidences so that the closest calculation in terms of difference in cost of construction and difference in prices of medical and other items may come on record.

5. After the remand, the trial court framed following three additional issues:-

1. **What is the difference of cost of construction of building material between the years, 2003 and 2007/2008?**

2. **What is the difference of price of medical and electronic equipment likely to be purchased and installed for the hospital of 20 beds and two operation Theaters?**

3. **What should the decree be?**

6. To prove the said issues, respondent No.1 reexamined Muhammad Iqbal, and one Sadat a representative of the company dealing in medical equipment, while, on the other hand, appellants examined Rizwan Baig and Nizamuddin as their witnesses. The suit was decreed by learned Senior Civil Judge, Thatta by a judgment and decree dated 24.04.2018 to the tune of Rs.84,87,900/-. The appellants challenged the same by filing a Civil Appeal No.38/2018 which has been dismissed by learned 1st Additional District Judge, Thatta vide impugned judgment and decree dated 13.10.2018, hence this appeal.

7. Learned counsel for appellant has argued that impugned judgment is not based on judicial consideration of material on record and suffer from misreading of evidence; that difference in increase of the cost of construction can only be granted when it is proved by plaintiff / respondent No.1 that he has constructed the first floor after delay due to existence of high tension wires over his land; that plaintiff could not establish increase in the cost of construction of hospital or medical equipment, furniture and fittings through cogent and reliable evidence; that findings of the trial court as well as first appellate court are based on conjectures and surmises; that there is no evidence to show that how much amount appellant has spent over construction of 1st floor or in purchase of medical equipment, furniture and fittings to determine difference between the cost of those items in 2003 when the plaintiff intended to construct 1st floor and 2007 when the high tension wires were removed allowing him to do so and purchase medical equipment, etc.; that there is no evidence demonstrating that equipment were immediately required to the plaintiff in 2003 but were purchased in 2008 due to availability of the wires to hold that respondent No.1 suffered due to an increase in the prices; that plaintiff has already been granted mesne profits and once mesne profits have been granted to him, no other amount in damages can be awarded to him; that impugned decree in favour of the plaintiff bears no proportion to the actual increase in the cost of construction as well as price in medical equipment, furniture and fittings if any; that there is nothing on record to prove that the plaintiff actually purchased the medical equipment, furniture and fittings in the year 2008. He has relied upon 2008 CLD 1343, PLD 1963 (W.P) Karachi 766 to support his arguments.

8. On the other hand, learned counsel for the plaintiff/respondent No.1 has supported impugned judgments and has submitted that through cogent evidence the plaintiff has succeeded in establishing his claim of difference in cost of construction and price of medical equipment, furniture and fittings prevalent in 2003 as mandated by this court in judgment dated 20.12.2017 in II-Appeal whereby the case was remanded to the trial court for only a limited purpose of determining prices of construction and the medical equipment, furniture and fittings in the year 2003. According to him, the plaintiff had actually demanded the damages in the suit from the year 1999 which had been decreed in his favour but in the second appeal this court observed that the plaintiff would be entitled to the difference in price of construction and medical equipment, furniture and fittings not from the date as mentioned in the judgment and decree of the trial court. But he would be entitled to the same when he planned to raise construction over the plot which was in the year 2003. According to learned counsel, the positive findings in respect of the same issues were not disturbed by this court in the second appeal and remanded the case only for the limited object of allowing the parties to record their respective evidences so that the closest calculation in terms of difference in the cost of construction and the difference in the price of medical equipment, furniture and fittings may come on record. Learned counsel has further submitted that the case was remanded by this court with a heavy heart as no record was available as to what were prices of construction and medical equipment, furniture and fittings in 2003 when the plaintiff intended to raise construction of his hospital to grant him such difference; that respondent is entitled to decretal amount in view of concurrent findings in his favour.

9. I have considered contentions of the parties and perused material available on record including the case law relied at bar. The suit originally prayed for damages to the tune of Rs.96,00.000/ as cost of construction of the 1st floor at the rate of Rs.600 as difference in the price; mesne profits for illegal use of the plot from 1996 to 2007 at the rate of Rs.5000/- per month amounting to Rs.6,60,000/-; increase of prices of medical, electronic equipment and hospital furniture and fittings to the tune of Rs.20,00,000/-; and mental torture and hardship caused to the plaintiff amounting to Rs.10,00,000/-, total Rs.1,32,60,000/-. The suit was decreed as prayed and appeal

dismissed. In the second appeal, this court realized the mistake made by the two forums below by awarding to the plaintiff difference in cost of construction and prices of medical equipment, furniture and fittings from 1996/1999 till July 2007 when finally high tension wires were removed and he was allowed to raise construction. This court observed in the judgment that such difference shall be awarded from the year 2003 when the plaintiff intended to raise construction of the 1st floor of hospital. Resultantly, this court while agreeing with reliefs of mesne profits and general damages granted by the two courts below noted that the calculation in the difference of prices w.e.f. 1999 may not be correct, and stated *'there is no cavil to the proposition that the respondent / plaintiff is entitled to a claim of difference in prices but w.e.f. 2003 and since the difference in prices i.e. the prices of cost of construction and medical equipment, that existed in 2003 is not available on record therefore, with heavy heart after so many years, I remand the case to the trial court and allow the parties to record their respective evidence so the closest calculation in terms of difference in the cost of construction and the difference in prices may come on record.'*

10. In the last para, after noting above facts and circumstances, this court made the following conclusion.

> "Since the matter is pending for last so many years, I direct the trial court to record the evidence of the parties on this limited issue only as to the existence of pieces in the year 2003 within six weeks from today. The claim of cost of construction and increase in the prices of medical and electronic equipments (sic) likely to be purchased and installed, shall be subject to the outcome of the findings of the trial Court depending upon evidence, which shall form part of the decree along with claim of mesne profit and general damages."

It was in the said background the case was remanded to the trial court where both parties in line with above observations adduced additional evidence for deciding the controversy. In the evidence led by the plaintiff the difference in the cost of construction and prices of medical equipment in the year 2003 and the year 2007 has been emphasized. But the question is whether by merely urging the difference in the cost of construction and prices of medical equipment between the year 2003 and the year 2007/2208, the plaintiff has discharged his burden of proving the actual injury/loss allegedly sustained by him as a result of an act or omission by the defendants/appellants.

11. The Supreme Court in the case of *Abdul Majeed Khan V. Tawseen Abdul Haleem and others* (PLD 2012 SC 80) has elaborated that generally there are two types of damages: special damages and general damages. Defining the same, it has been held that:-

> The term general damages refer to the special character, condition or circumstances which accrue from immediate, direct, and approximate result of the wrong complained of. Similarly, the term special damages is defined as the actual but not necessarily the result of injury complained of. It follows as a natural and approximate consequence in a particular case, by reason of special circumstances or condition. It is settled that in an action for personal injuries, the general damages are governed by the rule of thumb whereas special damages are required to be specifically pleaded and proved. In the case of *British Transport Commission v. Gourley* [(1956) AC185] it has been held that special damages have to be specifically pleaded and proved. This consists of out-of-pocket expenses and loss of earnings incurred down to the date of trial, and is generally capable of substantially exact calculation. The general damages are those which the law implies even if not specially pleaded. This includes compensation for pain and suffering and the like, and, if the injuries suffered are such as to lead to continuing or permanent disability, compensation for loss of earning power in the future. The basic principle so far as loss of earnings and out-of-pocket expenses are concerned is that the injured person should be placed in the same financial position, so far as can be done by an award of money, as he would have been had the accident not happened.

12. In the case of *Qazi Dost Muhammad V. Malik Dost Muhammad* (1997 CLC 546), it has been held that:-

> "It is settled principle of law that in respect of special damages it is the duty of an aggrieved person to prove each item of the loss, on the basis of evidence and as far as general damages are concerned, relating to mental torture, defamation etc. those are to be measured, following the 'Rule of Thumb', according to which, discretion rests with the Court to calculate such compensation keeping in view the attending circumstances of the case. As far as inconvenience is concerned, this item can be considered while assessing the general damages."

13. In the case of C.B. Singh V. Agra Cantonment (AIR 1974 Allhabad 147), it has been laid down that:-

> "The next question relates to the quantum of damages. The most important remedy which is available to victim of tort is award of damages. The conventional classification of damages is made under two head-- general and special. General damages are those which the law presumes to flow from the negligence complained of. These damages must be proved, but it is not necessary to allege them in detail in

> the statement of claim. Special damages mean some specific item of loss which the plaintiff alleges is the result of the defendant's negligence in the particular case, although it is not presumed by the law to flow from the negligence as a matter of course. Full particulars of all special damage must be given. The orthodox approach was to bring the various head of damage under one or the other of these two classes, but practice of the courts has demonstrated that these head often overlap and it is not always possible to maintain the distinction between them. Another classification which seems to have evolved in actions for personal injury is based on the distinction between damages which are capable of substantially exact pecuniary assessment. It thus includes any loss of earnings suffered by the plaintiff which accrued by the date of the trial. It also includes such other items as legal expenses, loss of pension rights, reduction prospects of marriage and even consequent inability to pursue one's hobby etc."

The above reproduction clearly indicates that generally there are two types of damages: special damages and general damages. General damages are defined as immediate, direct, and approximate result of the wrong complained of. The law presumes general damages to flow from the negligence complained of. These damages have to be proved but it is not necessary to allege them in detail in the pleadings. The general damages are governed by the rule of thumb whereas special damages are required to be specifically pleaded and proved. General damages are those which the law implies even if not specially pleaded. This includes compensation for pain and suffering and the like, and, if the injuries suffered are such as to lead to continuing or permanent disability, compensation for loss of earning power in the future.

14. Special damages are explained as actual but not necessarily the result of injury complained of. Special damages mean some specific item of loss which the plaintiff alleges is the result of the defendant's negligence in the particular case, although the law does not presume it to flow from the negligence as a matter of course. Special damage consists of out-of-pocket expenses and loss of earnings incurred down to the date of trial and are generally capable of substantially exact pecuniary assessment. The basic principle so far as loss of earnings and out-of-pocket expenses is concerned is that the injured person should be placed in the same financial position, so far as can be done by an award of money, as he would have been had the accident not happened. In simple words the damages are intended to put a person in the same position as he would have been in, had he not received the injury.

15. In the light of aforesaid commentary highlighting a broad definition of damages, relevant to the facts of the present case, and the level of proof required to prove them in the court of law, it is obvious that plaintiff was required to mention full particulars of all special damages, he is claiming, in his pleadings and prove them in the trial later on. Now as far as award of mesne profit amounting to Rs.6,60,000/- and general damages i.e. mental torture and hardship to the tune of Rs.10,00,000/- pleaded in the plaint are concerned, the same stand finally awarded to the plaintiff vide judgment dated 29.01.2018 passed by this court in IInd Appeal 01 of 2015. This judgment has attained finality having not been challenged before the Supreme Court. The controversy before this court to adjudicate upon is thus related to only award of special damages i.e. increase in the cost of construction and in the prices of medical equipment, furniture and fittings from the year 2003, when the plaintiff intended to raise the first floor of the hospital, to the year 2007 when finally the high tension wires were removed and he allegedly succeeded to build the said floor which is in dispute. To prove the same, the case was remanded to the trial court allowing the parties to lead their respective evidences on this point.

16. The plaintiff in order to prove the same has examined two witnesses Muhammad Iqbal, and Sadat. The former is civil contractor whose evidence was also recorded in the first round of litigation, and the latter is a representative of a company by name ANASO which deals with hospital equipment. The former in his evidence has revealed that he had supervised construction of the hospital being supervisor of NAQI ALI MIRZA ARCHITECTT ENGINEER COMPANY. Further, he has given rate of steel per ton, rate of per bag of cement, rate of mason, wage of labour, rate of *retti* per truck, and rate of *crush* per truck prevalent in the year 2003. Per him, the covered area of the hospital was 16000 sq. feet and cost of construction per sq. feet was Rs.600/-. According to him, the total difference of construction cost in between 2003 and 2008 was Rs.64,00,000/-. And there are 24 indoor patient rooms on first floor of the hospital with two operation theaters.

17. The second witness Sadat has, in his evidence, produced authority letter of the company and a certificate containing two leaves issued by M/S ANASCO in tabular form having the list of articles with a difference in their prices in 2003 and 2008 required for a hospital of 24

beds and two operation theaters. The total difference calculated is Rs.3,87,900/-.

18. On the basis of above evidence, the plaintiff is claiming a round sum against each head of special damages i.e. cost of construction of 1st floor and money spent on medical equipment etc. The law requires him to give full detail of the injury/loss sustained by him to earn a decree for damages. The level of proof required to prove special damages entailed him to mention full particulars of all special damages, he has complained of, in his pleadings and prove them in the trial. The entire plaint contains story of plaintiff's ordeal when he first spotted the high tension wires running from above his plot which he succeeded in getting removed only after a prolonged litigation with the defendants/appellants. But there is nothing in the pleadings that after removal of the wires, the plaintiff started constructing the 1st floor of the hospital, or for that matter when he started and completed the construction. How much steel, bags of cement, payments to mason, wages on labour, payments on *retti* per truck, and payments on *crush* per truck were consumed by the plaintiff in the course of construction of the 1st floor, and when. How such payments were made by him and where to conclude that he has suffered the loss/injury i.e. in the shape of difference in the cost of construction prevalent in the year 2003 and the year 2007/2008 when it is being claimed the construction of the 1st floor started. Neither is it pleaded that the construction of ground floor was completed in the year 2003, and the site was ready for construction of the 1st floor but because of negligence act on the part of defendants/appellants, the construction could not start resulting in injury/loss to the plaintiff, nor through evidence such important and mandatory particulars have been proved.

19. While writing this judgment, I summoned the original R&Ps of the suit to see what evidence the plaintiff has produced in the first round of litigation. There are only three receipts available in the R&Ps from page No.199 to 203 (Ex. 31/O to Ex. 31/Q). First is dated 30.10.2008 and is of Rs.12685/-, second is dated 10.05.1999 and is of Rs.14500/-, and third is dated 18.8.1999 and is of Rs.32000/-. It is clear that last two receipts belonging to the year 1999 have nothing to do with the construction, if any, of the 1st floor, which as per case of the plaintiff, he could not raise after completing ground floor of the hospital

in the year 2003 due to presence of high tensions wires over his plot. Insofar as the first receipt of the year 2008 of Rs.12685 is concerned, there is no reference about it in the entire plaint. The shop-owner who has purportedly issued this receipt has not been examined to verify its authenticity either. There is nothing on the record to show that when this receipt was issued on 30.10.2008, the construction of the 1st floor of the hospital was ongoing. It is also not clear either that whether the payment was made in cash or through other means. More so the amount mentioned in the said receipt does not tally with the cost of construction claimed by the plaintiff to consider it as a valid evidence to award relief of damages to the plaintiff on the basis thereof. Besides, in the R&Ps, there is another receipt of Rs.144896/-dated 16.09.2008 (Ex. 31/N) purportedly issued by NASIR BROTHERS at page No.197. It *prima facie* appears to be 'estimation/quotation', and not the cash memo. But, in any case, it is not clear that through this receipt what construction material was purchased by the plaintiff and whether the same was used in the construction of the 1st floor or not. Because in the evidence of plaintiff's witnesses (Muhammad Bachal and Muhammad Iqbal, Ex.45 and 47) examined originally in the first round, it has come on record that the plaintiff had a school and a library constructed in the same year i.e. 2008 near Jamia Mosque Thatta and hired the services of the same persons employed by him in the construction of the hospital. Not only have none of these witnesses uttered a word about their employment in construction of the disputed 1st floor of the hospital, nor has it come on record that the said construction material was used by the plaintiff in construction of the 1st floor of the hospital, and not in construction of the school and library, to give any credence to this receipt (Ex. 31/N) and rely upon it for decreeing the suit on this point.

20. Likewise in the purchase of medical equipment, furniture and fittings nothing has been pleaded in the plaint or any evidence led with proof that when such equipment were purchased by the plaintiff, of which company and if the equipment are of a particular company, why that company, and what is the difference in price of equipment offered by that company in comparison with the other company offering the same quality of equipment on the same or less price. In regard to purchase of furniture and fixing of fitting, absolutely no material suggesting kind of such furniture or fitting or the cost incurred on them or the date and time when it was supplied or purchased etc. has been

either pleaded in the plaint or any evidence adduced to quantify the damages with such cost and decree the suit. The list produced by the company representative only shows the difference in prices, in the year 2003 and the year 2007, of medical equipment being sold by it. For a comparison, and most importantly to assist the court to come to a just conclusion, the plaintiff has not produced on record the list of prices of equipment being offered by the other companies so as to show his *bona fide* in using minimum expenses over the best medical equipment available in the market on the less prices. Hence, the question which can be asked here is why the plaintiff chose to purchase the equipment from this particular company, whether it was because quality-wise its equipment were better than others or was it offering the equipment on cheaper prices compared to the others that influenced the plaintiff to opt for this company. When the plaintiff is seeking damages on account of difference in prices of medical equipment, then he has to satisfy the court of all the angles and necessary particulars of his matter to earn a right to such a relief. In absence of quotations from other companies in regard to prices of medical equipment for comparing the same with the prices of the company opted by the plaintiff, there would be nothing to discourage the court from presuming that the plaintiff has quoted, for the sake of seeking maximum relief, the prices of the company which sells its equipment costly as compared to the other companies.

21. Further, this list produced in evidence does not remotely help the court to conclude that the plaintiff has suffered the loss/injury at the hands of the defendants/appellants. The list does not imply either that the plaintiff has purchased or ordered to purchase the enlisted equipment and therefore has incurred out-of-pocket expenses, a mandatory ingredient entitling the aggrieved person to such relief. The list only conveys the fact that the medical equipment mentioned therein were available in the market in the year 2003 on certain prices less than the ones in the year 2007. Nonetheless, the fact, weather the plaintiff purchased them against such prices in the year 2007 and from the same company has neither been pleaded in the plaint nor subsequently brought on record in the trial through either oral or documentary evidence. In absence of mandatory details about the actual loss to the plaintiff, there is virtually nothing on record to quantify the damages allegedly suffered by the plaintiff in this regard with the amount he is claiming and decree his suit as prayed. The principle that damages are

intended to put a person in the same position as he would have been in, had he not received the injury is not in the given facts and circumstances attracted for want of necessary description of actual loss suffered by the plaintiff. There is absolutely no evidence that the plaintiff on account of special damages – not only full particulars of which must be given but the aggrieved person shall prove each item of the loss by means of evidence – has suffered any injury/loss. The plaintiff has brought on record no evidence that he has actually suffered/spent any expenses either on construction of the 1st floor of the hospital or on purchase of medical equipment, furniture and fittings, and that too in the year 2008, to measure damages with the amounts he is claiming and grant him reliefs. The plaintiff has failed to adduce any evidence indicating that he incurred out-of-pocket expenses with difference in the prices between the year 2003 and the year 2007/2008 on both counts i.e. construction of the 1st floor of the hospital or purchase of medical equipment, furniture and fittings. The relief of special damages cannot be given on the basis of hypothesis or presumption of the loss the aggrieved person has either suffered or is likely to suffer in future, and which he has actually not incurred in reality.

22. In view of above discussion, I am of the view that the plaintiff has failed to establish his entitlement either to the relief of cost of construction of 1st floor of the hospital amounting to Rs.96,00,000/-, or increase in prices of medical equipment, furniture and fittings amounting to Rs.20,00,000/-. Resultantly, the second appeal in hand is allowed, impugned judgments are set aside and the suit of the plaintiff to the extent of such reliefs is dismissed with no order as to cost.

The appeal is accordingly disposed of along with pending application.

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