

(2016) 08 KL CK 0027

In the High Court Of Kerala

Case No : AS. No. 229 of 1999 (B) 12339 of 2015, 2909 to 2911, 4267, 4268, 6108, 6109, 7332, 7333, 8557, 12095 to 12098, 16590, 469, 1237 to 1239, 3474, 9839, 9840, 14093 to 14095, 16320 to 16325, 17099 of 2016

K.J. Joseph

APPELLANT

Vs

Benny Markose

RESPONDENT

Date of Decision : 12-08-2016

Acts Referred:

Citation : (2016) 4 KerLJ 267 : (2016) 4 KLT 161

Hon'ble Judges : Mr. V. Chitambaresh and Mr. K. Harilal, JJ.

Bench : Division Bench

Advocate : Sri. S. Sreekumar, Advocate, for the Petitioner; Sr. Government Pleader, Sri. Thomas John Ambookan, for the Respondent

Final Decision : Allowed

Judgement

Mr. Harilal, J.—In a suit for damages,

- i. what is the scope and extent of an enquiry to determine cause of damage?
- ii. can the antecedent cause that co-operated to produce damage be held liable for compensation?
- iii. what is the test to be applied to determine cause of damage?
- iv. what is the requisite standard of proof to prove cause of damage?

These are the questions that emerge for consideration in this Appeal Suit.

2. The appellant is the plaintiff in O.S. No. 888 of 1991 on the files of the II Additional Sub Court, Ernakulam. The aforesaid suit is one for damages claiming an amount of Rs. 1,00,000/-, as compensation, on the allegation that damages to the plaint schedule building was caused, by the unlawful blasting of rock, by the 1st respondent, in execution of the work - the construction of canal that

passes near the plaint schedule building, under the Periyar Valley Irrigation Project-awarded to him, by the 3rd respondent. It is pleaded that the blasting of rock was done without obtaining necessary licence, for blasting of rock and taking protective measures, to prevent damage to the buildings, in the neighbourhood. In short, the damage to the building was caused, by the reckless blasting operation done, by the respondents, without taking preventive measures.

3. The defendants denied the cause of damage of the building alleged against them and contended that the construction of the plaint schedule building was defective and the quality of materials used was substandard. The blasting was done by an experienced and licensed person using gun powder in 3 Ft. drilled holes, under the supervision of the Engineer, after taking sufficient protective measures and there was no huge tremor, as alleged by the appellant.

4. On the aforesaid rival pleadings, the trial court mainly framed the issue "Was it due to the negligence of the defendants that the plaintiff's building sustained damages?" Both parties adduced - oral and documentary, evidence in abundance. After evaluating the entire evidence on record, the trial court dismissed the suit.

5. We have heard the learned counsel appearing for the appellant and the learned counsel for the respondents.

6. After a long discussion, comprised of 31 paragraphs, spreading over 7 pages, the learned Sub Judge concluded the findings in the last paragraph, in this way: The plaintiff has failed to establish a direct nexus between the blasting of the rock by the defendants and the damage to the plaint schedule building. No expert evidence had been adduced to substantiate the plaintiff's allegation. There is absolutely no evidence to prove that the building was constructed by a competent person and under the supervision of a competent person. The possibility of the building having defects cannot be ruled out. It is significant to note that P.Ws.2 and 4 had not lodged complaints with anyone till entered the witness box. The fact that the building situated very close to the canal did not sustain any damage and that improbabilise the plaintiff's case that it was blasting of the rock that caused damage to the building. The legality and correctness of the appreciation of evidence from which the aforesaid findings have been arrived at, are impugned in this Appeal Suit.

7. In a suit for damages, "causation of damage" is the crucial question and the burden is on the plaintiff to prove that the damage was caused by the wrongful act of the defendants. The "preponderance of probability" is the required standard of proof to prove the cause of damage. More particularly, in a case where a building has sustained damages, as a result of jerking, consequent on vibration, caused by the blasting of rock using explosives, it is very difficult to get direct evidence, and, as far as an ordinary litigant claiming compensation for the damages caused by blasting is concerned, he cannot be burdened with such direct evidence, as required by the court below. We are of the opinion that the

preponderance of probabilities of blasting as causation of damage has to be proved as required under Section 3 of the Evidence Act only. It is a fact which can be said to be proved, if the court believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the case, to act upon the supposition that the damage was caused by blasting.

8. With the above view, let us evaluate the evidence and appreciation thereon made by the court below. The undisputed facts can be marshalled as follows: The defendants have done blasting operations using explosives in connection with the construction of the canal during the relevant period, the canal passes near the plaintiff schedule building and the nearest distance from the canal where the rock blasting work was completed to the plaintiff schedule building is 82.60 Metres, the plaintiff schedule building developed a large number of cracks almost on walls, terrace, sunshade portion, wooden windows. Moisture was seen present in the walls; the door was seen separated from the wall due to jerking and thereby the plaintiff schedule building had sustained heavy damage. In short, the geographical proximity between the place of blasting and the plaintiff schedule building and the damages sustained by the building stand undisputed.

9. Going by Ext.B1 agreement between D.Ws.1 and 2, it could be seen that there is a specific undertaking that the blasting shall be permitted only when proper precautions are taken for the protection of the persons, work and property and the damage done to the work or property, by blasting shall be cured by the 1st respondent/contractor at his expense. The 1st respondent has to protect all buildings on and adjoining to the site, against the structural and decorative damages to be caused, by the execution of these works. That apart, as per the agreement, blasting shall be done by experienced licensed persons, under the supervision of an Engineer in charge. The manner of blasting operation, permissible under law, is specifically described and the 1st defendant agreed that blasting will be conducted absolutely in adherence to the provisions under the Explosives Act, 1946.

10. We are of the opinion that the inclusion of the aforesaid indemnity clause in the agreement gives rise to a reasonable presumption that damage to the building and property adjoining to the blasting area is so probable, unless blasting operations are made in strict adherence to the terms of agreement. In other words, damages to the nearby adjoining buildings is a natural consequence of blasting operation, unless necessary precautions are taken to prevent it. Thus, the aforesaid indemnity clause makes the damages consequent on blasting so probable and it would minimise the plaintiff's burden of proof, in the absence of precautionary measures from the part of the defendants. Further, it follows that admittedly, the damage due to blasting was a foreseeable event.

11. In order to prevent extensive damage to the surrounding properties, PWD has imposed certain regulations, in the case of rock blasting. As per the Kerala Standard Specifications (K.S.S.), blasting shall not be done within 100 Metres of an existing masonry structure, unless otherwise permitted by the Engineer in

charge. In the instant case, according to Ext.C2 revised Commission Report, the nearest vertical distance from the canal to the plaint schedule building is about 82.60 Metres and no documentary evidence had been produced by the defendants to show that the Engineer in charge permitted the 1st defendant to conduct the blasting operation within 100 Metres, as required by the Kerala Standard Specification. Thus, the blasting operation, in violation of the aforesaid standard specifications, is an additional determinant factor, which would probabalise the consequential damages, due to blasting, to the plaint schedule building.

12. Further, we find that the court below went wrong in rejecting Ext.C3 report prepared by P.W.3, who is a Retired Deputy Chief Engineer in the P.W.D. Department. It is a matter of common knowledge that none other than a qualified Engineer could hold the post of the Deputy Chief Engineer in P.W.D. But, the court below pretended ignorance of his qualification and rejected the report mechanically for the reason that he was not an expert appointed by the court.

13. But, going by Ext.C3 report, the Commissioner has stated that she could not assess the damage caused to the building without the assistance of an expert Engineer and she herself produced Ext.C3 report along with the revised Commission Report. So, it could be presumed that the Commissioner herself had solicited the assistance of P.W.3 to assess the cause of damage and the quantum of damage. We are of the opinion that even though the manner in which P.W. 3 was deputed is not proper, if the contents of the report are trustworthy and reliable, nothing wrong on placing reliance in Ext.C3 report, as it is a piece of evidence only. It has come out in evidence that P.W.3 is an approved Surveyor and Loss Assessor having necessary licence and even though he was cross examined, at length and breadth, nothing brought out to discredit his evidence or his competency. Therefore, we find that no way the court below is justified in rejecting such a valid expert opinion, which would aid the court to resolve the question, in controversy, involved in the suit.

14. It is reported that the damages occurred to the building such as, cracks on walls, cracks on concrete, cracking of foundation due to vibration caused by blasting of rock, using heavy explosives. The building developed a large number of cracks of length varying from 90 cms to 300 cms and thickness varies from 1.5 mm and the life of the structure had been reduced to 50% and the appellant had been put to innumerable hardships and agony in living in insecurity in an unsafe building. Further, the Commissioner inspected the place of blasting area and reported that blasting operation had been done, in violation of the Kerala Standard Specifications and the Explosive Substances Act. P.W.3 unequivocally deposed that damage was caused by the vibration emerged from the blasting operation. We do not find any reason to doubt the cause of damage to the plaint schedule building, found by the Commissioner and the expert, in the absence of anything, contrary to their opinion.

15. It stands proved by the evidence of P.Ws.2 and 4 and Exts.C1 to C4

Commission reports submitted by the Commissioner and the expert that five other buildings have also sustained similar damages as that of the plaint schedule building. But, the court below went wrong by discarding the evidence of P.Ws.2 and 4 on the reasoning that P.Ws.2 and 4 have not made complaints alleging damages before any authorities. Secondly, the building situating very close to the canal has not sustained any damage and some other buildings situating very near to the canal sustained small cracks; but the building situating far away sustained extensive damages.

16. Merely on the reason that P.Ws.2 and 4 have not filed any complaint before any Authority, seeking damage, their evidence cannot be wiped out of record or its reliability cannot be exhaled. Further, we are of the opinion that consequential effect of earth or rock vibration consequent on blasting is always unpredictable, as it depends upon the effect of different waves of vibration having different strength and the consequential effect. Consequential effect or impact of an explosion can never be uniform or in the order, as insisted by the court below. So, merely on the reason that some other buildings, near the blasting point sustained a little or no damage and the building situated at a larger distance than the former sustained extensive damages, one cannot rule out the possibility of damage caused by blasting using explosives. The stand taken by the court below sans any scientific support. The cracks uniformly developed on the walls, sunshades, terrace, etc. of the six buildings situating within the distance of 100 Metres from the blasting point give rise to a reasonable inference that the said cracks are caused by jerking of the building consequent on vibration that emerged from blasting.

17. We are of the opinion that in a case where blasting operation is permitted with an undertaking that necessary precautionary measures will be taken and blasting will be done in the specified manner to prevent damages to the building, situating within the restricted area, in adherence to the terms of Agreement, the Kerala Standard Specifications and the Explosive Substances Act, the burden is on the defendants to prove the performance of the aforesaid undertakings, where the plaintiff succeeds to prove the prima facie case of damage caused by blasting, with preponderance of probability. In the instant case, no sufficient evidence, except oral assertions, was forthcoming from the defendants to discharge the said burden, though the plaintiff had succeeded in proving the allegation against the defendants, with preponderance of probability.

18. Further, we find that the court below went beyond the scope of issues framed and embarked upon an enquiry to ascertain the quality of construction, the standard of materials used and the competency of the Engineers, who supervised the construction of the plaint schedule building. It is pertinent to note that the defendants have no case that the building was stood damaged, before the blasting operation.

19. What is the test to be applied to determine the cause of damage? For the determination of the question, whether the defendants' wrongful conduct is a

cause in fact of the damage to claim, the test which has almost universal acceptance is "but for" test. The said prima facie test of "causation" which is known as "but for" test looks too hypothetical situation as it could have been had the wrong not taken place. It is sufficient to prove that "but for" the defendants' breach of duty or negligence, he would not have suffered the loss concerned. In other words, the defendants' wrongful conduct is a cause of claimant's harm if such harm would not have occurred without it, but for it. Put it differently, the immediate precipitatory cause alone need be enquired into to determine cause of damage.

20. At this juncture, the proposition laid down by Devlin J. in the decision reported in *Heskell v. Continental Express* (1950 (1) All E.R. 1033) assumes much significance and relevancy and the same is extracted below:

"Where the wrong is a tort, it is clearly settled that the wrongdoer cannot excuse himself by pointing to another cause. It is enough that the tort should be a cause and it is unnecessary to evaluate competing causes and ascertain which of them is dominant."

21. In *Minister of Pensions v. Chennell* 1946 (2) All England Law Reports 719, Lord Denning held as follows:

"The best way is to start with the injury and inquire what are the causes of it. Sometimes there may be a single cause. More often there is a combination of causes. If the discharge of a missile or other event may be properly said to be a cause of the injury, that is sufficient to entitle the claimant to an award of a pension, notwithstanding that there may be other causes co-operating to produce it, whether they be antecedent, concurrent or intervening. It is not necessary that the discharge of the missile or other event should be "the" cause of the injury in the sense either of the sole cause or of the effective and predominant cause. In many cases where there is a combination of causes, it is impossible to single out one cause as distinct from others, and any attempt to achieve that impossible task would lead to difficulties as the insurance cases amply show."

22. In the light of the decisions referred above, we hold that the scope and extent of enquiry as to causation of damage is confined to immediate precipitatory cause and the antecedent causes which co-operated to produce the damage need not be enquired or taken into consideration, while determining causation of damage. It is sufficient to prove that "but for" the defendants' breach of duty or negligence the plaintiff would not have suffered damage or loss concerned. That apart, the principles of concurrent causation cannot be attributed, in the absence of evidence, which would establish another cause that co-operated to precipitate the damage and the burden of proof is on the defendants, where the plaintiff has succeeded to establish immediate precipitatory cause of damage.

23. But, in the instant case, the court below unnecessarily embarked upon an

enquiry for the determination of the quality of construction and the materials used for the construction of the plaint schedule building and arrived at an erroneous finding that possibility of building having defect cannot be ruled out. We reject the said finding as unfounded and unwarranted.

24. The plaint schedule building would have stood as such, had the blasting operation not taken place, even if the quality of construction was not so good. The defendants also have no case that the building would have collapsed, owing to the defective or substandard construction even if the blasting operation has not taken place. In the absence of any evidence to the contrary, we find that had the defendants not conducted blasting operation, in violation of the Rules, the building would not have suffered damages. If that be so, the quality of construction and the materials used for the construction are totally insignificant and irrelevant in the determination of the cause of damage.

25. According to the plaintiff, the plaint schedule building cannot be repaired, as damages are heavy and stability of the building had been reduced to 50% and it is unsafe to live in the building. Though he is entitled to get Rs. 2,28,000/- as damages, he limited his claim to Rs. 1,00,000/- only. The defendants have not seriously disputed the quantum of claim and we find that the amount claimed is minimum only.

26. In this analysis, we find that the court below has miserably failed to appreciate the fact, evidence and law in its correct perspective. We set aside the impugned judgment and decree and the Original Suit is decreed as prayed for, with cost.

27. This Appeal Suit is allowed accordingly.