APPELLATE CIVIL

Before D. K. Mahajan and H. R. Sodhi, JJ.

DILBHARI,—*Appellant*

versus

THE MUNICIPAL COMMITTEE, ROHTAK,—*Respondent.*

Regular Second Appeal No. 458 of 1965.

September 13, 1971

Law of Torts—Damages for misfeasance—Punjab Municipal Act (III of 1911)—Section 96—Municipal Committee getting work of laying down water pipes executed by an independent contractor or a State Department—Negligence in the execution of the work causing loss to a citizen—Municipal Committee—Whether liable to pay damages.

Held, that section 96 of Municipal Act, 1911 gives an authority to a Municipal Committee to lay pipes for the supply of water. This authority is nothing but a duty which can be compelled by the State Government. There is no doubt regarding the liability of a corporation like the Municipal Committee for the acts constituting misfeasance. It is no defence in law that the Municipal Committee allows the work, resulting in injury to a member of the public, to be executed by an independent contractor or a State Department. Whosoever is employed by the Municipal Committee is its agent for that specific work. A person is liable for torts committed by his agents or servants and the rule is equally applicable to a corporate body, the only condition being that the alleged tortious act is within the scope of the authority of the agent or the servant and is warranted for the purposes of the incorporation of the statutory body. The primary duty rests with the Municipal Committee to lay down water pipes without any negligence and to maintain them in proper order. The rights of the citizens will be in a very precarious condition if the defence is allowed on the part of a principal that he has entrusted the job causing injuries to the public to an independent contractor or any department of the State. Hence a Municipal Committee is liable to pay damages to a citizen who suffers loss by the negligent laying down of water pipes by a contractor or a State Department to whom the Committee entrusts the work for execution.

(Paras 11 & 12)

Regular Second Appeal from the decree of the Court of Shri Kul Bhushan, District Judge, Rohtak, dated the 25th day of September, 1964, affirming that of Shri M. L. Jain, Senior Sub-Judge, Rohtak, dated the 28th November, 1963, granting the plaintiff a decree for recovery of Rs. 2,509 with proportionate costs against the defendant.

The cross-appeal No. 52 of 1964 filed by the defendant was also dismissed and further ordering the parties to bear their own costs in both the appeals.

G. C. Mittal and S. N. Garg, Advocates, *for the appellant.*

Anand Swarup, Senior Advocate, R. S. Mittal, Advocate with him, *for the respondent.*

JUDGMENT

Judgment of this Court was delivered by:

SODHI J.—(1) This judgment will dispose of two connected Regular Second Appeals Nos. 458 and 215 of 1965 directed against the same judgment of the District Judge, Rohtak. The Municipal Committee, Rohtak, constituted under the Punjab Municipal Act, 1911, hereinafter called the Act, laid underground pipe-line for supply of water in the city through the instrumentality of the Public Health Department of the erstwhile State of Punjab. Chapter VIII of the Act deals with water supply and under section 96, the Committee is authorised to provide the area under its control or any part thereof with a supply of wholesome water needed for public and domestic purposes and the State Government can also direct it to do so in which case there is no option left with it. There are rules made by the State Government in exercise of the power given to it under section 240 and are called the Municipal Account Code. They deal with many procedural matters relating to different departments of the Committee and in the matter of execution of municipal works, some instructions have been laid down in Chapter XIII thereof. No work is permitted to be executed by the Committee until a detailed estimate of its costs has first been prepared in the prescribed manner and sanctioned by the Committee. Normally, a schedule of rates for municipal works is sanctioned every year. It is laid down in the Code that whenever a work is to be started for which an estimate has been sanctioned, the Municipal Engineer shall call for tenders unless the work is to be executed departmentally or through the agencies of the Public Works Department of the Government. It is necessary at this stage to make a reference to another set of rules known as the Municipal Works Rules of 1925. In the instant case, the pipes were admittedly laid through the Public Health Department. Rule 6 of the Municipal Works Rules enjoins that no original work is to be undertaken by a first class committee if it involves an

expenditure of ten thousand rupees or more, or by a second class committee if it involves an expenditure of two thousand five hundred rupees or more, unless the technical sanction of the competent authority has previously been obtained. There are different authorities who can accord sanction for different types of works. Rule 14(1) provides that if technical sanction to a project is within the powers of the Municipal Engineer, he shall be deemed competent to prepare the detailed surveys, plans, specifications and estimates and execute the work. In rule 14(2) it is stated that where the technical sanction of an authority higher than the Municipal Engineer is required, the Municipal Committee may resolve to work through its own engineering staff but shall in that case obtain from the authority competent to grant sanction to the execution of the work a written certificate to the effect that the said staff is competent to prepare the detailed plans, specifications, surveys and estimates and to execute the works. If no certificate is granted, the Municipal Committee must have the said surveys, plans, specifications and estimates carried out by the Superintending Engineer, Punjab Health Circle, the Electrical Engineer, or the Superintending Engineer, as the case may be or by some person or persons nominated by them in this behalf. It is not open to the Municipal Committee to employ any other agency without the previous consent in writing of such authority.

(2) The plaintiff, Smt. Dilbhari, constructed a house somewhere in the year 1958 in Ward No. 9 in the city of Rohtak and the main pipe-line passed through a public street near her house. It is alleged that some cracks appeared in the front portion, side walls, roofs and floors of the house of the plaintiff and on 28th April, 1962, she informed the Municipal Committee through its employees that these cracks were due to leakage of water from the main pipe-line. Nothing was done on that day and on the following day, i.e., 29th April, 1962, the plaintiff approached a Municipal Commissioner, Shri Parma Nand Tuli, who brought some employees of the committee to the spot to look into the matter. On earth being dug, two holes were found in the pipe-line through which water had leaked and damaged the plaintiff's house, and they were got plugged. Damage to the house had occurred because of this leakage of water, and the plaintiff alleged gross negligence on the part of the Municipal Committee in laying defective pipes and for not properly maintaining them. It was claimed by the plaintiff that the damaged portion of the house had to be demolished and reconstructed and the estimated cost for

such reconstruction was worked out at Rs. 9,750 to which were added Rs. 250 on account of the supposed loss of rent. It was in this way that the plaintiff claimed Rs. 10,000 as damages said to have been sustained by her. A notice was served on the Municipal Committee and on its failure to satisfy the demand of the plaintiff, the suit was instituted.

(3) The defendant Committee resisted the suit on various grounds. It was pleaded that there was no negligence on its part in laying or maintaining the underground pipe-line. The plea of the Committee further was that the pipe-line had been laid by the Committee through the Public Health Department of the State and the latter alone was responsible. It was, therefore, urged that the Punjab State and the Public Health Department were necessary parties. The parties went to trial on the following issues:—

(1) Whether the Punjab State and the Public Health Department P.W.D., are necessary parties ?

(2) Whether the house of the plaintiff has been damaged through the leakage of the underground water pipe line caused as a result of the negligence of the defendant ?

(3) Whether the plaintiff's house has been damaged through the leakage of water from the drain passing in front of the plaintiff's house as a result of the plaintiff's negligence?

(4) Whether the plaintiff's house has been damaged through causes other than the negligence of the defendant ?

(5) In case of proof of issue No. 2 to what amount of damage is the plaintiff entitled ?

(6) Relief.

(4) Issue No. 1 was decided by the trial Court against the defendant it being held that the Punjab State and the Public Health Department P.W.D. were not necessary parties. Decision on issue No. 2 went in favour of the plaintiff and on issues Nos. 3 and 4 against the defendant. Under issue No. 5, the damages were assessed at Rs. 2,509. A decree for recovery of Rs. 2,509 with proportionate costs was accordingly awarded against the defendant Committee.

(5) Both the parties were not satisfied with the decree of the trial Court and preferred separate appeals which were disposed of

by the judgment under appeal by the learned District Judge. He found no merit in either of the appeals and the same were dismissed leaving the parties to bear their own costs.

(6) One of the main questions that required determination was as to the cause of damage done to the house of the plaintiff. The pipe-line had been got unearthed in presence of Shri Parma Nand Tuli, Municipal Commissioner, P.W. 8, and others, who found two holes from which the water was leaking. The plaintiff examined an expert Shri S. D. Chawla, a retired S.D.O., who inspected the spot on 1st May, 1962, and produced the report Exhibit P. 1. It was after the holes had been got plugged. He found cracks in the building and assessed the damage at Rs. 9,750, the details of which it is not necessary to state here. Shri Sardari Lal, Sub-Divisional Officer (Retired), was appointed Local Commissioner by the Court and he too after inspection of the spot gave his report Exhibit L.C. 1. No water was leaking from the holes at the time when either of these experts inspected the pipe-line but the damage to the house of the plaintiff was, according to both of them due to the oozing of water out of the holes of the damaged pipe which crept into its foundations. The assessment of damage, according to this witness, was Rs. 3,510, as this much amount was necessary to effect repairs and reconstruction of some portion of the damaged house. It is the concurrent finding of both the Courts below that the plaintiff's house has been damaged as a result of leakage of water from the municipal pipe-line and this finding of fact arrived at on a due consideration of evidence has not been assailed before us.

(7) The only two questions debated are whether the defendant Committee is liable in law for the damage to the house of the plaintiff and, if so, what is the proper quantum of compensation that should be awarded in the circumstances of the present case.

(8) Mr. Anand Swarup, learned counsel for the defendant Committee, strenuously urged that the pipe-line was laid by the Public Health Department of the State Government over which the Committee had no control, and, as a matter of fact, the latter had no option in choosing its own contractor or supervising the original work of laying pipes. He in this connection relies on the Municipal Works Rules to which reference has already been made. The argument of the learned counsel is that the Committee was not guilty of any negligence and the only standard of care that could be expected from

it was that of an ordinary prudent man. It is urged that there is no evidence to show that the Committee ever knew of any initial defect in the pipes or of leakage of water subsequent thereto, and that if two ferrules attached to the pipe-line for giving connection to the residential house of the plaintiff had at two places been missing, resulting in two holes in the pipe-line, the fault and responsibility therefor were of the Public Health Department of the State Government and not of the Committee. The learned counsel contends that as soon as the information about the damage to the house of the plaintiff was conveyed to the Committee, the holes were got plugged.

(9) It is not disputed that the pipes used were rusty and quite old though the pipe-line was laid down only in the year 1959 after the construction of the house of the plaintiff. The leakage of water was beyond doubt due to the missing of the ferrules resulting in the oozing out of water which made the soil and the foundation of the house of the plaintiff wet thereby leading to the weakening of the foundations and the consequent cracks in the building. This must have been going on imperceptibly till the damage was discovered on 28th April, 1962.

(10) We are afraid the approach which is canvassed to us for acceptance by the learned counsel does not have any merit in it. The argument now advanced before us was half-heartedly raised before the Court of first appeal as well and rejected. A Municipal Committee is a body corporate with power to acquire and hold property and do all things that are necessary for the purposes of its constitution. Section 96 gives an authority to a Municipal Committee to lay pipes for the supply of water and this exercise of authority which is nothing, but a duty may be compelled by the State Government. As a corporate body, a Committee is as much liable for acts of misfeasance as any other person. The term misfeasance, as understood in law, is distinguishable from non-feasance, and consists in the improper performance of a lawful act. It is an axiomatic rule of law that no person, which expression includes a corporate body, is permitted to act negligently so as to cause injury to another, whether that person is performing a statutory duty or exercising a statutory power. Whatever be the law regarding the liability of a corporation for the acts of non-feasance its liability for those constituting misfeasance is beyond doubt. It makes no difference nor is it a defence in law that the statutory body allowed a work, resulting in injury to a member of the public, to be executed by an independent contractor

or that the rules require that instead of an independent contractor the work should be entrusted by the Municipal Committee to a department of the State. Whosoever be employed, the position is the same, namely, that the work and duty are that of the municipal corporation and those employed are its agents for that specific work. A person is liable for torts committed by his agents or servants and the rule is equally applicable if the principal happens to be a corporate body, the only condition being that the alleged tortious act is within the scope of the authority of the agent or the servant and is warranted by the purposes of the incorporation of the statutory body.

(11) In the instant case, the statutory duty was imposed on the Committee by virtue of section 96 and whatever consequences from the negligent performance of that duty arise, the Committee will be liable, no matter that it employs an independent contractor. The law does not contemplate that an authority under a statutory duty should be able to get rid of its liability by imposing it on another person. The tendency in the development of modern thought is towards extending the liability of the principal rather than restricting it. The Committee is liable not because the independent contractor has broken his duty by failing to exercise reasonable care and caution but on account of the primary liability being that of the Committee itself. The real test in all such cases is whether the duty, breach of which led to an action in torts, is owed by the committee to the plaintiff and when it is so, it is no defence to say that some other person, namely, an independent contractor had been asked to perform it. Statutory duties, unless the context otherwise warrants, are generally non-delegable duties. In this connection, it is useful to quote the observations of Denning Lord J. in *Cassidy* v. *Ministry of Health* (1):—

> "I take it to be clear law, as well as good sense, that, where a person is himself under a duty to use care, he cannot get rid of his responsibility by delegating the performance of it to someone else, no matter whether the delegation be to a servant under a contract of service or to an independent contractor under a contract for services."

Facts in *Cassidy's case* are quite interesting. The hospital authorities accepted the plaintiff there as a patient for treatment and it was

(1) 1951 2 K.B. 343.

their duty to treat him with reasonable care. They selected, employed and paid to the surgeons and nurses who looked after him. The plaintiff had no say in their selection at all. An operation was performed on the plaintiff but there was negligence in the post-operation care which made his left hand completely useless. In these circumstances, Denning L.J., held that the plaintiff knew nothing of the terms on which they employed their staff. All he knew was that he was treated in the hospital by the people whom the hospital authorities had appointed and the hospital authorities must be answerable in the way in which he was treated. The doctrine of *resipsa loquitur* was held to apply to such a situation and it was further observed that the onus lay on the hospital authority to prove that there had been no negligence on its part or on the part of any one for whose acts or omissions it was liable. The observations of Lord Denning J. must with all respect be accepted.

(12) In our society as well, a municipal corporation cannot be absolved of its responsibility towards the public merely because the execution of work which was its own duty to execute had been transferred to another person employed by it. There may be cases where a duty can be delegated but it is not necessary to refer them in the present case. In our view, the primary duty rests with the Municipal Committee to lay water pipes without any negligence and to maintain them in proper order. The rights of the citizens will be in a very precarious condition if the defence were allowed on the part of a principal that he had entrusted the job causing injuries to the public to an independent contractor or any department of the State.

(13) Decision in a Division Bench case reported as *Maya Ram* v. *Municipal Committee, Lahore* (2), is also of help in resolving the issue raised in the instant case. The plaintiff Maya Ram, sued the Municipal Committee, Lahore, for a sum of Rs. 10,000 as damages on the allegation that through the negligence, omission and illegal acts of the defendant, three houses belonging to the plaintiff were cracked and damaged and had ultimately to be partially demolished. These houses were getting their supply of water through pipes which were connected with the municipal main. The municipal stand pipe (standpost) was at a short distance from the houses in question and on 11th November, 1923, the public standpost stopped giving water. No body could find out what was the cause of this stoppage. On 13th November, 1923, the Municipal Engineer was informed about it on

(2) A.I.R. 1929 Lah. 730.

telephone by the Municipal Commissioner of the ward. A fitter and a supervisor were deputed to dig up the ground near the standpost and it was discovered that the pipe of the public standpost had broken. The municipal staff closed the ferrule which connected the main with the standpost in order to prevent further wastage of water. Some houses including those of the plaintiff began to crack and this led to the suit which was dismissed by the trial Court but decreed by the High Court on appeal. Some of the observations made in that case on a consideration of the relevant sections of the Act, including sections 96, 97, 99, 102 and 138 may be quoted hereunder with advantage :—

> "There cannot, therefore, be any manner of doubt that under these various provisions of the Municipal Act the subterranean system of connexion-pipes and ferrules attached and fixed to the municipal main, whether used for the benefit of the public generally or connected with private houses, is under the control, supervision and management of the municipality and that it is its duty to see that it is properly maintained and kept in working order. It may be made clear that in this discussion I am of course referring to the mains and pipes and ferrules actually on the municipal lands and streets and thoroughfares, and not to pipes on private lands, houses, buildings and compounds which might stand on a different footing ...
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> Thus in any view of the case the liability of the Municipality for damage done to the houses of the plaintiff by reason of the escape of the municipal water through its damaged pipes is beyond question."

(14) A perusal of the rules, on which reliance is placed by Mr. Anand Swarup, will show that they are of advisory nature and control only the administrative relations between the State and the Municipal Committee but it must be understood that the department by undertaking the work on behalf of the Committee does not act as a department of the State, but only as an agent of the said Committee. All that is required under the Works Rules is that certain classes of work should not be undertaken by the Committee without technical sanction of the competent authority and this sanction relates

to the preparation of the detailed surveys, plans, specifications and estimates. In some cases, the Municipal Engineer himself is competent to give necessary sanction while in others it may have to be obtained from the Superintending Engineer, Public Health Circle, or any other officer. The Committee, under rule 15, has to pay to the Government on account of the services rendered by the officers of the Public Health Circle. These rules have nothing to do with the actual execution of the works as such namely; laying of the pipes; and even if such works are to be supervised by these officers, they must be deemed to be acting as agents of the Committee. It is not disputed in the present case that there was initial negligence in laying the pipe-line as the pipe used was old and two ferrules attached were missing. How improper, if not dishonest, it was on the part of those responsible for laying the pipes to have used rusty pipe for the pipeline to be laid. The Committee was informed on 28th April, 1962, by the plaintiff but no steps were taken by it till the next day when Shri Parma Nand Tuli P. W. 8 himself went to the spot and got the holes plugged. All this shows callousness on the part of the Committee and it is presumptive evidence of negligence. At any rate, in view of the clear evidence of acts of misfeasance the Municipal Committee cannot escape liability.

(15) Mr. Anand Swarup has invited our attention to a reported case *Mt. Sultan Bi* v. *Nandlal Suganchand Marwadi and another* (3). The facts of that case are distinguishable. The defendants there had engaged certain persons to cut down a tree situate on their land. No exceptional hazard was involved in felling the tree of that kind which stood at a distance of 30 feet from the plaintiff's house. Any unskilled person could accomplish the task. The defendant had given the contract of cutting the tree to an independent contractor but by the negligence of the persons employed by him a portion of the tree fell on the plaintiff's house causing damage to it. In this case the respondents were not held responsible for the negligence of the persons whom they had employed as there was no proof of any want of reasonable care on their part.

(16) The next question that survives for consideration is that of quantum of damages. There are two reports on the record, one by Shri S. D. Chawla, retired Engineer, and the other by Shri Sardari Lal, Local Commissioner, both of whom inspected the spot and

(3) A.I.R. 1938 Nagpur 296.

assessed the amount required for repairs and necessary fresh constructions. The Courts below accepted the report of the Local Commissioner, who assessed the damages at Rs. 3,510. He had, however, deducted a sum of Rs. 1,001 as, according to him, it was the cost of the material to be reused. We find no justification for such a deduction. In our opinion, the report should have been accepted as a whole and the total amount of Rs. 3,510 awarded as damages.

(17) For the foregoing reasons, Regular Second Appeal No. 458 of 1965 is partly allowed to the extent that the amount of damages as payable to the plaintiff-appellant is enhanced from Rs. 2,509 to Rs. 3,510, whereas Regular Second Appeal No. 215 of 1965 stands dismissed. There is no order as to costs in both these appeals.

N. K. S.

INCOME TAX REFERENCE

Before D. K. Mahajan and H. R. Sodhi, JJ.

THE COMMISSIONER OF INCOME-TAX, HARYANA, HIMACHAL PRADESH AND DELHI-III, NEW DELHI,—*Applicant.*

versus

M/S. KRISHAN PARSHAD & CO., PVT. LTD., AMBALA CITY.—*Respondent.*

Income Tax Reference No. 13 of 1971.

September 20, 1971.

Income-tax Act (XLIII of 1961)—Section 104—Provisions of—When attracted—Entire arrears of tax due—Whether can be taken into account for determining the profits of a particular year for the purposes of the section—Provision prescribing period of limitation in section 104(1)—Whether mandatory—Such period of limitation—Whether can be enlarged on the ground of sufficient cause.

Held, that burden lies upon the Revenue to prove that all the conditions laid down in section 104 of Income-tax Act, 1961 are satisfied before an order can be made thereunder. What has to be ascertained in the first place under this section is the commercial profits of the company and their quantum. These profits have to be worked out by the Income-tax Officer