IN THE SUPREME COURT OF PAKISTAN
(APPELLATE JURISDICTION)

PRESENT
Mr. Justice Qazi Faez Isa
Mr. Justice Munib Akhtar

Civil Appeal No. 547 of 2012
(On appeal from the order dated 19.3.2012 passed by the Peshawar High Court, Peshawar in RFA No. 366 of 2011)

Chairman, Pakistan Telecommunication Corporation and others **… Appellant (s)**

vs

Konish Enterprise (Pvt) Ltd. and others **…Respondent (s)**
(in CA 1227/13)

For the Appellant (s)	:	Mr. Tariq Aziz, ASC
For respondent No.1	:	Ch. Afrashiab Khan, ASC Ch. Akhtar Ali, AOR
For respondent No.2	:	Mr. Sikandar Rasheed, ASC Syed Rifaqat Hussain Shah, AOR
Date of hearing	:	9.10.2019

JUDGMENT

Munib Akhtar, J.: The respondent No. 1, a private limited company, filed a civil suit in the courts at Peshawar, impleading therein the present appellants and the respondent No. 2 as defendants. The appellants are various manifestations of the Pakistan Telecommunication Company Ltd., and are together referred to as "PTCL". The respondent No. 2 is the National Highway Authority ("NHA"). The respondent No. 1 (herein after referred to as "Konish") sued NHA as a pro forma defendant only.

2. Briefly stated, Konish's suit was that it had entered into a contract with NHA sometime in 1995 to the effect that along both sides of certain roads owned and/or controlled by the latter it would plant trees (initially in the shape of plants/saplings) and would nurture and look after the same for a period of five years. They would then, if contractually compliant, become the property of NHA. It appears that during the five year period, the saplings/plants were to remain at Konish's cost and risk, and it was only at the end of the said period that the NHA

would pay for the same. The number of trees involved, as claimed by Konish, ran into the tens of thousands. The suit alleged that sometime in 1997 NHA gave permission to PTCL to lay an underground optic fibre cable along some of roads where Konish had planted its trees. In order to lay the cable PTCL dug up the land and, it was claimed, damaged and/or destroyed a substantial part of the plants/saplings etc laid by Konish. As a result of the loss and injury allegedly so sustained Konish filed the aforementioned civil suit. PTCL filed its written statement, issues were framed, evidence was led and ultimately the learned trial court decreed the suit as prayed, i.e., for a sum of Rs. 12,00,000/-. PTCL filed an appeal initially in the court of the District Judge but the same was returned for lack of pecuniary jurisdiction. It then filed the appeal in the High Court, which, by means of the impugned judgment, dismissed the same. PTCL approached this Court, and leave to appeal was granted by order dated 19.06.2012 in terms as stated therein.

3. Learned counsel for PTCL submitted that the suit filed by Konish was incompetent as proper authority to institute the same, whether by way of the relevant resolution of the Board of Directors or the company's Articles of Association, had not been produced. A number of judgments, including those of this Court, were relied upon. On the merits learned counsel submitted that the evidence produced at the trial did not establish any loss or injury as claimed by Konish and in particular the report of the local commission, on which the learned trial court essentially based its decision, did not prove any case against PTCL. It was submitted that PTCL had come on the NHA land after taking permission and in terms of a proper no-objection certificate issued by the latter. It had always acted in accordance with the permission so granted and not otherwise. Learned counsel emphasized that a sum of Rs. 8,59,200/-, as required by NHA, had been deposited with the latter to account for any damage or injury as a result of PTCL's cable laying activities. This aspect had been completely ignored by the Courts below. (We may note that this was the point on which leave to appeal was granted to PTCL.) Learned counsel emphasized that PTCL was not party to the contract between Konish and NHA. Any liability for any loss suffered by the former lay at the latter's door and was not PTCL's responsibility. It was prayed that the appeal be allowed. Learned counsel for Konish submitted that the appeal filed by PTCL before the learned High Court had been barred by limitation. On the merits learned counsel submitted that the judgments below were correct and fully accorded with the law and the evidence produced. There had been no misreading or non-reading of the same. It was prayed that the appeal be dismissed. Learned counsel for NHA submitted that it was only a pro forma party but emphasized that

NHA had always acted in accordance with law. On a query from the Court learned counsel submitted that it had made no claim, either against Konish or PTCL.

4. We begin with the preliminary objections taken by both sides. Insofar as the plea of limitation raised by Konish is concerned, that is very much a secondary point since PTCL's appeal before the learned High Court failed on the merits. Furthermore, the point does not appear to have been pressed there by Konish; certainly, the learned High Court took no notice of any such issue. Konish cannot be allowed to raise the point here. As regards the plea taken by PTCL, it was not taken as such in its written statement and likewise no specific issue was framed with regard thereto by the learned trial court. Although issue No. 3 could perhaps be read as relatable to the objection now taken, the learned trial court was apparently not addressed on the point. The same position appeared to have obtained in the High Court. Be that as it may, the point as now taken is in any case not sustainable. One of us (Munib Akhtar, J.) had occasion, while in the High Court of Sindh, to deal with this issue. In a decision reported as *Pak Turk Enterprises (Pvt) Ltd. v. Turk Hava Yollari (Turkish Airlines Inc.)* 2015 CLC 1 the case law, including the judgments of this Court, were extensively reviewed. With respect, the understanding of the case law put forward by learned counsel for PTCL is not correct. The objection cannot succeed and is dismissed.

5. This brings us to a consideration of the case on the merits. The first point that requires consideration is the legal relationship of each of Konish and PTCL with NHA (in the context of this appeal), and thence with each other. Taking up NHA and PTCL first, it is clear that the relationship was that of licensor and licensee. In terms of the NOC and the correspondence relating thereto (to which we were taken by learned counsel), PTCL was allowed and enabled to do that, viz., enter upon NHA land to lay its underground cable, which would otherwise have been a trespass. As regards NHA and Konish, the matter was regulated by the contract dated 12.09.1995 between them. Although the contract appears to be a substantial document, comprising of a number of parts (which are referred to in Clause IV thereof), it appears that only the main part was actually tendered in evidence. In other words, the whole of the contract was not before the learned trial court. Indeed, this was an objection taken by learned counsel for PTCL. While ordinarily this omission may well have proved fatal, we are of the view that it is of no moment in the circumstances of this appeal. The reason is that what is relevant for present purposes (and what is apparent even from that portion of the contract as produced) is that one aspect of it was clearly that the contract granted

a license to Konish to enter, and be, upon the NHA land, in order to plant the saplings etc., and to look after the same for a period of five years before handing them over (as trees) to NHA. Thus, for purposes of this appeal the relationship between NHA and Konish may also be regarded as that of a licensor and licensee.

6. This brings us to the main point, namely the position of PTCL and Konish vis-à-vis each other. That was of two licensees allowed to enter and be upon the licensor's same piece(s) of land simultaneously in order to work their respective licenses, which each licensee held independently and in its own right, and which respective license was for diverse, distinct and separate acts. What, in law, is the duty (if any) of each licensee towards the other in such a situation? This is the question that lies at the heart of this appeal. As is clear (and indeed is obvious even otherwise) it is wholly irrelevant that PTCL was not a party to the contract between NHA and Konish. It is also important to remember that the loss and injury sustained by Konish, even if such is established, was not in and of itself sufficient for PTCL to be legally liable. For there to be liability in law a duty of care had to be owed and breached. As was explained by the Privy Council in *Grant v. Australian Knitting Mills Ltd.* [1936] AC 85, [1935] UKPC 2, AIR 1936 PC 34:

> "It is, however, essential in English law that the duty [of care] should be established: the mere fact that a man is injured by another's act gives in itself no cause of action: if the act is deliberate, the party injured will have no claim in law even though the injury is intentional, so long as the other party is merely exercising a legal right: if the act involves lack of due care, again no case of actionable negligence will arise unless the duty to be careful exists."

In our view, the law in this country is the same.

7. Whether, and if so how and to what extent, a defendant is liable to the plaintiff in negligence and, more importantly, whether there is a principle or test of general (even universal) application is a matter with which the law has grappled ever since Lord Atkin's seminal speech in *Donoghue v. Stevenson* [1932] AC 562, [1932] UKHL 100. In *Anns v. Merton London Borough Council* [1978] AC 728, [1977] UKHL 4, Lord Wilberforce suggested a (two-stage) test for such purpose. However, this was subsequently abandoned in English law although, interestingly, it apparently continues to find acceptance in some common law jurisdictions (such as Canada, Singapore and New Zealand). In *Caparo Industries Plc v. Dickman* [1990] 2 AC 605, [1990] UKHL 2 Lord Bridge

formulated the test that is now the accepted position in English law. After reviewing the authorities, Lord Bridge set out a three-stage test as follows:

> "What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of "proximity" or "neighbourhood" and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other. But it is implicit in the passages referred to that the concepts of proximity and fairness embodied in these additional ingredients are not susceptible of any such precise definition as would be necessary to give them utility as practical tests, but amount in effect to little more than convenient labels to attach to the features of different specific situations which, on a detailed examination of all the circumstances, the law recognises pragmatically as giving rise to a duty of care of a given scope. Whilst recognising, of course, the importance of the underlying general principles common to the whole field of negligence, I think the law has now moved in the direction of attaching greater significance to the more traditional categorisation of distinct and recognisable situations as guides to the existence, the scope and the limits of the varied duties of care which the law imposes."

As to the requirements of foreseeability and proximity, guidance can usefully be taken from the judgment of Deane J. in the High Court of Australia in *Sutherland Shire Council v. Heyman* (1985) 157 CLR 424, [1985] HCA 41:

> "It involves the notion of nearness or closeness and embraces physical proximity (in the sense of space and time) between the person or property of the plaintiff and the person or property of the defendant, circumstantial proximity such as an overriding relationship of employer and employee or of a professional man and his client and what may (perhaps loosely) be referred to as causal proximity in the sense of the closeness or directness of the causal connection or relationship between the particular act or course of conduct and the loss or injury sustained. It may reflect an assumption by one party of a responsibility to take care to avoid or prevent injury, loss or damage to the person or property of another or reliance by one party upon such care being taken by the other in circumstances where the other party knew or ought to have known of that reliance. Both the identity and the relative importance of the factors which are determinative of an issue of proximity are likely to vary in different categories of case."

Finally, as to the requirement of fairness, justice and reasonableness, Sedley LJ had this to say in *Dean v. Allin & Watts (A Firm)* [2001] EWCA Civ 758:

> "After a century and a half of development of the law of negligence we know that there is no universal legal formula by which the presence or absence of liability can be determined, and policy has correspondingly come to fill some of the spaces. What is not always understood in this context is that the "fair, just and reasonable" test is not a gate opening on to a limitless terrain of liability but a filter by which otherwise tenable cases of liability in negligence may be excluded."

One of the leading treatises on the subject, *Clerk & Lindsell on Torts* (22nd ed., 2018) puts the matter in the following terms (para 8-18):

> "At its narrowest, it focuses on justice and fairness as between the parties. At a broader level, it will consider the reasonableness of a duty from the perspective of legal policy, focussing on the operation of the legal system and its principles. At a still wider but more controversial level, it may take account of the social and public policy implications of imposing a duty."

8. Having considered the point, in our view there is (subject to what is further said below) a legal obligation owed by each licensee to the other in the circumstances as mentioned in para 6 above as all three stages of the test laid down in *Caparo* are satisfied. That obligation is a duty to take such reasonable care as ensures that the working by each licensee of its license does not interfere with the working of the other license by its licensee, and also to take such reasonable care as ensures that (keeping in mind the nature of the other license) no damage is caused to the other licensee. Two points may be made here. Firstly, as so postulated, the liability is contingent upon the licensee (allegedly) at fault being aware of both the existence of the other license and licensee, and the nature thereof. If the licensee (allegedly) at fault was not aware of the other licensee and its license then there would be no liability, even if damage or injury is caused to the latter. However, it is not necessary that there be actual knowledge. If the facts of the case are such as show that the licensee can reasonably be regarded as being (or should reasonably have been) aware of the other licensee and the nature of the license worked by it that, in law, would suffice. Furthermore, the liability would arise when the licensee (allegedly) at fault became aware (or should reasonably have, or be regarded as having, become aware) of the other licensee and its license. Secondly, the liability here contemplated is that of one licensee as such towards the other licensee as such. The (general) liability (if any) of each licensee towards other persons/third parties (which could, in this sense, include the other licensee) would remain unaffected. Such liability however, is not here in issue or under consideration. The foregoing leads to another question: what if, on any reasonable basis, one (or for that matter, each) of the licenses cannot be worked without incurring liability in terms as just stated? Would a duty of care still exist in such circumstances? And if so, how would it operate? In our view, the answer is that the duty would still exist. The licensee at fault would be one who (actually) works its license later in time, even though its grant may have been earlier.

9. Applying the foregoing to the facts of the case at hand, it is clear that Konish was the licensee first in time. It had actually started working its license before PTCL came into the picture. There can be no doubt that the record

establishes that PTCL worked its license in a manner that caused injury and damage to Konish. However, the question that still needs to be answered is that when PTCL did appear, was it (or could reasonably be regarded as being) aware of the existence of the earlier licensee and the nature of its license? Or, if not so aware, did it subsequently become (or could reasonably be regarded as having become) aware of Konish and its license? Looking at the matter as a whole, i.e., the pleadings of the parties and the evidence led by them, including the report of the local commissioner (which in our view was admissible and rightly so regarded by the learned trial court), the proper conclusion in our view is that PTCL was in fact aware (or could reasonably be regarded as being aware) of Konish, its license and the nature thereof. Thus, the Managing Director of Konish specifically testified in his examination in chief that during the cable laying process PTCL was repeatedly asked to take care while digging so that the plants etc were not damaged, but they paid no heed to this. This statement was not specifically challenged or rebutted in cross examination. While it is true that in his cross examination another witness appearing for Konish (one of its managers) stated that he did not know whether any notice was given to PTCL that the plants etc had been damaged during the latter's cable laying operations, this is not in itself sufficient to displace the categorical statement made by the Managing Director. The (sole) witness appearing on behalf of PTCL stated in his cross examination that the actual cable laying work was contracted out to a third party and it seems that no PTCL staff was actually present during the operation. However, even if the complaints that the Managing Director claims to have made were directed to the third party contractor employed by PTCL that certainly does not negate the latter's knowledge of Konish and its license. In the facts of the case, the contractor's knowledge was, in law, that of PTCL. Finally, the PTCL witness did state in his examination in chief that all due and proper care was taken during the cable laying operation. However, this statement was not made on the basis on any personal knowledge or with reference to any record maintained by PTCL and produced in evidence, and can therefore be discounted. It is in any case a conclusion of law to be arrived by the Court on the facts. Thus, PTCL was unable to establish that it had exercised that reasonable care as would negate liability in negligence. On an overall basis, the conclusions are as arrived at above.

10. It follows from the above that all the ingredients for liability to arise were proven to exist. The fact that PTCL deposited the sum required of it by NHA (i.e., the aforementioned Rs. 8,59,200/-) is of no moment. That was a matter between the licensee (PTCL) and the licensor (NHA) only, and had nothing to do with the

former's liability in tort towards the other licensee (Konish), in terms as explained above.

11. In view of the foregoing, this appeal fails and is hereby dismissed. There will be no order as to costs.

Judge

Judge

Announced in open Court today 24th February, 2020 at Islamabad.

Judge

Approved for reporting