

Judgment Reserved on: 22.03.2017

Judgment Pronounced on : 05.04.2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Coram:

The Hon'ble Mr.Justice N.SATHISHKUMAR

Appeal Suit No. 758 of 2012
and
M.P.No.1 of 2012

1. Vestas RRB India Ltd., rep. By
its Managing Director,
No.189, Sukhder Vihar,
New Delhi – 110 025.
2. Senior Manager (projects)
Vestas RRB India Ltd.,
No.17, Vembullyamman Kovil Street,
K.K.Nagar (West), Chennai 600 078. .. Appellants

Versus

1. K.Ramasamy
2. Selvi
3. Gangai Garments, rep. by
Managing Partner Gangai Gardens,
Kavilipalayam Road, Siru Poouvapattti Post,
Tiruppur – 641 603. .. Respondents

Appeal Suit filed under Order 41 Rule 1 read with Section 96 of Civil Procedure Code read with against the Judgment and decree dated 30.11.2011 passed in O.S.No.624 of 2009 passed by the learned Principal District Judge, Coimbatore.

For Appellants	..	Mr.A.Tamilvanan
For Respondents	..	Mr.K.Thilageswaran

JUDGMENT

Aggrieved over the decree and judgment of the learned trial Judge, decreeing the suit for a sum of Rs.5.00 lakhs towards damages to the plaintiffs for the loss of life of the minor due to electrocution, the present appeal came to be filed by the defendants 1 and 2. Defendant No.3 has not filed any appeal against the decree and judgment of the trial Court. The parties are arrayed as per their own ranking before the trial Court for the sake of convenience.

2. Brief facts of the plaintiffs' case is as follows:- The plaintiffs are the father and mother of minor R.Chinnasamy, residing in Indra Nagar Harijan Colony, Annupatti, Palladam Taluk, Coimbatore. The first defendant is a public limited company engaged in the supply, erection installation and operations of wind mills for the purpose of generation of electricity. The second defendant is the site office of the first defendant at Plladam. The third defendant is engaged in the business of maintenance of Wind Mills at Annupatti, Palladam. The first and second defendants had erected and installed several wind mills in the open field to an extent of about 100 Acres and the same were being

maintained by the third defendant. There are several dwelling houses adjoining the above open field. On 21.04.2006, at about 5.00 p.m. their minor son R.Chinnasamy along with two other minor children while playing in the open field unexpectedly came into contact with the wire in the panel control device, as a result of which, they suffered severe burn injuries through electrocution, due to negligence on the part of the defendants 1 to 3 in keeping the entrance gate of the panel control device room open and un-manned by security personnel and without fencing the area. In spite of the best efforts taken by the plaintiffs and best treatment given to their son R.Chinnasamy, he succumbed to burn injuries and breathed his last on 9.9.2006 at Coimbatore Medical College Hospital. Hence, they claimed compensation for a sum of Rs.25 lakhs.

3. The third defendant remained ex parte. It is the case of the defendants 1 and 2 is that they were made as unnecessary parties. It is the case of the first defendant that they are only manufacturers of Wind Electric Generators and also giving comprehensive solutions to those intending to set up those wind power generation forms. Besides supply of Wind Eclectic Generators, the first defendant also undertaken commissioning operation and maintenance of Wind Electric Generators

for his customers. Typically in the business of Wind Energy, it is the manufacturer which supplies the WEGs, and also erects and commissions the same and thereafter, operates and maintains the WEGs. This typically takes the form of a EPC contract. The defendant No.3 the owner of the Wind Mill had approached the defendant No.1 for supply of two numbers of Vestas type V39-500 KW WEGs with 47 Mtr.Rotor dia, 50Mtr. Tower height along with accessories to be installed in Palladam, Coimbatore District vide Purchase Work Order, Erection and Commissioning Order all dated 24.01.2006. Accordingly, the defendant No.1 had supplied two numbers of Vestas type V39-500 KW WEGs with 47 Mtr.Rotor dia, 50Mtr., after receiving the consideration for each of the orders. The defendant No.3 also signed a Power Purchase Agreement with the Tamil Nadu Electricity Board and there was also wheeling agreement for dealing with the Power Generators from the WEGs executed between the aforesaid parties.

4. The defendant No.3 being the actual owner of the Wind Farm consisting of two WEGs where the alleged accident took place. There is no Master and Servant relationship between the defendant No.3 and defendant No.1. So far as providing security for WEGs, its accessories and perimeter, which, responsibility, defendant No.3 as the owner of

the Wind Mill has take upon itself. Therefore, the defendant No.1 and 2 cannot be mulcted with any joint liability with the owner of the Wind Mill, the defendant No.3. It is further contention of the defendant that the Control Room is secured tight with a steel door and locked. The control device is kept screwed tight. The deceased should have gained access by tampering the fastened security as stated above. The intention of the personnel gaining access inside must be certainly for the purpose of theft. At any event it is the contention of the defendants 1 and 2 that they cannot be fastened with any liability either under tort or under contract. The plaintiffs can sustain their case for compensation for the death of their minor child due to negligence, only against defendant No.3. The claim of compensation of Rs.25.00 lakhs is also not sustainable. Hence, the defendants 1 and 2 prayed for dismissal of the suit. -

5. On the basis of the above pleadings, the following issues are framed b y the learned trial Judge:-

1. Whether the plaintiffs are entitled to claim compensation from the defendants as prayed for ?
2. Whether the defendants 1 and 2 are not liable to pay compensation to the plaintiffs as they are not responsible for the security and insurance?
3. Whether the suit is barred by misjoinder of the unnecessary parties?

4. To what relief the plaintiff is entitled to?

6. On the side of the plaintiffs P.W.1 to P.W.4 were examined and marked Exhibits A1 to A11. On the side of the defendants first defendant examined himself as D.W.1 and marked Exhibits B1 to B9. On the basis of the oral and documentary evidence and materials, the learned trial Judge found the defendants 1 to 3 are jointly liable to pay compensation and fixed the compensation as Rs.5,00,000/-, payable to the plaintiffs with interest at the rate of 6% per annum from the date of filing of the suit till the date of realization. As against the above judgment, the defendants 1 and 2 have filed the present appeal.

7. Though in the memorandum of appeal the appellants have taken a ground about the quantum of compensation and also act of negligence on the part of the deceased minor child, during the course of argument the learned counsel appearing for the appellants has not canvassed the above aspects. The main contention of the learned counsel for the appellants is that defendants 1 and 2 are engaged in the supply, erection installation and operations of wind mills for the purpose of generation of electricity, whereas the defendant No.3 is the owner of the Wind Mill. In fact, he had entered in to Purchase

Agreement with the Tamil Nadu Electricity Board for sale of electricity. The documents filed on the side of the defendants 1 and 2 clearly show that after erection of Wind Mill the defendants 1 and 2 being the supplier their obligation is only to maintain the device as per the warranty clause agreed between the parties to that aspect. Whereas as far as the security and insurance is concerned the third defendant being the owner of the Wind Mill has agreed to take care of the above aspects. Therefore, the appellants being the supplier of the materials and agreed to maintain the panel control device for a period of two years as per their warranty clause,, cannot be made liable for any accident which resulted in the death of minor child. The third defendant being the owner of the Wind Mill should have taken all steps to provide necessary security in and around the Control Device Room.

8. Therefore, merely because the appellants agreed to maintain the device for a period of two years after the supply made by them, cannot be made liable for the loss of life of one minor child and caused injury to one minor child and death of the plaintiffs' minor child, due to failure of providing necessary security by the third defendant. Hence, it is the contention of the learned counsel for the appellants that the documents exhibited on the side of the defendants clearly show that

only the third defendant alone is liable for compensation for the injury caused to the appellants and the loss of life of other minor child. It is further contention of the learned counsel for the appellants that the appellants being the supplier of the materials and agreed to maintain the panel control device for a period of two years as per their warranty clause, while filing the appeal have deposited Rs.1.00 lakh as per the orders of this Court. The above amount was also withdrawn by the plaintiffs. The appellant even prepared give up that amount in the event of the appeal being allowed. In support of the same, they also made endorsement to that effect. Hence, prayed for allowing the appeal by relieving them from the liability.

9. Whereas it is the contention of the learned counsel for the first respondent that though the third defendant is the owner of the Wind Mill, at the first instance when the legal notices were sent to all the defendants after the accident, it is admitted by all the defendants that they are jointly owning the Wind Mill. Therefore, now the appellants cannot take a different stand. Further it is the contention of the learned counsel for the first respondent that if the amount already deposited by the appellants is not claimed, there is no objection in proceeding against the third defendant fixing liability to pay the decree amount. In support of his arguments, the learned counsel for the first

respondent placed reliance upon the judgment of the Supreme Court in

M.P. Electricity Board v. Shail Kumari – 2002(1) CTC 362.

10. In the light of the above submissions, now the points that arise for consideration are:

1. Whether the appellants 1 and 2 who are the supplier of materials as well as site office for maintenance of Wind Mill alone are liable for damages for the accident which resulted in the electrocution of the minor children?
2. To what relief?

11. In the plaint it is pleaded by the plaintiffs that the plaintiffs' minor child and others are living in the Harijan Colony near the Wind Mill. According to the plaintiffs the Wind Mill in Annupatti Village, Palladm Taluk, Cimbatores were maintained by the defendants 1 to 3. On 21.04.2006 at about 5.00 P.M., while the plaintiffs' minor child R.Chinnasamy and other children were playing in the open ground, unexpectedly, came into contact with the wire in the panel control room as the room was not closed at the relevant time. As a result of which the plaintiffs' minor child R.Chinnasamy was succumbed to burn injuries due to electrocution. Therefore, the defendants are liable to pay damages.

12. It is not disputed by the defendants 1 and 2 in their written statement about the alleged accident while the children were entering into the device control room. In respect of the said accident, a crime was also registered in Crime No.148/2006 for the offence under Sections 304A of IPC. Though the accident was not denied by the defendants 1 and 2, it is their main contention that they are only supplier of the materials and agreed to maintain the panel control device for a period of two years as per their warranty clause, and their job is only supply of Wind Eclectic Generators, the first defendant also undertaken commissioning operation and maintenance of Wind Electric Generators for his customers. As far as the security aspect is concerned, it is only by the third defendant who is the owner of the Wind Mill. It is also submitted that the third defendant being the owner of the Wind Mill specifically agreed to take care of providing security as well as insurance. Therefore, the defendants 1 and 2 are not liable for damages.

13. P.W.1 is the father of the deceased minor. In his evidence, he has stated that on the date of accident that is on 21.04.2006, at about 5.00 P.M., while the minor children were playing in the open area the minors while entering into the panel control device room,

came into contact with the wire, as a result of which they suffered burn injuries. In spite of best efforts and best treatment given to their son R.Chinnasamy, he succumbed to burn injuries and breathed his last on 9.9.2006 at Coimbatore Medical College Hospital. Playing of the children in the open area at the relevant time is not pleaded in the written statement. But the only contention put forth by the defendants is that the children without proper permission have entered into the premises. The children entered into the panel control device room is not even denied in the cross-examination of P.W.1.

14. P.W.2 one Nithiya has also spoken about the accident. Immediately on hearing the cries of the children she saw that children running from the panel control device room. It is also stated by P.W.2 that there was no proper fencing around the transformer and no watchman was engaged at the relevant time by the defendants. The evidence of P.W.2 with regard to the non-fencing and non availability of watchman is not denied in the cross-examination. Similarly, P.W.3-Chittan has also stated that while playing game ball went near the Wind Mill and when the children went to pick the ball, they came into contact with the wire, as a result they were electrocuted. His evidence to the effect that at the time there was no watchman and there was no

fencing is also not seriously denied.

15. D.W.1 in his evidence has stated that only the third defendant is liable to pay compensation. Besides it is also stated that the children unauthorizedly entered into the place and contributed their negligence for the accident.

16. From the evidence available on record it can be seen that the children were came into contact with the wire in the panel control room which was not properly secured at the relevant time. Ex.A1 is the Certified copy of First Information Report filed in this regard and final report is also filed in this regard under Ex.A2. Ex.A3 is the Postmortem Report. Ex.A4 is the Death Certificate of R.Chinnasamy. Ex.A5 is the School Certificate of R.Chinnnasamy. Ex.A6 is the Legal Heir Certificate. Ex.A7 is the Legal notice issued by the plaintiffs claiming compensation from all the defendants, which was replied by the defendants under Ex.A8. Ex.A9 series are the photographs taken in the place of occurrence. Ex.A10 is the Compact Disc containing photographs taken in the place of occurrence. Ex.A11 is the Bill issued by the Digital Studio. In the above reply notice the first defendant has admitted that they were engaged in the supply, erection installation

and operations of wind mills for the purpose of generation of electricity. It is also admitted that the defendants 1 and 2 being the supplier their obligation is only to maintain the device as per the warranty clause agreed between the parties to that aspect. Photographs marked as Ex.A9 also show that the area was not properly fenced and doors of the panel control room also found open at the relevant time. Therefore, from the evidence on record, it is clearly established that the person who is engaging in the power generation is certainly liable to pay compensation.

17. In the judgment reported in **2002(1) CTC 362**, it has been held as follows:-

“ The basis of such liability is the foreseeable risk inherent in the very nature of such activity. This is based on the doctrine of “strict liability”. The concept of negligence comprehends that the foreseeable harm could be avoided by taking reasonable precautions. If the third defendant did all that which could be done for avoiding the harm, he cannot be held liable when the action is based on any negligence attributed. But such consideration is not relevant in cases of strict

liability where the defendant is held liable irrespective of whether he could have avoided the particular harm by taking precautions.”

.....“where an enterprise is engaged in a hazardous or inherently dangerous activity and harm is caused on any one on account of the accident in the operation of such activity, the enterprise is strictly and absolutely liable to compensate those who are affected by the accident; such liability is not subject to any of the exceptions to the principle of strict liability under the rule in Rylands vs. Fletcher.”

18. All these facts clearly show that the person involved in generation of electricity has not taken all safety measures. Therefore, it cannot be contended by the defendants that without permission the minors entered into the panel control device room and came into contact with the wire, which resulted in cause of burn injuries on the minors, as a result of which the plaintiffs' minor son R.Chinnasamy succumbed to burn injuries. It is well settled that the act of stranger is exception to rule of strict liability. When a person manning such dangerous instruments for generating electricity have extra duty to

take out measures to prevent such mishaps. Basis of liability is inherent in every such activity. Even assuming that the minor children were illegally entered into the panel control device room, that cannot be the ground to deny the liability. It is the duty of the person who involves such business particularly generating electricity to the tune of more than 33000 K.W., to take all the safety measures to prevent the third party from entering into the panel control device room. There should have been proper watchman posted there and pucca fencing should have been made by the person who is generating electricity. Whereas in this case, the evidence of P.W.1 to P.W.3 would clearly show that no such precautionary measures have been taken by the defendants at the relevant point of time.

19. Now, the question arises for consideration is whether the appellants being mere supplier of the Wind Electricity Generators and agreed to maintain the panel control device for a period of two years as per their warranty clause, is also liable for compensation. In this regard, Ex.B2 when carefully perused, the third defendant the owner of the Wind Mill vide Purchase Work Order, Erection and Commissioning Order all dated 24.01.2006 No.1 requested the first defendant for supply of two numbers of Vestas type V39-500 KW

WEGs with 47 Mtr.Rotor dia, 50Mtr., tower height along with accessories to be installed in Palladam, Coimbatore District and the first defendant had supplied the same. There is a warranty clause agreed between the parties. The warranty clause reads as follows:-

“ Warranty:

You will provide Two years warranty effective from the date of commissioning against defects in materials, designs, engineering, construction and abnormal corrosion. You should provide necessary high voltage protective devices for lightning and over voltage protective devices for each circuit breaker to avoid damages caused due to over voltage and lightning. During the Warranty Period, you will offer Free Operation & Maintenance with Spares inclusive of all electrical components such as Wind Turbine Step up/down Power Transformer, Meeting Set and Energy Meter etc., and excluding Security & General Insurance. If full payments are not made as per this order, your Guarantee will be stand void. You shall not be responsible for damages of a consequential nature. Your obligation under this Warranty shall cease if the

WEG's are either operated/maintained or tampered by personnel unauthorized by Vestas RRB."

20. When careful reading of the above warranty clause provides that the supplier has to set right the defects in the materials designs and engineering construction and abnormally flourishing over the period of two years and also liable to provide protective devices for lighting and over voltage device etc. In the warranty clause it is clearly agreed by the owner of the Wind Mill that security aspect and insurance to be taken care of by themselves. As per the purchase order under Ex.B2 on 24.01.2006, work order also placed under Ex.B3 for erection of the two Wind Mill generators and the first defendant has accepted the work order and also under Ex.B5 dated 27.01.2006 erection and commissioning order was also issued by the third defendant. There is specific condition that the electric generator should be commissioned on or before 15.03.2006. The above letter was acknowledged by the first defendant under Ex.B6 dated 27.01.2006 calling upon them to agree to work within three weeks after 25.02.2006. Ex.B7 is the erection and commissioning order dated 30.01.2006 is also accepted by the first defendant. Ex.B8 is the statement of account belonging to the third defendant shows that erection was completed on 30.03.2006 commissioning was started on

the same day.

21. From the above documents it can be seen that the first defendant is in fact admitted the supply, erection installation and operations of wind mills for the purpose of generation of electricity and also undertaken commissioning for a specific period and it is also agreed by the first defendant to operate and maintain the Wind Electric Generators for his customers for the warranty period of two years. Whereas it is specifically agreed between the parties that the security aspects and insurance will be taken care of by the third defendant who is the owner of the Wind Mill. When there is a specific contract between the parties in respect of their responsibilities, it cannot be stated that since the supply and erection was done by the first defendant they are also liable to pay compensation. The documents produced by the defendants 1 and 2 would clearly establish that their obligation was only to supply, erection and commissioning of the Wind Mill was over as agreed between them. The evidence also shows that commissioning itself was done on 30.03.2006. Once the commissioning was done, they were no longer the owner of the Wind Mill. The duty cast on them is only to maintain the devices for a warranty period of two years, except that they are no way connected

with the generation of the electricity.

22. Whereas the third defendant being the owner of the Wind Mill Farm who is said to have entered into contract with the Tamil Nadu Electricity Board for sale of electricity, remaining ex parte and also failed to produce the agreement entered into between himself and TNEB. The conduct of the third defendant remaining ex parte would clearly give an inference that they remaining ex parte to avoid production of documents. Therefore, this Court can easily draw adverse inference against the third defendant for his remaining ex parte in all these days and also non production of the vital documents. At any event, the warranty clause in the purchase order clearly shows that security aspect and other insurance cover have to be taken care of only by the third defendant. The evidence of P.W.1 to 3 clearly show that in fact the panel control room was kept open at the relevant time while the minor children were entering into the panel control room and they came in to touch with the transformer inside. In fact there is no evidence available to show what had happened inside the room. It is not the case of the plaintiffs that due to snap of the wire there was electrocution. In fact the children directly entered in to the panel control room which was not closed at the relevant time, came into

contact with the electricity. In that case, the negligence cannot be fixed on the defendants 1 and 2. The fact that when heavy electricity voltage present in a particular transformer the person nearing such transformer itself likely to be affected even without directly came into touch with the transformer etc. This fact cannot be ruled out. Similarly the evidence on the side of the plaintiffs clearly show that the control room has not been locked at the relevant time. This is also clear case of negligence on the part of the third defendant. When the third defendant specifically agreed in the purchase order to take care of the security, they ought to have taken care of the fencing area prohibiting the entry by others. Whereas they have not done so. Similarly, in the control room in which the transformer accommodated, there must be huge voltage of electricity. All these aspects would show negligence on the part of the third defendant.

23. The learned trial Judge taking into consideration of the admission made by the defendants in the reply notice has fastened the liability on the defendants 1 to 3. The reply notice when carefully read, in fact the first defendant has admitted their position with regard to supply and generating electricity and also maintaining of the Wind Mill Generator. Therefore, such admission cannot be mean to hold that

they have admitted their ownership itself on the Wind Mill Farm. Further, admission is not a conclusive proof against the person making it, but it may be explained to under section 115 of the Evidence Act. Under the proviso to Section 58 the court may ask some other independent evidence to support the admitted facts. The court is not bound to give judgment in accordance with the admission. Whereas the defendants 1 and 2 have taken a specific stand explaining their stand by establishing the same by way of documentary evidence to show that they are only suppliers and their obligation is only to maintain the Wind Mill, only as per the warranty clause agreed between them and the third defendant. Therefore, the third defendant being the owner of the Wind Mill Form which he is generating electricity alone can be fastened with the liability. The learned trial Judge however, fixed liability on all the defendants. In view of the above discussion, this Court hold that the third defendant alone is liable to pay the compensation fixed by the trial Court.

24. Though the trial Court has fixed the quantum of compensation as Rs.5,00,000/- towards the loss of life of minor child R.Chinnasamy, considering the fact that a sum of Rs.1.00 lakh has already been deposited by the appellants in this case, at the time of

admission of the appeal and the same is also withdrawn as per the orders passed by this Court and since the appellants are also prepared to forgo the amount deposited by them in the event of allowing the appeal, this Court is of the view, fixing the liability against the third defendant to pay a sum of Rs.5,00,000/- towards compensation to the plaintiffs, as fixed by the trial Court would meet the ends of justice. Accordingly, the points are answered in favour of the appellants.

25. In the result, the appeal is partly allowed. The judgment and decree of the trial Court fixing the liability on the defendants 1 and 2 alone is hereby set aside and the remaining findings of the learned trial Judge decreeing the suit for a sum of Rs.5,00,000/- with interest at the rate of 6% per annum from the date of plaint till the date of realization as against the third defendant is hereby confirmed. No costs. Consequently, connected Miscellaneous Petitions are closed.

05.04.2017

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N.SATHISHKUMAR, J

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**PRE DELIVERY JUDGMENT
IN A.S.No.758 of 2012**

05.04.2017

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