IN THE HIGH COURT OF SINDH AT KARACHI

Suit No. 394 of 1997
[Muhammad Bilal Aslam v. Pakistan Steel Mills and another]

Suit No. 395 of 1997
[Syed Fayyaz Ali v. Pakistan Steel Mills and another]

Suit No. 398 of 1997
[Qadir Bakhsh Khan v. Pakistan Steel Mills and another]

Suit No. 399 of 1997
[Asia Khatoon v. Pakistan Steel Mills and another]

Date of hearing	:	12.03.2019.
Date of Decision	:	02.03.2020.
Plaintiffs	:	Muhammad Bilal Aslam, Syed Fayyaz Ali, Qadir Bakhsh Khan and Asia Khatoon (*in all suits*), through Messrs Farukh Usman and Aamir Maqsood, Advocates.
Defendants	:	Pakistan Steel Mills and another (*in all suits*) through Messrs Agha Zafar Ahmed and Sarosh Jamil, Advocates.

Decisions relied upon by Plaintiffs' Counsel

1. N L R 1992 Civil (SC) page-36
   [*Mst. Nur Jehan Begum v. Syed Mujtaba Ali Naqvi*]

2. 1997 M L D page-2013
   [*Dr. Aziza and 5 others v. Muhammad Sarwar and another*]

3. P L D 2018 Sindh page-360
   [*Muhammad Sarwar v. Government of Sindh and others*] – ***Sarwar case***

4. P L D 2017 Sindh page-634
   [*Muhammad Razi and another v. Karachi Electric Supply Corporation through Managing Director and another*] – ***Razi case***

5. 2006 S C M R page-207
   [*Punjab Road Transport Corporation v. Zahid Afzal and others*]

6. 2011 S C M R page-1836
   [*Islamic Republic of Pakistan through Secretary, Ministry of Railways and others versus Abdul Wahid*] – ***Abdul Wahid case***.

7. 1991 S C M R page-2126
   [*Zakaullah Khan v. Muhammad Aslam and another*]

8. 2005 S C M R page-1392
   [*Pakistan Steel Mills Corporation Ltd., Karachi and another v. Ehteshamuddin Qureshi*] – ***PSM case.***

9. 1995 M L D page-633
   [*Mst. Sakina and 3 others v. Messrs National Logistic Cell, through Commander and 2 others*]

10. 2009 M L D page-1093
    [*Province of Sindh and another v. Shams-ul-Hassan and others*] – ***Shamsul Hassan Case***

11. 1985 M L D page-255
    [*Mst. Qaisar Jahan and 3 others v. Pakistan through Secretary, Ministry of Defence and 2 others*]

12. 2006 M L D page-19
    [*Mushtari v. Islamic Republic of Pakistan through Secretary, Ministry of Planning and Development, Islamabad and 2 others*] – ***Mushtari case.***

13. 2016 Y L R page-1797
    [*Hina Ghori and 2 others v. National Logistic Cell through Field Command and 2 others*] – ***NLC case.***

14. 2015 M L D page-1401
    [*Islamic Republic of Pakistan through Secretary Ministry of Defence and others v. Numair Ahmed and 2 others*] – ***Numair case.***

Decisions relied upon by Defendants' Counsel

1. 1993 S C M R page-848
   [*Pakistan Steel Mills Corporation Limited and another v. Malik Abdul Hameed and another*]

2. 1991 S C M R page-2300
   [*Mst. Nur Jehan Begum through Legal Representative v. Syed Mujtaba Ali Naqvi*]-***Nur Jehan case.***

Other precedents

1. 2009 S C M R page-1005
   [*Karachi Transport Corporation Versus Muhammad Hanif*]

2. 2009 M L D page-1443
   [*Mir Hassan v. Master Hammad through his next friend and another*] – ***Mir Hassan case***

3. PLD 1996 Supreme Court 737
   [*Sufi Muhammad Ishaque versus The Metropolitan Corporation, Lahore***] – *Sufi case***

4. 2012 CLD {Supreme Court of Pakistan} page-6
   [*Abdul Majeed Khan v. Tawseen Abdul Haleem and others***] – *Abdul Majeed Case.***

5. P L D 2015 Supreme Court 137
   [*Mahdi Hassan alias Mehdi Hussain and another v. Muhammad Arif***].**

6. P L D 2014 Supreme Court 668
   [*Election Commission of Pakistan through Secretary v. Province of Punjab through Chief Secretary and others***].**

7. P L D 2008 Supreme Court 673
   [*Suo Motu Case No.10 of 2007*],

8. P L D 2007 Supreme Court 315
   [*Government Of Punjab, Lahore v. Abid Hussain and others***].**

9. PLD 2015 Supreme Court 187
   [Farzand Ali and another versus
   Khuda Bakhsh and others]-***Farzand Ali case.***

Law under discussion:

1. The Constitution of Islamic Republic of Pakistan, 1973 (**"Constitution"**).
2. The Fatal Accident Act, 1855.
3. Civil Procedure Code, 1908 (**"CPC"**).
4. Qanoon-e-Shahadat Order, 1984 (**"Evidence Law"**).
5. The Minimum Wages Ordinance, 1961.

JUDGMENT

Muhammad Faisal Kamal Alam, J: - These four different suits have been filed by the legal heirs of those four persons who lost their lives in a fatal accident on 18.02.1996, when a Bus bearing registration No. J.A – 0753 (the **"Subject Bus"**) owned by Defendant No.1 and driven by Defendant No.2 collided with a Car No. L – 5036 (the **"Said Car"**). Names of the deceased persons are Syed Riaz Ali (Suit No.395 of 1997), Muhammad Aslam (Suit No. 394 of 1997), Raja Muhammad Ashfaq (Suit No.399 of 1997) and driver Tahir Hussain (Suit No.398 of 1997) and Nasir Ahmed (whose family did not file any suit), lost their lives. All suits

contain identical prayer clause(s) except the quantum of damages, hence only prayer clause of Suit No.394 of 1997 being the leading suit is reproduced herein under_

a) ***A decree in the sum of Rs.5.5 Million against the defendants who are liable jointly and severally to pay the said sum of damages / compensation.***

b) ***Profit at the bank rate of 15% per annum on the amount claimed in clause (a) above from the date of the filling of the suit till the date of the decreetal amount be awarded.***

c) ***Cost of the suit may be awarded to the plaintiff.***

d) ***Any other relief or reliefs that this Hon'able Court may deem just and proper under the circumstances of the case be granted.***

2. Upon issuance of summons and notices, Defendant No.1 (Pakistan Steel Mills - **PSM**) contested the mater by filing a Written Statement, wherein, *inter alia*, it is stated that the present suits are premature because the matter was still *sub judice* (at the relevant time) before the learned Sessions Judge, District Malir in Sessions Case No. 177 of 1996, arising from FIR No. 14 of 1996, relating to the above accident; however, the incident/accident itself was not denied, while disputing the claim of Plaintiff about rash and negligent driving. Defendant No.2 adopted Written Statement of Defendant No.1 vide Statement dated 03.09.1998.

3. By the order dated 16.11.1998 following consent Issues on behalf of Parties were adopted_

1. ***Whether the death of the deceased Muhammad Aslam was caused on account of negligence of the defendant No.2 in driving the Bus No.JA-0753 on 18.2.1996, if so, its effect?***

2. ***Whether the plaintiff and other statutory beneficiaries are entitled to compensation against the defendants jointly or severally, if so, to what extent?***

3. ***Whether the cause of action is premature?***

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

4. In the intervening period, a C.M.A. No.8804 of 2001was filed by Plaintiff, praying that all the suits be consolidated, which application was granted by the order dated 24.12.2001. Subsequently, in the order dated 21.01.2009, it was observed that a common evidence is led. Respective Plaintiffs led the evidence, except in Suit No.398 of 1997, ***whereas***, on behalf of Defendant No.1, their representative, namely, Noor Islam Baig and Defendant No.2 testified.

5. Messrs Farrukh Usman along with Aamir Maqsood, Advocates, argued on behalf of all Plaintiffs, that due to rash and negligent driving of Defendant No.2, the bus owned by Defendant No.1, hit the Car in which the Plaintiffs were traveling, resulting in their deaths. It is contended that since Defendants have not specifically denied the facts mentioned in the plaint, therefore, in fact Defendants have admitted the stance of Plaintiffs; in a proceeding of the nature, standard of proof is different. If the factum of fatal accident itself is not denied by the Defendants, then the onus is on the latter to disprove that the cause of death was not due to negligent act of Defendants; hence, they are liable to compensate the Plaintiffs. All the Plaintiffs were earning members of their respective families. Plaintiffs in Suits No.395 and 398 (of 1997) were contractor and workman, respectively, at Defendant No.1. It is argued that due to advancement in medical science and other facilities, average expectancy age in Pakistan is 70 years, therefore, it is expected that Plaintiffs, who were maintaining good health, would have lived till 70 years and their families would have

benefited by their earning as well as their company and association. Learned counsel for the Plaintiff has relied upon the case law mentioned in the opening part of this judgment.

6. Mr. Aga Zafar Ahmed along with Mr. Sarosh Jamil, Advocates, have controverted the above arguments of Plaintiffs' legal team. Learned counsel has contended that the criminal case registered under above FIR No. 14 of 1996, has been decided, acquitting Defendant No.2 (driver Khalid Zaman). He stated that the Plaintiffs have failed to prove that the fatal accident happened due to negligent driving of Defendant No.2. Learned counsel has further argued that the witnesses of Plaintiffs could not rebut the suggestion that tie rod of the said Car (vehicle) of Plaintiff broke down due to which it collided with the subject Bus. Learned counsel has relied upon the judgments mentioned supra.

7. Arguments heard and record of the cases, particularly, the evidence, has been considered.

ISSUE NO.3:

8. Since this issue relates to cause of action and it is specifically pleaded in the Written Statement that when the subject suits were filed, already criminal proceeding in the aforementioned case was *sub judice*, therefore, as per the stance of Defendants, the present suits were premature and have to be dismissed. This contention was further developed by the legal team of Defendant No.1 at the time of final arguments, by stating that decision in the criminal case has been passed and Defendant No.2 is acquitted, thus, the negligence on the part of Defendant No.2 and causation of death of Plaintiffs have been disproved and consequently, Defendant No.1 is not liable to pay any compensation to Plaintiffs. Obviously, this contention has been rebutted by the Advocates representing Plaintiffs.

9. A reported decision of Hon'ble Supreme Court in ***Karachi Transport Corporation Versus Muhammad Hanif*** (**2009 SCMR page-1005**) is relevant to address both the objections of Defendants about viCarious liability and acquittal of Defendants in a criminal proceeding. The Hon'ble Apex Court in the above decision in an unequivocal term has held that employer is always vicariously liable for acts of its employees performed in course of duties and hence the Appeal of Karachi Transport Corporation was dismissed, which was directed to compensate the respondents (of the reported case), who filed a suit under the Fatal Accident Act. Similarly, the Hon'ble Supreme Court has also clarified, by observing that since standard of appraisal of evidence in criminal and civil Cases are altogether different, therefore, the findings of a Criminal Court would not be binding on Civil Court.

10. In addition to the above, the acquittal of private Defendant in the above referred Criminal Case does not have any adverse bearing on the present ***lis,*** for the reason that subject to the decision in these ***lis***, Defendants No.1 and 2 can still be held liable to compensate the Plaintiffs by applying the rule of vicarious liability.

The learned Division Bench of this Court in another reported case of **Shamsul Hassan** (***supra***) while explaining the above principle, has held that since in civil cases, the evaluation of evidence is also based on preponderance of probability, therefore, the decision given in criminal case "***does not Carry bearing for adjudication of civil cases in any manner whatsoever***". The learned Division Bench has based the above finding on number of reported precedents mentioned in the judgment itself. Similarly, the case law relied upon by Plaintiffs' legal team, viz. 2006 SCMR 207 and Sarwar case (*ibid*) are also relevant.

11. Conclusion of the above discussion is that acquittal of Defendant No.2 in a criminal proceeding and pendency of criminal proceeding when the present suits were filed cannot adversely affect the decision in these subject suits, which are to be decided on its own merits and after applying rule for appraisal of evidence in such matters of fatal accident. Issue No.3 is answered in negative that these four suits are not based on premature cause of action and are thus maintainable.

ISSUE NO.1:

12. In Suit No.394 of 1997, on behalf of Plaintiff, his attorney Muhammad Zakir (P.W.-1) testified. In other suits also, Plaintiffs or their attorneys, who have deposed, have narrated the accident as mentioned in their respective Affidavits-in-Evidence, in an identical manner; however, since the claim about quantum of damages varies from case to case, therefore, those paragraphs are different in each Affidavit-in-Evidence / examination-in-chief.

13. It has been deposed by Plaintiff's witness (In Suit No. 394 of 1997) that subject Bus driven by Defendant No.2, which was owned by Defendant No.1 (PSM), on 18.02.1996, hit the vehicle / said Car, which was coming from the opposite direction, in which the deceased persons (above named) were sitting and due to strong impact of collision, the Bus pushed the Car to a considerable distance. The accident took place near C.B. Chowrangi. It is further deposed that the driver did not have license at the relevant time and another case against him and Defendant No.1 was registered. To evidence this fact, a report from Police officials has been exhibited as P-1/10; this document is perused, in which it is mentioned that driver Khalid Zaman (Defendant No.2) had stated that his driving license had been lost.

14. The above named witness of Plaintiff was cross examined mainly to the extent about the criminal case (as mentioned above) and acquittal of Defendant No.2 in the said Case. Plaintiff witness has shown his unawareness that whether the tie rod of the Car was broken, which caused the accident. Almost similar questions were put to other witnesses of Plaintiffs in connected suits. Learned counsel for the Defendants has laid much emphasis on this portion of the evidence, in order to substantiate his arguments, that causation of accident as alleged by Plaintiffs, has been disproved by Defendants, because the witnesses of Plaintiffs could not rebut the suggestion about breaking of tie rod of the Said Car. To further substantiate his arguments, he has cited the above judgment of the Honourable Supreme Court in the case of Defendant No.1 (PSM) and reported as **1993 S C M R page-848**, *inter alia*, expounding the *maxim* and *principle* of '***res ipsa liquitor***'. As per learned Advocate of Defendants, that facts upon which the above principle is based, are absent from the present cases and thus the above rule does not apply to the facts of present case in view of the above testimonies.

15. In order to appreciate this contention of Defendants, the entire evidence is to be considered in the light of pleadings of respective parties.

16. The second witness from the side of Plaintiffs (in leading Suit) is Muhammad Rafique, who at the relevant time admittedly was in employment of Defendant – PSM, as Security Guard. He deposed as eyewitness to the accident and narrated the accident in the same manner as was done by the above named witness of Plaintiffs (P.W.-1). He has specifically denied the suggestion that accident took place because the tie

rod of vehicle was broken and voluntarily stated that **'the bus dashed the Car actually'.**

P.W.-3 is the most important witness. Ghulam Abbas Bhatti was at the relevant time Police Inspector and is the one who reached the scene when the accident took place during his duty hours, within remit of Bin Qasim Police Station. Besides completing other formalities, he also prepared the sketch of the site where the accident took place. He has produced necessary documents with his examination-in-chief and has corroborated the fact that above named P.W.-2 (Muhammad Rafique) was one of the witnesses of the accident. The site sketch of the incident has been produced in original as **Exhibit 4/8**.

No question was put to the said P.W.-3 (Police Inspector) with the object to dilute the evidential value of the above site sketch (Exhibit 4/8). He categorically rebutted the suggestion that Car of the deceased persons was supposed to turn on the left and bus was to turn on right. He was put questions about the outcome of the afore-mentioned criminal proceeding. No question was put to him (PW-3) about his testimony that Defendant No.2 (driver) escaped from the place of accident and later on he appeared at Police Station along with Manager Transport of Defendant No.1 (PSM). The site sketch (Exhibit 4/8) has been Carefully examined. It shows **that front part of the Subject Bus hit the Car from sideways**, which refutes the defence of Defendants, that the front side of the said Car hit the front side of the subject Bus, due to which the front grill of the bus was damaged.

17. In Suit No.395 of 1997, the Plaintiff's witness was cross-examined only to the extent of the cause of accident, and in connected Suit No. 399 of 1997, the Plaintiff's witness was cross-examined to the extent of factum of the accident as well as employment of deceased Muhammad Ashfaq.

18. Testimonies of Plaintiffs in titled suits do not contradict each other as far as occurrence of the accident is concerned, in particular, the evidence of Plaintiff's witness in Suit No.399 of 1997, namely, Muhammad Fayaz, who has corroborated the version of Plaintiffs' witnesses in leading Suit No.394 of 1997 and could not be shaken in his cross examination.

19. In all these cases, the above named two witnesses on behalf of Defendants deposed and their deposition is identical. Defendant No.2 (driver), who deposed as D.W.-1, in his Affidavit-in-Evidence / examination-in-chief, has stated that subject Bus was at its minimum speed of 20 to 25 Kilometers per hour, *whereas*, the said Car coming from the opposite side in high speed and instead of turning to its left, it moved 'centrifugally' to its right with smoke emitting from its bonnet, it lost control and ultimately collided with the subject Bus from the driver side.

20. In his cross examination, the said defense witness has admitted that he passes from the bridge where the accident took place, two to four times in a day; he acknowledged that there is a proper maintenance workshop at Defendant No.1 and the said maintenance department ensured that each bus is road worthy. He has answered a question that (at the time of giving evidence) he was driving light vehicle of Defendant No.1. To a question, he has answered in affirmative that if emergency break in the bus used at the speed of 20 / 25 Kilometer per hour, then the bus would stop after two to three steps. He acknowledged that at the time of incident it was clear daylight. To a specific question, he has stated that he does not have knowledge whether the tie rod of the said Car broken down. The said defence witness has **admitted** that the subject Bus was only **"**damaged from front side**"**, *whereas*, "the Car was damaged from all the four sides". To another question, he stated in affirmative that at the time of accident, the

'bus was stopped (stationary)' while denying that the Car dashed into the bus due to negligent and rash driving of said defence witness. He has refuted that the said defence witness was responsible for the death of above persons. The contradiction in the evidence of this witness (D.W.-1 / Defendant No.2) is quite apparent. In his examination-in-chief he has stated that '*the ill-fated Car / vehicle moved centrifugally to its right with fire smoke from its bonnet and lost control and hit the bus from the driver side*', ***whereas,* in his cross-examination** he has stated that '*the Car collided with the bus from the front*'. In one of his replies in cross-examination, he states that '*if breaks are applied, then the bus would stop after two or three steps*', whereas, to another question, he stated that '*Car was forty steps ahead of bus and he used the emergency break';* **it means, then the bus should have stopped before hitting the said Car, but, the evidence led in these Lis, clearly shows that the subject Bus hit the said Car.** In his Affidavit-in-Evidence, which is adopted as Examination-in-Chief, the said Defendant witness has stated that the said Car "moved centrifugally to its right", ***whereas,*** in his cross-examination he deposed that '*he does not know the meaning of centrifugal*'.

More significant contraction in the testimony of D.W.-1 (Defendant No.2) is that, when he acknowledged in his cross-examination that subject Bus was only damaged from front side and the Car was damaged from all the four sides; *whereas*, in the examination-in-chief, he has stated that the said Car hit the subject bus from driver side. This very piece of evidence of D.W.-1 (Defendant No.2), on the contrary, supports the version of above named Police Official (Ghulam Abbas Bhatti) and the side sketch produced by him in the evidence as Exhibit 4/8, that front of the subject Bus collided with the side of the said Car and pushed it to some distance. Because of this massive impact by the bus, all the passengers of the Car received fatal

wounds and three of them died on the spot and subsequently two passengers lost their lives.

It is significant to observe that he has admitted in his cross-examination that a Departmental Inquiry was also done about the accident, and statement of said witness / Defendant No.2 was recorded, but the said **Inquiry Report was never produced by the Defendants either with their Written Statements or their respective testimonies.**

21. To another specific question in cross-examination, the said D.W.-1 stated that since his license is detained in the office he will produce on the next date, but the driving license was never produced in the evidence by Defendants to successfully rebut the assertion of Plaintiffs that at the time of accident the said Defendant No.2 did not have valid driving license.

The cross-examination of D.W.-1 (Defendant No.2) further highlights the contradictions in his evidence, when he admits that he never disclosed in the Departmental Inquiry **about the defect in tie rod** of the said Car. It is noteworthy, that both witnesses of Defendants have stated that one of the main *causes* of the accident was the breaking of tie rod of the said Car.

The Affidavit-in-Evidence/examination-in-chief of another witness of Defendant-PSM, namely, Noor Islam Baig **[DW-2]**, has been perused. It is identical to the Affidavit-in-Evidence/examination-in-chief of D.W.-1 (the above named driver/Defendant No.2). The Affidavit-in-Evidence of this witness (D.W.-2) is nothing but a copy of the Affidavit-in-Evidence of above named D.W.-1/Defendant No.2, even to the extent that in paragraph-1 (even though it is mentioned as para-10)it is stated that the said Noor Islam is a Security Guard at Defendant No.1, and on 18-2-1996 (on the day of incident), he **"**was assigned to drive the corporation

Bus…….....**”** which in fact is the statement of D.W.-1 (Defendant No.2). In order to impeach the credit of said DW.-2, who claims to be an eyewitness, some questions were put about the accident. In his cross examination, the said D.W.-2 has stated that after the accident, no one from the public gathered as there was no traffic on the road; ***whereas***, the DW-1 (Defendant No.2) in his cross-examination, has deposed **that at the time of accident road was very busy as it was peak hour.** The said D.W.-2 to a question has showed his ignorance about the meaning of centrifugal, which this witness (D.W.-2) has taken as a main defence in his Affidavit-in-Evidence, that the above said Car moved centrifugally to its right. In his cross-examination, he has stated that he cannot say anything about the speed of the Car nor about negligence of the drivers of both the vehicles. To a question, he has testified that due to accident “*there was no jurk in bus, prior to accident no passengers stood up from the seat*”, **but,** in his Examination in Chief, he deposed that there was hue and cry in the subject Bus and passengers arose from their seats, in order to avoid collision. The said witness of Defendants has shown his ignorance about number of persons sitting in the said Car; whereas, DW-1 deposed otherwise.

The contradiction in the evidence of D.W.-2 is apparent, when to a question, he has clearly stated (as already mentioned herein-above), that there was no jerk felt in bus, but to another question, he stated that bus was pushed back when it was hit by the said Car. The witness has not refuted a specific suggestion about Departmental Inquiry, which means that he has not disputed that a Departmental Inquiry, as suggested, was in fact held, so also admitted by D.W.-1. Even though in his Affidavit-in-Evidence, the said D.W.-2 has mentioned that since tie rod of the said Car was broken that is why it hit the subject Bus, but in cross-examination, he again

contradicted himself by admitting that he cannot say that what was the defect in the said Car.

It is also significant to note that in their common Written Statement, the Defendants have not taken any such defence / plea about the defect in tie rod of the said Car or that it was moving 'centrifugally', when the accident occurred. Defendants made an attempt to improve their defence in the evidence by pleading new facts, which is not permissible at least in proceedings of this nature. Evidence of both Defendants is not believable and does not appeal to a common sense, because, even, if the said Car had hit the subject Bus from the front side, then the said Car **cannot be damaged from all four sides.**

22. The evidence of Defendants proves the fact that a Departmental Inquiry was also held by Defendant No.1, but its report was never produced in the evidence. The conclusion of such a Departmental Inquiry must have been based on factual aspects. Non-production of the above Departmental Inquiry findings (Report) in the evidence has raised an adverse presumption against the Defendants, as envisaged in Article 129 (g) of the Evidence Law, which is reproduced herein under for a ready reference_

> **"*129. Court may presume existence of certain facts*:-** *The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course to natural events, human conduct and public and private business, in their relation to the facts of the particular case.*
>
> .....
>
> .....
>
> *(g) that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it;***"**

23. The above provision has been interpreted and developed into a well-known doctrine, known as 'best rule evidence'; that is, if a party to a proceeding (present Defendants) withholds the best piece of evidence, then it is presumed that if the same was produced, it would have gone against him/them. In this regard, the reported judgment of Zakaullah (***supra***, 1991 S C M R page-2126) cited by the Plaintiffs' legal team is relevant and it would be advantageous to reproduce a paragraph from this judgment herein below_

> "***11. As regards the third question i.e., the rule of best evidence attracted and applied to the civil proceedings, M. Monir's commentary on section 91 of the Evidence Act contains as elucidation of it in the following words:-***
>
> > ***"This section is an illustration of what in English Law is known as "the best evidence rule", which requires that the best evidence of which the case in its nature is susceptible should always be presented. This rule does not demand that the greatest amount of evidence which can possibly be given of any fact should be offered; it is designed to prevent the introduction of such evidence as, from the nature of the case, allow room for supposing that better evidence is in the possession of the party and to prevent fraud. For, when better evidence than that which is offered is withheld, it is only fair to presume that the party has some sinister motive for not producing it, which would be frustrated, if it were offered. It is a Cardinal rule of evidence, not one of technicality but of substance, which it is dangerous to depart from that where written documents exist, they shall be produced as being the best evidence of their own contents."***"
>
> **{**Underlined for emphasis**}.**

24. ***Secondly***, the conflicting testimonies of witnesses of Defendants as highlighted above, if evaluated with the evidence of Plaintiffs, particularly of P.W.-3 (the afore-named Police Official), who has narrated the incident and could not be falsified in his cross-examination, leads to the conclusion that in fact it is the Subject Bus which hit the said Car and as a result of which the said Car was completely damaged and all the five passengers travelling in it died due to such a massive impact.

Thirdly, the defence setup by the legal team of Defendants (as mentioned in the foregoing paragraphs), about the causation of the accident due to breaking of tie rod, has been disproved by the appraisal of the evidence and hence the arguments of legal team of Defendants, particularly with regard to non-applicability of the *maxim* '***res ipsa liquitor***' to the facts of present Cases, is without any force.

25. From the above discussion, the case law cited by Plaintiffs is applicable, *particularly*, the decisions handed down in well-known cases of Punjab Road Transport and Numair Ahmed (***supra***) by the Hon'ble Supreme Court and learned Division Bench of this Court, respectively, are relevant and rule about burden of proof in cases of Fatal Accident as discussed in these decisions, which in fact is the reiteration of earlier judgments, are on all fours with the facts of present Suits. The crux of this rule is that where a factum of accident is not disputed then the burden to prove that the fatal accident did not happen due to the negligence of Defendant(s), shifts upon the latter (defendant). In fact, it is the present Defendants who have to prove that the accident in which fivepersons lost their lives, was not caused due to negligence of the Defendant No.2. Besides, this principle can be derived from Articles 117 to 120 of the Evidence Law, in particular, Articles 118 and 119, saddling that party with

the burden of proof, who wishes the Court to believe in its existence. Evaluation of evidence of Plaintiffs and Defendants, in particular, contradictions, as highlighted in the foregoing paragraphs in the testimonies of the Defendants, leads to the conclusion that Defendants have not successfully discharged their burden of proof about the rash and and negligent driving of Defendant No.2.

The reported Precedents of Apex Court and this Court in PSM and Numair Ahmed (***ibid***), respectively, has ruled that (i) driver of a heavy vehicle has to be extra vigilant in driving his vehicle, as his slightest Carelessness can be disastrous; and (ii) such responsibility is greater than that of a pedestrian or drivers of other light vehicles. It can be deduced that driving a heavy vehicle at high speed itself can be construed an act of rash and negligent driving, unless proven otherwise.

Defendant No.2 (Driver) in his deposition has admitted that he regularly plied the Subject Bus daily on the same route on which the fatal accident had taken place, which **means that he knew the route well,** thus, the said Defendant No.2 was under an obligation to be more careful and alert than an ordinary motorist, in the present case, the driver of the Said Car. The Defendants have failed to prove that the accident was caused due to negligent driving of the driver (Tahir Hussain) of the said Car.

26. Well known rules about "foreseeability", "causation" and “but for” test are also applicable here. Crux of judicial pronouncements on the above is that, if any reasonable person by applying his ordinary prudence can foresee a loss that can arise from his act(s), then he owes a duty of care to others [claimant] and is liable for the negligent act that has caused damaged to the other person (claimant). Similarly, causation is the linkage between the negligent act [breach of duty of Care] that has resulted in causing injury

and the "but for" test if simply put, means, that the injury would not have occurred without the defendant's negligence.

The upshot of above discussion is that Issue No.1 is answered in Affirmative that death of above named persons who were travelling in the said Car was caused due to negligence of Defendant No.2, while driving the Subject Bus.

ISSUE NO.2:

27. Since monetary claim in each suit varies, therefore, they have to be considered separately. But before doing so, it is necessary to discuss the principles evolved in this regard through various judicial pronouncements.

28. The learned counsel for the Plaintiffs have relied upon the decision of Mir Hassan Case (***supra***), handed down by learned Division Bench of this Court as well as the recent decisions of Razi and Sarwar cases (***ibid***), which are based on the judgments of Honourable Supreme Court; so also reported judgments of Honourable Apex Court and of this Court handed down in ***Abdul Wahid and Mushtari cases*** are of relevance here. In the last mentioned case [2006 MLD (Karachi) 19], **an additional amount of compensation was paid to** widow and children of the deceased (of the reported case) towards 'loss of consortium'; *that is,* deprivation of the benefits of a family relationship due to injuries or death caused by a tortfeasor.

29. Précis of the above cited judicial pronouncements is that in these cases, wherein the statutory beneficiaries as mentioned in Section 1 of the Fatal Accident Act, 1855, are deprived of the association and company of one of their family members, either son, daughter, spouse or father, then considering the general nature of human behavior and in an attempt to

forestall such incidents in future, the negligent conduct should be made more expensive in terms of actual damages.

In the case of Mir Hassan (***supra***), the learned Division Bench maintained the decision of the Trial Court, *inter alia*, awarding damages to a minor, who obviously was not gainfully employed, but was seriously injured due to reckless driving of one of the appellants (driver of the reported decision); *secondly*, in the recent decision of Razi case (***ibid***) this Court has invoked the provisions of the Minimum Wages Ordinance, 1961, for computing the income of victim of fatal accident, besides, following the criteria laid down by the Honourable Supreme Court in the case of Abdul Wahid (***supra***). It would be advantageous to reproduce the relevant portion of the landmark judgment handed down by the Honourable Supreme Court in the case of Abdul Wahid and others (**2011 S C M R page-1836**)_

> **" ……. *Besides, the above we would like to add here, that when a person has surmounted his teenage, and the early youth and enters into his practical life by joining an employment or a business etc. it can be legitimately expected that he shall complete his inning by attaining the age of his normal retirement from such practical life, meaning thereby, that he shall remain engaged in some gainful activity, obviously till the time he in the ordinary course, is mentally and physically fit and capable. Such an age on the touchstone of 'reasonable standard' can be termed to be somewhat around sixty fiveto seventy years;*"**
>
> **"DETERRENCE**
>
> …… ***Bearing in mind the general nature of human behaviour, if the consequences of negligent conduct are made more expensive and financially painful in terms of actual damages or the threat thereof, such tortious conduct is likely to be deterred. Courts can, particularly in cases of egregious conduct as in the present case, award exemplary or punitive damages. Such damages can go beyond the amount meant for***

compensation, in order to enforce the deterrent effect of tort actions. This mechanism has been used by Courts in other common law jurisdictions abroad, to positive effect.

9. It may be added that tort law, in a number of countries has operated as a tool for enforcing good governance and responsible behaviour, on account of its deterrent effect against the unlawful and negligent actions of tort feasors. Corporations such as the appellant Railways must implement and strictly adhere to the guidelines and safety precautions expressed in various statutory enactments and case-law. For their failure in observing these, legal precedent, in future, may consider holding them accountable through the award of exemplary damages. In this regard, the promotion of the law of torts is vital, Courts can, within the constraints of their available resources endeavour to facilitate the utilization and development of this law by delivering expeditious adjudication."

{UNDERLINED FOR EMPHASIS}.

30. Adverting to the evidence. In leading Suit No.394 of 1997, the P.W.-1 has specifically stated that the deceased at the time of his death was 34 years of age and was keeping a good health. It has been deposed that deceased Muhammad Aslam was an experienced established contractor and was doing business under the name and style of Aslam & Brothers having office at Haq Manzil, 160-B, Quaidabad, Karachi. The Plaintiffs' witness has produced copies of the contract between the Deceased's proprietorship and third parties in his evidence, as Exhibit P/1/14, Exhibit P/1/15, Exhibit P/1/16 and some other ancillary documents. It has been specifically stated that deceased Muhammad Aslam at the time of his death was earning a sum of Rs.10,000/- per month, which income would have increased with the passage of time. A relevant portion of the testimony of P.W.-1 is reproduced herein under_

> “ *The deceased was planning construct some low cost housing projects in the area of Razzakabad for the employees of the Pakistan Steel Mills and as such he could have succeeded in having the said in near future and could have managed to earn quite handsome profit day by day and at least profit of Rs.50,000/- per month can easily be assumed.The deceased Muhammad Aslam was very sincere and benevolent towards plaintiff and another legal heir and wanted to see them prosperous and happy that’s why he used to work day and night in order to give them relief. In addition to the monetary benefits, the widow of the deceased who is now just in her twenties had been deprived of the company association of her life partner in such a prime youth and have to go a long way in helpless position which may adversely and badly affect her personality owing to loss of company of her husband. This loss of association and company of the spouse entitles her in law to claim compensation on head of “consortium” which she assessed in this case for a sum of Rs.10,00.000/-. The amount of Rs.l0,000/- is also claimed for funeral expenses which the legal heir have spent in this regard.*
>
> *8. That I say that plaintiff and another legal heir claim a sum of Rs.55,00,000/-, which is just and reasonable. The defendant No.2 being employee of the defendant No.1 is vicariously liable to the compensation to plaintiff for wrongful act of the defendant No.2. Besides the defendants are liable jointly and severally to pay the compensation to plaintiff and another legal heir*.”

31. The above evidence of P.W.-1 (in Suit No.394 of 1997) has gone unchallenged as no cross-examination was done on the above portion of testimony.

32. To prove the age of Muhammad Aslam (in Suit No.394 of 1997), the P.W.-1 has produced the National Identity Card of the deceased as Exhibit P/1/2 and Medical Certificate (of cause of death) as Exhibit P/1/5, issued by JPMC Hospital, Karachi. At the time of death the age of deceased Muhammad Aslam was 34 years. It is held in number of judgments that average life expectancy of a person in Pakistan is 70 years. In this regard,

the case of Abdul Wahid (***ibid)*** is relevant and a portion whereof is already reproduced above. Applying the aforementioned criteria to the case of deceased Muhammad Aslam, means he would have earned Rs.10,000/- per month (as claimed at the time of his death) till 36 years, which comes to Rs.4.5 Million approximately.

It would be illogical to say that deceased Muhammad Aslam would have earned same amount for years to come and his business income would not have increased with the passage of time. Claim of Plaintiff in leading Suit No.374/1997 is thus realistic and correct.

33. It has been testified by the above named P.W.-1 that deceased Muhammad Aslam was benevolent towards his parents and wife and loss of his association has devastated the widow particularly. In this regard Rupees One Million has been claimed towards loss of consortium or association. Reported decision of this Court in ***Mushtri case*** (**2006 M L D page-19**) has been relied upon by the Plaintiffs. The rule laid down in the said judgment is fully applicable to the present ***lis***. ***Secondly***, as already stated in the foregoing paragraphs, that the Plaintiffs' witness was not cross-examined on that part of his evidence, which relates to monetary claims. It is an established rule that if a crucial fact deposed in the examination-in-chief, is not subjected to cross examination, then, it shall be deemed to have been admitted by the opposite party. Decisions of Nur Jehan and Farzand Ali (***supra***) handed down by the Apex Court explain this view.

Hence, a sum of Rupees One Million towards loss of consortium is also awarded to Plaintiffs in Suit No.394 of 1997. Therefore, the Defendants are jointly and severally are liable to pay a sum of Rupees 5.5 Million (rupees fifty fivelacs) to Plaintiffs in Suit No. 394 of 1997, together with ten percent markup from the date of institution of suit till realization of the amount.

34. Adverting to the claim of Plaintiff in Suit No.395 of 1997. Syed Fayaz Ali, the father of deceased Syed Riaz Ali, has led the evidence as P.W.-1. He has produced Medical Certificate of cause of death issued by JPMC Hospital, Karachi, as Exhibit P/1/2. According to the certificate, the deceased was 30 years old.

It is pleaded in the plaint as well as in the Affidavit-in-Evidence, which was later merged as examination-in-chief of said P.W.-1, that the deceased was working on daily wages in one of the Departments of Defendant No.1 – PSM, as Operator and was earning Rs.4,000/- to Rs.5,000/- per month (at the relevant time, that is, in the year 1996). The said deceased (Syed Riaz Ali) was married. A sum of rupees five hundred thousand is claimed towards loss of consortium and association. The P.W.-1 has quantified the claim at rupees six million, by deposing that with the passage of time the income of deceased would have increased. To this case also the criteria discussed in detail herein above is applicable. Since the Plaintiff's witness was not cross-examined on any material aspect of their monetary claim and this portion of evidence has gone un-rebutted, hence applying the aforementioned criteria to the facts of this case, a sum of Rupees Six Million (as claimed) has been proved. Thus, Defendants are liable to pay jointly and severally to Plaintiffs a sum of Rupees Six Million with 10% mark up from the date of filing of Suit No.395 of 1997 till the amount is paid.

35. Adverting to the claim mentioned in Suit No.399 of 1997. Initially the suit was filed by Asia Khatoon, the mother of deceased Muhammad Ashfaq, but during pendency of proceeding, she also passed away and her son Muhammad Fayaz Siddiqui, led the evidence by filing Affidavit-in-Evidence, and later his examination-in-chief was recorded. The said P.W.-1 has testified that deceased Muhammad Ashfaq was a daily wage worker and was earning Rs.4,000/- to Rs.5,000/- per month. He has also deposed

that with the passage of time, the deceased had a plan to join the family business. A claim of Rs.15,00,000/- (Rupees Fifteen Lac only) has been made, but no claim is made towards loss of consortium.

In his cross-examination, the said P.W.-1 has acknowledged that no documentary evidence was brought on record to corroborate the assertion that Plaintiffs and other family members of deceased were engaged in the clothing business. The said witness of Plaintiff also admitted that no evidence is produced to prove that deceased was on job. Even though This witness could not successfully prove that deceased was gainfully employed, but, in view of the discussion contained in the foregoing paragraphs, *particularly*, the rule laid down in Razi and Mir Hassan Cases (***supra***), the statutory beneficiaries of deceased Muhammad Ashfaq are still entitled for a reasonable monetary claim. It is not questioned that when deceased died in the above accident, he was only 22 years old; thus, invoking the settled judicial principle about the age expectancy in Pakistan, the said deceased (for the purposes of calculating monetary compensation) would have lived 48 years and hence, the claim of Rs.15,00,000/- is just and reasonable.

Therefore, the arguments of the legal team for Defendants, that Plaintiffs could not produce any plausible evidence about the gainful employment of deceased persons, loses significance.

Consequently, Suit No.399 of 1997 is decreed to the extent that Defendants are jointly and severally liable to pay a sum of Rs.15,00,000/- (rupees fifteen hundred thousand) together with ten percent markup from the date of institution of this suit till the amount is fully paid.

36. Now adverting to the Suit No.398 of 1997. This suit was filed by the father of deceased Tahir Hussain, who was working as Electrical Fitter in CRM Department of Defendant No.1, which fact is admitted by Defendant

No.1 in paragraph-2 of its Written Statement. For unknown reasons, the Plaintiff of this suit has not led the evidence. Although it is a settled principle that pleadings themselves cannot be treated as evidence, unless parties, viz. plaintiff(s) and Defendant(s) lead the evidence in support or in defence of their pleadings, but in my considered view, there can be an exception to the above rule and that exception can be created in the light of present facts of these consolidated suits, where accident, due to rash and negligent driving of Defendant No.2, has been proved, in which admittedly five persons died, including the above employee of Defendant No.1 (deceased Tahir Hussain). If monetary claims of other Plaintiffs have been accepted as mentioned in the preceding paragraphs, then it would be an injustice to deprive the Plaintiff of Suit No.398 of 1997 from such claim. Since, Plaintiff (of Suit No.398 of 1997) has not led any evidence in support of its monetary claim of Rs.1.8 Million together with 15 percent per annum profit, thus this monetary claim cannot be awarded to Plaintiff; but at the same time applying the rule of thumb an amount towards general damages can be granted.

37. Broadly, damages are of two kinds; general and special. Special damages are awarded only when a party successfully proves actual losses suffered by him / her, which is not done by the Plaintiff in Suit No.398 of 1997. Notwithstanding this aspect of the case, the Superior Courts have held in number of decisions, ***Abdul Majeed Khan versus Tawseen Abdul Haleem-2012 CLD page 6***, being one of the leading cases, that if circumstances so warrant, general damages can be awarded by invoking the rule of thumb; particularly where violation of legal rights exists. Similarly, in the case of ***Sufi Muhammad Ishaque versus The Metropolitan Corporation, Lahore-PLD 1996 Supreme Court 737***, the damages vis-à-vis mental agony has been discussed and the conclusion is that there can be

no yardstick or definite principle for assessing damages in such cases, which are meant to compensate a party who suffers an injury. The determination criteria should be such that it satisfies the conscience of the Court, depending on the facts and circumstances of the case.

38. In view of the above discussion it is just and proper to award a sum of rupees five hundred thousand (Rs.500,000/-) to Plaintiff in Suit No. 398 of 1997, which the Defendants are liable to pay.

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39. The upshot of the discussion in preceding paragraphs is that all the four suits are decreed by awarding the damages as mentioned individually in respect of each ***lis.***

40. In numerous decisions the Superior Courts of our Country has deprecated the government functionaries and Autonomous Bodies including, the present Defendant No.1, when they preferred Appeals against the judgments awarding damages and compensation to the aggrieved family members of victims of fatal accident. The Hon'ble Supreme Court in Punjab Road Transport Case (***ibid***, **2006 S C M R page-207**), while dismissing the Appeal has made the following observation_

> "7. .....The question of law had also been considered in Pakistan Steel Mills Corporation v. Nazar Hussain 1990 CLC 515. The relevant observation is as follows:--
>
> *"We are also inclined to hold that the public functionary particularly, in Pakistan which is an Islamic State is enjoined not only by our Constitution but also by the tenets of Islam that it should act in aid of advancing the cause of justice and not to frustrate or defeat it. It is indeed a deplorable act when a public functionary in order to resist a genuine claim arising out of fatal accident spends considerable amount on litigation instead of settling the matter with the dependents of the deceased."*

41. Looking at the pendency of Fatal Accident Suits, where legal heirs of a deceased person have to go through the mill of litigation, often result in acute hardship to the claimants / plaintiffs of such cases**.** It is about time that the Fatal Accident Act, 1855, should be revisited and necessary amendments be incorporated therein to align this law with the present day ground realities. In a Muslim Polity like ours, which is governed by a pragmatic Constitution, it is the bounden duty of the Government and an obligation of legislature to enact such laws which solely serve the public interest, ***inter alia,*** in view of Article 37, sub-Article (d) of the Constitution. To alleviate hardship of litigants and family members of those (victims) who died in fatal accidents, so also those who helplessly abstain from filing their claims in the Court of Law for various reasons, should also be given relief.

42. In various judgments when a necessity is felt, Courts have given directions for making necessary enactments. Following precedents are relevant:

A) P L D 2015 Supreme Court 137
[*Mahdi Hassan alias Mehdi Hussain and another v. Muhammad Arif***],**

B) P L D 2014 Supreme Court 668
[*Election Commission of Pakistan through Secretary v. Province of Punjab through Chief Secretary and others***],**

C) P L D 2008 Supreme Court 673
[*Suo Motu Case No.10 of 2007: In the matter of, decided on 24th January, 2008*], and

D) P L D 2007 Supreme Court 315
[*Government Of Punjab, Lahore v. Abid Hussain and others***].**

43. In my considered view, amendments can be made in the Fatal Accident Act 1855, ***inter alia,*** by taking the definition and concept of 'Inquiry Committee' and 'Organization' from the Act No.IV of 2010-Protection Against Harassment of Women at the Workplace Act, 2010. For

a ready reference their respective definitions and provision are reproduced herein-under:

"(l) “organization" means a Federal or Provincial Government Ministry, Division or Department, a corporation or any autonomous or semi-autonomous body, Educational Institutes, Medical facilities established or controlled by the Federal or Provincial Government or District Government or registered civil society associations or privately managed a commercial or an industrial establishment or institution, a company as defined in the Companies Ordinance, 1984 (XL VII of 1984) and includes any other registered private sector organization or institution;

(i) “Inquiry Committee” means the Inquiry Committee established under sub-section (1) of section 3;

3. **Inquiry Committee** -- (1) Each organization shall constitute an Inquiry Committee within thirty days of the enactment of this Act to enquire into complaints under this Act.**”**

Following broad parameters for the proposed amendment are recommended_

(i) It may be made mandatory for an Organization that when an information is received about the occurrence of a fatal accident in which a person or vehicle of an Organization is involved, then a Departmental Inquiry should be held and if it is found that the accident occurred due to mistake or negligence of the personnel of such organization, then the legal heirs as mentioned in Section 1 of the Fatal Accident Act, 1855, should be called for hearing and be offered a reasonable compensation.

For calculating ‘Reasonable compensation’, Chapter 16 of the Pakistan Penal Code (1860) can be taken as one of the criterion.

(ii) The proposed legislative amendments should also extend to private corporate entities.

(iii) All those falling within the purview of afore defined Organization should constitute an internal Inquiry Committee

for dealing with the cases of Fatal Accident. First the Inquiry Committee within an organization should decide a case or complaint. It is also a matter of common knowledge that large organizations also maintain a separate account, usually called **"**Corporate and Social Responsibility". Family members of deceased / victim of fatal accident can be compensated through such accounts.

44. It is expected that the Secretary Law and Justice Division (Government of Pakistan) will take appropriate steps in this regard.

JUDGE

Karachi,
Dated:29.02.2020.

A Copy of this Decision be communicated to the Worthy Secretary Law and Justice Division.

Riaz / P.S.