

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No.1152 of 2004

Inayat Masih and another

Versus

Waqar Ahmad and another

Dates of hearing : 23.10.2020, 20.09.2021
and 27.09.2021.

Date of Judgment : 27.09.2021.

Plaintiffs No.1 and 2
[*Inayat Masih and Sardaran*
Bibi, respectively]

: Through Mr. Muhammad Nazim
Khokhar, Advocate, along with
Plaintiff No.1-Inayat Masih and
his son/attorney-Iqbal Masih.

Defendants No.1 and 2
[*Waqar Ahmad and Moosa*
Khan, respectively]

: Nemo for Defendants No.1 and 2.

: Mr. Shakir Nawab, SIP, Police
Station Sohrab Goth, Karachi.

: Mr. Ghulam Akbar Uqaili,
Assistant Advocate General
Sindh.

JUDGMENT

Muhammad Faisal Kamal Alam, J: This suit under Fatal
Accidents Act, 1855, is filed by Plaintiffs against the Defendants, *inter*
alia, for recovery of Rs.3,550,000/- (*rupees three million five hundred fifty*
thousand only) towards damages/compensation, with the following relief _

“The Plaintiffs, therefore, prays for the Judgment and Decree as under: -

- “(a) A decree in the sum of Rs.3,550,000/- against the Defendants jointly and severally to pay the said sum of damages / compensation to the Plaintiffs or any other amount this Hon’ble Court may deem fit in circumstances of the case.*
- (b) Profit/mark up at the rate of 21% per annum on the amount claimed in Clause (a) above from the date of the filing of the suit till the date of realisation of the decretal amount which the Plaintiffs would have earned had the Defendants paid the said amount.*
- (c) Cost of the suit may be awarded to the Plaintiffs.*
- (d) Any other relief or reliefs that this Hon’ble Court may deem just and proper under the circumstances of the case be granted.”*

2. It is averred by learned counsel for Plaintiffs that their son, namely, Javed Masih, aged about 25 years, who was working as Conductor in Mazda Coach bearing No.PE-1394 (*the ‘said Vehicle’*) died due to rash and negligent driving of Defendant No.2 (*Moosa Khan*), whereas, the said Vehicle is owned by Defendant No.1 (*Waqar Ahmad*).

3. Summons were issued to Defendants. Only Defendant No.1 filed his Written Statement, wherein, he has acknowledged the ownership of the above Vehicle while denying the accident and other contents of the plaint. He finally prayed that the present *Lis* be dismissed. By the order of 01.06.2007, service against the Defendant No.2 was held good.

4. Proposed Issues on behalf of Plaintiffs were adopted as the Court Issues vide order dated 01.03.2010_

- “1. Whether the death of the deceased Javed Masih was caused on 28th September, 2003 due to negligence of the Defendant*

No.2 during the course of employment of Defendant No.1 while driving the Mazda Coach No.PE-1394 within the area and territorial jurisdiction of Sohrab Goth Police Station, if so, its effect?

2. Whether Defendants are liable jointly and severally to pay compensation to the Plaintiffs, if so, to what extent?

3. What should be the decree?"

5. The evidence was recorded on Commission and the Report was filed on 08.10.2018, according to which only Plaintiff led the evidence and Defendants did not participate, despite providing ample opportunity.

6. Learned counsel Mr. Muhammad Nazim Khokhar, representing the Plaintiffs has pointed out that earlier the said Vehicle was impounded but later on was released in lieu of furnishing alternate surety as reflected in the Order dated 31.03.2005. Learned counsel has further argued that since the entire version of Plaintiffs' witnesses has gone unrebutted, therefore, the relief as claimed be allowed.

7. The learned Assistant Advocate General Sindh has appeared in the matter on Court notice and he has filed today the relevant record of criminal proceeding arising out of the FIR No.264 of 2003 lodged in the matter. In the Judgment dated 08.03.2011 passed by the learned Ist Additional Sessions Judge, Malir, Karachi, the Accused-Moosa Khan, that is, present Defendant No.2 was acquitted while extending the benefit of doubt to him.

8. Arguments heard and record perused.

9. The crux of the claim of Plaintiffs is that their above named deceased son-Javed Masih was a young person of twenty five years, working as a Bus conductor in the said Vehicle, which was owned by Defendant No.1, when the said deceased had an accident, which later on proved to be fatal. Parents/Plaintiffs have claimed a sum of Rs.3.5 Million as

damages, besides Rs.5,00,000/- (*rupees five hundred thousand only*) each for the loss that the Plaintiffs suffered being parents; rupees one million is claimed as punitive and exemplary damages and rupees ten thousand for funeral expenses.

10. Since Defendant No.1 after filing of Written Statement did not lead the evidence, therefore, his pleadings lack evidential value except for the admission made in the said Written Statement regarding his ownership of the said Vehicle. Although Defendants did not lead the evidence, but still, the Claim of Plaintiffs has to be decided after the appraisal of the evidence.

11. Findings on the above Issues are as under:-

ISSUES NO.1	:	As under.
ISSUES NO.2	:	As under.
ISSUES NO.3	:	Suit decreed.

REASONS

ISSUE NO.1

12. Iqbal Masih son of Plaintiffs and brother of the deceased testified as sole witness on behalf of the Plaintiffs. He has produced the following documents_

- (i) FIR No.264 of 2003 relating to incident as Exhibit P/2, English translation whereof is also on record.
- (ii) Medico-Legal Officer (MLO) issued by Jinnah Post Graduate Medical Centre (JPMC) as Exhibit P/3.
- (iii) Memo of Site Inspection dated 24.09.2003 as Exhibit P/4.
- (iv) Memo of Arrest dated 24.06.2003 as Exhibit P/5.
- (v) Inquest Report dated 28.09.2003 as Exhibit P/6.

- (vi) Statement under Section 161 Cr.PC dated 25.09.2003 and 28.09.2003 as Exhibits P/7 and P/8.
- (vii) Photocopy of Medical Certificate dated 24.09.2003 regarding cause of death marked as X/1.

The other documents are also produced in the evidence but their description is not relevant for deciding this Issue.

13. The age of deceased is mentioned as 25 (twenty five) years in the plaint [at the time of his death] but no documentary evidence is produced in support thereof. The unchallenged official document of Jinnah Post Graduate Medical Centre (*JPMC*)-Exhibit P/3, the age of deceased is shown as 30 years, therefore, this will be accepted as the correct age and not 25 years [as mentioned in the plaint].

14. As already mentioned above, that a criminal case was also registered against the Defendant No.2 in respect of the above referred FIR, but the said Defendant No.2 [accused in the Sessions Case No.380 of 2003] was acquitted, as he was given benefit of doubt. By now it is a settled rule, particularly in the cases relating to fatal accidents, that fate/outcome of criminal proceeding would not adversely affect the determination of a civil liability, *inter alia*, because standard of proof in both proceedings; civil and criminal, are different; in this regard, the decision of learned Division Bench of this Court reported as **2009 MLD page 1093 [Province of Sindh and another versus Shams-Ul-Hassan and others]** is relevant.

15. Plaintiffs have claimed a sum of Rs.3.5 Million towards damages. It is stated and subsequently above witness deposed that deceased was a young person when he died during duty and in the family the life expectancy is around 80 years. Although this piece of evidence has also gone unchallenged, but, to further corroborate this fact, Plaintiff No.1-

Inayat Masih, who is present today in Court and his son, who led the evidence were called upon to produce their CNICs. Plaintiff No.1 has produced a document from National Database and Registration Authority (*NADRA*) that his CNIC is with NADRA for renewal. The above named witness (brother of the deceased) Iqbal Masih has produced photocopy of his CNIC according to which the year of his birth is 1963, that is, he is 58 (fifty eight) years old; whereas, photocopy of Plaintiff No.2, Mst. Sardaran Bibi shows her year of birth as 1948, that is, she is presently 73 (seventy three) years old. It is further stated that Plaintiff No.1 is above 80 (eighty) years of age, which Statement in view of ages of other family members, appears to be correct.

16. Taking into the account the above discussion, the evidence led by Plaintiff, particularly with regard to his specific Statement about life expectancy of the deceased, appears to be correct.

17. Since accident / incident is not disputed, therefore, in view of settled principle- '*res ipsa loquitur*' relating to such cases (of fatal accident), is applicable; gist of which is that where factum of accident is not disputed, the onus is on Defendants to prove that they did not cause the death of the deceased; in the present case, the above named Javed Masih.

18. The assertion of Plaintiffs' witness in his testimony, explaining the rash and negligent driving of Defendant No.2, *inter alia*, who on 24.09.2003, while plying the said Vehicle on the route from new Sabzi Mandi towards Karachi City, suddenly stopped and immediately accelerated the said Vehicle, due to which act the deceased fell off the said Vehicle, suffered gross injuries and he later expired, has not been challenged in the cross-examination. The Exhibit P/3, Medico Legal Report of Jinnah Post Graduate Medical Centre (*JPMC*) and Medical Certificate of Cause of

Death issued by the Hospital (produced in the evidence), mentions, *inter alia*, that deceased sustained head injuries when he was brought to the Hospital and was semi-conscious. These documents are the official records of the Hospital and carry the evidential value, which was never questioned in the cross-examination, therefore, cause of death of deceased as claimed has been proved.

19. Since Defendants did not lead the evidence, therefore, in view of the testimony of above named Plaintiffs' witness and the record of the above Criminal Case as produced by the learned AAG, it is a proven fact that the above named deceased died while doing duty at the said Vehicle due to the rash and negligent driving of Defendant No.2.

20. The deceased was in the employment of Defendant No.1, therefore, the latter (the said Defendant No.1) is vicariously liable to compensate the Plaintiffs. In this regard, a reported decision of the Hon'ble Supreme Court in *Karachi Transport Corporation Versus Muhammad Hanif (2009 SCMR page-1005)* is relevant.

21. Adverting to the other component of damages relating to loss of consortium; since the testimony has gone unchallenged, therefore, to the facts of present case, the rule laid down in the reported Judgment of *Mushtari v. Islamic Republic of Pakistan through Secretary, Ministry of Planning and Development, Islamabad and 2 others*] – 2006 M L D page-19, would be applicable. In various Judgments, including the above referred *Mushtari case*, it is held that the family of deceased is also entitled to damages towards 'loss of consortium', that is, deprivation of the benefits of a family relationship due to injuries or death caused by a tortfeasor. This category of claim is also granted to Plaintiffs, but only for an amount of Rs.500,000/- (*rupees five hundred thousand only*). However, there is no convincing evidence led in support of the claim for pecuniary and

exemplary damages, therefore, the amount of Rupees One Million is not admissible, whereas, the amount towards funeral being undisputed is also hereby granted. Consequently, **Issue No.1 is answered accordingly.**

ISSUES NO.2 AND 3.

22. In view of the above discussion, present *Lis* is decreed in the above terms, that is, to the extent of Rs.3,500,000/- (*rupees three million five hundred thousand only*), Rs.5,00,000/- (*rupees five hundred thousand only*) for loss of consortium and Rs.10,000/- (*rupees ten thousand only*) towards funeral expenses and Defendants jointly and severally are liable to pay the above amount of Rs.4,010,000/- (*rupees four million ten thousand only*) to Plaintiffs along with 10% mark up from the date of this Judgment till realization of the amount.

23. At this juncture, I may record my appreciation that both Plaintiffs' counsel and learned Assistant Advocate General Sindh have provided able assistant to this Court.

24. There is no order as to costs.

Karachi.
Dated: 27.09.2021.
M.Javaid.PA

JUDGE