

IN THE HIGH COURT OF SINDH AT KARACHI

PRESENT: MR. JUSTICE SALAHUDDIN PANHWAR

SUIT NO.1384/2014

Plaintiffs : WasiRaza Khan and two others,
through Mr. Masjood Ali Memon, advocate.

Defendants : Gul Khan and two others.
Nemo for defendants.

Date of hearing : 19.02.2016.

Date of announcement : 19.02.2016.

JUDGMENT

Succinctly, facts set out in the plaint are that plaintiffs filed instant suit for recovery of Rs.139,026,000/- under Fatal Accidents Act, 1855 pleading that plaintiff NO.3 is widow, plaintiffs No.1 and 2 are minor sons, and Zafar Khan and Nasreen are respectively father and mother of deceased Shamsher Khan aged 30 years (deceased) who died on 25.01.2013 on account of receiving fatal injuries in a traffic accident within the territorial jurisdiction of PS Darakhshan; that according to charge sheet No.47/2013, arose out of FIR No.33/2013, u/s 320/337-G/427 PPC, defendant No.1 was driving the vehicle bearing registration No.BC-6893 when fatal accident took place on the night of 25.01.2013 at crossing of Khayaban-e-Shujat and Khayaban-e-Tipu Sultan, DHA, Karachi, which caused death of deceased named above as well as of another person named in charge sheet and injured 17 other persons; that defendant No.2 is owner of the vehicle as per agreement produced in Cr. Misc. applications No.1184 and 8 of 2014 u/s 516-A Cr.P.C.

in which defendant No.2 attached sale agreement and claimed to be owner of the vehicle; that defendant No.3 stood surety for defendant No.1 in pre arrest bail application No.112/2013 by depositing title documents of her property; that death of deceased was caused by defendant No.1 while deceased was going in his Mazda No.JE-1354 with employees of Ambala restaurant, while crossing the intersection of Khayaban-e-Shujat and Khayaban-e-Tipu Sultan at DHA, Phase 8, Karachi at around 2.00 am the vehicle was hit by Toyota Land Cruiser Jeep bearing NO.BC-6893 which seriously injured the deceased who died on the spot whereas another person Sikandar Ali got critical injuries and died in hospital, leaving 17 others with critical injuries; that despite clear visibility defendant No.1 was traveling very fast and hit the rear right part of minibus of the deceased with full force without applying any breaks and the minibus spin and leaned over to the right side while defendant No.1 remained unhurt due to safety features of Land Cruiser however his vehicle was badly damages; defendant No.1 absconded from the scene; that defendant No.1 owing to willful misconduct, reckless driving, carelessness and gross composite negligence of defendant No.2 owner of subject vehicle had given his Land Cruiser to defendant No.1 despite having knowledge of his behavior is equally guilty of causing death of deceased; that death of deceased was caused due to negligence, wrongful act and default on part of defendant No.1 during the course of employment of defendant No.2 who is also vicariously liable to payment of compensation to plaintiffs, who destroyed a happy family life of deceased who was earning good livelihood and could have survived upto 70 years and his family has been deprived of present and expected pecuniary benefits to an extent of Rs.139,026,000/- as deceased was skilled driver deriving salary of

Rs.80,000/- per month inclusive other allowance/emoluments and getting increase of Rs.8,000/- every year; that sudden deprivation of paternal support like training, look after, proper nourishment, shelter and education etc. for children of deceased put them at the losses assessed to the tune of Rs.2,000,000/- each in addition to monetary loss, likewise deceased's widow claims a sum of Rs.500,000/- under the head 'consortium', parents of deceased claim aggregate sum of Rs.500,000/- as compensatory loss while plaintiff also claims a sum of Rs.20,000/- on account of funeral expenses; thus plaintiffs prayed to :-

- a. Pass a decree in the sum of Rs.139,026,000/- (Thirteen crores ninety lacs and twenty six thousand only) against the defendants jointly and severally to pay the said sum of damages/compensation to the plaintiff or any other amount this honourable Court may deem fit in the circumstances of the case.
- b. Grant profit/markup at the rate of 12% per annum on the amount claimed in clause (a) above from the date of the filing of the suit till the date of realization of the decretal amount which the plaintiff 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 relief's that this honourable Court may deem just and proper under the circumstances of the case be granted.

2. The defendants despite service did not cause their appearance hence were declared *exparte* vide order dated 26.01.2015.

3. It is a matter of record that the defendant(s), *despite service*, chose to remain absent meaning thereby that the defendant(s) *deliberately* avoided to avail the remedy of *defence*. Filing of written statement is meant to provide an opportunity to deny claims of plaintiffs and to bring his own claim which give rise to *framing of issues* (controversies between parties), if any, but where there is an admission of claim, it shall not require the Court

to adopt procedure of *trial* which is only meant to determination of controversies (issues). Since, availing of an opportunity of the defendant (written statement followed by trial) for defendant (s) in *ordinary* suits does not relieve the plaintiff (s) from proving their claim/allegation but situation in *fatal accident cases* would be different because the law is clear that the moment the defendant (*in fatal accident cases*) denies allegation of *negligence* the burden shifts upon him (defendant). Reference can be made to the case of *Anisur Rehman v. Govt. of Sindh* (1997 CLC 615) and *Mst. Sakina v. National Logistic Cell* (1995 MLD 633) wherein it was held that:

‘The defendants having given a different version of the accident were burdened with to discharge the same and to.....’

In another case of *Pakistan Steel Mills Corporation v. Malik Abdul Habib* (1993 SCMR 848), it was held that:

‘If defendant in the suit for damages took the plea that accident had occurred on account of negligence of deceased himself it was his duty to produce evidence to show that machine was in perfect order and there was no defect in the same and deceased died on account of his own negligence’

In the instant matter, happening of the unfortunate incident, costing life of deceased in road accident is not disputed. Since, the defendant (s) have not chosen to deny the claim *negligence* on part of the defendant No.1 hence failure thereof (*remaining absent despite service*) shall lead to no other *presumption* but the one that defendant(s) have nothing to shift the *onus probandi* to extent of happening of the accident as a result of negligence of the defendant No.1 (driver/employee of defendant No.2) hence claim to such an extent is taken as *proved* particularly when the material in shape of *FIR*,

charge sheet e.t.c establishing death of deceased in road accident are there as *undisputed*.

4. Now, there remains another question regarding *liability* of defendant Nos.2 and 3. There has been produced *documents* on record including the one which the defendant No.2 *himself* produced in Cr.M.A. No.1184 and 8 of 2014 whereby acknowledging the *ownership* of the vehicle. The defendant No.2 *at no material times* attempted to deny such status nor even has withdrawn the benefit of such claim i.e. *restoration of custody of vehicle* by the Court. Without diving into much debate and to make question of *vicarious liability* clear, Reference can be made to the case of *the Catholic Child Welfare society v Various Claimant (FC) the institute of the Brothers of the Christian Schools (2013 SCMR 787)* wherein it is held:

*'35. The relationship that gives rise to vicarious liability is in the vast majority of cases that of employer and employee under a contract of employment. **The employer will be vicarious liable when the employee commits a tort in the course of his employment.** There is no difficulty in identifying a number of policy reasons that usually make it fair, just and reasonable to impose vicarious liability on the employer when these criteria are satisfied:*

- (i). *the employer is more likely to have the means to compensate the victim than the employee and can be expected to have insured against that liability;*
- (ii). *The tort will have been committed as a result of activity being taken by the employee on behalf of the employer;*
- (iii). *The employee's activity is likely to be part of the business activity of the employer;*
- (iv). *The employer, by employing the employee to carry on the activity will have created the risk of the tort committed by the employee;*
- (v). *The employee will, to a greater or lesser degree, have been under the control of employer.'*

In the instant matter there can be no denial to the fact or *legal* presumption that:

- i) defendant No.2 has means to compensate and not the defendant No.1 (employee);
- ii) the defendant No.1 was driving the vehicle of defendant No.2 at time of accident being employee;
- iii) the act of defendant No.1 plying / running the vehicle was part of employment activity of the defendant No.2;
- iv) it was the defendant No.2 who by allowing the defendant No.1 to ply the vehicle on road has knowledge of creation of any *tort* by its (defendant No.2's) employee i.e defendant No.1;
- v) the defendant No.1 (being employee) was under direct control of the defendant No.2.

Accordingly, it is safe to say that all above conditions stand established hence it is not difficult to conclude that the defendant Nos.1 and 2 are jointly and severally liable for the *tort* in question. However, the act of standing surety for release of vehicle on *superdari basis* shall not put the defendant No.3 under any liability for an act of defendant No.2 as she is neither *employer* nor defendant No.1, *as driver*, was not under control of defendant No.3, hence claim of the plaintiff regarding vicarious liability of the defendant No.3 cannot be stamped to be sustainable.

5. Now, the last and crucial question is to be addressed which has nothing to do with absence of the defendant but has to be proved by the plaintiffs themselves i.e '*compensation amount*'.

6. To substantiate the claimed compensation, the plaintiffs have not produced any material which could legally justify the award of claimed compensation of Rs.139,026,000/- (Thirteen crores ninety lacs and twenty six thousand only). The record *however* shows that the plaintiffs specifically

pleaded that deceased was a healthy person; was earning sufficient amount for his family by drawing handsome salary. The plaintiffs *however* produced nothing on record to substantiate the average life in the family so also *monthly income* and *chances of increase* but the defendants have also brought nothing on record to prove otherwise. In such eventuality it would be appropriate to take guidance from Honourable Apex Court hence I would like to refer the operative part of the judgment of honourable Supreme Court, reported as 2011 SCMR 1836 which reads as:

“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 five to seventy years; to support the above age limit there is preponderance of judicial view in our jurisdiction, that it should be seventy years; some of the judgments in this behalf are Hassan Jehan v. Islamic Republic of Pakistan “

The deceased died at the age of 30 years hence has surmounted his teenage and has joined the practical life. Therefore, following the above principle, I would also take the age of the deceased for compensation/damage as ‘**seventy years**’. It is pleaded that the deceased was working as a *driver* but against handsome salary (as claimed) but in absence of any proof thereof I would take it as Rs.25,000 per month because *average* monthly income of the

deceased as driver could not be believed to be less than this in a city like Karachi. Therefore, the compensation / damage is awarded as:

Loss of pecuniary benefits to plaintiffs/LRs of deceased (40 x 12 x 25,000/-)	Rs.12,000,000/-
ADD 10% increase chances on the aggregate income of over all years:	1,200,000/-
Thus TOTAL amount comes to :	13,200,000/-
LESS: Personal expenses at 1/6 th i.e :	2,200,000/-
Net loss of pecuniary benefits:	11,000,000/-

In result of the discussions, the suit of the plaintiffs is decreed in above terms. Let such decree be drawn. However, parties are left to bear their own costs.

Imran/PA

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