IN THE HIGH COURT OF SINDH AT KARACHI

PRESENT: MR. JUSTICE SALAHUDDIN PANHWAR

SUIT NO.883/2009

Plaintiffs	:	Muhammad Razi and another, through M/s. Farrukh Usman and Aamir Maqsood, advocates.
Defendants	:	Karachi Electric Supply Corporation and another, through Mr. Asim Iqbal, advocate.

Date of hearing	:	13.01.2017.
Date of announcement	:	08.02.2017.

JUDGMENT

Plaintiffs being father and mother (respectively) of the deceased Muhammad Anas (hereinafter referred to as 'deceased') aged 20 years who died in traffic accident on 23.05.2009 when defendant No.2 during the course of employment of defendant No.1 while driving truck No.JT-6984 belonging to defendant No.1, in a rash, negligent and careless manner on his way from Liaquatabad towards Nazimabad via Ibne-Sina Road, Karachi, reached near PSO petrol pump, Gujar Nala, Nazimabad No.2 at about 1930 hours wrongfully dashed the motorcycle bearing No.KCF-6651 ridden by Muhammad Anas, in a careless and reckless attempt to overtake other vehicles bumped into the said motorcycle which was going in same direction ahead of the said offending truck. Resultantly deceased fell down and

received severe fatal injuries and appeared to have died instantaneously, pedestrians and road users rushed the spot of accident, one taxi driver evacuated the deceased to Abbasi Shaheed Hospital, where doctors confirmed his death, dead body was later on handed over to plaintiff No.1 after compliance and observance of all legal formalities, on statement of plaintiff No.1 recorded by police officials of Nazimabad PS, defendant No.2 was booked under section 320 Cr.P.C. for offence of killing Muhammad Anas on account of his rash and negligent driving, by FIR No.176/2009; incident flashed in daily newspapers. It is pleaded that since death of deceased was caused on account of negligence, wrongful act and default on part of defendant No.2 during the course of employment of defendant No.1 as such the latter is vicariously liable for payment of compensation to plaintiffs; defendant No.1 is directly liable for employing such incompetent, inexperienced and unskilled driver/defendant No.2 and in handing over such a heavy vehicle for plying on road. That deceased was aged only 20 years, having robust health and used to care much for plaintiffs and was expected to survive up-to the age of 70 years in view of life span in his family pedigree, advancement in medical facilities and good climate of the area from where he belonged; that viewing the ages of plaintiffs and deceased and present and expected earning capacity of deceased, plaintiffs have been deprived of their caretaker/supporter and present and expected pecuniary benefits to the extent of Rs.1,25,00,000/- as deceased was skilled computer

embroidery designer and used to supply such designs to different factory owners, earning Rs.15,000/- per month while he would have managed to earn more than double in view of his further excellence in work and an increment at the rate of 20% per annum can be safely assumed; plaintiffs have been deprived of their caretaker/supporter and deserted for all purposes hence claimed Rs.10,00,000/- each in addition to aforesaid pecuniary loss as well Rs.20,000/- on account of funeral expenses. Prayer was made for:-

a. A decree in the sum of Rs.1, 25, 00,000/- against the defendants to pay the said sum of damages/compensation to the plaintiffs or any other amount this honourable Court may deem fit in circumstance 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 realization 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.

2. In their written statement defendants No.1 and 2 objected the maintainability of the suit on account of misjoinder/non-joinder of necessary parties, having no cause of action, as well for the reason that deceased was riding motorcycle without license, with fast speed, rashly, carelessly and negligently and was responsible for the incident

as such having no cause of action. It was denied that plaintiffs are husband and wife, it was categorically stated that defendant No.2 driver did not dash the motorcyclist, in fact after completion of job of replacement of faulty transformer at F.B. Area on way back towards the office the truck was stopped near Gujjar Nala, Nazimabad No.2 which is a one way road, in connection with an incident involving a motorcyclist of which the truck driver had no notice, defendant No.2 who is a senior driver was neither driving fast nor in rash, careless or wickless manner but with utmost care and at normal speed, nor he tried to overtake any other vehicle as alleged; however defendants stated that defendant No.2 and the truck was taken to police station by police and defendant No.2 was arrested. It was denied that any of the defendants are liable to pay any compensation as such claim is false, malafide, malicious and unlawful; it was pleaded that deceased did not have any such skill or expertise as claimed, he did not work, nor earn anything nor contribute to the family expenses in the past hence was not expected to contribute anything in future or render any support whatsoever, hence plaintiffs have not suffered any present or expected loss, thus plaintiffs are not entitled for any relief and the suit is liable to be dismissed with cost.

3. Proposed issues filed by the parties were settled as Court issues, as follows:-

1) Whether the plaintiffs are husband and wife and parents of the deceased Muhammad Anas?

2) Whether the suit as framed is maintainable and the plaintiffs are the only legal representatives of the deceased, Muhammad Anas? What is the effect?

3) Whether the death of the deceased namely Muhammad Anas aged 20 years was caused on account of negligence of the defendant No.2 during the course of employment of defendant No.1 on 23rd May 2009, if so, its effect?

4) Whether on 23rd May 2009 the defendant No.2 driving Truck No.JT-6984 with fast speed in a rash, negligent and careless manner on his way from Liaquatabad towards Nazimabad via Ibne Sina Road and while attempting to overtake other vehicles dashed the deceased Muhammad Anas driving motorcycle No.KSF-6651?

5) Whether the deceased Muhammad Anas died due to the dash caused by the defendant No.2's rash, negligent and careless driving?

6) Whether the defendants are liable jointly and severally to pay compensation to the plaintiff and another legal heir, if so, to what extent?

7) Whether the defendants are responsible for the death of deceased Muhammad Anas?

8) Whether defendant No.2 has been an inexperienced, rash, negligent and careless driver? What is the effect?

9) Whether deceased, Muhammad Anas did any work? Whether he earned anything? Whether he contributed any amount of money towards the family expenses? If so, how much?

10) Who is responsible for the death of deceased Muhammad Anas? To what extent?

11) Whether the defendants owe any liability to plaintiffs?

12) Costs of the suit?

13) What should the decree be?

4. Commissioner was appointed to record evidence. Plaintiff Muhammad Razi filed his affidavit-in-evidence and produced certain documents at Ex.P/1 to P/10 so also submitted affidavit in evidence of PW2 Ashique Ali Hydri, SI (investigating officer of case crime No.176/2009 of Ps Nazmiabad for offence u/s 320/427 PPC) who produced police file at Ex.PW2/1. On the other hand, one Syed Sagheer Hussain, Deputy Manager, SSMR-IV and attorney of defendant's company filed his affidavit-in-evidence who produced no document except authority letter. The evidence of respective parties were recorded and commission was returned duly completed.

5. Learned counsel for plaintiff *inter alia* contends that plaintiffs successfully discharged the *onus of probandi* according to issues; death of the deceased in result of accident is undisputed; it is settled proposition of law that in cases of law of torts when accident is not disputed burden lies upon defendants who have failed to discharge the same as defendants took plea of not causing accident but produced nothing to substantiate the same.

6. Conversely, learned counsel for defendants argued that though accident is not disputed but it was not caused by defendants' negligence or *truck* even hence the suit of the plaintiffs against defendants is not sustainable. The plaintiffs even failed to prove their legal characters. He, *concluded,* in absence thereof suit merits dismissal.

7. Heard learned counsel for the parties, perused the record.

FINDINGS.

Issue No.1	In affirmative.
Issue No.2	In affirmative.
Issue No.3	In affirmative
Issue No.4	In affirmative
Issue No.5	In affirmative
Issue No.6	In affirmative
Issue No.7	In affirmative
Issue No.8	In affirmative
Issue No.9	In affirmative
Issue No.10	In affirmative.
Issue No.11	As discussed.
Issue No.12	As discussed.
Issue No.13	Suit is decreed; defendants are liable to pay Rs.**82,50,000/-** to the legal heirs of deceased Muhammad Anas.

ISSUE NO.1 & 2

1. Whether the plaintiffs are husband and wife and parents of the deceased Muhammad Anas?

2. Whether the suit as framed is maintainable and the plaintiffs are the only legal representatives of the deceased, Muhammad Anas? What is the effect?

8. Before starting discussion onto the issue, I, without any hesitation, would say that normally if two *adult* & *sui-juris* persons claim to be lawfully and legally married with each other and their such claim is found supported by their *way* of living then such *claim* should not be doubted or disputed by a *stranger* but the *State* may inquire, if circumstances so justify. I may add here that a *document* (Nikahnama) is not a conclusive proof of existence of such relationship if *either* of two (spouses) denies existence thereof *however* absence of such document (Nikahnama) *alone* would not be sufficient to deny or dispute such claim of *two* because **'marriage'** is a civil contract which binds *two* (husband and wife) for certain *rights* and *obligations* which they *both* alone have to perform towards each other *regularity* in following the prescribed procedure may expose parties to some *penal* consequences but shall not prejudice the validity of the marriage if both continue to have entered into a *lawful* contract (marriage). Such *presumption* would be in line of Article 129 of the Qanun-e-Shahadat Order, 1984 *too* which reads as:

> "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.

Similarly, a *stranger* is not legally entitled to challenge / question the *paternity* of a child. This is so, because of which the Article 128 of the Qanun-e-Shahadat Order, 1984 has attached *legitimacy* to such claim and leaves a room to question it *only* by:

> *a) the husband has refused, or refuses to own the child; or*

The question was *thoroughly* examined and dealt by honourable Supreme Court in the case of Ghazala Tehsin Zohra v. Ghulam Dastagir Khan (PLD 2015 SC 327). In this case the honourable Apex Court *categorically* laid down a principle that where circumstances *otherwise* prove legitimacy of such *status* then the Court will not allow evidence *even* for disproving such status. The operative part reads as:

> *"11. …… Once the relevant facts as to commencement and dissolution of marriage and the date of birth of a child within the period envisioned in Article 128 are proved, and the date of birth is within the period specified in Article 128(1),* **then the Court cannot allow evidence to be given for disproving the legitimacy of a child born within the period aforesaid***…"*
>
> *(emphasis supplied)*

In the said case, the competence to challenge such '**status'** and **'presumption'** attached thereto were also examined and it was held as:

> *"12. .. The wisdom of this rule of Muslim Personal Law cannot be gainsaid, considering in particular the patriarchal and at times misogynistic societal proclivities where women frequently donot receive the benefit of laws and on the contrary face humiliation and degrading treatment.* **It is for the honour and dignity of women and innocent children as also the value placed on the institution of the family, that**

> **women and blameless children have been granted legal protection and a defence against scurrilous stigmatization."**
>
> "13. …*There are many legal provisions in the statute book and rules of equity or public policy in our jurisprudence where the interests of individuals are subordinated to the larger public interests.* **In our opinion the law does not give a free license to individuals and particularly unscrupulous fathers, to make unlawful assertions and thus to cause harm to children as well as their mothers."**
>
> *(emphasis supplied)*

Thus, I can *safely* conclude that *normally* the individuals are not permitted to dispute a claim of *'lawful marriage'* by two competent persons and legitimacy of a child unless they *prima facie* show existence of reasons prejudicing their rights under such *claims*. However, the *burden* shall always be *squarely* upon them to prove who *denies* or *disputes* it.

9. Now, I would revert to examine the available material, produced by either side, to prove their *respective* claims. The necessity to frame these issues was *undeniably* result of denial of the defendants to claim of the plaintiffs that they are *parents* of the deceased but record shows that the defendants produced nothing on record to substantiate such claim except mere denial which I, *have no hesitation,* to say that is not sufficient to prove a claim. The defendants did not attempt to challenge the *legality* of the documents produced by the plaintiffs showing their status as **'husband and wife'** and that of ***'parents'*** of deceased. In absence whereof, it legally cannot be presumed that the

defendants discharged their burden to prove their claims. Though, the *failure* of the defendants is sufficient to answer these issues as *'affirmative'* however, as an abandon caution, on perusal of the evidence of the plaintiffs I found that:

> *i) plaintiffs specifically claimed in their pleading (Plaint) and even in affidavit-in-evidence that both (plaintiff Nos.1 & 2) are husband and wife and parents of the deceased;*
>
> *ii) produced their CNICs, showing their relationship as husband and wife, and have also produced the birth certificate of the deceased Anus wherein the names of parents of child are mentioned as* **'Muhammad Razi and Naseem Bano'** *i.e present plaintiffs;*

The defendants while enjoying opportunity of cross-examining the plaintiff Muhammad Razi did not attempt to put a single question towards their such claims or *legality* of said documents which *undeniably* produced to prove the status of plaintiffs as **'parents'** of deceased even not a single suggestion in that regard was made. Thus, such claims of plaintiffs went unchallenged hence the answer to these questions could be nothing but in *'affirmation'* and answered so, accordingly.

ISSUE NOS.3 TO 5.

> Whether the death of the deceased namely Muhammad Anas aged 20 years was caused on account of negligence of the defendant No.2 during the course of employment of defendant No.1 on 23rd May 2009, if so, its effect?
>
> Whether on 23rd May 2009 the defendant No.2 driving Truck No.JT-6984 with fast speed in a rash, negligent and careless manner on his way from Liaquatabad towards Nazimabad via Ibne Sina Road and while

attempting to overtake other vehicles dashed the deceased Muhammad Anas driving motorcycle No.KSF-6651?

Whether the deceased Muhammad Anas died due to the dash caused by the defendant No.2's rash, negligent and careless driving?

10. These all *issues* prima facie appear to be strongly interlinked with each other because in all these a common question of happening of accident and negligence, resulting into death of deceased, is involved.

11. Since, the defendants deny happening of incident from truck in question, hence I would examine such question *first.* Needless to add while opening discussion that in *fatal accident* matters the *onus of probandi* stands shifted upon the defendants, in *either* situation where defendants deny *negligence* or take specific plea of *not causing accident.* 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 Muhammad Anas in road accident is not disputed. The plaintiffs claim the accident a result of negligent and rash driving of the defendant No.2 while the defendants have come forward with a specific plea that it *(accident)* did happen but by some other vehicle, as is evident from pleading (written statement) of defendant nos.1 and 2 which was also included in affidavit-in-evidence as:

> *"4. I say that on 23.5.2009 a gang was dispatched to replace a faulty transformer at F.B. Area (Azizabad) on the truck in question. After completion of the job on way back towards the office the truck was stopped near Gujjar Nala Nazimabad No.2 which is a one way road in connection with an incident involving a motorcyclist of which the truck driver had no notice. The driver, defendant no.2 did not dash the motor cyclist. The defendant no.2 is a senior driver of K.E.S.C and he was not driving the truck at fast speed and was not driving either rashly, carelessly and recklessly but with utmost care and at normal speed and at no time he tried to overtook any other vehicle. The defendant no.2 did not see the deceased and motorcycle on the ground. Consequently the defendant no.2 has not been aware of the deceased receiving fatal injuries and dying instantaneously. The gathering of the people at the spot is denied for no knowledge. Similarly the taking alleged dead body to Abbassi Hospital and being pronounced dead are denied for want of knowledge. The defendants also have no knowledge of the dead body being handed over to plaintiff No.1. The defendant no.2 and the truck was taken to police station by a Police mobile and the defendant No.2 was arrested."*

From the above, it also becomes quite obvious that defendant Nos.1 & 2 though disputed happening of incident by defendant no.2 but admitted that:-

i) the defendant no.2 is driver of truck in question;

ii) the defendant no.2 was driving the truck at relevant time

iii) the defendant no.2 and truck in question were available at place of incident;

iv) the police not only arrested defendant no.2 but had taken him (defendant no.2) and truck to police station;

Since, as per settled principle of law in such like situation, the *onus of probandi* stands shifted upon defendants to prove all the above *pleaded* facts which became rather *grave* if it is read keeping in view the Article 119 and 122 of the Qanun-e-Shahadat Order, 1984 which reads as :-

> ***"119. Burden of proof as to particular fact.*** The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

The illustration (b), provided to explain this article makes things brighter by saying as:

> (b) B wishes the Court to believe that, at the time in question, he was elsewhere. He must prove it.

The Article 122 of the Order, 1984 says as:

> **"122. Burden of proving fact especially within knowledge.** When any fact is especially within the knowledge of any person, the burden to proving that fact is upon him.
>
> Illustrations
>
> (a) …

> (b) A is charged with traveling on a railway without a ticket. **The burden of proving that he had a ticket is on him."**

The record *however* shows that the defendants never attempted to prove any of the above specifically *pleaded* facts. The defendants did not examine anybody except DW1 Syed Sagheer Hussain. A *direct* reference to an *admission,* made by this witness during his examination *even* can result in excluding the evidence of this witness which is:

> "I was not present at the time of incident of place of incident. After incident, I inspected place of incident."

From above, it should not be confusing any more that the said witness never claimed to be an eye-witness of the incident hence *legally* his words in respect of said facts cannot be believed nor considered within meaning of Article 71 of the Qanun-e-Shahadat Order, 1984 which directs that **'oral evidence must, in all cases whatever be direct'** and insists as:

> ***71. Oral evidence must be direct.*** Oral evidence must, in all cases whatever be direct, that is to say---
>
> If it refers to a fact which could be **seen**, it must be the evidence of a witness **who says he saw it**;
>
> If it refers to a fact which could be **heard**, it must be the evidence of a witness **who says he heard it**;
>
> If it refers to a fact which could be perceived by another sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner;

The said witness in his examination has also claimed as:

> "I gathered information from the **house and area of deceased** **through our staff visited for information and condolence**."

From above, it *prima facie* appears that it was not the said DW1 but other staff who had collected the information but the defendants did not attempt to examine any of such *persons* and even not examined the defendant No.2 who, per examined DW1, was alone while driving the truck at material time. The said witness stated in his examination-in-chief as:

> "At the time of incident driver was alone in the vehicle. Driver/defendant No.2 was arrested by the police."

Such failure on part of the defendants is sufficient to answer these issues, however, on demands of equity and good conscious I would also examine what the plaintiffs have produced in order to establish *the incident.*

12. It is material to mention here that the plaintiff Muhammad Razi never claimed himself to be an eye-witness of the incident as shall stand evident from admission of the plaintiff Muhammad Razi made during his cross-examination as:

> *"It is correct to suggest that at the time of accident I was present at my business place. It is correct to suggest that I am not eye*

> *witness of accident. … It is correct to suggest that I came to know about facts of the incident through other people.'*

Therefore, the plaintiff Muhammad Razi not only examined PW2 (investigating Officer of the case crime) but also produced the police file of case Crime No.176 of 2009; photographs of dashed motorcycle and truck in question which *prima facie* make a chain of *links* i.e:

i) *happening of accident at Gujjar Nala, Nazimabad No.2;*

ii) *the arrest of the driver (defendant no.2) from said place at material time as an* **accused** *for an offence u/s 320 PPC which* undeniably *is a charge of driving rashly and negligently thereby causing death;*

iii) *securing of truck by police and detaining it as case property of said case crime;*

iv) *release of the said truck by the defendants on* superdari basis;

All above facts (links) are in a *proper* order. I have no hesitation in saying that such *unbroken* chain of circumstances (links) can *competently* be accepted particularly in view of Article 129 of Order, 1984 which permits such presumption to hold the ground if stands well to test of logic, reasons and acceptable to *normal* human behaviour and conduct.

Such specific claims and assertions of the plaintiff *even* with reference to documents were required to be denied or *least* disputed but a reference to *cross-examination* would show that none of the above facts were attempted to be denied or disputed rather stood admitted by the DW1 in his examination-in-chief as:

> "It is correct to suggest that vehicle belonging KESC was impounded by police in FIR No.176/2009 at PS Nazimabad, Karachi."

The above leaves nothing ambiguous that the defendants did not bother to deny the claims and specific assertions of the plaintiff which bring into play the settled principle that *'what is not denied is to be taken as admitted'*.

Further, it is also material to add here that **'Motor Vehicle Accident Report Form'** produced by the plaintiff Muhammad Razi, says as:

'CONDITION OF VEHICLE'

JT-6984 Mechanical condition of the vehicle found fit.

Damage. **Front R/side fender dented.**'

The said report is also sufficient to it was the truck in question which *caused* the accident particularly when such report was never challenged by the defendants. Further there appears no reasonable justification that the police or *gathered* people left the real vehicle and booked the defendant No.2 and truck in question in the cause of accident. Such plea also does not stand to reasons or human behaviour hence cannot be accepted at all. Thus, I find such plea of the defendants without any substance.

13. Now, while reverting to second part relating to *negligence,* I would say that it is also a matter of record that defendants did not

put a single question regarding the FIR *(narration of accident)*, Medical Certificate of *Cause of Death,* death certificate and news-clipping whereby incident was specifically claimed as a result of *negligent & rash* driving by defendant no.2. In existence of such *undisputed* documents and facts, mere denial of the defendants was never sufficient particularly when the defendants brought nothing on record nor even disputed such claims of plaintiff while enjoying the opportunity of *cross-examination*.

There can be no denial to the legal position that every single person, using or plying a vehicle on road, must exercise all senses to avoid any *unfortunate* incident however, care is proportionate to size of vehicle. A reference in this regard can well be made to the case of *Pakistan Steel Mills Corporation Ltd. Karachi & ors V Ehteshamuddin Qureshi (*2005 SCMR 1392) wherein it is held that:

> "The general rule is that driver of heavy vehicle on busy roads must take **extra care** and must not act in a manner which may be dangerous to the life of others. **The slightest carelessness of a driver of a heavy vehicle may badly disturb the traffic on the road and bring the serious consequence of a fatal accident**. The high speed or fast driving is not only rash and negligent driving rather carelessness even at low speed may also constitute an act of negligence to hold the driver responsible for the damages."
> *(Emphasis supplied)*

Further, the defendants have admitted the fact:-

i) Truck in question was belonging to them;

ii) Defendant No.2 was driver of the truck;

iii) accident, resulting into death of Muhammad Anas;

The deliberate failure or omission to produce any evidence and *specific* witnesses and documents shall result in drawing adverse inference against the defendants particularly when the DW1 was asked in cross-examination as:

> "Question: Do you have fitness certificate of vehicle?
>
> Answer: Vehicle fitness certificate pertains to transport department.
>
> "It is incorrect to suggest that documents pertaining to vehicle, certificate, license of driver, information report, fitness certificate are intentionally not produced in Court as the same are against defendant No.1."

The defendants were required to produce said documents to establish their claims but did not produce the same even when asked. Such failure was sufficient to draw an adverse inference against the defendants that had these documents been produced the same would not have favoured the defendants' claim. The defendants while cross-examining the PW2 insisted on non-examination of eye-witness of the incident during trial of criminal charge. For, this it would be sufficient to reproduce operative part of the case of judgment in Suit No.1505/2000 (Mst. Safia Begum vs. DMC and others), wherein it was concluded as:

> "An acquittal from *criminal charge* shall not be of any help in a civil matter because the parameters of both are

> entirely different and even consequences thereof are not similar to each other. Criminal Administration of justice revolves round *'benefit of doubt'* while Civil Administration of justice revolves round the determination of *rights & liabilities.* In *former* the Courts keep a principle in view *'better to acquit hundred guilty but not convict an* innocent' , however, in *later* it is only upon *discharge of* **onus probandi. "**

Accordingly, in result of what has been discussed above, I answer these issues as **'affirmative'**

ISSUE NO.6, 7 & 10.

> "Whether the defendants are liable jointly and severally to pay compensation to the plaintiff and another legal heir, if so, to what extent?
>
> "Whether the defendants are responsible for the death of deceased Muhammad Anas?
>
> "Who is responsible for the death of deceased Muhammad Anas? To what extent?

14. The burden to prove this issue was upon the plaintiffs. Firstly, the plaintiffs were to prove the relationship between the defendant Nos.1 and 2 for which the plaintiffs had claimed in pleading (plaint) as:

> *"2. That the defendant No.1 is the registered owner of the* **Truck bearing No.JT-6984** *(hereinafter referred to as "the said offending truck") as per police record. The defendant No.2 was the servant / employee / driver of the defendant No.1…."*

Such claim of the plaintiff since was not disputed by the defendants but was admitted as is evident from para-2 of written statement which reads as:

> *"2. That regarding para 2 it is stated that* **it is not denied that the truck belongs to defendant No.1 and the defendant No.2 is the permanent employee of the defendant No.1….**

After such admission what remains to be examined is question of vicarious liability of defendants. It is the defendant No.1 who is ultimate beneficiary of its vehicles. The defendant No.1, being the controlling and beneficiary, cannot claim any exception of its own negligence even coming on surface through its servant/driver because the driver/employee would be deemed to be carrying/plying the vehicle *in question* under direction and *implied* control of its employer. Such fact even stands admitted by the defendants *themselves.* A direct reference to para-3 of the written statement, being advantageous, is made hereunder:

> *"3. That the contents para 3 are denied for being incorrect, ambiguous and misconceived.* On 23.5.2009 a gang was dispatched to replace a faulty transformer at F.B. Area (Azizabad) **on the truck in question. On completion of the job….**

From above, it becomes quite clear that at material time the defendant No.2 (driver) was sent to perform a task, assigned by the defendant No.1 *himself* therefore, at relevant time the defendant No.2 was acting under direct control of the defendant No.1. 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.1 has have means to compensate and not the defendant No.2 (employee);

ii) the defendant No.2 was driving the truck of defendant No.1 at time of accident being employee;

iii) the act of defendant No.2 plying / running truck was part of business activity of the defendant No.1;

iv) it was the defendant No.1 who by allowing the defendant No.2 to ply the truck on road has knowledge of creation of any *tort* by its (defendant No.1's) employee i.e defendant No.2;

v) the defendant No.2 (being employee) was under direct control of the defendant No.1.

Accordingly, it is safe to say that all above conditions stand established hence it is not difficult to conclude that the defendants are jointly and severally liable for the *tort* in question. Accordingly, these issues are answered as **'affirmative'**.

ISSUE NO.8

> 'Whether defendant No.2 has been an inexperienced, rash, negligent and careless driver? What is the effect?"

15. Since, it was claim of the defendants that the defendant No.2 was a skilled and experienced driver hence the burden to prove this issue was upon the defendants. I *however* would add that past record of a *driver* would not be of much significance if at relevant time he (driver) was found to be negligent because in such like cases the *past* of the driver is not material but a *driver* of a heavy vehicle is always required to be careful while driving the heavy vehicle because a slightest negligence on road may result in costing one of irreparable injury. Be as it may, the defendants were required to have produced the service record of the defendant no.2 as *driver,* driving license and experience certificate but defendants produced nothing on record. A reference to evidence of the DW1 would show that how the defendants attempted to discharge their burden. The relevant portion reads as:

> **"K-electric has no driving license of defendant No.2.** Vol. says that all drivers of K-electric have been retired by virtue of voluntarily retirement scheme somewhere three years ago. **K-electric used to maintain job dispatch details containing the detail of job.**"

> "Hiring and firing is not in my domain a such I cannot say whether at the time of hiring experience certificate/driving license is required or not. I do not know whether during employment of defendant No.2, K-electric has asked the defendant No.2 to submit **renewed driving license."**

From above, it becomes quite clear that the defendants though claimed to have given the defendant no.2 a *heavy truck* to ply on road but had no record to show that defendant no.1 took reasonable care before allowing defendant no.2 to have *wheels* of such heavy truck. In absence of such record, there can be no answer to this issue but an **'affirmation'.**

ISSUE NO.11

Whether the defendants owe any liability to plaintiffs?

16. The plaintiffs had pleaded that deceased was aged 20 years; was a very healthy and was a skilled computer Embroidery Designer who used to supply such design to different factory owners hence, per claim of the plaintiffs, deceased was earning Rs.15,000/- per month. The plaintiffs also produced nothing on record to substantiate the average life in the family but since 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 20 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 a skilled computer Embroidery Designer and was earning Rs.15000/- per month i.e Rs.500- per day, which being matching with quantum of minimum wages (Workers Ordinance, 1969), can be accepted. The minimum wages reads as:-

Rs.8,000 per month (w.e.f. 1st July 2012 till 30th June, 2013)
Rs.10,000 per month (w.e.f. 1st July 2013 till 30th June, 2014)
Rs.12,000 per month (w.e.f. 1st July 2014 till 30th June, 2015)
Rs.13,000 per month (w.e.f. 1st July 2015)

Hence, *average* monthly income of the deceased who was having his independent business could not be believed to be less than Rs.15,000/- in a city like Karachi. Therefore, the compensation / damage is awarded as:

Loss of pecuniary benefits to plaintiffs/LRs of deceased

50 x 12 x 15,000/- = Rs.90,00,000/-

ADD

10% increase chances on the aggregate income of over all years**:** Rs.900,000/-

Thus TOTAL amount comes to : Rs.99,00,000/-

LESS:

Personal expenses at 1/6th i.e : Rs.16,50,000/-

Net loss of pecuniary benefits: Rs.82,50,000/-

Accordingly, it is safe to say that all above conditions stand established hence it is not difficult to conclude that the defendants are jointly and severally liable for the *tort* in question. Accordingly, the defendants are found liable to pay such amount to the plaintiffs.

ISSUE NO.12 & 13.

17. In result of the discussion *made* on issue Nos.1 to 11, the suit of the plaintiffs is decreed in above terms. Let such decree be drawn. However, parties are left to bear their own costs.

J U D G E

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