

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No. 421 of 1991

[Rahim Ali Palari and 2 others v. Government of Sindh and 2 others]

Date of hearing : 14.03.2019.
Date of Decision : 14.03.2019.
Plaintiffs : Rahim Ali Palari and 3 others, through M/s. Farukh Usman and Aamir Maqsood, Advocates.
Defendants : Government of Sindh and 2 others, through Ms. Leela @ Kalapna Devi, Assistant Advocate General Sindh.

Case law relied upon by Plaintiffs' Counsel

1. 2006 S C M R page-207
[*Punjab Road Transport Corporation v. Zahid Afzal and others*]
2. 2011 S C M R page-1836
[*Islamic Republic Of Pakistan through Secretary, Ministry of Railways and others v. Abdul Wahid and others---Respondents*]
3. P L D 2017 Sindh page-634
[*Muhammad Razi and another v. Karachi Electric Supply Corporation through Managing Director and another*]
4. P L D 2018 Sindh page-360
[*Muhammad Sarwar v. Government of Sindh through Secretary and others*]
5. 2015 M L D page-1401
[*Islamic Republic of Pakistan through Secretary Ministry of Defence and others v. Numair Ahmed and 2 others*]
6. 2006 M L D page-19
[*Mushtari v. Islamic Republic of Pakistan through Secretary, Ministry of Planning and Development, Islamabad and 2 others*]
7. 2009 M L D page-1443
[*Mir Hassan v. Master Hammad through his next friend and another*]
8. 1984 C L C page-2830
[*Muhammad Younus Khan 3 others v. Karachi Road Transport Corporation and another*]

Case law relied upon by Defendant's Counsel

- Law under discussion:**
1. The Fatal Accident Act, 1855.
 2. The Motor Vehicle Ordinance, 1965.
 3. The Sindh Minimum Wages Act, 2015.
 4. Civil Procedure Code, 1908 (“CPC”)
 5. Qanun-e-Shahadat Order, 1984 (Evidence Act, 1872); **Evidence Law.**

JUDGMENT

Muhammad Faisal Kamal Alam, J: - This action at law is filed by the Plaintiffs under Fatal Accidents Act, 1855, against the Defendants with the following prayer_

- a) *A decree in the sum of Rs.50,00,000/- against the defendants who are liable jointly and severally to pay the said sum to the Plaintiffs on account of Damages/Compensation.*
- b) *Interest at the rate of 15% per annum on the amount claimed in clause (a) above from the date of the filing of the suit till realization of the decretal amount be awarded.*
- c) *Cost of the suit may be awarded to the Plaintiff.*
- d) *Any other relief or reliefs that this Honourable Court may deem just and proper under the circumstances of the case be granted.*

2. The relevant facts as averred in the plaint, giving rise for filing of the present suit are that on 25.12.1990 at about 1230 hours, Defendant No.3, who was at the relevant time in employment of Defendant No.2, while driving the Bus No.965-232 (owned by Defendant No.2) on Super Highway hit the Pickup (registration No.LS-9970) near Bridge Poultry Farm, resultantly, Muhammad Anwer Palari, who was accompanied by the driver Tanveer Ali received serious injuries and ultimately Muhammad Anwer Palari succumbed to the fatal injuries and died. Defendant No.3 / driver of the above bus was arrested and a criminal case was registered against him

by lodging F.I.R. No.319 of 1990 dated 25.12.1990 in the remit of Gadap Police Station. The Plaintiffs No.1 and 2 are the parents of deceased Muhammad Anwer Palari, whereas, Plaintiffs No.3 and 4 are his widow and daughter, respectively.

3. Upon service of summons, the Defendant No.2, (a Government Department), has filed its Written Statement and denied the claim of the Plaintiffs. It is, however, clarified that Defendant No.2 has been restructured and is now called 'Department of Transport and Mass Transit, Government of Sindh', whose Focal Person (Mr. Yar Muhammad) was also present on 08.03.2019. Defendant No.3, the driver of the vehicle, against whom the allegation is that due to his negligence and rash driving, he caused the death of deceased Muhammad Anwer, did not contest the matter.

4. From the divergent pleadings of the parties, following consent Issues were adopted as Court Issues on 03.11.1991_

- 1. Is the suit not maintainable in view of Section 67(g) of the Motor Vehicle Ordinance?*
- 2. Whether the suit as framed is maintainable?*
- 3. Whether the persons mentioned in Para-1 of the Plaint are the legal heirs of the deceased?*
- 4. Whether the Defendant No.2 are not the owner of bus in question? If so, its effect?*
- 5. Whether the bus in question was being driven rashly and negligently and in the result thereof caused the death of the deceased?*
- 6. Whether the Plaintiff has suffered pecuniary loss due to death of the deceased? If so, to what extent and against which of the Defendants jointly or severally?*
- 7. Whether the Plaintiff is entitled to claim the compensation?*
- 8. To what relief, if any, the Plaintiff is entitled?*

5. Evidence was led by the Plaintiffs' side and Plaintiff No.3 – Zarina, widow of Muhammad Anwer, who died in the accident, examined herself and was cross-examined, whereas, second witness of the Plaintiff was one Haji Rahab, who was eyewitness and he was examined as P.W.-2. Even though on behalf of Defendant No.2, its the then Chairman, filed his Affidavit-in-Evidence, but the witness on various dates did not come forward to lead the evidence and eventually the Defendants debarred from leading the evidence vide Order dated 19.04.2018.

6. The Issue-wise finding is mentioned herein under:

Issue No.1	Negative.
Issue No.2	Affirmative.
Issue No.3	As under.
Issue No.4	Affirmative.
Issue No.5	Affirmative.
Issue No.6	As under.
Issue No.7	As under.
Issue No.8	Suit decreed.

Discussion / Reasons of the Issues.

ISSUES NO.1 and 2:

7. Mr. Farukh Usman, learned counsel representing the Plaintiffs, while arguing the matter at length has submitted, that the incident itself, in which the victim Muhammad Anwer died, is not disputed by the Defendants, but only its causation. The victim was the son of Plaintiffs No.1 and 2 and husband and father of Plaintiffs No.3 and 4, respectively. Learned counsel for the Plaintiffs has cited the judgments, which are mentioned in the opening paragraph of this decision.

8. With regard to the main objection raised by the learned A.A.G. Ms. Leela @ Kalapna Devi, so also mentioned in the Written Statement about

the maintainability of the suit, learned counsel for the Plaintiffs has relied upon the case of Muhammad Younus Khan (*supra*) that the bar contained in Section 67-G of the Motor Vehicle Ordinance, 1965, does not apply in the present case as the statutory provision of Motor Vehicle Ordinance, 1965, itself suggests that a claim which can be adjudicated upon by the Claims Tribunal, cannot be a subject matter of a suit proceeding.

Admittedly, since no prior proceeding has taken place with regard to the present claim, therefore, this objection of learned A.A.G., does not have any force and the reply of Plaintiffs' Advocate has substance.

9. The judgment cited by the Plaintiffs' side of *Younus Khan v. Karachi Road Transport Corporation (ibid)* is fully attracted to the facts of the present case. In the said reported decision, this Court has come to the conclusion that even if proceeding under section 67 of the Motor vehicle Ordinance, 1965, has been concluded in favour of the aggrieved party, still the said aggrieved party can maintain its separate claim in the proceeding of the nature; however, in the said case even though compensation was granted but interest was disallowed because the plaintiff of the reported case had already received a claim from the Tribunal established under the above statute – Motor Vehicle Ordinance, 1965. Consequently, both Issues are answered in Negative and Affirmative, respectively, that the present *lis* is maintainable, and not barred by the Motor Vehicle Ordinance, 1965.

ISSUE NO.3:

10. This Issue *primarily* pertains to the legal character of the four Plaintiffs. Un-rebutted evidence, which has been brought on record, proves the relationship of the Plaintiffs with the deceased Muhammad Anwer. Computerized National Identity Cards (CNICs) have been produced in the evidence, which are Exhibited as P/3 (of the deceased/victim), P/4 of Plaintiff No.3, P/5 of Plaintiff No.1, P/6 of Plaintiff No.2 and P/7 of the

Plaintiff No.4. It has been testified by the Plaintiffs' witness, who is Plaintiff No.3, as well as from the CNICs., it is quite clear that Plaintiffs No.3 and 4 are the widow and daughter (respectively) of the deceased, whereas, Plaintiffs No.1 and 2 are parents. Therefore, this Issue is answered accordingly that all the Plaintiffs are the family members of the Deceased, that is, parents, widow and daughter, respectively, thus these Plaintiffs fall within the ambit of Section 1 of the Fatal Accident Act, 1855, and they are the concerned persons, who can file the claim of the nature.

ISSUE NO.4:

11. It is specifically mentioned in paragraph-1 of the plaint that the bus No.965-232, which hit the pickup on Super Highway, belongs to and owned by Defendant No.2, whereas, it has been further elaborated in the testimony of P.W.-1 that the Controlling Authority of Defendant No.2 is Defendant No.1 and the bus in question, which hit the vehicle/Pickup was owned by Defendant No.2. On this material factual assertion, the Plaintiffs' witness has not been cross-examined, nor, the Defendants in their written statement refuted this fact about the ownership of the bus; therefore, this fact is also proved by the Plaintiffs and the Issue No.4 is answered in Affirmative that the above mentioned bus, which hit the ill-fated Pickup (vehicle) was owned by the Defendant No.2.

ISSUES NO.5:

12. Learned counsel for the Plaintiffs has relied upon the three reported decisions; of the Honourable Supreme Court 2006 S C M R page-207, a recent one of learned Division Bench of this Court in the case of *Islamic Republic of Pakistan through Secretary Ministry of Defence and others v. Numair Ahmed and 2 others, and of Mushtari – 2006 M L D 19*, wherein the maxim *res ipsa loquitur* (things speak for themselves) has been explained, and it is held that if an accident / incident resulting in death of a person,

itself is not disputed by the Defendants, then the onus to prove that a person died not because of negligence or wrongful act of the Defendant is on the latter (the Defendants) and not on the Plaintiffs, in order to succeed in claim for damages. In other words, to disprove the causation of death is on Defendant(s). **More so, failure to examine driver of the vehicle involved in an accident can create an adverse presumption against the Defendant.** In the afore-mentioned Judgment, the learned Division Bench has further highlighted the standard of care to be taken by those and the drivers, who ply heavy vehicles on the roads, and they are under an obligation to take extra care while driving on the roads, in order to prevent any unfortunate incident, like the one happened in the present case, which resulted in a precious loss of a human life.

13. Learned A.A.G. has argued while referring to paragraph-2 of the Written Statement that it was the pickup of the deceased (Muhammad Anwer), which hit the vehicle of Defendant No.2 and not *vice versa* and, therefore, negligence was on the part of the driver of the Pickup and not on the Defendants and thus they are not liable to pay any compensation to the Plaintiffs in respect of the incident in question.

14. The testimony of the Plaintiffs' side has been evaluated. P.W.-1 has confidently rejected the suggestion that it was not the fault of her deceased husband and the incident occurred and caused due to sheer reckless driving and negligence of the Defendant No.3 (the driver); whereas, the testimony of the eyewitness (P.W.-2) is also straightforward who corroborated the deposition of Plaintiff No.3 and the credit of both the said witness could not be impeached during their cross-examination, by the Defendants. P.W.-2 has unequivocally stated in his deposition that the incident occurred due to the fact when the Bus in question (of Defendant No.2) recklessly tried to overtake another vehicle and while doing so it went out of control and

collided with the Pickup No.LS-9970, in which the deceased was travelling with the driver of the Pickup and received fatal injuries. Since the Defendants did not lead the evidence, therefore, in view of the above appraisal of the evidence, the finding on Issue No.5 is that the accident occurred and caused due to reckless and negligent driving of Defendant No.3 and since it is a proven fact that he was the employee of Defendant No.2, which was the owner of the Bus and also the said Defendant No.2 is one of the Departments of Defendant No.1, as already mentioned in the foregoing paragraphs, thus, inter alia, principle of vicarious liability is applicable to the facts of present case too; hence, all the Defendants are jointly and severally liable to compensate the Plaintiffs. Accordingly, Issue No.5 is replied in Affirmative.

ISSUES NO. 6, 7 AND 8:

15. It has been argued by the learned A.A.G. that the Plaintiff No.3 failed to bring convincing evidence on record that her husband (*deceased Muhammad Anwer*) was gainfully employed with the Octroi Collector Contractor and he was drawing a salary of Rs.2,500/- (Rupees Twenty Five Hundred only) per month, way back in the year 1990. It is further argued on behalf of the Defendants that the second portion of the claim of Plaintiffs that the income of the deceased would have increased to Rs.12,000/- to Rs.16,000/- per month, as with the passage of time the deceased himself being experienced person could have obtained the contract from the District Council, is based upon mere presumption and no direct evidence is produced and, therefore, this claim is to be rejected.

16. On the other hand, 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; *particularly*, another reported judgment of Honourable Apex Court given in Abdul Wahid case is of relevance here.

17. Précis of the above cited judicial pronouncements is that in the cases of the nature, 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 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 Statute of the Minimum Wages Ordinance, 1961 (of the relevant time) 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*). Therefore, arguments of learned A.A.G. that the Plaintiffs could not produce any plausible evidence about the gainful employment of deceased Muhammad Anwer, loses significance.

The question is that how much compensation, the Plaintiffs are entitled to, 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 five to 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 feasons. 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.”

18. The Defendants could not successfully dislodge the assertion and testimony of the Plaintiffs that the deceased (Muhammad Answer) was a young man of 26 years old at the time of fateful accident and usually life expectancy in the family of the Plaintiffs is 75 years.

19. Following a consistent view contained in series of precedents, as also mentioned in the foregoing about the life expectancy of a victim, it can

be said that the life expectancy in the present case is 70 years (Seventy Years). Similarly, as per the latest Notification No. L-11-13-3/2016: dated 8th October, 2018, under Section 4 of the Sindh Minimum Wages Act, 2015, issued by Labour and Human Resources Department of Defendant No.1 (Government of Sindh), the minimum rates of wages of an unskilled adult employee in the Province of Sindh is Rs.16,200/- per month, therefore, damages / compensation is calculated in the following manner_

Date of Birth as per National Identity Card produced in evidence (Exhibit 5/5)	03.06.1964
Date of incident	25.12.1990
Age of deceased at the time of incident	Days Months Years 22 06 26
Life expectancy in Plaintiffs' family as per the above discussion	72 years.
The deceased would have lived for another 45 years and 6 Months	Equal to 546 months
Base figure in rupee term is taken as	Rs.15,000/- per month
Rs.15,000/- x 546 months comes to	Rs.8,190,000/- (Rupees Eighty One Lacs Ninety Thousand only)

20. Plaintiffs are also entitled to the additional sum of Rupees One Million towards loss of consortium, as held in the case of Mushtari (*supra*).

21. The Plaintiffs have claimed a sum of Rs.5 Million. By now, it is a settled rule that Courts in appropriate cases can mould the relief. More so, in the case of Abdul Wahid (*supra*), the Honourable Supreme Court has also observed as under_

“..... Nevertheless it does bring into prominence the implications and consequences of delayed adjudication. It would be worthwhile, therefore, for Courts to develop a sensitivity for such implications which arise from tortious actions particularly those arising under the Fatal Accidents Act involving the death of providers such as Aslam, Mohiuddin Ahmed and Sajjad Ahmed.”

(Underlined to add emphasis)

22. The suit was instituted on 04.03.1991 and decided on 14.03.2019, therefore, it cannot be said that the decision is given beyond the prayer clause because claim of Rs.5 Million way back in the year 1991, considering the devaluation of local currency in proportion to other foreign currency on the one hand and on continuous inflationary trend, on the other hand, could be adequate, but, not in the present circumstances.

23. In view of the above, Plaintiffs are entitled to damages in the sum of Rs.8,190,000 (Rupees Eighty One Lacs Ninety Thousand only) and Rs.1,000,000/- (Rupees One Million) towards loss of consortium, respectively. The suit is decreed for the total sum of Rs.9.1 Million with 10% markup per annum from the date of institution of suit till realization of the amount, which Defendants are liable to pay.

24. Suit stands decreed.

Judge

Karachi Dated: 14.03.2019.

Riaz / P.S.