IN THE HIGH COURT OF SINDH AT KARACHI

PRESENT: MR. JUSTICE SALAHUDDIN PANHWAR

SUIT NO.633/2009

Plaintiff : Syed Qamar Sultan,
through Mr. Qazi Hifzur-Rehman, advocate.

Defendants : Javed Iqbal Gohar and another,

Date of hearing : 09.02.2017.

Date of announcement : 31.03.2017.

JUDGMENT

The present suit for recovery of compensation and damages has been filed by plaintiff for:-

a. direction to defendant to pay compensation @ Rs.22,000/- per month totaling Rs.5,00,000/- since September 2005 till November 2007 and further be directed to pay the same @ Rs.22,000/- per month with 10% till the plaintiff recovers his health and starts his service and earn his livelihood.

b. direction to defendants to pay jointly and severally to the plaintiff the charges of the medical treatments and medicine for the last two years totaling Rs.20,00,000/- and further be directed to pay to plaintiff @ Rs.2,00,000/- per month till recovery of health.

c. direction to defendant to pay damages to the plaintiff amounting to Rs.50,00,000/- due to mental shock and

agony suffered by the plaintiff due to accident caused due to carelessness of the defendants.

d. any other relief.

2. As pleaded, plaintiff is a commerce graduate and computer literate having sound health, working in a company Limton Innovative System as Business Executive since 01.04.2005 at monthly salary of Rs.12,000/p.m. plus Rs.10,000/p.m. incentives; that on 19.09.2005 plaintiff was driving his motorcycle No.SKB-7747 which was hit by defendant No.2 driving Shahroze truck bearing registration No.KM-6212 owned by defendant No.1 as a result whereof he suffered serious injuries and his spinal cord was badly damaged and till filing of the suit his lower half portion of body is totally paralyzed hence he is on bed and unable to move without assistance; on registration of FIR No.629/2005 at PS Jamshed Town criminal proceedings are pending before Judicial Magistrate– I, Karachi East in Cr. Case No.424/2007; that plaintiff borne expenses of Rs.20,00,000/- on medical treatment upto-date and such treatment still continues besides he is unable to earn his livelihood hence bearing loss of Rs.22,000/p.m. on account of loss of salary, therefore defendants are jointly and severally liable to pay compensation as such loss was caused due to carelessness of defendant No.2 being servant of defendant No.1, who was driving heavy vehicle on LTV license; that defendants are liable to pay to plaintiff at least Rs.5,00,000/- due to financial loss of his salary for past two years and continuously to pay the same with 10% increase per year, further charges of his medical treatment

for last two years totaling Rs.20,00,000/- and continue to pay the same till recovery of his health; plaintiff has suffered mental torture and agony and even due to such shock his mother has also passed away hence plaintiff claims Rs.50,00,000/- as damages to be paid by defendants; therefore total claim of plaintiff relating to last two years comes to Rs.75,00,000/- with 10% increase every year and further Rs.25,00,000/- every year.

3. On 05.03.2010 defendant No.1 was debarred from filing written statement; matter was ordered to be proceeded *ex-parte* against defendant No.2 on 22.10.2010.

4. Order dated 06.02.2009 shows that on application of plaintiff, filed under section 5 of the Limitation Act, following order was passed:-

> "Since admittedly the suit is time barred as the incident in which the plaintiff received injuries took place on 19.09.2005 whereas the suit was filed on 6.12.2007. A suit for compensation for any such injuries, as the plaintiff has received, is covered under article 22 of the Limitation Act, 1908. It provides a period of one year to file suit. The date of commencement of the limitation is when injury was committed. Here in this case the injuries were committed on 19.09.2005, therefore, the suit should have been filed within one year from the said date but it was filed on 6.12.2007, therefore, the same is hopelessly time barred. With regard to the application under section 5 of the Limitation Act, it would be suffice to observe that the provisions of section 5 of the Limitation Act are not applicable to the suit. …….

> Since the suit is not included in the provisions, therefore, this Court is not competent to entertain such application for condonation of delay in filing the suit. Learned counsel for the plaintiff has failed to submit any explanation in this regard.
>
> In these circumstances, the suit is hopelessly time barred, office objection is accepted and the suit is dismissed, as provided under section 3 of the Limitation Act."

However, on 09.05.2014 it was observed:-

> "On 07.05.2014 after arguments of the learned counsel for the plaintiff the matter was reserved for judgment. However, during course of examination of case file it has transpired that on 06.02.2009 the suit was dismissed on the ground of limitation. Subsequently, the plaintiff assailed the said order in HCA No.75/2009 wherein the hon'ble Division Bench of this Court, while setting aside the impugned order, with the observation that from the perusal of record, it appears that the appellant has not filed suit under the Fatal Accident Act but for compensation in respect of injury caused to him by malfeasance and accordingly article 36 attracted, which provides limitation of two years from the date of the malfeasance and while remanding the matter to this Court left the issue of application of proper article of the Limitation Act to this Court to decide in accordance with law."

5. Plaintiff filed his affidavit in evidence and examined himself, he produced his affidavit in evidence, B.Com degree certificate,

certificate of achievement and documents relating to his medical treatment and expenditure thereof, as exhibits P/2 to P/76 respectively.

6. Learned counsel for plaintiff has argued that due to the accident, the plaintiff is still confined to the bed and unable to move hence is continuously suffering immense loss in terms of health, money, mental torture and agony as he lost his earning of Rs.22,000/- to Rs.30,000/- per month as his nominal salary hence till end of 2010 suffered loss of Rs.15,45,134/-, medical charges from date of incident till filing of suit in the sum of Rs.20,00,000/- and Rs.2,00,000/- as he had traveled to India for medical treatment as well Rs.50,00,000/- as damages, totaling to Rs.85,45,134/-; that defendant No.2 permitted defendant No.1 to drive heavy vehicle on LTV license who hit the plaintiff, the custody of the vehicle was taken from the Court trying criminal case; this is a case of negligence on the part of defendants No.1 and 2; that on service defendant No.1 made his appearance through his counsel but has not filed written statement while defendant No.2 has not made his appearance in-spite of service; defendant No.2 has been declared absconder in criminal proceedings arising out of FIR No.626/2005. It is contended that though suit was dismissed on point of limitation but by order passed in HCA No.75/2009 case was remanded back to this Court for decision of merits holding that article 22 of the Limitation Act does not apply in instant matter; while placing reliance on PLD 1970 Lahore 298 (Abdul Majid vs. United Chemicals Ltd) and PLD 1969 Azad J & K 51 (Mujahid Abdur-Rehman vs. Mangla Dam Contractor). It is argued that

provisions of article 36 of the Limitation Act apply to present case which provides limitation of two years for filing such suit hence suit is within time.

7. I have heard the learned counsel for the plaintiff and have perused the available material.

8. Though, the matter has *admittedly* proceeded *ex-parte* however this will never absolve the plaintiff to prove and establish his case, as per requirement of the law, as has been sketched by honourable Supreme Court in the case of *Farzand Raza Naqvi & 5 others v. Muhammad Din through L.Rs & Others* (2004 SCMR 400) as:

> "4. ….. We, while taking into consideration the nature of ailment of Din Muhammad, predecessor-in-interest of respondents and the dispute between the parties, are of the view that despite of non-representation of defendants in the suit, the trial Court was under legal obligation to attend the important question relating to the maintainability of the suit and the genuineness of the claim of plaintiff arising out of the pleadings of the parties, and decide the suit on merits to avoid any injustice to any party in his absence. **The interest of administration of justice always demands that one should not be allowed to get any benefit in absence of is opponent to which he is not entitled in law."**

In the instant, the question of *limitation* has since been decided by the appellate Court which *legally* is binding upon this Court hence this question needs not be discussed any more. However, to examine the claim of the plaintiff, it would be proper to have a direct reference to

operative part of the case of *Abdul Majid Butt v. United Chemicals Ltd.* (PLD 1970 Lahore 298) which reads as:

> "8. … In the context the word **'committed'** implies the commission of an overt act and would not cover a case of injury that has resulted on account of misfeasance i.e. the improper performance of a duty cast on a person by law. **Thus if the serious injuries suffered by the petitioner are the consequence of culpable negligence and the failure of the respondent to perform its legal obligations to maintain their plants and equipment in a proper condition,** the injury suffered by a person as a result of such negligence would fall in the category of cases visualized by the provisions of Art. 36 of the Limitation Act. According to this article suits for compensation for any malfeasance, misfeasance or non-feasance independent of contract and not specifically provided for in the Act may be instituted within two years when the malfeasance, misfeasance or non-feasance takes place.

From above, it is quite clear that before insisting entitlement for such compensation, one shall be required to establish that:

i) injuries, suffered by him, were / are consequence of culpable negligence; and

ii) defendant *prima facie* failed to perform his obligations in maintaining his *things* (under his control) properly;

Since, the instant plaintiff has claimed compensation for injuries, suffered in result of hit by vehicle. There can be no denial to the fact and legal position that while driving a vehicle on a public way, a driver is under an *implicit* duty rather *obligation* to ensure that his driving does not endanger the life of the *users of the road* thereby assuring that he (driver) has been taking sufficient care to avoid danger to *others*. Once it is alleged that

Reference may be made to the case of *Ravi Kapur v. State of Rajhistan (*2013 SCMR 480) wherein it is held as:

> "12. The Court has to adopt another parameter, i.e 'reasonable care' in determining the question of negligence or contributory negligence. **The doctrine of reasonable care imposes an obligation or a duty upon a person (for example a driver) to care for the pedestrian on the road and this duty attains a higher degree when the pedestrian happen to be children of tender years**. It is axiomatic to say that while driving a vehicle on a public way, there is an implicit duty cast on the drivers to see that their driving does not endanger the life of the right users of the road, may be either vehicular users or pedestrians. **They are expected to take sufficient care to avoid danger to others.** "

Thus, in such like case, *normally* the burden to prove that driver did take sufficient care would rest upon the driver if the plaintiff has alleged so because *legally* the defendant either has to accept the assertion and claim of the plaintiff or to dispute the same. Once he (defendant) disputes and denies the burden stands *shifted* upon him (defendant) to prove what he states in respect of manner of happening of incident. Reliance can well be placed on the case of *Steel Mills Corporation v. Malik Abdul Habib* (1993 SCMR 848) wherein it is held as:

> *"If defendants 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"***

The present plaintiff has categorically claimed the injuries as a result of negligence on part of the defendant no.1 i.e driver of the defendant no.2;

stated so on Oath and even produced FIR, lodged against the defendants therefore, the defendants were *legally* required to have disproved the same but it is a matter of record that the defendants, despite proper service, did not choose to discharge their burden. Thus, versions of the plaintiff to such an *extent,* in absence of no-rebuttal, cannot be disbelieved and is accepted as such.

9. However, since I am conscious of the legal position that for an entitlement for compensation / damages, the plaintiff is required to prove /establish compensation / damages with reference to each head. In order to prove the claim of compensation, the plaintiff has examined himself and has produced photocopies of B.Com Degree issued by the Karachi University as Certificate of Achievement dated 20th February, 2001 issued by Jaffar Brothers (private) Limited, certificate dated 25th July 2007 issued by Limton innovative Systems, his *own* photographs, FIR bearing No.629/2005 lodged by him with P.S Ferozabad, Karachi, medical certificate dated 20.9.2005, issued by the Liaquat National Hospital alongwith medical record and receipts, PIA Air tickets whereby traveled to India for treatment, payment receipts, issued to him in India, photocopy of Vascular Doppler Study Report and Peripheral Artery Doppler Report, issued by Dr. Pankaj Bhargava, medical payment receipts for the payments, made for attendants to Real Patient Care, Human Social Services on different dates, legal notice issued to the Defendant and courier receipts as Ex.P/3 to P/76. The documents are sufficient to establish injuries, suffered by the plaintiff in consequence to

hit by vehicle. Since, these are the *actual* payments, made by the plaintiff for treatment of the injury, which he has claimed to have received in result of *malfeasance* / negligence of the defendant nos.1 and 2 hence in absence of *disproof* the plaintiff shall be entitled for such an amount as same shall fall within meaning of *special damages.* The special damages / compensation would mean material and actual loss capable of assessment in terms of money, resulting as a natural or proximate consequence of a wrongful act. Reference may be made to the case of *Tahir Jahangir & another v. DON WATERS* (2003 CLC 1699). Since, the plaintiff has assessed such compensation i.e medical expenses as Rs.20,000,00/- which with reference to produced documents is accepted. However, as regard the claim of damages with reference to mental shock and agony, the plaintiff has not produced any other evidence but his *own* words therefore, plaintiff cannot claim entitlement for a *specific* sum of his choice but where the **'wrong'** on part of the defendant is *otherwise* established then the Court should assess a fair compensation for **'mental shock'**. Reference may be made to the case of *Malik Gul Muhammad Awan* (2013 SCMR 507) wherein it is held as:

> '*Once it is determined that a person who suffers mental shock and injury is entitled to compensation on the principles stated above, the difficult question arises what should be the amount of damages for such loss caused by wrongful act of a party. There can be no yardstick or definite principle for assessing damages in such cases. The damages are meant to compensate a party who suffers an injury. It may be bodily injury loss of reputation, business and also mental shock and suffering.* ***So far nervous shock is concerned, it depends upon the evidence produced to prove the nature, extent and magnitude of such suffering,*** *but even on that basis usually it becomes difficult to assess a fair compensation and in those circumstances it is the discretion of the Judge who may, on*

> *facts of the case and considering how far the society would deem it to be a fair sum, determines the damage.* **The conscience of the Court should be satisfied that the damages awarded would, if not completely, satisfactorily compensate the aggrieved party.'**
> *(Emphases supplied)*

Keeping above, in view and legal positions, since it is not disputed that plaintiff did suffer *serious* injuries resulting in confinement of plaintiff to bed cannot be taken to have not resulted in **'mental shock and agony'** to such a person. I would also add that mere treatment and recovery alone even shall not wash away the mental shock and agony which such a person shall undergo hence compensation *alone* for actual amount, paid by plaintiff over treatment, would not disentitle the plaintiff from a compensation / damages under head of **'mental shock and agony'**. Considering all the facts in view, I am of the view that it would be appropriate to fair to award an amount of Rs.10,00,000/- (Rupees one million) as compensation for mental shock and agony which *otherwise* was claimed by plaintiff as Rs.50,00,000/-

10. As regard the monthly compensation, the plaintiff has brought sufficient material on record including his photographs, showing him in *healthy* position and that of after incident; he has also produced material to show his *monthly* earning as Rs.12,000/- but produced nothing on record to substantiate his claim of earning monthly incentive of Rs.10,000/-. Since there is nothing to dispute the fact that it is the injury which has resulted in confining the plaintiff to bed therefore, the monthly amount of Rs.12000/-per month being reasonable, is accepted. Accordingly, plaintiff is found entitled for such amount from date of his

injuries till today. Let such decree be drawn, after calculation of total amount. Nazir shall ensure that decree is executed within stipulated period.

Announced in open Court this 31st day March, 2017.

IK **J U D G E**