IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

SC. HC. CA. LA. 101/2013
WP/HCCA/COL/291/2006(F)
D.C.Colombo Case No. 25127/MR

In the matter of an Appeal from the Judgment of the Learned Judges of the Provincial High Court of Civil Appeal of the Western Province holden at Colombo dated the 26/02/2013 made in Case No. WP/HCCA/COL/291/2006 Final, under and in terms of Article 127 of the Constitution read together with Section 5C of the High Court of the Provinces (Special Provisions) Act No 19 of 1990 as amended by High Court of the Provinces (Special Provisions) (Amendment) Act, No 54 of 2006.

Tangerine Beach Hotel
P.O. Box 195
No. 236, Galle Road,
Colombo 03.
1st Defendant-Appellant-Petitioner

Vs.

Ryan William Smith
No. 27, Melibee Street,
Blairgowrie, Victoria 3942
Australia.

Formerly at No. 4/39, Plummer Road,
Mentone, Victoria 3194, Australia.
Plaintiff-Respondent-Respondent

1. Mercantile Investments Limited
Galle Road,
Colombo 03.
2. Maggonage Wimalasena of
No. 46, Gemunu Mawatha,
Kalutara South, Kalutara.

Defendants-Respondents-Respondents

BEFORE : **TILAKAWARDANE, J.**
MARSOOF, PC, J. &
DEP, PC, J.

COUNSEL : **Romesh de Silva PC with Harsha Amarasekera for the 1st Defendant-Appellant-Petitioner.**
Avindra Rodrigo with M.P. Maddumabandara for the Plaintiff-Respondent-Respondent.

ARGUED ON : **30.07.2013.**

DECIDED ON : **18.11.2013**

Tilakawardane J:

An application for Leave to Appeal before this Court was made by the 1st Defendant – Appellant – Petitioner (hereinafter referred to as the Petitioner) and the matter appeared before this Court on 30.07.2013. The appeal was against the decision of the Provincial High Court of Civil Appeal of the Western Province which delivered judgment on 26.02.2013.

It is the opinion of this Court that the following two questions of law that were raised for leave to appeal require the consideration of this Court.

1. Whether the Provincial High Court of Civil Appeal of the Western Province had misdirected itself when they held the Petitioner vicariously liable for the actions of the 3rd Defendant.
2. Whether the Provincial High Court of Civil Appeal of the Western Province had misdirected itself when it failed to take cognizance of the fact that the documents marked by the Plaintiff – Respondent – Respondent (hereinafter referred to as the Respondent) were admitted into evidence subject to proof and were allegedly not proven.

The facts that precede this appeal are as follows. The Respondents in the above captioned cases were three males: a father, a son and the brother of the father. The three passengers were being driven in vehicle number 65-2938 at the time of the accident. The said vehicle collided with train number 506 which was travelling from Colombo to Galle. The accident occurred at the Paunangoda Road rail at Hikkaduwa. The Petitioner of this case is the legal owner of the said vehicle.

The first issue that requires the consideration of this Court is whether there is a vicarious liability that falls on the part of the Petitioner, arising out of the actions of the driver, the 3rd Defendant. It is submitted by the Petitioner that there is no vicarious liability that falls on him due to the fact that the 3rd Defendant was not an employee of the Petitioner and was hence not within his control.

The Petitioner asserts that the 3rd Defendant is not his employee and that hence he is not liable vicariously for his actions. The Petitioner quoted the recent case of **Krishnan Nalinda Priyadarshana v Kandana Arachchige Nilmini Dhammika Perera** (case no. SC. Appeal 67/2012 decided on 14.06.2013) in which **Wanasundara J** stated as follows:

"In the instant case, the driver who drove was the employee of the owner of the lorry. The driver's wrongful act was done within the act of driving which he was employed to perform by the owner of the lorry. Even if the wrongful act was unauthorized by the employer and criminal in nature, the employer is vicariously liable for the employee's action, thus making the employer bound to pay damages caused by the employee."

The Petitioner further quoted the judgment on the **General Principles of Vicarious Liability in Tort** as laid down by **Salmond** in **"Law of Tort" 1907** which further clarifies the issue of the liability only falling upon an employer of the driver. The Petitioner also quoted cases such as **Ellis v Paranavitana** *58 NLR 373* and **Rafina and Another v The Port (Cargo) Corporation and Another** (1980)*2 SLR 189* both of which establish that the Sri Lankan Courts have previously decided that vicarious liability only falls upon the employer when there is a direct nexus between the employer and the employee. It is the assertion of the Petitioner that such a nexus does not exist between himself and the 3rd Defendant. The Petitioner alleges that in order to find him vicariously liable for the action of the 3rd Defendant the corporate veil must be lifted and that such an action by the Court would be contrary to the concept of "distinct legal entity" as created by the **Companies Act No. 7 of 2007**.

Conversely, it is the position of the Respondent that the Petitioner, as the lawful owner of the vehicle is vicariously liable for the actions of the ultimate user of the vehicle. Abundant case law affirms this position and this Court is inclined to agree with this assertion. The case of **Jafferjee v Munasinghe** *51 NLR 313* saw **Jayatileke J** cite the English case of **Chowdhary v Gillot** *2 A.E.R 541* which states that:

".. if a person lends his car to another, prima facie he does not place the driver under the control of the borrower, and the borrower does not become liable for the negligence of the driver."

Similarly, in the American case of **Seattle v Stone** *410P.2d 583.* **Weaver J** held that there is a prima facie responsibility that falls upon the registered owner of a vehicle. This prima facie responsibility can be rebutted by the owner if he is able to present evidence to the contrary to the Court. The provisions for such a rebuttal are found in **Section 214 (2) (b) (ii)** of the Motor **Traffic Act No. 14 of 1951** which states as follows:

".. *Provided, however, that- the owner, if he was not present in the motor vehicle at the time of such contravention, shall not be deemed under paragraph (b) to be guilty of an offence under this Act, if he proves to the satisfaction of the court that the contravention was committed*

without his consent or was not due to any act or omission on his part or that he had taken reasonable precautions to prevent such a contravention."

The view of **Rolfe B** in the case of **Reedie v The London and North Western Railway Company**(*1849)4Exch244, 154ER01201* was reaffirmed by **Rix LJ** in the recent case of **Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd** *(2006) QB510,529* where liability was imposed on the employer on the basis that:

"Those who set in motion and profit from the activities of their employees should compensate those who are injured by such activities even when performed negligently."

This principle was taken up by **Gratiaen J** in the case of **T. H. I. De Silva v Trust Co Ltd** *55 NLR 241.* It was held that despite the fact that the owner was not in the vehicle, the fact that he had delegated the task of driving the car to another for his own purposes, gives rise to vicarious liability of the owner. A similar view was set out by the English Judge **Denning J** in the case of **Ormrod v Crossville Motor Services Ltd** *(1953)2AER 755* in the following words:

"The law puts an especial responsibility on the owner of a vehicle who allows it to go on the road in charge of someone else, no matter whether it is his servant, his friend, or anyone else. If it is being used wholly or partly on the owner's business or for the owner's purposes, the owner is liable for any negligence on the part of the driver."

The applicability of this opinion to Sri Lankan law was affirmed in the case of **Ellis V Paranavithana** *58NLR 373*.

The ability to disprove this responsibility was discussed by **Streatfield J** in the case of **Samson v Aitchison** *AC 488* as follows:

"where the owner of the vehicle, being himself in possession and occupation of it, requests or allows another person to drive, this will not itself exclude his right and duty of control; and therefore, in the absence of further proof that he has abandoned that right by contract or

otherwise, the owner is liable as principal for damages caused by the negligence of the person actually driving."

Moreover, **Section 214(2)(b)** of the **Motor Traffic Act No. 14 of 1951** imposes prima facie liability for an accident on the driver and the owner of the vehicle. Subsection (b) reads as follows:

"*the driver and the owner of the motor vehicle shall also be guilty of an offence under this act, notwithstanding that a duty or prohibition, or the liability in respect of such contravention is not expressly imposed by such provision or regulation on the driver or the owner:."*

Accordingly, there is a statutory liability on the part of the owner with regards to damages that arise in the operation and use of his vehicle.

Hence, it is the opinion of this Court that the Petitioner has not adduced any evidence in order to establish that it has abandoned its right or authority to control the driver at the time that the said events unfolded as per **Section 214(2) (b) (ii)** as stated above. In fact the Petitioner, in vide page 21, on the 23rd of February 2006, adduced evidence in order to establish that it plays an active role in the selection of the drivers of its vehicle.

It has also been called into question before this Court as to whether the Petitioner, Tangerine Beach Hotel, has sufficient interest in the duties of the driver so as to be held liable for his action although, the 3rd Defendant, the driver, is an employee of Tangerine Tours Limited, it transpired in evidence that the Petitioner and Tangerine Tours Limited despite being distinct legal entities, share a common chairman, common directors and that they own shares in each other's companies and maintain a close relationship with each other. Hence, despite the fact that the contract of employment for the driver was provided for by Tangerine Tours Limited, sufficient evidence has been adduced in order to establish interest as well as proximity between the driver and the Petitioner.

The issue that was raised with regards to the evidence that was adduced by the Respondent was that the documents marked "P1", "P2" and "P3" were allegedly entered into evidence subject to proof by the Respondent. The Petitioners have objected to the validity of the said

documents on the basis that they were not proven and hence are not admissible in evidence in these cases. Furthermore, it is alleged by the Petitioner that the failure of proof by the Respondent should bar the judges from taking the said evidence into consideration. The evidence mentioned by the Petitioner is evidence that include medical reports from doctors in Australia indicating the condition of the passengers in the vehicle, that is, the three Respondents in the above captioned cases.

The law relating to the admissibility of evidence is laid down in **Section 154** of the **Civil Procedure Code**. The section states:

"*every document or writing which a party intends to use as evidence against his opponent must be formally tendered by him in the course of proving his case at the time when its contents or purport are first immediately spoken to by a witness, id I is an original document already filed in the record of some action, or the deposition of a witness made therein, it must previously be procured from that record by means of and under an order from, the court. if it is a portion of the pleadings, or a decree or order of court made in another action, it shall not generally be removed therefrom, but a certified copy here of shall be used in evidence instead."*

The explanation of the section further elaborates that:

"*If the opposing party does not, on the document being tendered in evidence, object to its being received, and if the document is not such as is forbidden by law to be received in evidence, the court should admit it."*

The Petitioner alleges that the documents were objected to upon their admission to evidence; however, this Court has not been provided with adequate evidence of such an objection nor has it been specifically stated as to what the basis of the objection is. The law on the matter has been laid down with great clarity in the case of **Silva v Kindersley** *(1914). 18 N. L. R. 85* where the Court held that in a civil suit, when a document is tendered in evidence by one party and is not objected to by the other, the document is deemed to constitute legally admissible evidence as against the party who is sought to be affected by it. Furthermore, in

the case of **Sri Lanka Ports Authority and Another v Jugolinija – Boat East** *[1981] 1 Sri LR 18* **Samarakoon CJ** held that:

"If no objection is taken when at the close of a case documents are read in evidence they are evidence for all purposes of the law. This is the curses curiae of the original courts."

Similar views were taken in cases such as **Cinemas Ltd v Soundararajam** *1988 (2) SLR 16* and **Balapitiya Gunanandana Thero v Talalle Mettananada Thero** *1997 (2) SLR 101.*

The Respondents tendered the documents into evidence on 07.06.2004 subject to proof and proved the grievous injuries suffered by him during the course of presenting the evidence. There is no evidence to the satisfaction of the Court that suggests that an objection was made in the first instance by the Petitioner.

The only available question then is whether the objection to the documents can be made upon appeal. In the Privy Council decision of the case of **Shahzadi Begam v Secretary of State for India** *(1907) 34 Cal 1059*, it was held that it was too late for an objection with regards to the admissibility of evidence of a document to be raised on the appeal. Such an objection may only be raised if the issue was called into question in the first instance. This view was upheld by **Hutchinson CJ** in **Sangarapillai v Arumugam** *(1909) 2 Leader 161* as well as in the case of **Siyadoris v Danoris** *42 NLR 311.*

Hence, this Court feels that it would be contrary to law and judicial precedent to allow the Petitioner to call into question the validity of evidence that has already been admitted.

Furthermore, the Petitioner has not specified the grounds on which the evidence is being called into question, nor have they provided this Court with a reasonable basis on which they object to the admissibility of the evidence. Additionally, this Courts draws attention to the evidence that has been adduced in vide page 304-309, which are the Bed Head Tickets of the Respondent. The evidence corroborates the statements contained in the doctor's report in the evidence that has been objected to by the Petitioner.

Section 3 of the **Evidence Ordinance** defines the word "proved" as:

"A fact is said to be proved when, after considering the matters before it, the court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists."

Accordingly, in the absence of any evidence to the contrary being presented by the Petitioner, this Court believes that there is no basis upon which the validity of the said evidence could be questioned and that the Respondents have established the validity of the said documents to the satisfaction of this Court.

For the aforementioned reasons the application for leave is denied. I also order cost in the sum of Rs. 100,000 to be paid to the Respondents.

JUDGE OF THE SUPREME COURT

MARSOOF, PC, J.

I agree.

JUDGE OF THE SUPREME COURT

DEP, PC, J.

I agree.

JUDGE OF THE SUPREME COURT