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

H.K.D.W. De Alwis,
No. 7A, Nelum Mawatha,
Sirimal Uyana,
Mt. Lavinia.
2nd Defendant-Appellant-Appellant

SC/APPEAL/76/2017
WP/HCCA/MT/120/06 (F)
DC MORATUWA 999/M

Vs.

Ponsuge Jayantha Chandrakumara
Thissera Sandanayake,
No. 54/19, Bowila Road,
Pahala Bomiriya,
Kaduwela.
Plaintiff-Respondent-Respondent

Majuwana Gamage Chaminda Dilhan,
No. 82/10, Sri Dharmarama Road,
Ratmalana.
1st Defendant-Respondent-Respondent

Before: Hon. Justice E. A. G. R. Amarasekara
Hon. Justice Kumudini Wickremasinghe
Hon. Justice Mahinda Samayawardhena

Counsel: Sagara Kariyawasam for the 2nd Defendant-Appellant-Appellant.

Amrit Rajapakse for the Plaintiff-Respondent-Respondent.

Argued on: 03.12.2024

Written submissions:

By the Appellant on 24.10.2017.

By the Plaintiff-Respondent-Respondent on 24.11.2017 and 21.02.2025.

Decided on: 13.06.2025

Samayawardhena, J.

The plaintiff, who was a passenger at the time of the accident, instituted this action in the District Court of Moratuwa against the 1st defendant, the driver of the private bus in which the plaintiff was travelling, and the 2nd defendant, the registered owner of the said bus, seeking compensation in a sum of Rs. 3,000,000 for the injuries sustained in the accident, alleging that the accident occurred due to the negligence of the 1st defendant. The cause of action against the 2nd defendant was based on vicarious liability.

Notwithstanding that summons had been duly served on the 1st defendant, he did not appear to contest the action, and the matter proceeded to *ex parte* trial against him. In his answer, the 2nd defendant admitted that the 1st defendant was his employee and that the accident occurred in the course of the employment. However, his position was that the accident was caused due to the negligence of the driver of the other bus involved in the collision.

At the trial, the plaintiff testified, and medical evidence was also led to assist in determining the quantum of compensation.

The judgment of the District Court was delivered on 09.05.2006, holding that the plaintiff had proved his case against the defendants on a balance of probabilities, and that the 2nd defendant was vicariously liable for the acts committed by the 1st defendant in the course of his employment. The District Court accordingly awarded compensation to the plaintiff in a sum of Rs. 1,500,000, together with interest and costs of the action, to be recovered from the 1st and 2nd defendants jointly and/or severally.

The appeal filed by the 2nd defendant against the judgment of the District Court was dismissed by the High Court of Civil Appeal by its judgment dated 22.09.2016.

The 2nd defendant is now before this court, challenging the judgment of the High Court of Civil Appeal. The pivotal argument advanced by learned counsel for the 2nd defendant–appellant is that the plaintiff failed to establish that the accident occurred due to the negligence of the 1st defendant. However, I am not inclined to accept that submission, having regard to the facts and circumstances of this case.

In paragraph 4 of the plaint, the plaintiff stated as follows:

> වර්ෂ 2001 පෙබරවාරි මස 19 වන දින හෝ ඊට ආසන්න දිනක 1 වන විත්තිකරු එකි වාහනය කොළඹ සිට මතුගම බලා ධාවනය කරන අවස්ථාවේ මොරටුව, ගාලු පාර, කුරුස හන්දිය අසලදී පහත සඳහන් නොසැලකිලිමත් ක්‍රියාවන් එකක් හෝ කිහිපයක් හෝ සියල්ලම සිදු කිරීමෙන් එනම්:
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> (i) එකි වාහනය එම ස්ථානයේ හා අවස්ථාවේ හැටියට අධික වේගයෙන් ධාවනය කරමින්,
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> (ii) එම වාහනය අපරික්ෂාකාරි ලෙස ධාවනය කරමින්
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> (iii) එම වාහනය මහා මාර්ගය පරිහරණය කරන වෙනත් අයවලුන් හා දේපල ගැන සාධාරණ විමසිලිමත් වීමකින් තොරව ධාවනය කිරීමෙන්
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> (iv) එම වාහනය පාලනයකින් තොරව ධාවනය කිරීමෙන්

එකී මාර්ගයේ ධාවනය වූ අංක 62-8026 දරන බස් රථයේ හැප්පීම හේතු කොට ගෙන එකී අංක 62-6039 දරණ බස් රථයේ මගියකුව සිටි පැමිණිලිකරුට බරපතල තුවාල සිදුකරන ලදු බව ප්‍රකාශ කර සිටී.

The 1st defendant did not contest this position.

In this regard, the 2nd defendant, in his answer, stated as follows:

පැමිණිල්ලේ 4 වන ඡේදයේ දැක්වෙන සම්ප්‍රකාශ ප්‍රතික්ෂේප කර සිටින මෙම විත්තිකරු පිළිතුරු ලෙස ප්‍රකාශ කර සිටිනුයේ මෙම අනතුරු සිදුවුයේ මෙම වාහනයේ වරදින් නොවන බවත් මෙම අනතුර සිදුවුයේ අංක 62-8026 දරණ බස් රථයේ වරදින් බවත් වැඩිදුරටත් ප්‍රකශ කර සිටී.

The 2nd defendant did not give evidence, nor did he call any other witness in support of his case.

In the cross examination of the plaintiff, the 2nd defendant produced V1, in order to demonstrate that the police had filed a case in the Magistrate's Court against the driver of the other bus for negligent driving, that he had pleaded guilty to the charge, and that a fine of Rs. 1,500 had been imposed on him. This was not disputed by the plaintiff.

During cross-examination, learned counsel for the 2nd defendant further suggested to the plaintiff as follows:

ප්‍ර: තවදුරටත් මට කියා සිටිනවා මෙම අනතුර සිදු වුනේ තමා ගමන් කළ බස් රථයේ රියදුරුගේ වරදින් නොව, 62-8026 දරණ බස් රථය පැදවූ රියදුරාගේ වරදින් කියා?

උ: ඒක පිළිගන්න අපහසුයි. මම ගමන් කල බස් එකේ රියදුරුට මෙම අනතුර වලක්වාගන්න හැකියාවක් තිබුනා කියා මම හිතන්නේ.

ප්‍ර: ඒ තමා හිතන දේ. තමා මේ සිද්ධිය දැක්කේ නෑ. තමා පොලිසියට කල කටඋත්තරයේ කියා තිබෙනවා තමා නිදාගෙන සිටියා කියා?

උ: උත්තරයක් නැත.

ප්‍ර: තමා මේ සිද්ධිය දැක්කේ නෑ කිව්වොත් හරි නේ?

උ: ඔව්.

It is on this basis that learned counsel for the 2nd defendant argues that the negligence of the 2nd defendant was not proved.

As this court held in *LOLC Factors Limited v. Airtouch International (Pvt) Ltd* (SC/CHC/APPEAL/20/2015, SC Minutes of 03.04.2024), "*In terms of section 85(1), what the plaintiff is required to do at the ex parte trial is to lead evidence to satisfy the court that he is entitled to the relief claimed; no higher degree of proof is required. If there is no satisfactory evidence, the court shall dismiss the plaintiff's case*."

In *De Silva v. De Silva* (1974) 77 NLR 554 at 558 this court stated "*The evidence led in an ex parte trial is of the barest minimum*".

In the case of *The Finance Company PLC v. Thushara and Others* (SC/CHC/APPEAL/5/2012, SC Minutes of 26.01.2017), this court held that, in an *ex parte* trial, the plaintiff is only required to present evidence on a *prima facie* basis, demonstrating the constituent elements of his cause of action.

> *When determining whether or not burden of proof has been discharged in an ex parte trial, it has to be kept in mind that, a Plaintiff who adduces evidence at an ex parte trial is, usually, required to adduce only such evidence as is necessary to establish his case on a prima facie basis by establishing the constituent elements of his cause of action. This is subject to the Court seeing no reason to doubt the authenticity and bona fides of the evidence.*

Merely because the driver of the other bus pleaded guilty to the charge of negligent driving—knowing well that the court would impose only a nominal fine of Rs. 1,500—the 1st defendant cannot be exonerated, particularly when

he did not contest the plaintiff's assertion that he too was liable for negligent driving.

It is true that the High Court, in its judgment, observed that "*it is possible to apply the doctrine of res ipsa loquitur to the matter at hand in the circumstances*." I am prepared to accept that this may not be an ideal case for the application of that doctrine. However, it must be noted that the High Court did not affirm the judgment of the District Court on that basis alone. The High Court further stated as follows:

> *In fact when the plaintiff and the doctor who gave evidence on behalf of the plaintiff were being cross examined the learned counsel put questions relating to the injuries caused to the plaintiff. It appears that neither questions nor suggestions put to the plaintiff on the basis that the 1st defendant driver was driving the bus with due care to the passengers including other vehicles driven on the road when the accident took place other than tendering the document marked as V1 to show that the driver of the other bus had been charged before the magistrate court. A perusal of that document reveals that the accused in that case had pleaded guilty but it is not clear exactly to what charge he had pleaded guilty enabling court to conclude that the accident occurred entirely on the negligence of the driver of the other bus who collided with the bus in which the plaintiff was travelling.*

The issues raised by the 2nd defendant at the trial were as follows:

> 10. පැමිණිල්ලේ සඳහන් අනතුර සිදු වුයේ උත්තර ප්‍රකාශයේ 4 වන ඡේදයේ සඳහන් පරිදි අංක 62-8026 දරණ බස් රථය පැදවූ රියදුරාගේ වරදක් නිසාද?
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> 11. ඉහත සඳහන් විසදිය යුතු ප්‍රශ්නයට 'ඔව්' යැයි ගරු අධිකරණයෙන් පිළිතුරු ලැබුනහොත් මෙම 2 වන විත්තිකරුට එරෙහිව පැමිණිල්ල පවත්වාගෙන යා හැකිද?
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> 12. කෙසේ වෙතත් ඉල්ලා ඇති අලාභ ඉතා අධිකද?

Even if issue No. 10 was answered in the affirmative, it does not necessarily follow that the plaintiff's action should have been dismissed by the District Court. A motor traffic accident may occur due to the negligence of the drivers of both vehicles involved in the collision. As previously noted, in the present case, the 1st defendant, by failing to contest the plaintiff's claim, effectively accepted that he was, at the very least, partly responsible for the accident.

The District Court was not incorrect in concluding that the 1st and 2nd defendants were jointly and/or severally liable to pay the plaintiff a sum of Rs. 1,500,000, together with interest and costs of the action.

It is regrettable that the plaintiff has been unable to recover this modest sum for over 19 years, despite the judgment of the District Court having been delivered as far back as May 2006.

A previous Bench of this Court granted leave to appeal on the following questions of law:

1. Did the High Court err in applying the doctrine of *res ipsa loquitur* to the relevant accident?
2. Did the High Court err in law in holding that the onus was on the 2nd defendant to establish that the 1st defendant exercised due care towards the respondent at the time of the accident?
3. Did the High Court err in law in not considering that the negligence of a third party caused the accident?

My answers to the above questions are as follows:

1. The High Court did not affirm the judgment of the District Court solely on the basis of the doctrine of *res ipsa loquitur*.
2. The High Court did not affirm the judgment of the District Court solely on that basis.

3. The High Court did consider the role of the third party in its judgment.

Accordingly, I dismiss the appeal with costs.

Judge of the Supreme Court

E.A.G.R. Amarasekara, J.
I agree.

Judge of the Supreme Court

Kumudini Wickremasinghe, J.
I agree.

Judge of the Supreme Court