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

R.G.L. de Silva
18-1/1, Sakwithi Lane
Colombo 5.
Presently of
16A Don Carolis Road,
Colombo 5.

PLAINTIFF

C.A 543/1998 (F)
D.C. Kuliyapitiya 9539/M

Vs.

1. North Western Transport Board
Legal Division
Kurunegala.

2. K. M. Ariyadasa Kumarasiri
Pahala Moragane
Moragane.
(Deceased)

1A. Kurunegala Peoplised Bus Service
Kurunegala.

3. Sri Lanka Central Transport Board
200, Kirula Road,
Colombo 5.

DEFENDANTS

AND

R.G.L. de Silva
18-131, Sakwithi Lane
Colombo 5.
Presently of
16A Don Carolis Road,
Colombo 5.

PLAINTIFF-APPELLANT

Vs.

1. North Western Transport Board
Legal Division
Kurunegala.

2. K. M. Ariyadasa Kumarasiri
Pahala Moragane
Moragane.
(Deceased)

1A. Kurunegala Peoplised Bus Service
Kurunegala.

3. Sri Lanka Central Transport Board
200, Kirula Road,
Colombo 5.

DEFENDANTS-RESPONDENTS

BEFORE: Anil Gooneratne J.

COUNSEL: Nigel Hatch P.C with S. Illangage
for the Defendant-Appellant

Respondent absent and unrepresented

ARGUED ON: 16.11.2011

DECIDED ON: 12.01.2012

GOONERATNE J.

Plaintiff-Appellant filed action in the District Court of Kuliyapitiya claiming damages in consequence of injuries suffered by him due to collision between the vehicle (14 Sri 1311) in which he traveled and bus (23 Sri 8802) belonging to the 1st Defendant driven by the 2nd Defendant on or about 8.11.1987. Plaintiff's action was dismissed by judgment dated 12.8.1998 by the learned District Judge. This appeal is against the said judgment. At the hearing before me only the Plaintiff-Appellant was represented, though Respondents were duly noticed by the Registrar of this court previously. Learned President's Counsel made submissions before this court and referred to certain infirmities in the judgment especially the inadequacies referred to by the District Judge pertaining to the sketch plan prepared by the police. Learned President's Counsel also informed court that his brief does not contain the marked documents but nevertheless pursued making submissions before this court.

The learned President's Counsel drew the attention of this court to the following extracts from the judgment, indicative of the driver of the bus not driving the vehicle carefully and that the driver could have seen the

motor car coming from the opposite direction ඉදිරිපත් වී ඇති සාක්ෂි වලින් එතරම් තද වංගුවක් මෙම ස්ථානයේ නැති බැවින් රියදුරු ප්‍රවේසම් සහගතව සහ සෙසු වාහන ගැන සුපරීක්ෂාකාරීව රථය පැදවුයේ නම් මෝටර් රථය නොදැක සිටීමට කිසිදු හේතුවක් ද නැත.

Further another observation made by the learned District Judge as follows who was of the view that the sketch plan had not been properly drawn up.

මෙම න්‍යාය නිවැරදිව යොදා ගැනීමට හැකි වන්නේ එකි සිද්ධියට ආදාල කරුණු මා විසින් සියැසින්ම එම අවස්ථාවේදි දුටු විට හෝ නිසියාකාරව සිද්ධිය සම්බන්ධයෙන් සැලැස්මක් ඉදිරිපත්ව තිබෙන අවස්ථාවේදි පමණක් බව මගේ අවබෝධය වෙයි.

Parties proceeded to trial on 3 admissions and 16 issues. The date of accident and collision admitted. The 1st Defendant was the owner of the bus and the deceased 2nd Defendant was a servant of the 1st Defendant are all admitted facts. Based on the issues Plaintiff need to prove negligence of the 2nd Defendant driver (deceased) to make the 1st Defendant liable in damages. (vicarious liability). On behalf of the Defendants-Respondents issue of contributory negligence and some important defences by way of issues are also suggested by the Defendants-Respondents viz. whether the heirs of the deceased 2nd Defendant would be liable and failure to make the heirs of the deceased 2nd Defendant parties to the action is fatal to the

Plaintiff's case. Though issue Nos. 9, 10, 12 & 15 were tried as preliminary issues the original court decided to decide all issues being mix questions of law and fact at the conclusion of the trial. It is also recorded (proceedings of 19.7.1995) that Plaintiff will proceed only against the 1st & 3rd Defendants.

The learned President's Counsel at the hearing before this court referred to the judgment and attempted to demonstrate that the trial Judge erred in dismissing the plaint, and as such this court has to carefully evaluate the case of each party especially when the Respondent party was absent and unrepresented. Trial Judge has on the question of negligence (re-issue No. 1 & 7) held that it has not been proved. This is something to be concerned and checked with the evidence led at the trial.

The Plaintiff has given evidence and testified inter alia that he was seated behind in the rear seat with his wife and state he saw a bus coming towards Kuliyapitiya and the bus had been driven on the right side and the private car driver in which he was traveling steered the car to the left and was moving towards Hettipola. The driver of Plaintiff vehicle took the vehicle to the left and it suggest that there was a stream where he could take the car to the left only to a certain point in view of the stream. Then he state the collision took place and he was unconscious. Plaintiff's version does not suggest any high speed or any form of reckless driving (except taking the

bus to the right) by the bus driver. The other evidence of Plaintiff is with regard to the aspect of injuries caused to him and the damages suffered by him. Plaintiff never made a statement to the police even at a later stage

I note that in cross-examination of the Plaintiff there are suggestions regarding the negligence of the Plaintiff driver which are denied by the Plaintiff but the vehicle being taken to the left side by his driver or that the bus came towards the right has not been contradicted. The question is in the absence of speed by way of evidence of both vehicles can one come to the conclusion that the bus driver was negligent? Trial Judge observes that the sketch plan cannot be relied upon. This court will not interfere regarding the Judge's views on that aspect. There is hardly enough evidence giving details of the collision. Nor can I find any independent evidence to prove the question of negligence.

Plaintiff and Defendants have closed each others case by reading in evidence documents P1 to P4 (proceedings of 24.3.1998) and V1 – V3 respectively without any objections. When a document is produced in evidence the opposing party has a right to object. If there is no objection the document is admitted.

At this point of this judgment I refer to the case of Cinemas Ltd Vs. Sounderarajan 1998 (2) SLR 16 (1) & (2) ....

(1) In a civil case when a document is tendered the opposing party should immediately object to the document. Where the opposing party fails to object, the trial judge has to admit the document unless the document is forbidden by law to be received and no objection can be taken in appeal – S. 154 CPC (explanation).

(2) Where one party to a litigation leads prima facie evidence and the adversory fails to lead contradicting evidence by cross-examination and also fails to lead evidence in rebuttal, it is a "matter" falling within the definition of the word "proof" in the Evidence Ordinance and failure to take cognizance of this feature and matter is a non-direction amounting, to a misdirection.

If no objection to any particular marked document is taken at the close of a case, when documents are read in evidence, "they are evidence for all purposes of the law" This is the cursus curiae of the original court. This practice has developed in the original court from time immemorial 1981 (1) SLR 18 at pgs. 23 to 24.

There was much emphasis on the part of the Plaintiff-Appellant to draw the attention of this court to the maxim of Res Ipsa Loquitur. This position was never pleaded or raised as an issue in the Original Court. (except in the written submissions). If the plaintiff relied on same an issue should have been suggested, to enable the defendants to give an explanation and give the cause relevant to the accident. In the absence of it being raised, in the Original Court, I am not inclined to accept same. At the best the

Appellate Court could refer to same only if the facts itself speak or apparent from the evidence, provided the Defendant had the opportunity to explain. To permit such a plea for the first time in appeal would be unreasonable/unfair and lead to a travesty of justice especially in the absence of representation of the Respondents though they cannot be excused for their absence in the Appellate Court. To stress this aspect of the case I would refer to a few authorities as the rationale of the rule emerge on the premise Plaintiff is unable to give details of the true cause of the accident. In this instance it is not so. It is more or less a rule of evidence.

Res Ipsa Loquitur

Two views. (i) it is not a rule of law on its own. Ultimate burden of proof rests on the plaintiff.

(ii) It represents a rule of law. But the 2nd view is more practical and fair. Take increasing road accidents for example. The accidents occurs and some times you may find it difficult to identify the person actually negligent. In such situations, depending on the facts and circumstances, this rule may be useful as a rule of law.

The Rationale for a rule of this nature to emerge or to be adopted, was because the plaintiff is unable to give details of the true cause of accident and provide with precise details. In other words the knowledge

of the true cause of accident lies with the Defendant. As such plaintiff only need to prove a prima facie case of negligence. It permits court to infer negligence. It is more or less a rule of evidence.

The Catherine Docks 159 ER 665. Defendant was in possession of warehouse and crane for lowering goods from warehouse to ground. Plaintiff passing the warehouse was injured by the fall of some bags of sugar that were being lowered by the crane. Held, accident itself was prima facie evidence of negligence.

Byrne vs. Boadle 1863 2 H & C 722 – a barrel rolled out of the upper floor of the defendants premises and fell on the plaintiff, a passer by in the street below. The defendant called no evidence. Held, this fact alone without any evidence as to how the accident happened was sufficient to enter judgment for the plaintiff.

Roe vs. Minister of Health 1954 2 WLR 915 at 922(C.A.) - A patient at a hospital became permanently paralysed from the waist downwards after the administering of a spinal anesthetic injection by an Anesthetist who was the servant of the hospital authority Mottis L.J of the view that it was for the defendant hospital to explain how the accident occurred.

Saffena Umma vs. Siddek 37 NLR 25. - The defendant's bus suddenly left the road, mounted the pavement, and knocked down a boy seated on the steps of a house adjoining the pavement. The only explanation given by the defendant's driver was that the steering rod of the bus broke. It was held that the defendant has no discharged the burden of giving a reasonable explanation.

Cabral vs. Alberatne 57 NLR 368. - A motor truck belonging to the defendant ran off the road into the plaintiff's house on the side of the road. Defendant merely stated that the steering rod got out of its place. He did not say how and why the steering rod came out of its place. He did not say that the

vehicle was serviced regularly or serviced at all. It was held he had not discharged the burden of giving a reasonable explanation.

More often than not the defendant is as much in the dark as the plaintiff as to how the accident happened. He may, instead of giving an explanation, show that he took all reasonable precautions to prevent the occurrence of the accident.

Barkway vs. South Wales Transport Co. Ltd. 1950 1 AER 392 (HL) - A motor bus belonging to the defendant went off the road when a tyre burst killing the plaintiff's husband. The tyre burst was caused by an impact fracture of the tyre from a severe blow which does not leave a mark on the outside of the tyre, but results in a fracture inside the tyre. The defendant led evidence to show that all its tyres were examined twice a week by an expert fitter under its employment. It did not however instruct its drivers to report heavy blows to tyres likely to cause impact fractures. The House of Lords held that it was the duty of the defendant Co. to have instructed their drivers to report such heavy blows, and they had failed to do it. In the circumstances the defendants had not discharged the burden on showing that they had taken all reasonable steps to prevent the accident.

The above examples and taken together with the maxim of Res Ipsa Loquitur cannot be made use of as regards the case in hand. Though the maxim is adopted I cannot haphazardly apply it to this case.

On the question of damages I wish to observe that traditional rules are applicable but we have to look into the modern sophisticated social environment and human behavior. The court should consider granting punitive damages whenever possible as a deterrent particularly in road

accident cases etc. This kind of compensation has been available since 18th century in the English Law. Before considering damages let me also refer to another case.

Perera vs. Gamini Bus Co. Ltd. LI NLR 328...

An omnibus stopped at a halting place to enable passengers including plaintiff to alight and the plaintiff was later found run over by the rear wheel of the bus.

Held, that the maxim res ipsa loquitur applied and that in the absence of an explanation the defendant was liable.

Once issues are raised pleadings recedes to the background. In the absence of Defendant being called upon or giving an explanation where the maxim had not been urged in the Original Court, the Appellate Court should not rule on it.

The other aspect is the question of negligence. Though the learned President's Counsel attempted to blame the Original Court judgment, I do not think by such remarks alone is sufficient to fault the judgment in it's entirety. There is no proper description of evidence on negligence of the deceased 2nd Defendant driver. This trial does not seem to have elicited much evidence to prove negligence of the 2nd Defendant. There is no evidence at all on the speed of both vehicles, though Defendants witness state 30 M. P. H., he does not described all that in his statement marked V1. In that statement (V1) he does not go beyond 10 M. P. H. No

reliance could be placed on speed. Whether it be 30 M. P. H. or 10 M. P. H. it does not indicate reckless driving other than slow speed. Plaintiff's wife though did not give evidence in court her statement (V3) had been admitted in evidence. (I have stated above how it becomes evidence for all purposes)

In V3 it is stated by Plaintiff's wife when the car was taking the bend I notice the bus coming from the direction of Hettipola towards Kuliyapitiya at a slow speed. My driver too was going very slowly. My car was going at a speed of about 5 to 10 M.P.H. Suddenly the car knocked on the bus and got thrown to the side. The car is damaged on the front portion. The engine, radiator, the cell, the right side light the air cooler, bonnet, the steering, mud guard, buffer and some other parts and two seats damaged.

This court get the impression that the driver of the Plaintiffs vehicle knocked on the bus. He may have lost control. There had been a slight shower or was drizzling as stated in V3, at the relevant time. The statement in it's entirety does not suggest negligence of the 2nd Defendant. Nor provide some clue to infer the above maxim. It is a brief statement without prior details.

One cannot haphazardly apply the maxim of Res Ipsa Loquitur. Nor can this court come to a conclusion that the 2nd Defendant had not traveled on the correct path and it resulted in a collision. Court should not

presume or surmise events in the absence of strong direct and or circumstantial evidence, merely to apply the maxim. This court is not convinced at all of the arguments put forward by learned President's Counsel. The circumstances suggested does not lead court to draw inferences favourable to the Plaintiff. Learned District Judge may have erred on a few matters, but this court would not be in a position to interfere with all primary facts and disturb the findings of the District Judge. 1993 (i) SLR 119. It is the District Judge who heard the evidence, caged the witnesses and took a close look at the actions and reactions of the witness, when questioned by the opposing counsel. The trial Judge's conclusions that the case lacks evidence of negligence is a finding that should not be disturbed although some aspects of the judgment of the Original Court could be criticized.

There is no evidence of any mechanical defect in the vehicles involved in the accident. Nor can I find a sudden unexplainable event or a dangerous situation that led to a collision, unable to be explained by parties to the suit. No doubt the Plaintiff has suffered injuries. That alone would not give rise to a cause of action unless evidence of negligence could be demonstrated, for which the 2nd Defendant could be held liable. It is very

unfortunate that this court and the court below cannot grant any relief to the Plaintiff-Appellant.

In all the above circumstances I am reluctantly compelled to refuse and reject this appeal. The judgment of the District Judge is affirmed. Appeal dismissed without costs.

Appeal dismissed,

JUDGE OF THE COURT OF APPEAL