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

In the matter of an application to receive and admit fresh evidence under and in terms of Section 773 of the Civil Procedure Code

1. Hewage Don Ariyadasa

2. Vithanage Dona Dayawathie
both of Sirikandura Road
Sandasirigama, Matugama.

Plaintiff-Appellants

Vs

C.A. APPEAL NO.794/98 (F)
D.C.KALUTARA CASE NO.3590/MR

1. D.M.D.Gamini
No.314, Hokandara Road
Hokandara.

2. H.A.D.Fonseka
No.108, Fonseka Road, Panadura.

Defendant-Respondents

BEFORE : **K.T.CHITRASIRI, J.**

COUNSEL : Lasitha Chaminda with Mihiri Abeyrathne
Attorneys-at-Law for the 1st & 2nd Plaintiff-Appellants

Deeptha Perera for the 2nd Defendant-Respondent

ARGUED ON ; 13TH DECEMBER 2012

DECIDED ON : 18TH JANUARY 2012

CHITRASIRI, J.

The plaintiff-appellants (hereinafter referred to as plaintiffs) filed this appeal consequent upon the judgment dated 15.10.1998 of the learned District Judge of Kalutara. By the said judgment, the plaintiffs' action filed against the 2nd defendant-respondent (hereinafter referred to as the 2nd defendant) was dismissed whilst deciding against the 1st defendant-respondent as prayed for by the plaintiffs. In that judgment it was also held that the plaintiffs had failed to prove the ownership of the vehicle bearing No.29 Sri.7637 to make the 2nd defendant liable. The wordings in the judgment read thus:

> "පැමිණිලිකරුගේ සාක්ෂියෙන්, 2 වැනි විත්තිකරු මෙම වාහනයේ අයිතිකරු බව දැන ගත්තේ පොලිසියෙන් බව පවසන්නට යෙදී ඇත. පැමිණිල්ලෙන් කැඳවූ පොලිස් නිළධාරීගේ සාක්ෂියෙන් ඒ සම්බන්ධයෙන් හෙළිදරව් කර ගැනීමට පැමිණිල්ලෙන් ක්‍රියා කර නැත. වාහනය ලියා පදිංචි කර ඇත්තේ 2 වැනි විත්තිකරුගේ නමින් බව සනාථ කිරීමට මෝටර් රථ වාහන දෙපාර්තමේන්තුවේ නිළධාරියකු මගින් අවශ්‍ය ලේඛන ඉදිරිපත් කර සාක්ෂි මෙහෙයවීමට පැමිණිල්ල ක්‍රියා කර නැත."

Being aggrieved by the said judgment, plaintiffs filed this appeal seeking permission to produce a certified copy of the registration certificate of the vehicle bearing No.29 Sri.7637 alleging that the 2nd defendant is the owner of the said vehicle.

The said request of the plaintiffs is clearly stated in the prayer to the petition of appeal and the same is re-produced herein below.

"WHEREFORE, the plaintiffs-appellants pray that YOUR LORDSHIPS' COURT be pleased:-

a) to grant permission and leave, to produce a certified copy of the registration of the vehicle bearing No.29 Sri.7637; and
b) on that basis answer issue No.1 in favour of the plaintiffs;
c) to amend the answer to issues Nos.1 and 2 and enter judgment for the plaintiffs against the 2nd defendant;
d) to grant costs;
e) to grant any other and further relief as YOUR LORDSHIPS' COURT may deem just and fair in the circumstances."

Accordingly, it is evident that the plaintiffs' desire is to obtain permission of this Court to lead fresh evidence in order to establish that the 2nd defendant is the owner of the vehicle 29 Sri 7637 for the purpose of making him liable. Indeed, it had been the contention of the Counsel for the plaintiffs right through out until the matter was fixed finally for argument on 13.12.2012.

Having dealt with the application of the plaintiffs, I will now briefly refer to the facts of this case. Initially this action was filed by the plaintiffs in the District Court of Kalutara claiming damages jointly and severally from the 1st and the 2nd defendants. The action was to claim damages from them for the injuries caused to the two plaintiffs due to the negligent driving of the 1st defendant that led to the collision of the vehicles bearing No.29 Sri.7637 driven by him and the motor cycle bearing No.81 Sri 2984 rode by the 1st plaintiff. The 2nd defendant was made a party with the intention of making him liable vicariously; on the basis that he is the employer of the 1st defendant driver at

the time of the accident, him being the owner of the vehicle bearing No.29 Sri.7637. The case against the 1st defendant was taken up *ex parte* and the judgment was entered against him accordingly as prayed for by the plaintiffs. As stated above, the 2nd defendant had been made a party in order to make him liable on the basis that he is the employer of the 1st defendant. Had the plaintiffs been successful in establishing those facts, namely the 1st defendant acted negligently in the course of employment under the 2nd defendant; both the defendants would have been made liable for the wrongs committed by the 1st defendant. **(McKERRON LAW OF DELICT, SIXTH EDITION at Page 85).**

The issue No.1 suggested by the plaintiffs is to prove that the 2nd defendant is the registered owner of the vehicle bearing No.29 Sri.7637. The Issue No.8 suggested by the 2nd defendant also is directed to show that the 2nd defendant is not the owner of the said vehicle. Therefore, it is clear that the matter as to the ownership of the vehicle had been put in issue in the District Court, in order to establish the master servant relationship between the two defendants. The evidence of the 1st plaintiff to this effect is as follows:-

ප්‍ර : තමන් සත්‍ය වශයෙන්ම දන්නේ නැහැ මේ අනතුර සිදු වන අවස්ථාවේදී එම වාහනයේ අයිතිකරු කවුද කියා?

උ : නැහැ. .....

ප්‍ර : තමන් අයිතිකරු කියා තමන් සොයා ගත්ත පුද්ගලයා මේ නඩුවට පාර්ශවකරුවෙක් කලේ ඇයි?

උ : පොලිසියෙන් දැන ගත්තා. .....

ප්‍ර : එහෙම නම් 1 වන විත්තිකරු රියදුරු, තමන් කියන දෙවන විත්තිකරු කියන අයිතිකරු යටතේ වැඩ කලා කියා තමන් හිතන නිසා තමයි, තමන් මේ නඩුවේ විත්තිකරුවෙක් විදිහට දෙවන විත්තිකරුව නම් කලේ?

උ : ඔව්.

ප්‍ර : තමන් සොයා බැලුවේ නැහැ. ඇත්තටම පල වන විත්තිකරු දෙවන විත්තිකරු යටතේ වැඩ කරනවාද කියා?

උ : නැහැ.

ප්‍ර : ඒ වාගේම මේ වාහනයේ අනතුර වන අවස්ථාවේදී, අයිතිකරු වෙන කෙනෙක් වගේ නම්, පලවන විත්තිකරු වන රියදුරු, මේ අද අධිකරණයේ ඉන්න දෙවන විත්තිකරුගේ සේවකයෙක් වෙන්න බැහැ?

උ : උත්තරයක් නැත. .....

The evidence mentioned above does not support to establish the ownership of the vehicle involved in the accident. Be that as it may, there was no evidence whatsoever was led before the District Judge to establish that the 1st defendant was an employee of the 2nd defendant at the time the accident occurred. Having considered the totality of the evidence learned District Judge held that the plaintiffs have failed to establish that the 2nd defendant is the owner of the vehicle bearing No.29 Sri.7637 at all material times. He has further said that the plaintiffs did not even call any officer from the Motor Traffic Department or from the Police to show that the 2nd defendant is the registered owner of the vehicle. Not even an attempt had been made to produce in evidence the registration certificate of the vehicle concerned. Therefore, it is abundantly

clear that not an iota of evidence is available to establish the wrong, alleged to have committed by the 1st defendant, had been within the scope of his employment under the 2nd defendant. Accordingly, it is clear that the learned District Judge is correct when he decided to dismiss the claim of the plaintiffs made against the 2nd defendant.

Having realized this position, the plaintiffs have filed this appeal to obtain another opportunity to produce the registration certificate of the vehicle bearing No.29 Sri.7637, probably with the intention of establishing the master servant relationship between the two defendants. Such a proposition is evident by the aforementioned prayer to the petition of appeal.

Now that the matter before the Original Court had been concluded having gone through a full scale trial and also having afforded every opportunity to produce the evidence of the respective parties, I do not see any reason to give another chance for the plaintiffs to correct their mistakes or to overcome their shortcomings. Such a directive will prejudice the rights of the 2nd defendant as well.

The scheme of the Civil Procedure Code is not designed to give such an opportunity at the time the appeal is being argued. However, it must be noted that Section 773 of the Civil Procedure Code may be made use of to afford such an opportunity while writing a judgment in an appeal. **However, such a decision could only be made on a very rare occasion under extraordinary circumstances.** Therefore, it is my considered view that the circumstances of the case at hand do not permit for such a directive as contended by the learned Counsel for the plaintiffs.

Indeed, the learned Counsel for the plaintiffs on the day of the argument namely on 13.12.2012 informed Court that he is not pursuing the application of the plaintiffs to lead fresh evidence before the District Court even though it was his contention all this time. In the circumstances, this Court is not inclined to allow the reliefs prayed for in the petition of appeal filed by the plaintiffs.

However, on the day of the argument, learned Counsel for the plaintiffs took up the position that it is necessary by law, to presume that the 2nd defendant is the registered owner at the time of the accident. This contention was advanced by him relying upon paragraph 4 of the answer filed by the 2nd defendant. In that paragraph 4, it is stated that the 2nd defendant had been the owner of the vehicle bearing No.29 Sri.7637 until 20.4.1989. Said Paragraph 4 of the answer reads as follows:

> "4. තව දුරටත් පිළිතුරු දෙමින් මෙම විත්තිකරු කියා සිටින්නේ ඔහු විසින් මෙම වාහනය 1989 අප්‍රේල් 20 වන දින මෙම වාහනය ඔහු විසින් එවි. ගුණරත්න ප්‍රනාන්දු, පදිංචිය, 150/9, ශ්‍රී මහා විහාර පාර, පානදුර. යන ලිපිනයේ පදිංචි අයට එම්.ටී. 6 පෝරමය නිසි ලෙස පුරවා අත්සන් කොට බාර දී ඇති බවත්ය."

Relying upon the said averment in the answer, learned Counsel for the plaintiffs argued that it is the duty of the 2nd defendant to establish that he is not the owner of the vehicle 29 Sri 7637 at the time of the accident. In other words his position was that the 2nd defendant having accepted that he was the owner of the vehicle up to a certain date, the burden shifts on to him (2nd defendant) to prove the negative.

It is a cardinal principle that the duty of proving a case brought against a defendant lies on the plaintiff in that action unless the law provides for the other way

around. Therefore, the aforesaid argument advanced by the learned Counsel for the plaintiffs is not at all tenable. Furthermore, if such a proposition is correct, the plaintiffs should not have suggested the issue No.1, taking over the burden of proving the ownership of the vehicle. Admittedly, he has failed to do so and accordingly the learned District Judge has correctly answered the issue against the plaintiffs.

Moreover, it is the law that the pleadings go to the background once the issues have been framed. This position had been established in the case of **Hanaffi v. Nallamma (1998) 1 SLR at 73**. In that decision G.P.S.DE.Silva, C.J. held:

> *"once issues are framed the case which the court has to hear and determine becomes crystallized in the issues and the pleadings recede to the background".*

In the light of the above authorities, it is my considered view that the learned Counsel for the plaintiffs cannot rely on the averments in the answer disregarding the grounds of appeal in this instance. Moreover, it will lead to a confusion of the entire process laid down in the Civil Procedure Code. Also, such an attitude would amount to formulate a case different to the case in which the trial had commenced on particular issues. It also may amount to make out a fresh case than the one already before the trial judge. Accordingly, I am not inclined to interfere with the decision of the learned trial judge considering the averments in the answer at this late stage.

For the aforesaid reasons, I decide to dismiss this appeal with costs.

Appeal is dismissed with costs.

JUDGE OF THE COURT OF APPEAL