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

CA 947/98(F)
D.C. Horana Case No. 5299/L

1. Metiwalage Newton Bandarawaththa
   Horana.

2. Sri Lanka Transport Board
   No. 200, Kirula Road,
   Colombo 5.

Defendants - Appellants

-Vs-

Ihaleck Kankanamalage Vasantha Kumarathilaka
"Elsmore"
Ingiriya.

Plaintiff - Respondent (Deceased)

1. A.M. Nanda Jayalath Abewickrama
   No.1, Dharmarama Road,
   Ingiriya.

2. I.K. Heshan Pradeep Kumarathilake
   No.1, Dharmarama Road,
   Ingiriya.

3. I.K. Avin Binuka Kumarathilake
   No.1, Dharmarama Road,
   Ingiriya.

4. I.K. Lasan Thanuka Kumarathilake
   No.1, Dharmarama Road,
   Ingiriya.

Substituted Plaintiff - Respondent

CA 947/98(F) D.C. Horana Case No. 5299/L

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

Counsel : U.M.D. Nayomi with Priyantha Rajapakshe for the 2nd Defendant-Appellant

Mrs. M.Premachandra for the Plaintiff-Respondent

1st Defendant-Appellant is absent and unrepresented

Argued &

Decided on : 12.11.2013

K.T. CHITRASIRI, J.

This appeal has been filed jointly by the two defendants. However, the 1st defendant-appellant has not paid the brief fees though he was directed to do so. Therefore, acting under Rule 13(b) of the Supreme Court Rules, appeal of the 1st defendant-appellant is dismissed. Further it must be noted that the Counsel who appeared for the 2nd defendant-appellant also has marked appearance for both the appellants in many occasions in this Court even though the Counsel who is appearing today has not marked appearance for the 1st defendant-appellant.

Counsel for the 2nd defendant-appellant moves for a date, submitting that he was retained only yesterday. The date of argument was fixed to suit the

Counsel on the 02.09.2013 when the matter was mentioned to effect the substitution. Therefore, it is seen that a clear date had been given for the 2nd defendant-appellant to retain a Counsel having given it sufficient time. Hence, application to have this matter re-fix is refused.

This is an appeal seeking to set aside the judgment dated 30.06.1998 which was delivered on 17.07.1998. By that judgment learned District Judge decided the case in favour of the deceased plaintiff-respondent (hereinafter referred to as the Plaintiff) and awarded damages as prayed for in the prayer to the plaint dated 28.10.1993.

Learned Counsel for the substituted plaintiff-respondent submits that this appeal had been filed out of time. He further submits that the months of July and August consist of 62 days and therefore this appeal had been filed beyond 60 days becoming it a violation of Section 755(3) of the Civil Procedure Code. Admittedly, judgment had been delivered on the 17.07.1998 and the petition of appeal had been tendered on 16.09.1998. Learned Counsel for the 2nd defendant-appellant too concedes that those two months consists of 62 days and therefore he has nothing to submit on that issue. Accordingly, this appeal should stand dismissed for non-compliance of Section 755(3) of the Civil Procedure Code. This position in Law had been discussed by **Mark Fernando, J. in Brewary Company Ltd Vs. Jax Fernando. [2001 (1) S.L.R. 270]**

In the petition of appeal, the appellants have stated that the learned District Judge has misdirected himself when he decided that the plaintiff has

failed to prove that the 2nd defendant was the registered owner of the bus involved in the accident. The other ground of appeal is in respect of calculation of the quantum of damages.

This is an action to claim damages as a result of the damages caused to the premises of the plaintiff. The 1st defendant in his evidence has admitted that he drew the vehicle involved in the accident that caused damages to the property of the plaintiff and that the bus he drew belonged to the C T B. [vide proceedings at pages 105, 106 and 107 of the appeal brief]

The liability on the part of the 2nd defendant-appellant can only be established by proving that the 1st defendant had been working within the scope of employment under the 2nd defendant-appellant. The driver himself has given clear evidence that he was an employee of the 2nd defendant and he had been paid by the 2nd defendant-appellant for the services rendered to it by him. (vide proceedings at pages 102 & 105 of the appeal brief). Therefore, it is not necessary to establish the ownership of the vehicle driven by the 1st defendant-appellant to seek damages from the 2nd defendant-appellant. Therefore, it is correct to make the 2nd defendant-appellant liable for the acts of the 1st defendant-appellant performed within the scope of his employment though the registered owner of the bus has not been established by producing the Certificate of Registration of the vehicle though it is mentioned as one of the grounds for the appeal.

The other issue is in respect of the quantum of damages awarded by the learned District Judge. Witness who gave evidence on behalf of the appellants themselves namely, Kulatunga Silva has stated in his evidence-in-chief that he assessed the damages caused to the property to the value of Rupees Two Hundred Thousand (Rs.200,000/-). Learned District Judge having considered his evidence has concluded that such a value should not be the sole criteria in assessing damages. Accordingly, he has considered the evidence of Chandradasa Ratnayake, who had prepared the document marked P3 (vide proceedings at page 39 of the appeal brief) and has taken into consideration the other expenses mentioned therein to quantify the damages claimed by the plaintiff. Obviously, damages should not be restricted to the value of the property that was damaged, but it should also include the expenses incurred by him to restore the property including the house that was damaged.

In the circumstances I do not see any wrong in the judgment of the learned District Judge. Therefore, I am not inclined to interfere with the findings of the learned District Judge.

For the aforesaid reasons this appeal is dismissed with costs.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

NR/-