

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

1. Hapuarachchilage Dayarathne
- 2.
3. Kasthuriarachchilage Jayawathie
Both of Ingiriyawatta, Theligama.

Plaintiffs

CA 370/2000(F)

D.C. Avissawella – 20680/M

Vs.

1. Seneka Permin Fernando
2. Kelani Vally Plantation Ltd
Both of No. 400, Deans Road,
Colombo 10

Defendants

AND NOW BETWEEN

1. Seneka Permin Fernando
2. Kelani Vally Plantation Ltd
Both of No. 400, Deans Road,
Colombo 10

Defendant – Appellants

Vs.

1. Seneka Permin Fernando
2. Kelani Vally Plantation Ltd
Both of No. 400, Deans Road,
Colombo 10

Plaintiff - Respondents

BEFORE: M.M.A. Gaffoor J

S. DEVIKA DE LIVERA TENNEKOON J

COUNSEL: Dr. Sunil Cooray on the instructions of Buddhika
Gamage for the Defendant – Appellants
Nalini Jayathilake for the Plaintiff – Respondents

ARGUED ON: 26.10.2016

WRITTEN SUBMISSIONS – Plaintiff – Respondents - 14.12.2016

Defendant – Appellants – 13.01.2017

DECIDED ON: 23.03.2017

S. DEVIKA DE LIVERA TENNEKOON J

The Plaintiff – Respondents (hereinafter sometimes referred to as the Plaintiffs) filed action by plaint dated 16.01.1998 in the District Court of Avissawella against the Defendant- Appellants (hereinafter sometimes referred to as the Defendants) for a sum of Rs. 200,000/- as damages for causing the death of their 10 year old daughter as a result of the negligent driving of the 1st Defendant.

The Defendants filed Answer dated 26.02.1999 and denied the allegations of the Plaintiffs and moved for a dismissal of the Plaint on the basis *inter alia* that the 1st Defendant was not the driver of the vehicle which caused the aforesaid

accident and as such that the 1st Defendant never caused such accident and further that the 2nd Plaintiff and the deceased daughter were guilty of contributory negligence.

Trial commenced on 30.09.1999 and 2 admissions were recorded by the parties and the Plaintiffs raised 7 issues and the Defendants raised 6 issues. The evidence was led on behalf of the Plaintiffs including that of the 2nd Plaintiff and the Plaintiffs closed the case marking documents P1 – P7.

Thereafter the 1st Defendant gave evidence on behalf of the Defence and upon conclusion of his evidence the Defence sought to lead the evidence of the purported driver of the vehicle i.e. one A.K. Rupasinghe.

At this stage it transpired that the said A.K. Rupasinghe was not listed in the list of witnesses and documents on behalf of the Defence, moreover, that the Defence has failed to tender a list of witnesses and documents as per the provisions of Section 121, and as such the Defence made an application under Section 175 of the Civil Procedure Code to allow for the evidence of the said A.K. Rupasinghe.

The learned District Court Judge pronounced the order dated 25.10.1999 and refused the application of the Defence to lead the evidence of the said A.K. Rupasinghe and therefore the case for the Defence was concluded.

After both parties tendered their respective written submissions the learned Trial Judge delivered judgment on 14.06.2000 in favour of the Plaintiffs.

Being aggrieved by the said judgment the Defendants preferred the instant appeal to set aside the judgment dated 14.06.2000 and for a dismissal of the Plaint dated 16.01.1998.

The main contention of the Defendant is that natural justice has been denied to the Defendants since the Defence was not allowed to call the aforementioned A.K. Rupasinghe who allegedly caused the accident. The Defendants contends that the learned District Judge has totally disregarded the Defendant's story. The 1st Defendants story is that it was A.K. Rupasinghe who drove the vehicle at the time of incident and not the 1st Defendant.

It is clear that after a careful reading of the impugned judgment of the learned District Court Judge that the findings of the said judgment were arrived at, after a careful and meticulous evaluation of the evidence presented before Court. This Court concurs with the order of the learned District Judge to disallow the testimony of the said A.K. Rupasinghe for the reasons stated in order dated 25.10.1999 and if the Defendants were aggrieved by the said order they should have taken steps to remedy that at that juncture.

The Bus driver and conductor who gave evidence on behalf of the Plaintiff has clearly stated in evidence that the said A.K. Rupasinghe was on a bus at the time material to the incident and further that they were puzzled to hear the news that the said A.K. Rupasinghe was wanted in connection to a vehicle accident when the said A.K. Rupasinghe was with them moments before the said accident.

The learned Counsel for the Defendants submit that the learned District Judge has totally disregarded 'V1' (journal entry dated 13.08.1997) which reflects the accused in the Magistrates Court case as the said A.K. Rupasinghe.

I do not find any merit in such submissions as a cursory reading of the journal entries reveal that he said A.K. Rupasinghe was released by 23.10.1998 and the Magistrates Court continued against the 1st Defendant who was named as the 2nd

Suspect. Further, the Journal Entries specifically states that the said A.K. Rupasinghe is not a suspect in this case.

The Defendants further contend that the 2nd Plaintiff was guilty of negligence. It is noted that no issue has been raised to this effect although the Defendants answer dated 26.02.1999 alleges that the said accident was caused by the negligence of the 2nd Plaintiff. This Court is not inclined to agree with this contention and finds that the learned District Court Judge has, after a careful consideration and evaluation of the evidence and applicable law, arrived at the correct conclusion that it was the direct Negligence of the 1st Defendant which caused the death of the 10 year old minor child of the Plaintiff's which is evidenced by the Police Observation Report marked as P6a which places the vehicle on the wrong side of the road at the time of incident.

This Court finds that the learned District Court Judge has accurately analysed the facts elucidated before Court and has given adequate reasons for the findings pronounced by the judgment dated 14.06.2000.

Therefore, this Court finds no reason to interfere with the findings of the learned District Judge and dismiss the instant appeal with costs fixed at Rs. 15,000/-. Further the Rs. 200,000/- as prayed for in prayer (a) of the Plaint is granted and shall be paid together with legal interest from the date of pronouncement of the judgment i.e. 14.06.2000.

Appeal dismissed with costs.

Judge of the Court of Appeal

M.M.A. Gaffoor J

I Agree.

Judge of the Court of Appeal