11/1956

No. 26 of 1955.

In the Privy Council.

ON APPEAL

FROM THE SUPREME COURT OF CEYLON.

BETWEEN

THE TRUST COMPANY LIMITED . (Defendant) *Appellant*

AND

DR. T. H. I. DE SILVA . . . (Plaintiff) *Respondent.*

Case for the Appellant.

RECORD.

1. This is an appeal from a Judgment and Decree of the Supreme Court of Ceylon, dated the 29th October, 1953, setting aside a Judgment and Decree of the District Court of Colombo, dated the 8th March, 1951, whereby an action instituted by the present Respondent (hereinafter also called " the Plaintiff ") against the Appellant (hereinafter also referred to as " the Company ") for the recovery of a sum of Rs.50,000/- as damages for injuries sustained in an accident to a car which was alleged to belong to the Company and to be driven negligently by its employee, was dismissed, with costs. pp. 46, 52. pp. 36, 44.

Allowing the appeal the Supreme Court directed Judgment to be entered in favour of the Plaintiff for Rs.50,000/- with costs in both Courts.

2. The Company transacts insurance business in Ceylon, its principal place of business and registered office being in Colombo. Part of this insurance business comes to the Company through Canvassers who are paid a commission in respect of the business introduced but no salary. The Canvassers are free to engage in other occupations and some of them do.

Supervising and controlling the Canvassers are Field Organisers or Agents who, unlike the Canvassers, are employees of the Company in receipt of salaries. Field Organisers however can engage their own Canvassers and in such a case a Field Organiser receives an " over-riding commission " on any business brought in by his own Canvasser.

On introducing life insurance business to the Company a Canvasser arranges for the medical inspection of a proponent by any doctor of his (the Canvasser's) choice. The Company expects Canvassers to engage doctors who have practised medicine for at least three years. The Company pays the doctor's fee at a standard rate which it has fixed after taking into account such items as transport, etc.

3. In the present case a Canvasser (Holsingher) arranged with a Colombo doctor (the present Respondent) for the medical examination of proponents in Jaffna—about 248 miles from Colombo. Subsequently Holsingher, the Respondent, and one Perera (a Field Organiser who employed Holsingher) all decided to travel together from Colombo to Jaffna in a car which was registered in the Company's name but which, in fact, was owned by Perera who had bought it with money loaned to him by the Company in April, 1948, the registration in the Company's name being only a measure of security until repayment of the loan. From the date of the purchase of the car it had been used exclusively by Perera under the terms of an agreement in writing made 30th July, 1948, between him and the Company. When it set out on its journey from Colombo for Jaffna, on the 27th April, 1950, the car, which Perera used for both private and business purposes, contained also its usual driver—there being thus four persons in all.

D. 2., pp. 59, 60.

En route, the car ran off the road and crashed into a tree causing injuries to the Respondent. At the time of the accident Holsingher was driving with Perera's consent.

The Respondent instituted this action against the Company claiming Rs.50,000/– as damages for injuries caused to him by the negligent driving of an employee (Holsingher) of the Company. Giving due consideration to the mixed questions of law and fact involved the learned District Judge dismissed the action. He was of opinion that, in relation to the accident, the relationship between Holsingher and the Company and between Perera and the Company was not, in either case, that of master and servant so as to impose upon the Company liabilities for the acts of either. And, he expressed the view that in suing the Company the Respondent had sued the wrong party.

On appeal the Supreme Court held that while Holsingher could not, in relation to his functions as a Canvasser, be regarded as a servant of the Company, Perera *qua* Field Organiser was a servant of the Company, that the Court below had misdirected itself on this point, and that throughout the journey the car was, " through Perera's instrumentality," used on the business of the Company whose liability, upon the facts, had been established.

4. The main question for determination on this appeal is whether, on the evidence as it was presented by both sides in the District Court, the District Court was right in its view that neither Perera nor Holsingher could, in relation to the accident, be said to be a servant of the Company so as to make the Company liable for their acts or whether the decision of the District Court was so palpably wrong as to have merited reversal on appeal. Further, even assuming (contrary to the Company's contentions) that Perera was at the material time a servant of the Company, whether the fact that Perera had permitted Holsingher to drive the car constituted such a relationship between him and the Company as to render the latter vicariously liable for the negligent driving of Holsingher.

5. The facts, briefly stated, are as follows :—

By his Plaint, dated the 12th June, 1950, filed in the District Court of Colombo, the Respondent claimed from the Company the sum of Rs.50,000/– as damages for injuries which, he alleged, were suffered by him in a motor car accident in the following circumstances :— pp. 6–7.

" 3. At all times material to this action the Defendant Company engaged the services of the Plaintiff to proceed to Jaffna to examine certain prospective insurers and on or about 27.4.1950 while the Plaintiff was being conveyed in motor car No. CY-8850, belonging to the Defendant Company, and driven by an employee of the Company acting within the scope of his employment and for the benefit of the Company, the said car ran off the road about three miles this side of Anuradhapura causing the Plaintiff several serious injuries. p. 6, ll. 29–36.

" 4. The Plaintiff was so injured by reason of the rashness and/or negligence of the said driver of the Defendant. The said rashness and/or negligence consisted in the driver of the said car falling asleep while driving. p. 6, ll. 37–40.

" 5. By reason of the aforesaid rash and/or negligent act of the driver of the Defendant the Plaintiff has suffered loss and damage and pain of body and mind. The Plaintiff assesses the total damages so sustained by him in the sum of Rs.50,000/–." p. 7, ll. 1–4.

6. By its Answer, dated the 25th August, 1950, the Company denied liability and pleaded as follows :— pp. 7–8.

" 2. . . . the Defendant admits that the Plaintiff went to Jaffna on the day in question for the purpose of examining certain prospective insurers in the Northern Province for the Defendant Company but the Defendant denies that car No. CY-8850 belonged to the Defendant and/or that the said car was at any time driven by an employee of the Defendant . . . p. 7, l. 35 to p. 8, l. 1.

* * * * *

" 4. Further answering the Defendant states— p. 8, ll. 6–17.

(A) that the said car was bought by one James Andrew Perera and registered in the name of the Defendant by way of security for the repayment of a sum of money advanced to the said J. A. Perera for the purchase of the said car. The said car was at all material times in the control and possession of the said James Andrew Perera ; and the driver referred to in paragraph 3 of the Plaint was under the employ of the said James Andrew Perera.

"(B) the Plaintiff had to proceed to the residences of the prospective insurers at his own cost and expense and at Plaintiff's request the said car together with a driver was loaned to the Plaintiff by the said James Andrew Perera in order that Plaintiff's travelling expenses might be reduced as much as possible."

pp. 8, 9, 23. 7. Issues framed in the suit were answered thus by the learned District Judge in his Judgment hereinafter referred to in detail (see paragraphs 13 to 16, *infra*) :—

p. 8, ll. 34–36. " 1. Were the injuries sustained by the Plaintiff on or about the 27th April, 1950, due to the negligence of the person driving Car No. CY-8850 ? "

p. 43, l. 32. *Answer :* " Yes. Negligence of Holsingher."

p. 9, ll. 3–4. " 2. (A) Was the said car at the time being driven by an employee of the Defendant Company ?

p. 23, ll. 36–40. " (B) Was the said employee acting in the course of and within the scope of his employment and for the benefit of the said Company ? "

p. 43, l. 33. *Answer :* (A) " No."

p. 43, l. 34. (B) " No."

p. 9, ll. 8–9. " 3. If Issues 1, 2 (A) and 2 (B) are answered in the affirmative to what damages is the Plaintiff entitled ? "

p. 43, l. 35. *Answer :* " As claimed."

p. 9, ll. 13–14. " 4. Was the Defendant Company the owner of the said car on the date in question ? "

p. 43, l. 36. *Answer :* " Yes. The nominal owner. The actual owner being James Perera."

p. 9, l. 15. " 5. If not, can Plaintiff maintain this action ? "

p. 43, ll. 37–38. *Answer :* " I think Plaintiff can maintain the action if Issues 1 and 2 had been answered in favour of the Plaintiff."

It is to be observed that no issue was directed to the question nor was it contended that Perera in permitting Holsingher to drive the car was negligent or that Holsingher was not a proper and competent person as a driver.

8. The said Answers to Issues were arrived at by the learned District Judge after a careful consideration of the oral evidence produced by both sides, relevant portions of which are referred to below.

Giving evidence in support of his case, the Plaintiff said, in examination-in-chief :—

p. 11, ll. 27–39. " I was examining cases for this particular Insurance Company from somewhere in November or December, 1949. I was paid at the rates of Rs.15 and Rs.13 depending on the amount of the policy. Most of the persons I examined were round about Colombo. I have examined cases from outside Colombo also . . . I have my own car . . . this is the car I use for my own work and business. The Defendant Company got me to examine people outside Colombo. On those occasions these two people, Perera and Holsingher, came for me. They brought a car and took me out for the examination. They always brought me that car . . .

" I first heard of the trip to Jaffna from Holsingher. He wrote p. 12, ll. 1–3.
to me a letter dated 19th April, 1940, . . . which I produce marked
P2 . . . Holsingher and Perera came for me " (on the 27th April, p. 12, ll. 8–12.
1950) " in the same car CY-8850. I got into the car with them to
go to Jaffna to examine the case. When I was paid Rs.15/– a case
I did not have to make my own arrangements to go to Jaffna . . .
On this occasion they came in the car at 1.30 a.m. . . . The accident p. 12, ll. 23–26.
took place in the early morning. At that time Holsingher was
driving."

10 In cross-examination, the Plaintiff said :—

" Holsingher is a canvasser. I know that there are a lot of p. 13, ll. 25–27.
people canvassing for insurance companies whose regular
occupation is something else . . .

" The insurance company has to provide the car if I am going p. 13, ll. 30–38.
out otherwise it is not worth while. Normally they provide the
car. The arrangement was for the Company to provide the
transport. That arrangement was made with Holsingher. He said
he will provide me with transport—by that he meant the Company.
He said he will get the Company's car . . . I had no correspondence
20 with the Company. They did not offer to provide me with a car."

In re-examination, the witness said :—

" James Perera was there when the arrangement was made p. 15, ll. 43–44.
about the Company providing the transport . . .

It was always this particular car that was provided. So far p. 16, ll. 3–4.
as I was aware it was the Company's car."

9. Giving evidence for the defence, A. Ameresekera, Secretary of the Company, said, in examination-in-chief :—

" We get custom through agents. The agents are not in our p. 17, ll. 7–11.
employment, they are merely Canvassers and they are paid a
30 commission . . . according to the business they bring. They do
not get a salary. A number of them have other occupations as
well . . .

" The agents select the doctor. That part of the business is p. 17, ll. 15–17.
delegated to the agents. When an agent brings an applicant he
must also bring a certificate from a doctor . . . There is no restriction p. 17, ll. 20–23.
placed in the choice of the doctor except that he has to be three years
in practice . . . I was not aware that the Plaintiff in this case did not
have three years' experience.

" James Perera is a field officer. He is a direct employee of p. 17, ll. 24–31.
40 the Company and paid a salary. He is called Field Organiser.
He is expected to assist the agents and to get business through the
agents or bring personal business through his sub-agents. He has
to supervise and control the agents. There are three field super-
visors. An agent can bring business direct to us or if the field officer
tells the agent to bring business he brings the man to us and we pay
the field officer what is called over-riding commission . . .

p. 17, ll. 33–35. "Holsingher was a person employed by James Perera to help him procure business. He was not paid a salary by the Company. He was a Canvasser and he got a commission on the premiums paid . . .

p. 17, ll. 40–46. "Doctors who examine applicants have to provide their own transport normally. The Company has not undertaken to provide transport for doctors because we pay the doctor a fee of Rs.13 and Rs.15 . . . The doctor goes to the proponent who wants to insure. If we want to insure someone in Jaffna the D.M.O. or the D.M.A. or a doctor in Jaffna would examine him . . .

p. 18, ll. 8–12. "Holsingher did not mention to us that he was getting a proposal from Jaffna. They make arrangements on their own . . . I was not aware that the Plaintiff was going to Jaffna. There was no need to take the Plaintiff from Colombo to Jaffna to get the man examined so far as the Company was concerned.

p. 18, ll. 12–20. "This car actually belonged to James Perera. James Perera wanted a loan and as security we registered the car in the name of the Company and gave him the loan. He wanted the loan to purchase a car . . . We opened a ledger account for the car. We took it as an asset of the Company and that was pointed out to us by our auditor as being incorrect and in the subsequent page that has been altered."

10. In cross-examination, the Secretary of the Company said :—

p. 18, ll. 44–45. "We have no Managing Director. The Secretary does the Managing Director's work . . .

p. 19, ll. 2–10. "There are field officers . . . They are paid about Rs.100/– a month and they are answerable to the Secretary. Their functions are to bring in insurance work. It is left to them whom they will employ. They employ their own Canvassers. Canvassers are not paid any salary. The commission due to the Canvassers is paid by the Company . . . There are Canvassers appointed directly by us also. That is done on application made to us . . . I cannot say whether the Canvasser" (appointed directly by the Company) "is an employee of the Company. He works for us and he gets paid for the work he does . . .

p. 19, ll. 22–24.

p. 19, ll. 25–28. "So far as the doctors are concerned we are not concerned with it, it is left to the field officer or agent. If the field officer brings a proposal it is up to him to see that the proposal is accompanied with a doctor's report . . .

p. 19, l. 45 to p. 20, l. 2. "A field officer cannot function efficiently without a car. They are not in a position often to buy their own cars . . . For that purpose the Company has advanced moneys to field officers and agents to buy cars. We do not buy the car."

p. 22, l. 22. Further the witness referred to and there was produced by him and put in evidence the agreement between Perera and the Company as to the car.

In re-examination the witness said :—

" The car at the time of the accident was driven by Holsingher who was in the first instance employed as a Canvasser by James Perera, a Field Officer. Holsingher was not answerable to us. He had no specified hours of work . . . If he does work or not is a matter entirely for him. If he does not work he gets no commission." p. 23, ll. 14–19.

11. The Company's case was supported also by the said Holsingher (the Canvasser-Driver) who, in examination-in-chief, said :—

" On the work brought in by me I am paid a commission. James Perera is also paid an over-riding commission . . . p. 24, ll. 12–13.

" I met the Plaintiff in Colombo after writing P2 " (a letter, dated the 19th April, 1950, in which the witness, after informing the Plaintiff of the large number of medical examinations for insurance waiting for him in Jaffna for which his services would be required ' somewhere about the 29th ' April, 1950, asked him to make ' the necessary arrangements at your end '). " I told him that it will be about 50 cases he will have to examine in Jaffna. The doctor would have got roughly about Rs.700/–. We were to go in his car. At the last moment he said his tyres were bad and we did not go in his car. He asked me to bring a car. The doctor was to pay the petrol. As I was giving him 50 cases he was going to spend on the trip . . . p. 24, l. 25. P2, p. 63. p. 24, ll. 25–30.

" Whilst I was driving, the car suddenly swerved to a side. Something, I think, went wrong with the steering and it went off the road . . . It is not correct to say that I fell asleep and the car went off the road." p. 24, ll. 41–44.

12. In cross-examination the witness (Holsingher) said :—

" The more insurance I get for the Company it is the better for me. The Company benefits because it gets policies. I benefit from the commission . . . James Perera also benefits because he gets an over-riding commission . . . p. 25, ll. 25–29.

" We did not take the doctor in this car to examine other cases also. Up to this day we did not take the doctor in this car. In every instance we went in the doctor's car . . . p. 25, ll. 44–46.

" That the Secretary of this Company was up to date unaware of the fact that I did work for somebody else I do not know. I did not tell him . . . It was in James Perera's car that I went about for other work also . . . James Perera works only for the Defendant Company. I was paid my commission cheques by the Company direct. p. 26, ll. 3–5. p. 26, ll. 9–10. p. 26, ll. 12–13.

" The arrangement with James Perera was that I did this canvassing and the Company paid me. He was employing me for the Company. In the course of this canvassing whatever James p. 26, ll. 15–20.

Perera asked me to do for the Company I did. James Perera does not take me along with him. I take him along. I fix my own time . . .

p. 26, ll. 21–25. " Sometimes I drove this car with the approval of James Perera and sometimes the driver drove the car. I hold a certificate of competence to drive a car. On this day also I drove with James Perera's approval. We started off at 1 a.m. . . .

* * * * *

p. 28, ll. 25–28. " James Perera knew that the car was bring driven to see cases. He approved of my driving the car. I get no instructions direct from the Company regarding my work. I get instructions from nobody. I find my work . . .

p. 29, ll. 15, 24–26, 28–29. " The doctor paid for the petrol . . . This trip to Jaffna was to be financed by the doctor and he gave us an advance of Rs.20/– to put in petrol. The money was handed over to Perera . . . The doctor had not financed any trips before this."

pp. 36–43. 13. By his Judgment, dated the 8th March, 1951, incorporating the said Answers to Issues (see paragraph 7 hereof), the learned District Judge dismissed the action with costs.

On the basis of the Plaintiff's claim—that the damage was caused directly by the negligence of an employee of the Company (Holsingher)— the learned District Judge said :—

p. 36, ll. 29–33. " It would thus be seen upon the pleadings that the basis on which the Plaintiff seeks to fix liability upon the Defendant Company is that the injuries were caused by the negligent act of a servant of the Defendant Company in the course of and within the scope of his employment. It is on this basis that issues were framed."

p. 36, l. 38 to p. 37, l. 5. The learned Judge said that Counsel for the Plaintiff had " seemed to concede that Holsingher was not directly a servant of the Defendant Company but that he being under the control of James Perera the Company was liable inasmuch as James Perera was at that time an agent of the Company." The learned Judge, before dealing with this point (which, he pointed out, was not strictly covered by the pleadings or the Issues), considered the question " whether Holsingher, who was the driver at the time of the accident, can be regarded as a servant of the Company and whether he was at that time acting in the course of and within the scope of his employment." This was, as he had already stated, the basis of the Plaintiff's claim.

pp. 37–38. Reviewing the evidence of the Secretary of the Company on the employment of Holsingher (see paragraphs 9 and 10 hereof), the learned Judge expressed his conclusion as follows :—

p. 38, ll. 12–18. " It can hardly be said therefore in these circumstances that he was a servant of the Defendant Company. Even if he was a servant, driving a car was not one of his duties as such servant. That was something he did on his own and over which the Defendant

Company had absolutely no control. The authorities which I shall refer to presently show that, in these circumstances, Holsingher could not have been regarded as a servant of the Defendant Company."

14. On the argument for the Plaintiff "that James Perera was an attorney or agent of the Company with authority to engage and employ persons for the purpose of securing business, and that he being in the car, the position would be the same as if the Company was in the car and that he having control over the manner in which the car was driven, employed the services of Holsingher to drive the car and Holsingher was in consequence a servant of the Company," the learned District Judge said that before this argument would be accepted or rejected it was necessary to consider the relationship between James Perera and the Company. p. 38, ll. 26-31. p. 38, ll. 38-40.

Reviewing the evidence on the subject the learned Judge said:—

"If James Perera was expressly employed by the Company for the purpose of taking Canvassers around in order to secure proponents and the Company could have controlled the manner in which James Perera did this work, one would be prepared to consider that James Perera in those circumstances was an agent for whose wrongful acts the Company would be liable, but in this case one cannot say that this is so . . . p. 38, ll. 40-46.

"The evidence clearly shows that the car was bought by the Insurance Company for James Perera who had not the money to pay for it . . . They had no control over him as to how he should use the car. The agreement D2 shows . . . that in order to help James Perera to discharge his obligations the Company has lent him a sum of Rs.5,870 for the purpose of purchasing a motor car in the name of the Company as its owner until such time as the Rs.5,870 with interest has been repaid . . . It also provides that when the repayment has been made the Company will transfer the ownership of the car to James Perera . . . It is thus clear from this document coupled with the evidence of the Secretary, that although the Company was nominally the owner, the control and possession of the car remained with James Perera and to all intents and purposes James Perera was the owner but the car was registered in the Company's name until James Perera repaid the amount . . . p. 39, ll. 2-24. D2, pp. 59-60.

"Ameresekera, the Secretary, specifically says that the organisers or Field Officers like James Perera were given complete discretion as to the manner in which they set about bringing in business; the Company was only concerned with the result of their efforts and not with the manner in which they sought to obtain business. No instructions were given to Field Officers as to where the proponent is to be examined and who the doctor to be employed is; that was entirely within their discretion. p. 39, l. 40 to p. 40, l. 2.

"In these circumstances it can hardly be said that even James Perera was a servant of the Company in the sense in which that term is used in order to fix liability upon the master . . .

p. 40, ll. 9–19. " The terms of James Perera's employment make it clear that he cannot be regarded as a servant still less as a person in the position of the Defendant Company in so far as Holsingher was concerned. In this connection it will be relevant to cite the observations made by Mr. Justice Willes referred to in Clerk and Lindsell on Torts, 10th Ed., at p. 106 :—

> ' I apprehend it to be a clear rule in ascertaining who is liable for the act of a wrongdoer that you must look to the wrongdoer himself or to the first person in the ascending line who is the employer and has control over the work. You cannot go further back and make the employer of that person liable.'

* * * * *

p. 40, ll. 31–34. " It is always a difficult matter to decide whether a person was a servant or not. It is a mixed question of law and fact and the authorities go to show that in deciding the question one has to consider all the relevant terms of the employment."

15. The learned Judge next referred to the decision in *Colonial Mutual Life Insurance Co.* v. *McDonald* (1931), S.A.A.D. 412, a South
p. 40, ll. 34–36. African case, in which the facts were similar to those in the present case, and in which de Villiers, C.J., had stated that on the questions of law
p. 41, ll. 4–6. involved there was no difference between the relevant Roman Dutch law (the Common Law of Ceylon) and the English law, and had quoted with approval the following passages from authoritative English works :—

p. 41, ll. 9–13. " The true test by which to determine whether one person who renders service to another does so as a contractor or not, is to ascertain whether he renders the service in the course of an independent occupation, representing the will of his employer only as to the result of the work, and not as to the means by which it is accomplished." (Fraser, on " Master and Servant ").

And

p. 41, ll. 20–27. " The mere fact that one person employs another to do work on his behalf does not establish the relation of master and servant between them. Even the right to give directions as to the work to be done and to superintend its execution, is not in itself sufficient to do so. The essential feature of the relation is that the master has the right to control the servant even in details and to direct not only the work which is to be done, but the manner in which the servant is to do it." (Welford, on " Accident Insurance ").

p. 41, ll. 14–17. Applying the test referred to in the first of these passages, the learned District Judge said :—

" It is quite clear that all the Company was concerned with was the result of James Perera's efforts. They had no control over the manner in which he set about his employment or the means by which he accomplished the results obtained."

16. The learned District Judge referred also to the test laid down in the said South African case (*Colonial Mutual Life Insurance Co.* v. *McDonald*) by Wessels, J., who (agreeing with de Villiers, C.J.), had said :—

" Before a principal can be held liable it must be proved that at the moment when the wrong was done the agent was acting within the terms of his mandate and on behalf of his principal and that at that moment he was actually doing the work or business of his principal rather than his own." p. 41, ll. 42–46.

Applying this test, the learned District Judge said :—

" It is quite clear that both Holsingher and James Perera, when they took the Plaintiff out in the car to examine proponents were acting in their own interests and also by so doing in the interests of the Defendant Company. They were going to profit by this work. They would each be getting commission from the Defendant Company. It was their business to introduce proponents, have them medically examined and submit proposals to the Defendant Company. They had an absolute discretion as to how they should set about this work and they profited by it as much as did the Defendant Company. p. 42, ll. 1–11.

In these circumstances they could not be held to be servants of the Defendant Company."

As to the ownership of the car the learned District Judge said that the presumption that the Company owned the car had been rebutted but (following the view of Wessels, J., in the said South African case) he was of opinion that it would make no difference to the view he had expressed whether the car belonged to the Company or to Perera. p. 42, ll. 11–16.

The learned District Judge concluded as follows :—

" Taking into consideration all the terms of the employment of James Perera one cannot say that he was a servant of the Company at the moment he was driving the car. If the accident had arisen at the time he drove it and before he handed it over to Holsingher the Company in my view would not have been liable. They had no control over his driving. They could not, under the terms of his employment, have exercised any control with regard to the manner in which he drove the car or used it. If the Company could not have been held liable, I do not see how the mere fact of his presence in the car when it was driven by Holsingher would make the Company liable." p. 42, l. 42 to p. 43, l. 3.

17. A Decree in accordance with the Judgment of the learned District Judge was entered on the 8th March, 1951, and against the said Judgment and Decree the Plaintiff appealed to the Supreme Court of Ceylon on grounds stated in his Petition of Appeal dated the 14th March, 1951. p. 44. pp. 44–46.

18. The appeal in the Supreme Court was heard on the 16th and 23rd October, 1953, by a Bench consisting of Gratiaen, J., and H. A. de Silva, J., who, by their Judgments dated the 29th October, 1953, set aside pp. 46–52.

the said Judgment of the District Court and directed that a Decree be entered in favour of the Plaintiff for Rs.50,000/- (the sum prayed for) with costs in both Courts.

19. In his Judgment, Gratiaen, J. (with whom H. A. de Silva, J., agreed) considered the following questions which, in view of the conflict of evidence had, in his opinion, to be immediately answered :—

p. 48, ll. 9–17.

> " For instance, what was the precise relationship between the Company on the one hand and Perera and Holsingher respectively on the other ? What were the circumstances in which the Company's car was placed at the disposal of Perera ? And what were the circumstances in which the Plaintiff was a passenger in the car at the time of the mishap ? It is conceded that Perera had authorised Holsingher to drive the car. Did he do so in circumstances which rendered the Company liable to compensate the Plaintiff for the injuries which he sustained in the accident ? "

On the position of Holsingher, the learned Judge, having referred to certain portions of the evidence of the Secretary of the Company, said :—

p. 48, ll. 40–46.

> " It is clear enough, I think, that Holsingher could not, in relation to his functions as a Canvasser, be regarded as a servant of the Company . . . He was in truth an independent contractor, so that the Company could not, under normal circumstances, be held responsible for any torts committed by him *qua* Canvasser."

p. 49, ll. 1–12.

20. The learned Supreme Court Judge (Gratiaen, J.) did not however agree with the view of the Court below that Perera could not be regarded as a servant of the Company " in the sense in which that term is used in order to fix liability upon the master." Applying a test which, he said, p. 49, ll. 16–24. was contained in certain observations of Lord Porter in *Mersey Docks and Harbour Board* v. *Coggins & Griffith (Liverpool), Ltd.* [1947], A.C. 1, he held that " the functions of Perera *qua* ' field agent ' of the Company p. 49, ll. 30–31. were those of a servant under a ' contract of service ' as distinguished from those of an independent contractor under a ' contract of services '." He held therefore that the learned District Judge had misdirected himself as to the true relationship between Perera and the Company.

21. The learned Supreme Court Judge (Gratiaen, J.) next considered p. 49, ll. 32–33. " the circumstances in which the Company's motor car was made available p. 49, l. 39 to p. 50, l. 7. to Perera." On the question " whether the Company could under any circumstances have been held responsible for the negligence of a person driving the vehicle at a time when it was in Perera's possession under the D2, pp. 59–60. ' contract of loan ' D2," the learned Supreme Court Judge thought that the view of the Court below, that no such liability could attach because the control of the car remained with Perera and to all intents and purposes he was its owner, went too far, for, in his view, the authorities indicate that " in certain instances the Company might well be liable for the negligence of the driver of the car because of the special relationship subsisting between Perera and the Company," and the Judgment of the Privy Council in *Canadian Pacific Railway Co.* v. *Lockhart* [1942], A.C. 591 " establishes that, if the motor car had been negligently driven on any

occasion in the course of a journey for the purposes of, and as a means of execution of the work of, Perera, as an employee of the Company, the Company would have been liable to compensate a third party injured by reason of that negligence."

22. The learned Supreme Court Judge (Gratiaen, J. with whom H. A. de Silva, J., agreed) then referred to the decision in *Ormrod* v. *Crossville Motor Services, Ltd.* [1953] 1 W.L.R. 409, affirmed on appeal [1953] 2 All E.R. 753, which, he said, illustrated that the owner of a vehicle may be responsible for the negligence of a person who was driving it if the owner had (or even shared with that other person) an interest in the journey being undertaken, and continued as follows :— p. 50, ll. 21–27.

> " I concede that Perera was not precluded by the terms of the ' contract of loan ' from using the vehicle for his private purposes if he so desired. If, therefore, the car were negligently driven while Perera was travelling to his golf club, the Company could not have been held responsible. But if, on the other hand, an accident occurred while he was engaged on the Company's business in the performance of his legitimate duties as the Company's employee, the position would have been entirely different." p. 50, ll. 28–35.

The learned Judge next examined the circumstances in which the Plaintiff happened to be travelling in the motor car at the time of the accident, conflicting evidence as to which had been given by the Plaintiff and by Holsingher. p. 50, l. 36 to p. 51, l. 25.

In his view of the facts, the Company's liability had been clearly established, for Perera had not divested himself of his character as a servant authorised by the Company to act on its behalf and throughout the journey therefore the car was, " through Perera's instrumentality," being used on the Company's business on which the Plaintiff must be considered to have been engaged while travelling to Jaffna. p. 51, ll. 26–27. p. 51, ll. 42–45. p. 52, ll. 3–4.

23. A Decree in accordance with the Judgment of the Supreme Court was entered on the 29th October, 1953, and against the said Judgment and Decree this appeal is presented to Her Majesty in Council, leave to do so having been granted to the Company by two decrees of the Supreme Court, dated, respectively, the 16th March, 1954, and the 26th May, 1954. pp. 52–53. pp. 55, 58.

The Appellant Company respectfully submits that this appeal should be allowed, that the said Judgment and Decree of the Supreme Court, dated the 29th October, 1953, should be set aside, and the Judgment and Decree of the District Court, dated the 8th March, 1951, restored, with costs throughout, for the following among other

REASONS

(1) BECAUSE on the evidence it was clear that at all material times neither Perera (the Field Organiser who owned the car in question) nor Holsingher (the Canvasser-Driver) were servants of the Company acting in the course of and within the scope of their employment.

(2) BECAUSE on the documentary and oral evidence it was clear that the ownership control and possession of the said car remained with Perera quite independently of the Company which was concerned only with the results of his efforts and not with the means which he employed to obtain those results.

(3) BECAUSE at the time of the accident neither Perera nor Holsingher nor even the Plaintiff could reasonably be said to be acting in the interests of the Company.

(4) BECAUSE on the evidence it is clear that the arrangements made to travel from Colombo to Jaffna in the car in question were made by the said three independent persons who could not reasonably be said to have thus arranged to travel on the Company's business merely because the ultimate end, if achieved, was profit to be made by means of business to be transacted with, and by, the Company.

(5) BECAUSE the basis of the Plaintiff's claim was the negligence of Holsingher acting as a servant of the Company and both Courts below have found that Holsingher was a Canvasser for, but not a servant of, the Company.

(6) BECAUSE even assuming (contrary to the Company's contentions) that at the material time and for the purposes of the journey to Jaffna Perera was the Company's servant, the Company in the absence of evidence of express authority given to Perera to engage other persons to drive the car cannot in law be held liable for the negligent driving of such other persons.

(7) BECAUSE there was no evidence on which it could be held that in respect of the driving of the car by Holsingher any relationship had been constituted between him and the Company rendering the latter liable for Holsingher's negligent driving.

(8) BECAUSE the Judgment of the Supreme Court is wrong and, for the reasons stated therein, the Judgment of the District Court was right.

NEIL LAWSON.

R. K. HANDOO.

No. 26 of 1955.

In the Privy Council.

ON APPEAL
from the Supreme Court of Ceylon.

BETWEEN

THE TRUST COMPANY LIMITED (Defendant) . *Appellant*

AND

DR. T. H. I. de SILVA (Plaintiff) . . . *Respondent.*

Case for the Appellant.

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