~~GL G2~~ 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 RESPONDENT.

RECORD.

1. This is an appeal from the Judgment and Decree of the Supreme Court of Ceylon dated the 29th October, 1953, setting aside the Judgment and Decree of the District Court of Colombo dated the 8th March, 1951. pp. 46, 52. pp. 26, 44.

2. The question raised by this appeal is whether the Appellant Company (hereinafter called " the Company ") is liable to the Respondent for damages sustained by him through the negligence of one Holsingher the driver of a motor car in which the Respondent was being driven on the business of the Company.

3. The facts giving rise to this appeal are not now seriously in dispute. It is implicit in the Judgment of the District Court that the Judge accepted the Respondent's version as to the circumstances in which he came to be travelling in the motor car at the time of the accident. This was conceded in the Supreme Court and findings on this aspect of the case are concurrent. p. 50, l. 46.

4. One Perera was employed by the Company which is an Insurance Company, as a " field officer." He was in its whole-time service, receiving a salary and a commission on business introduced. To enable him to carry out his duties efficiently the Company bought a motor car which it let to him on hire-purchase terms. Perera paid the running expenses of the motor car. Part of Perera's duties was to engage canvassers (who were paid by the Company purely on a commission basis) and to control and assist them in their work. One of the canvassers he so engaged was the said Holsingher. p. 39, l. 2, and p. 49, l. 35.

5. The Respondent is and was at all material times a registered Medical Practitioner. The Company, whose business included Life Insurance, had, from time to time, engaged the Respondent to examine persons desiring to insure with the Company, with a view to deciding whether or not such persons were medically fit. The Respondent received from the Company a fee for each examination. Sometimes the proponents

were brought by Perera and Holsingher to the Respondent's surgery for examination. At other times the Respondent was taken by Perera and Holsingher in the said motor car to examine the proponents at their homes, the arrangement having been made with Holsingher in the presence of and with the approval of Perera that in such cases the Company would provide transport. It was the practice for Perera and Holsingher always to accompany the Respondent to the examinations.

6. On or about the 27th April, 1950, Perera and Holsingher called for the Respondent in the said motor car to take him to Jaffna for the express purpose of examining persons who were proposing to insure with the Company. During the course of this journey the car went off the road and the Respondent sustained severe injuries in consequence.

7. At the time of the said accident there were in the said car, besides the Respondent, the following persons: Perera, a chauffeur employed by Perera, and Holsingher. These last three persons had taken turns in driving and it was while Holsingher was at the wheel that the accident occurred.

8. It is not now disputed that the accident occurred through Holsingher's negligence, nor that the damages claimed, Rs.50,000, were reasonable. Nor was any serious attempt made to establish the averment in the Answer to the Plaint herein which, after stating (quite wrongly)
p. 8, l. 13. that the Respondent " had to proceed to the residences of the prospective insurers at his own cost and expense," alleged that at the Respondent's request " the said car together with a driver was loaned to the Plaintiff by the said Perera in order that Plaintiff's travelling expenses might be
p. 8, l. 6. reduced as much as possible." Paragraph 4 (A), however, of the Answer is, it would seem, still relied on by the Company. It is in these terms :—

> " 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."

9. The action was heard by the District Judge of Colombo on the
pp. 9–36. 18th December, 1950, the 31st January and the 22nd February, 1951.
p. 36. Judgment was delivered on the 8th March, 1951. The learned Judge found (1) that the accident was caused through the negligence of Holsingher, and (2) that the damages claimed were not excessive. He, however, dismissed the claim on the ground that though " there is no doubt that the
p. 37, ll. 44–46. trip was made with the object of helping the Defendant Company in the
p. 39, ll. 34–36. furtherance of its business " and that Perera " was expected to assist the agents and to get business through the agents " and " had also to control and supervise their work," the Company was not liable as—

p. 42, l. 42, to p. 43, l. 3.

> " Taking into consideration all the terms of 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."

10. The Respondent appealed to the Supreme Court of Ceylon from the said judgment. p. 44.

11. In the appeal before the Supreme Court, the Company did not dispute the findings of the learned District Judge :—

(A) that the negligence of Holsingher was the effective cause of the accident ; and p. 47, ll. 6–9.

(B) that the damages should be assessed at Rs.50,000/–.

12. The only issue therefore which called for the decision of the Supreme Court was whether or not, in the circumstances of this case, the Company was vicariously responsible for the consequences of Holsingher's negligence.

13. Mr. Justice Gratiaen (who with Mr. Justice De Silva heard the appeal) in his judgment stated :—

" The learned District Judge took the view that ' even Perera was not a servant of the Company in the sense in which that term is used in order to fix liability upon the master '. The reason given for this conclusion was that ' 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 '. The judgment proceeds as follows on this issue : p. 49, ll. 1–38.

' . . . it is quite clear that all that the Company was concerned with was the results of 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.'

With respect, I do not accept this line of reasoning. An employer cannot escape liability for his servant's torts by pleading that he had vested in the servant a discretion as to how he should carry out his duties—*Mersey Docks and Harbour Board* v. *Coggins & Griffith (Liverpool) Ltd.* [1947] A.C. 1. ' It is true ' said Lord Porter, ' that in most cases no orders as to how a job should be done are given or required : the man is left to do his own work in his own way. But the ultimate question is not what specific orders, or whether any specific orders, were given but who is entitled to give the orders as to how the work should be done.' Applying this test, I would hold that the functions of Perera, *qua* ' field agent ' of the Company, were those of a servant under a ' contract of service ' as distinguished from those of an independent contractor

under a ' contract of service.' He was answerable to the Secretary of the Company, and the unlimited discretion or authority which he was given as to how he should perform his ' field duties ' for the benefit of his employer could have been withdrawn or curtailed at any moment. It has not even been suggested that the Company had contracted itself out of its right to give him particular directions (if it so desired) as to how he should discharge his duties in the future. In my opinion, the learned Judge misdirected himself as to the true relationship between Perera and the Company.

I shall now examine the circumstances in which the Company's motor car was made available to Perera. The Secretary admitted, and it is obvious, that ' a field officer cannot function efficiently without a car.' Accordingly, the Company purchased this particular vehicle and ' loaned ' it to Perera ' with a view to helping him to discharge his obligations (as a field officer) '—*vide* the formal agreement D2 dated 30th July, 1948, in terms of which Perera was handed possession of the car."

14. Mr. Justice Gratiaen went on to say :—

p. 50, ll. 1–10. " 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. Perera's general duties as a field officer necessitated and involved his presence as the Company's representative in many places, and if he was travelling in the car in order to perform any of these duties, ' the means of transport used by him was clearly incidental to the execution of that which he

p. 51, ll. 3–18. was employed to do . . . On earlier occasions, Perera and Holsingher had (except in one instance) taken the plaintiff in this identical car to the proposed client's residence if it was not convenient to bring the client to the plaintiff's place of business. The arrangement arrived at with Holsingher, in the presence and with the approval of Perera, was ' for the Company to provide the transport.' With regard to the particular journey with which this case is concerned, Holsingher, who had previously gone to Jaffna with Perera on a canvassing tour, wrote a letter P2 dated 19th April, 1950, on business notepaper belonging to the Company, saying ' we are at present working at Jaffna, and as promised we are going to give you all the business up here, which would be a very large number of exams. You will have to spend four days with us as the volume of work is going to be large.' In due course, Holsingher and Perera arrived at the plaintiff's house and took him away in the car. It was in the course of this journey that the accident occurred by reason of Holsingher's negligence . . . At

p. 51, ll. 43–46. no relevant stage had Perera divested himself of his character as a servant authorised by the Company to act on its behalf. Throughout the journey, therefore, the car was, through Perera's instrumentality, being used on the Company's business."

15. For the reasons given in the judgment Mr. Justice Gratiaen (with whom Mr. Justice De Silva agreed) held that the Company's liability had been clearly established and therefore entered a decree in favour of the Respondent. p. 51, l. 26. p. 52.

16. The Respondent submits that the Decree of the Supreme Court of Ceylon dated the 29th October, 1953, is right and should be affirmed for the following among other

REASONS

(1) BECAUSE the said car was provided for the Respondent by the Company's employee or agent, Perera, acting within the scope of his authority.

(2) BECAUSE Holsingher, an employee or agent of the Company, was, at the material time, acting within the scope of his authority.

(3) BECAUSE the Respondent was, at the material time, being driven in the said car on the business of the Company.

(4) BECAUSE the said car was the property of the Company.

(5) BECAUSE the said car was at the time under the control of Perera, a servant of the Company who had himself authorised Holsingher to drive it.

(6) BECAUSE on the occasion in question the said car was provided by the Company pursuant to an arrangement that transport should be provided.

(7) BECAUSE the Company was vicariously responsible for Holsingher's negligence.

(8) BECAUSE the Judgment of the Supreme Court is right.

(9) BECAUSE the Judgment of the District Court of Columbo is wrong.

PHINEAS QUASS.

SIRIMEVAN AMERASINGHE.

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CASE FOR THE RESPONDENT.

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