

1951

*Present: Jayetilleke C.J. and Gunasekara J.*

JAFFERJEE, Appellant, and MUNASINGHE, Respondent

*S. C. 191—D. C. Colombo, 17,767**Master and servant—Loan of car—Negligence of driver—Injury to third party—Is owner or borrower liable?—Course of employment.*

Defendant lent his car to T and owing to the negligence of the driver the plaintiff's car was damaged in a collision.

*Held*, that *prima facie* the defendant did not place the driver of his car under the control of the borrower who, therefore, was not liable to pay the damages; the plaintiff was entitled to recover damages from the defendant.

**A**PPPEAL from a judgment of the District Court, Colombo.

*D. S. Jayawickreme*, for the defendant appellant.

*H. W. Jayewardene*, for the plaintiff respondent.

*Cur. adv. vult.*

March 13, 1951. JAYETILLEKE C.J.—

The plaintiff instituted this action against the defendant for the recovery of a sum of Rs. 2,985 as damages. He alleged that on December 5, 1946, a motor car belonging to the defendant, which was driven by one Andy Perera, collided with a motor car belonging to him, owing to the negligence of Andy Perera and caused considerable damage to it. The defendant filed answer alleging that on the day in question he lent his car to one Thambaiyah, and that Thambaiyah engaged Andy Perera to drive the car.

At the trial the following issues were framed:—

1. Did the collision referred to in Para. 3 of the plaint occur owing to the negligence of the driver of car No. Z 3710, namely, M. Andy Perera?
2. Was the said Andy Perera the servant of the defendant at the time of the collision?
3. Was the said Andy Perera acting in the course of his employment?
4. Did the plaintiff sustain damages as a result of the said collision?
5. (a) If so is the plaintiff entitled to recover same, from the defendant?  
(b) What is the amount of such damages?

After trial the learned District Judge answered issues 1, 2, 3, 4, and 5 (a) in the affirmative and entered judgment for the plaintiff for Rs. 1,260 and costs. The present appeal is against that judgment. At the argument before us the correctness of the finding of the learned District Judge on issue 1 was not contested but it was argued that his finding on issue 2 is erroneous. After considering the evidence before him the learned District Judge said:

“ I am satisfied on the evidence that Andy Singho was employed by the defendant and the car was entrusted to Andy Singho as the defendant's brother himself says. It may very well be that Thambiaiyah paid a santhosum of Rs. 10 to the driver who had worked the whole day hard ”.

This finding is supported by the admission made by the defendant's brother, A. A. Jafferjee, in cross-examination that before instituting the action the plaintiff saw him once or twice about his claim, and he did not tell the plaintiff that Andy Perera was not the defendant's driver. We do not, therefore, feel justified in disturbing it. The only other point taken by Counsel for the defendant was that the defendant was not liable as he lent the car to Thambiaiyah. In Chowdhary v. Gillot<sup>1</sup> it was held that if a person lends his car to another *prima facie* he does not place the driver under the control of the borrower, and the borrower does not become liable for the negligence of the driver. This is a direct authority on the point. The question whether the defendant abandoned his right or authority to control the driver when he lent the car to Thambiaiyah was not raised either in the answer or in the issues that were framed at the trial. In *Mersey Docks and Harbour Board v. Coggins and Griffiths (Liverpool) Ltd. and Mcfarlane*<sup>2</sup> Viscount Simon said:—

“ It is not disputed that the burden of proof rests upon the general or permanent employer to shift the *prima facie* responsibility for the negligence of servants engaged and paid by such employer so that this burden in a particular case may come to rest on the hirer who for the time being has the advantage of the service rendered. And, in my opinion, this burden is a heavy one and can only be discharged in exceptional circumstances ”.

The judgment appealed from is, in our opinion, right. We would, accordingly, dismiss the appeal with costs.

GUNASEKARA J.—I agree.

*Appeal dismissed.*

