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virtual complainant that the intruders at times lifted their facemask. For these reasons, probably the virtual complainant was in a position to identify the 4th accused. The identification of the 4th accused at the parade is corroborated by the other evidence such as the discovery of the revolver from the possession of the 4th accused and the opinion expressed by the ballistic experts.

Before parting with this judgment it is not inappropriate to have to place on record that the misdirection and other errors committed by the learned high Court Judge appear to me as an attempt towards the embellishment of his findings and conclusion and nothing more. Therefore,, when the evidence led by the prosecution and the dock statements of 1st and 4th accused are considered, in its entirely, I am of the opinion that such errors and misdirections deserve to be ignored and excused. Vide under article 138 (1) of the Constitution and section 334 of the Criminal Procedure Code.

In the circumstances, for the reasons assigned by the learned High Court Judge in his judgment, the conviction of the 4th accused on count numbers 1, 8, 9, 10, 11, 12 and 14 is affirmed. However for lack of evidence the conviction of the 4th accused on counts 2, 3, 4, 5, 6, 7 is set aside and the 4th accused is acquitted on those charges.

In the result my conclusion of the appeals presented to this court would be as follows.

The conviction of the 1st accused on count numbers 1, 8, 9, 10 and 11 affirmed and his conviction on count numbers 2 to 7 and 12 is set aside and his appeal is accordingly partly allowed and partly dismissed.

The conviction of the 4th accused on count numbers 1, 8, 9, 10, 11 and 14 affirmed and his conviction on count numbers 2, 3, 4, 5, 6, 7, 12 is set aside and his appeal also stands as partly allowed and partly dismissed.

The conviction of the 2nd, 3rd and 5th accused and the corresponding sentences passed on them are set aside and all three of them are acquitted on all the charges in the indictment. Accordingly their appeals are allowed.

SILVA J – I agree

Appeals of the 1st and 4th accused partly allowed.
Appeals of the 2nd, 3rd and 5th accused allowed.

M.D. GUNASENA & CO. LTD VS. SOMARATNE GAMAGE

SUPREME COURT
TILAKAWARDANE, J.
IMAM, J. AND
DEP, PC, J.
S.C. APPEAL NO. 106/2009
SC/SPL/LA/35/2009
WP/HCCA/KAL NO. 21/2006
HCA (LT) 05/2006
LT 25/PN/507/2002
OCTOBER 19TH, 2011

Industrial Disputes Act – Section 31 (B) termination of employment – Misconduct – Acts of misconduct inconsistent with the express or implied conditions of service

In an application filed in the Labour Tribunal, the applicant – Respondent – Respondent (Applicant) alleged that his services were terminated unlawfully by the Respondent Applicant (Respondent) and claimed reinstatement with back wages or in the alternative compensation considering his past employment and the period he could be employed in the establishment in the future.

The Respondent in its answer admitted the termination and alleged that the termination was justified and the Applicant was not entitled to any relief. In the letter of termination it was stated that the Applicant was guilty of charges of a serious nature which amounts to misappropriation of the company's money.

The applicant refuted the allegations made against him, and alleged that the domestic inquiry was not properly conducted. After the conclusion of the inquiry the Labour Tribunal held that the Applicant was not guilty of the charges of misconduct and ordered reinstatement. The Respondent appealed against the order of the Labour tribunal. After inquiry, the Provincial High Court affirmed the Order of reinstatement of the Labour Tribunal.

The Respondent appealed against that order to the Supreme Court.

Held:

(1) The orders of the Labour Tribunal and the Provincial High Court were just and equitable and well within the powers given by the Industrial Disputes Act.

(2) In the absence of a definition of 'misconduct' in the Industrial Dispute Act it is necessary to refer to case law in Sri Lanka and in other jurisdictions. Sri Lankan and Indian Courts have followed the English Case law. The misconduct must be inconsistent with the fulfillment of the express or implied conditions of service or such as to show that the workman had disregarded the essential conditions of the contract of service.

Priyasath Dep, PC. , J.

> "The implied conditions of service includes conduct such as obedience, honesty, diligence, good behavior, punctuality, due care. Therefore acts such as disobedience, insubordination, dishonesty, negligence, absenteeism and late attendance, assault are treated as acts of misconduct which are inconsistent with the implied conditions of service".

(3) There is no fixed rule of law defining the degree of misconduct which will justify dismissal. Misconduct inconsistent with the fulfillment of the express or implied conditions of service will justify dismissal.

(4) Applicant's conduct is not inconsistent with the fulfillment of the express or implied conditions of service. The Applicant did not commit any act of misconduct and therefore termination of his services is not justified.

Cases referred to:

(1) *Pearce Vs. Foster* (1886) 17 QBD 536, SLJ QB 306

(2) *Shalimar Rope Works Mazdoor Union Vs. Shalimar Rape Works Ltd* (1953) (2) LLJ 876

(3) *Clouston and Co. Ltd. Vs. Cory* (1906) AC 122

(4) *Laws Vs. London Chronical Ltd* 1WLR 698, 1959 2 AllER 285

(4) *Sharda Prasad Tiwari and others Vs. Divisional Superintendent, Central Railway, Nagpur Division (9161) AIR Bombay 150-154*

(5) *Laws Vs. London Chronical Ltd.,* (1959 – 2) ALL ER 285, (1959 – 1) WLR 698

APPEAL preferred against the Judgment of the Provincial High Court of Kalutara.

Shirley N. Fernando PC., with *Ruwan D. V. Dias* for the Employer – Appellant –Appellant

W. Premathilake with *Padma S.Perera* for the Applicant – Respondent – Respondent

Cur.adv.vult.

October 07, 2012

PRIYASATH DEP, P.C., J.

This is an Appeal preferred against the Judgment dated 22-01-2009 of the Provincial High Court of Kalutara affirming the Judgment of the Labour Tribunal of Panadura in Case No LT/PN/25/507/2002 which reinstated the Applicant – Respondent – Respondent.

The Applicant – Respondent – Respondent (hereinafter referred to as "Applicant") filed an Application in the Labour Tribunal of Panadura under Section 31B of the Industrial Disputes Act challenging the termination of his services by the Respondent- Appellant – Appellant (hereinafter referred to as "Respondent – Appellant") The Applicant was employed by the Respondent – Appellant as its Manager of the Horana Branch. He was employed in that capacity from 27th December 1994 and his services were suspended on 18.09.2000. By the letter dated 24-11-2011 his services were terminated with effect from 18.09.2000. The Applicant alleged that his

services were terminated unlawfully and claimed reinstatement with back wages or in the alternative compensation considering his past employment and the period he could be employed in the establishment in the future.

The Respondent-Appellant in its answer admitted termination and alleged that the termination was justified and that the Applicant is not entitled to any relief. The Respondent – Appellant stated that before terminating the services of the applicant a domestic inquiry was held by a retired judicial officer who found the applicant guilty of following acts of misconduct:

1. Failure to pay exhibition sales commission money to places where exhibition sales were conducted and where the money was collected by the Applicant for such payment.

2. Failure to pay sales promotion officer, D. Rajapakse the full sum payable to him on account of exhibition commissions.

In the letter of termination dated 24th November 2001 it was stated that the Applicant was guilty of charges of a serious nature which amounts to misappropriation of company's money.

In the replication the Applicant refuted the allegations made against him. The Applicant alleged that the domestic inquiry was not properly conducted and he was not allowed to continue with his cross-examination of the principal witness and the inquiry was abruptly concluded.

In the inquiry held by the Labour Tribunal, in order to justify termination the Respondent called Chaminda

Rajapakse, sales promotion officer to prove the charges to which the Applicant was found guilty at the domestic inquiry. The said Chaminda Rajapakse gave evidence on several days and he was cross examined by the Applicant. Before the conclusion of his cross-examination the said witness Chaminda Rajapakse passed away. At this stage an application was made on behalf of the Applicant to expunge the evidence of this witness from the proceedings as he did not conclude his evidence. It is the position of the Applicant that he was prevented from cross –examining this witness on important matters due to his sudden death. The President of the Labour Tribunal overruled the objection and proceeded with the inquiry. The Labour Tribunal is not prevented from considering Rajapakse's evidence subject to the infirmity that the Applicant could not complete his cross-examination which will no doubt affect the probative value of his evidence. The Respondent did not call other witnesses to supplement or substitute the evidence of Rajapakse.

The Applicant gave evidence and produced documents marked A1 – A 59 and concluded his evidence. He did not call witnesses to support or corroborate his evidence. After the conclusion of the inquiry the Labour Tribunal ordered the appellant to pay one year's salary as compensation. The learned President held that there was no evidence to prove Charge (1) leveled against the Applicant at the domestic inquiry. In relation to charge (2) where the Applicant did not pay the full sum payable to Chaminda Rajapakse had wrongfully failed to return books worth over Rs. 12,000/- given to him for exhibitions. It was revealed in evidence that the Applicant had sent several reminders to Rajapakse to return books. He made a complaint against Rajapakse to the police after obtaining instructions from his seniors. The Applicant had deposited

the money in the company account and he did not misappropriate that sum. The Labour Tribunal held that the Applicant was not guilty of misconduct.

Being aggrieved by the Order of the Labour Tribunal the Respondent filed an appeal to the Provincial High Court of Panadura. The Provincial High Court of Panadura affirmed the Order of reinstatement made by the Labour Tribunal. At the time of the judgment, it was revealed that the applicant had only one year to serve in the establishment before reaching the retiring age of 55. In view of this the High Court ordered the Respondent to pay four years salary as compensation or else the applicant to be employed by the Respondent Appellant for a period of four years.

Being aggrieved by the Order of the Provincial High Court, the Respondent Appellant appealed against the order to the Supreme Court and obtained leave on following questions of law;

Questions of Law;

(a) Is the Judgment of the Provincial High Court and the Order of the President of the Labour Tribunal vitiated by the fact that it is contrary to the mandatory provisions of the Industrial Disputes Act, which requires that such order should be just and equitable, particularly as the said employee himself has not asked for enhancement of relief?

(b) Is the Judgment of the said Provincial High Court and the Order of the President of the Labour Tribunal vitiated by the failure to judicially evaluate the evidence led at the inquiry before the Labour Tribunal?

In considering the first question of law it is necessary to ascertain whether the orders of the Labour Tribunal and the High Court are just and equitable particularly for the reason that the Employee (Applicant) did not ask for enhanced relief. The Applicant in his application to the Labour tribunal specifically prayed for reinstatement with back wages and in the alternative adequate compensation considering his period of service and also the prospect of future employment in the respondent company. The Labour Tribunal ordered reinstatement with effect from 15.06.2006 without a break in service and also compensation amounting to one year's salary. This order is well within the powers of the Labour Tribunal.

The Respondent – Appellant did not comply with the order of the Labour Tribunal and exercised its statutory right to appeal against the said order. The High Court upheld the findings of the Labour Tribunal. Considering the fact that the Applicant had only one year to serve in the respondent company before reaching the retirement age, ordered the respondent company to pay 4 years salary unless it allows the applicant to continue for four years in the company. It is to be observed that the applicant's services were terminated in September 2000. The said termination was held to be unjust. In such circumstances, the Labour Tribunal has the power to order reinstatement with back wages. However, Labour Tribunal did not order back wages. Therefore, Respondent – Appellant cannot complain that the order is not a just and equitable order. The applicant was out of employment from 2000 due to unlawful termination of his services. If he was reinstated in 2006 as ordered by the Labour Tribunal the applicant could have served more than four years in the company before reaching the retirement age. In such circumstances one cannot state that the order of the High Court

to pay four years salary as compensation is not a just and equitable order. It is well within the powers given by the Industrial Disputes Act and falls within the reliefs prayed for by the applicant.

In the second question of law the Respondent – Appellant alleged that the President of the Labour Tribunal and the honorable judges of the High Court failed to judicially evaluate the evidence led at the inquiry before the Labour Tribunal.

The Labour Tribunal as well as the High Court after examining the evidence came to the conclusion that the Applicant was not guilty of misconduct. The question that arises is whether the evidence was properly evaluated and the finding could be supported by the evidence led at the inquiry.

It is necessary at this stage to briefly refer to the alleged misconduct and the evidence led to establish that fact. The main allegation against the Applicant is that he had failed to pay Sales Promotion officer, C. Rajapakse the full sum due to him as exhibition commission. The Applicant giving evidence admitted that he received Rs. 15216.91 as sales commission payable to C. Rajapakse, the sales promotion officer. The money was deposited in the bank account of the branch. Applicant was required to pay money out of daily proceeds of the branch. Accordingly on 9th April 1999 he paid Rs. 5216.90 and another sum of Rs. 5000/- was paid on 28th April 1999. He withheld Rs. 5000/- and retained that money in the bank account of the branch because the sales promotion officer C. Rajapakse failed to return books worth Rs. 12,000/- given to him for exhibitions. It was revealed that in spite of several reminders, C. Rajapakse did not return the books and the applicant made a complaint to the police.

It is to be noted that the balance Rs. 5000/- due to C. Rajapakse was kept in the bank account of the branch. Therefore, one cannot state that the Applicant misappropriated that sum. He did not appropriate or convert that money for his use. He did not release the balance money to the sales promotion officer due to the reason that Rajapakse did not return the books belonging to the company in spite of several reminders sent to him. 'The Applicant's decision to retain that money in the Branch account is a Sound and a prudent financial decision which is in the best interest of the Respondent – Appellant. On the other hand had the Applicant retained the money with him without paying Chaminda Rajapakse he is certainly guilty of misappropriation. In that background the Labour Tribunal as well as the High Court had to determine whether the conduct of the Applicant amounts to misconduct or not.

The Respondent – Appellant in order to justify the termination called the sales promotion officer C. Rajapakse to give evidence against the Applicant – Respondent. He admitted that he retained the books with him and the applicant sent reminders to him and also made a complaint against him.

The question that arises is whether the conduct of the applicant amounts to misconduct or not. If the applicant is found guilty of misconduct the next question that arises is whether it amounts to a grave or serious misconduct that warrants a dismissal.

Misconduct is not defined in the Industrial Dispute Act. In the absence of a definition it is necessary to refer to case law in Sri Lanka and in other jurisdictions. Sri Lankan and Indian Courts have followed the English case law. As far back

as 1886 *Pearce Vs. Foster* [1], laid down the law thus "The test is that the misconduct must be inconsistent with the fulfillment of the express or implied conditions of service in order to justify dismissal". This was followed in *Shalimar Rope Works Mazdoor Union vs. Shalimar Rope Works Ltd.*[2] , a case very often cited in our courts.

A slightly different test was laid down in *Laws v. London Chronical Ltd* [3]. In that case it was held that "the misconduct must be inconsistent with the fulfillment of the express or implied conditions of service or such as to show that the servant had disregarded the essential conditions of service of the contract of service."

The implied conditions of service includes conduct such as obedience, honesty, diligence, good behavior, punctuality, due care. Therefore following acts such as disobedience, insubordination, dishonesty, negligence, absenteeism and late attendance, assault are treated as acts of misconduct which are inconsistent with the implied conditions of service.

The next question that arises is the degree of misconduct which will justify termination. In *Clouston and Co. Ltd. Vs. Cory,*[4] the Privy Council stated "now the sufficiency of the justification depended upon the extent of misconduct. There is no fixed rule of law defining the degree of misconduct which will justify dismissal. Of course, there may be misconduct in a servant which will not justify the determination of the contract of service by one of the parties to it against the will of the other. On the other hand, misconduct inconsistent with the fulfillment of the express or implied conditions of service will justify dismissal"

The Indian case of *Sharda Presad Tiwari and other v. Divisional Superintendent, Central Railway, Nagpur Division*[5] followed the principles laid down in English cases cited above and proceeded to enumerate the acts or conduct of a sevant which may amounts to misconduct. In the light of the above authorities this court has to ascertain whether the Applicant – Respondent is guilty of misconduct or not. I find that for the reasons stated above. Applicant Respondent's conduct is not inconsistent with the fulfillment of the express or implied conditions of service. The Appellant – Respondent failed to establish this fact. The Applicant did not commit any act of misconduct and therefore termination of his services is not justified.

I am of the view that the findings of both the Labour Tribunal and the High Court are correct and in accordance with the law.

The Provincial High Court of Panadura affirmed the order of reinstatement made by the Labour Tribunal. At the time of the judgment it was revealed that the applicant had only one year to serve in the establishment before reaching the retirement age of 55. In view of this fact the High Court ordered the Respondent to pay four years salary as compensation unless the applicant to be employed by the Respondent Appellant company for a period of four years. The applicant had now passed the retirement age and the relations between the applicant and the respondent had strained due to protracted litigation. Therefore the alternative relief of employing the applicant for a further period of four years is not desirable and for that reason that part of the judgment is set aside.

Subject to the above variation the judgment of the Provincial High Court of Panadura is affirmed. Respondent appellant is ordered to pay four years salary calculated on the basis of Rs. 6800 per month as compensation in lieu of re instatement and a further sum Rs. 39,000/= as ordered by the High Court.

Appeal dismissed. I order Rs. 75,000/= costs to be paid by the Respondent Appellant – Appellant to the Applicant – Respondent – Respondent.

TILAKAWARDANA, J. – I agree.

IMAM, J. – I agree.

Appeal dismissed, with variations.

NILMINI DHAMMIKA PERERA VS. NALINDA PRIYADARSHANA AND TWO OTHERS

SUPREME COURT
TILAKAWARDANE, J.
EKANAYAKE, J. AND
EVA WANASUNDARA, PC., J.
S. C. APPEAL NO. 67/2012
SC/JCCA/LA NO. 360/2011
WP/HCCA/AV. NO. 565/2008
D. C. AVISSIAWELLA NO. 23240/M
MARCH 1ST, 2013

Delict – Vicarious Liability – Employer is liable for the negligent act of the employee – Damages for physical injury

The Plaintiff – Respondent – Respondent (Respondent) alleged that the 1st Defendant – Appellant – Appellant (Appellant), the owner of the lorry bearing No. WP CJ 2267 had deliberately knocked down the Respondent from behind, and after stopping the lorry, the driver along with the husband of the Appellant had got off the lorry and assaulted the Respondent. The Respondent was badly injured and at the time he gave evidence in Court, he was paralyzed below waist, on a wheel chair, due to the injuries he had sustained. The Appellant's husband and the driver were indicted for attempted murder in the High Court.

The appeal against the judgment of the District Court was dismissed by the Civil Appellate High Court. The High Court Judge concurring with the District Judge awarded Rs. 2 million as damages.

Held:

(1) English law principles of vicarious liability being similar to the Roman Dutch Law principles of vicarious liability in Sri Lanka, the English law principles have got accepted and adopted into the Sri Lankan law.

(2) Outcome of a criminal action is no bar to an action for damages before a Civil Court.

(3) The driver who drove was the employee of the owner of the lorry. The driver's wrongful act was done within the act of driving which he was employed to perform by the owner of then lorry. Even if the wrongful act was unauthorized by the employer and criminal in nature, the employer is vicariously liable for the employee's action, thus making the employer bound to pay damages caused by the employee.

(4) When a person gets injured due to a vehicle deliberately running into a person, it is prime-facie proof of the negligence of the driver. Only if the driver could prove contributory negligence on the part of the Respondent, the damages could be reduced or vitiated.

(5) As the owner of the lorry is vicariously liable to pay the entire amount of damages, the Plaintiff is entitled to claim and recover the money either from the owner of the lorry or from the driver of the lorry. The law does not provide for any apportionment of damages.

APPEAL from the Judgment of the Provincial High Court of the Western Province holden at Avissawella.

Cases referred to:

(1) *Priyani Soyza Vs.Arsekularatne* (2001) 2 Sri L.R. 293

(2) *Lister Vs. Hesley Hall Ltd.* (2002) 1 AC 215

(3) *Dubai Aluminium Co. Ltd., Vs. Salaam* (2003) AC 366

Maduranga Ratnayake for the 1st Defendant-Appellant – Appellant

Thishya Weragoda with Nishan Prematiratne, Mahela Liyanage and Niluka Dissanayake for the Plaintiff-Respondent – Respondent

Cur.adv.vult.

June 14, 2013

EVA WANASUNDERA, PC., J.

The two appeal cases bearing Nos. SC. 67/12 and SC. 68/12 have arisen out of one and the same Judgment of

the Provincial High Court of the Western Province holden in Avissawella, and therefore are consolidated for convenience with the consent of all the Counsel who appeared at the hearing, agreeing that one judgment would bind all the parties in both cases.

In this appeal No. 67/12 the Supreme Court granted leave to appeal on 21.03.2012 on the questions of law set out in paragraphs 11(a), (b), (c), (d), (f) and (h) of the Petition dated 09.09.2011. Both parties agreed at the hearing that they would confine the arguments only to question 11 (a) to read as "Did the Provincial High Court of the Western Province (holden at Avissawella) exercising its civil appellate jurisdiction, err in law when it held that the 1st Defendant was vicariously liable for the acts of the 3rd Defendant?"

The Provincial Civil Appellate High Court judgment which has been challenged is dated 01.08.2011. It is in favour of the Plaintiff awarding Rupees Two Million and costs and affirming the judgment of the District Court dated 17.01.2007. The appeal from the District Court was dismissed by the Civil Appellate High Court.

The Plaintiff-Respondent – Respondent (hereinafter referred to as the Respondent), was 20yrs of age at the time of the incident where he alleged that the 1st Defendant – Appellant – Appellant (hereinafter referred to as the Appellant), the owner of the lorry No. WPGJ 2267 had deliberately knocked down (hereinafter referred to as the incident) the Respondent. The lorry driver was the nephew of the lorry owner and her husband. It was undisputed that shortly prior to the incident the Respondent had been at the Police Station with regard to a complaint made by the Appellant's husband against the

Respondent after an altercation between them on the same day. The driver accompanied by the husband of the Appellant had in the incident, knocked down the Respondent from behind, and after stopping the lorry, had thereafter got off the lorry and further assaulted him. Then they have taken him first to the Police Station and then to the hospital. The Respondent was badly injured. At the time he gave evidence in the District Court, he was a paraplegic with his lower body paralyzed, on a wheel chair, due to the injuries he had sustained. The record bears that there was a non-summary inquiry in the Magistrate's Court and thereafter that the Appellant's husband and the driver were indicted for attempted murder in the High Court. The Counsel stated in Court that they are serving a sentence in prison at the moment.

The appeal arises out of "vicarious liability" in delict/tort placed by law on the employer (the owner of the lorry), for negligent acts of the employee (the driver of the lorry). The record bears that the Respondent instituted action for damages in the District Court through the Legal Aid Commission by a plaint dated 06.01.2004. Over 9 years have lapsed on litigation and more than 10 yrs have lapsed since the date of the incident.

The Learned Civil Appellate High Court Judge had evaluated the evidence on record and has considered the questions of law carefully before arriving at the conclusions in the judgment. The admitted facts at the District Court trial are that the Appellant owned the lorry at the time of the incident, and that the legal husband of the owner of the lorry accompanied the driver of the lorry at the time the incident took place.

The Respondent had shortly prior to the incident been walking on the same side of the road as the lorry was being

driven. When he, on hearing the sound of an approaching lorry, looked back, and had seen the lorry veering into him. He had been knocked down and after he fell, he was beaten with iron rods by the 2nd and 3rd Defendants of the District Court case. ie, the lorry owner's husband and the driver. They have taken him in the lorry to the Police Station first and thereafter to the hospital. Neither the driver nor the owner of the lorry had given evidence at the trial. Even the owner's husband who was in the lorry at the time of the incident had not given evidence.

In any civil action, the District Judge makes the judgment on a balance of probabilities; in this case, there is no evidence on record for the defence. The Appellant had opted only to rely on the infirmities of the evidence of the Respondent and three witnesses who gave evidence on his behalf.

The argument of the Appellant, who is the owner of the lorry, was that, as the employer, she is not vicariously liable for the 'intentional acts' of the employee, the driver. It is admitted that the Appellant was the owner of the lorry and the lorry had been driven in a manner to deliberately run over the Respondent. The lorry driver was not on a 'frolic of his own'. It was admitted that the lorry owner's husband was with the driver inside the lorry. In this instance, I hold that in law the incident speaks for itself – "res ipsa loquitor "Vicarious liability", is a strict liability principle in civil law holding the owner of the vehicle liable in damages on the driver's acts of negligence. The owner did not give evidence to say that the driver has deliberately driven the lorry to harm the Respondent, therefore when he is injured: the owner is not liable for damages. Therefore the defence cannot now take up the position at the appeal stage to say that the action of the driver

was deliberately done by him only and therefore the owner was not liable in delictual damages. There is a criminal action for attempted murder pending before the criminal High Court or may be, it is concluded against the lorry owner's husband and the lorry driver. But the ourcome of the criminal action, whether the driver is convicted or not, holds no bar to the action for damages before a civil trial court. When a person gets injured due to a vehicle deliberately running into a person, it is prima-facie proof of the negligence of the driver. Only if the driver could prove contributory negligence on the part of the Respondent, the damages could be reduced or vitiated. In this case the defense has failed to prove contributory negligence of the Respondent. The owner of the lorry has not even tried to show that the driver's action of knocking down the Respondent was an 'independent act' of the driver with a purpose of his own. She could not have done so as her husband was in the lorry with the driver. The defence has taken up all these untenable arguments at the appeal stage and not at the trial stage. The suggestion that it was an 'intentional act" of the driver alone was not brought up at the trial in the District Court.

In *Priyani Soyza Vs. Arsekularatne,*(1) it was held that in an acquilian action, actual pecuniary loss must be established, the exception being 'damages for physical injury'. This instant case is one where physical injuries are so grave that the amount cannot be assessed by any Judge arithmetically, but grant the least by awarding what is asked for by the Plaintiff. The learned Civil Appellate High Court Judge has analysed the documentary evidence and the facts proved by the Plaintiff and mentioned that the Defense was unable to either contradict the position in cross examination or by leading contradictory evidence. The said analysis of facts are as follows:-

(a) that even after the incident, the Plaintiff was assaulted while being dragged along the road near the lorry.

(b) that the Plaintiff sustained grievous injuries from the incident and is incapable of walking due to the injuries

(c) that he is unable to control passing urine and excreta

(d) that all the organs below the waist are lifeless and paralyzed

(e) that he has no ability to do anything without the help of others and

(f) that he has to spend the rest of his life on a wheel chair

The Learned High Court Judge concurring with the District Judge awarded two million rupees as damages to the Respondent payable by the appellant and this court affirms these findings.

The Counsel for the Appellant further argued that the damages on vicarious liability should have been apportioned between the employer and the employee. This argument is untenable as the vicarious liability is placed upon the owner of the vehicle (the employer) and not upon anybody else. As such the owner of the lorry is held liable in law to pay the full amount of damages, since she is jointly and severally liable to pay damages with the driver. The Plaintiff is entitled to claim and recover the money either from the owner of the lorry or from the driver of the lorry in cases such as this in the District Court. Only the amount is adjudged by the trial Judge. The law does not provide for any apportionment of damages.

The general principle of vicarious liability in respect of master-servant relationship which is accepted as part of our law in Sri Lanka, is based on the principle initially laid down by Salmond in "The Law of Torts" [1907] which states thus:

> "An employer will be liable not only for a wrongful act of an employee that he has authorized but also for a wrongful and unauthorised mode of doing some act authorised by the master. But a master (as opposed to an employer of an independant contractor) is liable even for acts which he has not authorised provided they are so closely connected with the acts which he has authorised that they rightly may be regarded as modes. (authough inproper modes) of doing them".

English Law principles of vicarious liability being similar to the Roman Dutch Law principles of vicarious liability in Sri Lanka, the English Law principles have got invariably accepted and adopted into the Sri Lankan Law, which has been developed over the years. In *Lister Vs. Hesley Hall Ltd* [2] 1 AC 215 and in *Dubai Aluminium Co. Ltd Vs. Salaam* [3], it was held that if an employer carries out a wrongful act which is unauthorised and/or intentional and/or fraudulent, the employer may be held liable depending upon the closeness of the connection between the employee's wrongdoing and the class of acts of which he was employed to perform.

In the instant case, the driver who drove was the employee of the owner of the lorry. The driver's wrongful act was done within the act of driving which he was employed to perform by the owner of the lorry. Even if the wrongful act was unauthorized by the employer and criminal in nature, the employer is vicariously liable for the employee's action, thus making the employer bound to pay damages caused by the employee.

In the circumstances of this case. I answer the question of law mentioned above in the negative and hold that the Provincial Civil Appellate High Court was quite correct in dismissing the appeal of the Appellants and affirming the judgment of the Learned District Judge. I hold that the 1st Defendant-Appellant-Appellant and the 3rd Defendant-Appellant-Respondent are jointly and severally liable to pay damages to the Plaintiff – Respondent – Respondent. I dismiss this appeal with costs and affirm the judgment of the Learned High Court Judge of the Civil Appellate High Court as well as the judgment of the Learned District Judge subject to the variation that the Plaintiff Respondent is entitled to claim legal interest on the said award of rupees two million (Rs. 2000000/-) from the date of the Judgment of the District Court to date and this Court makes order granting such claim of legal interest to be paid by the Appellant to the Respondent.

The Registrar of this Court is directed to send this judgment forthwith, along with the original case record to the District Court of Avissawella for enforcement of the judgment.

TILAKAWARDANA, J. – I agree

EKANAYAKE, J. – I agree

Appeal dismissed.

WAKACHIKU CONSTRUCTION CO. LTD. VS. ROAD DEVELOPMENT AUTHORITY

SUPREME COURT
SALEEM MARSOOF, PC., J.
SRIPAVAN, J. AND
IMAM, J.
S. C. MISC. 01/2011
H. C. (ARB) NO. 2404/2010
FEBRUARY 6TH, 2012

Arbitration Act No. 11 of 1995 – Sections 7(3)(b),32 – Where parties unable to reach an agreement as to the appointment of an Arbitrator or Arbitrators, any party may apply to the High Court to take necessary measures towards the appointment of the Arbitrator or Arbitrators – Inherent jurisdiction of Court?

The Petitioner is a foreign construction company which was engaged in construction work for the Respondent. Disputes had arisen between the Petitioner and the Respondent during the course of the construction works. The Petitioner referred the said disputes first to the Engineer and then to the Adjudicator in terms of the provisions of the Condition of contract. Being dissatisfied with the decision of the adjudicator, the Petitioner referred the said disputes to Arbitration. The Petitioner nominated three foreign Arbitrators and requested the Respondent to select one of them to serve as an Arbitrator with the stipulated time period of 21 days. The Respondent refused to comply with the request made by the Petitioner and made a counter request to name Sri Lankan Arbitrators for consideration. The Petitioner urged the Respondent to select one Arbitrator from the list submitted by the Petitioner within the contractually stipulated period of 21 days. The Respondent rejected the three names submitted by the Petitioner.

As the Respondent failed to select an Arbitrator from the three names nominated by the Petitioner within the stipulated period, the Petitioner,

with notice to the Respondent appointed Mr. Neville Tait as the sole Arbitrator as per Clause 19.5 of the Conditions of Contract.

The Respondent thereafter invoked the jurisdiction of the High Court on the ground that inter alia the Petitioner had unilaterally appointed an Arbitrator in violation of its contractual obligations and the provisions of the Act.

The High Court by its order dated 11.3.2011, held that the procedure adopted by the Petitioner to appoint the said Neville Tait is contrary to the agreement and the said appointment has been done without authority.

On appeal:

Held:

Per Sripavan, J.

> "It would be a matter for determination by the Court in each individual case whether the circumstances of the case make out the necessity to exercise the inherent power and make it incumbent on the Court to exercise that power to do justice between the parties. Hence the inherent power of the Court has to be exercised carefully and with caution and only where such exercise is justified considering the facts of the case which saddens the conscience of the Court."

(1) When a statute provided a method so as to meet a contingency in a particular manner, any other method thought of by the Court cannot then be said to be a method which would advance the interest of justice. No occasion for the exercise of any inherent power arises when the statute expressly provides for what is to be done in that situation.

per Sripavan J. –

> "The remedy provided by the statute may not be an efficacious one. It may even lack the necessities to grant quick relief. However, it is well settled and accepted as axiomatic that justice be administered in accordance with the law of the land"

(2) If all the powers which will be necessary to secure the ends of justice exists at some point and such existence is recognized by the statute, inherent power of a Court cannot be invoked disregarding express statutory provision.

(3) The Act gives the Petitioner an express provision to invoke the jurisdiction of the High Court in a particular manner once an award is made and the party seeking to enforce the right must resort to that remedy and not to others.

(4) It cannot be the duty of any Court to exercise its inherent powers when it plainly appears that in doing so, the Court would be using a jurisdiction which the legislature has forbidden it to exercise. Any lacuna in the law is to be dealt with by the legislature if it cause any inconvenience or hardship to a litigant.

It is unnecessary to emphasize that the ambit and scope of the Court's power to interpose its inherent authority cannot be invoked in regard to matters which are sufficiently covered by a specific provision of the Act.

APPLICATION to exercise the inherent jurisdiction of the Supreme Court to set aside the order of the High Court.

Cases referred to:-

1. *Merchant Bank of Sri Lanka Ltd. Vs. D. V. D. A Tillakeratne – (2001) BALR 71*
2. *Ganeshanathan Vs. Vivienne Gunawardane – (1984) 1 SLR 319*
3. *Mohamed Vs. Annamalai Chettiar – 1932 CLR – Vol . XII 228*
4. *Kotalawela V. W. H. Perera and another – (1937) 1 CLJ 58*

K. Kanag – Isveran PC., with *S. Kanag – Isvaran* for the Petitioner

A.H.M.D. Nawaz, D. S. G. for the Respondent.

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February 02nd 2013

SRIPAVAN, J.

The Petitioner by its Petition dated 21st April 2011, inter alia, moved Court to exercise its inherent jurisdiction to set aside the Order of the High Court dated 11th March 2011 and to declare that the said High Court did not have jurisdiction

to have entertained proceedings in H.C. (ARB) No. 2404/2010 instituted by the Respondent.

The facts relating to this application are briefly as follows:-

The Petitioner is a foreign construction company which was engaged in construction work for the Respondent Authority. When disputes arose during the course of the works, the Petitioner referred the said disputes first to the Engineer and then to the Adjudicator in terms of the provisions of Clause 19.1 to 19.3 of the Conditions of Contract. Being dissatisfied with the decision of the Adjudicator, the Petitioner thereafter referred the said disputes to arbitration by its letter dated 10th December 2009 in terms of Clause 19.5. The Petitioner in its letter nominated the following three Arbitrators in accordance with Clause 19.5 and requested the Respondent to select one of them to serve as an Arbitrator within the stipulated time of 21 days.

1. Mr. Daniel Atkinson, FICE, FCI Arb
2. Mr. David Loosemore, FICE, MCI Arb
3. Mr. Neville Tait, FICE, FCI Arb

The Respondent by its letter dated 18th December 2009 refused to comply with the request made by the Petitioner and made a counter request to name Sri Lankan arbitrators for consideration. In response thereto, the Petitioner by its letter dated 21st December 2009 urged the Respondent to select one Arbitrator from the list submitted by letter dated 10th December 2009 within the contractually stipulated period of 21 days and informed that the failure on the part of the Respondent to do so would result in the Petitioner itself

selecting one of them to be the sole Arbitrator in terms of Clause 19.5.

The Respondent, however, by its letter dated 28th December 2009 advised the Petitioner that the decision conveyed by its letter dated 18th December 2009 remained unchanged. Thus, the Respondent rejected the three names nominated by the Petitioner in toto. As the Respondent failed to select the sole Arbitrator, within the stipulated period, the Petitioner, with notice to the Respondent duly appointed Mr. J. Neville Tait as per Clause 19.5 of the Conditions of Contract. By letter dated 15th June 2010, Mr. J. Neville Tait accepted the appointment and forwarded a "Draft Arbitration Procedure for Comment" by both the Petitioner and the Respondent.

Though the Petitioner by letter dated 28th June 2010 made certain comments on the conduct of the Arbitration proceedings as set out in the "Draft Procedure", no comments or suggestions were made by the Respondent to the sole Arbitrator.

It is in this backdrop, the Respondent purported to invoke the jurisdiction of the High Court under Section 7 [Part III of the Arbitration Act No. 11 of 1995 (hereinafter referred to as the "Act"] and pleaded, inter alia, that the Petitioner had unilaterally appointed an Arbitrator in violation of it's contractual obligations and the provisions of the Act, that a situation contemplated under Section 7(3)(b) of the said Act had arisen, and that the High Court was required to appoint a suitable Arbitrator from a list submitted by the Respondent thereby reversing and nullifying the contractually agreed procedure for the appointment of arbitrators.

Section 7 (3)(b) of the Act provides that, *"Where under an appointment procedure agreed upon by the parties, the parties*