Privy Council Appeal No. 27 of 1976

Karuppan Bhoomidas (Administrator of the estate of Veeranan s/o Solayappan, deceased) – – – – – – *Appellant*

v.

Port of Singapore Authority – – – – – – *Respondent*

FROM

THE COURT OF APPEAL IN SINGAPORE

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 15TH NOVEMBER 1977

Present at the Hearing:

LORD SIMON OF GLAISDALE

LORD SALMON

LORD KEITH OF KINKEL

SIR GARFIELD BARWICK

SIR RICHARD WILD

[*Delivered by* LORD SALMON]

The appellant is the Administrator of the estate of Veeranan deceased. On 22nd January 1968 the deceased met with an accident when he was a member of a gang engaged in loading a cargo of planks from the wharfside at the Port of Singapore into the holds of an adjacent ship. Each member of this stevedoring gang was in the regular employment of the respondent which engaged them, paid them, prescribed the jobs which they should undertake and alone had the power of dismissing them. The shipowners paid the respondent for the stevedoring services which it rendered in accordance with the provisions of sections 45 to 49 of the Straits Settlements Ports Ordinance of 1912.

The only members of the gang concerned in the accident suffered by the deceased were the deceased himself, a winchman and a signalman. It is unnecessary to give anything except a brief description of this accident. The deceased's job was to secure a load of planks with a chain and attach each end of the chain to the cable hook of one of the ship's winches. The winchman's job was to hoist the load and then lower it into one of the ship's holds. He should not however commence this operation until he received the signal from the signalman to do so because the winchman could see neither the deceased nor the load and had no means of knowing that it was safe to operate the winch until he received the signal. The signalman's job was to give the signal to hoist after he had satisfied himself that it was safe to do so. In fact, the winchman lifted the load

together with the deceased, whose thumb had been caught in the chain securing the load, to a height of 40 feet from which the deceased fell to the ground and suffered grave injuries.

At the trial, it was agreed that the accident had been caused by the negligence of the winchman and/or the signalman and contributed to by the negligence of the deceased: it was also agreed that if, in law, the respondent was vicariously liable for the negligence of the signalman and winchman, the blame should be apportioned as to 75% to the respondent and 25% to the deceased. Damages were agreed at a total of $80,000; so that if the appellant had succeeded on the law she would by consent have recovered judgment for $60,000.

The relevant points of law were:

(1) Did By-Law 26 of the respondent's By-Laws, on its true construction, exempt the respondent from any liability to the deceased?

(2) If the respondent was right on this first point, was By-Law 26 *ultra vires* section 75 of the Straits Settlements Ports Ordinance of 1912 (which empowered the respondent to make By-Laws) or unreasonable and therefore of no effect?

These two points of law had both been decided by the Court of Appeal in the respondent's favour in *Alishakkar v. Port of Singapore Authority* (Civil Appeal No. 25 of 1972, Suit No. 652 of 1970)—a case which is indistinguishable from the present in so far as the effect of By-Law 26 is concerned.

The only difference between *Alishakkar* and the present case concerns the facts. In the former case it was held that no negligence had been proved against anyone but that even if negligence had been established against any member of the respondent's gang, the respondent would have been protected by By-Law 26, whereas in the present case, as already indicated, it was admitted that the members of the respondent's gang had been negligent and that the injuries to the deceased were attributable 75% to that negligence and 25% to the negligence of the deceased.

The decision in *Alishakkar* was treated as binding on the learned trial judge and also on the Court of Appeal. The respondent accordingly succeeded in the present case at first instance and on appeal. Leave to appeal to this Board was granted to the appellant by the Court of Appeal on 2nd August 1976.

It may perhaps be useful in examining the judgment under appeal, to consider what the legal position would have been at common law, had By-Law 26 never existed. Clearly, in such circumstances, the respondent would not have had, nor has it been suggested that the respondent could have had, any defence to the claim against it. It has long been established that the onus of proof

> "rests on the general or permanent employer—in this case the appellant board—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". *Mersey Docks and Harbour Board v. Coggins and Griffith (Liverpool) Ltd.* [1947] A.C.1 per Viscount Simon at p.10.

Their Lordships' attention has not been drawn to any case since *Donovan v. Laing* [1893] 1 Q.B. 629 in which this burden has been successfully discharged. *Donovan's* case came in for a good deal of criticism in the

Mersey Docks case with which their Lordships respectfully agree. Viscount Simon said at p. 11:

> ". . . if that decision is upheld, it must be on the basis found in the words of Lord Esher M.R., when he said: 'The man was bound to work the crane according to the orders and under the entire and absolute control of' the hirers."

Lord Macmillan in referring to *Donovan's* case said at p. 14:

> "The current of subsequent authorities has set against this case and the opinions of the learned judges who have commented on it have been largly concerned with distinguishing and explaining it, if not explaining it away".

Lord Simonds at p.18 said of anyone in the position of the present respondent that they could escape liability only:

> ". . . if they can show that *pro hac vice* the relation of master and servant has been temporarily constituted between [the ship and the members of the gang] and temporarily abrogated between [the respondent and those members]. This they [could] do only by proving, in the words of Lord Esher M.R. in *Donovan v. Laing* [1893] 1 Q.B.629, 632 that 'entire and absolute control' over the [gang] had passed to the [ship]."

In the *Mersey Docks* case, the appellant Board had hired out to the respondent Company, who were master stevedores, a mobile crane with a skilled driver. The hiring contract provided that the driver should, whilst on hire, be the servant of the stevedores. Owing to the driver's negligence in manipulating the crane, a man checking the goods to be transferred from shed to ship by means of the crane was seriously injured. It was held unanimously by the Court of Appeal and by the House of Lords that the appellant Board and not the stevedores were liable for the injuries caused by the crane driver. Each of the noble and learned Lords made it plain in their speeches that servants cannot be transferred from the service of one master to that of another without their consent, express or implied, and that the onus of establishing that consent rests on the master by whom the servant is paid. They also relied upon *M'Cartan v. Belfast Harbour Commissioners* [1911] 2 I.R. 143 H.L. and *Ainslie v. Leith Harbour and Docks Commissioners* 1919 S.C. 676 and in particular upon the speech of Lord Dunedin in the former, and the judgment of Lord Mackenzie in the latter case to support the view that partial control by the hirer is not enough but that entire and absolute control is necessary in order to transfer liability for the negligence of the servant from the shoulders of the employer who engages, pays and regularly employs and can alone dismiss him on to the shoulders of those who have hired the servant's services from his regular employers.

Their Lordships recognise that the authorities relied on by the appellant are mostly concerned with the hiring out by a port authority of a travelling crane with a skilled driver to be used for loading or unloading a ship. The principles enunciated in those cases cannot however be confined to that particular fact. They are of general application.

No doubt it may be somewhat less difficult to produce acceptable evidence that the servants of a port authority whose services alone have been hired out to a ship agreed to put themselves under the entire and absolute control of the ship than that the skilled driver in the service of a port authority and in charge of a travelling crane hired out by the port authority agreed to put himself in such a position. But the task in either case is likely to be formidable, particularly when the services rendered are stevedoring services. In *Cameron and Another v. Nystrom* [1893] A.C.308 Lord Herschell L. C. said at p.312:

> " Reliance was placed upon expressions used in the evidence, with regard to the extent to which the mate and master had the right to direct and control the acts of the stevedores' servants. That does not seem to their Lordships in the least inconsistent with their being the servants of the stevedores, and not the servants of the shipowner. There was no express agreement with regard to the extent to which the master and mate should have control over them. That control is only to be implied from the circumstances in which they were employed. The relation of stevedore to shipowner is a well-known relation, involving no doubt the right of the master of the vessel to control the order in which the cargo should be discharged, and various other incidents of the discharge, but in no way putting the servants of the stevedore so completely under the control and at the disposition of the master as to make them the servants of the shipowner, who neither pays them, nor selects them, nor could discharge them, nor stands in any other relation to them than this, that they are the servants of a contractor employed on behalf of the ship to do a particular work."

See also *Murray v. Currie* [1870] L.R. 6 C.P.24.

It seems to be a natural inference from the facts that the respondent was rendering stevedoring services to the ship under contract with the shipowners. Unfortunately the agreed facts were not put into writing: there is no record of them except what appears to be a tenuous note of what Counsel said at the trial. This note does not, for example, disclose the size of the respondents' gang or whether it included a foreman. Having regard to the burden of proof it certainly cannot be assumed that it did not. If there was a foreman in charge of the gang, it puts the respondent out of court. If there was no foreman, it certainly does not establish the respondent's case. There is no need to recite the note of what Counsel said because, rightly, it has never been argued on behalf of the respondent that the facts referred to in it could possibly discharge the burden of proof which admittedly rests upon the respondent. This no doubt is why, in the courts below, and therefore necessarily before this Board, the respondent has relied solely upon By-Law 26.

Their Lordships have dealt with the principles and the authorities relating to this branch of the law because they do, in their Lordships' view, throw considerable light on the true construction of By-Law 26.

The By-Law 26 which dates from 5th December 1913 reads as follows:

> " The serangs and labourers employed in discharging and loading vessels shall be under the superintendence of the ship's officers; the Board undertake no responsibility as stevedores ".

Their Lordships consider that this By-Law falls far short of putting the servants of the respondent under the entire and absolute control of the ship. It does not seem to their Lordships in the least inconsistent with their being the servants of the respondent, and not the servants of the shipowners. It throws no light upon the extent of the superintendence of the ship's officers. Superintendence is a somewhat loose and ambiguous word. For example a building owner's architect superintends on behalf of the building owner the work of the building contractor's workmen, but this does not make them the building owner's servants. The ship's officers no doubt have the right to superintend the loading by directing into which holds the cargo is to be loaded and the order in which it is to be loaded but this in no way puts the servants of the respondent so completely and entirely under the control and at the disposition of the ship's officers as to make them the servants of the shipowners, who neither pay them, nor

select them, nor could discharge them. Incidentally it does not seem feasible that the ship's officers would be watching the signalmen to see that they did not give the signal to hoist when it was unsafe to give it nor the winchmen to see that they did not begin to hoist until they had received the signal to do so.

Had it been the intention of By-Law 26 to shift the *prima facie* responsibility of the respondent for the negligence of servants engaged and paid by them on to the shoulders of the shipowners, nothing would have been easier than to do so in plain words. This indeed was done in section 97B of the Port of Singapore Authority Act as amended in 1971— which is strikingly different from By-Law 26. That section reads as follows:

> " Any stevedore or workman whilst engaged in performing work in or in respect of any vessel shall, notwithstanding that his wage or remuneration for performing the said work is paid by the Authority, be deemed to be the servant of the owner and master of such vessel and the Authority shall be exempt from all liability for any loss or damage caused by any act, omission or default of such stevedore or workman ".

Their Lordships do not consider that By-Law 26 is of any assistance to the respondent which is being sued in its capacity as an employer. The action is brought by the representative of one of its deceased servants in respect of the negligence of the deceased's fellow servants for which the respondent is vicariously liable. Its liability for the negligence of its servants does not spring from any undertaking it has given. It is imposed upon the respondent by the common law. In their Lordships' view, By-Law 26 does not exclude that liability, nor transfer any part of it on to the shoulders of the shipowners.

In 1913 the doctrine of Common Employment still prevailed: and that no doubt would have constituted a complete defence to the appellant's claim. That doctrine however has long since disappeared. The respondent is vicariously liable for the negligence of its servants if such negligence causes personal injury to a fellow servant or to a member of the public. In their Lordships' view the fact that the negligence occurred in the course of a stevedoring operation does not afford the respondent any defence.

Having regard to their Lordships' views about By-Law 26 it is unnecessary to deal with the argument that that By-Law was *ultra vires* or unreasonable.

Their Lordships will therefore allow the appeal and direct that judgment be entered for the appellant for $60,000 with costs here and below.

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In the Privy Council

KARUPPAN BHOOMIDAS
(Administrator of the estate of Veeranan s/o Solayappan, deceased)

v.

PORT OF SINGAPORE AUTHORITY

DELIVERED BY
LORD SALMON

Printed by HER MAJESTY'S STATIONERY OFFICE
1977