FERNANDO

v.

DE SILVA AND OTHERS

COURT OF APPEAL
U. DE Z. GUNAWARDENA, J.
JAYAWICKREMA, J.
CALA 191/97
DC MT. LAVANIA 13/91/M
18TH OCTOBER 1999
10TH, 13RD DECEMBER 1999

Execution of Decree - Addition of Party at that stage - Civil Procedure Code - S.18, S.217 (A), 218, Doctrine of Subrogation - Constructive Trust - property held "on behalf" - Motor Traffic Act - S.105 - 109, shall pay - Inherent powers of Court.

The District Court refused the application of the Plaintiff-Appellant to execute the Decree. The award had been made as damages for serious physical injuries that the Plaintiff Appellant suffered. The 1st Defendant Respondent, operation of whose lorry had caused these injuries had third party insurance cover against liabilities. The Insurance Company (3rd Respondent) was not a party in the District Court. The application made to add the Insurance Company at the execution Stage was refused by Court.

At the Appeal the 3rd Respondent Insurance Company was named the added Respondent and they contended that :

(1) the added Respondent could not have been made a party to the action after Judgment had been entered.

(2) The added Respondent not being a party to the action is not bound by the Judgment.

Held :

(1) No one can be added as a Party to the action after Judgment had been entered, therefore the added Respondent not being a party, the Judgment could not be enforced or execute against it.

Held further :

(1) The 1st Defendant Respondent (insured) has no direct interest in the safety of third parties. The loss against which he (1st Defendant

Respondent) seeks protection is not the injury or damage caused by the accident, he seeks protection (under the Policy) against the consequence of the fact that he happens to be responsible for the accident in the circumstances in which it has happened.

(2) The addition of the Insurance Company was not at all necessary for the execution against the Insurance Company by the money decree that had been entered in favour of the Plaintiff Appellant.

(3) In terms of S.218 C.P.C., the money to the amount awarded in the hands of the insurer cannot strictly be said to be money (property) belonging to the Judgment Debtor, more so as the 1st Defendant Respondent (insured) has insured against liability to third party arising otherwise than from contract.

(4) The insurer is legally bound to compensate and the 1st Defendant-Respondents right is not a mere right to request that he be given assistance or an indemnity - it is a legal entitlement as opposed to a benefit.

(5) One aspect of the doctrine of Subrogation in relation to an insurer, mean the right of the insurer, who has indemnified the insured to step into the shoes of the insured and in the name of the insured pursue any right of action available to the insured which may diminish the loss insured against. The other aspect of the doctrine of subrogation is that the insured cannot make a profit from his loss and that for any profit he does make he is accountable to his insurer either as constructive trustee or an action in quasi contract for money had and received.

(6) Even if the money (to the amount of the Judgment) is not held by the added Respondent in trust yet it can be said to be held on behalf of the Judgment Debtor.

(7) The words 'shall' in S.105 of the Motor Traffic Act "the insurer shall pay to the person entitled to the benefit of the decree the sum payable thereunder." denotes an absolute obligation.

(8) Civil Procedure Code is not exhaustive as to the powers of court in matters of procedure. The Court has an inherent power to make a particular order, where its decision is based on sound general principles and is not in conflict with them or the intention of the legislature.

(9) Courts are expected not to act upon the principle that every procedure is to be taken as prohibited unless it is expressly provided for by the Code.

(10) As there is no prohibition legal or otherwise, the Plaintiff-Appellant has the power in execution of the Judgment to "seize and sell or to realise the money by the hands of the Fiscal" all saleable property, whether movable or immovable belonging to the added Respondent (Insurance Company).

It is wholly unnecessary to add the Union Assurance Company as a party.

APPLICATION for Leave to Appeal from the Order of the District Court of Mt. Lavania.

Cases referred to :

1. *King v. Victoria Insurance Company* (1986) AC 250
2. *Hukum Chand v. Kamalanand Singh* 3 CLJ 67 : 33 Cal 927
3. *Narasinghe Das v. Mangal Dubey* (1883) 5 All E. 163

David Weeraratne for Plaintiff-Appellant.

Geoff Alagaratnam with *M. Adamally* for Respondent-Respondent.

Cur. adv. vult.

October 01, 2000.

U. DE Z. GUNAWARDENA, J.

This is an appeal against an order dated 07.10.1997, made by the learned District Judge, refusing the application by the plaintiff-appellant, for execution of a decree, awarding the plaintiff-appellant a sum of Rs. 735,000 with costs. The abovementioned award had been made as damages for serious physical injuries that the plaintiff-appellant had suffered: one of the legs had to be amputated from the hip. The 1st defendant-respondent, the operation of whose lorry had caused these injuries, had third party insurance cover against liabilities to third parties.

It would appear that the Insurance Company viz. Union Assurance although not been made a party in the District Court, at the outset, had been made so at the stage when the execution of the judgment was applied for - or it is more accurate to say that an application was made for the addition of the Insurance Company, at that stage, which application

had been refused by the learned District Judge by the order complained of.

The said Insurance Company who is named, in this application made to the Court of Appeal for leave to appeal, as the added respondent-respondent, and who will mostly be referred to as such in this order, had raised several objections, by way of argument here and below - the two main of any worth of those (objections) being that:

(a) the added respondent-respondent couldn't have been made a party to the action after the judgment had been entered;

(b) in any event, there is no provision in law for executing a money decree against the added-respondent-respondent, (Insurance Company) who, in the submission of the learned Counsel appearing for that party, is a "third party". In other words, added-respondent-respondent, not being a party to the action is not bound by the judgment; one cannot execute a judgment against a person who is not bound thereby - so the learned Counsel for the added respondent-respondent, submitted.

To consider the two aspects outlined above: it goes without saying that no one can be added as a party to the action after judgment had been entered, one way or the other. Nothing more need be said in regard to this question as it is so well known. Strictly speaking section 18 of the Civil Procedure contemplates addition of parties, on or before hearing i. e. before the trial proper commences. Of course, this rule is relaxed if there is a compelling need for the addition of a party, for one does not in practice, give abnormally excessive attention to the rule by making a fetish of it. If the truth be told, sanction for adding a party, at any stage, but necessarily before the stage of judgment, is to be found in the relevant section itself i. e. section 18 referred to above.

The second argument (b) enunciated above, so to speak, springs from the first and is almost a concomitant thereof, if not, a follow up or continuation - the second argument, to repeat it, being that the added-respondent-respondent (Insurance Company) not being party (as it could not be added after judgment) - the judgment could not be enforced or executed against it. In principle, one cannot find fault with that argument on the basis on which the learned Counsel for the added respondent-respondent chose to put it forward. That any judgment will have binding force only in relation to the parties is a inveterate rule.

It will be interesting to note that the addition of the Insurance Company i. e. added-respondent-respondent, was not at all necessary for the execution, against the Insurance Company, of the money decree that had been entered in favour of the plaintiff-appellant. To explain why the addition of added-respondent-respondent is wholly unnecessary, it would necessitate an examination of the relevant section of the Civil Procedure Code i. e. 218 which gives the power or the right to the Judgment creditor to seize or to seize and sell the judgment debtor's property in satisfaction of the decree for payment of money - the decree in favour of the plaintiff-appellant in this case, also, being one such (decree). A decree to pay money, as in the case in hand, falls under section 217(A) of the Civil Procedure Code. To cite the aforesaid section 218: "when the decree falls under head (A) . . . the judgment creditor has the power to seize and to sell or realise in money by the hands of the Fiscal . . . all saleable property, movable or immovable, belonging to the judgment debtor, or over which or profits of which the judgment-debtor has a disposing power, which he may exercise for his own benefit, and whether same be held by or in the name of the judgment debtor or by another person in trust for him or on his behalf."

In terms of the above section the judgment-creditor has the power, in execution of the money-decree, to sell or seize;

(a) the property whether movable or immovable belonging to the judgment-debtor;

(b) any property, movable or immovable, over which or over the profits of which the judgment-debtor has a "disposing power" if such disposing power can be exercised for his own benefit if such property is held by or in the name of the judgment-debtor or by another person in trust for him (judgment-debtor) or on his behalf.

The money, to the amount awarded by the judgment, in the hands of the insurer i. e. added-respondent-respondent cannot strictly be said to be money (property) "belonging" to the judgment-debtor, more so as the 1st defendant-respondent (the insured) has insured against liability to third party arising otherwise than from contract. The 1st defendant-respondent (insured) has no direct interest in the safety of third persons. The loss against which he (the 1st defendant-respondent) seeks protection is not the injury or damage caused by the accident. He seeks protection (under the policy) against the consequence of the fact that he happens to be responsible for the accident in the circumstances in which it has happened. A thing can be said to belong to a person when he owns it or when it appertains to him. The meaning of the word "own" is to be gathered from the context but usually it means the right to enjoy the property and do as he pleases therewith and even dispose of it according to his pleasure. Another reason, that deters me from holding that money in the hands of the added respondent, to the amount of the sum awarded to the plaintiff-appellant by the judgment, "belongs" to the 1st defendant-respondent (insured) in the sense that he owns it, is this, i. e. under section 105 of the Motor Traffic Act the third party (plaintiff-appellant) has a direct right against the insurer in respect of the sum awarded, as will be explained later on.

From the above section i. e. section 218 of the Civil Procedure Code, one thing can be gathered for certain, that is, that any property whether movable or immovable, can be

seized by the judgment-creditor in execution of the judgment, if the property belonged to the judgment-debtor. Any particular property, which includes money, can be said to "belong" to the judgment-creditor if it appertains to him or if he is entitled to the same. But strictly speaking, in the exact sense, money held by or in the hands, of added-respondent-respondent (insurer) cannot be said to "belong" to the judgment-debtor in the sense that he owns it, although the judgment-debtor, (1st defendant-respondent) undoubtedly, has some kind of limited interest in it, short of ownership in that he has every legal right to expect, if not make a demand from the added-respondent-respondent, as the insurer, to utilize the money in its hands i. e. in the hands of the insurance company, to liquidate or meet the 1st defendant-respondent's liability to the plaintiff-appellant which is one of liability insurance - the type of insurance protection which indemnifies one from liability to third persons as contrasted with insurance coverage for losses sustained by the insured himself. One has to remember that in terms of the relevant contract of insurance, between the 1st defendant and the added-respondent-respondent - the latter (insurer) has admittedly, undertaken to pay damages or compensation on the occurrence of damage or injury to a third party arising out of the use of the lorry belonging to the 1st defendant-respondent. The insurance policy in favour of the 1st defendant-respondent protects him i.e. the 1st defendant-respondent (owner of the lorry) from liability to third persons as a result of the operation of the relevant lorry. The insurer is legally bound to compensate and the 1st defendant-respondent's right is not a mere right to request that he be given assistance or an indemnity. - the 1st defendant-respondent's right as against the added respondent-respondent (the insurer) being a very much stronger right than that, for it is a legal entitlement as opposed to a benefit which is truly only discretionary or granted at the discretion. The only real purpose of the insurance policy is to indemnify against the risk of injury, or loss and as the 1st defendant-respondent has a policy with added-respondent-respondent (who are the insurers) the law

requires and binds the latter to indemnify the former against the former's liability to pay damages that had been awarded by the Court to the plaintiff-appellant. Inasmuch as the added respondent-respondent as the insurer is under a legal obligation (under the policy) to protect and relieve the 1st defendant-respondent of his liability to the plaintiff-appellant - there is scope for saying that the amount decreed by Court is held by the added-respondent-respondent, who are the insurers, at least, on a constructive trust if not, on behalf of the 1st defendant-respondent. It is worth pausing to note that section 218 of the Civil Procedure Code confers power on the judgment-creditor to seize or to seize and sell property (of whatever kind) held by another person if that property is held by that person in the name of judgment-debtor in trust or on behalf of judgment-debtor. The 1st defendant-respondent had paid the premia to the added-respondent-respondent (insurers) because of the solemn assurance given by them as insurers (be it noted that the name of the Insurance Company itself, ironically enough, is also Assurance . . .) to compensate or protect the insured, in this case, the 1st defendant-respondent, against liability to third parties when such liability arose. It is obvious that the 1st defendant-respondent (the insured) who is the owner of the lorry, will suffer prejudice by the happening of the accident for which he is responsible to a third party viz. the plaintiff-appellant for if the added respondent-respondent (insurer) does not pay, the 1st defendant-respondent will have to pay the amount decreed. It was never the intention of the parties to the contract of insurance, that the premia paid by the 1st defendant-respondent should remain with the added-respondent-respondent (insurer) but that it should be applied, if the injury or the damage contemplated occurred, to indemnify the 1st defendant-respondent, who is the owner of the vehicle, against suits by third parties. The object of the law must be deemed to be that the insurer holds the money, at least, after the stage that the judgment is entered against the insured, i. e. the 1st defendant-respondent, for the ultimate benefit of the insured, if not, that of the person injured. Particularly in the case of

Motor Insurance which is a form of liability insurance-the purpose of such insurance being to insure against risks of the persons insured incurring liabilities to third persons arising out of the use of a motor vehicle etc. Liability insurance, that being the nature or sort of policy that the 1st defendant-respondent has with the added respondent-respondent, indemnifies against liability on account of injuries to the person or property of another.

I think it is unconscionable conduct on the part of the added-respondent-respondent (insurer) to resort to questionable defences such as that it (the Insurance Company) had invoked and seek to avoid payment of the damages which the District Court has by its judgment awarded. The insurer in good conscience cannot refuse to pay. It is in circumstances such as this that a constructive trust can be said to arise. They arise by operation of law, so far as I know, to put it bluntly, to avoid an injustice. The man injured, that is, the plaintiff-appellant, it is to be recalled, has lost one of his legs from the hip downwards.

In this context, it is apt to refer to the doctrine of subrogation, in particular, to the principle on which it rests. One aspect of the doctrine of subrogation in relation to an insurer, means the right of the insurer, who has, be it noted, indemnified the insured (i. e. person insured) to step into the shoes of the insured and in the name of the insured pursue any right of action available to the insured which may diminish the loss insured against. In the generality of cases, the insurer's right will be to sue a third party liable to pay damages in tort or for breach of contract, which the insured had already recovered from his insurer. The other aspect of the doctrine of subrogation is that the "insured cannot make a profit from his loss and that for any profit he does make he is accountable to his insurer either as constructive trustee or in action in quasi contract for money had and received". Vide Modern Insurance Law - John Birds (Reader in Law, University of Sheffield - lest he be mistaken for a rara avis) (2nd edition) page 238. In the

case of *King v. Victoria Insurance Company*[1] Lord Hobhouse expressed the opinion that if after the insurers had paid the insured - the insured recovers or is paid by the tort - feasor (wrong doer) as well, a Court of Equity would treat the insured as trustee, for the insurers, i. e. the insured would have been treated as a trustee to the extent of the payment that the insured had received from the tort-feasor. Likewise, if not, conversely, the insurer (added-respondent-respondent) must be treated as one who holds the amount of judgment as a constructive trustee, for the 1st defendant-respondent, because he (the insurer) is under a duty to use that money for the protection of the 1st defendant-respondent from liability to the plaintiff-appellant who had suffered serious physical injuries as a result of the operation of the 1st defendant-respondent's lorry. It is obvious that the 1st defendant-respondent (the insured), who is the owner of the relevant lorry will undoubtedly suffer prejudice as a result of the happening of this accident which has resulted in grave physical injury to the third party viz the plaintiff-appellant, if the added respondent-respondent (insurer) successfully evades the payment for then the 1st defendant-respondent will have to make the payment. When there is no direct precedent in point, in cases on more or less the same subject, the Courts have recourse to cases on a different or allied subject-matter, but governed by the same general principle, which is known as reasoning by analogy. One cannot lose sight of the fact that the 1st defendant-respondent had paid premia to the added respondent-respondent (insurer) on the latter's solemn undertaking to the former to indemnify against liability on account of injuries to another (third person) - a form of insurance that covers suits against the 1st defendant-respondent for such damages as injury, death etc. to third parties. The added-respondent-respondent should not in equity and good conscience seek to retain the money (to the extent of the judgment) or refuse to withhold payment as he had undertaken to do by the contract of insurance. We know that a constructive trust arises in circumstances such as this when retention of property by one party is wrongful and would lead to his unjust enrichment if that party were permitted to do so.

One knows that constructive trust is that which is established by the mind of law in its act of interpreting facts and circumstances. Constructive trust in its own essential nature has not the character assigned to it, but acquires such character in consequence of the way in which it is regarded by the policy of law. In fact, the word legal is sometimes used instead of constructive. In other words, constructive trust arises by operation of law whenever it becomes necessary to prevent a failure of justice. Law intervenes and creates the trust. Such trusts do not arise by agreement, as such. Most common instance in which the law or the Courts will raise a constructive trust is when the circumstances under which property (includes money) was acquired made it inequitable that it should be retained by him who holds the legal title. In a way, a constructive trust can be said to arise not only in favour of the 1st defendant-respondent who has taken the policy under a contract of insurance with the added respondent-respondent, but also in favour of the plaintiff-appellant as well, for, in practice, third party insurance, such as the one in question, involves or is intended to benefit the third party (who in this case happens to be the plaintiff-appellant) as much as the insured person who, in this case, is the 1st defendant-respondent. Of course, one need not go to that extreme of holding that the money in the hands of the added respondent-respondent to the extent of the sum of Rs. 735,000/= with costs awarded in the judgment, is held by the added-respondent-respondent (insurer) subject to a constructive trust in favour of the plaintiff-appellant as well, for it is unnecessary to do so for the decision of this matter; for as pointed out above, section 218 of the Civil Procedure Code authorizes the judgment-creditor to seize or seize and sell property of the judgment-debtor (defendant-respondent) if such property is held by another person in trust or on behalf of the judgment-debtor. As the added respondent-respondent (insurers) is held to be a constructive trustee for the 1st defendant-respondent who is the insured - (inasmuch as the added respondent-respondent (insurer) is clearly under a duty to utilize the money to the extent of the sum awarded as

damages to indemnify the 1st defendant-respondent against the claim of the plaintiff-appellant) it must necessarily be held that the added respondent-respondent holds the money (to the extent of the sum decreed) "on behalf" of the 1st defendant-respondent because a person who "holds property in trust" always or necessarily holds it "on behalf" of another, that is, for the benefit of another. It is to be observed that in terms of section 218 of the Civil Procedure any property belonging to the judgment-debtor can be seized in execution of the judgment-debtor even if that property is held by another person not only "in trust" but also if it is held on "his behalf" i. e. in trust or on behalf of the judgment-debtor. What I am seeking to explain is this, that is, even if the money (to the amount of judgment) is not held by the added respondent-respondent in trust, yet, it can be said to be held "on behalf" of the 1st defendant-respondent (judgment-debtor) inasmuch as the added respondent-respondent must be considered to be holding the money for the benefit of the 1st defendant-respondent, since that money has to be made use of, by the added respondent-respondent, in terms of the contract of insurance, to protect the 1st defendant-respondent against the claim made by the plaintiff-appellant in this action (in the District Court) against him i. e. the 1st defendant-respondent (insured).

What does the expression or phrase "property held . . . on behalf" of the judgment-debtor mean in section 218 of the Civil Procedure Code? Something can be said to be held "on behalf" of judgment-debtor if it is held for his (judgment-debtor's) "benefit support, defence or advantage." That is the way the expression "on behalf" has been explained in standard legal dictionaries. For instance, financial assistance received in time of sickness, disability or unemployment and so on either from insurance or public programs such as social security can be described as a benefit. One hears of benefit societies. Corporations exist under this name to receive periodical payments from members and hold them as a fund to be loaned or given to members needing pecuniary relief in adversity. So

that when the insurers hold the money in trust, the money must be taken to be held "on behalf" of the judgment debtor within the meaning of section 218 of the Civil Procedure because the insurer is bound to succour or go to the defence of the insured (policy holder) by indemnifying the insured - making use of the money in the insurer's hands, against liability on account of injuries to third party.

This matter can be viewed in another light and from a different stand-point. If, in fact, the added respondent-respondent (insurer) does not hold the amount of the judgment as constructive trustee for the 1st defendant-respondent who is the insured, or on his behalf, then it would be even more accurate for one to say that added-respondent-respondent (the insurer) holds the amount of the judgment on behalf of the plaintiff-appellant himself - he being the judgment-creditor - inasmuch as the sum ascertained by the District Court as damages to which the plaintiff-appellant is entitled in terms of the judgment must be held to be property "belonging" to the plaintiff-appellant for three overwhelmingly strong reasons; if not the cumulative effect of those three circumstances is to impress upon the money in the hands of the added respondent-respondent (insurers) the character of money "belonging" to the plaintiff-appellant upon a sum of Rs. 735,000/= - presently in the hands of the added respondent-respondent, that being the award in the judgment in favour of the plaintiff-appellant. The three reasons or circumstances aforesaid are : (i) The District Court has entered judgment in favour of the plaintiff-appellant in the sum above mentioned; (ii) the 1st defendant-respondent against whom the said judgment has been entered has an insurance policy with the added-respondent-respondent (insurers) whereby the latter has undertaken to protect the former from liability to third persons arising in consequence of the operation of the lorry of which the 1st defendant-respondent (insured) is the owner; (iii) Section 105 of the Motor Traffic Act imposes an absolute legal obligation - an obligation which gives no alternative to the added-respondent-respondent (insurer) -

but requires fulfilment, i. e. according to the contract (of insurance). The said section 105 of the Motor Traffic Act is self-explanatory and is in the following imperative terms. To quote: "If after a certificate of insurance has been issued . . . a decree in respect of any such liability . . . is obtained against any person insured by the policy . . . the insurer shall, subject to the provisions of sections 106 to 109, pay to the persons entitled to the benefit of the decree any sum payable thereunder in respect of that liability . . ."

(It is to be observed that in the circumstances contemplated in sections 106 - 109 the insurer is relieved of liability to pay, but those circumstances had not been invoked in the submissions of the learned Counsel for the added-respondent-respondent either in this or in the Court below and those circumstances exempting liability do not demand consideration inasmuch as those circumstances have not been raised byway of defence, - the submissions on behalf of the added respondent-respondent (insurers) must be taken to tacitly recognise the fact that those exempting circumstances are non - existent).

The word "shall", in the expression in section 105 of the Motor Traffic Act i. e. "the insurer shall pay to the person entitled to the benefit of the decree the sum payable thereunder" in the context, must be given a compulsory meaning denoting an absolute obligation. Even in common or ordinary parlance it (the term "shall") is a word of command. The word shall, ordinarily, has the invariable significance of excluding the idea of discretion and has the significance of operating to impose a duty or obligation which has to be enforced, particularly if the public policy is in favour of this meaning. The added-respondent-respondent (the insurer) would do well to remember the wisdom enshrined in the old maxim: *"prudenter agit qui praecepto legis obtemperat."* (He acts prudently who obeys the command of the law). The State is concerned to ensure that Insurance Companies will be reasonable and show utmost good faith in their dealings with

the public. The business of insurance is clothed or impressed with a public interest because it is something in which public or community or a part thereof has some pecuniary interest or some interest by which their legal rights or liabilities are affected.

It is worth noting that under a contract of insurance the insurer is legally bound to compensate the other party. In this case there is the added feature for the law (section 105 of the Motor Traffic Act) itself commands the insurer to pay, be it noted, directly to the injured third party - which makes, so to say, the insurer . . . bound, legally to make the payment directly to the injured third party i. e. the plaintiff-appellant. Because the law compels or commands the insurer to pay directly to the injured third party - the injured third party (plaintiff-appellant) acquires a legal entitlement to such an amount or sum, in the hands of the added respondent-respondent (insurer), as is equivalent to the sum awarded by the judgment to the plaintiff-appellant. By virtue of the operation section 105 of the Motor Traffic, set out above, the plaintiff-appellant has a legal entitlement, as opposed to a mere right to be considered for a benefit which is truly only discretionary. It is true that the insurer is withholding payment. But such refusal to pay is wrongful and is in direct violation of section 105 of the Motor Traffic Act. Yet, the money, although wrongfully in the hands of the insurer, "belongs" to the plaintiff-appellant in terms of the law.

It is to be observed that in terms of section 218 of the Civil Procedure Code, the plaintiff-appellant (judgment-creditor) has the right in execution of the judgment to seize property, (to use the very words used in the said section 218) "belonging to the judgment-debtor". (The word "belong" has been interpreted in legal dictionaries to mean: to appertain to, to be the property of, to own). But there is no like express provision of law which enables the judgment-creditor to seize, (in execution of the judgment in his favour) property that belongs or appertains to himself rightfully, that is in accordance with

what is right, just and legal. It is said: *Jus constitui oportet in his quae ut plurimum accidunt non quae ex inopinate* (laws ought to be made with a view to those cases which happen most frequently and not to those which are of rare or accidental assurance). Perhaps, a case, such as this in which the judgment-creditor has to seize what appertains or belongs to himself, being in a way, a rare case, law has not yet provided for it. But, law, although it does not define exactly trusts in the judgment of a good man *(Lex non exacte definit sed arbitrio boni viri permitit).* It is said, that which never happens but once or twice, legislators pass by. But this situation, that has arisen in this case perhaps, will go on happening, in the future, times without number, and is not going to be a rare occurrence although it had not occurred to anyone to view this matter from this stand-point, perhaps, for no other reason than that necessity had never arisen before to do so. One cannot act after the fashion of the Roman judge who dismissed the plaintiff's action for recovery of damages for cutting down his vines, because form of the action spoke in general terms, of trees (*actio de arboribus succicis*). The judge took the odiously technical view that there was no provision for the award of damages for cutting vines which are creepers and that action lay or provided for cutting down trees only. Perhaps, that Roman Judge made a fetish of literalism - rigid insistence on literal interpretation. The Roman Judge failed to appreciate that trees and creepers derive nutrient from the soil and fall under broad head or genus of plants - the only difference, if any, as I had, in another judgment, explained, being that former (trees) grew vertically to the ground and the latter (vines or creepers) grew along the ground.

I think for the following reasons the plaintiff-appellant ought to be allowed, although the money or the amount awarded by the judgment, already "belongs" to him (in terms of the law) to seize the same for any one or both of the following reasons:

(i) In the absence of a specific provision governing a given situation the Court has an inherent power to make an order which is essential in the interests of justice;

(ii) A judgment ought not to be illusory; it ought to have its proper effect. (*Judicium non debet esse illusorium; suum effectum habere debet*).

To deal with two reasons enunciated above in order: As Sarkar on Civil Procedure, 7th edition, has pointed out, the Civil Procedure Code is not exhaustive as to the powers of Court in matters of procedure. The Court has an inherent power to make a particular order, even when no section of the Code can be pointed to as direct authority for it, where its decision is based on sound general principles and is not in conflict with them or the intention of the legislature. It is one of the three basic precepts of the law to give every man his due - the other two being, if they be mentioned, for the sake of completeness, to live honestly and not to harm or to hurt another. It is to be observed that the amount payable under the decree has to be paid in terms of the mandate of the law itself to the plaintiff-appellant for, as stated above, section 105 of the Motor Traffic ordains that the "insurer shall pay to the persons entitled to the benefit of the decree any sum payable thereunder." So that what is awarded as damages by the judgment of the District Court, is the plaintiff-appellant's due or legal entitlement. I cannot bring myself to believe that Parliament would have ever intended that a man should not get his due in execution of a judgment in his own favour, for no other or better reason than that there is no express legal provision enabling a judgment-creditor to seize what, in truth, is his own money or property, (or what the law has declared to be so, as section 105 of the Motor Traffic Act had done) in the hands of a person wrongfully retaining or withholding the same as the added respondent-respondent (insurer) is doing. I, for one, cannot think that the plaintiff-appellant should be denied his due, that is, the amount decreed by the judgment, when both law and justice require that it should be paid to him.

In the case of *Hukum Chand v. Kamalanand Singh*[2] (referred to at page 443 Civil Procedure - Wickramasinghe) Woodroffe J. explained how the Court ought to act in a situation not covered by any express provision of law. Where no specific provision or rule exists, the Court should not refuse to act; on the contrary it should act according to equity, justice and good conscience. To quote "from Woodroffe, J. "further, law cannot (as pointed out by Barnes Peacock C. J.) make express provisions against all inconveniences so that their dispositions shall express all the cases that may possibly happen, and it is therefore the duty of a good judge to apply them not only to what appears to be regulated by express provisions, but to all cases to which a just application of them may be made and which appear to be comprehended either with the express sense of the law or within consequences that may be gathered from it."

In the case of *Narasingh Das v. Mangal Dubey*[3] 5 Mahmood J. laid down a very helpful guideline to be followed when express provision was wanting.

In the above-mentioned case it was observed that the Courts are expected not to act upon the principle that every procedure is to be taken as prohibited unless it is expressly provided for by the Code, but on the converse principle that every procedure is to be understood as permissible till it is shown to be prohibited by the law. It is a general principle that prohibitions are not to be presumed. They say "*boni judicis est ampliare jurisdictonem,*" which means that it is the part (or duty) of a good judge to enlarge or use liberally his remedial authority or jurisdiction. We have learnt as students, and recall with nostalgia, that justice is a steady and unceasing disposition to render to every man his due. Of what earthly use is what we have learnt unless we make a conscious effort to make of use what we have learnt. One knows what ought to be done, that is, to give the plaintiff-appellant his due. There is only one way of doing it and that is by making the benefit of the award of damages available to him and not by withholding it from him. But it profits little to know what ought to be done,

if you do not do it or if you do not know how it is to be done. When laws imposed by the state or enacted by the Parliament fail or are silent we must act by the law of nature. I suppose, law of nature means the principles for guidance of human, conduct, which independently of enacted law, might be discovered by the rational intelligence of man, undefaced by dishonesty and legerdemain - legerdemain and sophistry being a distinctive flavour of the submissions on behalf of the added respondent-respondent in this case. This is another way of saying what I have said above, that is, that one must make orders to accord with justice and good conscience.

To deal with the second reason referred to above as to why the plaintiff-appellant should be permitted to seize an amount in the hands of the added respondent-respondent equivalent to the sum awarded by the judgment; a judgment should be of some practical value to the party concerned, particularly, when it awards damages and not turn out to be, what, one may call, phoney, without substance or practical value. Just as much as the effect of law consists in execution - the value of a judgment, too, depends on execution. An order, such as the one that the learned District Judge had made, does not conform to reason nor to law and is subversive of both - the practical effect of his order being to deprive the plaintiff-appellant of what is due to him, and due to him, be it noted, not upon a mere moral view of the matter, but according to law. It is well to remember that section 105 of the Motor Traffic Act commands the insurer who in this case is the added respondent-respondent to pay the amount decreed directly to the person who is entitled to the benefit of the decree, who in this case, is the plaintiff-appellant. The learned District Judge has, with a consequential air, also expressed the view that the plaintiff-appellant has to file another action against the respondent-respondent (insurance Company) to recover the sum or damages that has been awarded to him in this action. To quote "රක්ෂණ සමාගමට විරුද්ධව ඇති වගකීම ඉටුකරවා ගත නැත්තේ එකී සමාගමට විරුද්ධව විනිශ්චිත ණය හිමියා විසින් වෙනත් නඩුවක් පැවරීමෙන් පමණි." This view in a way runs flagrantly counter to

the inveterate policy of the law, that suit shall not grow out of suit and which principle is tersely spelt out in the dictum: *boni judicis est lites dirimere ne lis ex lite oritur, et interest rei publicae ut sint fines litium* - which means that it is the duty of a good judge to prevent litigations, that suit may not grow out of suit and it concerns the welfare of the State that an end be put to litigation. One is painfully aware that one District Court action will give a man enough of litigation to last him a life-time. What is more the learned District Judge had been un-feeling enough to dismiss by his order dated 07.10.1997, what is virtually, the application for execution against the insurance company, with costs. In any event no costs should have been ordered against the plaintiff-appellant in the circumstances. A Judge should have "the salt of conscience lest he be devilish". **Ordering costs against the plaintiff-appellant, as the learned District Judge had done, is somewhat reminiscent of the incident where the man who fell from the tree was gored by a bull.**

Although I have explored the possibility of holding that the added respondent-respondent (insurer) holds the amount payable under the judgment as a constructive trustee for the 1st defendant-respondent, I have not rested this order on that basis, but rather on the firmer ground that the said amount "belongs" to the plaintiff-appellant or that it is his (plaintiff-appellant's) legal entitlement. I have explained that although there is no specific legal provision enabling the plaintiff-appellant to seize, in execution of the judgment, what legally and rightly "belongs" to him - yet there is no legal prohibition either for prohibitions are not to be presumed. And, inasmuch as there is no prohibition, legal or otherwise, the plaintiff-appellant has the power in execution of the judgment (in his favour) to "seize and sell or to realize in money by the hands of the fiscal" all saleable property, whether movable or immovable, belonging to the added-respondent-respondent (Union Assurance Company). It is wholly un-necessary to add the Union Assurance as a party just as much as it is un-necessary for the purpose of seizing property in execution

of a judgment, to add as a party, a person who "holds the property on behalf of the judgment-debtor or in trust for the judgment debtor" within the meaning of section 218 of the Civil Procedure Code. As a final note, I must add that I have liberally made use of traditional legal concepts and basic principles to arrive at this decision which I trust is rooted not only in justice and good-sense, but also in law as well. These concepts continue to form the foundation for much of our jurisprudence, if not a key to the substance and terminology not only of our system of law, but also to those of any modern or advanced system anywhere in the world, because they are designed to promote the ends of justice by taking a sensible view un-trammeled by detestable technicalities. Submissions of the learned Counsel in this case are "incomparable or are beyond compare," in that they cannot be compared even to the proverbial "two grains of wheat hidden in two bushels of chaff. You shall seek all day ere (before) you find them, and when you have them they are not worth the search".

The order of the learned District Judge dated 07.10.1997 is hereby set aside. The added respondent-respondent viz. the Union Assurance Company, will also pay the plaintiff-appellant a sum of Rs. 10,500/= as costs of this appeal. The plaintiff-appellant is entitled to execute the judgment and decree against the Union Assurance - the added-respondent-respondent - without adding the added respondent-respondent.

JAYAWICKREMA, J. - I agree.

Appeal allowed. The Plaintiff - Appellant is entitled to execute the Judgment and Decree against Union Assurance - the added Respondent - Appellant without adding the added Respondent Respondent.