SRI LANKA INSURANCE CORPORATION LTD
v
PERERA AND OTHERS

COURT OF APPEAL
AMARATUNGA, J.
BALAPATABENDI, J.
C.A. 802/2001
D.C. KULIYAPITIYA 10281/M
JULY 11, 2002
OCTOBER 17, 2002
NOVEMBER 5, 2002

Motor Traffic Act, No. 14 of 1951 – Section 105 and 106 – Damages – Accident – Insurance Corporation not a defendant – Notice of action given – Decree entered – can it be enforced against the Insurer who is not a party? Steps in execution proceedings – Interlocutory or Final Order?

Held :

(i) The Insurer's liability under section 105 does not arise if the plaintiff has not given notice of action to the Insurer either before or within 7 days of the filing of action – section 106.

In this instance the plaintiff had given notice to the Corporation about the plaintiff's intention to file action. Therefore the Corporation cannot rely on section 106 exception.

(ii) A money decree obtained by a plaintiff in an action for damages for motor accident against a defendant whose vehicle was involved in the accident can be enforced against the Insurer without making the latter a party to the action. The addition of the insurer was not at all necessary and that the Insurer is legally bound to satisfy the decree entered against the insured – Subject to section 106.

(iii) A step in execution procedure is an interlocutory order and not a final order.

APPLICATION in revision from the Order of the District Court of Kuliyapitiya.

Cases referred to :

1. *Chitty* v *Parameswary* - CALA 40/79 CAM 25.2.83

2. *Fernando* v *de Silva and Others* - 2000 3 Sri LR 29 (followed)

Wijayadasa Rajapaksa P.C. with *Rasika Dissanayake* for the Intervenient-defendant-petitioner

J. Joseph for the respondent.

Cur.adv.vult

April 02, 2003

GAMINI AMARATUNGA, J.

This is a revision application filed by the Sri Lanka Insurance Corporation Ltd which is the intervenient defendant in D.C. Kuliyapitiya case No. 10281/M. This is an action filed by the plaintiff-respondent to obtain damages sustained by her as a result of a motor vehicle accident caused due to the alleged negligence of the 1st defendant-respondent who was the driver of the vehicle at the time of the accident. The vicarious liability of the 2nd defendant-respondent who is the owner of the vehicle depended on the negligence of the driver. The petitioner, Sri Lanka Insurance Corporation Ltd was not a defendant to the action but later became the intervenient defendant.

According to the plaint, the accident which gave rise to this action occurred on 9/1/1990. The action had been instituted on 19/11/1991. After the service of summons, the defendants have appeared and have obtained a date to file answer. According to the journal entry dated 25/8/92 the answer had been filed. The petitioner has not filed a copy of the answer with this application but the failure to produce it is immaterial and what is material is what happened in Court on 26/7/93 which was the 4th day fixed for the trial. On that day both defendants were absent and the Attorney-at-Law appearing for them said that she had no instructions from the defendants and as such she could not appear for the defendants. The Court thereafter took up the trial *ex parte* and after leading the evidence of the plaintiff her case was closed. The Court entered

judgment in favour of the plaintiff for a sum of Rs. one million as damages with costs. On 14/11/1995 an application was made on behalf of the plaintiff for the inclusion of the Sri Lanka Insurance Corporation Ltd as the 3rd defendant to obtain satisfaction of the decree. On 31/10/1996 this application was withdrawn and on that day the Judge made order that the plaintiff has the right to execute writ against the Insurance Corporation Ltd.

On 29/4/1998, Counsel for the plaintiff, having produced details of the insurance policy issued by the Insurance Corporation Ltd in respect of the vehicle No 26 Sri 6874, which was involved in the accident, and having produced proof of notice to the Insurance Corporation Ltd about the action to be filed, moved to have the writ issued against the Insurance Corporation Ltd. The learned District Judge, for the reasons set out in his order dated 29/4/1998 directed writ to be issued against the Insurance Corporation Ltd. The writ was accordingly issued to the fiscal of the District Court of Colombo who returned the writ with a report which states that when the Fiscal went to execute the writ the officials of the Insurance Corporation informed him that the Court having accepted the corporation's objection has discharged the Corporation from the case and accordingly the Corporation objects to the execution of the writ. Having considered this report the Court directed to re issue the writ. The Court also directed notice under section 219 of the Civil Procedure Code to be issued on the General Manager of the Insurance Corporation. Thereafter Counsel for the Insurance Corporation appeared in Court and moved Court to recall notice issued on the General Manager of the Corporation under section 219 of the Civil Procedure Code and also to dismiss the application of the plaintiff for an order directing the execution of the writ against the Corporation and to discharge the Corporation from the proceedings.

The Court having heard the submissions of both parties refused the application of the Corporation and directed to re issue the writ against the Corporation. The Corporation then filed an appeal against the said decision and when the plaintiff submitted that there was no right of appeal available to the Corporation against the decision to issue writ the Court accepted the submission and made order on 26/4/2001 rejecting the appeal. This revision application has been filed to have the order dated 26/4/2001 set aside.

The first question to be decided is whether the order made by the learned Judge rejecting the Corporation's appeal is correct in law. It has been held in *Chitty* v *Parameswary*[1] a step in execution proceedings is an interlocutory order and not a final order. Therefore there was no right of appeal and the learned Judge was correct in rejecting the petition of appeal. There is another reason on which the learned Judge's order is supportable. Although the Insurance Corporation sought itself to be added as an intervenient-defendant the Court has not made an order adding the Corporation as a defendant. Thus the Corporation was not a party to the action and as such it had no right of appeal. Its remedy is by way of revision which it now seeks in these proceedings.

The next question is whether the order made by Court directing writ to be issued without making the Insurance Corporation Limited a party to the action is correct in law. In considering this I have to refer to section 105 of the Motor Traffic Act, No. 14 of 1951 as amended, which reads as follows:

> 105. "If after a certificate of insurance has been issued under section 100(4) to persons by whom a policy has been effected, a decree in respect of any such liability as is required by section 100(1)(b) to be covered by a policy of insurance (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, 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 including any amount payable in respect of costs and any sum payable in respect of interest on that sum under such decree."

This provision was considered by this Court in *Fernando* v *De Silva and others*[1]. It was held in that case that the word 'shall' in section 105 of the Motor Traffic Act which enacts that 'the insurer shall pay to the person entitled to the benefit of the decree the sum payable thereunder' denotes an absolute obligation and that the addition of the insurer was not at all necessary for execution against the insurer of the money decree that had been entered in favour of the plaintiff.

The question that was in issue in that case was whether a money decree obtained by a plaintiff in an action for damages for a motor accident against a defendant whose vehicle was involved in the accident can be enforced against the insurer of the vehicle without making the latter a party to the action. The Court answered this question in the affirmative. The court's decision completely rested on the interpretation of section 105 of the Motor Traffic Act. The Court held that the addition of the insurer was not at all necessary and that the insurer is legally bound to satisfy the decree entered against the insured.

In the course of the judgment the Court has discussed the doctrine of subrogation but this was not the real basis on which the judgment was based. In the written submissions it was submitted that subrogation is not relevant and does not arise on the facts of the case. As I have pointed out the decision in *Fernando* v *de Silva and others* [(2)](*supra*) was based on the interpretation of section 105 of the Motor Traffic Act. The Court's observations regarding the doctrine of subrogation and constructive trust do not form a part of the ratio decidendi of the case. Those observations cannot obscure the real decision of the case. I am in agreement with the interpretation of section 105 of the Motor Traffic Act given by Gunawardena, J. in *Fernando* v *de Silva and others* (*supra*).

In this case there is no denial by the Insurance Corporation of Sri Lanka Limited that at the time vehicle No 26 Sri 6874 was involved in the accident which was the subject matter of action No 10281/ Money in the District Court of Kuliyapitiya there was a valid insurance policy issued by it in respect of the said vehicle. When the plaintiff sought *a writ of execution* against the Insurance Corporation the plaintiff has produced the notice the plaintiff has sent to the Corporation on 1/11/1991 giving notice to the Corporation about the plaintiff's intention to file action. Registered postal article receipt too had been produced before Court. Vide proceedings of 29/4/1998. The action had been filed on 19/11/1998. The insurer's liability under section 105 of the Motor Traffic Act does not arise if the plaintiff has not given notice of action to the insurer either before or within seven days of the filing of the action. Vide Section 106 of the Motor Traffic Act. In this case notice of action had been given before filing the action. Therefore the Corporation cannot rely on the exception contained in section 106.

Accordingly the learned District Judge has rightly issued the writ against the Insurance Corporation Limited. This revision application has no merit. Accordingly I dismiss the revision application with costs in a sum of Rs.10,000/-.

BALAPATABENDI, J. I agree.

Application dismissed.