

**JANA SHAKTHI INSURANCE CO. LTD.,
VS
DASANAYAKE MANIKE AND OTHERS**

COURT OF APPEAL
WIMALACHANDRA, J
C. A. 2583/2004 (REV)
D. C. KANDY No., 30115/MR
JANUARY 28, 2005

Motor Traffic Act, sections 105 and 106 - Accident - Ex parte trial - Writ of execution against defendants and on the Insurer - Insurer seeks dismissal of application - No section 106 notice served on insurer - Should the insurer purge his default first on the basis that notice under section 106 was not received?

HELD :

- (i) Liability under section 105 does not arise only if the plaintiff has not given notice of action in terms of section 106.
- (ii) If the petitioner (insurer) says he did not receive the notice in terms of section 106 he must make an application to the original court to absolve his liability by establishing that he did not receive the notice. He must first purge his default.

Per Wimalachandra J.,

"It is settled law that a party effected by an order of which he had no notice must apply in the first instance to the court which made the order and initiate

an Inquiry into the allegations made by him; after such Inquiry if the petitioner is dissatisfied with the order by the District Court he can thereafter revise the matter in the Court of Appeal."

- (iii) If the petitioner (Insurer) is not legally bound to satisfy the decree on establishing that no notice under section 106 had been given to him, court can make order to execute the decree against the other defendants.

APPLICATION to revise the order of the Additional District Judge of Kandy.

Cases referred to :

1. *Fernando vs De Silva* - 20003 Sri LR 29
2. *Abdul Majeed vs Gunasekara, Secretary Ministry of Justice and others* - (2003) - 3 Sri LR 237

S. Piyasena for petitioner.

Cur. adv. vult.

April 27, 2005

WIMALACHANDRA J.,

This is an application in revision filed by the petitioner from the judgment of the learned District judge of Kandy dated 29.09.2003.

The plaintiff-respondent (plaintiff) filed this action bearing No.30115/MR in the District Court of Kandy to recover damages sustained by her as a result of a lorry bearing the registered number 226-1280 driven by the 1st defendant negligently, causing the death of Indika Udaya Bandara, the son of the plaintiff. The 2nd defendant was the owner of the said lorry at the time of the accident.

The 1st defendant-respondent (1st defendant) had a third party insurance cover against liabilities to a third party. The Insurance Company (petitioner) was not a party in the District Court.

The accident referred to in the plaint occurred on 28.03.2001. Upon the service of summons, the defendants appeared in Court on the summons returnable date and obtained a date to file answer. According to the journal entry dated 05.02.2003, which was the 2nd date given by the Court to the defendants to file answer, on that day they were absent and answer was

not filed. The attorney - at - law of the defendants said that he had no instructions and as such he was not appearing for them. The Court fixed the matter for *ex-parte* trial. On a subsequent date the *ex-parte* trial was held and the court entered the judgment in favour of the plaintiff in a sum of Rs. 500,000 and *ex-parte* decree was entered accordingly. The defendants, upon the decree being served on them, moved court to set aside the decree. After an inquiry the Court dismissed the application of the defendants and directed the fiscal to issue a writ of execution against the defendants and also ordered to issue notice of the writ of execution on the insurer (petitioner) upon an application made by the attorney - at - law for the same.

Thereafter the petitioner filed an undated petition (marked 'X16') in the District Court seeking the dismissal of the application for the writ of execution of the decree.

The main ground of objection to the application made by the plaintiff for a writ of execution of the decree is that the petitioner's liability (insurer's liability) under section 105 does not arise as the plaintiff had not given notice of action to the insurer in terms of section 106 of the Motor Traffic Act.

It was held in the case of *Fernando Vs de Silva*⁽¹¹⁾ that the words "Shall", in the expression in S. 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' denotes an absolute obligation.

In the case of *Abdul Majeed Vs. Gunasekara, Secretary Ministry of Justice and others*² Justice Amaratunga, observed:

"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."

In the instant case it appears from the documents marked 21 and '21' produced at the trial that the notice of action had been given to the insurer.

The document marked "P21" is the notice of action sent by the plaintiff to the insurer on 07.02.2002. The document marked 'P21' is the registered postal article receipt. The action has been filed on 31.01.2002.

The petitioner (insurer) has made this application in revision seeking to set aside the judgment delivered on 29.09.2003. It is the petitioner's position that no notice under Section 106 of the Motor Traffic Act has been issued to him. The liability under Section 105 of the Motor Traffic Act does not arise, only if the plaintiff has not given notice of action in terms of section 106 of the Motor Traffic Act. The notice given to the petitioner was in consequence of a requirement of section 106. For whatever reason the petitioner did not appear in Court.

The petitioner has filed a petition in the District Court seeking to set aside the application for a writ of execution of the decree filed by the plaintiff. That application had not been inquired into by the Court. In my view, the petitioner's primary duty is to purge his default before the District Court. Therefore the correct procedure that should have been adopted by the petitioner would have been to have his default purged in the original Court on the basis that he did not receive the notice under section 106 of the Motor Traffic Act. In this case it appears that proper notice has been given by the plaintiff (vide 'P21' and 'P21') under section 106 of the Motor Traffic Act. In the circumstances the insurer is legally bound to satisfy the decree. However if the petitioner says he did not receive the notice in terms of section 106 of the Motor Traffic Act, he must make an application to the original District Court to absolve his liability by establishing that he did not receive the notice.

If the petitioner establishes that he did not receive the notice under section 106 of the Motor Traffic Act his obligation to satisfy the decree will not arise. On the other hand if it is established that the plaintiff had given notice either before or within seven days of the filing of the action the petitioner is legally bound to satisfy the decree. In either case the Court need not set aside the judgment. If the petitioner is not legally bound to satisfy the decree on establishing that no notice had been given to him in terms of section 106 of the Motor Traffic Act by the plaintiff, the Court can order to execute the decree against the 1st and 2nd defendants.

If the petitioner had taken proper steps to absolve his liability on the basis that he did not receive the notice of the action an inquiry would have been held by the District Court. The District Court would be in a position to consider the allegations made by the petitioner and to evaluate the statements and averments made by him when the petitioner is subjected to cross-examination. When such procedure is not adopted the Court of Appeal is not in a position to make an order on the matter before it.

It is settled law that a party effected by an order of which he had no notice must apply in the first instance to the Court which made the order. The petitioner must first file the necessary papers in the original Court and initiate an inquiry into the allegations made by him. After such inquiry, if the petitioner is dissatisfied with the order made by the District Court, he can thereafter raise the matter before the Court of Appeal. The Court of Appeal then would be in a position to make an order on the issues after taking into consideration the order made by the District Court.

The relief prayed for by the petitioner in this application in revision is to review and set aside the judgment delivered by the learned District Judge on 29.09.2003 and/or to revise the said judgment.

The fact that the petitioner has merely filed an undated petition against the writ of execution of the decree without initiating an inquiry in the District Court into the allegation that he did not receive notice under section 106 of the Motor Traffic Act does not give this Court the power to set aside or revise the judgment of the District Court. In any event that application had not been inquired into by the District Court and there is no material to say that the District court has made an order on that application.

For these reasons I am of the view that this is not a fit case to issue notice and the petitioner's application in revision is dismissed.

Application dismissed.
