

**IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC
OF SRI LANKA**

Liyanarachchige Sumathipala
“Upul Stores”, Kahatagollewa
Kebithigollewa.

PLAINTIFF-APPELLANT

C..A 137/1997 (F)
D.C. Colombo 1063/M

Vs.

National Insurance Corporation
No. 47, Muttiah Road,
Colombo 2.

DEFENDANT-RESPONDENT

BEFORE: Anil Gooneratne J.

COUNSEL: Appellant is absent and unrepresented
Shivan Cooray for Defendant-Respondent

ARGUED ON: 15.03.2011

DECIDED ON: 28.03.2011

ANIL GOONERATNE J.

This was an action filed in the District Court of Colombo against the Defendant-National Insurance Corporation, Colombo 2 claiming a sum of Rs. 150,000/-, based on a insurance policy. Plaintiff-Appellant who is the registered owner of vehicle No. 28 Sri 5735 avers in the plaint that the said vehicle was robbed by some unknown persons at gun-point on 07.5.1985 at Kahatagollawa whilst it was driven by Plaintiff driver. Vehicle was loaded with cement. The claim (as in paragraph 3 of plaint) made by Plaintiff-Appellant on the above insurance policy was rejected by the Defendant Corporation. Three admissions were recorded and parties proceeded to trial on 8 issues.

At the hearing of this appeal the Plaintiff-Appellant was absent and unrepresented. Appellant had been duly noticed to appear and the Registrar of this Court issued notices on both Appellant and his registered Attorney but there was no response to the said notices. This court also takes the view that the Appellant has failed to exercise due diligence to prosecute this appeal. Nevertheless this Court heard submissions of learned counsel for the Respondent who supported the learned District Judge's judgment dated 07.0.2.1997, dismissing plaintiff's case.

The insurance policy does not cover matters as described in paragraph 7 of the (issue No.4) answer and Clause 4 of the general exceptions referred to in the insurance policy (vide A2 & A1). In brief the loss caused to Plaintiff was not due to terrorist activities need to be proved by the Plaintiff. This burden has to be discharged by Plaintiff. In the instant case it was submitted by learned counsel for the Respondent that the driver of the vehicle never gave evidence before the Trial Court. Plaintiff had testified and marked a photocopy of the statement made to the police by the driver of the vehicle. All documents in the police station had been destroyed by 1992 due to an attack on the Vavuniya police. The learned Trial Judge has considered the evidence of Plaintiff and comments on his evidence in cross-examination as follows:

- (a) Plaintiff never saw or witnessed the incident of robbing the vehicle.
- (b) Plaintiff did not make a statement to the police.
- (c) Plaintiff unable to confirm that any other person robbed the vehicle

The learned District Judge has been satisfied on the evidence placed before the trial Court that the Defendant Corporation rejected Plaintiff's claim on above mentioned Clause 4 of the general exceptions, contained in the insurance policy, and as such Defendant Corporation is not bound to settle the claim. On a balance of probability the District Judge has accepted the evidence of the Defence witnesses. The trial Court Judge has been

satisfied on the Hansard report (D1) regarding terrorist activities in the area in question on the relevant date. (07.05.1985).

This court wish to observe that in the absence of placing evidence to prove Plaintiff's case, although it may have been a difficult task at that point of time, a Court of Law cannot act on mere surmise. In a case of this nature under any circumstances, court has to arrive at a decision based solely on evidence and not on hearsay, which is a general exclusionary rule. In civil cases a claim may be decided on a preponderance of evidence or on a balance of probabilities. Miller Vs. Minister of Pensions 1947(2) AER 372-374. In terms of Section 101 burden of proof lies generally on the Plaintiff in civil cases. This point had been considered in Bertie Fernando Vs. Missie Fernando 1986 (1) SLR 211; 19 NLR 5 refer to a claim to Cargo; 75 NLR 481 (claim to freight). I observe that Plaintiff has failed to discharge the burden of proof in the case in hand.

I have considered the merits of this appeal, and there is no good reason to interfere with the conclusions arrived at by the learned District Judge. In the circumstances appeal is dismissed without costs.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL