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

CA 1054/98 (F), 1055/98(F), 1056/98(F)
D.C. Negombo Case No. 7823/M

Sri Lanka Insurance Co-operation
Vokeshole Street,
Colombo 02.

Appellant

Vs.

J.D. Prinsi Pilochina Rathnayake
No: 195,
Colombo Road,
Nagoda,
Kandana.

Respondent

CA 1054/98 (F), 1055/98(F) 1056/98(F)

D.C. Negombo Case No. 7823/M

BEFORE : K.T. Chitrasiri, J

COUNSEL : Palitha Kumarasinghe PC with Viran Fernando for the 3rd Defendant-Appellant.
M. Nizam Kariapper with M.I.M. Iynullah for the 2nd Defendant-Respondent.
All 3 Plaintiff-Appellants are absent and unrepresented.

ARGUED &
DECIDED ON : 20.05.2013.

K.T. Chitrasiri, J

Both Counsel made submissions in support of their respective cases having agreed to take up all the 3 appeals together. The said 3 appeals bear the Nos.1054/98F, 1055/98F and 1056/98F. Counsel also submitted that the evidence in relation to all three cases had been recorded in the action bearing No.7779/M filed in the District Court of Negombo. Accordingly, they moved that the evidence recorded in that case be considered as the evidence relevant to all three appeals.

These three appeals have come up before this Court pursuant to the order dated 14.09.1998 delivered by the learned District Judge of Negombo. In that order, learned District Judge stated that it relates to all three cases bearing Nos.7823/M, 7824/M and 7779/M.

Those 3 cases have been filed in order to recover damages from the 1st and the 2nd defendants for causing death of Ratnayake Liyanage Karunasena. Death was due to a collision of the vehicles bearing No.38 – 5925 driven by the 1st defendant-respondent and the motor cycle rode by the deceased, Karunasena. Three plaintiffs are the wife and the two children of Karunasena. The claim against the 2nd defendant-appellant was on the basis that he was the owner of the said vehicle 38-5925 at the time.

Three cases were taken up ex parte by the trial judge and the judgments were delivered in favour of the 3 plaintiffs accordingly. Thereafter, applications to execute the decrees in respect of all the cases had been made against the Sri Lanka Insurance Company in terms of Section 105 of the Motor Traffic Act. The said insurance company was the insurer of the vehicle driven by the 1st defendant and it was made a party to the action as the 3rd defendant at a subsequent stage. First application that was made to have the

decrees executed was refused by the learned District Judge by his order dated 25.10.1996. The said order dated 25.10.1996 had been canvassed in this Court and an order was made refusing the 3 appeals but allowing the learned District Judge to re-consider the applications if another request is made. Accordingly, once again separate applications had been made in all three cases to have the decrees executed against the 3rd defendant-appellant (hereinafter referred to as the appellant) and the learned District Judge then made order allowing the said applications of the plaintiffs. Being aggrieved by this order, the appellant had filed this appeal.

Learned President's Counsel for the appellant, at the outset submitted that the issue in this matter is to determine whether a notice was sent to the insurer as required by Section 105 of the Motor Traffic Act in order to have the insurer liable. Indeed, this appeal is on the basis that it is wrong on the part of the learned District Judge to decide that a notice in terms of Section 105 of the Motor Traffic Act had been given to the insurer. Therefore, I will now consider whether it is correct or not to decide that the notice referred to in the said Section 105 had been given to the insurer in this instance.

The said Section 105 of the Motor Traffic Act stipulates:

105.(1) If after a certificate of insurance has been issued under section 100 (4) to the 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.

The Section that follows Section105 is the Section 106 of the Motor Traffic Act which prohibits payment by the insurer under a decree of Court unless a notice under Section 105 is given to the insurer. Therefore, it is mandatory to send a notice under Section 105 of the Motor Traffic Act in order to have a decree of a Court executed.

Section 106 of the Motor traffic Act reads thus:

"106.No sum shall be payable by an insurer under the provisions of section 105 –

(a) in respect of any decree, unless before or within seven days after the commencement of the action in which the decree was entered, notice of the action had been given to the insurer by a party to the action;"

At this stage, it must be noted that the said Section 105 of the Motor Traffic Act has now been amended requiring a plaintiff to

make the insurer a party to an action when a claim is made upon an Insurance Policy.

Be that as it may, the contention of the learned Counsel for the respondent in this instance is that the letter dated 15.02.1993 marked as P4 in evidence, is the notice that was given to the insurer in accordance with Section 105 of the Motor Traffic Act. It is a letter written by C.Vignarajah, Attorney-at-Law, writing on the instructions of his clients supposed to have been the 3 plaintiffs. The said letter was addressed to K.Ajith Mohamed Riyal namely, the 2nd defendant-respondent (hereinafter referred to as the respondent) and not to the insurer, Sri Lanka Insurance Company. A copy of this letter had also been sent to Filomina Ratnayake, who is one of the plaintiff's.

Accordingly, on the face of the said letter marked P4, nothing is found to establish that it was sent to the Insurance Company. Therefore, the letter *per se* does not establish sending a notice to the insurer under Section 105 of the Motor Traffic Act.

Learned District Judge in coming to his conclusion seems to have considered the contents of the said letter P4 and had held that the insurer had accepted having received the letter P4. However, in

the contents of the letter P4 nothing is found to conclude that the insurer had accepted that it had received the letter P4. In the circumstances, it is incorrect to decide that the contents of the letter Marked P4 constitutes sending of a notice under Section 105 of the Motor Traffic Act.

Learned Counsel for the respondent then argued that the learned District Judge was correct when he decided that there is evidence to prove sending of a notice under Section 105. In doing so he submitted that the 2nd defendant has stated that the letter marked P4 was handed over to the Insurance Corporation by himself. However, having perused the brief, the Counsel for the respondent conceded that there is no such evidence available though the learned District Judge has stated so. The Court upon a careful consideration of the matter finds that there is evidence as to a discussion had with the officials of the insurer but is unable to find evidence as to handing over of such a letter to the Insurance Corporation by the 2nd defendant.

Learned Counsel for the 2nd Defendant also submitted that there is another letter which is dated 30.04.1993 found at page 172 in the brief in which it indicates that the Insurance Corporation was aware of the action that is to be filed in this regard and therefore it should be treated as the notice under Section 105. However, contents of the said letter dated 30.04.1993 does not indicate

anything as to a filing of action. Furthermore, the said letter dated 30.04.1993 had not been produced in evidence at all. Therefore, the Court could not have considered the contents of the said letter without it being marked in evidence at the relevant inquiry.

Learned Counsel for the 2nd Defendant-Respondent referring to the statement of objection dated 09.02.1996 of the insurance company (vide page 44 of the brief) submitted that the insurer was aware of receiving a notice under Section 105 in this instance. Therefore, he contended that the insurer is estopped from stating that it did not receive such a notice.

In paragraph 3(ඇ) in the said objections referred to by the learned Counsel and was filed by the insurance company, nothing is found as to a notice under Section 105 but in that it is stated that a letter demand dated 15.02.1993 had been sent. However, the said letter of demand dated 15.02.1993 is not addressed to the respondent Insurance Corporation. Moreover, unless those matters found in a statement of objections were led in evidence, no trial judge is in a position to consider such matters on his own at an inquiry such as this.

For the reasons set out above, I am not inclined to accept the submissions that there is evidence available to decide that there had been notice to the insurance company under Section 105 of the Motor Traffic Act in this instance. Accordingly, I am inclined to accept the contention of the learned President's Counsel for the appellant.

For the aforesaid reasons, it is my considered view that the respondent insurer was not given notice in terms of Section 105 of the Motor Traffic Act in this instance though the learned District judge has held otherwise. Accordingly, I allow all 3 appeals of the insurance company and set aside the order dated 14.09.1998 of the learned District Judge. Respondent insurance company is entitled to the costs of this appeal as well.

Appeals allowed.

JUDGE OF THE COURT OF APPEAL