~~G.H.G.2.~~

24,1953

No. 33 of 1952. 33581

In the Privy Council.

ON APPEAL
FROM THE SUPREME COURT OF CEYLON.

BETWEEN—

THE CEYLON MOTOR INSURANCE ASSOCIATION LIMITED (Defendants) *Appellants*

— AND —

P. P. THAMBUGALA (Plaintiff) *Respondent.*

CASE FOR THE RESPONDENT.

RECORD.

1. This is an appeal from a judgment and decree of the Supreme Court of Ceylon dated the 20th May, 1952, whereby it was adjudged and decreed, affirming a judgment and decree of the District Court of Colombo dated the 24th October, 1950, that the Respondent was entitled to recover from the Appellants the sum of Rs.13,881.22 with interest from the 5th April, 1950, till payment in full and the costs of the proceedings. p. 28; p. 33. p. 20; p. 25.

2. The sole issue in the appeal is whether a letter dated the 21st May, 1946, and sent by the Respondent's Solicitors to the Appellants, as being the insurers of a motorist who had negligently run the Respondent down and injured him, was an adequate notice within the relevant Ceylon legislation so as to entitle the Respondent to recover from the Appellants the amount of the judgment entered in his favour against the said motorist. p. 40.

3. The uncontroverted facts forming the background of the case are as follows:—

(a) On the 1st September, 1945, the Respondent was knocked down in the street by a motor car No. X4851 owned by one K. Stephen Perera and driven at the material time by a servant of his acting within the scope of his employment. p. 11, l. 6. p. 7, l. 12.

p. 11, l. 3. (b) On the said date the said K. Stephen Perera was insured by the Appellants under a policy of insurance No. 9432 against third party risks as specified in Section 128 of the Motor Car Ordinance of Ceylon (No. 45 of 1938) issued to the said K. Stephen Perera by the Appellants who at all material times were authorised insurers within the meaning of the said Ordinance.

p. 7, l. 10. p. 10, l. 23. (c) That on the 10th June, 1946, the Respondent issued proceedings in the District Court of Colombo under Case No. 17020/M against the said K. Stephen Perera claiming Rs.15,000/- as damages in respect of injuries sustained by him as a result of the negligent driving of the said car as aforesaid.

p. 10, l. 28. (d) That on the 25th June, 1948, judgment in the said proceedings was entered in the District Court of Colombo in favour of the Respondent against the said K. Stephen Perera for the sum of Rs. 10,000/- together with legal interest and costs.

p. 11, l. 1. (e) That on the 11th November, 1949, an appeal of the said K. Stephen Perera to the Supreme Court of Ceylon against the said judgment was dismissed with costs.

p. 8, l. 1. (f) That on the 5th April, 1950, there was due and owing to the Respondent pursuant to the said judgments and decrees the sum of Rs.13,881.22.

p. 40. 4. Prior to the proceedings mentioned in paragraph 3 (c) hereof, namely on the 21st May, 1946, the Respondent's proctors wrote as follows to the Appellants as being the authorised insurers of the car alleged to be responsible for the said accident:—

"re Car No. X-4851.

"Dear Sir,

"We are instructed by Mr. P. P. Thambugala of Manikkawa "Walauwa in Mawanella to file on action for the recovery of "Rs.15,000 against Mr. Kodituwakku Aratchige Stephen Perera "of Mawanella, being damages sustained by our client as a "result of the above car knocking down our client on the 1st "September, 1945, by reason of the negligent and careless "driving on the part of his driver.

"We are given to understand that the above car has been "insured with your Company.

"Our client is still under treatment and unless our client's "claim is settled on or before the 31st instant, we are instructed "to file action against the owner of the car.

"Yours faithfully,"

5. The foregoing letter was acknowledged by the Appellants by letter dated the 23rd May, 1946, as follows:— p. 41.

"Dear Sirs,

"Re Accident to Car No. X-4851.

"We are in receipt of your letter of the 21st instant claiming "Rs.15,000 as damages alleged to have been suffered by your "client Mr. P. P. Thambugala as a result of being knocked down "by car No. X-4851 on 1st September, 1945.

"We have hitherto been totally ignorant of any accident in "which the above car had been involved, and this is the first "intimation we have of an accident to the above or an impend-"ing third party claim.

"Since the insured has failed to report the accident in terms "of the Conditions of the Policy issued to him, we would advise "you to communicate with the owner of the vehicle direct in the "matter.

"Yours faithfully,"

6. Not having been paid anything by the Appellants in satisfaction of the said judgment the Respondent on the 5th April, 1950, commenced in the District Court of Colombo the proceedings out of which the present appeal arises claiming that the Appellants were pursuant to the relevant legislation of Ceylon liable to pay the Respondent the amount of the said judgment together with interest and costs. p. 6.

7. The defence of the Appellants to the said claim was that notice of the prior proceedings as required by Section 134 (a) of the Motor Car Ordinance (No. 45 of 1938) had not been given to them: in other words that the letter set out in paragraph 4 hereof was not such a notice as was required by the said Section 134 (a). p. 9, l. 30. p. 11, ll. 10-21.

8. The relevant legislation of Ceylon, based almost entirely on the comparable legislation in the United Kingdom under the Road Traffic Act 1930 and Sections 10 and 12 of the Road Traffic Act, 1934, was designed on the following lines, namely:—

(a) every motorist must hold a policy of insurance issued by an authorised insurer and providing cover against the risks popularly known as third party risks (Ordinance No. 45 of 1938, Section 128 corresponding with the English Act of 1930, Section 36);

(b) a policy of motor insurance issued by an authorised insurer might include any number of restrictive clauses defining

the scope of the risk and any number of conditions on breach of which the insurer was, as between himself and his assured, entitled to be free from liability to afford indemnity, but as against an insured third party "so much of the policy as "purports to restrict or attach conditions to the insurance shall, "save as is otherwise provided . . . . be of no effect as respects ". . . . " a third party liability which was compulsorily insurable (Ordinance No. 45 of 1938, Section 130 corresponding with the English Act of 1930, Section 38 and the English Act of 1934, Section 12);

(c) a direct right of action against the authorised insurer of a car which had incurred liability in respect of such third party risks was given to the third party concerned quite irrespective of whether there had been any infringement of a "limitation of user" clause or a restrictive condition which, as against a third party, was declared to be of no effect (Ordinance No. 45 of 1938, Section 133 corresponding with Section 10 of the English Act of 1934);

(d) the overriding condition for the said direct right of action of the third party against the authorised insurer of the negligent motorist was contained in Section 134 of the Ordinance No. 45 of 1938 in the following terms:—

"No sum shall be payable by an insurer under the "provisions of Section 133—

"(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; or

"(b) in respect of any decree, so long as execution "thereof is stayed pending appeal."

9. In the proceedings under appeal the Appellants contended that the letter of the 21st May, 1946, was not a notice complying with the said Section 134, maintaining in particular:—

p. 21, l. 27. (a) that to comply with the said Section 134 (a) a notice must contain all the particulars required of a plaint issued under Section 40 of the Civil Procedure Code;

p. 21, l. 37. (b) that the letter in question was merely conditional and that a conditional notice was not sufficient;

p. 23, ll. 8–21. (c) that there was a material difference between the requirement of the English legislation that an insurer must have "had notice" of the Third Party's action and the requirement

of the Ceylon legislation that "notice had been given to the "insurer".

10. In a careful judgment delivered on the 24th October, 1950, the District Judge of Colombo rejected these contentions and held that the letter of the 21st May, 1946, was an adequate notice in compliance with Section 134 of the Motor Car Ordinance and that the Appellants were accordingly liable to pay to the Respondent the sum claimed by him. The Respondent respectfully adopts and will rely on the reasons given by the said District Judge in his judgment. pp. 20–25.

11. On appeal by the Appellants to the Supreme Court of Ceylon this judgment was affirmed by judgment dated the 20th May, 1952. The leading judgment of the Court was delivered by Nagalingam J. and the Respondent respectfully adopts and will rely upon the reasoning therein contained. A decree of the Supreme Court of Ceylon of the same date was entered accordingly. pp. 28–33. pp. 33–4.

12. In amplification of the said judgments the Respondent will respectfully contend that the basic policy of the legislation in question, as indicated by the language in which it is framed, the historical background leading up to its enactment and the mischief it was designed to prevent, may be summarised in the following propositions:—

(a) Motor cars being a necessary evil of our modern civilisation, provision had to be made to secure that innocent sufferers from their use should be afforded proper compensation.

(b) Insurance against third party risks was the only method by which this compensation could in practice be secured.

(c) Such insurance must be made compulsory on all motorists, with penal sanctions for driving while uninsured.

(d) Shaky insurance companies must be kept out of business, which could be done by requiring insurances to be issued by authorised insurers and substantial guarantees of financial stability being required.

(e) It could not be left to a private bargain between the authorised insurers and the assured to lay down for all purposes the conditions to be complied with, both before and after an accident, if the authorised insurers were to be held liable: the insurers if left complete liberty of action in this respect would as often as not be able to find a form of wording which would relieve them of liability to indemnify their assured: and if the injured third party was left merely to step into the shoes of the assured (e.g., on making the assured bankrupt as under the

English Third Parties (Rights against Insurers) Act, 1930), the right would as often as not be found to be valueless.

(f) Accordingly a direct right of action had to be given to the injured third party against the authorised insurers relieved of many of the restrictive policy conditions, but subject to certain qualifications.

(g) The main qualifications were:—

(i) that the authorised insurers should have as against their assured a right to recover back anything they had to pay to a third party which but for the legislation they would not have been obliged to pay;

(ii) that steps could be taken by authorised insurers to set aside, within carefully defined limits of time, a policy which was ab initio voidable as having been obtained by fraud, nondisclosure or misrepresentation of material facts;

(iii) That to enable the authorised insurers to decide whether to embark on these steps or not, they must be given notice of any action which was likely to lead them into a statutory liability whatever their position vis-a-vis their assured might be.

(h) If any such steps were going to be taken, proper notice thereof was to be given to the third party so as to enable him to consider whether his projected action was worth while or would amount to no more than throwing good money after bad.

13. In the light of these considerations it is respectfully submitted that what the legislation required by way of notice of proceedings by a third party was nothing technical or complicated, but merely something which was sufficient to put a reasonably minded insurer on guard that, if he was minded to take the protective steps laid down by the legislation as open to him, the time had come for him to set about doing so actively; otherwise the third party would be enabled to go on with his projected proceedings on the basis that, if successful, he would have his rights against the insurers.

14. On this basis it is respectfully submitted that no objection whatever can be made to the letter of the 21st May, 1946, as a compliance with the requirements of Section 134 (a) of the Motor Car Ordinance 1938.

15. The Respondent accordingly respectfully submits that this appeal should be dismissed and the judgment and decree appealed from affirmed for the following amongst other

REASONS.

1. BECAUSE the letter dated the 21st May, 1946, was a valid compliance with the requirements of Section 134 (a) of the Motor Car Ordinance 1938.

2. BECAUSE the decisions of the Supreme Court of Ceylon and the District Court of Colombo were right for the reasons given in the judgments they delivered.

STEPHEN CHAPMAN.

No. 33 of 1952.

In the Privy Council.

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FROM THE SUPREME COURT OF CEYLON.

THE CEYLON MOTOR INSURANCE ASSOCIATION LIMITED

v.

P. P. THAMBUGALA.

CASE FOR THE RESPONDENT.

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