GL1.G.2. 24/1953

No. 33 of 1952.

In the Privy Council.

33680

ON APPEAL

FROM THE SUPREME COURT OF CEYLON.

BETWEEN

THE CEYLON MOTOR INSURANCE ASSOCIATION LIMITED . . . . *Appellant*

AND

P. P. THAMBUGALA . . . . . *Respondent.*

Case for the Appellant.

RECORD.

1. This is an appeal from a Judgment and Decree of the Supreme Court of Ceylon, dated the 20th May, 1952, dismissing an appeal from a Judgment and Decree of the District Court of Colombo, dated the 24th October, 1950, whereby, in an action which he had instituted against the Appellant, the Respondent was awarded, in accordance with his prayer, the sum of Rs.13,881.22, together with legal interest and costs. pp. 28–34. pp. 20–26.

2. In a previous action which he had instituted against the owner of a car insured with the Appellant (the said owner is hereinafter also referred to as "the assured") the Respondent was awarded, as damages in respect of personal injuries sustained by him as a result of the said car being negligently driven, the sum of Rs.10,000, together with legal interest and costs. At the date of the present proceedings the total sum due to the Respondent from the assured under the said previous award amounted, presumably, to the said sum of Rs.13,881.22 which the Respondent now seeks to recover from the Appellant as an insurer of third party risks of the assured and in terms of the statutory obligations imposed upon insurers by Section 133 of the Motor Car Ordinance, No. 45 of 1938. p. 7, ll. 20–28. p. 10, l. 22 to p. 11, l. 5. p. 7, ll. 29–36. Annexure.

3. By the said Section 133 an insurer's liability to persons who are entitled to the benefit of a decree obtained against any person insured is made subject to, *inter alia*, Section 134 of the said Ordinance which enacts that no sum is payable by an insurer under Section 133 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." Annexure.

4. The sole question for determination on this appeal is whether or not the information contained in a letter written by the Respondent's Proctors and addressed by them to the Appellant's Manager to the effect that they (the said Proctors) were instructed by the Respondent to file an action against the said assured failing the settlement of the Respondent's claim on or before a specified date was a good and sufficient " notice of the " action " to the Appellant within the meaning of the said Section 134.

5. Relevant Sections of the Motor Car Ordinance No. 45 of 1938 are printed in an Annexure hereto.

6. The facts, briefly stated, are as follows :—

P1, p. 40. By their said letter, dated the 21st May, 1946, the Respondent's proctors informed the Appellant of the Respondent's claim against the assured in the following terms :—

" *Re* Car No. X—4851.

" We are instructed by Mr. P. P. Thambugala of . . . to " file an action for the recovery of Rs.15,000 against Mr. " Kodituwakku Aratchige Stephen Perera of . . . 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."

P2, p. 41. 7. In reply, the Appellant, by its letter, dated the 23rd May, 1946, acknowledged receipt of the said letter from the Respondent's Proctors, and, continuing, said :—

" 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 impending " 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."

p. 9, ll. 8–18. p. 10, ll. 22–27. 8. Without any further communication to the Appellant the Respondent, on the 10th June, 1946, instituted proceedings against the assured in the District Court of Colombo for the recovery of Rs.15,000 as damages for the said injuries; and nearly two years later—on the 25th June, 1948—judgment was entered in the Respondent's favour in a sum of Rs.10,000, together with legal interest and costs.

p. 7, ll. 22–28. p. 10, l. 28 to p. 11, l. 2.

An appeal to the Supreme Court by the assured was dismissed on the 11th November, 1949.

p. 9, ll. 8–18. p. 14, ll. 10–12. The Appellant was not informed of the said proceedings at any stage thereof.

9. Thereafter the Appellant was called upon to pay the amount of the said judgment and on its refusal to do so the Respondent (hereinafter also referred to as " the Plaintiff ") instituted the

PRESENT PROCEEDINGS

against the Appellant (hereinafter also called " the Defendant ") in the District Court of Colombo.

By his Plaint, dated the 5th April, 1950, the Plaintiff maintained that pp. 6–8.
the said letter of his Proctors, dated the 21st May, 1946 (see paragraph 6 p. 7, ll. 18–20.
hereof) was " due notice of the action " in terms of the said Section 134. p. 7, ll. 29–32.
Continuing, he said that " on the Decree in the said case there is now due " and owing to the Plaintiff a sum of Rs. 13,881.22 which sum the " Defendant is in law liable to pay to the Plaintiff in terms of the " statutory obligations imposed by Section 133 of the said Motor Car " Ordinance."

10. By its Answer, dated the 23rd June, 1950, the Defendant pp. 8–10.
admitted receipt of the said letter but denied that it had thereby been p. 9, ll. 12–14.
given " notice of action " as required by Section 134 of the said Ordinance.

It disclaimed all knowledge of the said action against the assured. p. 9, ll. 8–9, 15–18.

11. Three Issues were framed in the present action and they were p. 11.
answered thus by the learned District Judge :—

" (1) Was the letter, dated 21.5.46, sent by the Plaintiff to p. 11, ll. 10–13.
" the Defendant Company, sufficient notice under the provisions of " Section 134 of Ordinance 45 of 1938 ? "

Answer : " Yes." p. 25, l. 1.

" (2) If so, is the Defendant liable to pay Plaintiff the sum p. 11, ll. 14–15.
" of Rs. 13,881.22 with legal interest thereon from the 5th April " 1950 ? "

Answer : " Yes." p. 25, l 2.

" (3) If Issue 1 is answered in the negative is this action p. 11, l. 17.
" maintainable ? "

Answer : " Does not arise." p. 25, l. 3.

12. On the 24th October, 1950, the learned District Judge, incorporat- pp. 20–25.
ing in his Judgment his said Answers to the Issues, entered Judgment for the Plaintiff as prayed for, with costs.

The learned District Judge was of opinion that the " notice of action " required by Section 134 was " not one of a very formal nature." He p. 23, ll. 26–27.
referred to, but did not accept, the argument advanced on behalf of the Defendant that the alleged notice was insufficient because— p. 21, l. 37 to p. 23, l. 41.

(A) it was conditional and not absolute—there was no certainty that legal proceedings would be taken ; and

(B) it did not contain the particulars usually found in a plaint or at least such particulars as would have enabled the insurers to take all appropriate steps in protection of their interests.

p. 23, ll. 26–32. The learned Judge thought that it is " certainly very desirable " from the insurer's point of view that the notice should specify the Court in which the action is to be filed and the date on which it would be filed, p. 23, ll. 33–41. but, in his opinion, these particulars could not, under Section 134, be insisted on. He said that, it was the Defendant's business to obtain any additional information which it considered was necessary. And, it was his opinion that, under Sections 136 and 137 of the Ordinance, the Defendant, in protection of its interests, could have instituted proceedings to obtain a declaration of non-liability even before any action against the assured was filed. 10

pp. 25–26. 13. A Decree in accordance with the Judgment of the learned District Judge was entered on the 24th October, 1950, and against the said Judgment and Decree the Defendant appealed to the Supreme Court of Ceylon.

The Petition of Appeal to the Supreme Court, dated the 25th October, 1950, is printed on pp. 26–28 of the Record.

p. 29. 14. The appeal was heard by a Bench of the Supreme Court consisting pp. 28–33. of Nagalingam, A.C.J., and Swan, J., who, by their Judgment, dated the 20th May, 1952, affirmed the Judgment of the District Court and dismissed the appeal, with costs.

p. 29, ll. 14–18. 15. In delivering the main Judgment of the Court, Nagalingam, A.C.J. 20 (with whom Swan, J., agreed), referred to the " only point for deter- " mination " which, he said, was " whether notice sufficient and adequate Annexure. " in terms of Section 134 of the Motor Car Ordinance No. 45 of 1938 had " been given to the Appellant ; for it is conceded by the respondent that " if no such notice had been given then the appellant Company would not " be liable to him."

The learned Judge set out the provisions of the said section and interpreted it thus :—

p. 30, ll. 24–29. " When the section refers to ' the action ' it means the action " in which the decree was entered as indicated in the earlier part 30 " of the section, and what the section requires is that notice should " have been given of the action in which the decree was entered " and that notice would be adequate if the action that is filed " subsequently can be identified as the action in contemplation " of which notice had been given."

p. 30, l. 40 to p. 32, l. 10. 16. The learned Acting Chief Justice referred to, but did not accept, the argument that the scheme of the Ordinance contemplated a notice which would contain a reference to the Court in which it was proposed to institute the action, particularly where, as here, it was possible to file the Annexure. action in more than one Court. He said that Section 134 did not expressly 40 make this necessary and its terms were not such as would lead to any such p. 31, ll. 11–16. inference by implication. Further, he expressed the opinion that it was possible for an insurer to obtain a declaration of non-liability under Annexure. Section 136 or 137 of the Ordinance even though a notice of a contemplated action against the assured did not specify the Court in which the action was to be brought.

17. As to the argument that "the particular forum should be "expressly stated in the notice to the insurer in order that he may take "over the defence or assist in the defence of the action instituted against "the assured" the learned Acting Chief Justice said that normally one would expect the assured to give all relevant information of the accident and proceedings in relation thereto to the insurers, which had not occurred in this case. He referred to conditions in policies of insurance whereunder insurers were not liable if notice of accidents, or of proceedings in relation thereto, were not given to them forthwith by the assured. It was his view that Section 130 of the Ordinance, whereby certain conditions in policies are rendered ineffective, provided for such cases, and that where an insurer becomes liable to make a payment because of the default of the assured he has a right of recourse against the latter. p. 31, ll. 17–44. Annexure.

18. Rejecting the argument that the alleged notice was not a good notice of action because it was not absolute in its terms, the learned Acting Chief Justice said that the intimation that an action would be filed unless the claim was previously settled by a specified date must be taken to refer to a previous settlement by the Appellant and not by the assured and the Appellant not having effected a settlement by the said date must be deemed to have had knowledge of the action which was subsequently filed. p. 33, ll. 4–23.

19. A Decree in accordance with the Judgment of the Supreme Court was entered on the 20th May, 1952, and against the said Judgment and Decree this appeal to Her Majesty in Council is now preferred, the Appellant having obtained leave to do so by Decrees of the Supreme Court, dated the 26th May, 1952 (Conditional Leave) and the 4th June, 1952 (Final Leave). pp. 33–34. pp. 35, 38.

The Appellant respectfully submits that the appeal should be allowed, the Judgments of both Courts below set aside, and the action dismissed, with costs throughout, for the following among other

REASONS.

(1) BECAUSE the said letter of the Respondent's Proctors, dated the 21st May, 1946, was not a good and sufficient "notice of the action" within the meaning of Section 134 of the Motor Car Ordinance No. 45 of 1938.

(2) BECAUSE the said letter was no more than a demand or invitation to settle the Respondent's claim under threat of legal proceedings and as such was not the unambiguous and unconditional "notice of the action" contemplated by the said section.

(3) BECAUSE on the true interpretation of the said section the words "notice of the action" must be taken to mean notice of an action which has been instituted or which it has definitely been decided to institute in a specified Court on or about a specified date.

(4) BECAUSE the interpretation of the said words by the Courts below does not give effect to the scheme of the Ordinance in so far as it relates to the protection of an insurer's interests.

(5) BECAUSE the said letter did not state the place at which the accident therein referred to had occurred.

(6) BECAUSE the Judgments of both Courts below are wrong and ought to be set aside.

GEOFFREY CROSS.

R. K. HANDOO.

ANNEXURE.

THE MOTOR CAR ORDINANCE, No. 45 of 1938.

PART VIII.

INSURANCE AGAINST THIRD-PARTY RISKS.

Users of motor cars to be insured or secured against third-party risks.

127.—(1) Save as is otherwise provided in subsection (2), no person shall use or drive, or cause or permit any other person to use or drive, a motor car on a highway unless there is in force in relation to the use of the car by that person or that other person, as the case may be, a policy of insurance, or a security, in respect of third-party risks, in conformity with the requirements of this Part.

(2) The provisions of subsection (1) shall not apply in the case of a motor car belonging to the Crown or a local authority at any time when the motor car is being used or driven for the purposes of His Majesty's service or, as the case may be, by a servant of the local authority in the course of his employment.

128.—(1) In order to conform to the requirements of this Part a policy of insurance in relation to the use of a motor car must be a policy which—

(*a*) is issued by an insurer, (hereinafter referred to as an " authorised insurer "), who is authorised by the Executive Committee, subject to such conditions as may be prescribed, to issue policies of insurance for the purposes of this Part ; and

(*b*) insures, in accordance with the provisions of paragraph (*c*), such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of the use of the motor car on a highway ; and

(*c*) (i) in the case of a hiring car . . .

(ii) in the case of a lorry . . . ; or

(iii) in the case of any other motor car covers any such liability which is referred to in paragraph (*b*) as may actually be incurred :

Provided that . . .

(2) . . .

(3) Notwithstanding anything in any other law to the contrary, an insurer issuing a policy of insurance for the purposes of this Part shall be liable to indemnify the persons or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of those persons or classes of persons.

(4) A policy of insurance shall be of no effect for the purposes of this Part unless and until there is issued by the insurer to the person by whom the policy is effected a certificate in the prescribed form containing such particulars of any conditions subject to which the policy is issued and of such other matters as may be prescribed.

(5) . . .

* * * * *

Certain conditions in policies or securities to be of no effect.

130.—(1) Where a certificate of insurance has been issued in connexion with a policy of insurance, so much of the policy as purports to restrict, or attach conditions to, the insurance of any person insured thereby shall, save as is otherwise provided in subsection (4), be of no effect as respects any such liability as is required to be covered by section 128 (1) (*b*).

(2) Any condition in a policy of insurance effected for the purposes of this Part, providing that no liability shall arise under the policy, or that any liability so arising shall cease, in the event of some specified thing being done or omitted to be done after the happening of the event giving rise to a claim under the policy, shall be of no effect in connexion with any claims in respect of any liability mentioned in section 128 (1) (*b*).

(3) Nothing in subsection (1) or subsection (2) shall be deemed to render void any provision in a policy of insurance requiring the person insured to repay to the insurer any sums which the insurer may have become liable to pay under the policy and which have been applied to the satisfaction of the claims of third parties.

(4) Nothing in subsection (1) shall apply in the case of any condition in a policy of insurance, being a condition which—

(*a*) excludes the use of the motor car to which the policy relates—

(i) for business purposes, except by the insured, or by some other named individual, in person ;

(ii) for business purposes, other than the business purposes of the insured ;

(iii) for the carriage of goods or samples in connexion with any trade or business ;

(iv) for the carriage of persons or goods for fee or reward ;

(v) for organised racing or speed testing ;

(vi) on a contract of letting and hiring ;

(*b*) provides that the motor car shall not be driven by a person other than—

(i) the insured or any person driving with his express or implied permission ;

(ii) the insured or any person employed by him ;

(iii) any person or persons named in the policy ;

(*c*) provides that the motor car shall not be driven by—

(i) any person or persons named in the policy ;

(ii) any person who is not the holder of a certificate of competence ;

(iii) any person whose certificate of competence has been cancelled or suspended or who is for the time being disqualified for obtaining a certificate of competence ;

(*d*) in the case of a motor cycle which has no side car attached thereto, provides that no person other than the driver shall be carried thereon ;

(*e*) excludes liability for injury caused or contributed to by conditions of war, riot or civil commotion.

(5) Where a person, who has completed eighteen years of age, drives any motor car in accordance with the conditions set out in the Proviso to section 64 for the purpose of learning to drive a motor car, no condition inserted under paragraph (*c*) (ii) of subsection (4) in the policy of insurance relating to that car shall be of any effect as respects and such liability, as is required to be covered by section 128 (1) (*b*), and may be incurred while the motor car is driven by that person.

* * * * *

Duty of insurers to satisfy decree against persons insured in respect of third-party risks.

133. (1) If after a certificate of insurance has been issued under section 128 (4) to the persons by whom a policy has been effected, a decree in respect of any such liability as is required by section 128 (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 134 to 137, 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.

(2) In this section, " liability covered by the terms of the policy " means a liability which is covered by the policy or which would be so covered but for the fact that the insurer is entitled to avoid or cancel, or has avoided or cancelled, the policy.

Insurers to have notice of actions.

134. 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.

* * * * *

Declaration of non-liability for misrepresentation, &c.

136. (1) No sum shall be payable by an insurer under section 133 if, in any proceedings commenced before or within three months after the institution of the action in which the decree was entered, he has obtained from a court of competent jurisdiction—

(*a*) a declaration that, apart from any provision contained in the policy, he is entitled to avoid it on the ground that it was obtained by the non-disclosure of a material fact, or by a representation of fact which was false in some material particular ; or

(*b*) if he has already avoided the policy on such ground, a declaration that he was entitled so to do apart from any provision contained in the policy :

Provided that an insurer who has obtained such a declaration as aforesaid in any such proceedings shall not thereby become entitled to the benefit of this section as respects any decree obtained in an action instituted before the commencement of those proceedings, unless before or within seven days after the commencement of those proceedings he has given notice thereof to the person who is the plaintiff in the said action specifying the non-disclosure or false representation on which he proposes to rely ; and any person to whom notice of such proceedings is so given shall be entitled, if he thinks fit, to be made a party to the proceedings.

(2) In subsection (1) " material fact " and " material particular " mean respectively, a fact and a particular of such a nature as to influence the judgment of a prudent insurer in determining whether he will take the risk, and, if so, at what premium and on what conditions.

Declaration of non-liability for breach of condition.

137. No sum shall be payable by an insurer under section 133 in respect of any decree if, in proceedings commenced before or within three months after the institution of the action in which the decree was entered, the insurer has obtained from a court of competent jurisdiction a declaration that a breach has been established of a condition specified in the policy, being one of the conditions enumerated in section 130 (4) :

Provided that an insurer who has obtained such a declaration as aforesaid in any such proceedings shall not thereby become entitled to the benefit of this section as respects any decree obtained in an action instituted before the commencement of those proceedings, unless before or within seven days after the commencement of those proceedings he has given notice thereof to the person who is the plaintiff in the said action specifying the breach of condition on which he proposes to rely ; and any person to whom notice of such proceedings is so given shall be entitled, if he thinks fit, to be made a party to the proceedings.

* * * * *

No. 33 of 1952.

In the Privy Council.

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