

(1964) 12 KL CK 0016
In the High Court Of Kerala
Case No : S. A. No. 1417 of 1960

Asiatic Government Security Fire and General Assurance Co., APPELLANT
Ltd.

Vs

Scindia Steam Navigation Co., Ltd., Bombay RESPONDENT

Date of Decision : 15-12-1964

Acts Referred:

Marine Insurance Act, 1963 — Section 50, 50(2)
Transfer of Property Act, 1882 — Section 135, 135A, 6, 79

Citation : (1965) KLJ 86

Hon'ble Judges : M. S. Menon, C.J; M. Madhavan Nair, J

Bench : Division Bench

Advocate : V. Parameswara Menon, for the Appellant; K. A. Nayar and K. Sukumaran, for the Respondent

Final Decision : Dismissed

Judgement

M.S. Menon, C. J.

1. The plaintiff in O. S. No. 67 of 1958 of the Munsif's Court of Cochin, the Asiatic Government Security Fire and General Assurance Company Limited, is the appellant in this second appeal. It was the respondent in A.S. No. 131 of 1959 of the Sub Court of Cochin, the successful appeal filed by the respondent before us, the Scindia Steam Navigation Company Limited. The Travancore-Cochin Prawn Curers' Co-operative Marketing Society Limited shipped a consignment of five hundred bags of prawns from Cochin to Rangoon by S.S. Jalatapi, a vessel belonging to the respondent. The goods shipped were insured with the appellant against the risk, among other things, of damage caused by "Rain &/or Fresh &/or Sea &/or River Water" (Ext. P. 1).

2. Twenty-eight bags out of the shipment of five hundred bags were damaged by contact with fresh water and the appellant settled the claim in respect of the said damage by the payment of a sum of Rs. 3,282/- The suit is to recover that sum from the respondent.

3. There has been no assignment of the rights under the policy in favour of the appellant; and the first question for determination is whether the appellant is entitled to maintain a suit in its own name in the absence of such an assignment. The answer to the question depends on the true scope and effect of section 135A of the Transfer of Property Act, 1882.

4. Section 135A was inserted into the Transfer of Property Act, 1882, by the Transfer of Property (Amendment) Act, 1944. Before the amendment the assignment of rights under both marine and fire insurance policies was governed by section 135. What the amendment did was to take marine insurance policies out of section 135 and provide for them in the new section 135A.

5. The Bill that became the Transfer of Property (Amendment) Act, 1944, was L.A. Bill No. 9 of 1944. The statement of Objects and Reasons appended to that Bill-Gazette of India, Part V, dated the 19th February 1944-dealt with the reason for the amendment as follows:

The rules and principles governing a marine insurance policy being materially different from those governing a fire insurance policy, it is very unsatisfactory to accord the same treatment in the matter of assignment of both categories of policies. To take but one instance, a fire insurance policy is not assignable after loss, but the nature of a marine insurance contract is such as to require that marine insurance policies should be assignable even after loss. In the United Kingdom, assignability of marine insurance policies after loss is placed beyond doubt by Section 50 of the Marine Insurance Act. But in the absence of a similar provision here, it is doubtful if Courts in British India would hold that they are so assignable.

6. Section 135A consists of four sub-sections. They read as follows:

(1) Where a policy of marine insurance has been assigned so as to pass the beneficial interest therein, the assignee of the policy is entitled to sue thereon in his own name; and the defendant is entitled to make any defence arising out of the contract which he would have been entitled to make if the action had been brought in the name of the person by or on behalf of whom the policy was effected.

(2) Where the insurer pays for a total loss, either of the whole, or, in the case of goods, of any apportionable part, of the subject-matter insured, he thereupon becomes entitled to take over the interest of the insured person in whatever may remain of the subject-matter so paid for, and he is thereby subrogated to all the rights and remedies of the insured person in and in respect of that subject-matter as from the time of the casualty causing the loss.

(3) Where the insurer pays for a partial loss, he acquires no title to the subject-matter insured, or such part of it as may remain, but he is thereupon subrogated to all rights and remedies of the insured person as from the time indemnified by such payment for the loss.

(4) Nothing in clause (e) of section 6 shall affect the provisions of this section.

It is common ground that it is sub-section (3) that applies to this case.

7. Sub-section (1) of section 135A specifically provides that the assignee of a policy of marine insurance is entitled to sue thereon in his own name. Such a provision is absent in sub-sections (2) and (3). Counsel for the respondent contends that the absence is significant and that it means that under sub-sections (2) and (3) the insurer is not entitled to sue in his own name as has been done in the case before us.

8. Clause (e) of section 6 of the Transfer of Property Act, 1882, provides that a mere right to sue cannot be transferred. Sub-section (4) of section 135A says that nothing in clause (e) of section 6 shall affect the provisions of that section. Counsel for the respondent contends that sub-section (4) of section 135A indicates that an assignment of the policy is contemplated under all the three sub-sections that precede sub-section (4).

9. The application of the doctrine of subrogation to policies of marine insurance is based upon the fundamental principle that the contract of insurance contained in a marine policy is a contract of indemnity, and of indemnity only. The assured in the case of a loss against which the policy was taken is entitled to be fully indemnified; but never to be more than fully indemnified.

10. The insurer is entitled to recoupment only for a loss for which he has paid, and to the extent of his payment "Subrogation", as stated by Lord Atkin in *Glen Line v Attorney-General* (1930 46 T L R 451), "will only give the insurer rights up to 20s. in the ? on what he has paid".

11. The right of the insurer against the person responsible for the loss, however, does not rest upon any relation of contract or of privity between them. It arises out of the nature of the contract of marine insurance as a contract of indemnity, and is derived from the assured alone, and can be enforced in his right only.

12. Sub-section (1) of section 135A corresponds to section 50(2) of the (English) Marine Insurance Act, 1906, and sub-sections (2) and (3) of section 135A to sub-sections (1) and (2) respectively of section 79 of that Act. In *Yorkshire Insurance Co. Ltd. v Nisbet Shipping Co. Ltd.* (1962 2 Q.B. 330) Diplock J. had occasion to deal with the meaning of the word "subrogation" in relation to a contract of marine insurance. He said:

"Subrogation" is concerned solely with the mutual rights and liabilities of the parties to the contract of insurance. It confers no rights and imposes no liabilities upon third parties who are strangers to the contract. It vests in the insurer who has paid a loss no direct rights or remedies against anyone other than the assured. He cannot sue such parties in his own name.

13. As between the insurer and the assured, the insurer is entitled to the advantage of every right of the assured, whether such right consists in contract,

fulfilled or unfulfilled, or in remedy for tort capable of being insisted on or already insisted. But as stated by the Privy Council in *King v Victoria Insurance Company Limited* (1896 A.C. 250):

Subrogation by act of law would not give the insurer a right to sue in a court of law in his own name.

14. To the same effect is the decision of Mitter J. in *Indian Trade and General Insurance Co. Ltd. Vs. Union of India (UOI)*, , a case under sub-section (3) of section 135A, and of Mitra J. in *Textiles and Yarn (P) Ltd. Vs. Indian National Steamship Co. Ltd.*, , also a case under sub-section (3) of section 135A. In between these two decisions Mukherjee J. took a contrary view in *Alliance Assurance Co. Ltd. v Union of India* (1957 58 62 C.W.N. 539), a case under sub-section (2) of section 135A. That decision has been followed by Shamsheer Bahadur J. in *Union of India v Bharat Fire and General Insurance Ltd.* (A.I.R. 1961 Pun 157), also a case under sub-section (2) of section 135A.

15. The decision of Mitter J. was not cited before Mukherjee J. The only way in which the decision of Mitter J. is distinguished by Shamsheer Bahadur J. is by saying that it was a case under sub-section (3) of section 135A and not under sub-section (2) of that section.

16. Mitter J. quoted the statement of Arnould that "the under-writer has no independent rights of his own and cannot even sue in his own name" and the following passage from Welford and Otter-Barry:

The mere fact of subrogation does not entitle the insurers to enforce the rights in their own names: To enable them to do so, it is necessary that a statute should confer upon them a right of action, or that the assured should make a formal assignment to them of his rights of action in respect of the subject-matter.

Mitra J. surveyed the decisions of the Calcutta High Court, other decisions bearing on the subject, and said;

In my view, the effect of the decisions discussed above is that the insurer cannot maintain an action in his own name although there is subrogation of the claims of the insured in his favour. In order to entitle him to maintain an action in his own name must be an assignment of the claim by the insured in favour of the insurer.

17. We are in agreement with the view expressed above and hold that the appellant was not entitled to bring the suit from which this second appeal arises in its own name and that as a result the second appeal should fail. In the view we have taken the other points involved in the case do not arise for consideration and are not considered in this judgment. There is no prayer for an amendment of the plaint and the question as to whether such a prayer is competent and if competent, whether it should be allowed, also does not arise for consideration. The second appeal fails and is hereby dismissed. In the circumstances of the case, however, there will be no order as to costs.