

(2004) 07 NCDRC CK 0005

In the National Consumer Disputes Redressal Commission

EAST INDIA TRANSPORT AGENCY

APPELLANT

Vs

ORIENTAL INSURANCE CO. LTD.

RESPONDENT

Date of Decision : 05-07-2004

Acts Referred:

Citation : 2004 0 NCDRC 52

Hon'ble Judges : M.B.SHAH , RAJYALAKSHMI RAO , S.N.KAPOOR J.

Final Decision : Petition is dismissed

Judgement

1. THIS Revision Petition arises out of the order dated 16.10.1997 passed by the Kerala State Consumer Disputes Redressal Commission, in Appeal No.761/97, whereby the State Commission affirmed the order dated 29.7.1997 of the District Forum.

2. IN this case, the M/s. Jithen Trading Co., Complainant, who is Respondent No.2 before us, forwarded a consignment consisting of 75 bags of copra through the carrier, M/s. East India Transport Agency (Petitioner) by consignment note dated 5.1.1995 from Calicut to Moradabad. The consignee received the said goods and it was found that the goods were damaged. The Petitioner also issued a damage shortage certificate dated 31.3.1995. The damage was assessed at Rs.1,14,177.50ps. by the consignee. The consignor (2nd Complainant) suffered the said loss. The consignor issued notice to the Petitioner on 8.4.1995 claiming the amount of damages but the Petitioner did not reply. The goods were insured with the Complainant No.1, M/s. Oriental Insurance Co. Ltd. The Insurance Company assessed the loss at Rs.41,000/- and paid the same to the Complainant No.2 and obtained a letter of subrogation and special power of attorney. The, complaint was filed thereafter by the Insurance Company and the consignor against the carrier (Petitioner).

3. THE District Forum, Kozihkode allowed the said complaint and directed the Petitioner to pay the sum of Rs.41,000/- to the first Complainant, Insurance Company, with interest at the rate of 15% p.a. from 1.2.1995.

4. AGAINST that judgment Petitioner preferred an appeal No.761 of 1997 before the State Consumer Disputes Redressal Commission, Kerala which was dismissed. Hence, the carrier has filed this Revision Petition. At the time of hearing of this Revision Petition, the learned Counsel for the Petitioner submitted that in view of the decision rendered by the Apex Court in *Oberai Forwarding Agency Vs New India Assurance Co. Ltd. & Anr*, (2000) 2 SCC 407, the complaint by the assignee is not maintainable. As against this, the learned Counsel for the Respondent submitted that the State Commission and the District Forum have rightly rejected the said contention by relying upon the decision rendered by this Commission. He has also referred to the decision in *Union of India Vs. Sri Sarada Mills Ltd.*, (1972) 2 SCC 782. In the present case, the complaint is filed by the consignor as well as the consignor's Insurance Company. It cannot be disputed that the consignor was entitled to file the complaint for the loss suffered by it and for that, under the Carriers Act, Petitioner was liable to compensate. Complainants have not prayed that order be passed in favour of the Insurance Company alone. The prayer is for recovering the losses suffered by the consignor. Further, the decision rendered by the Apex Court in *Oberai Forwarding Agency (supra)* it is held that assignee is not entitled to file complaint because he is not a consumer, but it nowhere lays down that a subrogee is not entitled to file complaint. Considering the letter of subrogation and special power of attorney executed by the Complainant No.2 in favour of the Insurance Company it is clear that it is a pure and simple case of subrogation. It empowers the Complainant No.1 to bring any action or proceedings in the name of Complainant No.2 or in the name of Complainant No.1. It was agreed that Complainant No.2 would assist and concur in any matters or proceedings which may be taken for recovering the damages and simultaneously, it has irrevocable power to prosecute or proceed on behalf of the Complainant No.2.

5. IN *Oberai Forwarding Agency (Supra)* the Apex Court has referred to the decision of the Madras High Court in the case of *Vasudeva Mudaliar Vs. Caledonian Insurance Co. and Anr.*, AIR 1965 Madras 159, wherein it has been, inter alia, observed thus: "(4) A contract of motor insurance, like marine or accident insurance, is, in essence, one of indemnity. The underwriter, for consideration, guarantees the assured compensation against loss or risks, the limits of the guarantee against accident or loss or damage suffered, totally or partially, being subject to the maximum stipulated in the contract of insurance. Conversely, the rights of the assured are not to profit out of the bargain. It is implied in the very nature of the contract of indemnity that the indemnifier is entitled to recoup or minimise the damages he is obliged to pay the assured, by ways and means the assured himself could resort to, in order to reimburse himself against loss caused to him by third-party negligence. Such a right of the insurer is, of course, conditional upon his having already indemnified the assured. In other words, arising out of the nature of a contract of indemnity, the insurer, when he has indemnified the assured, is subrogated to his rights and remedies against third parties who have occasioned the loss. This right of the

insurer to subrogation or to get into the shoes of the assured as it were, need not necessarily flow from the terms of the motor insurance policy, but is inherent in and springs from the principles of indemnity. This is as a matter of law relating to indemnity, and the basis of the right is justice, equity and good conscience, namely, the indemnifier should be in a position to reduce the extent of his liability within limits.

As against this, for the assignment it has been observed thus: "An assignment or a transfer implies something more than subrogation, and vests in the insurer the assured's interest, rights and remedies in respect of the subject-matter and substance of the insurance. In such a case, therefore, the insurer, by virtue of the transfer or assignment in his favour, will be in a position to maintain a suit in his own name against third parties."

6. THE Apex Court has also referred to the decision in *Union of India Vs. Sri Sarada Mills* (1972) 2 SCC 877 wherein it is held that subrogation does not confer any independent right on underwriters to maintain any action, suit or proceeding in their own name and without reference to the persons assured an action for damage to the thing insured. The right of the assured is not one of those rights which are incidental to the property insured. The Court has also observed: "22. In the present case the insurance company and the mill proceeded on the basis that the insurance company was only subrogated to the rights of the assured. The letter of subrogation contains intrinsic evidence that the respondent would give the insurance company facilities for enforcing rights. The insurance company has chosen to allow the mill to sue. The cause of action of the mill against the Railway Administration did not perish on giving the letter of subrogation."

Same would be the position in the present case. The letter of subrogation, in the present case, evidences that the Complainant No.2 was to give facilities to the Insurance Company for enforcing rights and that rights of the Complainant No.2 had not perished on giving the letter of subrogation and power of attorney. The Supreme Court has also referred to "*Transport Corporation of India Ltd. Vs. Davangera Cotton Mills Ltd. and Ors.* II (1998) CPJ 16, wherein the Court has observed that though the claim has been settled by the Insurance Company and the consignor had issued a letter of subrogation that did not affect the rights of the consignor and consignee to claim the value of the goods from the transporter.

7. LETTER of subrogation and special power of attorney for indemnifying the Insurance Company provides that the Insurance Company can use the name of the assured in any action or proceedings. It also provides that consignor shall assist and concur in the proceedings and would execute the pleadings, by which letter, power of attorney is also given for the said purpose. It was also agreed that if required the assured would institute any action or proceeding which was directed by the Insurance Company and that the Insurance Company would indemnify for the costs, charges or expenses. It is also agreed that in case the lost articles are subsequently traced, the assured undertook to accept and take

delivery of the same and claim is to be re-adjusted on correct basis and something was to be refunded, the same would be done by the assured. Considering all these terms, it is apparent that the letter of subrogation and power of attorney merely confer right to be indemnified, i.e. to say, what was assigned was only right of indemnification, and, there by it was subrogation. In the case Oberai Forwarding Agency (supra) the facts were totally different. The power of attorney was separately executed and the consignor had not retained any right to recover the compensation for the loss of consignment, whereas in the present case the letter of subrogation and power of attorney is one document, and hence on the basis of the power of attorney the complaint by the Insurance Company was maintainable. Further, in the complaint filed by the Insurance Company as well as the consignor, what is claimed is the amount paid by the Insurance Company to the Complainant No.2. By the said letter of subrogation all the rights of the consignor, in spite of loss, are not transferred. Otherwise, Complainants would have claimed for a larger sum of Rs.1 lakh and odd as mentioned in the damage shortage certificate dated 31.3.1995 issued by the Petitioner. That is to say, the transfer was limited to the recovery of the amount paid by the Insurance Company to the second Respondent (Complainant No.2). This was not the position in the case of Oberai Forwarding Agency (supra). Further, in the said case it is provided that the Insurance Company was to take action in its own name, at its own risk and expense to recover the claim for the said damage or loss. As against this, the letter of subrogation and power of attorney, in the present case, provides for taking action in the name of the consignor also. In this view of the matter, there is no substance in this Revision Petition and is hereby dismissed. There shall be no order as to costs.