**(2007) 01 NCDRC CK 0063**

**In the National Consumer Disputes Redressal Commission**

**Case No :** 1228 of 2003

M. R. Shah Transport APPELLANT

Vs

United India Insurance Co. Ltd. and another RESPONDENT

**Date of Decision :** 05-01-2007

**Acts Referred:**

**Citation :** (2007) 01 NCDRC CK 0063

**Hon'ble Judges :** Rajyalakshmi Rao, B. K. Taimni

# Judgement

1. Petitioner was the opposite party before the District Forum where the respondents had filed a complaint alleging deficiency in service on the part of the petitioner.

2. Very briefly, the undisputed facts of the case are the M/s. V. K. Oil Mills, Sangrur had an open Insurance Policy for covering the risk of various goods being transported. As a part of his business the second respondent M/s. V. K. Oil Mills Pvt. Ltd. dispatched Palmolin oil in a tanker from Kandla to Ahmedgarh in district Sangrur through M/s. National Steel Industries, Kandla on 3.9.1998. After reaching a certain destination, the complainant V. K. Oil Mills hired the services of the petitioner for further transportation. This tanker belonging to the petitioner met with an accident resulting in leaking of oil amounting to 5,605 kgs. The matter was reported by the second respondent/ complainant to the insurance company as also the transport company. The insurer, i.e., the first respondent appointed a surveyor and after laid down procedure paid to the second respondent/complainant Rs. 1,82,682 after obtaining a letter of ''subrogation'' and ''assignment''. A claim was also preferred with the petitioner but since it was not getting settled, a complaint was filed by the respondents jointly before the District Forum, who directed the petitioner to pay Rs. 1,90,506 (Rs. 1,82,682 being the price of oil and Rs. 7,824 being the fee of the surveyor) alongwith interest @ 12% p.a. and cost of Rs. 3,000. An appeal was filed against this order before the State Commission which was basically dismissed as barred by limitation as also on merits.

 

3. Before the State Commission, it was the case of the petitioner that he was never served any notice hence he was given no opportunity to present his case. The petitioner had filed a review petition before the District Forum which was dismissed as not being maintainable. The State Commission after perusal of material and hearing the parties, dismissed this appeal, hence this revision petition before us.

4. We heard the learned counsel for both the parties and after perusing the material on record we find that on merits the order passed by the District Forum and affirmed by the State Commission cannot be sustained for the simple reason that the complainants before the District Forum could not be said to be ''consumers'' within its meaning under C.P.A., 1986. In these circumstances we are not going into the question whether the District Forum had the power to review its own order or not?

5. We also see that this case is squarely covered by the judgment of the Hon''ble Supreme Court in the case of Oberai Forwarding Agency v. New India Assurance Company Ltd., 2000 (2) SCC 407 : 2000 (2) AWC 947 (SC). There is no disputing the fact, that the payment was made by the insurance company to the consignee after executing the letter of ''subrogation'' and ''assignment'' by the consignor in favour of the insurer. The Hon''ble Supreme Court had occasion to go into the whole question of ''subrogation'' in the cited judgment and their observations in this regard are as follows : "18. The distinction between subrogation and assignment is explained in the standard text book on "Insurance Law" by MacGillivrary and Parkington (Seventh Edition). "1131. Difference between subrogation and assignment. Both subrogation and assignment permit one party to enjoy the rights of another, but it is well established that subrogation is not a species of assignment. Right of subrogation vest by operation of law rather than as the product of express agreement. Whereas rights of subrogation can be enjoyed by the insurer as soon as payment is made, an assignment requires by agreement that the rights of the assured be assigned to the insurer. The insurer cannot require the assured to assign to him his rights against third parties as a condition of payment unless there is a special clause in the policy obliging the assured to do so. This distinction is of some importance, since in certain circumstances an insurer might prefer to take an assignment of an assured''s right rather than rely upon his rights of subrogation. If, for example, there was any prospect of the insured being able to recover more than his actual loss from a third party, an insurer, who had taken an assignment of the assured''s right, would be able to recover the extra money for himself whereas an insurer who was confined to rights of subrogation would have to allow the assured to retain the excess.

1132. Another distinction lies, in the procedure of enforcing the rights acquired by virtue of the two doctrines. An insurer exercising rights of subrogation against third parties must do so in the name of the assured. An insurer who has taken a legal assignment of his assured''s right under statute should proceed in his own name...." (Emphasis supplied)

19. With the distinction between subrogation and assignment in view, let us examine the letter of subrogation executed by the second respondent in favour of the first respondent Its operative portion may be broken up into two, namely, (i) "we hereby assign, transfer and abandon to you all our rights against the Railway Administration, road transport carriers or other persons whatsoever, caused or arising by reason of the said damage or loss and grant you full power to take and use all lawful ways and

means in your own name and otherwise at your risk and expense to recover the claim for the said damage or loss", and (ii) "we hereby subrogate to you the same rights as we have in consequence of or arising from the said loss or damage".

20. By the first clause the second respondent assigned and transferred to the first respondent all its rights arising by reasons of the loss of the consignment. It granted the first respondent full power to take lawful means to recover the claim for the loss, and to do so in its own name. If it were a mere subrogation, first, the word ''assigned'' would not be used. Secondly, there would not be a transfer of all the second respondent''s right in respect of the loss but the transfer would be limited to the recovery of the amount paid by the first respondent to the second respondent. Thirdly, the first respondent would not be entitled to take steps to recover the loss in its own name; the steps for recovery would have to be taken in the name of the second respondent. Thus, by the first clause there was an assignment in favour of the first respondent.

23. Now, as is clear, the loss of the consignment had already occurred. All that was assigned and transferred by the second respondent to the first respondent was the right to recover compensation for the loss. There was no question of the first respondent being a beneficiary of the service that the second respondent had hired from the appellant. That service, namely, the transportation of the consignment, had already been availed of by the second respondent, and in the course of it the consignment had been lost. The first respondent, therefore, was not a ''consumer'' within the meaning of the Consumer Protection Act, and was, therefore, not entitled to maintain the complaint.

24. By reason of the transfer and assignment of all the rights of the second respondent in the first respondent''s favour, the second respondent retained no right to recover compensation for the loss of the consignment. The addition of the second respondent to the complainant as a co-complainant did not, therefore, make the complaint maintainable."

(Emphasis supplied)

6. In view of above, we find that this case is squarely covered by the judgment of Hon''ble Supreme Court in view of which we cannot sustain the order passed by the State Commission which is set aside for the simple reason that the

 

complainant could not fall within the definition of ''Consumer'' and complaint filed by them is not maintainable. However, the respondents shall be free to seek remedy before any appropriate forum, if so advised under appropriate law for which the time spent before the Consumer Fora can be sought to be exempted under Section 14 of the Limitation Act in the light of the judgment of the Hon''ble Supreme Court in the case of Laxmi Engineering Works v. P.S.G. Industrial Institute, (1995) 3 SCC 583 .

 