
(1996) 09 MAD CK 0010
In the Madras High Court

M.S. Balasubramaniam

APPELLANT

Vs

The United India Insurance Co. Ltd. and Others

RESPONDENT

Date of Decision : 11-09-1996

Acts Referred:

Marine Insurance Act, 1963 — Section 52
Transfer of Property Act, 1882 — Section 130A

Citation : (1996) 2 MLJ 525

Hon'ble Judges : C.V. Govardhan, J

Bench : Division Bench

Judgement

C.V. Govardhan, J.—The first defendant in O.S.No. 66 of 1986 and O.S.No. 146 of 1988 on the file of the Sub Court, Tuticorin, is the

appellant in both the appeals.

2. The plaintiff's case in both the suits is briefly as follows: 1175 bundles of match boxes belonging to the third respondent in O.S.No. 66 of 1986

and 150 bundles of match boxes belonging to the third defendant in O.S.No. 146 of 1988 were dispatched by them to the first defendant from

Kovilpatti and Kadambur to Killianwali (Punjab). The consignment in both the suits were insured with the plaintiff in both cases. It was carried in

the lorry bearing registration No. KRD 8190 belonging to the first defendant. On 21.1.1983 at about 4.00 P.M. near Lakshmi Mills Railway Gate

at Kovilpatti, the lorry rolled down in the ditch and the entire consignment was damaged. The consignment belonging to the third defendant in

O.S.No. 66 of 1986 was insured with the plaintiff for Rs. 97,608.41. The consignment of the third defendant in O.S.No. 146 of 1988 was insured

with the plaintiff for Rs. 13,223. At the request of the above owners the plaintiff has paid the amount to them. The owners have executed power of

attorney and letter of subrogation in favour of the plaintiff. Therefore, the plaintiff in both the suits is entitled to recover the amount due under both the suits from the defendants 1 and 2, who are the owners of the lorry. Hence the suits.

3. The defendants 1 and 2 filed a separate written statement in both the suits contending briefly as follows: The accident was not due to the rash and negligent driving of the lorry by its driver. When the lorry attempted to over take another lorry the tyre bursted resulting in the accident. The entire consignment was burnt to ashes. The defendants 1 and 2 are therefore not liable to make payment to the owners of the consignment in both the suits, since the accident was due to an act of God. The deed of assignment and deed of power of attorney claimed by the plaintiff is not correct. The lorry was also burnt and damaged. The defendants are therefore not bound to make payment of the suit claim to the plaintiff. There is no privity of contract between the insurance company and the owner of the lorry and the suit is liable to be dismissed on that ground.

4. Since both the suits arise out of a single accident and the plaintiff has made payment of the value of the goods lost in the accident to the owners of the consignment, a common trial was conducted by the learned Subordinate Judge, Tuticorin. The learned Subordinate Judge gave a finding that the accident was due to the rash and negligent driving of the lorry in which consignment were dispatched and granted a decree in favour of the plaintiff in both the suits on the ground that the plaintiff is entitled to file the suit as per the letters of subrogation and power of attorney given in favour of the plaintiff by the third defendant in both the suits. Aggrieved over the same, the first defendant, owner of the lorry, through which the consignment was dispatched from Tuticorin, against whom a decree has been passed by the trial, has come forward with these two appeals.

5. The first defendant, against whom a decree has been passed in both the suits, has come forward with these two appeals, challenging the judgment of the trial court on two grounds. The first ground is that the case of the plaintiff that there was no negligence on the part of the driver of the first defendant and the accident was due to the act of God and yet the trial court has given a finding that the accident was due to rash and negligent driving of the driver of the bus and it is erroneous. According to the learned Counsel appearing for the appellant, the question whether the

driver of the first defendant was negligent or not would arise for consideration only if the court holds that the suit filed by the insurance company is maintainable against the defendants and therefore the maintainability of the suit assumes importance and we have to deal with the same at the first instance.

6. According to the learned Counsel appearing for the appellant, the suits have been filed by the insurance company on the basis of the letter of

subrogation-cum-power of attorney said to have been issued in their favour by the owner of the consignment namely, the third defendant in both the

suits and such a suit is not maintainable by insurance company alone on the basis of the above letter of subrogation as per the Marine Insurance

Act. According to the learned Counsel, the suit filed by the insurance company is not maintainable unless the policy issued by them to the owner of

the consignment is assigned in favour of the insurance company either before or after the loss on which the claim has been made. Section 52 of the

Marine Insurance Act reads as follows:

52. When and how policy is assignable -- (1) A marine policy may be transferred by assignment unless it contains terms expressly prohibiting

assignment. It may be assigned either before or after loss.

(2) Where a marine policy has been assigned so as to pass the beneficial interest in such policy, 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 suit

had been brought in the name of the person by or on behalf of whom the policy was effected.

(3) A marine policy may be assigned by endorsement thereon or in other customary manner.

7. The learned Counsel appearing for the appellant would contend that Ex.A-17 on which the claim has been made can only be a letter of

subrogation and power of attorney made by the owner of the consignment and it would not amount to assignment of the policy under Ex.A-1 to

enable the insurance company to file the suit. The learned Counsel would argue that on a perusal of the document Ex.A-17 it is not known what is

the nature of the document whether it is a letter of subrogation or power of attorney, but it is definitely not a document of assignment and therefore

the claim made by the plaintiff on the basis of Ex.A-17 has to fail. The relationship between the plaintiff in both suits and the third defendant in both the suits is that of an insurer and insured. The contract of insurance is a contract of indemnity. In a contract of indemnity the indemnifier by itself cannot file the suit as per repealed Section 130-A of the Transfer of Property Act. In the present case, the plaintiff being the insurance company it is the indemnifier and the suit having been filed by the indemnifier it is not maintainable as per the repealed Section 130-A of the Transfer of Property Act.

8. Coming to the provisions of Marine Insurance Act, which has revealed Section 130-A of the Transfer of Property Act, Section 52(2) makes it abundantly clear that the assignee of the policy is entitled to sue in his own name. Where a marine policy has been assigned so as to pass the beneficial interest in such policy. Sub-clause (3) of the said section is to the effect that a marine policy may be assigned by endorsement thereon or any other customary manner. In Exhibit A. 1 there is no endorsement of assignment made by the third defendant in favour of the plaintiff in both the suits. There is no plea in the plaint or in the evidence to the effect that there is a custom of assigning the policy by issuing letter of subrogation or by issuing power of attorney. Exhibit. A-17 even if it is considered as a letter of subrogation or power of attorney cannot be said to satisfy the requirements of Section 52(3) of the Marine Insurance Act, which provides that a marine policy may be assigned in any other customary manner apart from endorsement. If Exhibit A. 17 is considered as letter of subrogation it does not confer any independent right on the plaintiff to maintain the suit in their own name without reference to the persons secured an action for damage to the thing insured. The assignment contemplated u/s 52(3) of the Marine Insurance Act is the assignment of the policy and not any document. Therefore, Exhibit A. 17, which is a letter of subrogation, cannot be considered to specify the requirements of Section 52(3) of the Act, even if it is assumed that it confers an independent right. But as already observed by me, letter of subrogation does not confer any independent right on the plaintiff to maintain the suit in their independent name without reference to third defendant in both the suits, for damages, to the consignment insured. This is a case in which the plaintiff is seeking a

decree against the third defendant and it is not a case where the insurance company and the insured together seek relief against the carries.

Therefore, letter of subrogation Exhibit Ex.A-17 by itself is not sufficient to enable the plaintiff to file the suit in their individual capacity.

9. The learned Counsel appearing for the respondents would argue that it may be that the assigner has not joined the insurer in the suit, but they

have issued no objection certificate Ex.A-30 to the plaintiff to file the suit against the carrier and all that is required is that the person who is entitled

for compensation should be a party to the proceedings, since there cannot be any further claim made by the consignor against the carrier after the

claim made by the insurance company as per the letter of subrogation is satisfied. But this argument of the learned Counsel appearing for the

respondents is not a tenable one.

10. In the decision reported in New India Assurance Co. Ltd. Vs. Okay Transport Corporation and Others, it has been held that where the

consignment has been duly insured was not delivered by the carrier and the insurance company settled the claim of the consignor, the suit filed by

the insurance company is maintainable. This decision has been relied by the learned Counsel appearing for the respondents in support of his

contention that the third defendant having been made a party to the proceedings, the contention of the appellant that the suit is not maintainable is

not a tenable one. It is no doubt observed in the above decision that when all the parties, including the party entitled to recover damages are in the

party array, the court will be reluctant to take a hypertechnical view and dismiss the suit only because insured is, instead of being made co-plaintiff,

made a defendant.

11. In the decision reported in Union of India (UOI) Vs. Sri Sarada Mills Ltd., it has been held that the subrogation does not confer any

independent right on underwriters to maintain in their own name and without reference to the person assured an action for damages to the thing

insured and that the right of the assured is not one of those rights which are incident to the property insured. The above ruling of the Supreme

Court has been relied on by the Division Bench of High Court of Kerala in New India Assurance Co. Ltd. Vs. Okay Transport Corporation and

Others, . But in the same decision it has also been held that where the

consignment duly insured was not delivered by the carrier and the insurance company paid the claim to the consignor-insured--Insurance company filed suit against the carrier for recovery of damages and impleaded the consignor as one of the defendants --Whether the insurance company on the basis of letter of subrogation can sue the carrier alone in its own name

- Held no; insured consignor ought to be made co-plaintiff.

12. Similarly in the decision reported in Arief Trading Co. v. United India Insurance Co. Ltd. (1994) 1 C C C 653, it has been held that the subrogation is not an assignment and assignment has to be by endorsement on the policy and that letters of subrogation are not assignments of the policies and they, by themselves cannot confer any title to the plaintiff to sue for recovery by the insurance company as per Section 52(3) of the Marine Insurance Act. The above decision also lays down that an insurance company cannot maintain a suit on the basis of letters of subrogation as it does not confer title on it and the assignment contemplated by Section 52(3) of the Marine Insurance Act is the assignment of the policy and not any document. I have already observed that the policy is not assigned and there is no evidence that the assignment was in any other customary manner.

Therefore, when once the claim of the plaintiff on the basis of the letters of subrogation and power of attorney suffers this defect regarding assignment as contemplated under the Marine Insurance Act, the impleading of the assignor as a defendant in the suit cannot rectify the defect and enable the plaintiff to file the suit. In that view, the court is of opinion that the finding of the trial court that the suit is maintainable has to be set aside.

When once we hold that the suit is not maintainable, the question whether there was negligence on the part of the driver of the lorry of the first defendant, appellant herein, does not even arise of consideration. But anyhow for the sake of completion, I wish to observe that the documents in the suit have not been marked by any witness. When no witness has been examined, the assignor who has alleged that the driver of the first defendant was negligent cannot be said to have discharged the burden of proof that the accident was due to the rash and negligent driving of the lorry by its driver, since the burden of proof of damage under the Carriers Act is not on the person who had entrusted the goods to the carrier. No

evidence has been let in by the consignor and the evidence let in by the plaintiff-insurance company also does not show by any oral evidence that the driver was negligent. Except the fact that the accident had occurred, which is not in dispute, it cannot be stated that sufficient-evidence has been let in to show that there was negligence on the part of the driver of the first defendant. But as already observed by me, this question whether the driver was negligent or not need not be considered, when once we hold that the suit is not maintainable under the Marine Insurance Act. In that view, I hold that the appeal has to be allowed.

13. In the result, both the appeals are allowed, setting aside the judgment and decree of the trial court and dismissing the suits. In the circumstances of the case there will be no order to costs in these appeals and in the suits.