
(2000) 02 MAD CK 0049
In the Madras High Court
Case No : A.S.No. 117 of 1986

M/s. Ravichandran Transports Mettur Dam, Salem District	APPELLANT
Vs	
United India Insurance Company Limited, Divisional Office	RESPONDENT

Date of Decision : 03-02-2000

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 20
Marine Insurance Act, 1963 — Section 17, 2, 3, 4(2), 52
Stamp Act, 1899 — Article 47A
Transfer of Property Act, 1882 — Section 135, 6

Citation : (2000) 1 CTC 748 : (2000) 2 LW 770 : (2000) 2 MLJ 318

Hon'ble Judges : R. Balasubramanian, J

Bench : Single Bench

Advocate : Mr. D. Rajendran, for the Appellant; Mr. N. Balasubramanian, for the Respondent

Judgement

1. The defendant in O.S.No.158 of 1983 on the file of the 9th Additional City Civil Judge, Madras and the plaintiff therein are the appellant and the respondent respectively in this appeal. In this judgment the parties to the appeal would hereinafter be referred to as the plaintiff and the defendant. The plaintiff filed the above suit to recover a sum of Rs.64,871.25 made up of Rs.60,345 as damages suffered after salvation of the goods with subsequent interest on Rs.60,345 at 18% p.a. The suit was decreed on merits. Hence the present appeal before this court at the instance of the defendant. Heard Mr.D.Rajendran learned counsel appearing for the defendant and Mr.N.Balasubramanian learned counsel appearing for the plaintiff.

2. The plaint allegations are as follows:

The insured of the plaintiff has it's registered office at Madras. They booked for

transport 360 bags weighing about 9,000 Kgs. P.V.C. Resin 124

to M/s. Suryodhaya Industries Limited, Bangalore under Lorry Receipt No.886 dated 06.05.81. The consignor namely, M/s. Chemical & Plastics

India Limited delivered the goods in good condition to the defendant. The goods were insured with the plaintiff. At the time of delivery at the place

of destination the goods were found to be in a damaged condition (wet) due to the defendant not taking proper, adequate and reasonable care,

which the carrier is expected to take. Under these circumstances the consignee rejected the consignment itself. The defendant did not even take

back the original lorry receipt and the goods consignment note. However he had negligently and improperly left the consignment at the place of the

consignee itself.

As the consignment was insured with the plaintiff, the plaintiff as per the terms and conditions of the policy, settled the claim of their insured at

Rs.1,69,100. On account of such settlement the plaintiff gets subrogated to the rights of the consignor, i.e., the insured. The consignor lodged a

claim on 08.05.81 on the defendant and it was acknowledged by them on 11.05.81. The plaintiff after proper scrutiny as well as after proper &

reasonable advertisement and publicity through an agency, sold the damaged goods and realised a sum of Rs.1,10,000 out of the sale of the

salvage. After deducting the sale proceeds; adding the cost of the Survey Report and publication charges, the defendant is bound to pay

Rs.60,345 with interest in lieu of damages from the date of settlement of the claim. Therefore the plaintiff issued a lawyer's notice dated 05.07.82

calling upon the defendant to settle the claim referred to above. The defendant neither replied nor settled the claim. Hence the suit.

3. The defendant filed a written statement inter alia contending as follows:

The suit is not maintainable in law and bad for non-joinder of parties. Therefore the suit is liable to be dismissed on that short ground alone. The

defendant denies the genuineness or the validity of the letter of subrogation stated to have been obtained from the insured. The suit is bad for non-

joinder of the consignor. The goods entrusted to the defendants were delivered to the consignee in the same good condition. The consignee

received the goods without any protest as there was no occasion for protest.""

The fact remains that the goods were sent under freight ""to pay

basis. The goods were thus delivered on receipt of the freight charges. The defendant states that they took proper, adequate and reasonable care

in handling the goods and the goods were delivered in good condition. If the goods at the time of delivery are not in good condition, then the

consignee should have taken ""open delivery"" taking a certificate from the carriers about the condition of the consignment. No such ""open delivery

was given to the consignee, as the goods were in good condition at the time of delivery. On enquiries made by the defendant it is learnt that the

value of the consignment was only around Rs.1,00,000.

The defendant sent a reply to the consignor that the goods were delivered in good condition. The consignee neither protested nor took ""open

delivery"". Inasmuch as the goods were delivered in good condition, the defendant is not liable to pay any amount to the consignor much less to the

plaintiff. The defendant does not admit that there was proper and reasonable advertisement and publicity before effecting the sale. The plaint is

vague and devoid of particulars with regard to the sum of Rs.60,345 claimed in the plaint. The plaintiff is not entitled to the said amount. The

defendant is not liable to pay any interest. The defendant was not put on notice about the proposed sale. The defendant had no opportunity to

check and be satisfied about the auction. It is evident that the plaintiff had taken nearly one year time to dispose of the goods. The loss, if any,

would only be due to the long "lapse of time and improper care of the goods. To the lawyer"s notice dated 05.07.82 the defendant sent a reply on

15.07.82. The defendant does not admit the value of the goods, consigned as Rs.1,69,100. The plaintiff never informed the defendant about the

proposed auction. The plaintiff has no cause of action to file the suit at Madras. The goods were booked from Mettur to Bangalore. The goods

were neither booked at Madras nor entrusted at Madras. The delivery has to be made at Bangalore. The defendant is permanently carrying on

business at Mettur Dam. Therefore the plaintiff has no cause of action to file the suit at Madras. There was no necessity for the defendant to take

back the original lorry receipt or the goods consignment note, since the goods were consigned on freight ""to pay"" basis and the goods were

delivered in good condition. The averment that the defendant did not take back the original lorry receipt as well as negligently and improperly left

the goods is incorrect and unsustainable in law. The defendant reiterates that there was no negligence on his part.

In the additional written statement filed by the defendant it is stated as follows:

The defendant states that the goods were entrusted to ""Sri Ravichandra Transport"" having their office at Mettur Dam, Salem District. The

defendant has no Branch Office at Madras and the alleged Branch Office is not the Branch Office of the defendant. The defendant states that the

alleged Branch Office is not the Branch Office of the defendant but it is a separate partnership firm run by different partners. Therefore the plaintiff

has no cause of action to file the suit at Madras.

4. On the side of the plaintiff two witnesses were examined as P.Ws.1 and 2 and 16 exhibits were marked as Exs.A.1 to A.16. On the side of the

defendant one witness was examined as D.W.I and there was no documentary evidence on his side. The learned trial Judge on the pleadings

framed the following issues:

(a) Whether the suit is bad for non-joinder of parties?

(b) Whether the plaintiff's claim on the basis of subrogation from M/s. Chemical & Plastics India Limited is sustainable and is the subrogation true, valid and binding?

(c) Whether the goods were delivered in a damaged condition?

(d) Whether the defendant is guilty of negligence and carelessness in transporting the goods?

(e) Whether there was a proper auction?

(f) Whether the sum of Rs.1,69,100 represents the correct value of the consignment?,

(g) Whether the defendant is liable to pay the amount as claimed in the plaint?

(h) Whether the defendant is liable to pay any interest and, if so, at what rate?

(i) Whether the court has no jurisdiction to try the suit?

(j) To what reliefs are the parties entitled?

5. Mr. D. Rajendran learned counsel for the appellant would contend as follows:

The transport of goods is from Mettur to Bangalore. It does not involve any voyage or even transport on inland water. Ex.A.11 is the Marine

Insurance Policy. This policy is governed by the Marine Insurance Act, 1963.

Under the Act referred to above the Marine Insurance Policies cannot cover any risk to goods, being the subject matter of transport on land alone. Therefore the policy Ex.A.11 is opposed to the Statutory provisions contained in the Marine Insurance Act. That being so, the Insurance Company has no right to claim any money from the defendant namely, the carrier. The suit filed by the plaintiff alone namely, the insurer is not maintainable in law. The letter of subrogation relied upon by the plaintiff would not enable him legally to sue in his own name and he ought to have joined the insured as the co-plaintiff. The plaintiff does not get any legal right either under the Marine Insurance Act or under the letter of subrogation to maintain the suit in its own name. The goods entrusted to the defendant for carriage to Bangalore was in fact delivered in a good condition to the consignee. There is no evidence to show that the goods suffered any damage in transit and that the carrier is guilty of negligence in transporting the goods. On the day when the letter of subrogation was given by the insured to the insurer, assuming it is valid, the insured had lost all its rights in the goods by the sale that had taken place prior to that date and therefore the insured had no interest in the goods. In the absence of any interest in the goods insured, there cannot be any valid assignment of the rights of the insured in those goods in favour of the Insurance Company. There was no proper advertisement or publication before the intended sale by the insurer and that it resulted in the same causing considerable loss. The carrier was not put on notice about the intended sale. In any event there was an inordinate delay of nearly one year from the date the goods reached the place of destination till it was actually sold and this delay is an added factor to the deterioration of the goods or bringing lesser price for the sale of such goods. If the goods had been promptly sold without any delay, it would have fetched a higher price resulting in complete mitigation of damages. The defendant cannot therefore be saddled with any liability in terms of money on account of such negligence on the part of the parties concerned in bringing the properties to sale. There is no proof before court about the actual value of the goods entrusted to the carrier and the actual damages suffered. The learned counsel would also contend that neither the whole of the cause of action nor a part of the cause of action had arisen in the City of Madras

and as such the court at Madras has no jurisdiction. Therefore the suit must be dismissed.

6. Mr.N.Balasubramanian learned counsel appearing for the respondent would argue that the risk in question can be legally covered under the

Marine Insurance Policy and therefore the insurer under the Insurance Policy can legally proceed against the carrier. On settlement of the claim of

the insured under the policy the rights of the insurer are statutorily protected under the Marine Insurance Act which enables the insured to file a suit

in his own name. Both subrogation and assignment are recognised under the Marine Insurance Act. In this case apart from subrogation of the

insured's right in favour of the insurer, there is also a valid assignment by the insured of all his rights in the goods in favour of the insurer. Therefore

the maintainability of the suit filed by the insurer can be tested in his capacity as the assignee. Assignment of a mere right to sue alone is opposed to

section 6(e) of the Transfer of Property Act. The assignment of the rights of the owner in the goods in favour of the insurer, though in enforcing the

said rights, a litigation is involved, is always valid and it is not opposed to section 6(e) of the Transfer of Property Act. The evidence available on

record" establishes that the goods were found damaged at the place of destination and the defendant, being a common carrier, is made absolutely

liable under, the Carriers" Act unless and until he discharges the burden cast upon him that there was neither a criminal act nor negligence on the

part of the carrier or his servants, etc., etc. In such suits the Carriers" Act provides that the owner of the goods need not prove any negligence or

carelessness on the part of the carrier. There is no negligence or laches on the part of the insurer in bringing the goods to sale and the best price

had been realised in respect of the goods as a salvage. Regarding the value of the goods entrusted to the carrier for transport, there are enough

materials on record to support the same. The Deed of Assignment and subrogation had taken place within the jurisdiction of the City of Madras,

which gives a cause of action for the plaintiff to file the suit at Madras.

7. In the light of the arguments advanced by the learned counsel on either side I perused the entire pleadings and the evidence, both oral and

documentary, available on record. To my mind the following issues arise for consideration in this appeal:

- (a) Whether the court at Madras has jurisdiction?
- (b) Whether the risk to the goods involved in the case on hand could be covered by a Marine Insurance Policy under the provisions of the Marine Insurance Act, 1963?
- (c) Whether the suit filed by the Insurance Company alone is maintainable?
- (d) Whether the goods entrusted to the carrier were found damaged at the time of delivery?
- (e) Whether the value of the goods entrusted by the insured to the carrier and the actual value of loss suffered, are established in this case?
- (f) Is not the plaintiff guilty of laches/negligence/delay in bringing the goods to sate, which had considerably affected it's value?
- g) To what relief the parties are entitled to?

8. Issue No.(a) Ex.A.5 is the letter of subrogation executed by the Insured in favour of the Insurance Company. At the foot of this document it is noted that it was executed on 19.06.82 at Madras. The insured is the person having business at Mettur and the head office at Madras. The execution of this document at Madras is attested by a Notary in the City of Madras. It may be true that the entrustment of the goods to the carrier was at Mettur and the place of destination is in Bangalore. Ex.A.1 is the goods consignment note issued by the defendant. It is in the name of the defendant. This goods consignment note discloses that the defendant has a Branch Office at Madras. u/s 20(c) of the CPC a suit can be laid in a place where the cause of action wholly or in part arises. The plaintiff, to institute the suit at Madras, relies upon Ex.A.5 namely, the letter of subrogation. I have already noticed that Ex.A. 5 was executed at Madras. In this context the learned counsel for the decree holder brought to my notice a judgment of this court in a case reported in Abdul Kareem v. Rational Insurance Company Limited, Coimbatore, 1983 (96) L.W. 709. In that case pursuant to a contract of transport, the owner of the goods delivered at Kothagiri certain goods for transport to Cochin. The goods were damaged in transit. The Insurance Company got itself subrogated to the rights of the insured and filed that suit at Coimbatore. It was argued that the suit should have been filed either at Kothagiri (Nilgiri District) or at the place where the damages took place, both being in Nilgiri District. The Insurance Company relying upon the Deed of Subrogation executed at

Coimbatore, contended that the court at Coimbatore would have jurisdiction. The objection of the carrier was overruled by the learned trial Judge. That matter came up before this court and a learned single Judge of this Court, in the reported case referred to supra, held that subrogation has a great bearing and that being a part of the cause of action arising at Coimbatore, the court at Coimbatore would have jurisdiction. That judgment applies with full force to the case on hand. Therefore I am in entire agreement with the learned trial Judge on the finding rendered by him in this case that the suit is maintainable in the City of Madras.

9. Issue Nos. (b) and (c); To decide these issues it is necessary for this court to look into the Marine Insurance Act 1963. The statements of

objects and reasons to that Act discloses that for the smooth development of Indian Marine Insurance it is essential to have a legislation consistent

with Indian conditions and therefore the law relating to the same was codified. Section 90 of the Marine Insurance Act, 1963 declares that nothing

in clause (e) of section 6 of the Transfer of Property Act 1882 shall affect the provisions of sections 17, 52, 53 & 79 of the Marine Insurance Act.

Sections 52 and 53 relate to assignment of Marine Insurance Policy and section 79 is on the right of subrogation. Under sub clause (e) of section 6

of the Transfer of Property Act a mere right to sue cannot be transferred. Inasmuch as certain provisions of the Marine Insurance Act 1963 is

declared as not affected by sub clause (e) of section 6 of the Transfer of Property Act, the prohibition contained in sub clause (e) of section 6 of

the Transfer of Property Act will no longer be available to any court to decide the validity of the assignment or subrogation arising under the

Marine Insurance Act 1963. In other words assignment and subrogation of a Marine Insurance Policy have been statutorily recognised under the

provisions of the Marine Insurance Act. Prior to the coming into force of the Marine Insurance Act the assignment of rights under a policy of

Marine Insurance was governed u/s 135-A of the Transfer of Property Act. However after the coming into force of the Marine Insurance Act,

Section 135-A of the Transfer of Property Act stands repealed and the provisions contained therein in substance stands incorporated in the

Marine Insurance Act. (Vide sections 52(2) and 79).

10. Ex.A.11, the policy in this case, is shown to be a Marine Policy (cargo). It is

in a printed form. As against the column voyage it is stated ""from Mettur factory site to any depots and any places in India."" As against the column vessel and or conveyance it is stated ""by lorry"". No movement of goods by ship or sea is contemplated by the policy and the policy is clearly a policy to cover loss to the goods in transit while being carried from one place to another by lorry. Relying on this and going by the definition of the Marine Insurance u/s 3 of the Marine Insurance Act, Mr.D.Rajendran learned counsel for the appellant would contend that though the policy is in the printed form of a Marine Policy, yet the terms of the policy excludes it from the purview of the Marine Policy as defined u/s 3 of the Marine Insurance Act. The learned counsel also contended that there is no provision in the Marine Insurance Act which would cover the transportation of goods by road as covered in this case. For the above two submissions the learned counsel Mr.D.Rajendran relies upon the cases reported in M/s. Indian Dyestuff Industries Limited and another Vs. M/s. Mehta Transport Company, and United India Insurance Co. Ltd., Madras Vs. M/s. Aman Singh Munshi Lal and others, The judgment of the Bombay High Court was with reference to the stamp duty payable in respect of a Sea Policy under the Indian Stamp Act, 1889 in the context of Section 2(20) and Articles 47A and 47B of the Indian Stamp Act. From the terms of the policy in that case, which did not disclose any movement of goods by Ship or Sea, the Bombay High Court held that the policy in that case cannot be equated to a Sea policy within the meaning of Article 47A of the Indian Stamp Act. In the judgment of the Punjab & Haryana High Court it was held that as the insured consignment in that case was to be transported throughout by road and though the cover note issued was printed in the form of Marine Insurance, yet that itself would not attract the provisions of the Marine Insurance Act as no provisions in the Marine Insurance Act, 1963 to cover such risk was brought to the notice of the court.

11. As against this Mr.N.Balasubramanian learned counsel submitted that the risk to the goods to be transported completely by road can also be covered by the Marine Insurance Act, 1963. For this purpose he took me through some provisions in the Indian Insurance Act as well as the relevant provisions in the Marine Insurance Act. Prior to the coming into force of

the Marine Insurance Act, 1963 (hereinafter referred to as the 1963 Act), the Insurance Act, 1938 (hereinafter referred to as the 1938 Act)" was the only legislation relating to the business of insurance. Under sub section (13-A) of section 2 of the 1938 Act, "marine insurance business" is defined to mean "the business of effecting contracts of insurance upon vessels of any description, including cargoes, freights and other interests which may be legally insured, in or in relation to such vessels, cargoes and freights, goods, wares, merchandise and property of whatever description insured for any transit, by land or water, or both, and whether or not including warehouse risks or similar risks in addition or as incidental to such transit, and includes any other risks customarily included among the risks insured against the marine insurance policies.

12. "Fire insurance Business", "general insurance business" and "miscellaneous insurance business" are defined under sub section (6-A); sub-section (6-B) and sub section (13-B) of section 2 of the 1938 Act. "General Insurance business" is defined to mean fire, marine or miscellaneous insurance business." It appears from a reading of the definition of "marine insurance business" that it enables the insurance company to cover the risk to goods in any form of transit either by land or water or both. In other words "marine insurance business" as defined under the 1938 Act would enable the insurance company to cover a risk attached to goods to be transported on land only. It may be noticed here that the 1938 Act defined only "marine insurance business" and not a "marine Insurance policy". Section 2(a) of the 1963 Act defines a "contract of marine insurance as defined in section 3 of that Act. u/s 3 of that Act a "contract of marine insurance" is stated to be an agreement whereby the insurer undertakes to Indemnify the assured, in the manner and to the extent thereby agreed, against marine losses," that is to say, the losses incidental to marine adventure. Section 2(d) of the 1963 Act defines "marine adventure" as including any adventure where.

- (i) any insurable property is exposed to maritime perils;
- (ii) the earnings or acquisition of any freight, passage money, commission, profit or other pecuniary benefit, or the security for any advances, loans, or disbursements is endangered by the exposure of insurable property to maritime perils;

(iii) any liability to a third party may be incurred by the owner of or other person interested in or responsible for, insurable- property by reason of maritime perils;

For the purpose of our case the adventure covered under (I) of sub section (d) of section 2 of the 1963 Act alone is relevant. Section 2(e) of this

Act defines ""maritime perils"" as ""the perils consequent on, or incidental to, the navigation of the sea, that is to say, perils of the sea, fire, war perils,

pirates, rovers, thieves, captures, seizures, restraints and detentions of princes and peoples, jettisons, barratry and any other perils which are

either of the like kind or may be designated by the policy"". A reading of section 2(e) of the 1963 Act shows that apart from the perils mentioned in

that sub section, the ""maritime perils"" would also include any other perils which are either of the like kind (meaning thereby similar to the perils

mentioned earlier) or may be designated by the policy. Therefore this section empowers an Insurance company to designate any other peril in the

policy not covered under the various types of perils mentioned in that sub-section.

13. In the context of the above provision of law in the 1963 Act, section 4 of that Act assumes considerable importance in deciding the question as

to whether the risk to the goods to be transported only by land can also be covered under a Marine Insurance Policy or not. Therefore it is better I

extract the entire section 4 of the 1963 Act hereunder:

4. Mixed Sea and Land Risks; - (1) A contract of marine insurance may, by its express terms, or by usage of trade, be extended so as to protect

the assured against losses on inland waters or on any land risk which may be incidental to any sea voyage.

(2) Where a ship in course of building or the launch of a ship, or any adventure analogous to a marine adventure, is covered by a policy in the form

of a marine policy, the provisions of this Act, in so far as applicable, shall apply thereto, but, except as by this section provided, other than a

contract of marine insurance as by this Act defined:

Explanation: - An adventure analogous to a marine adventure includes an adventure where any ship, goods or other movables are exposed to

perils incidental to local or inland transit.

Sub- section (2) of section 4 - and the Explanation to this section throws

considerable light on this question. That sub section declares that the 1963 Act would apply to any adventure analogous to a marine adventure covered by a policy in the form of a marine policy. "Adventure analogous to a marine adventure" is defined to include, under the Explanation, an adventure where any ship, goods or other movables are exposed to perils incidental to local or inland transit.

14. The earliest judgment which will throw a definite light on this issue is the one reported in Alliance Assurance Company Limited v. Union of

India, 62 C.W.N. 539. That judgment came to be delivered in the context of section 135-A(2) of the Transfer of Property Act. I have already

noticed in this case that after the coming into force of the Marine Insurance Act, 1963. section 135-A of the Transfer of Property Act stands

repealed and consequently stands incorporated in the Marine Insurance Act in substance. In that decided case the goods were carried for transit

by land alone by a Railway Administration and the question was as to whether the insurer, who had paid for the total loss of an apportionable part

of the goods carried can maintain a suit in his own name against the carrier for reimbursement of the amount paid to the insured for the loss?

Having regard to the definition of "marine insurance business" in the Insurance Act, the learned Judge held that the Insurance Company intended to

do marine insurance business and therefore the policies must be regarded as marine insurance policies covered by section (135-A) of the Transfer

of Property Act. It may be noticed here that the policies covered only land risk and not any risk on voyage or on an inland water. The decision on

the main issue was that the Insurance Company can maintain an action in its own name. However I am relying on this case only to the extent that

marine insurance policies can cover risk to goods in transit on land only. This judgment on the maintainability of an action by the Insurance

Company alone was affirmed in Union of India (UOI) Vs. Alliance Assurance Co. Ltd. and Another, . On facts it was noticed in that case that

there was an assignment of the rights of the Insured in favour of the insurer and so it is not prohibited u/s 6(e) of the Transfer of Property Act.

However the judgment in Alliance Assurance Company Limited v. Union of India, 62 C.W.N. 539 referred to above was brought to the notice of

the Supreme Court in the decided case namely. Union of India (UOI) Vs. Sri

Sarada Mills Ltd., . In paragraph 41 of that judgment the Hon"ble Judges of the Supreme Court did not agree with the reasons given by the Calcutta High Court enabling the insurance Company to maintain an action in it"s own name.

15. In a case reported in The Gaya Muzaffarpur Roadways Co. and Others Vs. Fort Gloster Industries Ltd. and Another, sub-section 2 of section 4 of the Marine Insurance Act, 1963 came up for consideration. In that case the goods were entrusted at Calcutta for transport to Tata Nagar and the goods were in fact transported by lorries. In other words the transit was to be by land alone. It was contended in that case before the learned Judges on behalf of the carrier that the marine insurance is always referable to sea voyage and incidental land risk and not to any transit over land only. The Bench rejected the contention on the following lines:

26. These contentions, apparently attractive, have, however, no legal basis as pointed by Mr.Mitra who drew out attention to sub section (2) of section 4 of the Act and its Explanation and also contended that the new Act could not affect pending action in absence of express provision. In section 4 sub- section (1), it is provided that a contract of marine insurance may, by its terms or usage of trade, be extended to protect the assured against losses on Inland waters or on any land risk incidental to any sea voyage. - Sub- section (2) provides that where ""any adventure analogous to a marine adventure"" is covered by a policy in the form of a marine policy, the provisions of the Act, only -as by this section provided, shall apply thereto. The ""Explanation"" attached to this sub section is to the following effect: Explanation: - ""Adventure analogous to a marine adventure"" includes an adventure where any ship, goods or movable are exposed to perils incidental to local or inland transit.

It is obvious that such an adventure, by its terms includes cases where the goods or movables are exposed to perils incidental to local or inland transit. This definition thus obviously covers the present case where the goods entrusted for transit and covered by the policy in the form of a marine policy were wholly through inland routes and exposed to perils incidental to such transit. Accordingly, the provisions of section 135-A of the Transfer of Property Act as also the corresponding sections of the said Act would, in our opinion, apply to cases of local or purely inland

transit if covered by policy in the form of marine policy. The insurer in the present case thus would be entitled to a decree in the suit.

Therefore reading the definition of "maritime perils" as found in section 2(e) of the 1963 Act with sub section (2) and the Explanation to section 4

of the same Act in the light of the judgment of the Calcutta High Court namely, 62 C.W.N. 539 and The Gaya Muzaffarpur Roadways Co. and

Others Vs. Fort Gloster Industries Ltd. and Another, . I am of the opinion that the Insurance Company has given the power to designate any other

peril which it wants to cover under the Marine Insurance Policy. Only in exercise of such power, the Insurance Company had designated the risk

attached to the goods in question to be transported by road only and therefore the Insurance Company had validly covered the risk under the

Marine Insurance Policy.

16. Once Ex .A.11 is held to be a policy covered under the Marine Insurance Act 1963, then Sections 52 and 79 of the said Act would

immediately stand attracted. I perused Ex.A.5 and it is styled as the letter of subrogation and special power of attorney. It is executed by the

insured in favour of the Insurance Company. The plaintiff also relies upon Ex.A.5 only as a letter of subrogation in the plaint. However a reading of

Ex.A.5 shows that it is not a mere letter of subrogation only. The first paragraph reads as follows:

In consideration of your paying to us a sum of Rs.1,69,000 in respect of loss/damage to the under mentioned goods and/or duty payable thereon

insured under policy No.10400/83/1/5334/81 issued by the United India Insurance Company Limited we hereby assign, transfer and abandon to

you all out actionable rights, title and interest in and to the said goods and proceeds thereof (to the extent provided by law) and all tights and

remedies against Railway Administration and/or Sea Carriers and/or agents of Sea Carriers and/or Port Authorities and/or Customs Authorities

and/or person or persons whosoever is liable in respect thereof.

This shows a clear assignment of all the rights which the insured had in the goods insured In favour of the Insurance Company. In a case reported

in Vasudev Mudaliar Vs. Caledonian Insurance Co. and Another, a learned Judge of this Court has held that "subrogation does not ipso jure

enable the insurer to sue third parties in his own name. It will only entitle the

insurer to sue in the name of the assured, it being an obligation of the assured to lend his name and assistance to such an action." "However 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 insured, by virtue of the transfer of assignment in his favour, will be in a position to maintain a suit in his own name against third parties." When there is an assignment, the assignee can file a suit in his own name, is also found in the judgment of the Andhra Pradesh High Court reported in *United India Fire and General Insurance Co. Ltd. Vs. Pelaniappa Transport Carriers and Another*, . Similar recitals as noticed in this case were also found in the policy concerned in the above referred to case decided by the Andhra Pradesh High Court. The learned Judge in that case held that the terms extracted in that judgment, which are similar to the one in the case on hand, would amount to an assignment.

In paragraphs 3 to 5 the rights of the insured had been subrogated to the insurer and an express authorisation is given to the insured to file a suit also against the carrier. Therefore Ex.A.5 contains not only an assignment of the Insurance Policy in favour of the insurer but also evidences subrogation of the rights of the insured in favour of the insurer as well as appointing the insurer as the power agent of the insured. u/s 52(3) of the 1963 Act a Marine Policy may be assigned by endorsement thereon or in any other customary manner. Of course Ex.A.11 does not contain any endorsement of assignment. But however by executing Ex.A.5 it is clear that the policy stands assigned in favour of the insurer and that mode of assignment will come under the "other customary manner" referred to in Sub-Section (3) of Section 52 of the 1963 Act. Section 52(1) of the 1963 Act provides for assignment of a Marine Policy either before or after loss. u/s 52(2) -of the same Act once a Marine Policy has been assigned, then the assignee of the policy is entitled to sue thereon in his own name. By assigning under Ex.A.5 the entire beneficial interest in the policy, Ex.A.11 has been passed on to the assignee. In a case reported in *Union of India (UOI) Vs. Sri Sarada Mills Ltd.*, , the Hon"ble Judges have held as follows:

11. It is indisputable that an insurance company can sue in its own name where

the marine policy has been transferred by assignment u/s 52 of the Marine Insurance Act, 1963. That is not the present case.

12. It is equally indisputable that an insurance company is entitled to subrogation in accordance with the provisions of Section 79 "of ""the Marine Insurance Act, 1963. Subrogation does not allow the subrogee or the underwriter to sue in its own name. In the present case, the insurance company has not enforced its claim by virtue of subrogation.

Therefore I have no hesitation to hold on these two issues that there is a valid Marine Insurance Policy covering the risks attached to the goods in question and to be transported by road alone and that the suit filed by the Insurance Company in it's own name is maintainable.

17. Mr.D.Rajendran learned counsel advanced one other legal argument that, by the time when the insured executed Ex.A.5 in favour of the insurer, assuming it is an assignment, the insured had parted with the subject-matter of the goods and thus lost all his interest over the same.

Therefore the assignment of the policy is inoperative. In this context I refer to section 53 of the 1963 Act, which reads as follows:

Assured who has no interest cannot assign: Where the assured has parted with or lost his interest in the subject- matter insured, and not, before or

at the time so being expressly or impliedly agreed to assign the policy, any subsequent assignment of the policy is inoperative:

Provided that nothing in this section, affects the assignment of a policy after loss.

Therefore it is the duty of this court to find out as to whether, before parting with the goods and losing his interest over the same, the insured had

expressly or impliedly agreed to assign the policy? Under Ex.A.2 dated 8.5.81 the insured lodged a claim with the defendant for damages and

marked a copy of the same to the Insurance Company to register their claim. Ex.A.6 is an advertisement in an issue of ""Deocan Herald"" dated

17.5.82, which contain an advertisement given by the Insurance Company inviting offer for the sale of the goods In question. It is therefore clear

that even before the execution of Ex.A.5, the Insurance Company had asserted it's rights to sell the goods in question. But even before this

advertisement, there is a communication dated 03.05.82 sent by an Intending buyer to the Insurance Company and this letter is marked as Ex.A.7.

This letter contains an offer from the intending buyer for the purchase of the

goods. This is followed by another letter dated 05.06.82 from the same intending buyer to the Insurance Company and this is marked as Ex.A.8. Ex.A.12 is the receipt dated 22.5.82 given by the consignor namely, the insured for having received the sum of Rs.1,69,100 from the Insurance Company. The documents referred to above taken together would establish beyond the realm of doubt that the insured had impliedly agreed to assign the policy in favour of the plaintiff even before he had actually assigned his rights. Therefore I have no hesitation to reject the argument of the learned counsel for the appellant that the assignment of the insurance policy is inoperative due to the insured having no interest at all on the date of the assignment in favour of the insurer as a consequence to the sale having already taken place prior to that date for the reasons stated above by me.

18. Issue Nos.(d), (e) & (f): P.W.1 is an employee of the Insurance Company. Since the Insurance Company had stepped into the picture only

later on, he will not be a competent person to speak about the condition of the goods at the time of entrustment to the carrier and at the time of

delivery to the consignee. P.W.2 is an employee of the insured. He is the store keeper of the insured at Mettur. His evidence shows that the goods,

at the time of loading in the lorry, were in good condition. Ex.A.16 is the surveyor's report. He affirms in his evidence in cross that when the goods

were loaded in the lorry, he was there and after loading, the lorry was covered with tarpaulin. He also admits that he was not present when the

surveyor inspected the goods. Of course he was not there at the place of delivery. The surveyor's report is dated 3.4.82. No doubt the survey had

taken place after a long break. It shows the nature of damage to the goods as water damage and due to water contact during transit. His report-

further shows trace of the water marks mostly at the end of the bags. He had noticed that the contents of few of the bags had oozed out and dried

on account of water contact. He had also noticed that the contents of some of the bags were found to be hard on account of clotting. His

conclusion for suspected cause of damage is that, water might have seeped through the needle holes of the stitchings and entered into the bag,

which would have caused damages to the contents at varying degrees. According to the report, the loss has to be treated as a total loss. It may be

true that the surveyor had not been examined. But I find that no cross examination worth mentioning had been made when P.Ws.1 and 2 were cross examined to discredit the surveyor's report. In fact there is literally no cross examination of P.W.1 with reference to the manner in which the survey was conducted. The surveyor's report clearly establishes the damage to the goods. The insured sent a letter to the defendant informing him about the damage to the goods stating that they were found in a wet condition. This notice was served on the carrier on 11.5.81 itself as could be seen from Ex.A.3, the acknowledgment due. The insured had not chosen to send any reply at all to the said notice and in fact till he filed the written statement in the suit, he had not come forward with any definite stand about the condition of the goods at the time of delivery.

19. It is no doubt true that the driver of the lorry had been examined in this case as D.W.1 and he would state that at the time of delivery, the goods were in a good condition and there was no rain on route from Mettur to Bangalore. However on a perusal of this evidence, I find that it does not inspire any confidence at all in me and no material circumstances are brought out before me as to why I should take a different view than the one taken by the learned trial Judge on this aspect. If what D.W.1 says about the condition of goods at the time of delivery is true, then I see no reason as to why he had not collected the transport documents from the consignee. If really the carrier was not at fault, nothing prevented him from sending a reply to ExA.3 notice. Ex.A.14 is the sales tax declaration accompanying the goods given by the insured. It gives the consignee's name, the quantity of the goods and the value of the same. The value of the goods is stated to be Rs.1,67,245.23. Exs. A.7 and A.8 disclose the price realised in the sale by the Insurance Company. Though the sale had taken place after the goods reached Bangalore, i.e., almost after one year, no material worth acceptance has been brought out to hold that the Insurance Company had acted negligently or carelessly in bringing the property to sale. There is also no evidence that the materials had suffered damage while they were in custody of the consignee. Therefore I am in entire agreement with the judgment rendered by the learned trial Judge on these issues as well in favour of the plaintiff. Accordingly I find no merits in this appeal. Consequently the appeal is liable to be dismissed on merits.

20. However the appeal could not be dismissed for the following reasons:

Arguments were advanced in this appeal on a number of days by the learned counsel appearing on either side. Thereafterwards this court reserved

the judgment and adjourned the case to 10.12.1999 for pronouncing the judgment. At that time the, learned counsel appearing for the appellant

mooted the settlement proposition, which was readily agreed to by the learned counsel for the respondent/decreed holder. With a view to allow the

parties to settle the dispute out of court amicably, this court adjourned this appeal, though the judgment was made ready. The terms of the

settlement are agreed between the parties represented by their respective counsel. In terms of the settlement, two substantial payments namely, a

sum of Rs.30,000 was paid on 13.12.99 in court and recorded and a further payment of Rs.37,300 was paid in court on 25.1.2000 and

recorded. Under the terms of the settlement (oral) the appellant should pay a sum of Rs.3,800 towards 50% of the costs in the appeal. That

payment is also made today. Therefore the payments referred to above is recorded in full satisfaction of the decreed holder's claim under the decree

challenged in this appeal. Accordingly this appeal is dismissed as settled out of court.

21. Though the appeal should have been dismissed solely on the ground of dismissed as settled out of court, yet since a new point is argued in this

appeal, which is not stated to be covered by any judgment of this Court. I am inclined to give my decision on merits also. With humility, I stated

that I have decided to give my decision on merits also, because I am of the opinion that this judgment may be of some use to all concerned.