

(1968) 02 BOM CK 0001

In the Bombay High Court

Case No : Civil Revision Application No. 161 of 1964 and F.A. No's. 509 and 510 of 1964

Oriental Fire and General Insurance Co. Ltd.

APPELLANT

Vs

American President Lines Ltd. and Another

RESPONDENT

Date of Decision : 12-02-1968

Acts Referred:

Marine Insurance Act, 1906 — Section 79

Marine Insurance Act, 1963 — Section 52, 53, 79, 90

Transfer of Property Act, 1882 — Section 130A, 135A, 135A(3)

Citation : (1968) 70 BOMLR 487 : (1968) 38 CompCas 294

Hon'ble Judges : J.N. Nain, J;Chitale, J

Bench : Division Bench

Judgement

Nain, J.—This revision application involves an interesting point of law as to whether an insurer of goods carried by sea and covered by a policy of marine insurance, who on payment for partial loss is subrogated to all the rights and remedies of the insured person to the extent of the payment, is entitled to sue the carrier of goods in his own name to recover compensation for partial loss or damage to the goods. This depends on the interpretation of section 135A of the Transfer of Property Act, which is applicable to the suit transaction. Sections 130A and 135A were inserted in the Transfer of Property Act by the Transfer of Property (Amendment) Act (6 of 1944) and have since been repealed by the Marine Insurance Act (9 of 1963) and have been re-enacted in sections 52, 53, 79 and 90 of the said Act.

2. The facts leading to this matter are that the petitioners are a company carrying on business of insurance. The respondents No. 1 are a shipping company who carry on business of carriers of goods by sea. They have their registered office in the State of California in U.S.A. and carry on business through their agents in Bombay. The respondents No. 2, M/s. Cotton Trading Corporation of San Francisco, shipped a consignment of 466 bales of cotton per S. S. Taylor belonging to the respondents No. 1 from the port of San Francisco in

California. The respondents No. 1 issued two bills of lading dated January 23, 1959. The goods were to be discharged at the port of Bombay to the order of the shippers or to the ultimate endorsees of the bills of lading. The shippers negotiated the bills of lading and other documents of title to the Punjab Cotton Company through a bank. Punjab Cotton Company thus became the owners of the cargo on the documents of title being endorsed in their favour. When the consignments landed in Bombay, they were found to be damaged. On an application by Punjab Cotton Company a general survey was made and a certificate of damage was issued in favour of Punjab Cotton Company. It was alleged that the consignment was damaged on account of negligence, misfeasance and nonfeasance on the part of the respondents No. 1. The damage was assessed at Rs. 3639.15. The consignment was insured with the petitioners under a policy for marine risk. Punjab Cotton Company from the petitioners the loss arising from the said damage. The petitioners paid the said loss. They then abandoned a part of the claim and filed a suit for recovery of Rs. 3,000 in the Bombay Small Causes Court. Obviously a part of the claim was abandoned to bring the suit within the jurisdiction of the said court. The claim was based on the right of subrogation claimed by the petitioners u/s 135A(3) of the Transfer of Property Act. We are not aware whether there was an assignment of the claim in favour of the petitioners, but in any case none was pleaded in the lower court. In the lower court a preliminary issue was raised as to whether the suit was maintainable by the petitioners in their own name. The lower court answered the said issue in the negative and dismissed the suit. An application for fresh trial to a bench of the small cause court was also dismissed. Thereafter the petitioners have filed the present revision application.

3. The doctrine of subrogation in relation to marine insurance was developed in England as a part of the common law. In England it was codified in 1906. The common law doctrine, however, continued to be applicable to India till 1944, when it was introduced in the Transfer of Property Act by sections 130A and 135A and has since been re-enacted in the Marine Insurance Act, 1963. In order, therefore, to appreciate its scope in its application to the right of insurers and underwriters to sue in their own name, the wrong-doers and tort-feasors in respect of the subject-matter of insurance in the place of the assured, it is necessary briefly to trace the history of the doctrine in England and in India.

4. In English common law both before and after the Judicature Act of 1873, right upto 1906, subrogation was an equitable arrangement incident to all contracts of indemnity and to all payments on account thereof. The doctrine has been discussed in Arnould of Marine Insurance in volume 10 of British Shipping Laws, 1961 edition. In *Burnand v. Rodocanacdi* [1882] 7 App. Cas. 333 Lord Blackburn observed at page 339 :

"The general rule of law (and it is obvious justice) is that where there is a contract of indemnity (it matters not whether it is a marine policy, or a policy against fire on land, or any other contract of indemnity) and a loss happens,

anything which reduces or diminishes that loss reduces or diminishes the amount which the indemnifier is bound to pay; and if the indemnifier has already paid it, then, if anything which diminishes the loss comes into the hands of the person to whom he has paid it, it becomes an equity that the person who has already paid the full indemnity is entitled to be recouped by having that amount back."

5. In *King v. Victoria Insurance Co.* [1896] A.C. 250 it was declared by the Privy Council that a payment bona fide made by insurers in satisfaction of a claim made under the policy was enough to give the insurers a right of subrogation, and that it was not open to a third party to object to the insurer's right to sue on the ground that the payment was not actually due under the policy. And the doctrine was stated in even more comprehensive terms by Brett L.J. in the case of *Castellain v. Preston* ([1883] 11 Q.B.D. 380 :-

".... as between the underwriter and the assured, the underwriter 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 on, or in any other right, whether by way of condition or otherwise, legal or equitable, which can be, or has been exercised or has accrued, and whether such right could or could not be enforced by the insurer in the name of the assured, by the exercise or acquiring of which right or condition the loss against which the assured is insured, can be, or has been diminished".

6. In the same case Bowen L.J. said [1883] 11 Q.B.D. 380.

".... what is the principle which must be applied ? It is a corollary of the great law of indemnity, and is to the following effect :- That a person who wishes to recover for and is paid by the insurers as for a total loss, cannot take with both hands. If he has a means of diminishing the loss, the result of the use of those means belongs to the underwriters. If he does diminish the loss, he must account for the diminution to the underwriters."

7. In *Simpson v. Thomson* [1877] 3 App. Cas. 279, Lord Cairns L.C. said :

"I know of no foundation for the right of underwriters, except the well known principle of law, that where one person has agreed to indemnify another, he will, on making good the indemnity, be entitled to succeed to all the ways and means by which the person indemnified might have protected himself against or reimbursed himself for the loss."

8. The principle insisted upon throughout is that it is entirely foreign to the spirit of contracts of indemnity that a person indemnified should recover his loss more than once; it is, therefore, clear that if he has already recovered from a third party, there can be no liability under the contract of indemnity. On the other hand, if he has not previously recovered from such third party, but has the right to do so, there is no reason why such third party should be allowed to allege that his liability has been satisfied or reduced by a payment made by a stranger to him, under a contract with which he has nothing to do. The third party remains

liable to the person indemnified just as if there had been no contract of indemnity. But the person indemnified can only take the sum recovered from the third party as trustee for the indemnifier and similarly if he has not himself received any sum to which he is entitled, he is bound to afford the latter, i.e., indemnified all facilities for doing so. In practice, the commonest way in which the principle of subrogation is applied to insurance, is for the insurer to pay the claim of the assured, and then to institute proceedings in the name of the latter, but for his own benefit, against the party ultimately liable.

9. If the insurer recovers more by the exercise of his right of subrogation than what he has paid to the assured, it seems just that the surplus ought to be payable by him to the latter. In such cases the value as between a wrongdoer and the insured may be different from that as between the assured and his insurer, as where the policy is valued. It may therefore be a question of considerable practical moment whether an insurer in paying a loss in accordance with the policy valuation is entitled to subrogation on the basis of the real value of the property insured. It appears to be clear on principle that the position as between the parties to the policy must be governed for all such purposes by the valuation covered by the policy itself and in that the third party is not concerned.

10. It is, therefore, clear that the underwriter is only entitled to the benefit of such remedies, rights or other advantages as the assured would himself be able to enjoy. The underwriter has no independent rights of his own and cannot sue in his own name.

11. In the case of *James Nelson & Sons Ltd. v. Nelson Line Ltd.* [1906] 2 K.B. 217, it was held that an insurer is not liable to give discovery in an action brought in his interest in the name of the assured. In *Simson v. Thomson* [1877] 3 App. Cas. 279, where two ships, A and B, were the property of the same owner, and ship A was sunk by negligence of those in charge of ship B, it was held by the House of Lords that the underwriters on A, having paid for a total loss, had no claim upon a fund lodged in court by the owner to satisfy all claims for the damage caused by the negligent navigation of B. Inasmuch as the owner could not be answerable in damages to himself, no claim could be allowed against the fund in respect of any right derived from him and enforceable only in his name. Secondly, the insurer is only subrogated to the rights of the assured in respect of the subject-matter insured. Thus, where a vessel is damaged by collision, and her owners recover from those by whose negligence the collision was caused damages in respect of matters which are not covered by a policy on ship, the underwriters cannot, by paying for a total loss, recover from their assured sums paid to them by the wrongdoer, but not paid as part of the value of the ship insured.

12. In England the right of subrogation was incorporated in section 79 of the Marine Insurance Act, 1906, which section reads as under :-

"(1) 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 assured in whatever may remain of the subject-matter so paid for, and he is thereby subrogated to all the rights and remedies of the assured in and in respect of that subject-matter as from the time of the casualty causing the loss.

(2) Subject to the foregoing provisions, 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 assured in and in respect of the subject-matter insured as from the time of the casualty causing the loss, in so far as the assured has been indemnified, according to this Act, by such payment for the loss."

13. Chalmers on Marine Insurance Act, 1906, 6th edition, at page 126, says :

"Speaking broadly the insurer in the absence of special contract must exercise all remedies arising from subrogation in the name of the assured. It follows that the insurer is entitled to the use of the assured's name, but if the insurer wishes to bring an action he must, of course, be prepared to indemnify the assured as regards costs."

14. Even after the Marine Insurance Act, it has been held in England in *Yorkshire Insurance Co. Ltd. v. Nisbet Shipping Co. Ltd.* [1961] 2 All E.R. 487 that an insurer cannot recover from an assured by means of the doctrine of subrogation now embodied in section 79 of the Marine Insurance Act, 1906, a greater sum than the insurer has paid. Similarly, it has been observed in *Compania Colombiana de Seguros v. Pacific Steamship Co.* [1965] 1 Q.B. 101; [1964] 1 All E.R. 216 by Mr. Justice Roskill in a suit based on assignment, following *Simpson v. Thomson* [1877] 3 App. Cas. 279 that subrogation by act of law would not give the insurer a right to sue in a court of law in his own name.

15. Halsbury in *The Laws of England*, volume 22, 3rd edition (1958), paragraph 5 & 6, at page 263, states as follows :

"In the absence of a formal assignment of the right of action, the insurers cannot sue the third party in their own names; they must bring the action in the name of the assured. It is his duty, on receiving a proper indemnity against costs, to permit his name to be used in such action."

16. It would, therefore, appear that in England under the common law before and after the Judicature Act, 1873, as well as after the statute of 1906, the law has been that :

(a) an insurer cannot recover by means of the doctrine of subrogation a greater sum than the assured has been paid, and

(b) subrogation by act of law would not give the insurer a right to sue in a court of law in his own name.

17. In India, prior to 1947, in the absence of statutory provision, the English

common law was applied as embodying the principles of equity, justice and good conscience, except in matters of personal law of the parties. In the case of *British and Foreign Marine Insurance Co. Ltd. v. Indian General Navigation and Railway Co. Ltd.* ILR [1910] 38 Cal. 28, Sir Lawrence Jenkins C.J. held in 1910 that rights and liabilities of common carrier in India were governed by the principles of English common law as modified by the Carries Act. Following the cases of *Burnand v. Rodocanacdi* [1882] 7 App. Cas. 333 and *Simpson v. Thomson* he held that an insurer claiming by way of subrogation and not assignment can sue only in the name of the assured. In 1925 the Madras High Court held in the case of *K.V. Periyamianna Marakkayar and Sons Vs. Banians and Co.,* , that in a contract of indemnity the indemnifier cannot on performance of the contract of indemnity in the absence of an assignment, sue the debtor in his own name, as there is no private of contract between them.

18. In 1944, sections 130A and 135A were introduced in the Transfer of Property Act by the Transfer of Property (Amendment) Act, VI of 1944. The English common law doctrine of subrogation, which had been enacted in England in section 79 of the Marine Insurance Act, 1906, was enacted in India verbatim in sub-sections (2) and (3) of section 135A, with the addition of sub-section (4), the effect of which we shall consider later. These provisions have since been verbatim re-enacted in sections 52, 53, 79 and 90 of the Marine Insurance Act, 1963, with which, however, we are not concerned in this case.

19. In *Maxwell on Interpretation of Statutes*, 11th edition (1961), at page 58, it has been stated that, "the words of a statute will generally be understood in the sense which they bore when it was passed." Adopting this principle of interpretation, we must give to the words of section 135A of the Transfer of Property Act the same meaning as they bore in English common law, which was applicable in India, as we have stated above, until 1944 when section 135A was introduced. We should also give to the words of that section the meaning given to the words of section 79 of the English Act in England, because the words of these sections are the same (except for sub-section (4) of section 135A) and both the sections codify the doctrine of subrogation in English common law. We have only to see whether sub-section (4) of section 135A of the Transfer of Property Act or any other statutory provision makes the law different from the law in England.

20. Section 135A of the Transfer of Property Act (this provision was repealed by the Marine Insurance Act, 1963) reads as under :

"135A. (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 of the casualty causing the loss, in so far as the insured person has been indemnified by such payment for the loss.

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

21. We must now find out what is the real reason for enacting sub-section (4) of section 135A and whether that should make any difference to the interpretation of this section in a manner different from that in which section 79 of the English Marine Insurance Act has been interpreted in England. The preamble to the Transfer of Property Act makes the Act applicable to transfers of property by acts of parties. Chapter II of the Act has the Chapter heading "Of transfers of property by act of parties". Section 5 in Chapter II defines "transfer of property" as "an act by which a living person conveys property to one or more other living persons". Section 6, which also occurs in Chapter II, states what may be transferred. Section 6(e) provides that except as otherwise provided by the Act, a mere right to sue cannot be transferred. Section 130A, also introduced in the Transfer of Property Act in 1944 along with section 135A, provides that a policy of marine insurance may be transferred by assignment both before and after the loss has occurred. It appears to us that if the transfer takes place after the loss had occurred, it would amount to a transfer of a right to sue. Although transfer of a marine policy is expressly permitted by section 130A and section 6(e) would not prohibit such transfer, section 130A contains sub-section (4), which is in terms similar to sub-section (4) of section 135A. It would appear to us that this sub-section (4) was inserted in section 130A *ex majori cautela*, to remove any doubt and to make it clear that section 6(e) of the Transfer of Property Act will not come in the way of assignment of policies of marine insurance. Similarly, sub-sections (2) and (3) of section 135A provide for subrogation by operation of law and it would appear that section 6(e) would have no application to such subrogation. It would, therefore, appear that sub-section (4) has been inserted in section 135A for the same reasons, viz., *ex majori cautela*, in order to remove all doubts that in cases in which the transfer is of a right to sue, section 6(e) would be no bar.

22. Even apart from the above reasoning, sub-section (4) in section 130A and section 135A of the Transfer of Property Act does not confer in terms on the insurer any right to sue in his own name.

23. In England there is no distinction between a right to sue such as is contemplated by section 6(e) and an actionable claim provided by section 130 of the Indian Transfer of Property Act. In England both these would be chose in action. After 1873, a chose in action was made assignable u/s 25(6) of the Judicature Act, 1873, and after 1925 it is expressly made assignable by section 136 of the Law of Property Act, 1925. In view of this, a provision similar to sub-section (4) in sections 130A and 135A was unnecessary in England and none was inserted in section 79 of the Marine Insurance Act, 1906. In other respects the provisions of sub-sections (2) and (3) of section 135A of the Transfer of Property Act in India and section 79 of the Marine Insurance Act, 1906 in England, are the same and there appears to be no reason why a different interpretation should be put on these two provisions.

24. In India, a third party cannot enforce rights under a contract. Observations in that connection made by Sir John Beaumont C.J., in the case of *National Petroleum Company Ltd. v. Popatlal* (A.I.R. 1936 Bom. 344, 346; 38 Bom. L.R. 610 at 621) are as follows :

"The rule of English law is clearly established that the only persons who can sue upon a contract are the parties to that contract. No doubt there are many case in the books in which persons who are not in terms parties to a contract have been allowed to sue upon it. But those cases are based on the view that the plaintiff is claiming through a party to the contract, that he is in the position of a cestui que trust or of a principal suing through an agent, that under the old procedure he could have filed a suit in equity, even if he could not have sued at common law. Those cases are recognised exceptions to the general principle that only parties to a contract can sue upon it. There seems to me nothing in the Indian Contract Act which suggests that that principle does not apply in India."

25. That being the normal provision of law one has to look for the conferment of an express right to sue in statute providing for assignment. In India actionable claims are made assignable by section 130 of the Transfer of Property Act. Although sub-section (1) of this section expressly confers on the assignee all the rights and remedies of the transferee, that provision has not been considered sufficient to confer on the transferee or assignee a right to sue in his own name. Sub-section (2), therefore, provides that the transferee of an actionable claim may upon the execution of the instrument of transfer, sue or institute proceedings for the same in his own name without obtaining transferor's consent to such suit or proceedings and without making him a party thereto. Sub-section (1) of section 135A, which provides for assignment of rights under policies of marine insurance also provides that 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. The absence of such a provision in respect of sub-sections (2) and (3) of section 135A clearly indicates that a subrogee would have no right to sue in his own name. Without such right being expressly conferred on the assignee the assignee also could not have sued in his

own name by virtue of the judgment of Sir John Beaumont C.J., in *National Petroleum Co. Ltd. v. Popatlal* (A.I.R. 1936 Bom. 544; 38 Bom. L.R. 610) referred to hereinabove.

26. One of the incidents of subrogation is that it operates by law only between the insurer and the assured. It neither confers any rights on a third party nor does it cast on the third party a liability in favour of the subrogee. The bills of lading in this case being contracts between the assured and the defendant No. 1, the subrogee having no privity of contract with the defendant No. 1 shipping company would not have the right to sue them in his own name. Where the claim arises out of a contract between the assured and the third party or the third party is a tort-feasor, if the insurer sues in his own name the wrongdoer or tort-feasor can defeat the claim.

27. In our opinion, if the law allowed the insurer who on payment is subrogated to the right and remedies of the assured to sue in his own name, it would in some cases lead to absurd results. We have seen above that the insurer is subrogated to the rights and remedies of the assured only to the extent of his payment. There can be cases where the assured under-insures the subject-matter of insurance and takes a part of the risk upon himself or where by the contract of insurance the insurer restricts the extent of his liability. Such cases are common in the case of insurance of motor vehicles where the insurer in several cases limits his liability in respect of the damage caused on account of the accident. In some cases the statute provides for a minimum insurance covering a third party risk and it is not uncommon for an insurer to limit his liability to the minimum provided by the statute. In such cases of under-insurance or limited liability, the claim of the assured against the wrongdoer or tort-feasor would be larger than that part of it which would on subrogation accrue to the insurer. The cause of action in such cases against the wrongdoer or the tort-feasor is one, but a part of the claim would accrue to the insurer and a part would continue to vest in the assured. There would be no harm if the assured is allowed to sue in his own name and hold the amount recovered to the extent of the rights of the insured as a trustee for him because he can sue for the whole claim and the third party will have no answer to his claim on the ground that in respect of the part of his claim the insurer has been subrogated. Whereas if the insurer were allowed to sue in his own name, he could sue only for that part of the claim which accrues to him and the cause of action for the whole claim being one, the other part would conceivably be lost to both. The cause of action being one, it cannot be split up. If it is argued that the insurer would be entitled to the entire claim, the result would be that he would stand to gain more than he is entitled to under the doctrine of subrogation.

28. Mr. Daji, on behalf of the petitioners, argued and his argument was based on the judgment of Mr. Justice Renupada Mukherjee reported in *Alliance Assurance Co. Ltd. v. Union of India* ([1958] 28 Comp. Cas. 43; 1958 ILR Cal. 544, to which we will refer later, that considerable inconvenience would be caused to insurer, if

the assured refuses to lend his name or to permit a suit to be filed in his name even on being indemnified as to costs or if the assured is dead and his legal representatives could not be found; in such cases the insurer will suffer. We think that this inconvenience could be avoided or got over. The assured can always be compelled to sue or lend his name as a plaintiff through the court. The insurer could also take an assignment of the claim in his favour before making the payment. The insurer could also file a suit and join the assured as a party to the suit. It would, therefore, be seen that the inconvenience is avoidable. In any case if the legal position is clear any possible inconvenience would not affect the interpretation and the insurer would normally be left to his own resources to take precautions in this respect. As against this surmountable inconvenience, we think that if we were to interpret sub-section (2) and (3) so as to confer a right on the insurer to sue in his own name, it would lead to absurd result, which must be avoided.

29. Mr. Ashok Desai, for the appellants in Appeals Nos. 509 and 510 of 1964, argues that the insurer could sue in his own name and u/s 94 of the Indian Trusts Act he would be a trustee in respect of the part of the claim vesting in the assured. But, this argument could be made equally applicable to the assured filing a suit in his own name or insurer filing the suit in the name of the assured and the assured holding as trustee for that part of the recovery which had accrued to the insurer.

30. For the reasons hereinabove stated, we have come to the conclusion that an insurer or an under-writer of goods carried by sea or otherwise but covered by a policy of marine insurance who on payment of partial loss under sub-section (3) of section 135A is subrogated to the rights and remedies of the insured person to the extent of the payment is not entitled to sue a carrier of goods or other wrongdoer or tort-feasor in his own name to recover compensation for loss or damage due to the assured. We have also come to the conclusion that in cases falling under sub-section (2) of section 135A of the Transfer of Property Act also the insurer will not be entitled to sue in his own name on the ground that he succeeds to the rights and remedies of the assured.

31. It has been argued before us on behalf of the petitioners that the English law is based on English procedure and is not applicable in India. We have set out hereinabove the development of the doctrine of subrogation in England and it would appear that the fact that an insurer or an underwriter has to sue in the name of the assured is a part of the substantive law of England and not a part of the English procedure. We asked Mr. Daji to point out a rule from the Rules of the Supreme Court in England or any other provision of the procedural law of England showing that the insurer is not allowed to sue in his own name as a part of the procedural law. No such provision, however, is pointed out to us.

32. Mr. Daji argued that sub-sections (2) and (3) of section 135A of the Transfer of Property Act gave to the subrogee all the rights and remedies of the assured. He argued that such rights and remedies would include the right to institute a

suit in his own name. Now, a remedy, whether for a breach of a contract or for a tort, is the relief to which the person is entitled and not the legal proceedings or the means and ways by which such a remedy is secured or enforced. It would, therefore, mean that conferment on the insurer of all rights and remedies of the assured would make him entitled to the relief to which the assured is entitled, but would not confer on him the right to obtain the relief in his own name. If one looks to section 130(1) of the Transfer of Property Act, one finds that this sub-section gives to the assignee of an actionable claim, rights and remedies of a transferor. But this has not been considered enough by the legislature to confer on the assignee a right to sue in his own name. Sub-section (2) of section 130 of the Transfer of Property Act has been enacted to confer this right expressly on the assignee. In our opinion, the conferment on the subrogee of rights and remedies of the assured does not confer on him the right to sue in his own name and the rights and remedies conferred on him must be enforced in the name of the assured.

33. Mr. Daji has drawn our attention to section 92 of the Transfer of Property Act, under which a subrogated party is permitted to enforce in his own name the rights of a mortgagee to whom payment is made by that party. According to him, there is a distinction between that subrogation and the right of subrogation under sub-sections (2) and (3) of section 135A of the Transfer of Property Act. We, however, cannot accept this contention. Section 60 of the Transfer of Property Act confers a right on the mortgagor to redeem and to have the mortgage conveyed to a third party. Section 91 of the Transfer of Property Act confers on an interested person, surety or creditor not only a right to redeem the property, but also the right to sue for redemption. Section 92 of the Transfer of Property Act confers on such a person right of subrogation. The difference between subrogation u/s 92 and section 135A of the Transfer of Property Act is that u/s 92, the subrogation results in the extinction of the original mortgagee's rights and, therefore, the original mortgagee has no more rights under the mortgage, whereas a subrogee u/s 135A acquires rights only to the extent of his payment which, as we have indicated above, may be less than the rights of the assured himself. Another distinction between the subrogation under these two provisions is that the person who redeems u/s 91 is an interested person or a surety or a creditor, which are also categories of interested persons. The subrogee under that section would get the rights conferred u/s 69 of the Indian Contract Act because it would be a payment made by a person interested. But in the case of subrogation u/s 135A the insurer pays under his own contract of insurance and he is not interested in discharging the liability of the wrongdoer or the tort-feasor. In our opinion, section 69 would have no application to him. The third distinction is that section 92 confers on the person redeeming rights of the mortgagee "against the mortgagor or any other person". It is these words that confer the right to sue. There are no such words in section 135A (2) and (3) as "against the wrongdoer or tort-feasor".

34. While on this point, we might also state that Mr. Daji made an attempt to

argue that an insurer would be entitled to sue in his own name by virtue of section 69 of the Indian Contract Act, because he is interested in making the payment. This contention, however, does not appear to us to be correct, because, as we have observed, the insurer pays not because he is interested in the payment on account of the wrongdoer or tort-feasor, but he pays under his own contract of insurance with the assured, and secondly because there is no other person bound to pay the insurance amount on whose behalf the insurer pays. Section 69 would have no application action to the facts of the case.

35. The next argument of Mr. Daji was that subrogation is a substitution of one creditor in the place of another and on such substitution the subrogee would get the right to institute a suit in his own name in respect of the claim to which he is subrogated. This argument was also advanced in the case of *East & West Steamship Co. v. Queensland Insurance Co.* (Pakistan Law Decision 1963 (1) S.C. 663), to which we have referred and to which we shall again refer later. But, in our opinion, such subrogation would not bring about a privity of contract between the insurer and a third party. Further, subrogation u/s 135A being a substitution in part, as we have stated above, an insurer cannot sue in his own name because that would lead to absurd results. Mr. Ashok Desai tried to equate the right of a subrogee with that of an assignee to sue in his own name, but, as we have noticed above, in cases of assignment permitted by law under sections 130 and 135A of the Transfer of Property Act, the right to sue has been expressly conferred. Subrogation, however, is not the same as a transfer by operation of law. In fact it is not a transfer at all. It is an act of being substituted in the place of another only to a limited extent and such limitation has implicit in it the disability of not being able to sue in the name of the subrogee.

36. Another argument advanced before us by Mr. Daji was based on section 41 of the Indian Contract Act. He stated that the assured having accepted performance of the promise of the carrier from a third person viz., insurer, cannot subsequently enforce it against the promisor, viz., the carrier. In other words, the argument was that where an assured person accepts money under a contract of insurance or indemnity from the insurer, he cannot subsequently sue the wrongdoer or the tort-feasor in respect of any claim for loss or damage. Here, as we have pointed out, the assured receives money from an insurer under his own contract of insurance. It is not the performance of a promise made by the wrongdoer or a tort-feasor, and section 41 would, therefore, have no application. In fact, in cases where the assured sues a tort-feasor, it is not in pursuance of a promise at all whether under a contract or as a result of its breach, but the claim arises out of a tort, and there is no question of a promise.

37. The point for decision in this case has been discussed in the judgment of our learned brother Mr. Justice K. K. Desai in Original Side Suit No. 202 of 1957, *New India Assurance Co. Ltd. v. Union of India* (Original Side Suit No. 202 of 1957). It would appear that this question arose in that case incidentally and not directly. The learned judge, after referring to *The National Petroleum Company Ltd. Vs.*

Popatlal Mulji,) and some Calcutta cases observed in that case as under :

"..... Though it is not necessary for me to come to any final conclusion on the contentions made that the first party has no cause of action and is not entitled to maintain a suit, I may mention that my tentative conclusion is that the 1st plaintiffs have no cause of action to maintain the suit in their own name. I take that view having regard to the strong observations made by Beaumont C.J. as quoted above and also because under sub-section (1) of section 135A in connection with the assignment of the marine policy a specific provision is made in favour of assignees entitling them to sue thereon. In sub-sections (2) and (3) no such provision is made. The words used are "he is thereby subrogated to all the rights and remedies of the insured person in and in respect of that subject matter" though in sub-section (1) the words are "the assignee of the policy is entitled to sue thereon in his own name"."

38. Although this question was left undecided in the above case the reasoning was relied upon by the Small Causes Court in the decision of this case and also has been relied upon in Appeals Nos. 509 and 510 of 1964 in the City Civil Court.

39. This question has come up for decision in the Calcutta High Court on a few occasions. In the case of Indian Trade and General Insurance Co. Ltd. Vs. Union of India (UOI), , Mr. Justice G. K. Mitter held that where a consignment of jute despatched by railway was the subject-matter of marine insurance and the goods were damaged in transit by fire but there was no total loss either of the whole of the goods or any apportionable part thereof, sub-section (3) of section 135A and not sub-sections (1) and (2) would be the proper statutory provision applicable to the case. In such a case, where the insurer has paid for a partial loss he acquires no title to the subject-matter, but is subrogated to all rights and remedies of the insured person as from the time of the casualty causing the loss. He further observes that the mere fact of subrogation however, 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. And where the deed of subrogation gave the insurers nothing more than what they would have u/s 135A, it cannot be held that there was any assignment of the subject-matter of insurance by the document, and would not entitle them to file a suit for damages against the railway in their own name.

40. When the same question arose in a subsequent case in the Calcutta High Court, viz., Alliance Assurance Co. Ltd. v. Union of India ([1958] 28 Comp. Cas. 43; ILR 1958 Cal. 544, attention of the learned judge hearing the subsequent matter was not drawn to the earlier decision of Mr. Justice G. K. Mitter in Indian Trade and General Insurance Co. Ltd. Vs. Union of India (UOI), . In the subsequent case, Mr. Justice Renupada Mukherjee held that sub-section (2) of section 135A of the Transfer of Property Act subrogates the insurer to all the rights and remedies of the insured from the time of the casualty causing the loss.

He held that a defence that unlike sub-section (1) of section 135A of the Act, the sub-section (2) does not confer any right of action and that subrogee's suit is not maintainable was dispelled by sub-section (4) which takes effect in spite of section 6(e) of the Transfer of Property Act. He held that Indian Statute Law makes a deliberate departure from "the English rule of procedure" which is founded on the concept that such rights were personal. He further held that sub-section (4) of section 135A was based on equitable principle of reimbursement which is contained in section 69 of the Indian Contract Act. He held that a right of action followed from the principle of equity and has been deliberately given by the Legislature in making section 6(e) of the Transfer of Property Act inapplicable to the sub-sections of section 135A of the Act. The decision was based on section 69 of the Indian Contract Act, and argument based on section 92 of the Transfer of Property Act, the interpretation of section 135A(4) of the Transfer of Property Act and the fact that inconvenience would be caused to the insurer if he was not allowed to sue in his own name. We have dealt with all the aforesaid reasons herein-above and we are unable to agree with the reasoning of Mr. Justice Renupada Mukherjee.

41. The question again came up before a Division Bench of the Calcutta High Court in Union of India (UOI) Vs. Alliance Assurance Co. Ltd. and Another, , where it was held that a contract of insurance against loss was a contract of indemnity, and that on payment of the amount of the loss the insurer as indemnifier had an equitable right of subrogation to the claims of the assured against the carrier. But this equity did not give the insurer the right to sue the third party in his own name and that in the absence of an assignment the insurer who was subrogated to the rights of the assured could only sue in the name of the assured. It was further held that after receiving payment of his claim under the insurance policy, the assured was a bare trustee of all his rights of action against the railway administration concerned, and those rights of action were thenceforth held by the assignor for the benefit of the insurer. In another judgment of the Calcutta High Court, Mr. Justice Mitra in the case of Textiles and Yarn (P) Ltd. Vs. Indian National Steamship Co. Ltd., , held that sub-section (3) of section 135A of the Transfer of Property Act deals with partial loss of goods in transit by sea and when the insurance company made a full payment of the claim made by the consignee in respect of such loss, the insurance company, as insurer was subrogated to all the rights and remedies of the consignee as from the time of the casualty. He, however, held that the insurer could not maintain an action in his own name although there was subrogation of the claims of the insured unless there was an assignment of the claim by the insured in favour of the insurer. In this judgment the learned judge in interpreting section 41 of the Indian Contract Act observed that the assured having accepted the performance of the of the promise to pay compensation from the insurer, could not enforce the same claim against the carrier. With this part of the judgment, however, we respectfully disagree. This part of the judgment is also irrelevant so far as the subject-matter of the present revision application is concerned.

42. These are the cases decided by the Calcutta High Court and, as stated hereinabove, we do not agree with the decision of Mr. Justice Renupada Mukherjee; the remaining cases, however, support the view that we have taken in this matter.

43. In the Punjab High Court this question came up before Mr. Justice Shamsher Bahadur in *Union of India (UOI) Vs. Bharat Fire and General Insurance Ltd., New Delhi*, , where the learned judge held that an insurer who had paid for a total loss of an apportionable part of insured goods carried by a railway administration could maintain suit in his own name under sub-section (2) against the carrier of reimbursement of the amount paid to the insured-consignee for the loss. He held that in such a case sub-section (3) did not apply. He, however, suggested that in a case arising under sub-section (3) the insurer would probably have no right to sue in his own name. For reasons indicated in this judgment, we do not agree with the decision in this case. The learned judge followed the judgment of Mr. Justice Renupada Mukherjee in *Alliance Insurance Co. Ltd. v. Union of India* ([1958] 28 Comp Cas. (Ins.) 43; ILR 1958 Cal. 544. He did not decide whether the position would or would not be different under sub-section (3). We are, however, of the view that both under sub-sections (2) and (3) of section 135A, a subrogee would have no right to sue in his own name.

44. In the case of *Vasudev Mudaliar Vs. Caledonian Insurance Co. and Another*, . Mr. Justice Veeraswami observed that a contract of motor insurance, like marine or accident insurance, was, in essence, one of indemnity and that the right of an insurer to subrogation or to get into the shoes of the assured as it were, was inherent in and sprang from the principles of indemnity and the basis of the right was justice, equity and good conscience, namely, that the indemnifier should be in a position to reduce the extent of his liability within limits. He held that subrogation did not ipso jure enable the subrogee to sue third parties in his own name. It would 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.

45. A Division Bench of the Kerala High Court decided the same question in the case of *The Asiatic Government Security Fire and General Assurance Co. Ltd., Madras Vs. The Scindia Steam Navigation Co. Ltd., Bombay*, . The said High Court held that where an insurer settled the claim by payment of certain sum in respect of the partial damage caused in transit to the goods insured under marine insurance but there had been no assignment of the rights under the policy in favour of the insurer, the insurer was not entitled to maintain a suit against the carrier to recover that amount, in his own name in the absence of such an assignment. Their Lordships observed that the right of the insurer against the person responsible for the loss did not rest upon any relation of contract or of privity between them. It arose out of the nature of the contract of marine insurance as a contract of indemnity, and was derived from the assured alone, and could be enforced in his right only. As between the insurer and the insured, the insurer was entitled to the advantage of every right of the assured,

whether such right consisted in contract fulfilled or unfulfilled, or in remedy for tort capable of being insisted on or already insisted but subrogation by act of law would not give the insurer a right to sue in a court of law in his own name. With the judgments of the Madras and Kerala High Courts we are in respectful agreement.

46. The judgment of the Supreme Court of Pakistan in *East and West Steamship Co. v. Queensland Insurance Co.* (Pakistan Law Decision 1963 (1) S.C. 663 has been cited before us. In this case a majority of four judge out of five held that an insurer in such a case could maintain a suit in his own name. It must, however, be noted that there was an assignment of the claim by the assured in favour of the insurer in that case and it was really unnecessary for the learned judges to decide the question. The reasons contained in the judgment of Mr. Justice Renupada Mukherjee, in *Alliance Assurance Co. Ltd. v. Union of India* [1955] 28 Comp. Cas. 43; ILR 1958 Cal. 544, are some of the reasons given by the learned judges of Pakistan Supreme Court. As we have disagreed with those reasons and have given our own reasons hereinabove, we can only say that we do not agree with the conclusion arrived at by the Pakistan Supreme Court and have come to our own conclusions in the matter.

47. Having come to the conclusion to which we have, we might here observe that our attention has been drawn to the statements of objects and reasons for the Bill which introduced in the Transfer of Property Act, sections 130A and 135A. This statement is published in the Gazette of India, Part V, page 31, dated 19th February, 1944. The objects in the said statement read as under :

"The need for the enactment of provisions corresponding to section 79 of the Marine Insurance Act and for amending section 6(e) of the Transfer of Property Act has also been represented to Government. On consideration of the opinions expressed by the Provincial Governments, High Court and leading commercial bodies, Government has now reached the conclusion that this is desirable."

48. If the object of introducing sections 130A and 135A in the Transfer of Property Act was to bring law in conformity with section 79 of the Marine Insurance Act in England, the conclusion to which we have come, we find is in consonance with the objects in introducing these provisions in the Transfer of Property Act.

49. We accordingly hold that the plaintiffs were not entitled to maintain the present suit in the Small Causes Court and uphold the decision of the lower court.

50. Revision Application is, therefore, dismissed with costs. Rule discharged.

51. We have heard these matters along with Civil Revision Application No. 161 of 1964. The names of respondents Nos. 3 and 4 in these matters were deleted, as they were not served. The learned advocate for the appellants, however, stated that the plaintiffs did not press their claims against the said defendants, although relief was claimed against them in the plaint. We heard the learned counsel in

the matters fully so that the matters may be decided between the parties before us. For reasons recorded in our judgment in C.R.A. No. 161 of 1964, we dismiss the appeals with costs and confirm the decisions of the lower court.