

(1987) 08 KAR CK 0015
In the Karnataka High Court

Oriental Insurance Co. Ltd.

APPELLANT

Vs

Prakash Road Lines (P.) Ltd.

RESPONDENT

Date of Decision : 10-08-1987

Acts Referred:

Marine Insurance Act, 1963 — Section 27, 27 (1), 27 (2)
Transfer of Property Act, 1882 — Section 130, 131

Citation : (1991) 70 CompCas 670

Hon'ble Judges : P.P. Bopanna, J;K.A. Swami, J

Bench : Division Bench

Advocate : B.V. Acharya, for the Appellant; N. Kumar, for the Respondent

Judgement

P.P. Bopanna, J.—At the stage of admission, the respondent was notified and the records of the lower court were also obtained. The respondent has put in appearance through counsel. Learned counsel for both sides agreed to argue the appeal for final disposal. Accordingly, the appeal was treated as having been posted for final hearing and heard for final disposal.

2. This appeal raises an important question relating to the right of the insurance company to recover the damages payable by the common carrier, after having compensated the insured in terms of the policy of insurance in favour of the insured.

3. The matter arises in this way:

The appellant-company is the insurer of the goods in question which were admittedly entrusted to the respondent-common carrier for transshipment from Secunderabad to Rae Bareli. The goods did not reach the consignee-Indian Telephone Industries Ltd. (in short "the ITI") in time and, therefore, enquiries were made by the consignee to trace the consignment. The consignment finally reached ITI, Rae Bareli, in a damaged condition and the damage to the goods is not in dispute since the respondent-carrier has issued an open delivery certificate certifying the damage to the goods in question. ITI after taking delivery of the

goods damage to the goods in question. ITI after taking delivery of the goods obtained a survey report from the engineer of Praga Tools Ltd. (in short, the manufacturer of the goods in question and in terms of the survey report, ITI had no option but to claim compensation from the appellant since the machine in question was a total loss to the ITI and, accordingly, it registered its claim against the appellant, The appellant in terms of the policy of insurance settled the claim of ITI in a sum of Rs. 2,23,189.57 and obtained a deed of subrogation from ITI in consideration of the said payment. After obtaining the said subrogation, letter marked exhibit P-9 before the trial court, the appellant sold the damaged machinery in question after taking out an advertisement for sale of the machinery in the newspapers. The highest offer made was accepted by the appellant and a sum of Rs. 36,000 was realised by such sale. Only thereafter, it sued the respondent common carrier for the balance of the amount of Rs. 1,88,305.97 with interest at the rate of 18% per annum.

4. On the basis of the pleadings of the parties, the trial court raised as many as 10 issues and answered issues Nos. 3,4,5,6,7,8 and 9 in favour of the appellant. The other two issues related to the maintainability of the suit and the ownership of the goods in question. The trial court found that the suit was not maintainable since the appellant had no locus standi to file the suit without making the ITI a party. On the question relating to the ownership of the goods, the trial court found that the ITI was not the owner of the goods and it was the consignor which was the owner of the goods and, therefore, the ITI could not have subrogated its right to the appellant in terms of the policy of insurance. Consequently, the trial court dismissed the suit. Hence, this appeal.

5. The respondent, which is admittedly a common carrier, did not lead any evidence. Regard being had to the provisions of the Carriers Act, 1865, the plea of negligence against the respondent stood un rebutted and, therefore, without any further evidence on the side of the appellant, the suit should have been decreed against the respondent. However, a number of technical pleas were taken by the respondent-common carrier and we will advert to those pleas at the appropriate stage.

6. We will now briefly state the facts which are not in serious controversy up to the date of filing the suit.

7. ITI, the consignee, had placed an order with Praga on July 16, 1978, for supply of one rolling machine along with the necessary spares and accessories. This machine was manufactured by Praga Tools at Secunderabad and after manufacture, it dispatched the same to ITI, Rae Bareilly, by entrustment to the respondent-common carrier on March 31, 1979. Invoices dated March 31, 1979, in favour of the ITI, for having dispatched this machine were produced as exhibits P-2 and P-3 before the trial court.

8. The goods reached the ITI, Rae Bareilly, on September 21, 1979. On that day, an open delivery certificate was issued by the respondent as per exhibit P-4. Its

contents disclosed that three cases were booked under goods receipt No.794578, dated March 31, 1979, dated March 31, 1979, ex-Secunderabad to Rae Bareli. Two cases contained machines and accessories, etc., and were delivered to ITI, Rae Bareli, in sound packing but the thread-rolling machine was delivered without any packing in a badly damaged/rusted condition. It was further mentioned in the certificate that the report of the engineers of the ITI would be acceptable to the carriers in respect of the damages / shortages /rusting or total loss. Photographs of the machine were also taken in the presence of the carrier's representative, one S. H. Rizvi. On the basis of this certificate, it is clear that the goods were damaged in transit and that the respondent carrier had agreed not to dispute the damages as assessed by the engineers of ITI. The assessment of damages to the machine was got done by one Mr. V. K. Kela, Sales Engineer of Praga, since that company had manufactured the rolling machine as per the specification given by the ITI. This Kela visited the ITI, Rae Bareli, and submitted his report as per exhibit P-5. According to this engineer, the machine was beyond repairs and rectification. Therefore, he suggested that the ITI should scrap this machine. He also advised that the transporters for this replacement machine should be nominated along with the purchase order so that the new machine is not damaged in transit. On the basis of this report and also of the surveyor who was examined as PW 2, the ITI lodged its claim both against the respondent-carrier and against the appellant. The surveyor had assessed the loss at Rs. 2,11,044.37 being the invoice value of the machine and the value of the spares (exhibit P-6).

9. It is to be noted at this stage that even before the issue of the open delivery certificate by the carrier, the ITI had issued a notice as per exhibit P-17 to the respondent calling upon them to deliver the machine immediately and also to register its claim for a sum of Rs. 2,23,189.87 being the value of the machine on the ground that the machine having not been delivered till that date, it had suffered loss to the extent. The claim made by the ITI under exhibit P-17 against the respondent was on the following terms:

"Since you have not delivered the above machine till date, we are lodging monetary claim upon you for Rs.2,23,189.57 as total loss.

Kindly arrange to deliver the above machine immediately. In the meantime, please also register our claim for total loss of property and intimate your claim No."

10. The said letter (exhibit P-17) was also endorsed to the appellant with a request to register the ITI's provisional claim. After ITI obtained the survey report, there was an exchange of correspondence between the appellant and the ITI and, ultimately, the appellant settled the claim of ITI for a sum of Rs. 2,23,189.57 as is evident by the vouchers, exhibits P-7 and P-8. It also obtained a subrogation letter from the ITI which evidences the payment of Rs. 2,23,189.57 in full settlement of the ITI's claim for non-delivery, shortages and damages in terms of the insurance policy in question. We will refer to this

document in detail when we deal with the question touching upon the maintainability of the suit filed by the appellant-insurance company.

11. It is also in evidence that the appellant had entrusted the matter to their agents, S.K. Ahuja and Associates of Kanpur, to recover the amount due from the respondent. The agent's letter dated January 26, 1981, addressed to the carrier discloses a number of reminders issued by them dated August 25, 1980, September 24, 1980, October 29, 1980, November 16, 1980 and December 20, 1980, but the carriers had not cared to settle the claim or even cared to send a reply denying their liability. Finally, the carriers in reply to the notice dated January 26, 1981, informed the agents of the appellant that the consignment was delivered to their client (meaning ITI) on September 21, 1979, and the machine was delivered in a damaged condition due to poor packing. The carrier further took the stand that the consignment was booked at owner's risk and so the carriers were not responsible and the insurance company which had received the premium was fully responsible to compensate the loss to the party, if any. By a subsequent letter dated May 2, 1981 (exhibit P-12), the carriers informed the agents that they were not responsible for the damages during transit.

12. The appellant, after settling the claim of ITI, brought the machine in question for sale by advertisement in a local newspaper, a copy of which is produced and marked as exhibit P-13. Machine Tool Aids made an offer for Rs. 36,000 which was accepted by the appellant. Accordingly, after deducting a sum of Rs. 36,000 from the amount paid to the ITI, the appellant brought the suit for the balance amount.

13. On these facts, the following points arise for consideration in this appeal:

"(1) Whether the respondent-carrier was right in contending that the title to the goods in question had not passed on to the ITI and, therefore, the appellant was not entitled to be subrogated to the rights of ITI under the policy (exhibit P-1) in favour of ITI?

(2) Whether the suit was maintainable without impleading the ITI as a party-plaintiff ?

(3) Whether the appellant had proved the damages as claimed by the ITI?

(4) If so, whether it can claim any interest and at what rate?"

14. The carriers having not adducted any evidence to disprove their negligence, it was not open to them to plead before the trial court that they were not liable to compensate the loss since it is well-settled that the carriers are liable to make good the loss occasioned during transit under the provisions of the Carriers Act. They also did not plead any special contract limiting their liability.

15. Point No.1 : On this point, viz., whether the title to the goods in question had passed on to the ITI the trial court took the view that the title to the goods had not passed on to the section and, therefore, the appellant could not have been

subrogated to the rights under the policy of insurance. In our view, this finding of the trial court cannot be sustained since the trial court did not apply its mind to the documentary evidence on record which indisputably came into existence much before the filing of the suit. The invoices, exhibits P-2 and P-3, clearly make out that these goods were sold to the ITI, Rae Bareli, and the ITI had paid the amount to Praga towards the value of the goods. The endorsement on exhibits P-2 and P-3 bear out that the State Bank of India as the bankers of ITI had paid to Praga the value of the goods under a short letter of credit No.331. This is also borne out by the evidence of one of the official of the ITI who had been examined as PW 3.

16. One P. N. Khuller, Assistant Manager, Shipping Department of ITI who was examined as PW 3 had stated that his company had purchased certain machinery from Praga, Secunderabad, under two invoices, exhibits P-2 and P-3, and the same was entrusted to the respondent-carrier for transportation from Secunderabad to Rae Bareli; that the machinery was insured with the appellant-insurance company for its value to cover the transit risk and the same was delivered to the ITI, Rae Bareli, on September 21, 1979. It was found to be badly damaged; that the ITI asked the carrier to give an open delivery receipt and, accordingly, it issued the open delivery receipt. In cross-examination, it is elicited that he had personal knowledge about the transaction but he did not know the terms and conditions under which the order was placed; that he could not give the date on which the payment for the machinery was made to the supplier ; that from the invoices , exhibits P-2 and P-3, he said that the supplier had sent the goods under a letter of short credit through the State Bank of India; that he did not know for how many days the letter of short credit was given and he had no idea as to whether any payment was made within that period.

17. The trial court, on the basis of the evidence of PW 3 in his cross-examination, came to the conclusion that the title to the goods had not passed on to the ITI. Though the evidence of PW 3 in cross-examination may not be very satisfactory since he was not a person acquainted with the payment for the goods, his evidence should have been read along with the documentary evidence, viz., exhibits P-2, P-3 and P-17. That apart, the very fact that the ITI had been compensated in terms of the insurance policy would go to prove that the appellant was satisfied with the ownership of the goods by the ITI and the claim made by the ITI towards the loss sustained by it. The respondent did not raise any objection before the matter was taken to court regarding the ownership of the goods or the claim of the ITI on the ground that the title to the goods had not passed on to the ITI. The only plea raised by them was that they were not liable for the loss caused during transit and the insurance company was responsible for it. They did not take the stand that the ITI was not the owner of the goods but only pleaded that the goods were booked at "owner's risk".

18. A number of cases were cited by learned counsel for the respondent on the point relating to the passing of title to the goods. In our view, those case do not

bear upon the issue that arises for consideration in this appeal. Those are cases which deal with the effect of the negotiability of the G.C. note by one person to another. Here we are not concerned with the clause or an endorsement in the bill of lading or G. C. note, but we are concerned with a case of sale of the goods from one party to another party. The very fact that the respondent had issued an open delivery certificate to the ITI is sufficient for the purpose of this case to prove that the ITI was the owner of the goods and the title to the goods had passed on to the ITI at the time the open delivery certificated was issued.

19. It was contended by learned counsel for the respondent that in the G. C. note the consignee was mentioned as ITI. This G.C. note was not produced before the trial court by the respondent. Even assuming that the contents of the G.C. note are correct, the endorsement on the G.C. note that the consignee is "self" would not go to show that the title to the goods had not passed on to the ITI. This endorsement was presumably made with a view to keep a lien on the goods, since no payment had been made by the ITI or Praga towards transportation charges. But it is well- settled under the Sale of Goods Act, that the property in the goods can pass on to the buyer in consideration of future payment. In the circumstances, on the oral and documentary evidence, the appellant had proved beyond a shadow of doubt that the goods belonged to the ITI when the open delivery certificate (exhibits P-4) was issued to the ITI. That apart, when the ITI lodged a claim as per exhibits P-17 on August 21, 1979, with the appellant as well as the respondent who had not repudiated the ownership of the goods by the ITI. Even in their reply (exhibits P-11) to the agents of the appellant, A. K. Ahuja Associates, they did not contend that the title to the goods had not passed on to the ITI. Even their subsequent reply (exhibits P-12) bears out that the ITI were the owners of the goods in question since they had admittedly delivered the goods to the ITI under the open delivery certificate. On these facts, we have no doubt that the trial court was clearly in error in recording a finding that the title to the goods had not passed on to the ITI. So, on the first point, we hold that the title to the goods had passed on to the ITI and the ITI was the owner of the goods in question. As such ITI was entitled to subrogate or assign its right of claim to the appellant-insurer.

20. Point No.2 : The second point is purely a question of law and a number of cases have been cited by learned counsel fo both sides in support of the contentions urged by them. The decisions of the various High Courts cited before us are not uniform on this point. Two learned judges of the Calcutta High Court had taken the view that the suit by an insurance company in terms of the instrument of subrogation was not maintainable. But, subsequently, two Division Benches of the same High Court had differed from that view, regard being had to the provisions of section 52 of the Marine Insurance Act and clauses (1) and (2) of section 135A of the Transfer of Property Act and had held that the suit by the insurance company without impleading the insured as a party was maintainable. But it is unnecessary for us to go into the controversy in these cases in view of the unambiguous contents of the letter of subrogation exhibits P-9.

21. The Supreme Court in *Union of India (UOI) Vs. Sri Sarada Mills Ltd.*, on a consideration of the relevant provisions of the Transfer of Property Act, viz., section 135A as also the provisions of the Marine Insurance Act, has ruled (at p. 283):

"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".

22. This is the majority view of the Supreme Court. The minority view of Justice Mathew upholding the decision of the Madras High Court in *Vasudev Mudaliar Vs. Caledonian Insurance Co. and Another*, has also supported this view. The learned judge observed (at p. 290):

"The real reason why a mere right to sue cannot be assigned is that such an assignment would offend the rule of champerty and maintenance. Now, as in this case, where an insurance company has been subrogated to all the rights and the remedies of the assured by virtue of section 135A, the reason for the rule against assignment of a mere right to sue does not obtain because the insurance company is clothed with all the rights and remedies of the assured and the only thing lacking is the capacity to sue in its own name. If the right is capable of being assigned and is assigned, it would no longer be logical to say that the assignor can still sue, for, whatever rights the assignor had in the subject-matter had passed to the assignee. It is impossible to understand, how, after the assignment, the assignor can still maintain a suit."

23. In the aforesaid decision, the point that arose for consideration was whether the insured could maintain a suit against the carrier, i.e., the Union of India (Railway), after having executed an instrument of subrogation in favour of the insurance company. But the point whether the insurance company could maintain the suit without impleading the insured did not directly come up for consideration. But, while considering the question in regard to the right of the insurer to maintain the suit, both the majority and the minority views of the Supreme Court emphasised that the terms of the documents of subrogation will have to be considered for coming to a correct conclusion. The terms of the subrogation letter in our case are found in exhibit P-9. They read as under:

"In consideration of your paying to us a sum of Rs. 2,23,189.57 only, say rupees two lakhs twenty-three thousand one hundred eighty-nine and paise fifty-seven only, in full settlement of our claim for non-delivery/ shortages and damages under policy / certificate No. ME 13 issued by you on the undermentioned goods, we hereby assign, transfer and abandon to you all our rights against the railway company / administration or other persons whatsoever, caused or arising by reason of said damages or loss and grant you full power to take and use all lawful ways and means in your own name and otherwise at your risk and expense to recover the said damage or loss and we hereby subrogate to you the same rights as we have in consequence of or arising from the said loss or

damage.

Ane we hereby undertake and agree to make and execute at your expense all such further deeds, assignments and documents and to render you such assistance as you may reasonably require for the purpose of carrying out this agreement".

24. This document, no doubt, is styled as a letter of subrogation. It was executed on the requisite stamp paper as per law.

25. It is contended by learned counsel for the carrier, Mr. Kumar, that if the pleadings of the appellant-company are read with the instrument of subrogation, it is clear that the parties proceeded on the basis that the appellant was the holder of only an instrument of subrogation and not a deed of assignment of the rights under the policy. No doubt, in the trial court, the appellant had described this document as a letter of subrogation but the contents and the substance of the letter of subrogation are clear and unambiguous. Under that document, the ITI had not only assigned and transferred its rights but had also abandoned its right, title and interest in respect of the goods in question and all its claims against the carriers whatsoever caused or arising by reason of the said damages or loss to the goods in question in favour of the appellant-insurer. If the documents is read as a whole, it is clear that it is also a deed of assignment and, therefore, the appellant was not a mere subrogation but an assignee of the rights of ITI under exhibits P-9. If it is held otherwise, it would defeat the very purpose of insurance cover obtained by the ITI to protect the risk to its goods in transit as observed by the Privy Council in *King v. Victorial Insurance Co. Ltd.*, [1896] AC 250 . This decision of the Privy Council was followed by the Supreme Court in *Union of India (UOI) Vs. Sri Sarada Mills Ltd.*,

26. In *King v. Victorial Insurance Co. Ltd.* [1896] AC 250, the Privy Council was dealing with an appeal preferred against the judgment of the Supreme Court of Queensland in regard to the right of an insurance company to sue the carrier. In that case, the payment made to the insured was outside the terms of the policy of insurance. Even in such a case, the Privy Council observed that payment honestly made by the insurers in satisfaction of a claim by the insured entitles the insurers to the remedies available to the insured and such remedies cannot be resisted on the ground that the payment was not within the terms of the policy. It was further held that although the insurers could not by mere force of subrogation sue in their own name, yet in this case, the right to do so was conferred by assignment from the insured aided by section 5, sub-section (6), of the Judicature Act corresponding to the English Judicature Act of 1873. The Privy Council, at page 254 of its judgment, observed as follows:

"To their Lordships, it seems a very startling proposition to say that when insurers and insured have settled a claim of loss between themselves, a third party who caused the loss may insist on ripping up the settlement and on putting in a plea for the insurers which they did not think it right to put in for

themselves; and all for the purpose of availing himself of a highly technical rule of law which has no bearing upon his own wrongful act. It is not alleged that there was anything but perfect good faith in the claim made by the bank and satisfied by the insurance company. It is not alleged that the question of negligence has not been as fully and fairly tried in this action as it could have been in an action by the bank; or that the Government has been in any way prejudiced by the form of the action. But it is claimed as a matter of positive law that in order to sue for damages done to insured goods, the insurers must show that if they had disputed their liability the claim of the insured must have made good against them. If that be good law, the consequence would be that insurers could never admit a claim on which dispute might be raised except at the risk of finding themselves involved in the very dispute they have tried to avoid by persons who have not interest in that dispute but who are sued as being the authors of the loss. The proposition is, as their Lordships believe, as novel as it is startling..."

27. It was further observed by the Privy Council that "such settlements of claims between the parties concerned ought not be reopened for a by purpose at the instance of parties not concerned. To hold otherwise, would convert rules of law framed for the purpose of checking speculations in law-suits into instruments for promoting law-suits which the parties interest are wise enough to avoid by agreement. Their Lordships have no doubt that if after receiving payment from the plaintiffs, the bank had got damages from the Government, a Court of Equity would have treated them as trustees for the plaintiff to the extent of the payment..."

28. This decision of the Privy Council, as noticed earlier, was followed by the Supreme Court in Union of India (UOI) Vs. Sri Sarada Mills Ltd., : Union of India (UOI) Vs. Sri Sarada Mills Ltd., But the contention of learned counsel for the respondent- carrier is that this instrument is not properly stamped as a deed of assignment as in that even the stamp duty should have been ad valorem on the value of the goods damaged. We are unable to accept this argument since no objection was taken by the respondent - carrier before the trial court when this document was admitted in evidence. Section 35 of the Karnataka Stamp Act bars the raising of such an objection at any later stage of the same proceedings which also includes the appellate stage. The transfer of an actionable claim can be made without a registered instrument as it is not a transfer of interest in immovable property. When once the document is admitted in evidence, any objection as to its admissibility on the ground that the document has not been duly stamped cannot be raised at any stage of the same suit or proceeding and more so at the stage of appeal. Full effect to the contents of the document shall have to be given and consequences flowing therefrom must receive due recognition from the court. Therefore, when the contents of the documents in unambiguous terms spell out a clear case of complete assignment, in other words, transfer of an actionable claim, it is the duty of the court to consider the document as an assignment, in other words, as a deed of transfer. Under the

document, the insured without any reservation has transferred to the insurer its right to recover damages from the carrier. In our view, what is assigned or transferred to the plaintiff-insurer is not the property in the goods but an actionable right of the insured against the respondent, which includes the right to recover damages which the ITI had against the carriers. This transfer or assignment of the right of the insured to claim damages cannot be questioned for a moment since the appellant had already obtained the goods from the ITI and sold it as its own property as is evident from exhibit P-13. In our view, though the parties had proceeded on the basis that there was a letter of subrogation in favour of the appellant company, we must give true and proper effect to the indisputable contents of the document for doing substantial justice. Since those contents have a direct nexus to the question relating to the maintainability of the suit, the trial court should have given effect to the legal implication of this document. When there was a full and complete transfer or assignment of right to claim damages from the carriers by the ITI in favour of the appellant-insurer, there was no need to join the ITI either as the plaintiff or as the defendant. The appellant alone was entitled to maintain the suit. This transfer or assignment of the aforesaid right of the ITI falls u/s 130 of the Transfer of Property Act, 1882 (for short, "the T. P. Act"). Sub-section (2) of section 130 of the T. P. Act specifically provides that the transferee of an actionable claim may, upon the execution of such instrument of transfer as per sub-section (1), sue or institute proceedings for the same in his own name without obtaining the transferor's consent to such suit or proceedings and without making him a party thereto.

29. Before answering point No.2, it is also necessary to consider the other contentions urged by learned counsel for the respondent- carrier. It is contended that the assignment in question was made without notice to the respondent; that notice was necessary as required by the proviso to sub-section (1) of section 130 read with section 131 of the T.P. Act. Therefore, it is contended that the assignment has no legal effect and it cannot either bind the respondent or enable the appellant to maintain the suit claim. We are inclined to think that the contention is not well- founded and does not deserve acceptance.

30. Sub-section (1) of section 130 of the T.P. Act reads thus:

"130 (1). Transfer of actionable claim. - The transfer of an actionable claim whether with or without consideration shall be effected only by the execution of an instrument in writing signed by the transferor or his duly authorised agent, shall be complete and effectual upon the execution of such instrument, and thereupon all the rights and remedies of the transferor, whether by way of damages or otherwise, shall vest in the transferee, whether such notice of the transfer as is hereinafter provided be given or not:

Provide that every dealing with the debt or other actionable claim by the debtor or other person from or against whom the transferor would, but for such instrument of transfer as aforesaid, have been entitled to recover or enforce such

debt or other actionable claim, shall (save where the debtor or other person is a party to the transfer or has received express notice thereof as hereinafter provided) be valid as against such transfer".

(underlining * by us)

31. Originally, the subject matter covered by sub-section (1) of section 130 of the T.P. Act regarding the transfer of an actionable claim was covered by former section 131 of the T.P. Act. The said former section 131 with illustration (1) read as follows:

"No transfer of any debt or any beneficial interest in movable property shall have any operation against the debtor or against the person in whom the property is vested until express notice of the transfer is given to him, unless he is a party to or otherwise aware of such transfer; and every dealing by such debtor or person, not being a party to or otherwise aware of, and not having received express notice of a transfer with the debt or property shall be valid as against such transfer.

Illustration:

A owe money to B, who transfers the debt to C. B then demands the debt from A, who, having no notice of the transfer, pay B. The payment is valid, and C cannot sue A for the debt".

32. To know the obvious difference between sub-section (1) of section 130 and the old section 131 of the T.P. Act, illustration (1) to section 130 of the Act may also be noticed. It reads:

"A owes money to B, who transfers the debt to C. B then demands the debt from A, who, not having received notice of the transfer, as prescribed in section 131 pays B. The payment is valid and C cannot sue A for the debt".

33. A reading of the old and the new section and the illustrations thereof makes it abundantly clear that for the assignment of an actionable claim, no notice to the person who is liable to make good the claim is necessary. It was only under the old section 131 that an express notice of transfer was required to be given unless the party liable to make good the claim was also a party to the transfer or assignment or otherwise aware of such transfer or assignment. No such requirement or condition is laid down in sub-section (1) of section 130 of the T.P. Act. On the contrary, it is clear from the words underlined by us in sub-section (1) of section 130 of the T.P. Act that the assignment takes effect from the date it is made. The effect of this sub-section is to confer without notice to the person who is liable to satisfy the claim, a legal title on the transferee as opposed to an equitable title only. This is intended to enable the transferee to sue in his own name. The transfer or assignment of actionable claim takes place no the T.P. Act. Such a transfer can even be without consideration as is evident from the words "with or without consideration" contained in the very sub-section. The validity of a transfer or assignment of an actionable claim does not depend upon the giving

of notice to the person who is liable to satisfy the claim. However, as per the proviso to sub-section (1) of section 130 of the T.P. Act, the transferee may give notice to the person who is liable to satisfy the claim to prevent such person from acting prejudicial to the interest of the transferee or setting the claim with the assignor because until he receives the notice of transfer, his dealings with the transferor regarding the claim transferred is good and he will not be liable to pay to the transferee. Thus, the proviso is intended to safeguard the right and interest of the transferee and also at the same time, it safeguards and protects the person who is under a liability to satisfy the claim and settles or satisfies the claim with the assignor in case he is not a party to the assignment or transfer or has not received an express notice of assignment or transfer. Thus, it is clear that the proviso does not affect the assignment nor does it postpone the date of coming into effect of the assignment. Section 131 only provides for a form and the manner of notice to be given on transfer of an actionable claim. If the assignee or the assignor gives notice of transfer of an actionable claim to the person who is liable to satisfy the claim, such person is prevented and is not entitled to settle the claim with the assignor. He case thereafter settle the claim with the assignee only. But this does not mean that the assignment is not effective or is not valid until notice is given to the person who is liable to satisfy the claim. It is also stated in Mulla's T. P. Act, seventh edition, at page 818, under the heading "Priority" this:

"Under the English law, priority in the case of successive assignments of choses in action, each one without notice of the earlier one is determined by the date of notice to the debtor. But, in India, no such notice to the debtor is necessary to perfect the assignee's title. u/s 130, the title vests in the assignee on the execution of the transfer deed and no further action on his part, e.g., sending of notice is necessary to complete his title. In such cases, priority has ordinary to be determined with reference to the date on which title vested in the transferee, that is, the date of execution of the transfer deed. The proviso to section 130 is only for the benefit of the debtor and it has nothing to do with the title of the transferee or with priority or claims".

34. It is not the case of the respondent that it had settled the claim of ITI. Therefore, the plea of notice raised on behalf of the respondent-carrier is wholly untenable.

35. It is next contended by learned counsel for the respondent that regard being had to the provisions of section 27 of the Marine Insurance Act, the policy in question being a time policy for a period of two years was not valid in law. Accordingly, the ITI did have any right of compensation under the policy. Section 27 of the Marine Insurance Act no doubt prescribes a period for a time policy. But u/s 27(1) of the Marine Insurance Act, a marine insurance policy could also be a voyage policy and a time policy. But u/s 27(2), a time policy could not be extended beyond twelve months. In this case, on a closer examination of the terms of the policy, it is clear that the policy is not only a time policy but it is also

voyage policy. Exhibits P-1 is the insurance policy in question. In that policy, against the heading "Voyage", it is mentioned "as per annexure A attached herewith". Annexure A which forms part of the policy provides for the period covered and the terms and conditions. Under clause 2 of annexure A, it is provided that:

"Insured against all risks of physical loss or damage warehouse to warehouse and including strike, riot and civil commotion risks subject to rail risks or transit by lorry clauses, institute, theft pilferage and non-delivery (insured value) clause, institute replacement clause and institute strike, riot and civil commotion clause as attached".

36. The other terms of the policy are:

"Upon indigenous and imported plant, machinery and equipment for stronger switching equipment despatched from time to time by various Indian suppliers, despatch particulars of which are to be sent to Lucknow Divisional Office of the company immediately after despatch".

37. The sum assured under the policy is Rs.1,55,00,000. This is an open insurance policy which covers all the equipment and machines despatched from time to time to ITI at Lucknow Divisional Office during the period of coverage. As the policy in question is not a pure and simple time policy, section 27(2) of the Marine Insurance Act is not attracted. The contention is accordingly rejected.

38. The further contention of learned counsel for the respondent is that the particular machine in question was not covered under the policy and hence the appellant could not get any right under the instrument of assignment, exhibits P-9. The terms of the policy are very clear and they cover all equipment transported between April 16, 1978, and April 15, 1980. This policy was in force for a period of two years and covered the risk from April 16, 1978 to April 15, 1980. The damage to the goods occurred some time in the year 1979. Therefore, the risk to the goods was clearly covered by the policy. The trial court, in our view, was in error in not noticing the terms of the policy. This policy is an open covering all the goods despatched to ITI, Rae Bareilly, during the period of insurance, i.e., from April 16, 1978, to April 15, 1980. The evidence of exhibits PW-1, in this regard should be noticed.

39. PW-1, Sham Nath Singh, has spoken to this policy, Exhibits P-1. He has stated that the policy was valid for two years commencing from April 16, 1978, to April 15, 1980; that the machine in question was covered under this open insurance policy entrusted by Praga to the plaintiff-company; that the consignment in question was delivered to the ITI, in a damaged condition. He had also spoken to the survey report and the quantum of damages assessed by the engineer of Praga. In cross-examination, it is elicited that this policy does not specifically mention that the machinery transported through the respondent-carrier comes within the terms of the policy. That does not in any way give a wrong meaning to the terms of the policy since that policy, exhibits P- 1, indisputably covers all the

goods despatched during the period in question, i.e., April 16, 1978, to April 15, 1980. In the circumstances, the trial court was in error in not giving full effect to the terms of the policy by relying on the answer given by PW-1, in his cross-examination. Thus for the reasons stated above, point No.2 is answered as follows:"The suit brought by the insurer-assignee without impleading the insured-assignor is maintainable".

40. Point No.3 : On the question of damages, admittedly, no evidence was adduced on behalf of the respondent-carrier. According to the plaintiff, the goods had been completely damaged when they were delivered to the ITI; that immediately after the receipt of the goods, an open delivery certificate was obtained and the engineer of Praga, the manufacturer was called upon to assess the damages who after inspection had submitted his report. The surveyor had also made an assessment of damages. There was no plea of collusion between the ITI and the surveyor in regard to assessment of damages. The appellant had realised a sum of Rs. 36,000 by the sale of the damaged machinery in question. The respondent adduced no evidence regarding absence of negligence or for disputing the quantum of damages before the trial court. Mere denial of the plaint averments would not advance the case of the respondent-carrier any further. The respondent having failed to rebut the averments of the appellant in the plaint in this regard, the findings of the trial court on the liability of the respondent in sum of Rs. 2,23,189.57 has to be affirmed. Thus, there was no dispute at all with regard to the quantum claimed by the appellant from the respondent-carrier in terms of the instrument of assignment. Accordingly, point No.3 is answered in the affirmative.

41. One more contention raised by the respondent-carrier requires to be noticed at this stage. u/s 10 of the Carriers Act, the appellant was required to give a notice of six months before the institution of the suit from the date the damages became due. According to learned counsel for the respondent, the plaintiff in this case being the insurance company, the notice that was given by the ITI as per exhibits P-17 and also as per exhibits-10 could not be considered to be a notice as required by section 10 of the Carriers Act, because such notice has to be given by the plaintiff only within the period allowed by section 10. This contention was not taken before the trial court nor was any issue framed before the trial court. In the plaint, the appellant had stated that the requisite notice under the Carriers Act had been given. But this plea was met by the carrier by a mere general denial. In the absence of specific denial, the respondent must be deemed to have admitted receipt of notice as pleaded by the appellant. In addition to this, no issue was insisted upon by the respondent-carrier on this point. As the respondent- defendant did not insist on raising an issue but chose to proceed with the trial, it must be deemed to have abandoned the plea, if any, of alleged non-issue of notice as per section 10 of the Carriers Act. Even otherwise, we are of the view that this contention is only hyper-technical. A notice under the Carriers Act is contemplated within a period of six months without reference to the provisions of the Marine Insurance Act. Nowhere under

the Carriers Acts, the rights of the insurance company under the Marine Insurance Act or u/s 69 of the Contract Act have been considered or provided for. The object of notice is to put the defendant on guard against the claim in question. By virtue of the assignment, the plaintiff for the purpose of section 10 of the Carriers Act must necessarily mean and include the assignor of the plaintiff in the suit, i.e., the ITI. Hence we hold that the notice issued by the ITI as per exhibits P-10 and P-17, well within time are sufficient and as such the requirement as to issue of notice u/s 10 of the Carriers Act has been complied with.

42. Point No.4. - The next point that arises for consideration is whether the appellant is entitled to interest. If so, whether it can claim interest at the rate of 18%. In the case of a claim for unliquidated damages, interest can be claimed on the damage being determined. Even though the determination takes place subsequent to the date of institution of the suit, such determination must be deemed to have been made on the date of institution of the claim because it is on that date the plaintiff makes a claim for damages in a specified sum. Therefore, the appellant is entitled to claim interest from the date of institution of the suit claiming damages. In our view, the appellant cannot raise a claim for interest at 18% in a suit nature. The contract between the ITI and the appellant in terms of the insurance policy cannot be termed a commercial transaction. It is a contract uberrima fide. Moreover, the ITI had not claimed interest on damages under the policy of insurance. Therefore, the proper interest to be allowed is 6% from the date of suit till the date of realisation. Point No.4 is answered accordingly.

43. For the reasons stated above, this appeal is allowed, the judgment and decree of the trial court are set aside and the suit is decreed as prayed for with interest at 6% per annum from the date of realisation. The appellant would be entitled to costs throughout.

44. After the pronouncement of our judgment, learned counsel for the respondent made an oral application for grant of certificate to appeal to the Supreme Court. In our view, no substantial question of law of general importance which needs to be decided by the Supreme Court arises in this case. The law on the point has been settled by the decision of the Supreme Court in Union of India (UOI) Vs. Sri Sarada Mills Ltd., and by the decision of the Privy Council in Victoria Insurance Co. [1896] AC 250. We have only followed those cases. Accordingly, we reject the application made by learned counsel for the respondent.