

(1966) 01 MAD CK 0010
In the Madras High Court
Case No : Appeal No. 129 of 1961

Sri Sarada Mills Ltd.

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 04-01-1966

Acts Referred:

Contract Act, 1872 — Section 41

Transfer of Property Act, 1882 — Section 130, 135, 135, 6(E), 92

Citation : AIR 1966 Mad 381 : (1967) ILR (Mad) 631 : (1966) 79 LW 237 :
(1966) 2 MLJ 16

Hon'ble Judges : Veeraswami, J;Kunhamed Kutty, J

Bench : Division Bench

Judgement

This Judgment has been overruled by : Union of India (UOI) Vs. Sri Sarada Mills Ltd., AIR 1973 SC 281 : (1973) 43 CompCas 431 :

(1972) 2 SCC 877 : (1973) 2 SCR 464

Kunhamed Kutty, J.

(1)The plaintiff, Sri Sarada Mills Ltd., whose suit for damages against the Union of India, as owning and representing the Central and Southern

Railways, was dismissed by the court below, is the appellant. They had consigned through their agents Ranjit Ginning and Pressing Factory Ltd.,

100 bales of R. P. Cotton from Nagpur to Podanur under a railway receipt issued by the Central Railway (the first defendant). The goods had to

pass through several stations along the two railways, Central and Southern, before it arrived at Podanur, and when it arrived 87 bales out of 100

were burnt and charred and 13 bales were found loose and short. The plaintiff applied for open delivery and the railway authorities at Podanur got

the damage surveyed, and issued a certificate of damage and shortage. But

when the plaintiffs made a claim for damages the Chief Commercial Superintendent, Southern Railways, informed them that the consignment was involved in a fire accident at Sirpur Nagaznagar on the Central Railway, that the cause of the fire was unknown and that the railways were not liable for the damages caused to the goods as there was no negligence or misconduct on their part.

The plaintiff, on the other hand, had alleged that the damage and shortage were occasioned only by the acts and negligence on the part of the Administration and misconduct of the employees and they were bound in law to indemnity for the loss sustained by the plaintiff. The plaintiff, therefore, instituted the suit on the above allegations when the second defendant-railway in its written statement (which was adopted by the first defendant railway) further stated that a Committee of Enquiry, constituted for the purpose of finding out the cause of the fire was unknown, that the certificate of damage and shortage was not final or conclusive or exempted the plaintiff from proving the extent of damages suffered by the mills and that the plaintiff, having realised damages from the Insurance company, had no right to claim any amount from the defendants.

(2) The contentions raised by the defendants gave rise to as many as seven issues. The learned Subordinate Judge, who tried the suit had before him the evidence of two witnesses examined on the side of the plaintiff, one on Commission at Nagpur and the other before the court, and the testimony of as many as 25 witnesses, 18 examined on commission, 15 at Nagpur, 3 at Hyderabad and 7 before the court. A number of documents were also before the court marked before the Commissioners and before it. On a consideration of the entire evidence in the light of the case law, the learned Subordinate Judge was inclined to hold, on issue 2, that the fire which caused loss to the goods of the plaintiff was not due to any cause beyond the control of the defendants and, on issue 3, that the damage was due to the negligence of the defendants. He further found that the damages caused to the plaintiff by the fire accident was only to the tune of Rs. 15534 but the plaintiff had no right to file the suit since it had already realised a sum of Rs. 32254-6-9 from the Indian Globe Insurance Co., with whom the goods in question had been insured, on executing a letter of subrogation, with the result he dismissed the suit directing the parties to

bear their respective costs.

(3) Mr. Gopalswami Iyengar for the appellant urged before us that a right to sue for damages for breach of contract is only a bare right to sue

which cannot be assigned and the learned Subordinate Judge was wrong in concluding that S. 6(E) of the Transfer of Property Act is subject to the

provisions of S. 135-A(4) of the Act. He also contended that a right of subrogation will not entitle the Insurance Company to enforce the right in its

own name as a deed of subrogation could not amount to any assignment of the subject matter of insurance; but could give the insurer only what

they would have under S. 135-A(3) of the Transfer of Property Act.

(4) Subsequent to the accident, the plaintiff-mills had received from the Insurance company the sum of Rs. 32,254-6-9. But it was contended

before the learned Subordinate Judge that though the Insurance company has a right of subrogation under the law of insurance, it could not sue in

its own name and it was obligatory for the assured to sue for damages for the purpose of making it over to the Insurance company. Certain rulings

of the Calcutta High Court were relied on in support of this contention. The learned Subordinate Judge, however, construed the language of Ex. A

9, the letter of subrogation executed by the plaintiff, as having the effect of a transfer in favour of the insurance company of the right to maintain an

action against the railway administration for damages and relying on sub-section (4) of S. 135-A held that in the face of the aforesaid sub-section,

it cannot be contended that the transfer to the Insurance company, of the right to sue the railway administration is not valid in this view, he held that

the plaintiff has no right to file the suit, as it had admittedly realised the amount from the Insurance company as per the receipt, Ex. A 8, after

executing the letter Ex. A 9. This letter read:

We hereby assign, transfer and abandon to you all our rights against the railway company or other persons whatsoever caused or arising by

reason of such damage or loss and grant you full power to take and use all lawful ways risk, and expense to recover the said damage or loss, and

we hereby subrogate to you the same right as we have"".

Under Section 6(3) of the Transfer of Property Act, a mere right to sue cannot be transferred. But this provision cannot affect S. 135-A of the Act

relating to assignment of rights under a policy of Marine insurance, so 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 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. Sub-section (2) of this section deals with subrogation of the insurer to all the rights and remedies of the insured where the insurer pays for the total loss of the subject matter insured and sub-section (3) deals with such right when the insurer pays for the partial loss. After the amendment in 1944, S. 135 of the Act enabled every assignee by endorsement or other writing, of a policy of insurance against fire, in whom the property in the subject insured shall be absolutely vested at the date of the assignment to have all rights of suit transferred and vested in him as if the contract contained in the policy had been made with himself.

(5) It is these provisions coupled with S. 41 of the Contract Act that are relied on for the Railways to sustain the judgment of the learned

Subordinate Judge. The argument of the learned counsel for the railways is that the Insurance Company having been subrogated became a

transferee in respect of the rights which the plaintiff could have enforced and the plaintiff having accepted performance from the said company, it

cannot maintain this suit and the party competent to sue is the insurance company. The ruling in *Alliance Insurance Co. v. Union of India*, 62 Cal

WN 539, lends support to the position contended for by the learned counsel. In that case, an insurer who had paid for a total loss of an

apportionable part of some goods carried for transit by land by a railway administration was held by *Renupada Mukerjee J.* to be competent to

maintain a suit in his own name against the carrier for reimbursement of the amount paid to the insured for the loss. It was further held in this case

that under S. 92 of the Transfer of Property Act, a subrogee could enforce his right by a suit without using the name of the mortgagee whose

mortgage he has redeemed and that a subrogee under S. 135-A(2) of the Transfer of Property Act should not be placed in a more

disadvantageous position than a subrogee under S. 92 of the Act. According to learned Judge, if any doubt remained about the right of suit of an

insurer under S. 135-A(2) of the Transfer of Property Act, it is dispelled by sub-

section (4) which makes clause (e) of S. 6 inapplicable to all the sub-sections of S. 135-A. He pointed out that though clause (e) of S. 6 of the Transfer of Property Act provides that a mere right to sue which includes a personal right of action cannot be transferred, by removing the bar, sub-section (4) of Section 135-A makes a deliberate departure from the English rule of the Transfer of Property Act, it is dispelled by procedure which lays down that an insurer who pays for a total loss cannot sue independently of his own name.

(6) In *Textiles and Yarn (P) Ltd. Vs. Indian National Steamship Co. Ltd.*, which was a suit for recovery of damages on the Original Side of the Calcutta High Court, for loss of goods in course of transit from Madras to Calcutta by sea in a steamship called ""Sivarathna"", Mitra J. held that the insurer cannot maintain an action in his own name although there is subrogation of the claims of the insured unless there is an assignment of the claim by the insured in favour of the insurer. The learned Judge referred to 62 Cal WN 539, but after adverting to the *Indian Trade and General Insurance Co. Ltd. Vs. Union of India (UOI)*, and *K.V. Periyamianna Marakkayar and Sons Vs. Banians and Co.*, and the observation of the Judicial Committee in *King v. Victoria Insurance Co. Ltd.*, 1896 A.C. 250 that subrogation by Act of Law would not give the insurer a right to sue in a court of law in its own name, observed:

In my view, the effect of the decisions discussed above is that the insurer cannot maintain an action in his own name although there is subrogation of the claims of the insured in his favour. In order to entitle him to maintain an action in his own name there must be assignment of the claim by the insured in favour of the insurer"".

The learned Judge also considered S. 41 of the Indian Contract Act in the context of the plaintiff's claim and observed:

The plaintiff's right to compensation for short delivery arises from the contract for carriage of goods. The Bill of Lading lays down conditions on the fulfilment of which compensation for short delivery or non-delivery is payable by the defendant. The oral evidence shows that the plaintiff has recovered compensation from the insurer. The learned advocate for the plaintiff has also admitted that his client has recovered compensation claimed in the suit from the insurer. That being the position, Section 41 of the

Indian Contract Act is attracted and this suit is not maintainable by the plaintiff. The provisions of S. 41 are a clear bar to a suit by a promisee if he accepts performance of the promise from a third person. That is precisely what has happened in this case. The plaintiff has accepted performance of the promise to pay compensation from the insurer and cannot, therefore, enforce the same claim against the defendant".

It is on the above finding that the plaintiff's suit was dismissed by the learned Judge. This part of the judgment is undoubtedly in favour of the contention urged for the railways.

(7) Sri Gopalaswami Aiyangar, however, relied on *Diayadaru Chandrasekaralingam Vs. Arigapudi Nagabhushanam and Another*, wherein

Ramesam J. held that the transfer of a claim to past mesne profits is invalid u/s 6(e) of the Transfer of Property Act. That was a case where a

person who was the owner of the property, at the time it was trespassed upon and to whom the trespasser became liable for its mesne profits, filed

suits to recover mesne profits after such profits were intended to be transferred by the sale deed in favour of the vendee. The vendee did not sue

for these profits and as per the understanding between the vendor and the vendee, the vendor was to sue for these profits. Actually, it was the

reversioner who brought the suits and Ramesam J. on a consideration of the case law, held that he was entitled to maintain the suit even after a

valid assignment of the claim to such profits, observing that such a suit may be for the benefit of the assignee and he may be made to hand over the

amount when collected to the assignee. The learned judge followed this court's ruling in *Seetamma v. Venkataramanayya*, ILR Mad 308: AIR

1916 Mad 473 (1)) and was not inclined to share the doubts of Seshagiri Aiyar J. in *Venkatarama Aiyar Vs. Ramasami Aiyar and Others*, . At

page 344 (of Mad LJ): (at p.818 of AIR), Ramesam J. observed:

The defendants having incurred an obligation in favour of the present plaintiff, the fact that the plaintiff's right was transferred to some transferee

ought not to make the obligation any the less. It may be that in such a case, the defendants ought to be protected from a double action. Of that

there is no fear in the present litigation. It seems to me that even if the assignment is valid, the right of action originally residing in the assignor has

not ceased. It is true that Section 130 of the Transfer of Property Act says that

where an actionable claim is transferred, all the rights and remedies of the transferor are transferred. I do not deny this. All that I say is that the transferor may maintain an action and afterwards hand over the amount when collected to the transferee. The whole of Ch. VIII of the Transferees of actionable claims to maintain actions on the assignments and to get rid of the difficulties in the English law where, for some time, assignees could not maintain an action at all and afterwards they were allowed to maintain action in the name of the assignor; but I do not think this chapter is intended to lay down that the transferor himself cannot maintain an action for the benefit of the transferee

We share this view and consider that on a similar principle, it cannot be said that the plaintiff is not entitled or competent to institute the suit though

in our view the Insurance company could also well have been added as a plaintiff.

(8) The responsibility of the railway administration in respect of goods booked under railway risk is that of a bailee. The Administration must,

therefore, take as much care of the goods while under its control as a man of ordinary prudence would take of such goods and would be liable for

the loss, destruction etc, if it happens by its default or negligence. It is not for the plaintiff, in the first instance, to prove, when loss or destruction

occurs, as to how it happened. He has, no doubt, to satisfy that the defendant administration was negligent; but the duty of showing how the

consignment was dealt with during transit lies on the Railway Administration as matter within its special knowledge.

(9) In the case on hand, the learned Subordinate Judge has found that the fire which caused loss to the goods was due to the negligence of the

defendant and the learned counsel for the railways was not able to persuade us with reference to the evidence in the case, to take a different view.

The fire appears to have continued for about four hours in the wagon, and having regard to the running time between Makudi and Sirpur-

Kagaznagar, there can be no doubt that it should have taken place after the train left Makudi and before it reached Sirpur town. No one appears

to have noticed the fire at the latter station. This was done only at Sirpur-Kagaznagar. The burden is on the administration to show how the

consignment was dealt with during transit and when that has not been done to the satisfaction of the court, we are entitled to presume negligence

and that is the finding come to in this case. We accept this finding.

(10) The result is that the Union Government representing the railways are liable for the damage. The contention of the learned counsel, as we

understand it, appears to be that since the plaintiff had already been compensated by the insurance company, S. 41 of the Control Act applied

and, therefore, the plaintiff can have no further recourse against the railways. The cases relied on for the railways appear to make a distinction

between mere subrogation and assignment and take the view that in the case of an assignment wherein a promisee in this case, the plaintiff accepts

performance of the promise from a third person, like the Insurance Company, he cannot afterwards enforce it against the railways. Further, S. 41

does not apply to obligations in the nature of an executory contract, but only when the contract has in fact (244): AIR 1916 PC 68 (70)). Nor

does the fact that the Insurance company has made good the loss, prohibit the plaintiff from proceeding with the suit on the account. The contract

is between the plaintiff and the defendant and if as a result of loss or destruction of the consignment, the defendant was liable to make good the loss

to the plaintiff, it would be no defence to the plaintiff's action that the Insurance Company had paid to the plaintiff the amount for which the goods

were insured-Vide Parsram Parumal Dabrai Vs. The Air-India Limited, . We are, therefore, of opinion, that the dismissal of the suit for the amount

found due and payable by the defendant cannot be upheld..

(11) the decree of the learned Subordinate Judge dismissing the suit is accordingly set aside and the suit is decreed for Rs. 15,534 and pro-costs

both in the court below and in this court against the defendant.

(12). Appeal allowed.