

(1961) 12 CAL CK 0013

In the Calcutta High Court

Case No : Appeal from Original Decree No. 78 of 1959

Union of India

APPELLANT

Vs

Alliance Assurance Co. Ltd. and Another

RESPONDENT

Date of Decision : 07-12-1961

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 80
Transfer of Property Act, 1882 — Section 135A, 2, 4, 6(e)

Citation : 66 CWN 419

Hon'ble Judges : K.C. Sen, J;Bachawat, J

Bench : Division Bench

Advocate : G. P. Kar and R. M. Dutt, for the Appellant;R. C. Deb and P. K. Sen, for the Respondent

Final Decision : Dismissed

Judgement

Bachawat, J.—This is an appeal from a judgment and decree passed in a suit for money against the Union of India. On February 2, 1953 the defendant No. 2, The Good Year Tyre & Rubber Co. (India) Ltd. made over at Bansabati on the Eastern Railway 683 packages of tyres and tubes and/or other rubber accessories for the purpose of having the said goods carried to Delhi, a railway station on the railways formerly known as East Punjab Railway now known as Northern Railway. The railway administration accepted the goods for carriage under Railway Receipt No. 006797, dated February 2, 1953. The goods were short delivered and the railway administration at Delhi made out a shortage certificate and handed over the certificate to the consignee. The plaintiff, the Alliance Assurance Co. Ltd. had insured the goods under an insurance policy dated August 6, 1951 against risk of loss or damage whilst being conveyed by train or conveyance including risks of theft, pilferage and non-delivery. Having regard to the shortage certificate, the plaintiff as insurer of the goods paid to the assured the value of the goods short-delivered amounting to Rs. 4,210/11/-. On May 14, 1953 the assured assigned and transferred to the insurer all right, title and interest in respect of the goods and all rights and claims against any person or persons in respect thereof. The

letter of assignment also authorised the Insurance Company to use the name of the assured in any action which might be brought by the insurer against any third party. In the meantime, the plaintiff insurer by several letters dated May 9, 1953 lodged their claims with the Eastern Railway as also the Northern Railway. Notices u/s 77 of the Railways Act as also u/s 80 of the CPC were duly served. The plaintiff then instituted a suit against the Union of India claiming the sum of Rs. 4,210/11-, on account of the value of the goods short-delivered and Rs. 100/- as damages for detention of the goods. The assured, the ___Goodyear Tyre & Rubber Co. (India) Ltd. was also impleaded as defendant to the suit. The plaintiff averred that the Union of India owning and administering the two railways concerned had failed and neglected to deliver the goods to the consignee. The plaintiff submitted that the non-delivery was due to wilful neglect and misconduct on the part of the Railway Administration in not taking care of the goods while the same were in custody and control of the railways, adding that the plaintiff was unable to give particulars of the neglect and misconduct. The defendant No. 1, Union of India filed a written statement denying and disputing the allegations made in the plaint. The plaintiff called one witness who proved the non-delivery of the goods, their value as also the transfer and the assignment in favour of the plaintiff. The defendant No. 1 called no evidence. Several issues were raised at the trial of which issue No. 2 only is material. Issue No. 2 is follows:

Has the defendant No. 2 transferred or assigned to the plaintiff, the right, title and interest in the said goods? If so, what is the effect and validity thereof.

An issue as to the value of the goods was raised but the finding of the learned Judge on that issue is no longer challenged. The only point now urged is that the plaintiff has no right to sue the Union of India. The learned Trial Judge repelled the contention following a previous judgment of Bose, J., (as. he then was) in Suit_No. 3565 of 1949 (Alliance Assurance Co. Ltd. v. Union of India) decided by him on March 14, 1958 and decreed the suit. The Union of India has preferred this appeal from the decree and has urged before us also that the plaintiff is not entitled to maintain this suit. We have come to this conclusion that there is no substance in the contention.

2. On behalf of the appellant defendant No. 1 it is urged that on May 14, 1953, the assured defendant No. 2 had a mere right to sue the Union of India for damages for loss of goods and as such the transfer dated May 14, 1953 is a nullity and the plaintiff has no right of action against the Union of India. In support of the argument that the assured had a mere right to sue on May 14, 1953, the defendant No. 1 contends that on that date the goods had been lost by it. In our opinion this argument is baseless. The plaintiff claimed damages for non-delivery of the goods. The non-delivery of the goods is proved by oral evidence. The further allegation in the plaint that the non-delivery was due to the wilful misconduct and neglect of the defendant No. 1 in not taking proper care of the goods while the goods were in the custody of the defendant No. 1 and/or the Railway administration concerned is denied by the defendant No. 1 and is not

substantiated by the oral evidence The defendant No. 1 chose not to call any evidence to show that the goods have been lost in the sense that the goods are no longer in its custody. The goods are certainly lost to the plaintiff but there is no evidence to show that the defendant No. 1 had lost the goods on May 14, 1953 or thereafter. For all that we know, the goods are still lying with the defendant No. 1 and/or the railway administrations concerned. The correspondence -does not carry the matter any further. In substance the plaintiff was claiming reimbursement of the loss caused by the short delivery of the goods. The letter dated May 5, 1954 written by the Chief Commercial Superintendent, Northern Railway, Delhi, to the plaintiff shows that the railway administration understood the plaintiff's letters in that sense. The position, therefore, is this that the defendant No. 1 received the goods as the bailee thereof for carriage and delivery to the consignee. But the defendant No. 1 did not give delivery of the goods to the consignee and at the same time has chosen to withhold all evidence from the Court as to how the defendant had dealt with the goods. We must, therefore, proceed upon the assumption that the goods short-delivered were lying with the defendant on May 14, 1953. The assured who was the owner of the goods could lawfully assign and transfer not only the goods but all rights and claims against any person or persons in respect thereof. The assignment in question is an assignment of the goods and of all actionable claims in respect thereof. The assignment is not an assignment of a mere right to sue for damages. The real point in issue is whether the subject-matter of the assignment is property with an incidental remedy for its recovery or a bare right to bring an action; see (2) *Glegg v, Bromley*, (1912) 3 K.B. 474 at 490; (3) *Jiwan Ram v. Ratanchand*, 26 C.W.N. 285 at 290; (4) *N. C. Jute Mills Co., v. R. S. Navigation Co.*, AIR 1959 Cal. 35/2. The subject-matter of the assignment in this case is property with an incidental remedy for its recovery. The assignment is, therefore, not an assignment of a mere right to sue for damages and, as such, is not hit by section 6(e) of the Transfer of Property Act. Consequently, the plaintiff as the assignee of the goods and of all actionable claims in respect thereof is entitled to maintain this action.

3. Mr. Deb also argues that the plaintiff is entitled to maintain this action on the following other grounds:

1. The policy in question is a marine insurance policy within the meaning of section 135A of the Transfer of Property Act and as such in view of sub-sections 2 and 4 of section 135A of the Transfer of Property Act, the insurer is subrogated to all the rights and remedies of an insured in respect of the subject-matter of the insurance and is entitled to maintain the suit in its own name. He urged that Bose, J., as he then was, so held in his judgment delivered on March 14, 1958 in Suit No. 3565 of 1949 (1) (*Alliance Assurance Co. Ltd. v. Union of India*) and also that P. B. Mukharji, J., has also so held in the judgment under appeal.

2. In any event whether or not the policy is a marine insurance policy, the insurer on payment of the claim by the assured is subrogated to the rights of the

assured and as such the subrogee is entitled to maintain this suit in its own name, especially in view of the fact that the assured has been made a party defendant in this suit.

4. Having regard to our conclusions on the other points, it is not necessary to give any pronouncement on the additional arguments advanced by Mr. Deb.

5. In course of his arguments Mr. Kar has urged that the policy was governed by English law and consequently, the question of the validity of the assignment and transfer must be judged by English law. This argument is based upon a misapprehension. The insurance policy provided that the insurance was subject to English law and usage as to liability for any settlement of any and all claims. The policy did not and could not provide that any assignment of the claim of the insured in favour of the insurer also would be governed by the English law. Besides, assuming that the transfer and assignment is governed by English law, it is not shown that the assignment is invalid under the English law. There is no substance in this appeal. We pass the following order:

The appeal be and is hereby dismissed with costs.

K.C. Sen, J.

I agree.