

(1992) 01 BOM CK 0073
In the Bombay High Court
Case No : First Appeal No. 140 of 1984

Union of India

APPELLANT

Vs

United India Insurance Co. Ltd.

RESPONDENT

Date of Decision : 10-01-1992

Acts Referred:

Contract Act, 1872 — Section 69
Railways Act, 1890 — Section 73
Transfer of Property Act, 1882 — Section 135, 6

Citation : (1993) ACJ 437 : (1992) 94 BOMLR 357 : (1995) 82 CompCas 798 :
(1992) 2 MhLj 1193

Hon'ble Judges : V.A. Mohta, J;G.D. Patil, J

Bench : Division Bench

Advocate : K.A. Ghatpande, for the Appellant; R.K. Thakur, for the Respondent

Judgement

V.A. Mohta J.

1. This appeal by the Union of India represented by the General Manager, Central Railway, and the General Manager, Northern Railway, is directed against the judgment and decree for damages to the tune of Rs. 88,300 with consequential reliefs passed in favour of the respondent-plaintiff, the United India Insurance Co. Ltd.

2. Sagarmal Newatia and Sons (hereinafter referred to as "the firm") had despatched from Shegaon a Central Railway station - 100 bales of cotton to Jagajit Cotton Textile Mills Ltd. (hereinafter referred to as "the mills") at Fagwara, a Northern Railway station, under two different railway receipts Nos. D-114698 and D-114699, both dated May 25, 1979, and each for 50 bales. The firm was shown as the consignor and the mills as the consignee in the railway receipts. The goods despatched were insured with the plaintiff-insurance company. All the 100 bales were booked in one covered wagon No. CR 25562. When the goods reached the destination on June 16, 1979, it was discovered that they were badly damaged by fire as well as water and were transhipped during transit in a

different wagon No. CT 72393. The mills asked for open delivery on June 16, 1979. Actual delivery was taken on July 31, 1979. By consent of parties including the railway administration, a joint survey of goods was made by J. Lal and Co., the authorised surveyor, which assessed the loss at Rs. 74,260. Rupees 1,981 were paid as fees of the surveyor. The mills issued a notice u/s 78B of the Indian Railways Act, to the Central Railway as well as the Northern Railway, claiming a sum of Rs. 74,241 as damages caused due to negligence of the railway administration. The mills claimed the amount from the insurance company. The insurance claim was settled at Rs. 76,241 and the said amount was, in fact, paid to the mills by the insurance company. The mills thereafter executed a document dated September 4, 1979, styled as a letter of subrogation in favour of the insurance company, which thereafter gave a notice u/s 80 of the Civil Procedure Code, to both the Railways, reiterating the claim made by the mills earlier in the notice u/s 78B of the Railways Act and narrating in detail the circumstances under which it had acquired the right to recover the said amount from the railway administration. None of these notices were replied to. The suit claiming Rs. 74,260 as damages, Rs. 1,981 as surveyor's fee, Rs. 11,959 as interest and Rs. 100 as notice charges, totalling Rs. 88,300 was filed in the Court of the Civil Judge, Senior Division, Buldana.

3. The Northern Railway did not appear before the court though duly served with the suit summons. The Central Railway filed a written statement denying the negligence as well as the quantum of damages and questioning the right of the insurance company to sue. The Central Railway further averred that the wagon reached Bhusawal junction transshipment shed where it was marked "sick" for the purposes of repacking. The wagon was seen emitting smoke at about 12.09 hours on May 30, 1979. It was removed to the fire-fighting centre where fire was extinguished at about 15.00 hours. The Enquiry Committee reported that no definite cause could be attributed to the fire and hence the fire was classified as accidental.

4. The trial court after considering the documentary and the oral evidence adduced by the parties, held on all issues against the Railway administration. The trial court held that the damage was because of the negligence of the Railway administration, the quantum of damages as claimed was proved, and the suit by the insurance company without joining the consignee or the consignor was maintainable.

5. Three points are urged before us by Shri Ghatpande, learned counsel for the appellant :

(i) Only the consignor - and not the insurer - could file the suit.

(ii) Negligence of the Railway administration was not proved.

(iii) The quantum of damages was also not proved.

6. After hearing him and Shri Thakur, learned counsel for the insurance company,

and examining the record with their assistance, we see no merit in any of the above points, for the reasons that follow.

7. Point No. 1. - There is unimpeachable material on record to come to the conclusion that the firm had sold the goods to the mills and had also received its price. The bill (exhibit 30) prepared by the firm in the name of the mills, and the evidence of PW-1, Govindkumar, the representative of the firm, and PW-3, Harbanslal, the representative of the mills, clearly prove this. The mills was also the consignee of the goods as per the railway receipts and was entitled to receive delivery of goods at Fagwara in its own right. There was transit insurance of the goods. A sum of Rs. 74,260 as claimed by the mills against the Railway administration was fully paid by the insurance company to the mills. The evidence of PW-1, Govindkumar, PW-2, Nawanitlal, the representative of the insurance company and PW-3, Harbanslal, and the documents, such as railway receipt, insurance policy, receipt of payment, all prove that in ample measure. In consideration of the above payment by the insurance company in full and final settlement of the mills' claim under the insurance policy, the mills signed a letter dated September 4, 1979 (exhibit 41), styled letter of subrogation whereby the mills assigned and transferred in favour of the plaintiff the insurance policy and all its right, title and interest in respect of the said goods and claims against the Railway administration arising from loss, shortage, damage and non-delivery. The plaintiff was expressly authorised to bring any action or suit in relation to matters assigned and transferred.

8. In our view, having regard to section 69 of the Indian Contract Act and section 135 of the Transfer of Property Act, the insurance company had clearly acquired a right to sue the railway administration for the damage caused to the said goods, insured during transit by the insurance company. Section 69 of the Contract Act provides that a person who is interested in the payment of money which another is bound by law to pay and who, therefore, pays it, is entitled to be reimbursed by the other. u/s 135 of the Transfer of Property Act, 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, shall have transferred and vested in him all rights of suit as if the contract contained in the policy had been made with himself. In the instant case, we have already indicated how the property in the goods in the mills stood passed at the time of assignment/subrogation on September 4, 1979. Since this assignment or transfer was not of a mere right to sue, the transaction was not hit by section 6(e) of the Transfer of Property Act.

9. We are fortified in this view by decisions of at least three High Courts : (i) Vasudev Mudaliar Vs. Caledonian Insurance Co. and Another, , (ii) The Rajasthan Golden Transport Co. P. Ltd. Vs. The United India Fire and General Insurance Co. Ltd. and Another, , and (iii) United India Fire and General Insurance Co. Ltd. Vs. Pelaniappa Transport Carriers and Another, .

10. Strong reliance was placed on behalf of the Railway administration upon a

Supreme Court decision in Union of India (UOI) Vs. Sri Sarada Mills Ltd., . By a majority decision, the Supreme Court held, in that case, that the original insured could maintain a claim for loss and damages to the insured goods which was satisfied by the insurance company and even though there was subrogation of the insured's right to the insurance company. The Supreme Court, in that case, did not express any opinion on the question whether the letter of subrogation involved therein amounted to an assignment, because the insurance company had not sought to enforce any assignment. The Railway administration had not taken the specific plea based on assignment and dealing with that aspect the Supreme Court held that if that was done the mill would have impleaded the insurance company and the court could have in those circumstances been in a position to afford full and complete relief to the parties. The Supreme Court further held that the insurance company has chosen to allow the mill to sue, the cause of action of the mill against the Railway administration did not perish on giving the letter of subrogation and hence the said suit could not be dismissed on that technical ground. It would thus be seen that the factual background of that decision bears no similarity to the matter at hand and consequently the ratio of that decision would not apply.

11. We now turn to the point as to whether the mills which was neither the consignee nor the person who had taken the policy of insurance could make a valid assignment of the right to sue the Railway in favour of the plaintiff. We see no difficulty-legal or factual, the mills was not merely the consignee under the railway receipts but was also the owner of the goods not only when the assignment was made, but also at the time of despatch. It had every right to sue for damage to its goods. The Railway had accepted the mills as owner, as is clear from the joint survey report. In the process of settlement of the claim between the mills and the plaintiff, even the consignor had participated, as is clear from the documentary evidence. There was no dispute between the consignor, consignee or the plaintiff on the issue of rights of the consignee to sue u/s 135 of the Transfer of Property Act. The assignee of the policy in whom the property in the goods insured against fire vests, gets all the rights of suit as if he had made the contract of insurance. For all these reasons, the plaintiff had every right to file this suit.

12. Point No. 2. - Quite obviously, the damage is caused to the goods due to fire and thereafter due to water spread on them during transit. How the consignment was dealt with from time to time during transit was within the special knowledge of the railway administration, and hence the burden of disclosing and proving the matters within the special knowledge was on Railway administration. The Railway administration has not made full disclosures about the journey of the wagon and how it was dealt with from time to time. In the written statement it only says :

"Suit consignment contained in covered wagon booked ex Shegaon reached Bhusawal Transit Shed and it was marked sick for the purpose of repacking. The wagon was seen emitting smoke all of a sudden in the noon at 12.09 hours and

the said wagon was immediately removed to fire fighting unit in order to extinguish the fire. The fire was completely extinguished at about 15.00 hours."

13. The Railway administration has held an enquiry into the cause of the fire but those enquiry papers have not been placed on record. It is in the evidence that one Shri Patil noticed the fire for the first time. He has not been examined. The diary on the basis of which the witnesses of the defendant deposed was not produced. The wagon had become sick and was marked as such for repacking at the Bhusawal yard. No material is disclosed as to when the wagon was noticed as such. The defence about the time of noticing the fire and putting it off, is not proved by any documentary evidence. There is nothing on record even about the steps taken during a period of nearly 3 hours (12.09 hours to 15.00 hours). According to DW-1, Punachandra, the assistant yard master, the fire was extinguished within 10 minutes : According to DW-3, Deokilal, the in-charge of the fire fighting unit, the wagon was brought to the fire extinguishing centre at 12.30 hours and the fire was extinguished within 5 minutes. The pleadings and the evidence of different witnesses of the defendants do not tally, indeed they contradict. No evidence is led even about the steps taken for minimizing the loss to the goods and about the reasonable care the Railway administration as bailee had taken of the goods. It is true, section 73 of the Railways Act provides immunity to the Railway administration in respect of damages arising out of causes stated therein and fire is one of such causes, but the proviso leaves no doubt that it is for the Railways to show and prove that the damage took place in spite of reasonable care. This, therefore, is a case where the onus of proof of reasonable care is not discharged by the defendants leading to the inevitable conclusion that the damage was caused due to misconduct and negligence of the defendants. Indeed, this is also a case where adverse inference can be drawn against the Railways for non-production of certain evidence-documentary as well as oral.

14. In connection with the law of onus of proof in such circumstances and obligation of the Railway administration to take reasonable care of the goods as bailee, useful reference may be made to the following decisions :

(a) Union of India and Another Vs. Kalinga Textiles Ltd. Company and Another, .

(b) Union of India (UOI) and Another Vs. Orissa Textile Mills Ltd. and Another, .

15. Joint survey was made by the authorised surveyor, J. Lal and Co., with the aid of the Railway administration. PW-3, Harbanslal, has proved the report (exhibit 43) which was signed in his presence. Details of damages are given in the said report. There is no justification, under the circumstances, to reject the said report either on the merits or on the ground that the surveyor is not examined. The trial court is, on the whole, correct under the circumstances in determining the quantum of damages.

16. To conclude, the appeal is dismissed. No order as to costs.