
(1971) 11 GUJ CK 0007
In the Gujarat High Court
Case No : First Appeal No. 91 of 1964

Union of India	Vs	APPELLANT
Vulcan Insurance Co. Ltd. and Others		RESPONDENT

Date of Decision : 19-11-1971

Acts Referred:

Transfer of Property Act, 1882 — Section 135A(2)

Citation : AIR 1972 Guj 255

Hon'ble Judges : A.A. Dave, J

Bench : Single Bench

Advocate : M.M. Shah, for the Appellant; J.J. Shah and M.C. Patel, for M.D. Pandya, for the Respondent

Judgement

1. This appeal is directed against the judgment of the learned Judge, City Civil Court, Ahmedabad decreeing the plaintiff's suit for Rs. 4050 with future interest at the rate of 6% from the date of the suit till payment, against the Union of India, representing Western Railway, Central Railway and Eastern Railway.
2. The facts giving rise to this appeal in a nut-shell are as under:-
3. The plaintiff - Vulcan Insurance Company Limited filed a suit for recovering Rs. 4050 against defendant No. 1 viz. Union of India representing the Railways alleging that defendant No. 2 R. K. Dhand, owner of Arkay Traders had put an order with the Asiatic Machinery Corporation Private Limited i.e. defendant No. 4 in the suit to send five boxes of case iron plates by rail to defendant No. 3 Ambica Mills Limited, Ahmedabad. Defendant No. 4 accordingly despatched from Howrah as per railway receipt No. D-018605, invoice No. 173 of 5th December, 1956, goods worth Rs. 4000 of which defendant No. 2 was the owner. Defendant

No. 4 Asiatic Machinery Corporation Private Limited had despatched the said goods under the railway receipt which was assigned to self viz, in favour of the consignee itself with a blank endorsement. The said receipt was received by Arkay Traders which was in turn endorsed to Shree Ambika Mills Limited authorising it to take delivery of the goods at Ahmedabad Railway station. It transpires that the goods had not arrived at Ahmedabad and after making necessary inquiry and waiting for several days, it was ultimately found that the goods were lost in transit. Shree Ambika Mills Limited therefore returned the railway receipt to Arkay Traders informing them that the goods were not received. It may be noted that after the goods were despatched by Asiatic Machinery Corporation from Howrah, defendant No. 2 Arkay Traders had insured the goods with the plaintiff - company for the full amount that is for Rs. 4000. As the goods were not received and it was totally lost. Arkay Traders under the terms of the policy of insurance, recovered the said amount from the plaintiff - company, after recovering the said amount for the plaintiff - company, Arkay Traders in consideration of the amount of Rs. 4000 received from the plaintiff - company in full settlement of their claim for non-delivery of the goods under the policy of insurance, assigned and transferred all their rights against the railway administration and granting full power to the plaintiff - company to take all lawful ways and means in their own name and at their own risk and responsibility, to recover the said amount of damage or loss. Subsequently, Arkay Traders also informed the railway authorities about the transfer of their rights to the insurance company. The said letter was addressed to the Chief Commercial Superintendent, Western Railway informing him that Arkay Traders has received Rs. 4000 from the Vulcan Insurance Company Bombay in full and final settlement of their claim for non-delivery of the consignment and, therefore, they had no objection to their paying the amount of compensation to the said insurance company. The Vulcan Insurance company thereafter served a notice on the Union of India u/s 77 of the Indian Railways Act and also u/s 80 of the CPC as the railway failed to pay the said amount, it filed a suit to recover the said amount in the City Civil Court at Ahmedabad.

4. The Union of India by its written statement, Ex. 23 raised several contentions.

We are not concerned with all those contentions which have been negatived by the Court below and have not been raised before me. The only contention with which I am concerned in this appeal is that there was no privity of contract between defendant No. 1 and defendant No. 2 Arkay Traders and thus Arkay Traders had no right to sue on the strength of the railway receipt and claim damages from defendant No. 1. The plaintiff, therefore, had no right to institute a suit on the basis of subrogation as alleged. The other defendants remained absent and the suit proceeded ex parte against them. From the pleadings of the parties, the learned Judge framed several issues at Ex. 31 of which issue No. 6 is as under--

Has the plaintiff a right to file the suit as alleged"?"

The learned Judge recorded his finding in the affirmative and decreed the suit in favour of the plaintiff - company. Against the said judgment and decree of the learned Judge, the Union of India (original defendant No. 1) has preferred the present appeal to this Court.

5. Mr. M. M. Shah, learned Advocate for the appellants has merely questioned the right of the plaintiff - company to file the suit. He has not

canvassed any other points before me. The main contention raised by Mr. Shah is that in the instant case, in view of Section 135-A of the Transfer

of Property Act, the insurance company did not get any right, title and interest of the insured by mere subrogation and therefore the suit for

recovering the amount, the suit by the insurance company in its own name could not be tenable. Mr. Shah, in Bombay of his say, referred to a

recent Bombay decision which in a way supports his contention. I will refer to the said decision in order to find out whether thereto of the Bombay

decision could be applied to the instant case. Before I refer to the cases by the learned Advocates for the parties, it will be worthwhile to refer to

relevant section of the Transfer of Property Act. Section 135-A states as under:-

(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". It may be noted that under clause (2) of this section, if there is a total loss and if the insurer pays the full amount of the loss to the insured 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 respect of the subject-matter as from the time of the casualty causing the loss. Sub-clause (3) pertains to partial loss. In such a case, if the insurer pays for the partial loss to the insured persons, the insurer does not get any interest in the subject-matter insured but he is merely subrogated and he would be entitled to get indemnified for the payment made by him to the insured. Thus, there is a vital distinction between sub-clauses (2) and (3) of Section 135-A. Under sub-clause (2), the insurer gets interest in the subject-matter which the insured had therein. Bearing in mind, this distinction, I will now refer to the case of the Oriental

Fire and General Insurance Co. Ltd. Vs. American President Lines Ltd. and Another, , wherein the following observations were made:-

An insurer or an underwriter of goods carried by sea or otherwise but covered by a policy of marine insurance, who on payment of partial loss u/s

135-A(3) of the Transfer of Property Act, 1882, 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 wrong doer or tortfeasor in his own name to recover compensation for loss or damage due to the

assured. In cases falling u/s 135-A(2) of the Act, also the insurer will not be entitled to sue in his own name on the ground that the succeeds to the

rights and remedies of the assured.

The difference between subrogation u/s 92 of the Transfer of Property Act, 1882, and Section 135-A of the 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 135-A acquires rights only to the extent of his payment which may be less than the rights of the assured himself. Another distinction is

that the person who redeems u/s 91 is an interested person or a surety or a creditor and under that section that subrogee would get the rights

conferred u/s 69 of the Indian Contract Act, 1872 because it would be a payment made by a person interested; but in the case of subrogation u/s

135-A, the insurer pays under his own contract of insurance and he is not interested in discharging the liability of the wrongdoer or the tortfeasor.

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 conferred the right to sue. There are no such words in Section 135(2) and (3) as "against" the wrong-doer or tortfeasor.

The judgment of the Division Bench of the Bombay High Court has delivered by Nain, J., who was a member of himself and Chitale, J. After

referring to the history of the English Common Law, Nain, J., has observed:-

The English Common law doctrine of suborgation, which had been enacted in England in Section 79 of Marine Insurance Act, 1906, was enacted

in India verbatim in sub-sections (2) and (3) of Section 135-A, with the addition of sub-section (4).

He relied on the observations made by Sir John Beaumont, C. J., in the case of The National Petroleum Company Ltd. Vs. Popatlal Mulji, ,

wherein it was stated as under:-

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 cases 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. These cases are

a recognised exception 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.

Nain, J., then observed:-

That being normal provision of law one has to look for the conferment of an express right to sue in a statute providing for assignment. In India

actionable claims are 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 135-A 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-section (2) and (3) of Section 135-A 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., reported in *The National Petroleum Company Ltd. Vs. Popatlal*

Mulji, referred to hereinabove.

With greatest respect, I am unable to agree with the proposition of law enunciated therein. So far as the observations made by Beaumont, C. J.,

are concerned, they were made prior to introduction of Section 135-A in the Transfer of Property Act. In my opinion, therefore, the observations

made by Beaumont, C.J., would not be applicable to the facts of the instant case. Regarding the observations of the Bombay High Court in the

above case that a subrogee or an assignee shall have no right to sue in his own name seem to be rather too wider. It seems that these observations

made Beaumont, C. J., in the case of *National Petroleum Co., Ltd.*, referred to above. As stated earlier, there is distinct difference between sub-

clauses (2) and (3) of Section 135-A. In sub-clause (2) of Section 135-A, insurer who pays for the total loss would be entitled to take over the interest of the insured person in whatever may remain of the subject-matter so paid for and would thereby be subrogated to all the rights and remedies of the insured person in respect of that subject-matter. So far as partial loss is concerned, as stated in sub-clause (3), the insurer does not get interest of the insured but he is merely subrogated to all the 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. Thus, in the case of partial loss, it may be possible to hold that a mere subrogee would not be entitled to file a suit in his own name. But so far as the total loss is concerned when full payment is received by the insured from the insurance company, the insurance company gets all the interest of the insured in the subject-matter and it would be too much to say that the insurance company would not be entitled to take proper remedy for getting any damages in respect of the subject-matter from the third party by whose negligence, the said loss was occasioned. I am supported in my view by the case of Union of India (UOI) Vs. The Great American Insurance Co. Ltd. and Another, , where the Division Bench of the Calcutta High Court has taken a view contrary to the view taken by the Bombay High Court referred to earlier. There, the plaintiff insurance company had indemnified the owner for non-delivery of goods entrusted to the defendant Railway for carriage from Kodarma to Howrah under a policy of insurance and on such indemnification and on the oral express authority, the insurance company brought a suit against the railway to recover the said loss as damages for non-delivery of goods. The only point which was urged before the Calcutta High Court was whether the plaintiff company had any locus standi under the law to maintain the suit, wherein the following observations were made:-

The distinction between sub-secs. (2) and (3) of Section 135-A on this point lies in this, under sub-section (2), also , it may comprise a case of partial loss, where the loss can be fixed on an apportionable part of the subject-matter insured so as to bring it within the description "'a total loss of an apportionable part of the subject-matter insured'". In the case of sub-section (3), such fixation would not be possible as in the case of damage

by fire, which damaged in part some of the bales of jute of the disputed consignment and there was no total loss, either of the whole of the goods or of any apportionable part thereof. If it is a case under sub-section (2) of Section 135-A, the insurer, having paid for the loss of the apportionable part of the subject-matter insured, becomes entitled under that statutory provision, to take over the interest of the insured person in whatever may remain of the subject-matter, so paid for, and 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. In the case of sub-section (3), the insurer, paying for the partial loss, as contemplated therein, 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 the loss in so far as the insured person has been indemnified by such payment for the loss. The distinction between the two provisions is obvious. Under sub-section (2), the insurer takes 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". Under sub-section (3), 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". Under sub-section (3), his rights and remedies are of a limited character as he acquires no title to any portion of the goods insured. Under sub-section (2), however, the same cannot be predicated and obviously, the intention was that, thereunder the insure will get interest in respect of the subject-matter insured. On this vital distinction, it may well be said that, so far stands on a better footing, so far as the institution of suit by himself is concerned, and upon that ground, the decision of G. K. Mitter, J., as he then was in Indian Trade and General Insurance Co. Ltd. Vs. Union of India (UOI), , a case, dealt with under sub-section (3) by the learned Judge himself may well be distinguished and similar distinction may also be made of the relative observations of our learned brother B. C. Mitra, j., in Textiles and Yarn (P) Ltd. Vs. Indian National Steamship Co. Ltd., . Apart from that ,

however, it seems to us that the subrogation, contemplated both under sub-section (2) and under sub-section (3), would entitle the insurer to institute the suit in its own name. Essence of subrogation is substitution. Indeed, on this statutory subrogation, the insurer, on the wordings of the statute itself, becomes entitled to all rights and remedies of the insured person in respect of the lost goods, for which he has made the payment or indemnified the insured. From this point of view, this subrogation is wider than the subrogation, contemplated in this very act u/s 92 in the case of mortgages".

With respect,, I would prefer the view taken by the Calcutta High Court to the view taken by the Bombay High Court in the case reported at

Oriental Fire and General Insurance Co. Ltd. Vs. American President Lines Ltd. and Another, , referred to above. As observed by me earlier,

there is a vital distinction between sub-clauses (2) and (3) of Section 135-A. Subclause (2) says that when there is a total loss and if the insurer

pays for a total loss occasioned to the insured by the loss or non-delivery of goods, the insurer would be entitled to take over the interest of the

insured person in the subject-matter so paid for. Thus, in the case of a total loss, it cannot be said that he would not be entitled to file the suit in his

own name because sub-clause (2) itself says that on payment of full amount, he becomes entitled to take over interest of the insured person in

whatever may remain of the subject-matter so paid for. Merely because in section 135-A it is not specifically stated that insurer would be entitled

to file a suit in his own name as shown in sub-clause (2) of Section 130 of the Transfer of Property Act, it cannot necessarily be inferred nor could

it be spelt out from the omission of such a sub-clause in Section 135-A that the insurer after having paid the full amount for the total loss to the

insured would not be entitled to take suitable proceeding in its name against the person by whose fault the loss was so occasioned to the insured.

In my opinion, on the facts of the instant case, the insurance company would be entitled to file a suit in its own name. Ex. 104 is a letter of

subrogation dated 11.10.1957 executed by Arkay Traders in favour of Vulcan Insurance Company. The relevant portion of the said document is

as under:-

In consideration of your paying to us the sum of Rs. 4060.00 only Say Rupees

four thousand and sixty only, in full settlement of our claim for non-delivery under Policy No. M-82465 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 the said damage 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 expenses 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"".

After having executed this document, Arkay Traders informed the railway administration by their letter, Ex. 100 that they had received Rs. 4000/-

from the Vulcan Insurance Company, Bombay, in full and final settlement of their claim, for non-delivery of the consignment and therefore, they

had no objection to their paying the amount of compensation to the said insurance company. In view of these two documents, there is no doubt in

my mind that the Vulcan Insurance Company got all the rights, title and interest of the insured viz., Arkay Traders to take suitable action against the

railway administration for the loss occasioned for non-delivery of the goods and therefore, in my opinion, the Vulcan Insurance Company was

competent to file the suit in its own name to recover the amount from the railway administration. In my opinion, therefore, the decree passed by the

learned Judge below is proper under the circumstances.

6. In the result, the appeal fails and is dismissed with costs.

7. Appeal dismissed.