

(1963) 07 CAL CK 0021
In the Calcutta High Court
Case No : A.F.O.D. No. 48 of 1960

Union of India (UOI)

APPELLANT

Vs

Alliance Assurance Co. Ltd. and Another

RESPONDENT

Date of Decision : 25-07-1963

Acts Referred:

Transfer of Property Act, 1882 — Section 6

Citation : AIR 1964 Cal 31

Hon'ble Judges : R.S. Bachawat, J;A.K. Mukherjea, J

Bench : Division Bench

Advocate : Ramen Dutt, for the Appellant; P.K. Sen, for the Respondent

Final Decision : Dismissed

Judgement

Bachawat, J.—On the 7th June, 1954 the defendant No. 2 made over to the Eastern Railway administration represented by the defendant No. 1, 546 packages of tyres, rubber-goods and accessories for carriage from Bansbati, a station on the Eastern Railway to Lucknow, a station on the Northern Railways. The Eastern Railway administration accepted the goods for carriage and delivery to the defendant No. 2 at Lucknow. The goods were short delivered and a shortage certificate was issued to the defendant No. 2. The goods had been insured by the defendant No. 2 under an insurance policy dated the 6th August, 1951 issued by the plaintiff against risk of loss or damage whilst being conveyed by train or other 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 defendant No. 2 the value of the goods short delivered amounting to Rs. 3262/11/-. On the and August, 1954, in consideration of the aforesaid statement of the claim for shortage under the policy the defendant No. 2 assigned, transferred and abandoned to the plaintiff all then rights against the railway company caused or arising by reason of the damage or loss and granted to the plaintiff full power to take and use all lawful ways and means in the plaintiff's own name and to recover the damage or loss, and subrogated to the

plaintiff the same rights which the defendant No. 2 had in consequence of or arising from the said loss or damage. In spite of demand the defendant No. 1 did not pay the sum of Rs. 3262/11/- to the plaintiff. The plaintiff then instituted the suit claiming the aforesaid sum as damage for non-delivery of the goods short delivered and impleaded the assured as a proforma defendant. The learned Judge decreed the suit. Issue No. 2 raised at the trial was as follows :

"Did the defendant No. 2 transfer or assign their right, title and interest in the goods in suit to the plaintiff ? If so, what is the effect thereof ?"

The only point now urged on behalf of the appellant defendant No. 1 is that the plaintiff has no right to sue because on the 2nd August, 1954, the defendant No. 2 had a mere right to sue the defendant No. 1 for damages for loss of the goods and, as such, the transfer dated the 2nd August, 1954 was in contravention of Section 6(e) of the Transfer of Property Act and a nullity. This contention is baseless. The plaintiff claimed damages for non-delivery of the goods. This non-delivery 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 they were in the custody of the defendant No. 1 and/or the Railway administration concerned was denied by 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 had been lost in the sense that the goods were no longer in their 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. The defendant No. 1 did not give delivery of the goods and at the same time chose to withhold all evidence from the court as to how they had dealt with the goods. We must, therefore, proceed upon the assumption that the goods short delivered are lying with the defendant No. 1. On a true construction of the deed of assignment we think that the subject matter of the assignment are the goods short delivered together with the actionable claims relating thereto. Such an assignment is not a transfer of a mere right to sue for damages, and for the reasons given in *Union of India Vs. Alliance Assurance Co. Ltd.* and *Another*, is not hit by Section 6(e) of the Transfer of Property Act.

2. In *Bristol and West of England Bank v. Midland Ry., Co.* (1891) 2 QB 653 the plaintiffs as pledges sued the bailee for the recovery of the value of the goods alleged to have been wrongfully delivered by the bailee to a third party and it was held that the plaintiff's right of action was not affected by the fact they had acquired title to the goods after the date of the wrongful delivery to the third party. Fry, L. J., observed at pp. 663 and 664 :

"I think it is reasonable to say that the man who ought to have the goods shall not be allowed to set up a wrongful prior act by which he has made away with the goods. * * * The plaintiffs have a perfectly good common law title, independent of the Bills of Lading Act, under which they can sue the defendants in their character as pled-gees of these goods, and the defendants, not producing the goods, have no valid answer in saying, "we made away with them

before your title accrued".

The case of the defendant No. 1 in this case is much weaker. They have not even proved that they parted with the goods before the title of the plaintiff had accrued.

3. From whatever point the matter is looked at we see no defence to the present action. The plaintiff, as insurer, having paid the claim for shortage arising under the policy, has by way of subrogation an equitable right to all the claims of the assured against the carrier in respect of the shortage. The contract of insurance against loss is a contract of indemnity. On payment of the amount of the loss the insurer as indemnifier has an equitable right of subrogation to the claims of the assured against the carrier. But this equity does not give the insurer the right to sue the third party in his own name, see *K.V. Periyamianna Marakkayar and Sons Vs. Banians and Co.*, . In the absence of an assignment, the insurer who is subrogated to the rights of the assured can only sue in the name of the assured. But there can be no doubt that if after receiving payment from the insurer the assured obtained damages from the carrier, the Court would treat the assured as a trustee for the insurer to the extent of the payment received. And if it were necessary for the insurer to sue the carrier in the name of the assured, the Court would have compelled the assured to permit the use of his name on the usual terms. The true position, therefore, is that after receiving payment of their claim under the insurance policy, the assured defendant No. 2 was a bare trustee of all their rights of action against the Railway Administration concerned. Those rights of action were thenceforth held by the defendant No. 2 for the benefit of the plaintiff. In these circumstances, it cannot be said that the subsequent assignment of the right to sue is hit by Section 6(e) of the Transfer of Property Act. Such an assignment cannot be said to be a transfer of "a mere right to sue". The assignment enables the assignee to sue in his own name and to enforce the claim which was already held for his benefit by the assignor. In *King v. Victoria Insurance Co., Ltd.* 1896 AC 250 in a suit by the insurance company who had paid and discharged the claims under the insurance policy for the loss and damage to the goods caused by the defendant it was held that although the insurers could not by mere force of subrogation sue in their own name, yet that 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 (40 Vict. C. 84). corresponding with the English Judicature Act of 1875. On payment of the insurance money the insurance company obtained a formal assignment from the basis of all their rights and causes of action against the defendant for losses caused to certain wool, the property of the plaintiff. The assured bank stipulated that the assignment should not authorize the use of the assured's name in legal proceedings. It was contended on behalf of the defendant that a right of action arising out of a tort could not be said to be "legal chose of action" assignable under the statute. The, Supreme Court of Queensland observed that the term "legal chose in action" included all rights the assignment of which a Court of law or equity would before the Act have considered lawful and that the right in

question was a right of that kind. Their Lordships of the Privy Council chose to base their decision on a wider principle. Lord Hobhouse, J., observed thus at p. 256: "It is true that subrogation by Act of Law would, not give the insurer a right to sue in a Court of Law in his own name. But that difficulty is got over by force of the express assignment of the bank's claim, and of the Judicature Act, as the parties must have intended that it should be when they stipulated that nothing in the assignment should authorise the use of the bank's name. * * * They rest their judgment on the broader and simple ground that a payment honestly made by insurers in consequence of a policy granted by them and in satisfaction of a claim by the insured, is a claim made under the policy, which entitles the insurers to the remedies available to the insured."

The assignment in the instant case also gets rid of the technical difficulty that the insurer who has been subrogated to the rights of the assured cannot sue in his own name. The right of action was held by the assured for the benefit of the insurer. The subsequent assignment merely enables the insurer to sue in his own name.

4. It must also be remembered that the assured is a party, to the suit. In these circumstances we cannot understand why the Union of India is setting up this technical defence. Had the defendant No. 2 sued the Union of India, the latter would have, no possible defence to the action. As all interested parties are before the Court we see no difficulty in giving appropriate relief in the suit. It is well to remember in this connection the observations of Lord Porter, J., in AIR 1939 170 (Privy Council) :

"Nor, indeed would it matter that a wrong person had originally sued though he had no cause of action; See *Hughes v. The Pump House Hotel Co., Ltd.*, (No. 2) 1902-2 KB 485. Once all the parties are before the Court the Court can make the appropriate order and should give judgment in favour of all the persons interested whether they be joined as plaintiffs or defendants."

In the instant case we have a suit where, to say the least, the beneficiary is the plaintiff, the wrongdoer is the main defendant and the bare trustee is a proforma defendant. In such circumstances we see no difficulty whatsoever in passing a decree in favour of the sole beneficiary in the presence of the bare trustee.

5. There is no merit whatsoever in this appeal.

6. The appeal is dismissed with costs.

A. K. Mukherjee, J.

7. I agree.