
(1971) 03 CAL CK 0014
In the Calcutta High Court
Case No : A.F.A.D. No. 513 of 1963

Union of India (UOI)

APPELLANT

Vs

Gangabishan Banshilal

RESPONDENT

Date of Decision : 22-03-1971

Acts Referred:

Contract Act, 1872 — Section 41

Marine Insurance Act, 1963 — Section 79(1), 79(2)

Transfer of Property Act, 1882 — Section 135A(1), 135A(2)

Citation : (1971) ACJ 483 : AIR 1973 Cal 141 : (1973) 1 CALLT 441 : 75 CWN 730

Hon'ble Judges : Salil Kumar Datta, J

Bench : Single Bench

Advocate : Ajoy Kumar Basu, for the Appellant; C. Tondon and Giam Kaur, for the Respondent

Final Decision : Allowed

Judgement

Salil Kumar Datta, J.—This is an appeal by the defendant. Union of India as owning the concerned railway against a judgment and decree of reversal decreeing the plaintiff's suit. The plaintiff's case is that a consignment of 7 bales of cotton piece goods of which the plaintiff was the owner, was delivered to the railway at Ahmedabad on March 23. 1959 for carriage and delivery to Shalimar. Six bales of goods were delivered but one bale was not delivered to the plaintiff. In these circumstances, the plaintiff on due service of requisite notices instituted the instant suit on June 9. 1960 claim-ins damages for non-delivery of the goods valuing the suit at Rs. 1062.75 P as the value of the goods together with the excise_ duty, freight and higher market price. The suit was contested by the defendant by filing a written statement contending inter alia that the plaintiff had no locus standi to institute the suit and the requisite notices were not legal- valid or sufficient and not properly served.

2. In the course of trial before the learned Munsif it transpired that the insurer

had compensated the plaintiff for his total loss arising from the loss of the bale for which the suit was instituted long before the institution of the suit. A letter of subrogation was accordingly given by the plaintiff to the insurer, the General Assurance Society Ltd. as also a special power of attorney both dated October 5. 1959 whereby the plaintiff assigned, transferred and abandoned to the Insurance Company all his rights against the Railway Company or other persons whatsoever caused or arising by reason of the said damage or loss, giving all powers to the insurance company to take all lawful ways and means in its name or otherwise at its risk and expenses to recover the said damage or loss and subrogating to the Insurance Company the same rights he had in consequence of the said loss. This letter of subrogation was issued in consideration of the sum of Rs. 971,23P paid by the insurer to the plaintiff in full settlement of the plaintiff's claim for non-delivery under the policy issued by the Insurance Company in respect of the said consignment.

3. The learned Munsif on a trial on evidence held that by that subrogation the plaintiff divested himself of all rights and remedies available against the railway. It was accordingly held that the plaintiff had no locus standi to institute the suit and the suit as framed was not maintainable by him. It may be mentioned here that the Insurance Company was not a party to the said suit, which, in the premises, was dismissed.

4. An appeal was taken by the plaintiff against the said decision and the appellate Court took the view that the right to sue remains with the insured even after he subrogated his rights in favour of the insurer. Accordingly it was held that the plaintiff had the right to sue the railway and in view of the fact that a suit by the Insurance Company against the Union of India would by then be barred by limitation there could be no apprehension of another suit for the same claim by the insurer as observed by the trial Court. The plaintiff's suit was accordingly decreed by allowing the appeal before him. The present appeal is against the said decision by the Union of India.

5. The only point with which the present appeal is concerned is whether the suit is maintainable by the plaintiff in view of the payment to him by the insurer of the total loss by the Insurance Company claimed in the suit. It will be appropriate to consider the legal position in the light of the British statute and decisions thereon on which our law is based. The relevant British law about the rights of the insurer on payment is contained in Section 79. Sub-sections (1) and (2) of the Marine Insurance Act, 1906 (6 Edw. 7. c. 41). These two subsections are incorporated in our Transfer of Property Act. 1882 in its Section 135-A, Sub-sections (2) and (3). In our Marine Insurance Act, 1963 the above Sub-sections have been incorporated in Section 79 as its Sub-sections (1) and (2) and after coming into operation of the said Act on August 1. 1963, these Sub-sections have been deleted from the Transfer of Property Act. At the time, the cause of action in the present suit arose and its trial was held, the above two-sections were part, of Section 135-A of the Transfer of Property Act as stated above.

6. In Halsbury's Laws of England, 3rd Edn. Vol. 22 in Article 309 the General principle of subrogation was stated in the following manner:--

Article 309. General Principle of Subrogation.

"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 assured in whatever may remain of the subject-matter so paid for, and he thereby is subrogated to all the rights and remedies of the assured in and in respect of that subject-matter as from the time of the casualty causing the loss. Subject to the foregoing, 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 assured in and in respect of the subject-matter insured as from the time of the casualty causing the loss, in so far as the assured has been indemnified by the insurer for the loss".

Further in Article 311, the distinction between subrogation and rights arising on abandonment is stated as follows:--

Art. 311. "The rights given by subrogation must be distinguished from those resulting from abandonment in case of total loss. The insurers, by virtue of the abandonment, become entitled to the property in the thing insured and to all rights incident to the property; whereas, by subrogation, they become entitled to rights and remedies which may not depend upon the ownership of the thing insured".

7. It is thus clear that in British Law in cases of payment of the total loss, the insurer by abandonment becomes entitled to all rights of ownership of the thing that is lost; while by subrogation the insurer becomes entitled to the benefit of the claims and other remedies which may be independent of the ownership of the thing itself as was stated by Lord Blackburn in *Simpson v. Thomson* (1877) 3 AC 279 at p. 293. In Arnould's *British Shipping Laws* Vol. 10. The Law of Marine Insurance and Average Part 2 at page 1222 it is stated that in cases of subrogation the underwriter is only entitled to the benefit of such remedies, rights, or other advantages as the assured would himself be able to enjoy and the underwriter has no independent rights of his own and cannot even sue in his own name. In *King v. Victoria Insurance Co. Ltd.* 1896 AC 250 at P. 256 it was held 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 the difficulty is set over by the force of 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".

In the light of the above proposition, it is clear that in cases of payment of total loss by the insurer there is an abandonment of his rights by the insured and the

insurer by such abandonment becomes the owner of the thing that is lost This law has been laid down in Sub-section (2) of Section 135-A of the Transfer of Property Act as already noted while subrogation, which applies to the cause in which any loss is reimbursed by the party indemnifying whether it be partial or total, is incorporated in Sub-sections (2) and (3) of Section 135-A of the above Act. In the case of Indian Trade and General Insurance Co. Ltd. Vs. Union of India (UOI), it was held that where there was no assignment of the claim by the insured to the insurer the deed of subrogation gave the plaintiff insurer nothing more than what he would have u/s 235-A, Sub-section (3) of the said Act. There was no assignment of the subject-matter of the insurance and in absence of the same the plaintiff was not entitled to file a suit in "his own name. In the case of Textiles and Yarn (P) Ltd. Vs. Indian National Steamship Co. Ltd., it was held that the insurer cannot maintain an action in his own name although there is subrogation of the claims of the insured in his favour and in order to entitle the plaintiff insurer to maintain an action in his own name there must be an assignment of the claim by the insured in favour of the insurer.

8. In the case of Union of India v. Greet American Insurance Co. Ltd. in S. A. 381 of 1959, decided by a Division Bench of this Court on 16-3-1970 = (reported in AIR 1971 Cal 4911 the above Calcutta decisions. being of the single bench, were considered and it was observed by P. N. Mookerji, J. speaking for, the Court as follows:--

"Apart from that (that the above decisions were concerned with Sub-section (3)) however, it seems to us that the subrogation, contemplated both under Sub-sections (2) and (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 the statute itself, becomes entitled to all rights and remedies of the insured person in respect of lost goods, for which he had 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. u/s 92 the Subrogee becomes entitled to the rights only of the original mortgagee concerned. In spite of that, however, it has uniformly and consistently been held that, by reason of such acquisition of rights he was entitled to enforce them in the same manner as the original mortgagee concerned, or in other words, entitled to enforce them on that footing in his own name. We do not think a different situation was contemplated by using the same word in more comprehensive form in Section 135A, Sub-sections (2) and (3). This view is further strengthened and confirmed by reference to Sub-section (4) of this section

We would, accordingly, hold that the instant suit would be maintainable and the plaintiff insurance company would have locus standi to maintain the same in his own name, be it considered to be a case under Sub-section (2) or (3) of Section 135A. In this view, we are not prepared to accept the opinion on this aspect of law as expressed in Indian Trade and General Insurance Co. Ltd. Vs. Union of

India (UOI), relying inter alia on the observations of the Privy Council, in 1896 AC 250. The legislature in this country made a deliberate departure from that view, if it was really to the contrary, in Section 135A of the Transfer of Property Act, with which we are here concerned and the analogous Section 92 of the same Act".

9. The decision in *Alliance Insurance Co. Ltd. v. Union of India*, (1958) 62 Cal WN 539, a case under Sub-section (2). holding in favour of the maintainability of the suit by the insurer in his own name was approved. In case of *Union of India v. Alliance Insurance Co. Ltd.*, (1962) 66 Cal WN 419, the Court held that the assignment in question was an assignment of the goods and of all actionable claim in respect thereof and it was not an assignment of the mere right to sue for damages and as such not hit by Section 6(e). Accordingly the Insurance Co. was held entitled to maintain the action against the railway.

10. In the light of the above authorities the present case will have to be considered. There is no dispute in the present case that the payment by the insurer was of the total loss and accordingly Sub-section (2) would be attracted. On the authority of the case of *Great American Insurance Co. Ltd.* cited above, which is binding on me, there is no difficulty in holding that in the instant case, the suit would be maintainable by the Insurance Company. In view of the provision of the Sub-section (2), the Insurance Company became entitled to the rights of the insured in respect of the subject-matter and even on subrogation or the above authority the Insurance Company would thereby be entitled to institute the suit.

11. Mr. Ajay Kumar Basu, the learned Counsel for the appellants has referred me to the above decisions and submitted that on their authority, the present suit would be maintainable if it was filed only by the insurance company. Mr. C. Tondon, the learned counsel for the respondent has submitted that the above authorities only lay down that the suit by an insurance company would be maintainable, but even they are no authority for holding that a suit by the insured would not be maintainable, particularly in view of the provisions of the Special Power of Attorney whereby provision was made for institution of the suit in the name of the insured. The other contention of Mr. Tondon, that there was no assignment of the subject-matter of the claim, does not require any further consideration in view of the decision in *Great American Insurance Company's* case cited above.

12. We have seen that on the authority of the above decision, the insurer is entitled to maintain the suit in its own name and for its own benefit. The interest which the insured had in the subject-matter insured passed on the insurer on payment of the total loss under provisions of Sub-section (2) of Section 135A of the Act This being a rest-ins of interest under the statute, no document for such transfer of interest is necessary or called for, as contended, The insured on payment of the total loss was divested of all interest he had in the goods insured so that he had no further right or interest in the subject-matter and thus no

locus standi to sue for any damage arising from the loss of such goods. It" would also be inconceivable in law that separate suits by the insurer and the insured for the identical claim would be maintainable against the railway so as to put it under double jeopardy for damages for loss of the same consignment. Such liability is neither warranted by the Railways Act nor the Contract Act nor under the Code of Civil Procedure, as the insured, in such circumstances, will have no cause of action against the railway. The view of the appellate Court in granting a decree to the insured that the claim of the insurer against the railway had then become time barred is wholly erroneous, as it postulates that both the insured and the insurer had the right to sue and such proposition militates against the basic principles of law as discussed above. Even on mere subrogation that has come into operation by statute, the plaintiff, on the authority of the above decision, would have no right to sue. It must accordingly be held that the suit is not maintainable by the plaintiff.

13. There is another ground for which also the suit should fail. It was held in the case of Textiles and Yarn (P) Ltd. Vs. Indian National Steamship Co. Ltd., , relying on the case of Kapur Chand Godha Vs. Mir Nawab Himayatalikhan Azamjah, that where the plaintiff accepted the performance of the contract of a promise from insurer by receipt of his total claim, he would not be allowed to enforce the same against the defendant in view of Section 41 of the Contract Act. On this ground also, the plaintiff's suit against the railway is bound to fail for having accepted performance of the contract from the insurer.

14. In the result this appeal succeeds and is allowed and the judgment and decree under appeal are set aside and those of the trial Court restored. I however direct that the parties will bear their own costs throughout.