
(2003) 01 MAD CK 0004
In the Madras High Court

United India Insurance Co. Ltd.

APPELLANT

Vs

Muthulakshmi and Others

RESPONDENT

Date of Decision : 22-01-2003

Acts Referred:

Citation : (2006) 1 ACC 448

Hon'ble Judges : R. Jayasimha Babu, J;N.V. Balasubramanian, J

Bench : Division Bench

Judgement

N.V. Balasubramanian, J.—The plaintiff is the appellant. The defendant Nos. 1 and 2 are the legal heirs of one K.R. Raman who carried on

the goods transport business in the name and style, Sri Velmurugan Transport at Sattur. The defendant No. 3 booked a consignment on 15.6.1979

with the said Sri Velmurugan Transport for transporting certain boundles of matches from Mudukku Meendanpatti village, Sattur Taluk, Lalithapur,

Maharashtra State. The goods were transported by Sri. Velmurugan Transport through its lorry and the lorry on its way to the destination

overturned and fell and on account of heavy impact due to the said fall and the match bundles loaded in the lorry caught fire and the entire match

bundles were completely burnt. The defendant No. 3 who booked the consignment informed the plaintiff of the accident and also gave a notice to

the proprietor of Sri Velmurugan Transport claiming the value of the goods lost in fire. Proprietor of Sri Velmurugan Transport disowned his

liability. Since the goods were insured with the plaintiff by defendant No. 3 under Transit Insurance Scheme, plaintiff settled the claim of the

defendant No. 3 by payment of a sum of Rs. 75,530, being the value of the damaged goods on 10.12.1979. The defendant No. 3 executed on the

same day a letter of subrogation in favour of the plaintiff and also executed a Special Power of Attorney authorising the plaintiff to take necessary

legal proceedings on behalf of it against the proprietor of Sri Velmurugan Transport.

2. The proprietor of Sri Velmurugan Transport, Raman died and his legal representatives were shown as defendant Nos. 1 and 2 in the suit along

with the owner of the consignment, namely, the defendant No. 3 on the ground that the defendant No. 3 was colluding with defendant Nos. 1 and

2 and evading to join the plaintiff in filing the suit. Hence, the suit was filed for the recovery of a sum of Rs. 97,106.40 with interest of Rs. 75,530

from the date of plaint till the date of payment.

3. The defendant No. 3 remained exparte in the suit and defendant Nos. 1 and 2 contested the matter. The Trial Court, after framing necessary

issues, found that the accident had occurred due to negligence of the common carrier and it was only due to negligence on the part of the driver,

the accident had occurred. The Trial Court also found that on the basis of the document, viz., the deed of subrogation, Exh. A-12, the suit filed by

the plaintiff was maintainable and, accordingly, decreed the suit.

4. Defendant Nos. 1 and 2 preferred an appeal before this Court and the learned Single Judge has found that the tyre of the lorry was burst due to

negligence on the part of the carrier as the vehicle was not properly maintained by the carrier. Learned Single Judge accordingly confirmed the

finding of the Trial Court on the question of negligence and held that the accident had occurred due to negligence of the carrier. The learned Single

Judge, however, held that the letter of subrogation did not amount to assignment of policy to clothe the insurer to claim indemnity. The learned

Single Judge also held that under Exh. A-12 the right assigned was only a right to sue and not the right in the property and the suit filed by

Insurance Company was not maintainable. The learned Single Judge allowed the appeal holding that the plaintiff has no right to sue in its own

name. It is against the judgment and decree, the present appeal has been preferred.

5. We have heard Mr. B.T. Seshadri, learned Counsel for the appellant and Mr. K. Yamunan, the learned Counsel for the respondent Nos. 1 and

2. Though Mr. K. Yamunan, the learned Counsel for the respondents submitted

that the finding of the learned Single Judge that the loss occurred due to negligence on the part of the carrier is not sustainable yet we find that the Trial Court as well as the learned Single Judge of this Court, on appreciation of evidence, has correctly come to the conclusion that the loss occurred due to negligence on the part of the carrier. u/s 9 of the Carriers Act, 1865, it is for the common carrier to prove that the damage is due to act of God or alien enemies. The Trial Court and the learned Single Judge have found that the common carrier has not proved both the aspects and hence, the liability of the common carrier was not discharged.

6. The decision of the Supreme Court in Patel Roadways Ltd. v. Birla Yamaha Ltd. , is an authority for the proposition that the liability of a common carrier under the Carriers Act is that of an insurer, and in the case of claim of damage for loss to or deterioration of goods entrusted to a carrier it is not necessary for the plaintiff to establish negligence and the absolute liability of the carrier is subject to the exception where the loss or damage arises from an act of God. In the instant case, the accident could have been averted by certain amount of foresight of the owner of the common carrier and it is an accident which resulted from the action of the common carrier and the accident cannot be said to be an act of God. Accordingly, we confirm the said finding of the learned Single Judge that the accident occurred due to negligence on the part of the carrier in not properly maintaining the vehicle in question.

7. We are also of the view that the learned Single Judge was correct in his view that Exh. A-12 should be construed only as a letter of subrogation, though in the deed, the word "assignment" has been used. We have gone through the document Exh. A-12 and we find that the document does not amount to a letter of assignment as under Exh. A-12 what was transferred was only a right to sue and there was no transfer of interest in the property. In Union of India (UOI) Vs. Sri Sarada Mills Ltd., , the Supreme Court has held that u/s 6(e) of the Transfer of Property Act, 1882, a bare right of action for claims to damages for breach of contract or claims to damages for tort cannot be transferred because the law does not recognise the transaction which may favour of maintenance of champerty. The Apex Court also held that when there is only interest in the subject

matter, the transaction can be saved from the imputation of maintenance and the interest must exist apart from the assignment and to that extent,

must be independent of it. The Apex Court has held that the subrogation would not give the insurer a right to sue in a Court of law in his own name

as the subrogation is concerned solely with the mutual rights and liabilities of the parties to the contract of insurance and it confers no rights and

imposes no liabilities upon third parties who are strangers to the contract. It is clear that on facts of the case the goods did not exist on the date of

letter of subrogation. Hence, the mere use of the expression, "assignment of right in the property" in Exh. A-12 does not improve the case of the

plaintiff as the goods were not in existence on that date. Learned Single Judge was therefore correct in his view that Exh. A-1 2 does not assign the

policy and under Exh. A-12 only a right to sue was transferred which is prohibited u/s 6(e) of the Transfer of Property Act.

8. Though we are of the view that the learned Single Judge was correct in his view in the construction of the document Exh. A-12, we hold that the

learned Single Judge overlooked the fact that the plaintiff has included the defendant No. 3 in the array of parties to the suit and the plaintiff has

also claimed in the plaint that the defendant No. 3 was impleaded as a party/ defendant as it was evading to join the plaintiff as co-plaintiff in filing

the suit colluding with the defendant Nos. 1 and 2. Kerala High Court, in a similar circumstance, in *New India Assurance Co. Ltd. Vs. Okay*

Transport Corporation and Others, , noticed the decision of the Supreme Court in *Union of India (UOI) Vs. Sri Sarada Mills Ltd.*, , particularly,

the following passage to hold that such a suit is maintainable (para 21):

The defence of the railway administration was that the mill realised from the Insurance Company the damages and "as such the plaintiff (meaning

thereby the respondent mill) has no right to claim any sum in this action". If the specific plea of assignment had been taken in the written statement

the respondent mill would have impleaded the Insurance Company. The Court could have in those circumstances been in a position to afford full

and complete relief to the parties.

We are in respectful agreement with the view expressed by the Kerala High Court, it is axiomatic that the Court has the power to afford full and

complete relief to the parties when all parties are before the Court. Though the

plaintiff should have impleaded the insured as a co-plaintiff, since the defendant No. 3 was not willing to join the Insurance Company as a co-plaintiff, the plaintiff will be taking a great risk if the defendant No. 3 was impleaded as a co-plaintiff or if the suit was instituted on the power of attorney executed in its favour by the defendant No. 3. The defendant No. 3 also remained ex parte in the suit as well as in the appeal before this Court. We are, therefore, of the view that the Court has the full power to do complete justice between the parties and the defence raised by the defendant Nos. 1 and 2 that the insured is not a co-plaintiff is hypertechnical as the insured is before the Court though it figures as one of the defendants. We are of the view that when the Court finds that all the parties who are interested in the suit are before the Court, the Court has the necessary power to mould and grant the necessary reliefs. The defendant No. 3 has not disputed that it has received the money from the plaintiff in settlement of its claim, but the act of the defendant No. 3 and its unwillingness to participate in the Court proceedings show that it would not have joined the plaintiff as co-plaintiff. There can be no doubt that the Court has the necessary power to grant a decree in favour of the defendant No. 3 and then direct defendant No. 3 to pay the money realised out of execution of the decree to the plaintiff. Since the action of defendant No. 3 establishes that it was unwilling to participate in the Court proceedings as a co-plaintiff, we are of the view that the interest of justice would be met by granting a decree in favour of the plaintiff against the defendant Nos. 1 and 2.

9. Accordingly, the letters patent appeal stands allowed and the judgment and decree of the learned Single Judge is set aside and the judgment and decree of the Trial Court is restored, though not for the reasons stated by the trial Judge in his judgment. Accordingly, there will be a decree in favour of the plaintiff as against the defendant Nos. 1 and 2 as prayed for. The appellant succeeds to the above extent. However, in the circumstances, there will be no order as to costs.