

(1964) 01 MAD CK 0008
In the Madras High Court
Case No : Second Appeal No. 1251 of 1961

Vasudev Mudaliar

APPELLANT

Vs

Caledonian Insurance Co. and Another

RESPONDENT

Date of Decision : 03-01-1964

Acts Referred:

Contract Act, 1872 — Section 69
Motor Vehicles Act, 1988 — Section 96
Transfer of Property Act, 1882 — Section 130, 6

Citation : AIR 1965 Mad 159 : (1964) ILR (Mad) 901

Hon'ble Judges : Veeraswami, J

Bench : Single Bench

Judgement

Veeraswami, J.—This second appeal raises an important question as to the rights of an insurer to sue in his own name to recover damages

from a third party, by whose negligence the assured's car met with an accident and was totally damaged, but who was fully indemnified by the

insurer under a comprehensive policy. On that question, the courts below have differed, the lower appellate court, in a reversing judgment, holding

such a suit to be maintainable and decreeing the suit. One G. H. Morley had insured his car MSP 2228 with the Caledonian Insurance Co. the

plaintiff, against comprehensive risks for Rs. 4000. On 6-2-1955, on the Madras Bangalore road, a lorry MDJ 1099, coming from opposite

direction and after overtaking a bus, collided with the car causing serious damage to it. The insurer settled the claim of the assured at Rs. 3030,

treating the case as a total loss and itself taking over the damaged car. The insurer later sold it on 16-4-1955, for Rs. 1500 and brought the suit to

recover the balance of Rs. 1530 from the second defendant, the owner of the lorry, as loss and damages it had sustained by the wilful, gross, rash

and negligent driving of the lorry. The assured did not figure as a party to the suit either as a plaintiff along with the insurer or as a defendant. The basis of the insurer's claim in the suit was that it was subrogated to the rights of the assured against the defendants, including the right to sue and recover damages from them, and that, in any case, it held an assignment from the assured of all his rights. The factum of negligence by the second defendant's driver, which was in issue, is now concluded by the concurrent findings of the courts below, against the defendants, and this question is no longer reiterated in this court.

The second assistant Judge of the city Civil Court, who tried the suit was of the opinion that, though plaintiff had armed itself with a letter of subrogation from the assured to the latter's rights and remedies in respect of damages caused to his vehicle, such a right was not assignable and the latter did not validly clothe the insurer with the right to recover damages. On that view, he held that the suit was not maintainable. If it was, he added, that second defendant would be liable for the suit claim. The plaintiff, however, successfully appealed against that judgment. the Principal Judge, City Civil Court, who disposed of the appeal, thought that a formal assignment of the kind by the assured of his rights and remedies to the insurer was prohibited by S. 6(e) of the Transfer of Property Act, but held that the general principle of S. 69 of the Indian Contract Act together with the principles applicable to contracts of insurance under which in England, the insurer was able to get an assignment from the assured and institute a suit should help the plaintiff. His further view was that though S. 96 of the Motor Vehicles Act only enabled a third party, who had been injured by the insured car, to have his remedy against the insurer, the rights of the insurer should be treated as complementary to such rights of third parties against the insurer. He, therefore, decreed the suit against the second defendant.

2. On behalf of the second defendant, who is the appellant in this court, it is not contended that he is not liable, as held by the Principal Judge of the City Civil Court, if it be found that the plaintiff was entitled to maintain the suit in its own name. But, it is argued that, under the Indian Law, as evident from S. 6(e) of the Transfer of Property Act, there can be no valid assignment or transfer of a mere right to sue which was all the assured

in this case had. The argument is sought to be reinforced by reference to S. 130-A of the Transfer of Property Act, which expressly provides for transfer or assignment of a policy of marine insurance either before or after loss and by pointing out that this implied that in the absence of an express statutory provision as in the case of a policy of a marine insurance, other policies of non-marine insurance cannot validly be assigned after the loss. On the other hand, for the insurer, it is urged that in cases of total loss, where the insurer had indemnified the assured, the insurer is subrogated to the rights and remedies of the assured against third parties by whose negligence the damage is caused, by reason of which the insurer is entitled to sue in his own name to recover damages from such third party, that on this view, as a matter of fact, no assignment from the assured of his rights and damages to the insurer will be necessary and that under the English law if an insurer could not sue in his own name on the basis of subrogation but he could do so only on the basis of an assignment, it was because of the special rules of pleading there.

3. It is rather surprising that on a question so important as that, there appears to be not much of Indian authority directly bearing on it. But I think, on principles of English authority and having regard to the peculiar nature and effect of a contract of insurance providing cover for motor vehicles against risks, the view of the Principal Judge of the City Civil Court as to maintainability of a suit such as this brought by an insurer, is correct. But his judgment can be sustained, not on ground of subrogation, which is its basis, but on ground of assignment by the assured of his rights to the insurer.

4. A contract of motor insurance, like marine or accident insurance, is, in essence, one of indemnity. The underwriter, for consideration, guarantees the assured compensation against loss or risks, the limits of the guarantee against accident or loss or risks, the limits of the guarantee against accident or loss or damage suffered, totally or partially, being subject to the maximum stipulated in the contract of insurance. Conversely, the rights of the assured are not to profit out of the bargain. It is implied in the very nature of the contract of indemnity that the indemnifier is entitled to recoup or minimise the damages he is obliged to pay the assured, by ways and means the assured himself could resort to, in order to reimburse

himself against loss caused to him by third party negligence. Such a right of the insurer is, of course, conditional upon his having already indemnified

the assured. In other words, arising out of the nature of a contract of indemnity, the insurer, when he has indemnified the assured, is subrogated to

his rights and remedies against third parties who have occasioned the loss. This right of the insurer to subrogation or to get into the shoes of the

assured as it we, need not necessarily flow from the terms of the motor insurance policy, but is inherent in and springs from the principles of

indemnity. This is as a matter of law relating to indemnity, and the basis of the right is justice, equity and good conscience, namely, the indemnifier

should be in a position to reduce the extent of his liability within limits.

5. Where, therefore, an insurer is surrogated to the rights and remedies of the assured, the former is to be more or less in the same position as the

assured in respect of third parties and his claims against them founded or tortious liability in cases of motor accidents. But it should be noted that

the fact that an insurer is subrogated to the rights and remedies of the assured does not ipso jure enable him to sue third parties in his own name. It

will only entitle the insurer to sue in the name of the assured, it being an obligation of the assured to lend his name and assistance to such an action.

By subrogation, the insurer gets no better rights or no different remedies than the assured himself. Subrogation and its effect are, therefore, not to

be mixed up with those of a transfer or an assignment by the assured of his rights and remedies to the insurer. An assignment or a transfer implies

something more than subrogation, and vests in the insurer the assured's interest, rights and remedies in respect of the subject matter and substance

of the insurance. In such a case, therefore, the insurer by virtue of the transfer of assignment in his favour will be in a position to maintain a suit in his

own name against third parties. It is here, I think, the Principal City Civil Judge went wrong in his reasoning for his view that the insured's suit, in

his own name, was maintainable. As I indicated, however, his view as to maintainability of the suit is quite right. But the reason on which it is found

is wrong. I say he is right to sustaining the suit because the insurer had armed himself with an assignment from the assured.

6. I now turn to authority.

22 Halsbury's Laws of England, Simonds Edn. states in paragraph 512

that--""subrogation"" is a right inherent in all contracts of indemnity, and further--""the doctrine of subrogation applies to all contracts of non-marine insurance which are contracts of indemnity, such, as, for example, contracts of fire insurance, motor vehicle insurance and contingency insurance covering non-payment of money. It applies whether the loss is total or partial, and is a corollary of the principle of indemnity. By requiring any means of diminishing or extinguishing a loss to be taken into account it prevents the assured from recovering more than a full indemnity.

In paragraph 518, it is again stated:

Subrogation, in the strict sense of the term, expresses the right of the insurers to be placed in the position of the assured so as to be entitled to the advantage of all the rights and remedies which the assured possesses against third parties in respect of the subject matter..... The right does not arise until the insurers have admitted the liability to the assured, and have paid him the amount of the loss.

7. Shawcross on ""Motor Insurance"" which is a leading authority on the subject, in an elaborate discussion of the principles of subrogation as applied to motor insurance, mentions that the effect of the doctrine of subrogation is that the insurers are entitled to be placed in the position of the assured and to succeed to all his rights and remedies against third persons in respect of the subject matter of insurance, and explains that the test upon which the doctrine rests is the fundamental principle that insurance is a contract of indemnity. The author draws a distinction between subrogation and transfer and says:

The doctrine of subrogation does not apply so as automatically to transfer rights of action against third parties to the insurers, but it only entitles them, unless there has been an express agreement or transfer, to the benefit of such rights as are and remain vested in law in the assured. Actions, therefore, to enforce such rights must be brought in the name of the assured as a rule, and my defence which is valid against the assured as, for example, that he has released or compromised his right of action, is available to the defendant in such proceedings.

As regards rights of action, Shawcross, referring to *Castellain v. Preston*, 1883 11 Q.B.D.D. 380 and *Simpson v. Thomson*, 1877 3 A. C. 279

gives his view:

It is clear that amongst those rights and remedies of the assured to which the insurers succeed, and for the purposes of which they stand in his

shoes, are such rights of action as he was entitled to enforce towards the recoupment of that loss against which his insurers have provided

indemnity. It is equally clear, on the other hand, that the doctrine is one operative as a rule between insurers and assured only, and that the insurers

are therefore not entitled to proceed in their own names against such persons as may be liable to the assured in respect of the loss or liability

concerned. Thus, unless an express assignment of the assured's rights has been made to the insurers, which will entitle them without his intervention

to take action against third parties, the insurers must proceed in the name of the assured, who may be compelled to lend it for the purpose.

These two authorities clearly bring out the English principles of subrogation as implied in contracts of indemnity and the effect of subrogation as

distinguished from that of transfer or assignment as regards rights of action.

8. Normally, an assignment of a right of action for a tort is not valid. Such a right is but a bare right to sue, and the principle of non-assignability of

such a right of action has received statutory recognition under S. 6(a) of the Transfer of Property Act, But case of subrogation as applied to

insurance for indemnity are an exception to the rule. One justification may be that subrogation in such cases is brought about, not by assignment,

but by operation of law. But the decided cases in England appear to go further to hold that assignments by an assured to the insurer of his rights

and remedies are permissible and are valid. *King v. Victoria Insurance Co. Ltd.* 1896 A. C. 250 is one such authority. That was an interesting

case of an insurer, who, having paid the assured an indemnity, sued the Government of Queensland, a third party, whose negligence caused

damage to the assured, to recoup itself to the extent of the indemnity paid. The insurer sued in its own name, and one of the contentions before the

Privy Council was that the insurer could not maintain the action in its own name. Lord Hobhouse, speaking for the Board, overruled the contention

in these words:

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 the difficulty is to overcome 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.

Thus, this view of the law never since appears to have departed from in English courts. Though the facts in 1883 11 Q. B. C. 380 which was

decided by the English Court of Appeal were different, the doctrine of subrogation as applied to contracts of insurance, as in this case, has been

elaborately discussed and it is made clear that by reason of subrogation, defined as it is in a wide sense the, will not by itself enable the insurer to

maintain an action in its own name to recover from third parties in order to recoup itself. In my opinion, these well established English principles of

the law of insurance, as applied particularly to contracts of indemnity in insurance, are part of the laws of this country as well. They are founded not

only on the nature of insurance involving indemnity, but also on equitable principles and business consideration.

9. It is true that S. 130-A of the Transfer of Property Act provides for the transfer or assignment of a policy of marine insurance; but I do not

accept the argument for the appellant that this express enabling provision means that impliedly assignment of insurance policies either before or

after loss, is prohibited. Section 6(e) of the same Act forbids only transfer of a mere right to sue. It seems to me that an assignment or a transfer by

an assured of his rights and remedies to the insurer is not of a mere right to sue, and is, therefore not within the statutory inhibition. 1896 AC 250 is

in effect an authority for it. This case was referred to by a Division Bench of this court in *Seetamma v. Venkataramanayya*, ILR 38 Mad 308:

AIR 1916 Mad 473 and was distinguished for purposes of S. 6(e) by pointing out that the right of an insurer under a contract of insurance to be

subrogated to the rights and remedies of the assured could not be regarded as arising merely from the transfer of a mere right of action. An

assignment of such a right is not on a par with an assignment of a claim for past mesne profits or a claim for damages for negligence and is not hit

by S. 6(e). *Union of India Vs. Alliance Assurance Co. Ltd. and Another*, takes the same view.

10. I hold, therefore, that the assignment in favour of the respondent-insurer clearly entitled it to sue the defendant in its own name. The second

appeal fails and is dismissed with costs of the first respondent. No leave.

11. Appeal dismissed.