Union of India

Vs

Sri Sarada Mills Ltd.

Civil Appeal No. 1045 of 1967

(A. N. Ray, K. K. Mathew, I. D. Dua JJ)

28.09.1972

JUDGMENT

RAY, J. -

1. We have had the advantage of reading the judgment written by our learned brother Mathew.

2. The question which falls for determination in this appeal is whether the respondent mill on recovering Rs. 32,254-6-9 from India Globe Insurance Co. Ltd. and assigning all rights against the Railway Administration in favour of the insurance Company as a subrogee was competent to institute and maintain the suit against the Railway Administration.

3. We agree with the reasoning and conclusion of our learned brother Mathew that subrogation does not confer any independent right on under-writers to maintain in their own name and without reference to the persons assured an action for damage to the thing insured. The right of the assured is not one of those rights which are incident to the property insured.

4. Counsel for the appellant contended that by reason of the assignment to the insurance company of all rights against the Railway Administration the respondent mill did not have any cause of action against the Railway Administration. In aid of that contention the decisions in King v. Victoria Insurance Limited (1896 AC 250.), and Compania Colombiana De Seguros v. Pacific Steam Navigation Co. ((1965) 1 QB 101.), were relied on.

5. In the Victoria Insurance Company case (supra) the Bank of Australia effected an insurance with the insurance company of certain goods to be shipped to London. Before the cargo left Australia it was damaged or destroyed through the negligence of the defendant King, an employee of the Queensland Government. The bank claimed a sum from the company which was duly paid. The company took an assignment by deed of all the rights of the bank against King subject to a stipulation that the Bank's name should not be used in legal proceedings. The questions raised on appeal in that case were : (1) the plaintiffs have no right of action at all; (2) they have no right of action in their own name. The Supreme Court of Queensland held that mere payment by the insurance company did not subrogate them to the rights of the bank of the extent that they could sue in their own names. The Supreme Court of Queensland held that the assignment was covered by the Queensland Act which correspond to the English Judicature Act of 1873. The Queensland Supreme Court construed the term 'legal chose in action' to include all rights the assignment of which a Court of law or Equity would before the Act have considered lawful. On that ratio, the right covered by the assignment in Victoria Insurance Company case (supra) was held to be a right of that kind. The Judicial Committee upheld the decision and said "They rested their judgment on the broader and

simpler ground that a payment honestly made by the 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 Judicial Committee on this view said that "the highly artificial defence of the Queensland Government fails".

6. It should be noted here that the phrase 'legal chose in action was said in the Victoria Insurance Company case (supra), to mean' lawfully assignable' chose in action. A legal chose in action is something which is not in possession, but which must be sued for in order to recover possession of it. A legal chose in action does not include a right of action, such as, for instance, a right to recover damages for breach of contract, or for a tort, for it that were so, such a right would be assignable. They would materially affect the law of champerty and maintenance.

7. In the Pacific Steam Navigation Co. case (supra), the Pacific Steam Navigation Company by a bill of lading acknowledged the shipment of 183 drums of electric cable at Liverpool for carriage to and delivery at a port in Colombia to the Colombia Telephone Co. The electric cable was insured on behalf of the Telephone Company. The insurance company paid the telephone company in respect of the particular average loss. The telephone company on receipt of the payment handed to the insurance company two documents. By the first document, the telephone company ceded and endorsed to the insurance company "all rights which we have or which we may acquire in the future to claim reimbursement thereof from the third parties who may be responsible for loss or damage". By the second document the telephone company waived in favour of the insurance company "any rights he may have or has against others possibly responsible for the damages or losses indemnified by this payment, and we agree not to carry out any act that might in any way hinder the carrying out of such rights by the insurance company". The insurance company alleged that the documents went further than a form of letter of subrogation and constituted a valid assignment by the telephone company to the insurance company of the telephone company's claim against the defendants. The Court found that the language of the documents was that of assignment. The question was whether the Court would permit the enforcement of the claim in the name of the assignee or whether the assignment would be of a bare cause of action to defeat assignment and its enforcement.

8. The decision in May v. Lane (64 LJQB 236.), was referred to in the Pacific Steam Navigation Co. case (supra) for the proposition that a legal chose in action is something which is not in possession, but which must be sued for in order to recover possession of it. A legal chose in action does not include a right of action, such as, for instance, a right to recover damages for breach of a contract, or a legal right to recover damages arising out of an assault.

9. Again, in Torkington v. Magee ((1902) 2 KB 427.), it was said that the words "other legal chose in action" mean right which the common law looks on as not assignable by reason of its being a chose in action, but which a court of equity deals with as being assignable.

10. In the Pacific Steam Navigation Co. case (supra), the insurance company was found entitled to sue upon the bill of lading. A bill of lading confers title to sue because it is a form of property. The reason for allowing the insurance company to sue in that case was that equity before the Judicature Act allowed the enforcement of subrogation because equity never regarded subrogation as the enforcement of a bare cause of action, but as the enforcement of a cause of action legitimately supported by the under-writer's interest in recouping himself in respect of the amount of the loss which he had paid under the policy as a result of the acts, neglects or defaults of the actual contract breaker or tortfeasor. The assignment in that case was held to amount to assignment of the benefit of the contract with the ship-owners.

11. It is indisputable that an insurance company can sue in its own name where the marine policy has been transferred by assignment under Section 52 of the Marine Insurance Act, 1963. That is not the present case.

12. It is equally indisputable that an insurance company is entitled to subrogation in accordance with the provisions of Section 79 of the Marine Insurance Act, 1963. Subrogation does not allow the subrogee or the underwriter to sue in its own name. In the present case, the insurance company has not enforced its claim by virtue of subrogation.

13. Section 130 of the Transfer of Property Act however speaks of transfer of actionable claim. Actionable claims under the Indian Law include claims recognised by the Court either as to unsecured debts or as to beneficial interests in movable property not in possession. A debt is an obligation to pay a liquidated or certain sum of money. A beneficial interest in movable property will include a right to recover insurance money or a partner's right to sue for an account of a dissolved partnership or a decretal debt or a right to recover the insurance money or the right to claim the benefit of a contract not coupled with any liability.

14. Section 6(e) of the Transfer of Property Act states that a mere right to sue cannot be transferred. A bare right of action might be claims to damages for breach of contract or claims to damages for tort. An assignment of a mere right of litigation is bad. An assignment of property is valid even although that property may be incapable of being recovered without litigation. The reason behind the rule is that bare right of action for damages is not assignable because the law will not recognise any transaction which may savour of maintenance of champerty. It is only when there is some interest in the subject-matter that a transaction can be saved from the imputation of maintenance. That interest must exist apart from the assignment and to that extent must be independent of it.

15. A chose in action for breach of contract was not assignable at law but was assignable at equity. A chose in action in tort was assignable neither in law nor in equity. A bare right of action is not assignable. When however the right of action is one of the incidents attached to the property or contract assigned it will not be treated as a bare right of action.

16. In Ertel Bieber & Co. v. Rio Tinto Co. (1918 AC 260.) Lord Sumner treated a cause of action for damages for breach of contract as chose in action, a form of property. The reason for holding a cause of action for damages for breach of contract to be a form of property is that the assignee is seeking to enforce a right which is incidental to property or a right to a sum of money which theoretically is part of the property.

17. The common law was not include in favour of assignments of contractual rights and liabilities. A person to whom rights were assigned could not sue in his own name at common law. In equity both legal and equitable choses in action have been subject to assignment. Contractual rights being legal choses in action could generally be assigned. It is on these reasonings that the term 'thing in action' in the Law of Property Act has been interpreted in the Victoria Insurance Co. case (supra) and the Pacific Steam Navigation Co. case (supra), to include any right which the common law looked on as not assignable by reason of its being chose in action but which a court of equity dealt with as assignable.

18. In the present case, the insurance company has not sued to enforce any assignment. The document which is described as letter of subrogation also uses the words of assigning rights against the Railway Administration. It is not necessary to express any opinion whether the letter of

subrogation amounted to an assignment in the present case, because the insurance company has not sought to enforce any assignment.

19. The respondent mill will give a valid discharge to the Railway Administration in respect of loss and damages. This decree will be a bar to the institution of any suit by the insurance company in respect of the subject-matter of the suit. The respondent mill is answerable and accountable to the insurance company for the moneys recovered in the suit of the extent the insurance company paid the respondent mill.

20. The High Court expressed the view that even if the assignment is valid the right of action residing in the assignor has not ceased. The respondent mill sued the Railway Administration for breach of contract of carriage and damages for negligence. The letter of subrogation did not divest the mill of its cause of action against the Railway Administration for loss and damages.

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.

22. In the present case the insurance company and the mill proceeded on the basis that the insurance company was only subrogated to the rights of the assured. The letter of subrogation contains intrinsic evidence that the respondent would give the insurance company facilities for enforcing rights. The insurance company has chosen to allow the mill to sue. The cause of action of the mill against the Railway Administration did not parish on giving the letter of subrogation.

23. For these reasons, we regret our inability to agree with our learned brother Mathew that the respondent mill has no cause of action. We agree with the decision of the High Court that the suit should be decreed. The appeal is therefore dismissed with costs.

Mathew, J. (dissenting) - This is an appeal, by certificate, against the judgment of the High Court of Madras allowing an appeal preferred by the plaintiff against the decree of the trial court dismissing the suit instituted by it for recovery of damages.

25. The plaintiff, Sri Sarada Mills Ltd., instituted the suit against the Union of India as representing the Central and Southern Railway for damages to 100 bales of F.P. cotton consigned through their agents from Nagpur to Rodhanur under a railway receipt issued by the Central Railways. The goods had to pass through several stations along with the two railways, namely, the Central and the Southern, before it arrived at Podhanpur. When the goods arrived at Podhanpur, it was found that 87 bales out of the 100 were burnt and charred and that 13 bales were loose and short in weight. When the plaintiff applied for open delivery, the railway authorities at Podhanpur got the damage surveyed, and issued a certificate of damage and shortage. The plaintiff claimed damages against the Railway Administration. But the Chief Commercial Superintendent, Southern Railway, informed the plaintiff that the consignment was involved in a fire accident at Sirpur Kagaznagar on the Central Railway, that the cause of the fire was unknown and that the Railways were not liable for the damage caused to the goods as there was no negligence or misconduct. The plaintiff, therefore, instituted the suit for damages alleging that the Railway Administration was negligent.

26. The defendants contended that the plaintiff was not entitled to institute the suit as it had insured

the goods with the Indian Globe Insurance Co. and had received the total loss from the Company, that the damage to the goods was caused by fire, which was beyond the control of the Railways and, therefore, the defendants were not liable for damages.

27. The trial court found that the fire which caused the damage to the goods was not due to any cause beyond the control of the Railways and that the damage was due to their negligence. It, however, held that the suit was not maintainable as the Indian Globe Insurance Co., with whom the goods were insured under a marine insurance policy, had paid the plaintiff an amount of Rs. 32,254-6-9 for total loss of the goods and was subrogated to all the rights and remedies of the assured in respect of the subject-matter and so the plaintiff was not competent to institute to suit and hence dismissed the suit.

28. The plaintiff appealed to the High Court of Madras. The Court reversed the decree holding that the plaintiff was entitled to maintain the suit and that, damage to the goods was on account of the negligence of the Railways.

29. In this appeal, two submissions were made on behalf of the appellants : (1) that there was no evidence to show that the Railway Administration was negligent in dealing with the goods; and (2) that the suit was not maintainable.

30. As regards the first contention, the finding of the trial court as well as of the High Court is that the Railway Administration was negligent. The liability of a Railway is that of a bailee and it is not for the plaintiff, in the first instance, to prove, when the goods consigned were destroyed or damaged, as to how the loss or damage occurred. It has, no doubt, to satisfy the court that the Railway Administration was negligent but, the duty of showing how the consignment was dealt with during the transit lay on the Railway Administration as it was a matter within their exclusive knowledge. The trial court found that the fire which caused damage to the goods was due to the negligence of the Railway Administration and the High Court was not persuaded to come to a contrary conclusion. The burden was on the Railway Administration to show how the goods consigned were dealt with during transit and, when that has not been done to the satisfaction of the Court, the Court was entitled to presume negligence on the part of the Railway Administration. I see no grounds to interfere with the concurrent findings on this point.

31. The second question which was argued at considerable length relates to the maintainability of the suit. It may be noted at this stage that the Globe Insurance Co. paid the total loss to the plaintiff on August 3, 1956, the assured assigned all its rights, including the right to sue to the Insurance Company on July 31, 1956, and the present suit was filed on June 14, 1957. It was submitted on behalf of the appellant that the view of the High Court that the suit was maintainable overlooked the clear provisions of Section 135-A of the Transfer of Property Act, as that section was a bar to the suit by the assured Section 135-A was as follows (this section has since been deleted from the T.P. Act and incorporated in the Marine Insurance Act, 1963) :

> "153-A. (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 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.
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> (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 indemnified by such payment for the loss.
>
> (4) Nothing in clause (e) of Section 6 shall affect the provisions of this section."

This section was inserted in the Transfer of Property Act, 1882, by the Transfer of Property (Amendment) Act, 1944. Before the amendment, the assignment of rights under both marine and fire insurance policies was governed by Section 135. What the amendment did was to take marine insurance policies out of Section 135 and provide for them in the new Section 135-A. The Bill that became the Transfer of Property (Amendment) Act, 1944, stated the objects and reasons as follows :

> "The rules and principles governing a marine insurance policy being materially different from those governing a fire insurance policy, it is very unsatisfactory to accord the same treatment in the matter of assignment of both categories of policies. To take but one instance, a fire insurance policy is not assignable after loss, but the nature of a marine insurance contract is such as to require that marine insurance policies should be assignable even after loss. In the United Kingdom, assignability of marine insurance policies after loss in placed beyond doubt by Section 50 of the Marine Insurance Act. But in the absence of a similar provisions here, it is doubtful it Courts in British India would hold that they are so assignable."

It was the contention of the appellant that when the Globe Insurance Co. paid the assured the total loss, it became subrogated to all the rights and remedies of the assured in respect of the subject-matter and that thereafter the Insurance Company alone could file a suit for recovery of damages against the Railway Administration.

32. The application of the doctrine of subrogation to policies of marine insurance is based upon the fundamental principle that the contract of insurance contained in a marine policy is a contract of indemnity, and of indemnity only.

33. The expression "subrogation", in relation to a contract of marine insurance is no more than a convenient way of referring to those terms which are to be implied in contract between the assured and the insurer to give business efficacy to an agreement whereby the assured, in the case of loss against which the policy has been issued, shall be fully indemnified, and never more than fully indemnified.

34. The right of the insurer against the person responsible for the loss, does not rest upon any relation of contract or of private between them. It arises out of the nature of the contract of marine insurance as a contract of indemnity, and is derived from the assured alone, and can be enforced in his right only.

35. Sub-section (1) of Section 135-A corresponds to Section 50(2) of the (English) Marine

Insurance Act, 1906, and sub-sections (2) and (3) of Section 135-A to sub-sections (1) and (2) respectively of Section 79 of that Act. In Yorkshire Insurance Co. Ltd. v. Nisbet Shipping Co. Ltd. ((1962) 2 QB 330.), Diplock, J., as he then was had to deal with the question of subrogation. He said that the doctrine of subrogation in insurance law requires one to imply in contracts of marine insurance only such terms as are necessary to ensure that, notwithstanding that the insurer has made a payment under the policy, the assured shall not be entitled to retain, as against the insurer, a greater sum than what is ultimately shown to be his actual loss. As Cotton, L.J., said in Castellain v. Preston (11 QBD 380, 395.), "..... if there is a money or any other benefit received which ought to be taken into account in diminishing the loss or in ascertaining what the real loss is against which the contract of indemnity is given, the indemnifier ought to be allowed to take advantage of it an order to calculate what the real loss is".

36. So the only term to be implied to give business efficacy to the contract between the parties is that necessary to secure that the assured shall not recover from the insurer an amount greater than the loss which he has actually sustained. The insurer has contracted to pay to the assured the amount of his actual loss and if, before the insurer has paid under the policy, the assured recovers from some third party a sum in excess of the actual amount of the loss, he can recover nothing from the insurer because he has sustained no loss, but it has never been suggested that the insurer can recover from the assured the amount of the excess. Lord Blackburn in his speech in Burnard v. Rodocanchi, Sons & Co. ((7 App Cas 333, 339.), said :

> "The general rule of law (and it is obvious justice) is that where there is a contract of indemnity (it matters not whether it is a marine policy, or a policy against fire on land, or any other contract of indemnity) and a loss happens, anything which reduces or diminishes that loss reduces or diminishes the amount which the indemnifier is bound to pay; and if the indemnifier has already paid it, then, if anything which diminishes the loss comes into the hands of the person to whom he has paid it, it becomes an equity that the person who had already paid the full indemnity is entitled to be recouped by having that amount back."

37. That the insurer is entitled to recoupment only for the loss for which he has paid and to the extent of his payment is clear from what Lord Atkin said in Glen Line v. Attorney-General ((1930) 46 TLR 451.) :

> "Subrogation will only given the insurer rights up to 20 sh. in the pounds on what he has paid."

38. In King v. Victoria Insurance Co. Ltd. (1896 AC 250, 255-6.), Lord Hobhouse, made it quite clear that, under the doctrine of subrogation an insurer was entitled to recover from the assured only "to the extent of the payment" made to the assured by the insurer under the policy :

> "As between the insurer and the assured, the insurer is entitled to the advantage of every right of the assured whether such right consists in contract, fulfilled or unfulfilled, or in remedy for tort capable of being insisted on or already insisted. But as stated by the Privy Council in King v. Victoria Insurance Co. Ltd. (supra).
>
> Subrogation by act of law would not give the insurer a right to sue in a Court of law in his own name."

Subrogation is concerned solely with the mutual rights and liabilities of the parties to the contract of insurance; it confers no rights and imposes no liabilities upon third parties who are strangers to that contract and, the insurer who has paid a loss gets no direct rights or remedies against anyone other than the assured nor can sue such parties in his own name (see Simpson v. Thomson.)" ((1877) 3 App Cas 279 HL.)

39. It was argued on behalf of the appellant that clause (4) of Section 135-A would indicate that the Legislature intended to make a departure from the common law of England and to confer a right of suit upon the subrogee against third persons. I do not think that clause (4) has any such effect. It only says that nothing in Section 6(e) of the Transfer of Property Act will affect the provisions of that section. An assignment of marine insurance after loss would sound in the realm of an assignment of a mere right to sue and the Legislature wanted to put it beyond doubt that Section 6(e) is no bar to such an assignment. It is doubtful whether clause (4) has any operation upon clauses (2) and (3) of Section 135-A. Though the payment by the insurer of the total or partial loss is an act of party, subrogation is effected by the operation of clauses (2) and (3) of the section viz., by operation of law. Section 6(e) is concerned with a transfer of a mere right to sue by act of parties. It this is so, it would be incongruous to say that clause (4) will have any effect on the operation of clauses (2) and (3) of the section.

40. In Indian Trade and General Insurance Co. Ltd. v. Union of India (AIR 1957 Cal 190.), Mitter, J., had occasion to consider the question in detail and, after referring to the English Law, he came to the conclusion that, although by sub-sections (2) and (3) of Section 135-A, an insurer is subrogated to all the rights and remedies of the assured in respect of the subject-matter, it has no independent right of action in its own name, but can only sue in the name of the insured. The learned Judge referred to the decision in K. V. P. Marakkayar & Sons v. Banians & Co. (ILR 49 Mad 156.) and said that the rule of English law which never permitted a subrogee to institute a suit in its own name has been followed in India and is a sound rule.

41. In Alliance Insurance Company Ltd. v. Union of India (ILR (1958) 1 Cal 544.), it was held that an insurance company which has paid to the consignee the total loss, was entitled to maintain a suit in its own name against the carrier for reimbursement of the amount paid to the insured for the loss. The Court pointed out that although clause (e) of Section 6 of the Transfer of Property Act provides that a mere right to sue cannot be transferred, sub-section 4 of Section 135-A has removed the by and made a deliberate departure from the English rule of procedure which lays down that an insurer who pays for a total loss cannot sue independently in his own name. The Court did not, however, refer to the judgment of Mitter, J., in Indian Trade and General Insurance Co. Ltd. v. Union of India (supra). For the reasons already given, I do not think I can agree with the reasoning of this case.

42. In Textiles and Yarn (P) Ltd. v. Indian National Steamship Co. Ltd. (AIR 1964 Cal 362.), which was a suit filed by the insurer on payment of total loss for recovery of damages for loss of goods in the course of transit from Madras to Calcutta by a Steamship, Mitra, J., held that the insurer cannot maintain an action in its own name unless there was an assignment of the claims by the assured in favour of the insurer. In the Asiatic Government Security Fire and General Assurance Co. Ltd. v. The Scindia Steam Navigation Co. Ltd. (AIR 1965 Ker 214.), M. S. Menon, C.J. in a well reasoned judgment said that the insurer on subrogation, is not entitled to sue in its own name. In Vasudeva Mudaliar v. Caledonion Insurance Co. and Another (AIR 1965 Mad 159.), the Madras High Court said :

> "But subrogation 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."

43. I think the High Court was right in its conclusion on this point.

44. The second contention as regards the maintainability of the suit was that there was an assignment by the assured of all the rights, including the right to sue the Railway Administration, by virtue of which the Globe Insurance Co., could file a suit, and that precluded the assured from suing. The assignment, as already stated, was before the institution of the suit, and is in the following terms :

> "In consideration of your paying to us the sum of Rs. 32,254-6-9 only in full settlement of our claim for damage by fire under Policy No. 49757 issued by you on the undermentioned goods, we hereby assign transfer and abandon to you all our rights against the Railway Company or other persons whatsoever caused or arising by the 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 expense to recover the said damage or loss and we hereby subrogate to you the same rights as we have inconsequence of or arising from the said loss or damage.
>
> And we hereby undertake and agree to make and execute at your expense all such further deeds, assignments and documents and to render you such assistance as you may reasonably require for the purpose of carrying out this agreement."

45. The High Court held that the assignment was of a mere right to sue and it was not, therefore, valid under Section 6(e) of the Transfer of Property Act. The question is, whether what was assigned was a mere right to sue or something which the law of insurance recognises as assignable.

46. In King v. Victoria Insurance Company Ltd. (supra) a consignment of wool was insured by the Bank of Australia during its transportation by a ship from Townsvill to London. The wool was damaged in transit. The bank claimed against the Insurance Company under the policy for a loss of Pounds 920. The Insurance Company paid that amount and took a formal assignment from the bank of all its rights and causes of action against the Government, the bank stipulating that the assignment would not authorise the use of its name in legal proceedings. The Insurance Company sued the Government for the negligence of their officers and servants in not properly mooring and watching their punts which had caused the collision of the ship carrying wool resulting in damage to the consignment. The Government contended that the assignment of a mere right to recover damages was illegal. Lord Hobhouse, after stating that subrogation would not give the insurer a right to sue in its own name, said :

> "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 authorize the use of the bank's name.
>
> Their Lordships do not express any dissent from the views taken in the Court below of the construction of the Judicature Act with reference to the term 'legal chose in action'. They prefer to avoid discussing a question not free from difficulty, and to express no opinion what limitation, if any, should be placed on the literal meaning of

that term. They rest their judgment on the broader and simpler 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. On this view the highly artificial defence of the Queensland Government fails, and the appeal must be dismissed with costs." (P. 256).

47. The question whether there could be an assignment of such a right was considered in Compania Colombiana de Seguros v. Pacific Steam Navigation Co. ((1965) 1 QB 101, 121.) In that case, the assignment by the assured in favour of the Insurance Company was in the following terms :

"For loss and/or damage to the goods..... having received payment from the Compania Columbiana de Seguros for the foregoing, we cede and endorse to the said insurance company all rights which we have or which we may acquire in the future to claim reimbursement thereof from the third parties who may be responsible for such loss or damage."

48. The insurance company alleged that the document went further than a form of letter of subrogation and constituted a valid assignment by the assured to the insurance company of the assured's claim against the defendants. For the defendants it was argued :

"..... An assignment by the insured to the insurance company of the right of action is ineffective. The reason is that a bare right of litigation cannot be assigned..... The only decision to the contrary is that of the Privy Council in King v. Victoria Insurance Co. Ltd. (supra) which should not be followed." (See the argument at p. 108).

49. The court overruled the argument and held that the decision in King v. Victoria Insurance Co. Ltd. (supra), correctly lays down the law. After reviewing the case law on the subject, Roskill, J., speaking for the Court observed :

"So much, then for the authorities. What is the principle to be adduced from them ? I think it can be stated in this way. Where, before 1873 equity would have compelled the assignor to exercise his rights against the contract breaker or tortfeasor for the benefit of the assignee, those rights can, since 1873, be made the subject of a valid legal assignment and, subject to due compliance with the requirements of the statute as to notice, can be enforced at law. Equity always, before 1873, compelled an assured to lend his name to enforce his underwriter's rights of subrogation against a contract breaker or tortfeasor. It follows, therefore, that the only possible objection to such rights being now enforceable at law is that such enforcement would involve the enforcement of a bare cause of action in contract or in tort. But as Mr. Littman urged upon me, if that is so, why did equity act as equity did act before 1873 in relation to the enforcement of subrogation right ? I think the answer is because the enforcement of such rights was never regarded as the enforcement of a bare cause of action, but as the enforcement of a cause of action legitimately supported by the underwriter's interest in recouping himself in respect of the amount of the loss which he had paid under the policy as a result of the acts, neglects or defaults of the actual contract-breaker or tortfeasor."

50. In Anson's Law of Contract (Twenty-third edition, edited by A. G. Guest, p. 417.), it is stated that although an assignment of a bare right to litigate has been held invalid, the principle is necessarily subject to qualification. One such qualification is :

> "Suppose an insurer, who has indemnified his insured under a policy of insurance and in consequence been assigned the insured's right of action in respect of a breach of contract, sues to enforce this right of action against the contract-breaker. Could he be met by the plea that he is the assignee of a bare right of action ? In Compania Columbiana de Seguros v. Pacific Steam Navigation Co. (supra), Roskill, J., held that the enforcement of such a right is not the enforcement of a 'bare right of action' but of a right of action legitimately supported by the insurer's interest in recouping the loss sustained by paying out of the policy."

51. In the Law of Contract by Cheshire and Fifoot (Seventh Edition, p. 472.) the case of Compania de Seguros v. Pacific Steam Navigation Co. (supra) is quoted as authority for the proportion that if goods shipped on a vessel are delivered in a damaged condition, the consignee, after being indemnified for his loss by the insurers can assign to the latter his right to recover damages from the owner of the vessel.

52. The real reason why a mere right to sue cannot be assigned is that such an assignment would offend the rule of champerty and maintenance. Now, as in this case where an insurance company has been subrogated to all the rights and the remedies of the assured by virtue of Section 135-A, the reason for the rule against assignment of a mere right to sue does not obtain, because the insurance company is clothed with all the rights and remedies of the assured and the only thing lacking is the capacity to sue in its own name. If the right is capable of being assigned, and is assigned, it would no longer be logical to say that the assignor can still sue, for, whatever right the assignor had in the subject-matter had passed to the assignee. It is impossible to understand, how, after the assignment, the assignor can still maintain a suit.

53. This question was considered by the Madras High Court in Vasudeva Mudaliar v. Caledonian Insurance Co. and Another, (supra) and the Court said :

> "However, an assignment or a transfer implies something more than subrogation, and vests in the insurer the assured's incests, right 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. (22 Halsbury's Laws of England, Simond Edn., paras 512-513 and Shawcross on 'Motor Insurance').
>
> Normally, an assignment of a right of action for a tort is not valid under Section 6(e). But cases of subrogation as applied to insurance for indemnity are an exception to the rule and assignments by the assured to the insurer of his rights and remedies being more than a transfer of a mere right to sue are permissible and are valid. But express assignment by the assured of all his rights is necessary and subrogation by itself will not enable the insurer to sue in his own name [1896 AC 250; (1883) 11 QBD 380]."

It is regrettable that the attention of the High Court was not drawn to the above decision.

54. I think the reasoning in the decisions above referred to is correct, that the assignment conveyed

to the insurance company, the entire right in respect of the subject-matter of the insurance, including the right of the assured to sue in its own name and that, after the assignment, the assured had no cause of action to institute the suit against the Railway Administration for recovery of damages.

55. I would allow the appeal and set aside the judgment and decree of the High Court and restore the decree passed by the Subordinate Judge, Coimbatore, dismissing the suit, without any order as to costs.

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