New India Assurance Co. Vs Transport Corp.

Court: Madhya Pradesh High Court

Date of Decision: Feb. 9, 2015

Acts Referred: Carriers Act, 1865 - Section 3, 6, 8
Civil Procedure Code, 1908 (CPC) - Order 3 Rule 1, Order 3 Rule 2

Hon'ble Judges: Sanjay Yadav, J.

Bench: Single Bench

Advocate: S.K. Rao, Learned Senior Counsel and V. Pandey, Learned Counsel, for the Appellant

Final Decision: Dismissed

Judgement

Sanjay Yadav, J.
Heard.

2. Insurance Company, plaintiff No. 1, having indemnified the loss of consignment of plaintiff No. 2, in transition by the defendant Company

brought a suit for recovery of damages from the Carrier of Consignment, on the basis of letter of subrogation and the power of attorney. However,

is being non-suited as could not establish of having right to sue. And also that the plaintiffs could not establish that carrier was negligent in handling

the consignment.

3. The consignment booked by plaintiff no. 2 with defendant for its transportation from Satna to Calcutta to consignee M/s. Calcutta Electric

Supply Corporation Ltd., Calcutta was one drum Unistar Aluminium Conductor PVC Insulated Mini Type Led Alloy E measuring 204 meters vide

goods Receipt No. 17943 dt. 29.3.1988. The delivery of consignment was refused by the consignee as they were delivered in the damaged

condition. The defendant accordingly issued a damage certificate as well as non delivery certificate. Consignment being damaged were returned to

the consignor. The Insurance Company, i.e., plaintiff No. 1 having insured the consignment vide Policy No. 2444000037 indemnified the loss by

paying the amount of Rs.2,46,731 (of which Rs.60,000/- was recovered from the auction of salvage of damaged goods) to plaintiff No. 2 who

issued letter of subrogation and power of attorney in favour of plaintiff No. 1 Insurance Company to institute legal proceedings and for realisation

of amount from defendant, which was the basis for filing the suit for compensation/damages for loss of consignment.

4. The defendant Transporter while contending that the consignment was booked at owner''s risk and the damage caused to it was because of the

accident not attributed to the negligence of its employee also objected as to the maintainability of suit by the Insurance Company on the ground that

there is no assignment of right to sue in favour of the company.

5. Following five issues were framed by the trial Court:

6. The Trial Court non-suited the plaintiffs by answering in negative the issue Nos. 1 (v), 2, 3 and 5.

7. As to right to sue by the Insurance Co., the trial Court found that power of attorney in favour of the Manager by plaintiff No. 1 Insurance

Company was not produced nor the Manager who verified the plaint was examined. It also found that the power of attorney in favour of K.P.

Mishra by plaintiff No. 2 could not be established. Findings to that effect in paragraphs 6 and 11 are worth noting.

8. The letter of subrogation (Ex. P/11) executed by Shri K.P. Mishra in capacity as a power of attorney holder of plaintiff No. 2 company is in

following terms. Firstly it says:

i. We hereby acknowledge receipt of the sum of Rs.2,47,731/- which you have paid to us and which we accept in full and final settlement of our

claim under Policy No. 244400037, covering consignment containing Cable drums.

We place on record that by virtue of such payment the said New India Assurance Co. Ltd., Insurance, become and are subrogated to all our

rights, remedies and interests in and in respect of the subject matter insured as aforesaid.

And secondly:

ii. We also agree and record that the New India Assurance Co. Ltd., have authority to use our name and to take and conduct any legal

proceedings in our name to the extent necessary effectively to exercise all or any of such rights and remedies, that will furnish them with any

assistance that may be reasonable required by them when and/or for exercising such right remedies, whilst on their part they will indemnify us

against liability for costs, charges and expenses arising in connection with any proceedings which they may take in our name in the exercise of such

right and remedies.

9. For bringing an action for recovery of damages indemnified besides subrogation there has to be an assignment of right to sue. Both are different

act. A distinction was noted in Vasudev Mudaliar Vs. Caledonian Insurance Co. and Another, wherein it is held by learned Single Judge and this

Court is in respectful concurrence:

(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 be, 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 subrogated 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. ....

(emphasis supplied)

10. In the context, reference can also be had of the decision by Supreme Court in Oberai Forwarding Agency Vs. New India Assurance Co. Ltd.

and Another,

17. In its literal sense, subrogation is the substitution of one person for another. The doctrine of subrogation confers upon the insurer the right to

receive the benefit of such rights and remedies as the assured has against third parties in regard to the loss to the extent that the insurer has

indemnified the loss and made it good. The insurer is, therefore, entitled to exercise whatever rights the assured possesses to recover to that extent

compensation for the loss, but it must do so in the name of the assured.

18. The distinction between subrogation and assignment is explained in the standard text book on Insurance Law by MacGillivray and Parkington

(Seventh Edition).

1131. Difference between subrogation and assignment. Both subrogation and assignment permit one party to enjoy the rights of another, but it is

well-established that subrogation is not a species of assignment. Rights of subrogation vest by operation of law rather than as the product of

express agreement. Whereas rights of subrogation can be enjoyed by the insurer as soon as payment is made, an assignment requires an agreement

that the rights of the assured be assigned to the insurer. The insurer cannot require the assured to assign to him his rights against third parties as a

condition of payment unless there is a special clause in the policy obliging the assured to do so. This distinction is of some importance, since in

certain circumstances an insurer might prefer to take an assignment of an assureds rights rather than rely upon his rights of subrogation. If, for

example, there was any prospect of the insured being able to recover more than his actual loss from a third party, an insurer, who had taken an

assignment of the assureds rights, would be able to recover the extra money for himself whereas an insurer who was confined to rights of

subrogation would have to allow the assured to retain the excess.

1132. Another distinction lies in the procedure of enforcing the rights acquired by virtue of the two doctrines. An insurer exercising rights of

subrogation against third parties must do so in the name of the assured. An insurer who has taken a legal assignment of his assureds rights under

statute should proceed in his own name.

19. With the distinction between subrogation and assignment in view, let us examine the Letter of Subrogation executed by the second respondent

in favour of the first respondent. Its operative portion may be broken up into two, namely, (i) ""we hereby assign, transfer and abandon to you all

our rights against the Railway Administration Road transport carriers or other persons whatsoever, caused or arising by 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 claim for the said damage or loss""; and (ii) ""we hereby subrogate to you the same rights as we have in consequence of or arising from the said

loss or damage"".

20. By the first clause the second respondent assigned and transferred to the first respondent all its rights arising by reason of the loss of the

consignment. It granted the first respondent full power to take lawful means to recover the claim for the loss, and to do so in its own name. If it

were a mere subrogation, first, the word assigned would not be used. Secondly, there would not be a transfer of all the second respondents rights

in respect of the loss but the transfer would be limited to the recovery of the amount paid by the first respondent to the second respondent. Thirdly,

the first respondent would not be entitled to take steps to recover the loss in its own name; the steps for recovery would have to be taken in the

name of the second respondent. Thus, by the first clause there was an assignment in favour of the first respondent.

21. The second clause, undoubtedly, used the word subrogate, but it conferred upon the first respondent the same rights that the second

respondent had in consequence of or arising from the said loss or damage, which meant that the transfer was not limited to the quantum paid by the

first respondent to the second respondent but encompassed all the compensation for the loss. Even by the second clause, therefore, there was an

assignment in favour of the first respondent.

11. In the case at hand the letter of subrogation is by Shri K.P. Mishra who also executed power of attorney in favour of Insurance Company

brought on record as Ex. P/12 which is in following terms:

Whereas, the consignors/consignees in respect of the goods booked under G.R. No. 17943 dated 29.3.88 ex. Satna to Calcutta hereby appoint,

nominate, constitutes the New India Assurance Co. Ltd. Carrying on insurance business, to act any of their representative as our true lawful

attorneys to do all or any of the following acts, deeds and things for us and on our behalf in our name that is to day:

1. To claim and to receive moneys from carriers by means of notices or otherwise.

2. To give valid discharges on our behalf pertaining to the above claim.

3. To sign all notices and receipts in our name and on our behalf pertaining to the above claim.

4. To present any applications before any authority or persons concerned for claim.

5. To settle and to adjust the above claim if necessary, and to give valid discharges and effectual receipts.

6. To file suit in Court of Law against the carriers if necessary for the recovery of claim moneys for the aforesaid claim on our behalf and in our

name and give valid discharges and effectual receipts thereto.

12. What was, however, required to be passed was whether Shri K.P. Mishra had the lawful authority conferred by the plaintiff No. 2 Company

to assign the right to sue. Plaintiffs, however, failed to establish the lawful authority of Shri K.P. Mishra to assign right to sue through power of

attorney. Plaintiff""s witness No. 1, Shamsher Bahadur Chand, an employee of plaintiff No. 2 stated in paragraphs 8 and 11 as under:

13. However, Power of Attorney empowering Shri K.P. Mishra to act on behalf of company was not produced as would establish rightful

assignment of right to sue or even file a suit for damages along with plaintiff No. 1, Insurance Co.

14. That being so since, Rule 1 of Order 3 Code of Civil Procedure 1908 envisages that any appearance, application or act in or to any Court,

required or authorized by law to be made or done by a party in such Court, may, except where otherwise provided by any law for the time being

in force, be made or done by the party in person, or by his recognized agent. Recognized Agent as per Rule 2 Order 3 CPC is a person(s) holding

power(s)-of attorney, authorizing to make and do such appearances, applications and acts on behalf of such parties. In the case at hand there was

no assignment of right to sue in favour of the plaintiff No. 1 and Shri K.P. Mishra could not establish the execution of power of attorney by the

company in his favour being empowered to file the suit or to assign the right to sue, the suit at their instance has rightly been held to be not

maintainable.

15. Issue No. 8 related to whether the damage to consignor was attributed to the Carrier and the negligent of its employees.

16. Section 6 of Carriers Act, 1865 stipulates:

6. In respect of what property liability of carrier not limited or affected by public notice. Carriers, with certain exceptions, may limit liability by

special contract.-The liability of any common carrier for the loss of or damage to any property (including container pallet or similar article of

transport used to consolidate goods) delivered to him to be carried, not being of the description contained in the Schedule to this Act, shall not be

deemed to be limited or affected by any public notice; but any such carrier, not being the owner of a railroad or tramroad constructed under the

provisions of Act 22 of 1863 (to provide for taking land for works of public utility to be constructed by private persons or Companies, and for

regulating the construction and use of works on land so taken) may, by special contract, signed by the owner of such property so delivered as last

aforesaid or by some person duly authorised in that behalf by such owner, limit his liability in respect of the same.

17. Section 8 of 1865 Act provides for:

8. Common carrier liable for loss or damage caused by neglect or fraud of himself or his agent.-Notwithstanding anything hereinbefore contained,

every common carrier shall be liable to the owner for loss of or damage to any property including container, pallet or similar article of transport

used to consolidate goods) delivered to such carrier to be carried where such loss or damage shall have arisen from the criminal act of the carrier

or any of his agents or servants and shall also be liable to the owner for loss or damage to any such property other than property to which the

provisions of section 3 apply and in respect of which the declaration required by that section has not been made, where such loss or damage has

arisen from the negligence of the carrier or any of his agents or servants.

18. Effect of these two provisions are that a common carrier is liable for loss and damage caused due to its negligence or, misconduct of its agents

or servants, and that liability cannot be limited by contract. Thus the onus is on the Carrier to establish the care required under circumstances,

reasonably and practically possible to ensure the safety of the goods. [(See Mooljee Sicka and Co. Vs. Sardar Narhar Singh, .

19. In the case at hand as the evidence goes the defendant Carrier discharged its onus of proving the reasonable and practical possible care taken

to ensure the safety of the subject goods. This is reflected in the findings by the trial court in paragraph 29. On the contrary, plaintiffs utterly failed

in establishing that the damage was caused due to negligence of carrier.

20. In view whereof the appeal does not merit consideration. Consequently, judgment and decree by trial court in dismissing the suit is affirmed.

21. Appeal fails and is dismissed. Cost to be borne by parties themselves.