Hindustan Corporation (Hyderbad) Pvt. Ltd. Vs M/s. United India Fire and General Insurance Co. Ltd., Hyderabad and others

Court: Andhra Pradesh High Court

Date of Decision: June 6, 1996

Acts Referred: Carriers Act, 1865 â€" Section 10, 8, 9
Contract Act, 1872 â€" Section 124, 125, 141
Transfer of Property Act, 1882 â€" Section 130, 130, 6

Citation: AIR 1997 AP 347

Hon'ble Judges: S. Parvatha Rao, J; Avinash Somakant Bhate, J

Bench: Division Bench

Advocate: Vilas V. Afzulpurkar, for the Appellant; S. Hanumaiah for S. Venkata Reddy, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

S. Parvatha Rao, J.
Heard the learned counsel for the appellant and learned counsel for the 1st respondent.

2. The appellant is a transport company. It questions the judgment dated 2-6-1987 of a learned single Judge of this Court in C.C.C.A. No. 36 of

1979 confirming the judgment and decree dated 19-9-1978 of the learned 6th Additional Judge, City Civil Court at Hyderabad in O. S. No. 611

of 1975 filed by the respondents herein decreeing the suit and awarding a sum of Rs. 7,961.80 Ps. to the respondents to he paid by the appellant

towards loss and damage caused to the goods of the 2nd respondent, which were entrusted to the appellant for transporting from Hyderabad to

Madras on a finding that there was negligence on the part of the appellant carrier. The 1st respondent is the Insurance Company with which the

''2nd respondent insured the goods while in transit after entrustment to the appellant for transport.

3. Entrustment of 41 bales of semi tanned sleep skin to the appellant carrier for transportation from Hyderabad to Madras is not in dispute. The

goods were in fact carried by the appellant and delivered to the 2nd respondent at Madras on 15-12-1972. After deli very the 2nd respondent

found that 24 bales were in wet condition and some semi tanned sheep skin therein was damaged. That was certified by the Manager of""

appellant under certificate dated 15-12-1972 (Ex.A.5), In respect of the damage suffered by the goods, the 2nd respondent laid claim on the 1st

respondent-insurer and after assessment of the damage occasioned to the said goods at Rs. 15,923.60 Ps. the 1st respondent paid the said

amount to the 2nd respondent after obtaining a Power of Attorney dated 13-1-1973 from the consignees i.e. the 2nd respondent firm, in its favour

and also a letter assigning and transferring to the 1st respondent all the rights, title and interest of the 2nd respondent in respect of the said goods

and all rights or claims against any person or persons in respect thereof, etc. There is also a report (Ex.A.9) regarding the damage suffered by the

goods made by the surveyor, P.W. 2 at the instance of the 1st respondent. Thereafter, the 2nd respondent addressed letter dated 6-12-1972 to

the. appellant claiming compensation in respect of the damage caused to the said goods and the appellant replied by letter dated 8-1-1973

(Ex.A.6) admitting that on account of very heavy and torrential rains en-route the consignments got ""slightly damaged by rain water splashing"" and

that was the normal transit hazard due to circumstances beyond its control and that as the goods were booked at ''owners risk'' they would not

admit claim or liability in the matter and suggested that the matter should be taken up with ""the Insurance Company with which you should have

taken a policy for covering"" the goods in question. It is under those circumstances O.S. No. 611 of 1975 was instituted by the respondents

claiming a sum of Rs. 15,923.60 Ps. with interest and costs towards the damage caused due to the negligence of the appellant to the goods of the

2nd respondent transported by it from Hyderabad to Madras.

4. The learned 6th Additional Judge found that there was not merely negligence of the appellant but also of the 2nd respondent and, accepting the

evaluation of damage at Rs. 15,923.60 Ps. and apportioning the same at fifty percent towards the negligence on the part of the appellant, decreed

the suit to that extent. The appellant''s appeal C.C.C. A. No. 36 of 1979 questioning the judgment and decree of the learned 6th Additional Judge

was dismissed by the learned single Judge. Observing that the only question that arose for consideration was whether Ex.A.8 letter related to mere

right to sue for damages which was not transferable u/s 6(e) of Transfer of Property Act and therefore the suit was not maintainable, the learned

single Judge held that the said right was not a mere right to sue and that the suit laid jointly by the respondents i.e. the insurer and the insured,

against the common carrier--the appellant for the loss of the value of the goods carried was clearly maintainable. The learned Judge also agreed

with the view taken by the Calcutta High Court in Union of India (UOI) Vs. Alliance Assurance Co. Ltd. and Another, and The Gaya Muzaffurpur

Roadways Co. and Others Vs. Fort Gloster Industries Ltd. and Another, holding that a suit for damages for loss of goods against a common

carrier by the insured impleading as a co-plaintiff the insurer who made good the loss to the insured was maintainable and not bad for misjoinder as

on payment of the loss the insurer became subrogated to the rights and remedies as on the date of the loss u/s 135(2) of the Transfer of Property

Act. As regards the liability of the appellant, the learned single Judge held that it arose on a breach of contract in delivery of goods by a common

carrier and u/s 8 of the Carriers Act, 1865 the liability was on the carrier for damages or loss in the value of the goods in transit. Quantum of

damages assessed by the learned Additional Judge at Rs. 15,923.60 Ps. on the basis of Ex.A. 5 and the evidence of the assessor, P.W. 2 was

upheld by the learned single Judge on a finding that he was not inclined to differ.

5. The learned counsel for the appellant submits that when the goods were entrusted to the appellant for carriage it was made clear that they were

being carried at the owners risk and that the consignment notes, Exs. A. 1 to A.4 staled so and that therefore, it cannot be made liable for any

damage to the goods while in transit. We find that this depends on whether there was no negligence on the part of the carrier i.e. the appellant

herein. When there is negligence on the pan of the carrier it cannot absolve itself of the liability by merely stating that the goods were being carried

at the owners risk.

6. It is not in dispute that the appellant is a common carrier as defined u/s 2 of the Carriers Act, 1865. In the year 1883, a Full Bench of five

Judges of the High Court of Calcutta considered the legal position of common carriers in India in Moolhora Kant Shaw v. India General Steam

Navigation Company, ILR (1883) Cal 166. One of the learned Judges, Mitter J., observed that the English common law defining the duties and

responsibilities of common carrier was enforced in this country at the time when the Carriers Act, 1865 was passed and that from the preamble of

that Act, it was clear that the legislature had assumed that the English common law relating to common carriers was then in force in This country.

The learned Judge then referred to the English common law regulating the responsibility of a common carrier as stated by Cotton, L.J., in Bcrgheim

v. Great Eastern Railway Company (1878) 3 CPD 22l :

The liability of a common carrier as compared with that of other bailees is exceptional. He is answerable for the loss of goods entrusted to him as

such, though the loss be in no way caused by any default on his part. He is considered as haveing contracted to insure the safe delivery of that is to

say, as having contracted to carry and deliver safely and securely (the act of God and of the enemies of the Queen alone excepted) the goods of

which he, as common carrier, is bailee.

Garth, C.J., took the same view. He observed :

A carrier of goods was bound by the English law to receive all goods brought to him for carriage, provide he had conveniences to carry them, and

the employer was ready to pay any reasonable reward for the conveyance.....He was also bound to carry the goods within a reasonable time, and

to insure their safety during the carriage, and until delivery to the consignee, the act of God and the Queen"s enemies only excepted. And it is

important to note, that his duty was imposed upon him irrespective of any contract. It was imposed upon him by the custom of the realm, for the

benefit of the public, by reason of the important trust which he undertook.

Common carriers are largely intrusted with the property of the public. They are intrusted with it under circumstances which make a breach of the

trust a very easy matter, and the detection of the breach by the owner of the goods often extremely difficult. They are paid a fair compensation for

the carriage proportionate to the risks which they run, and the liability which they incur.

The policy of the law therefore is no more than just, which makes common carriers under ordinary circumstances insurers of the goods they carry.

The other learned Judges agreed. The Full Bench also took the view that the law relating to common carriers in India was not affected by the

Indian Contract Act, 1872. In holding so, the Full Bench differed from the view taken by the High Court of Bombay earlier ""that the effect of the

Indian Contract Act, 1872, was to relieve common carriers from the liability of insurers answerable for the goods entrusted to them ''at all events'',

except in the case of loss or damage by the act of God or the Queen"s enemies, and to make them responsible only for that amount of care which

the Act requires of all bailees alike in the absence of special contract.

7. The view of the Full Bench of the High Court of Calcutta was approved by the Privy Council in The Irrawadcly Flotilla Company Limited v.

Bugwandas ILR (1891) Cal 620 : 18 Ind App 121. After considering the scope and ambit of the two Acts, Lord Macnaghten held that the Act of

1872 was not intended to alter the law applicable to common carriers. He further held as follows :

The obligation imposed by law on common carriers has nothing to do with contract in its origin. It is a duly cast upon common carriers by reason

of their exercising a public employment for reward. "A breach of this duly", says Dallas, C.J., Bretherton v. Wood (1821) 3 B and B 54 at p. 62,

is a breach of the law, and for this breach an action lies founded on the common law which action wants not the aid of a contract to support

it.....

xx xx xx xx

It was hardly disputed that the liability of a common carrier as an insurer was an incident of the con tract between the common carrier and the

owner of the properly to be carried.

8. However, Section 6 of the Carriers Act, 1865 enables a common carrier by special contract to limit its liability as an insurer; but not so as to get

rid of the liability for negligence and criminal acts of the carrier or any of his agents or servants, in view of Section 8 of that Act. Lord Macnaghten

said in The Irrawaddy Flotilla Company Limited v. Bugwandas ILR (1891) Cal 620 : 18 Ind App 121 as follows :

''The combined effect of Sections 6 and 8 of the Act of 1865 is that, in respect of property not of the description contained in the schedule,

common carriers may limit their liability by special contract, but not so as to get rid of liability for negligence.

In India General Steam Navigation Company v. Bhagwan Chandra Pal ILR (1913) Cal 716, a Division Bench of the Calcutta High Court

reiterated the position that the liability of the common carrier was that of an insurer; but by Section 6 of the Carriers Act it could, subject to certain

exceptions, limit that liability, though, by Section 8, it would be liable for loss of, or damage to, any property arising ""from the negligence or criminal

act of the carrier or any of his agents or servants."" This has been the law ever since.

9. The Supreme Court has clarified the changes brought about by the Carriers Act in M.G. Brothers Lorry Service Vs. Prasad Textiles,

.TheSupreme Court held that the Carriers Act was enacted because it was thought expedient not only to enable common carriers to limit their

liability for loss of or darna get oproperty delivered to them to be carried but also to declare their liability for loss of or damage to such property

occasioned by the negligence or criminal acts of themselves, their servants or agents.

10. Section 6 provides that such carrier may, by special contract, signed by the owner of such property so delivered or by some person duly

authorised in that behalf by such owner, limit his liability in respect of the same. Section 8 of the Carriers Act, inter alia, provides that every

common carrier shall be liable to the owner for loss of or damage to any property delivered to such carrier where such loss or damage has arisen

from the negligence of the carrier or any of his agents or servants - this is ""notwithstanding anything hereinbefore contained"", which means not with

standing Section 6. Thus, in view of the non obstante clause with which section 8 begins, there can be no special contract limiting the statutory

liability u/s 8. The resulting position is that the statutory liability u/s 8 cannot be contracted out by the common carrier, though in respect of other

liabilities as insurer he can contract out u/s 6. This legal position is well supported by authority and is in no doubt.

11. Section 8 is followed by Section 9 which provides that ""in any suit brought against a common carrier for the loss, damage or non delivery of

goods entrusted to him for carriage, it shall not be necessary for the plaintiff to prove that such loss damage or non-delivery was owing to the

negligence..... of the carrier, his servants or agents."" In view of this provision, the burden is on the carrier to establish that any loss of or damage to

any property delivered to him has not arisen from his negligence.

12. We are, therefore, of the view that the appellant, as common carrier, cannot contract out or relieve itself of its absolute liability u/s 8 of the

Carriers Act, 1865 by stipulating that the goods were being carried at "the owner"s risk", and that the burden is clearly upon it to establish that

there was no negligence on its part. No reliable and convincing evidence has been adduced by the appellant to discharge the burden on it and to

establish that it and its servants or agents had taken all reasonable care in respect of the goods entrusted to it and that there was no negligence on

its part. That the goods were damaged due to rain waters splashing and that they were delivered in wet condition cannot be disputed because of

the admission to that effect in Ex.A.5 certificate and Ex.A.6 reply given by the Manager of the appellant at Madras. The learned trial Judge

observed that neither the driver of the lorry in which the goods were transported nor the person accompanying that lorry during the transit of the

goods from Hyderabad to Madras was examined and that was fatal to the case of the appellant as regards negligence because the knowledge or

cause for the damage would be within the exclusive knowledge of the driver or the person accompanying lhat lorry. The trial Judge also held that

three was no special contract u/s 6 of the Carriers Act, 1865 between the appellant and the 2nd respondent to the effect that the goods were being

transported at owner"s risk because none of the lorry"s receipts Exs. A-1 to A-4 bear the signature of the 2nd respondent or any other person on

its behalf and that therefore, the absolute liability of the carrier u/s 6 would be attract to the acts of the present case. These findings were not

seriously questioned before the learned single Judge. The requirement of notice of loss or injury ""within six months of the time when the loss or

injury first came to the knowledge of the plaintiff u/s 10 of the Carriers Act, 1865 is also satisfied as is seen from Ex. A-6 which was the reply of

the appellant to the letter dated 16-12-1972 of the 2nd respondent. The appellant tried to get over its liability by suggesting to the 2nd respondent :

that you kindly take up the matter with Insurance Company with whom you should have taken a policy for covering the above circumstances.

But, the appellant cannot escape its liability for its negligence that way that it has to compensate the 2nd respondent, the owner of the goods, for

the damage caused to them.

13. The learned counsel for the appellant contends that the 2nd respondent had no subsisting cause of action on the dale when the suit was filed

because by then it had already received compensation in full from the 1st respondent for the loss suffered by it. He submits that, therefore, there

was no surviving cause of action to be transferred by 2nd respondent to the 1st respondent. He further contends that the letter of subrogation, Ex.

A-8, given by the 2nd respondent in favour of the 1st respondent amounts to transfer of a mere right to sue by 2nd respondent to the 1st

respondent and that such a transfer is invalid being prohibited by Section 6(c) of the Transfer of Property Act. We do not find any merit in these

contentions because they proceed on a misconception of the right to subrogation claimed by the 1st respondent based on the payment made by it

pursuant to the contract of insurance under which the consignments in question entrusted 10 the appellant were insured against damage, loss, etc. in

transit.

14. Halsbury''s [Halsbury''s Laws of England (Fourth Edition, Vol. 25, Paras 523-524)] says that ""the doctrine of subrogation applies to all

contracts of non-marine insurance which arc contracts of indemnity, such as fire insurance, motor insurance and contingency insurance ..... The

doctrine of subrogation does not apply to contracts of life insurance and personal accident insurance."" and that ""in the strict sense of the term,

subrogation expresses the right of the insurers to be p(sic) 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."" and that ""the precise nature of the third party''s liability

to the assured is immaterial; subrogation applies even to a statutory liability .""These principles arc founded on centuries old authorities of the English

Courts as traced in Simpson v. Thomson (1877) 3 AC 279 by the House of Lords. Lord Cairns observed in that case as follows :

I know of no foundation for the right of underwriters, except the well-known principle of law, that where one person has agreed to indemnify

another, he will, on making good the indemnity, be entitled to succeed to all the ways and means by which the person indemnified might have

protected himself against or reimbursed himself for the loss ..... But this right of action for damages they must assert, not in their own name but in

the name of the person insured.....

The Lord Chancellor relied on Yates v. Whyte (1838) 4 Bing NC 272, wherein Chief Justice Tindal referred to what Lord Mansfield said in

Mason v. Sainsbury. (1782) 3 Dou Rep 61 :

But the contrary is evident from the nature of the contract of insurance. It is an indemnity. We every day see the insured put in the place of the

insurer.

and added :

That the insurers may recover i n the name of the assured after he has been satisfied appears from Randal v. Cockran (1748) 1 Ves Sen 98,

where it was held that they had the plainest equity to institute such a suit. Such, therefore, is the situation of the underwriters here, that this case has

received its answer from it. If the plaintiff cannot recover, the wrongdoer pays nothing, and takes all the ''benefit of a policy of insurance without

paying the premium. Our judgment must be for the plaintiffs.

Justice Park agreed :

l am of the same opinion. This point has been decided ever since the time of Lord Hardwicke; so much so that it has been laid down in

textwriters, that where the assured, who has been indemnified for a wrong recovers from the wrongdoer, the insurers may recover the amount from

the assured. In Randal v. Cockran, it was said they had the clearest equity to use the name of the assured, in order to reimburse themselves; and in

Mason v. Sainsbury, the Judges were all unanimous; they held, indeed, that the insurers could not sue in their own names, hut they confirmed the

general doctrine that the wrongdoor should be ultimately liable, notwithstanding a pay by the insurers.

Lord Cairns held that these authorities were conclusive ""that the right of the underwriters is merely for damages as the insured himself could have

made."" The other Law Lords agreed with him. Lord Blackburn said that the right of the underwriters anise from the fact ""that the underwriters had

paid an indemnity, and so were subrogaled for the person whom they had indemnified in his personal rights from the lime of the payment of the

indemnity.

15. Incidentally, what Chief Justice Tindal and Justice Park said in Yates v. Whyte (1838)4 Bing N.C. 272 is a complete answer to the contention

of the learned counsel for the appellant that the 2nd respondent cannot lay claim on the appellant because he had already recovered compensation

from the insurer, i.e. the 1st respondent for the damage suffered by it -- the appellant cannot escape liability for his negligence and cannot have the

benefit of the contract of insurance for which the 2nd respondent paid premium. In Symons v. Mulkern. (1882) 46 LT 763. Fry,J.. accepted the

contention that ""the fact that the plaintiffs there were paid the full amount of their loss by the insurance companies would not disqualify them from

bringing the action which was in effect the action of the insurance companies because every insurer had a right to be put in the place of the insured,

and to use the name of the latter in order to recover compensation from a wrong-doer who had caused the loss and if therefore, the insurer had

paid the amount of loss caused by the wrongful act of a third party, he had a right to sue the latter in the name of the insured to recover

compensation for the injury."" This is the law in India also. A Division Bench of the Madras High Court in Sri Sarada Mills Ltd. Vs. Union of India

and Others, . held :

Nor does the fact that the insurance company has made good the loss, prohibit the plaintiff from proceeding with the suit on that account. The

contract is between the plaintiff and the defendant and if as a result of loss or destruction of the consignment, the defendant was liable to make

good the loss to the plaintiff, it would be no defence to the plaintiff"s action that the insurance company had paid to the plaintiff the amount for

which the goods were insured - .Vide Parsram Panmal v. Air India Ltd.: 1954 Bom LR 944 at p. 954.

This has to be so because the payment made by the insurer the 1st respondent herein) to the insured (the 2nd respondent herein) under the

contract of insurance, by no stretch of imagination can be treated as payment made in discharge of the liability of the carrier (the appellant herein)

for its negligence and the carrier cannot get exonerated on the flimsy plea that the insured suffered no loss because the insurer compensated the

toss -- it is hero that the doctrine of subrogation steps in and sees that the insured does not get the additional benefit of the damages payable by the

carrier and enables the insurer to step into the shoes of the insured to gel that benefit.

16. Mason v. Sainsbury (1782) 3 Dou Rep 61. was a case where the property was burnt by a mob and the insurer paid and the owner sued for

the benefit of the insurer. In Darrel v. Tibbitts (1880) 5 QueBen 560. a house which was insured was damaged by the explosion of gas which

escaped from the mains which were broken because of the negligence of the servants of the Corporation of Brighton. The landlord was paid by the

insurance company at a time when they could not resist his demand, as they were hound by their contract to pay. Afterwards"" the Corporation of

Brighton, by whose negligence the mischief happened, paid the amount of damages to the defendant"s (landlord"s) house, and this amount was

expended in making good the damage. The question that arose in that case was whether the insurance company, after making payment to the

landlord under the policy, could recover back the amount from the landlord in view of the damage having been made good by the compensation

paid by the Corporation of Brighton. Brett. L. J., answered as follows :

The doctrine is well established that where some thing is insured against loss either in a marine or a fire policy, after the assured has been paid by

the insurers for the loss, the insurers are put into the place of the assured with regard to every right given to him by the law respecting the subject-

matter insured, and with regard to every contract which touches the subject-matter insured, and which contract is affected by the loss or the safely

of the subject-matter insured by reason of the peril insured against.

It was also observed in that case that the question whether fire policies were contracts of indemnity like marine policies or were contracts to pay a

certain sum of amount in a particular event like life policies was settled by the Court of Appeal in North British and Mercantile Insurance Company

v. London. Liverpool, and Globe-Insurance Company. (1877) 5 Ch. D. 569. It was Jesset, M. R., who held that a fire policy was a contract of

indemnity and indemnity only"" - it was to indemnify against loss by fire; and the Court of Appeal affirmed that. This shows that policies under which

things or goods are insured against loss, are contracts of indemnity because they indemnify against loss and the doctrine of subrogation is attracted

when amounts are paid under them. This has been further exemplified by Lord Blackburn in the case of Burnand v. Rodocanachi, (1882) 7 AC

333, as follows :

The general rule of law (and it is obvious justice) is that where there is a con tract 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 has already paid the full indemnity is entitled

to be recouped by having that amount back."" This enunciates the principle of subrogation as an incident of contract of indemnity involved in the

policy of insurance whether it be marine policy or fire policy or motor policy or any other policy incorporating the contract of indemnity, Brett, L.

J., in Castellain v. Preston (1883) 11 QBD 380, held as follows :

The very foundation, in my opinion, of every rule which has been applied to insurance law is this, namely, that the contract of insurance contained

in a marine or fire policy is a contract of indemnity, and of indemnity only, and that this contract means that the assured, in case of a loss against

which the policy has been made, shall be fully indemnified, but shall never be more than fully indemnified.

The full width of the right to subrogation was delineated by him as follows:

In order to apply the doctrine of subrogation it seems to me that the full and absolute meaning of the word must be used, that is to say, the insurer

must be placed in the position of the assured. Now, it seems to me that in order to carry out the fundamental rule of insurance law, this doctrine of

subrogation must be carried to the extent which I am now about to endeavour to express, namely, that as between the underwriter and the assured

the underwriter 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 on, or in any other right, whether by way of condition or otherwise, legal or equitable, which

can be, or has been exercised or has accrued, and whether such right could or could not be enforced by the insurer in the name of the assured by

the exercise or acquiring of which right or condition the loss against which-the assured is insured, can be, or has been diminished.

He then clarified what he held in Darrell v. Tibbilts (1880) 5 QB 560, in the following manner :

It seems to me that in Darrell v. Tibbitts, the insurers were not surogated to aright of action or to a remedy. They were not subrogated to a right to

enforce the remedy, but what they were; subrogated into was the right to receive they advantage of theremedy which had been applied. whether it

had been enforced or voluntarily administered by the person who was bound to administer it. That seems to me to be the doctrine.

More recently in John Edwards and Co. v. Motor Union Insurance Co. (1922) 2 Kin Ben 249, McCardie, J., traced the origin the basis, and the

essential features of doctrine of subrogation as follows :

The doctrine has been widely applied in our English body of law, e.g. to sureties and to matters of ultra vires as well as to insurance. In connection

with insurance it was recognizedere the beginning of the eighteenth century. In Randal v. Cockran (1748) 1 Ves Sen 98, it was held that the

plaintiffs insurers after making satisfaction stood in the place of the assured as to goods, salvage, and restitution in proportion for what they paid.

As the Lord Chancellor (Lord Harciwicke) said : ''The plaintiffs had the plainest equity that could be.''

It is curious to observe how this doctrine of subrogaiive equily gradually entered into the substance of insurance law and at length became a

recognized part of several branchesof the general common law. In Mason v. Sainsbury (1782) 3 DouRep 61, Lord Mansfield said: ""Every day the

insurer is put in the place of the insured,'' and Buller J., in the same case,-in approving judgment for the plaintiff insurer, said: ''Whether this ease be

considered on stricl legal principles, or upon the more liberal principles of insurance law, the plaintiff is entitled to recover.'' These more liberal

principles were based on equitable considerations, and in the well-known case of Burnand v. Rodicanachi (1882) 7 AC 333 Lord Blackburn said

in reference to a marine policy: ""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 has already paid the full indemnity is entitled to be recouped by having that

amount back." This equity springs I conceive solely from the fact that the ordinary and valid contract of marine insurance is a contract of indemnity

only.

He then concluded :

It will be observed that the whole basis of the subrogative doctrine is founded on a binding and operative contract of indemnity, and that it is from

such a contract only that the equitable results and rights as indicated above derive their origin.

..... The principle of subrogation is ever a latent and inherent ingredient of the contract of indemnity, but that it does not become operative or

enforceable until actual payment be made by the-insurer. It derives its life from the original contract. It gains its operative force from payment under

that contract. Not till payment is made does the equity, hitherto held in suspense, grasp and operate upon the assured"s choses in action. In my

view the essence of the matter is that subrogation springs not from payment only but from actual payment conjointly with the fact that it is made

pursuant to the basic and original contract of indemnity.

17. The doctrine of subrogation flowing from the contract of indemnity is accepted and applied by Indian Courts also. In Maharana Shri

Jasvaisingji Fatesingji v. Secretary of State for India ILR (1890) 14 Bom 299, Jardine J., applied the doctrine observing as follows :

The principle which the counsel for plaintiff asks us to apply is that "well-known principle of law, that where one person has agreed to indemnify

another, he will, on making good the indemnity, be entitled to succeed to all the ways and means by which the person indemnified might have

protected himself against or reimbursed himself for the loss" - per Earl Cairns, L. C. in Simpson v. Thomson (1877) 3 AC 279.

The Indian Contract Act, IX of 1872, section 141, applies this principle to the contract of suretyship :but Sections 124 and 125,which deal with

the contract of indemnity, are silent on this point; only the rights of the promisee are stated; those of the promise are not mentioned. The learned

counsel for plaintiff did not notice this omission when arguing for the application of the doctrine of subrogation. In the absence of reported

decisions, I am of opinion that the doctrine is to be applied for the following reasons. It is an essential part of the law about indemnity. It is clearly

based on natural equity, and is thus of general application. The Indian Contract Act does not impair it, and is itself only a partial measure, as the

preamble shows.

In Vasudev Mudaliar Vs. Caledonian Insurance Co. and Another, , alearncd single Judge of the Madras High Court held that a contract of motor

insurance, like marine or accident insurance, was, in essence, one of indemnity. and that the insurer, when he had indemnified the assured, was

subrogated to his rights and remedies against the third panics who had occasioned the loss; and that this right of the insurer to subrogation was to

get into the shoes of the assured as it were, need not necessarily flow from the terms of the motor insurance policy, but was inherent in and springs

from the principles of indemnity. After referring to Halsbury''s Casiellain v. Presion (1883) 11 QBD 380 and Simpson v. Thomson (1877) 3 AC

279, the learned Judge Veeraswami, J., observed as follows :

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 considerations.

It is true that S, 130A of'' the Transfer of Property Act provides for the transfer or assignment of a policy 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(c) 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 Appeal Cases 250

(King v, Victoria Insurance Co. Ltd.) is in effect an authority for it.

This view of Veeraswami J, was accepted by Ramaswamy J. (as he then was) in United India Fire and General Insurance Co. Ltd. Vs. Pelaniappa

Transport Carriers and Another, . That was also it case of transport contract and. when the goods were delivered, they were found to be damaged

due to the negligence of the carrier. The goods were insured against loss and damage while in transit, The insurer made pay men] and obtained

letters of subrogation and assignment of the rights to indemnification and instiuted a suit against the earners. Ramaswamy J. held that the insurer got

not merely a subrogation but also assignment of the right 10 recover the loss to get indemnification thereof which they suffered pursuant to the

policy under which they made payment to the consignor ..... so as to reducing or diminishing or extinguishing the said loss,"" He further held :

It applies to ordinary policy relating to commercial goods. This right is based on justice, equity and good conscience. Therefore, the embargo

created under S. 6(e) of the Transfer of Property Act is not attracted to the facts in this case. It is an actionable claim under S. 130 of the Transfer

of Property Act and therefore, it is validly transferred: the appellant (insurer) acquired valid right, title and interest from the consignor, and the suit

for the recovery thereof is maintainable.

18. The learned Judge also referred to the decision of the Supreme Court in Union of India (UOI) Vs. Sri Sarada Mills Ltd., . Ray. J., speaking

for himself and Dua. J., (majority view) agreed with Mathew. J.. (minority view) that subrogation did not confer any independent on underwriters

to maintain in their own name and without reference to the persons assured ah action for damage to the thing insured and that the right of the

assured was not one of those rights which were incident to the property insured. Ray. J.. then held as follows :

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 loan assignment in the present case, because the insurance

company has not sought to enforce any assignment.

xx xx xx

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 perish on

giving the letter of subrogation.

In the present case, it is not necessary for us to decide whether the assignment, if any, of the rights of the 2nd respondent to the 1st respondent

under Eex.A-8 is hit by Scction 6(e) of the Transfer of Property Act. The trial Court held that by giving a letter of subrogation. Ex. A-8. in favour

of the 1st respondent the 2nd respondent did not lose the cause of action to sue the appellant herein -- relying on the decision of the Supreme

Court in Union of India (UOI) Vs. Sri Sarada Mills Ltd., . The-trial Court also observed that the question was not really material because the

insured as well as the insurer both together filed the suit. The learned single Judge agreed and observed as follows :

We are encountered with no difficulty to uphold the maintainability of the suit for the obvious reason that both the consignor as well as the

Company (insurer) have jointly laid the suit to recover the damages. The plea of lack of privity of contract between the appellant and the company

or subsisting cause of action to consignor are alien to the action on facts. In view of the fad that the consequence that How from Ex A-S is

subrogation.. the liability sought to be recovered, as held by Bachawat. J. (as he then was) in Union of India (UOI) Vs. Alliance Assurance Co.

Ltd. and Another, . is ,that the contract of insurance against the loss was a contract of indemnity and on payment of the loss, the insurer as

indemnifier has an equitable right of subrogation to the claim of the assured against the carrier.

We have to uphold this view in the light of the legal position traced by us earlier. The 1st respondent, as insurer, having paid the loss to the 2nd

respondent, is entitled in he subrogated in the manner explained in the English decisions referred to by us earlier. This would mean that the 1st

respondent should gel any amount that the 2nd respondent is entitled from the appellant by way of damages for its negligence. It is not necessary

for us to express any opinion as to whether the learned single Judge was right in further holding that when the I st respondent had undertaken the

liability insured by the 2nd respondent the former ""is equally entitled in recover damages or loss of the value of'' the goods consigned from the

carrier"" i.e. in its own name because in the present case we find that the insurer (the 1st respondent) is claiming only through the insured (the 2nd

respondent) after obtaining Ex, A-7 Power of Attorney.

19. The learned counsel for the appellant questions the method of ascertainment and quantum of damages by the trial Court as continued by the

learned single Judge. We do not find any ground for interference. The learned single Judge observed that the evidence of PW-2. the surveyor, in

this regard was found acceptable by the Court below and that he did not find any ground to differ from the conclusions readied by the Court

below. The quantum of damages ascertained by PW-2 was in fact accepted by UK-1ST respondent. The appellant does not input any collusion

between the 1st and 2nd respondents. The loss was in fact made good by the 1st respondent to the 2nd respondent. PW-3. a partner of the 2nd

respondent, slated in his examination in chief that the appellant was contacted at the lime of inspect ion of the goods by the surveyor but that it did

not respond. DW-l. a senior executive of the appellant company, was working at Hyderabad then. He admitted that he had no direct knowledge

of the case, except receiving a report from his junior officers. DW-2, who was working al Madras office in the appellant company as Manager,

slated in his cross-examination that he did not know whether his office Manager has intimated on phone about survey of goods, DW-3 was. In

charge of the Hyderabad branch of the appellant company. In view of the stand taken by the appellant company in its Ex. A-6 reply dated 18-I -

1973, it is probable and likely that the appellant ignored the intimation by the 2nd respondent of the survey.

20. In the result, we do not find any reason to interfere with the judgment of the learned single Judge. The Letters Patent Appeal is. therefore,

dismissed with costs.

21. Appeal dismissed.