THE INDIAN LAW REPORTS

APPELLATE CIVIL

Before Shamsher Bahadur, J.

UNION OF INDIA,—*Appellant.*

versus

M/S BHARAT FIRE AND GENERAL INSURANCE, LTD,—*Respondent.*

Regular Second Appeal No. 74-D of 1955.

1960

July 19th.

Transfer of Property Act (IV of 1882)—S. 135-A—Insurer of goods—Whether has the right to sue in respect of the lost goods independently of the owner after it has paid the value of the lost goods to the owner.

Held, that where the goods lost are ascertainable and the Insurance Company has met its liability in accordance with the insurance policy, it becomes entitled to sue in respect of the subject-matter of the lost goods independently of the owner in view of the provisions of sub-section (2) of section 135-A of the Transfer of Property Act, 1882. The rule of English Law which undoubtedly was applicable before the amendment in the Transfer of Property Act has been abrogated in this country by statute and it cannot be said that in respect of the contingency provided for in sub-section (2), it is still essential for the underwriter to sue in the name of the owner of the goods. Under sub-section (3), however, the insurer does not acquire a full right to pursue his remedies for he acquires "no title to the subject-matter insurred" and the law of subrogation enunicated in the English authorities would stil be applicable according to which an underwriter, who has met the claim of the insured, is entitled to the remedies available

to the latter provided he seeks them in the name of the insured.

Regular Second Appeal from the decree of the Court of Shri S. B. Capoor, District Judge, Delhi, dated the 30th day of June, 1955, affirming with costs that of Shri Des Raj Dhameja, Commercial Sub-Judge, Ist Class, Delhi, dated the 31st December, 1954, decreeing the suit with costs.

R. S. NARULA, ADVOCATE, *for the Appellant.*

K. C. JAIN, *for the Respondent.*

JUDGMENT

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SHAMSHER BAHADUR, J.—This judgment would dispose of seven companion appeals raising identical questions of law.

The facts on which the decision of these appeals must turn lie within a narrow compass and may be briefly set out. The Tata Iron & Steel Limited consigned packages of Mild Steel bars from Kumardhubi railway station to New Delhi Safdarjang railway station, the consignee being the Executive Engineer of the Rehabilitation Division of the Central P.W.D., New Delhi. The consigned goods were insured against loss with the plaintiff-company, Bharat Fire and General Insurance, Ltd. It appears that in all the seven consignments concerning these appeals, there were shortages of bundles. It may, however, be observed that the shortage in each case related to the specific number of bundles. By way of illustration, in one of the consignments there were 462 bundles and 23 came to be lost. Claims were laid before the Insurance Company by the consignee and it is not in dispute that these claims were promptly met and payments made to the Executive Engineer. The consignee in each case was also the

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endorsee of the policy of insurance. The Executive Engineer in respect of each consignment executed a receipt for the moneys received from the Insurance Company by way of losses. Each of these letters is in these terms: —

> "We hereby acknowledge receipt of the sum of Rs.————which you have paid us and which we accept in settlement of our claim in respect of short delivery in the consignment despatched from Kumardhubi to Delhi Safdarjang particulars of which are as under :—
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> * * *
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> * * *
>
> We place on record that by virtue of such payment the Underwriters concerned became subrogated to all our rights and remedies in and in respect of the subject-matter insured in accordance with the laws governing the Contract of Insurance.
>
> We also record that they have authority to use our name to the extent necessary effectively to exercise all or any such rights and remedies; that we will furnish them with any assistance they may reasonably require of us when exercising such rights and 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 rights and remedies."

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Armed with this authority, the plaintiff Insurance Company instituted seven different suits against the Railway Administration represented by the Union of India, which was responsible for the loss of goods in transit from Kumardhubi to Safdarjang. The pleas ranged both in number and variety but ultimately the case was decided by the trial Court in favour of the plaintiff-company principally on one ground. It has been found that the letter of subrogation signed by the Executive Egineer authorised the Insurance Company to lay a claim against the Union of India, in its own name. The other objection relevant for purposes of these appeals preferred by the Union of India did not find favour with the trial Court and was dealt with in this way :—

> "So far as the second objection is concerned, if the consignee and the Railway are merely the Departments of the Union of India, then in that case the consignee should not have received the claims from the plaintiff when the responsibility was that of the other Department, namely, the Railway. Having received the claim from the plaintiff, the Union of India cannot turn round and say that the consignee had no right to sue."

I may say in passing that the second point was not dealt with at all by the learned District Judge in the appeal preferred by the Union of India

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and it must be presumed that the learned counsel for the appellant did not raise it. The District Judge upheld the decision of the trial Judge on the broad general ground of equity that the insurer upon paying to the assured the amount of loss of goods insured becomes subrogated without any formal assignment to the rights of the assured which can be enforced in his own name. This conclusion is based on certain American cases which neither counsel in this Court has considered it necessary to refer, as the matter is governed in India by statute, a paritian which appears to have been overlooked by the parties counsel in the Courts below.

The concurrent decision of the two Courts below is challenged by the learned counsel for the appellant, who has argued this case fully and with great ability, on the ground that the statutory enactment which governs the point in dispute disentitles the plaintiff to sue without impleading the Executive Engineer who signed the letter of subrogation. It is undoubtedly true that before the enactment of section 135-A of the Transfer of Property Act in 1944, the rule of English law laid down by the House of Lords in *Simpson and Company* v. *Thomson, Burrell* (1) requiring an underwriter who had paid for the loss to sue in the name of the insured prevailed in this country. As held by the Lord Chancellor, "an underwriter is entitled to succeed in making good the indemnity 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

(1) (1877-78) 3 A.C. 279.

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of action for damages must be asserted not in the name of the underwriter but in the name of the person insured." Both the Lord Chancellor and Lord Penzanc, who agreed with him, emphasised that if the owner and the insurer were the same person then there could be no right of action as no one could have right of action against himself which is an absurdity and a thing unknown to the law. This principle was reiterated in a later Privy Council decision in *King* v. *Victoria Insurance Company, Limited* (1). Reference was here made to an amendment which had been made in the law by the Judicature Act of 1873. It was held that "although the insurers could not by mere force of subrogation sue in their own name, yet in this case the right to do so was conferred by assignment from the insured aided by section 5, sub-section 6 of the Judicature Act, corresponding with the English Judicature Act of 1873". The latest English decision on the subject which has been cited at the Bar is a judgment of the Court of Appeal in *James Nelson and Sons, Ltd.*, v. *Nelson Line* (*Liverpool*), *Limited* (2). The Master of the Rolls, Lord Justice Collins, dealing with the question in issue at page 223 thus observed :—

> "What is the nature of their right by way of subrogation? It is the right to stand in the shoes of the persons whom they have indemnified, and to put in force the right of action of those persons; but it remains the plaintiffs' right of action, although the underwriters are entitled to deduct from any sum recovered the amount to which they have indemnified the plaintiffs, and although they may

(1) (1896) A.C. 250.
(2) (1906) 2 K.B. 217.

have provided the means of conducting the action to a termination."

The position, according to the English authorities thus appears to be that an underwriter who has met the claim of the insured is entitled to the remedies available to the latter provided he seeks them in the name of the insured. Precisely the same situation obtained in India till the amendment introduced in the Transfer of Property Act by section 135-A. As both the learned counsel have placed reliance on this section, it would be well to set out its provisions *in extenso* :—

"135A. (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 in 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.

(3) Where the insurer pays for a partial loss, he acquires no title to the subject-matter insured, or such part of it as

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may remain, but he is thereupon subrogated to all rights and remedies of the insured person as from the time of the casualty causing the loss, in so far as the insured person has been idemnified by such payment for the loss.

(4) Nothing in clause (e) of section 6 shall affect the provisions of this section."

It is common ground that clause (1) is not applicable in the instant case as no assignment of the policies in favour of the plaintiff-company has been made out. The dispute centres round sub-sections (2) and (3). Mr. Jain, for the respondent-company, in his very forcible argument, has submitted that the case is controlled by sub-section (2) whereas Mr. Narula, for the Union of India, submits that sub-section (3) alone is applicable. The plaintiff-company has met the claim in its entirety in so far as it related to the goods that had been lost. The goods that had been lost were specified packages out of the consigned goods consisting of Mild Steel bars. In my view, the goods lost were ascertainable and the Insurance Company had met its liability in accordance with the insurance policy. Sub-section (2) makes it clear that the insurer needs to have paid whatever is due for the loss of the goods "either of the whole or of any apportionable part," before he becomes entitled to sue in respect of the subject-matter of the lost goods independently. The rule of English Law which undoubtedly was applicable before the amendment in the Transfer of Property Act has been abrogated in this country by statute and it cannot be said that in respect of the contingency provided for in sub-section (2), it is still essential for the underwriter to sue in the name of the owner of the goods. Sub-section (3) which according to the learned counsel for the appellant is

applicable to the case, refers to a situation where an insurer pays for a partial loss only. It is not disputed that the plaintiff-company has paid the claim in respect of all the goods that came to be lost in transit and the provisions of sub-section (3), in my view, are not attracted. It is true that under sub-section (3), the insurer does not acquire a full right to pursue its remedies for he acquires "no title to the subject-matter insured" and the law of subrogation enunciated in the English authorities would still be applicable.

The conclusion at which I have arrived finds support from a recent decision of Mukherjee, J. In *Alliance Assurance Co., Ltd.* v. *The Union of India*, (1). It was held therein that "an insurer who has paid for a total loss of an apportionable part of some goods carried for transit by land by a Railway administration can maintain a suit in his own name against the carrier for reimbursement of the amount paid to the insured for the loss." Mukherjee, J., made a reference to the three cases of *Simpson and Co.* v. *Thomson Burrel,* (2) *King* v. *Victoria Insurance Co.,* (3) and *James Nelson and Sons, Limited* v. *Nelson Line (Liverpool) Limited,* (4) and observed that under the English law, or rather the English procedure the underwriter is only entitled to "the benefit of such remedies, rights, or other advantages as the assured would himself be able to enjoy. The underwriter has no independent right of his own and cannot even sue in his own name. There is, however, no reason why the peculiar form of English procedure should be engrafted on the procedure prevailing in our law courts."

(1) 62 C.W.N. 539
(2) (1877-76) 3 A.C. 279.
(3) (1896) A.C. 250.
(4) (1906) 2 K.B. 217.

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The point which has been made by Mr. Narula that the words "in his own name" in sub-section (1) of section 135A have been designedly omitted from both sub-sections (2) and (3), has been fully met by Mukherjee, J., at page 545 in *Alliance Assurance* v. *Union of India* (1). In the collocation and context of sub-section (1), the words "in his own name" were essential as the rights of an assignee were being dealt with. In sub-section (2) where the rights of the insured are transferred in entirety to the underwriter on payment of the total loss, the addition of the words "in his own name" would have been utterly redundant. Likewise, in sub-section (3), where the title to the subject-matter insured is definitely stated not to have been acquired by the insurer it could have been equally superfluous to add these words. I am, therefore, in respectful agreement with the views of Mukherjee, J., that sub-section (2), empowers an insurer to sue in his own right after the conditions laid down therein have been satisfied. The Division Bench authority of the Calcutta High Court in *British and Foreign Marine Insurance Co., Ltd.,* v. *India General Navigation and Railway Co., Ltd.,* (2) can no longer be said to be good law after the amendment brought about by section 135A of the Transfer of Property Act. Till the decision of that case, the Insurance Company, as was laid down by Sir Lawrence. H. Jenkins, could not claim to have an independent right of action by way of subrogation. Similarly, the Division Bench authority of Madras High Court in *K. V. Periamanna Marakkayar & Sons*, v. *Banians & Co.,* (3), can no longer be said to lay down the prevailing law. In both these authorities the conclusions of the Courts are based on the trilogy

(1) 62 C.W.N. 539.
(2) I.L.R. 38 Cal. 28
(3) I.L.R. 49 Macl 156

of the English decisions to which reference has been made.

There remains to discuss the judgment of G. K. Mitter, J., in *Indian Trade and General Insurance Co., Ltd.* v. *Union of India* (1). In this case, G. K. Mitter, J., took into consideration the provisions of section 135A of the Transfer of Property Act and came to the conclusion that the underwriters could not sue in their own name when they had paid for the goods which had been partially lost. In this case, G. K. Mitter, J., was dealing with the case of a partial loss under sub-section (3) and in this respect the ruling of this decision is distinguishable from the facts of the present case.

The second point raised by the learned counsel for the appellant may now be briefly dealt with. It is argued that the Executive Engineer was dealing as a representative of the Union of India. The Bharat Insurance Company as the underwriter has stepped into the shoes of the consignee. The claim is against the Railway Administration which is also a branch of the Union of India. Just as the Executive Engineer could not have sued the Railway Administration, both being the limbs of the same body, viz., the Union of India, the plaintiff company whose rights are no better than those of the consignee, is precluded from suing the Union of India. For one thing, the point thus formulated was not specifically pleaded in this form by the defendants. Though it has been dealt with by implication in the judgment of the trial Court, it was not decided as a specific issue in the judgment of the trial Court. The point does not appear to have been raised before the learned District Judge who has not even dealt with it. It cannot be denied that questions of law can be taken up even for the first time in

(1) A.I.R. 1957 Cal; 190

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second appeal provided they are based on clear, admitted and unambiguous facts or when the point presages a position which is not disputed or is indisputable. Mr. Jain has controverted not only the facts on which the objection is founded but also the right of the Union of India to raise the objection in this form at this stage. When the letter of authority signed by the Executive Engineer was handed over to the plaintiff-company, it was made clear that all the rights vested in the consignee stood transferred to the Insurance Company. No reservation of any kind was made in the letter that the claim being against the Railway Department would not be entertained. It is possible that if the position now taken up by the Union of India had been indicated to the plaintiff-company, the claim would never have been met. At that time it was open for the Executive Engineer to have taken one of the two courses, either to receive the claim for the loss or to disclaim the right to receive it because it arose out of the negligence of another Department of the Union of India. Having chosen to receive the claim it is not now open, in my opinion, for the Union of India to say that the claim is not entertainable on the ground that the consignee and the Railway are the Departments of the Union of India. The Union of India cannot be allowed to blow both hot and cold. As has been stated by Lord Atkin in *Lissenden* v. *C. A. V. Bosch, Limited* (1), at page 429, where a person concerned has the choice of two rights, either of which he is at liberty to adopt, but not both, and if he adopts the one he cannot afterwards assert the other.

In my view, the point now raised in second appeal is not so clear that I can allow it to be agitated at this stage. There was possibly more

(1) 1940 A.C. 412.

than one line of defence available to the plaintiff-company and it is only in cases where the point is clear and unambiguous that it could be permitted to be raised for the first time in second appeal. It would be contrary to the principles of equity and fair play if the claim of the plaintiff is allowed to be defeated on the ground which at least is debatable and so belatedly raised before me in this Court. I, thus, do not see my way clear in this case to permit the appellant to raise this point and I would accordingly dismiss these appeals. I would, however, make no order as to costs of these appeals.

B.R.T.

LETTERS PATENT APPEAL

Before Inder Dev Dua and Shamsher Bahadur, JJ.

BRAHM DUTT AND OTHERS,— *Appellants.*

versus

THE PEOPLES' CO-OPERATIVE TRANSPORT SOCIETY. LTD.. AND OTHERS,—*Respondents.*

L.P.A. No. 47-D of 1960.

1960

August 8th.

Letters Patent—Clause 10—Appeal under—Whether competent against an order passed by Single Judge in a petition under Article 226 of the Constitution of India in which further direction is given under Article 227—Letters Patent Appeal—New point of law—Whether and when can be raised—Motor Vehicles Act (IV of 1939)—Section 47—Whether confers unlimited and uncircumscribed power on the Transport Authorities in the matter of issue of permits—Proviso to S. 47(I)—Whether violative of Article 14 of the Constitution of India.

Held, that an order passed only under Article 227 of the Constitution of India cannot be assailed on appeal under Clause 10 of the Letters Patent, but an order passed