PETITIONER:
OBERAI FORWARDING AGENCY

Vs.

RESPONDENT:
NEW INDIA ASSURANCE CO. LTD. & ANR.

DATE OF JUDGMENT: 01/02/2000

BENCH:
S.Santosh Hedge, Syed Shah Mohammed Quadri, S.P.Bharucha

JUDGMENT:

BHARUCHA, J.

The facts are set out only in so far as they are relevant to the two issues in this appeal, namely, whether the first respondent insurance company was subrogated to the rights of the second respondent consignor in respect of the lost consignment or whether it was the assignee of the rights of the second respondent in respect thereof; and, if the latter, whether it was a consumer within the meaning of the Consumer Protection Act, 1986, entitled to maintain a complaint thereunder.

The second respondent, through its agent, hired two trucks from M/s. Bhasin Goods Carriers of Bareilly to transport broken rice to Barpeta, Assam. According to the appellant, it was asked by M/s. Bhasin Goods Carriers and the second respondents agent only to settle the freight for the consignment, which it did. The trucks loaded with the consignment did not reach their destination and the consignment was lost.

The second respondent made a claim for the value of the consignment upon the first respondent, who had insured it, in the sum of Rs.93,925.55. The claim was settled by the first respondent in the sum of Rs.64,137/- , and that sum was paid to the second respondent.

Consequent upon the claim being settled, the second respondent executed in favour of the first respondent, a Letter of Subrogation on 15th June, 1992. It stated : In consideration of your paying to us the sum of Rs.64137/- only say Rupees Sixty four thousand one hundred and thirty seven only in full settlement of our claim for non-delivery/shortage & damage under policy No.2142140400015 Cert. No./decl. No.269240001/54 & 55 issued by you all on the undermentioned goods, 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 we hereby subrogate to you the same rights as we have in consequence 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.

On the same day the second respondent also executed in favour of the first respondent a Special Power of Attorney, inter alia for the following purpose : To file suit in the court of law against the Railways Adm. if necessary for the recovery of the claim moneys for the afore said claim, on our behalf and in our name and to give valid discharges and effectful receipt thereto.

On 9th September, 1992 the first respondent filed against the appellant a complaint under the Consumer Protection Act in respect of the loss of the consignment wherein it stated that the second respondent had assigned/transferred their rights to claim the amount from the O.P. in favour of the complainant by executing Letter of Subrogation and power of attorney in it favour. . The complainant stands subrogated to the rights of M/s. M.S. Industries as consumer and is consumer under the law and the purview of the C.P. Act.. The appellant in its written statement contended that the first respondent was not a consumer and had no right to file the complaint and that the provisions of the Consumer Protection Act were not attracted. The complaint was thereafter amended and the second respondent was added as a co-complainant.

The District Forum, Shahjahanpur, in which the complaint was filed, allowed it and directed the appellant to pay to the respondents the sum of Rs.98,924.55 and interest. The appellant preferred an appeal before the State Forum. The appeal was dismissed, but the amount of compensation was reduced to Rs.69,137/-. Against the order of the State Commission, a Revision Petition was filed before the National Consumer Dispute Redressal Commission. The same was dismissed and the appellant was directed to pay to the respondents the sum of Rs.98,924.55 as compensation. The appellant impugns the order of the National Consumer Disputes Redressal Commission by special leave.

Learned counsel for the appellant submitted that the document quoted above, though styled Letter of Subrogation, was an assignment by the second respondent of its rights to the first respondent. Upon such assignment, the assignor second respondent had no right left. And the assignee first respondent was not a consumer. For the first respondent, on the other hand, it was submitted that the document was indeed a letter of subrogation and that, therefore, the first respondent and the second respondent were entitled to maintain the complaint.

Our attention was drawn by learned counsel for the appellant to the judgments of this Court in Union of India vs. Sri Sarada Mills Ltd., 1972 (2) SCC 877, and New India Assurance Co. Ltd. vs. G.N. Sainani, 1997 (6) SCC 383; the judgments of the Madras and Andhra Pradesh High Courts in Vasudeva Mudaliar vs. Caledonian Insurance Co. & Anr., AIR 1965 Madras 159, and United India Fire and General Insurance Co. Ltd. vs. Pelaniappa Transport Carriers &

Anr., AIR 1986 Andhra Pradesh 32; and to the judgments of the National Consumer Disputes Refressal Commission in M/s. Green Transport Company vs. New India Assurance Company Ltd., 1992 (2) CPJ 349, and Transport Corporation of India Ltd. vs. Davangera Cotton Mills Ltd. & Ors., 1998 (2) CPJ 16.

Before we proceed to consider the judgments and arguments, it is convenient to set out the relevant provisions of the Consumer Protection Act. Under Section 2(b) a consumer can be a complainant. A consumer, under the terms of Section 2(d)(ii), is, inter alia: any person who hires or avails of any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such services other than the person who hires or avails of the service for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person;

Section 3 states:

The provisions of the Consumer Protection Act are in addition to and not in the derogation of the provisions of any other law for the time being in force.

In the case of Vasudeva Mudaliar (ibid) a learned Single Judge of the Madras High Court said : (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 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 re-coupe 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 were, 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 on 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 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 assureds 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 or assignment in his favour will be in a position to maintain a suit in his own name against third parties. .

This Court in the case of Union of India vs. Sri Sarada Mills Ltd. (ibid) was hearing an appeal by the Railways in a suit for damages for bales of cotton which had been damaged in transit. All the three learned Judges who heard it were agreed that subrogation did not confer any independent right on underwriters to maintain in their own name and without reference to the persons assured an action for damage to the things insured. The majority took the view that in the case before them the insurance company and the consignor mill had proceeded on the basis that the former was only subrogated to the rights of the latter and the insurance company had allowed the respondent mill to sue; the cause of action of the mill against the Railways did not perish on giving the letter of subrogation. Mathew, J., dissenting, referred to the finding of the High Court that there had been an assignment of a mere right to sue by the respondent mill to the insurance company and, therefore, in his view, the question was whether what was assigned was a mere right to sue or something which the law of insurance recognised as assignable. The reason why a mere right to sue could not be assigned was that such an assignment offended the rule of champerty and maintenance. The learned Judge concluded that the assignment had conveyed to the insurance company the entire right in respect of the subject matter of the insurance, including the right of the insured to sue in its own name, and that, after the assignment, the respondent mill had no cause of action to institute the suit against the Railways for the recovery of damages.

The case of United India Fire and General Insurance Co. Ltd. (ibid) related to a document in its favour which recited that it had paid to the consignor compensation for the loss of the consigned goods and the consignor hereby assigned and transferred to you all our rights title and interest in respect of the said goods and all rights and claims against any person or persons in respect thereof. The Andhra Pradesh High Court held that the appellant insurance company had been assigned the right, title and interest of the consignor and the suit by it for recovery of damages was maintainable, though the consignor was not impleaded as a co-plaintiff.

In New India Assurance Co. Ltd. vs. G.N. Sainani (ibid) this Court was examining a complaint filed by the appellant insurance company under the Consumer Protection Act. The question that arose was whether the assignee could be said to be a beneficiary so as to be able to make the complaint. What had been assigned was found to be the

amount of the loss that was suffered by the assured on account of short landing of the concerned goods, meaning thereby that what had been assigned was the right to recover the loss. It was merely the assignment of a right to sue for the loss on account of short landing. It was, therefore, difficult to see how it could be said that the assignee was the beneficiary of any service. While the assignee might have the right to recover the loss from the insurer by filing a suit in a civil court, he could not avail of the remedy under the Consumer Protection Act because he was not a consumer.

The Consumer Protection Forum in the case of M/s. Green Transport Company (ibid) analysed the definition of consumer under the Consumer Protection Act and found that it was only the person who had hired a service for consideration or any other person availing of the benefit of such service with his approval who could be regarded as a consumer thereunder. In the case before it, the respondent insurance company was the complainant. It had insured a consignment which had been lost. The fact that it had acquired rights of subrogation against the transporter did not improve its position so far as proceedings under the Consumer Protection Act were concerned. Neither the subrogation nor the deed of transfer of the right of action nor the Special Power of Attorney clothed it with the legal status of a consumer so as to entitle it to invoke the special jurisdiction of and maintain the complaint under the Consumer Protection Act. In the Transport Corporation of India Ltd. case (ibid) the insurance company was not the sole complainant. The consignor and the consignee of the lost consignment were parties to the complaint. It was held that the transporter was liable to indemnify them for the loss of goods. Though the claim had been settled by the insurance company and the consignor had issued a letter of subrogation, that did not effect the rights of the consignor and consignee to claim the value of the goods from the transporter. Accordingly, the complaint was maintainable.

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.

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

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.

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.

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.

Learned counsel for the first respondent submitted that the Letter of Subrogation and the Special Power of Attorney should be read together and, so read, it would be seen that the first respondent was not an assignee of the second respondents rights but was merely subrogated to

them. The terms of the Letter of Subrogation are clear. They cannot be read differently in the light of another, though contemporaneous, document.

Now, as is clear, the loss of the consignment had already occurred. All that was assigned and transferred by the second respondent to the first respondent was the right to recover compensation for the loss. There was no question of the first respondent being a beneficiary of the service that the second respondent had hired from the appellant. That service, namely, the transportation of the consignment, had already been availed of by the second respondent, and in the course of it the consignment had been lost. The first respondent, therefore, was not a consumer within the meaning of the Consumer Protection Act and was, therefore, not entitled to maintain the complaint.

By reason of the transfer and assignment of all the rights of the second respondent in the first respondents favour, the second respondent retained no right to recover compensation for the loss of the consignment. The addition of the second respondent to the complaint as a co-complainant did not, therefore, make the complaint maintainable.

In the premises, the appeal is allowed. The judgment and order under appeal is set aside. The complaint filed by the respondents is dismissed.