

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ RSA 196/2011

Judgment delivered on: 13th December, 2011

M/s Gati Ltd. Appellant
Through Mr. Shankar Kumar Jha, Adv.
versus

The Oriental Insurance Co. Ltd. & Anr. Respondent
Through Nemo.

CORAM:
HON'BLE MR. JUSTICE KAILASH GAMBHIR:

KAILASH GAMBHIR, J. (Oral)

1. By this appeal filed under Section 100 Read with Order XLII of the Code of Civil Procedure, 1908, the appellant seeks to challenge the order dated 27.5.2011 passed by the first Appellate Court and order dated 15.5.2010 passed by the Civil Judge while decreeing the recovery suit filed by the respondent no.1 insurance company.

2. Assailing the said orders, the only argument advanced by the learned counsel for the appellant is that both the Courts below have not followed the ratio of the judgment of the Constitution Bench of the Supreme Court in the case of *Economic Transport Organization vs Charan Spinning Mills (P) Ltd. & Anr. (2010)4 SCC114* and, therefore, the findings given by both the Courts below are illegal and perverse.

3. The sum and substance of the contention raised by counsel for the appellant is that by virtue of letter of subrogation, the insurer cannot file a suit in its own name as in terms of the law laid down by the Apex Court in the said judgment such a suit based on subrogation can be filed by the insurer either through a Power of Attorney duly executed in its favour by the assured or by impleading the assured as co-plaintiff. Counsel laid emphasis on para 15.3 of the said judgment of the Apex Court to fortify his said submission. Inviting attention of this Court to the plaint from the Trial Court records, the counsel pointed out that in the plaint although the assured was impleaded as plaintiff No. 2, but the plaint was not signed by the said plaintiff No.2 and,

therefore, the filing of the suit by the insurance company respondent No. 1 herein does not satisfy the requirement of the law laid down by the Hon'ble Apex court in the said judgment. Counsel also submits that the respondent no.1 insurance company had also not placed on record Power of Attorney executed in its favour by the assured, co-plaintiff No. 2 in the main suit.

4. I have heard learned counsel for the appellant at considerable length and given my thoughtful consideration to the arguments advanced by him.

5. The sole contention raised by learned counsel for the appellant is that both the Courts below have not followed the ratio of the judgment given by the Constitution Bench of the Supreme Court in the case of *Economic Transport Organization* (supra) as neither any Power of Attorney was executed by the assured in favour of the insurer, the respondent herein, nor the assured, as co-plaintiff No.2, had signed and verified the suit along with the main plaintiff, the insurer.

7. The judgment of the Apex Court in the case of *Economic Transport Organisation (supra)* has explained the three kinds of subrogation i.e subrogation by equitable assignment, subrogation by contract and subrogation-cum-assignment. For the purposes of the case at hand, the third type of subrogation i.e subrogation-cum-assignment is relevant. The letter of subrogation proved on record as Ex.PW1/3 gives the right to the respondent no.1 to recover the amount from the appellant herein. For better appreciation, the said letter is reproduced as under:

Letter of Subrogation

The Oriental Insurance Company Ltd.,
1/20, Asaf Ali Road,
New Delhi.

Dear Sir,

In consideration of your paying us the sum of Rs. (Rupees _____) in full and final settlement of our claim No. _____ arising under open cover note No.7..... under G.R.No..... in connection with the damage quantity. We hereby declare that you, the Insurance of the damage quantity have become subrogated to all our rights, titles, interest and remedies in respect of this subject matter insured in accordance with the law governing the contract of Insurance and also under the General Law. We also hereby assign and transfer to you our rights to recover and to take possession of the damage quantity from the shipping company/transporter/warehouse incharge.

Further, we hereby authorise you and grant you full power to pursue one investigation regarding the damage of the imported goods and also

to do any other act/acts necessary in pursuance of and for the recovery of damage quantity.

We also authorize you to take our name and use by lawful ways and means your name and otherwise at your risk and expenses to recover the damages, against the person/persons concerned involved in the damages of the imported goods.

We also authorize you to transfer it in any manner whatsoever at your will and pleasure as your own property.

We also undertake and agree to make, execute at your expenses all such deeds and documents and render such assistance as you may reasonably require for the purpose of carrying out this agreement.

In witness whereof we have set our hands on the 16th day of March, 2000.

WITNESSES.

Yours faithfully,

- 1.
- 2.

In paragraph 29 of the judgment in *Economic Transport case*, it was held that in all three types of subrogation, the insurer can sue the wrongdoer in the name of the assured, meaning thereby that either the assured has joined as a co-plaintiff or alternatively the insurer can obtain a special Power of Attorney from the assured and then to sue the wrongdoer in the name of the assured as his attorney. Paragraph 35(iv) and (v) are relevant for present case and are reproduced as under:

"(iv) A subrogation enables the insurer to exercise the rights of the assured against third parties in the name of the assured. Consequently, any plaint, complaint or petition for recovery of compensation can be filed in the name of the

assured, or by the assured represented by the insurer as subrogee-cum-attorney, or by the assured and the insurer as co-plaintiffs or co-complainants.

(v) Where the assured executed a subrogation-cum-assignment in favour of the insurer (as contrasted from a subrogation), the assured is left with no right or interest. Consequently, the assured will no longer be entitled to sue the wrongdoer on its own account and for its own benefit. But as the instrument is a subrogation-cum-assignment, and not a mere assignment, the insurer has the choice of suing in its own name, or in the name of the assured, if the instrument so provides. The insurer becomes entitled to the entire amount recovered from the wrongdoer, that is, not only the amount that the insurer had paid to the assured, but also any amount received in excess of what was paid by it to the assured, if the instrument so provides."

Whether the letter executed is a subrogation simpliciter or a subrogation-cum assignment is only relevant for the dispute between the insurer and assured and does not in any manner effect the maintainability of the suit in question. In the facts of the case at hand, the insurer and the assured joined as co-plaintiffs to institute the suit against the appellant and the only question that remains to be decided is that will the omission of the co-plaintiff to sign the plaint amount to making the suit not maintainable? It is a settled legal position that for filing a suit, the plaint may not be signed by all the co-plaintiffs and the same can be maintained even if the plaint has been signed and verified by one of the co-plaintiffs. There is no rule providing that a

person named as a co-plaintiff is not to be treated as a plaintiff unless he signs and verifies the plaint which was held by the Privy Council in *Mohini Mohun Das and Ors. Vs. Bungsi Buddan Saha Das and Ors.* (1890) ILR 17P.C. 580 and is the established since then. This court in the case of *Vaidyaratnam P.S. Varier's Arya Vaidyasala Kottakkal Vs. K.C. Vijaikumar* ILR1990Delhi124 held the same in the following words:

"It is settled principle of law that where several persons institute a suit, it is not necessary that all should sign the plaint, It is sufficient that one of them signs the plaint with the other plaintiffs' knowledge and authority. There is no rule providing that a person named as co-plaintiff not to be treated as plaintiff unless he signs and verifies the plaint. In the face of the settled proposition of law I have no hesitation to hold that the plaint has been signed, verified and instituted by a duly authorized person."

Hence, it is manifest from the foregoing that the co-plaintiff not signing the plaint will not go to the root of the matter so as to vitiate the whole purpose of the suit. Therefore, the impugned orders does not in any manner transgress or dispute the legal position settled by the *Economic Transport Organisation Case(supra)* as the plaint would be taken to be validly presented by both the plaintiffs as the assurer had the knowledge of the

suit being instituted. It is also evident that the plaintiff has not disputed the fact that the assured has properly and validly executed the letter of subrogation, which was duly proved on record Exhibit PW1/3 and in the face of the above, the appellant thus cannot re-agitate the question of law correctly answered by the courts below.

8. In the light of the above, this court does not find merit in the present Regular Second Appeal and the same is hereby dismissed.

DECEMBER 13,2011

KAILASH GAMBHIR, J.