# Economic Transport Organisation Delhi vs M/S Charan Spinning Mills (P) Ltd.& Anr on 17 February, 2010

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## Bench: J. M. Panchal, P. Sathasivam, D. K. Jain, R. V. Raveendran

Reportable

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.5611 OF 1999

Economic Transport Organization ... Appellant

Vs.

M/s. Charan Spinning Mills (P) Ltd. & Anr. ... Respondents

J U D G M E N T

R.V.RAVEENDRAN, J.

This appeal was referred by a two-Judge Bench to a larger bench on 30.11.2000, being of the view that the decision of this Court in Oberai Forwarding Agency v. New India Assurance Co. Ltd. - 2002 (2) SCC 407, required reconsideration. In turn, the three-Judge Bench has referred the matter to a Constitution Bench on 29.3.2005. Factual Background :

> 2. The first respondent (also referred to as the `Assured' or the `consignor') is a manufacturer of the cotton yarn. It took a policy of insurance from the second respondent (National Insurance Co. Ltd, referred to as the `Insurer'), covering transit risks between the period 11.5.1995 and 10.5.1996 in respect of cotton yarn sent by it to various consignees through rail or road against theft, pilferage, non-delivery and/or damage. The first respondent entrusted a consignment of hosiery cotton yarn of the value of Rs.7,70,948/- to the appellant (also referred to as the `carrier') on 6.10.1995 for transportation and delivery to a consignee at Calcutta. The goods vehicle carrying the said consignment met with an accident and the consignment was completely damaged. On the basis of a surveyor's certificate issued after assessment of the damage, the second respondent settled the claim of the first respondent for Rs.447,436/- on 9.2.1996. On receiving the payment, the first respondent executed a

> Letter of Subrogation-cum-Special Power of Attorney in favour of the second respondent on 15.2.1996. Thereafter, respondents 1 and 2 filed a complaint under the Consumer Protection Act, 1986 (`Act' for short) against the appellant before the District Consumer Disputes Redressal Commission, Dindigul, claiming compensation of Rs.447,436/-

with interest at 12% per annum, for deficiency in service, as the damage to the consignment was due to the negligence on the part of the appellant and its servants. It was averred that the insurer as subrogee was the co-complainant in view of the statutory subrogation in its favour on settlement of the claim and the letter of subrogation-cum- special power of attorney executed by the Assured.

3. The District Forum by its order dated 8.11.1996 allowed the complaint and directed the appellant to pay Rs.447,436/- with interest at the rate of 12% per annum from the date of accident (8.10.1995) till date of payment to the Insurer, on the basis of the subrogation. The District Forum held that the failure to deliver the consignment in sound condition was a deficiency in service, in view of the unrebutted presumption of negligence arising under sections 8 and 9 of the Carriers Act, 1865. The appeal filed by the appellant before the State Consumer Disputes Redressal Commission, Madras, challenging the said order was dismissed on 2.4.1998. The appellant thereafter filed a revision before the National Consumer Disputes Redressal Commission in the year 1999. The National Commission dismissed the appellant's revision petition by a short non-speaking order dated 19.7.1999 which reads thus:

> "We do not find any illegality or jurisdictional error in the order passed by the State Commission." The said order is challenged in this appeal by special leave.

> The Issue

4. The appellant herein resisted the complaint on the following grounds:

> (i) The Assured (consignor) had insured the goods against transit risk with the Insurer. The Insurer had already settled the claim of the Assured. As a consequence, the Assured had no surviving claim that could be enforced against the carrier. At all events, as the Assured had transferred all its interest in the claim to the Insurer, it had no subsisting interest or enforceable right.

> (ii) The Insurer did not entrust the consignment to the carrier for transportation. The appellant did not agree to provide any service to the Insurer. There was no privity of contract between the Insurer and the appellant. As a result, the Insurer was not a `consumer' as defined in the Act and a complaint under the Act was not maintainable.

> (iii) The letter of subrogation was executed by the Assured (consignor), after the goods were damaged. This amounted to a transfer of a mere right to sue by the Assured in favour of the Insurer, which was invalid and enforceable.

(iv) There was no negligence on the part of its driver and the accident occurred due to circumstances beyond his control. The respondents did not place any evidence to prove any negligence, in spite of appellant's denial of negligence. Having regard to section 14(1)(d) of the Act, liability can be fastened on a carrier, for payment of compensation, only by establishing that the consumer had suffered loss or injury due to the negligence of the carrier as a service provider. In view of the special provision in section 14(1)(d) of the Act, the complainants under the Act were not entitled to rely upon the statutory presumption of negligence available under section 9 of the Carriers Act, 1865 which is available in civil suits brought against carriers. In the absence of proof of negligence, it was not liable to pay compensation for damage to the goods.

5. After leave was granted in this case on 27.9.1999, a three-Judge Bench of this Court rendered its decision in Oberai Forwarding Agency on 1.2.2000, making a distinction between `assignment' and `subrogation'. This Court held that where there is a subrogation simpliciter in favour of the insurer on account of payment of the loss and settlement of the claim of the assured, the insurer could maintain an action in the Consumer Forum in the name of the assured, who as consignor was a consumer. This Court further held that when there is an assignment of the rights of the assured in favour of the insurer, the insurer as assignee cannot file a complaint under the Act, as it was not a `consumer' under the Act. This Court held that even if the assured was a co-complainant, it would not enable the insurer to maintain a complaint under the Act, if it was an assignee of the claim. We extract below the relevant portion of the said judgment:

"17. In its literal sense, subrogation is the substitution of one person for another. The doctrine of subrogation confers upon the insurer the right to receive the benefit of such rights and remedies as the assured has against third parties in regard to the loss to the extent that the insurer has indemnified the loss and made it good. The insurer is, therefore, entitled to exercise whatever rights the assured possesses to recover to that extent compensation for the loss, but it must do so in the name of the assured.

x x x x x

19. With the distinction between subrogation and assignment in view, let us examine the letter of subrogation executed by the second respondent in favour of the first respondent. Its operative portion may be broken up into two, namely, (i) "we hereby assign, transfer and abandon to you all our rights against the Railway Administration, road transport carriers or other persons whatsoever, caused or arising by reason of the said damage or loss and grant you full power to take and use all lawful ways and means in your own name and otherwise at your risk and expense to recover the claim for the said damage or loss"; and (ii) `we hereby subrogate to you the same rights as we have on consequence of or arising from the said loss or damage".

20. By the first clause the second respondent assigned and transferred to the first respondent all its rights arising by reason of the loss of the consignment. It granted the first respondent full power to take lawful means to recover the claim for the loss, and to do so in its own name. If it were a mere subrogation, first, the word "assigned" would not be used. Secondly, there would not be a transfer of all the second respondent's rights in respect of the loss but the transfer would be limited to the recovery of the amount paid by the first respondent to the second respondent. Thirdly, the first respondent would not be entitled to take steps to recover the loss in its own name; the steps for recovery would have to be taken in the name of the second respondent. Thus, by the first clause there was an assignment in favour of the first respondent.

21. The second clause, undoubtedly, used the word "subrogate", but it conferred upon the first respondent "the same rights" that the second respondent had "in consequence of or arising from the said loss or damage", which meant that the transfer was not limited to the quantum paid by the first respondent to the second respondent but encompassed all the compensation for the loss. Even by the second clause, therefore, there was an assignment in favour of the first respondent.

22. 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 respondent's 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.

23. 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.

24. By reason of the transfer and assignment of all the rights of the second respondent in the first respondent's 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."

6. The referring Bench which heard this appeal considered the decision in Oberai. It was of the view that Oberai required reconsideration by a larger Bench, for the following reasons (vide order dated 30.11.2000) :

> "In the case of simple subrogation in favour of an insurance company, there is no difficulty in accepting that the insurance company gets subrogated to the rights of the consumer wherein the insurance company has paid compensation to the consumer

> pursuant to the contract entered into between the consumer and the insurance company. As per the principle referred to in the judgment in Oberai Forwarding Agency's case (supra), if there was simple subrogation, then the insurance company could maintain an action in the consumer court but it had to do so in the name of the consumer. It could not sue in its own name. Certainly that was the law laid down earlier by this Court and this is also a part of the common law. That was the position before the National Commission in Transport Corporation of India Ltd vs. Devangara Cotton Mills Ltd., reported in 1998 (2) CPJ 16 (NC), which is referred to in paragraph 16 of the judgment in Oberai Forwarding Agency (supra). But in the earlier judgment in Green Transport Co. vs. New India Assurance Co. Ltd., (1992) 2 CPJ 349 (NC) wherein the insurer had claimed a right of subrogation or transfer of the right of action which the insured had as against the transporter.

There it was held that the complaint in the consumer court was not maintainable. In Transport Corporation of India Ltd's case, the National Commission distinguished the judgment in Green Transport Co., wherein the complaint was held not to be maintainable. In other words, this Court in Oberai Forwarding Agency's case (supra) felt that where there was an assignment in addition to subrogation, the complaint was not maintainable even though the original consumer as well as the Insurance Company to whom the rights stood subrogated and assigned were the complainants. The crucial reasoning is set out in paragraphs 23 and 24 of the judgment in Oberai Forwarding Agency (supra) which we have already set out above.

So far as paragraph 23 of the said judgment is concerned, it states that in case the right to recover the compensation is assigned to the Insurance Company, there is no question of the Insurance Company being a `beneficiary' of the services which the consumer had hired through the transport company. Hence, section 2(b) of the Consumer Protection Act, 1988 would not apply. This Court also observed that `service' namely, the transportation of the consignment had already availed of by the consumer. The Insurance Company therefore, was not a consumer within the meaning of the provisions of the Consumer Protection Act, 1986 and therefore, not entitled to maintain the complaint.

It is contended for the appellant, relying on the above passages (para 23 in Oberai) that once the goods are handed over to a transporter for the purpose of transport, the services have already been rendered and that therefore, the consignor ceases to be a consumer. But it is pointed out for the respondent that the contract between the consumer and the transport company is to safely transport the goods through he entire distance and hand them over for delivery to the consignee at the opposite end. If the goods have been lost during transport, services are not fully rendered

- and a cause of action has arisen to the consignor (consumer) to recover the same, the consignor continues to be a consumer after the services are rendered and will be a consumer entitled to compensation (rather than goods) against the transport company. He does not, it is contended for the respondent, cease to be consumer. There is a breach of contract and the right of the consignor is to recover compensation. If, therefore, at such a stage the consignor is still a consumer entitled to sue for compensation, he is certainly entitled in that capacity to move the consumer court as a

complainant. That is how it is contended for the respondents that the consignor is in the position of a co-complainant.

So far as assignment of the rights in favour of the insurance company is concerned, it is contended for the respondents that one has to keep in mind that a simple assignment of a right to recover may, in law be bad, on the ground of `champerty/maintenance' and that is why, in these formats, it is coupled with subrogation. Once there is subrogation the insurance company is suing in the consignor's right as `consumer' because the consignor has not got the full services rendered in his favour, the goods not having reached their destination. An assignment coupled with rights of subrogation would be valid in law because then it will not be a case of a mere assignment of a right to sue.

In other words, on the date when the assignment is made, the consignor namely the consumer is still a consumer who has lost his goods and he is entitled to compensation for the loss of the goods by the transport company. Once the consignor receives the money from the Insurance company, the insurance company becomes subrogated as an indemnifier to all the rights of the consumer including the right to sue as a consumer. But the complaint must then be in the name of the consignor. In fact, that is the precise position on Transport Corporation of India Ltd. Vs. Davangere Cotton Mills Ltd. - 1998 (2) CPJ 16. It was held that the consignor could still sue notwithstanding the fact that compensation was paid by the insurance company. The only extra thing that happens in the event of the assignment in favour of the insurance company is that the insurance company becomes entitled to file the complaint in its own name by virtue of the assignment. The insurance company may not be a consumer to start with but it is subrogated to the rights of the consumer (consignor) to whom services were not fully rendered.

When we came to paragraph 24 of the judgment in Oberai Forwarding Agency (supra), it is stated that upon the transfer by assignment of all the rights of the consumer in favour of the insurance company, the consumer retained no right to recover compensation for the loss of consignment and therefore, the addition of the consignee as a co-complainant does not make the complaint maintainable. It is contended for the respondents that the law is well settled that there cannot be a bare assignment of a right to sue. But if such a right is coupled with the right of subrogation the action is maintainable by the assignee, who is suing for those rights and who need no longer implead the consignor. In fact, the principle in Transport Corporation of India Ltd., which has been accepted by the three Judge Bench itself says that if there is subrogation, the insurance company could sue in the name of consignor. The effect of the assignment is not to destroy the character of the insurance company as a person entitled to the rights of the consumer (because of subrogation) but also to provide an independent right to sue in its own name. Merely, because there is an assignment it does not follow that the complainant - insurer was not also clothed with the rights of the consignor as a consumer, if on the date of assignment the consignor was still entitled to compensation as consignor. The reasoning in paragraph 24 of the judgment appears to be closely intertwined with the reasoning in paragraph 23. As long as the goods had not been delivered, the consignor does not lose the right to claim compensation as a consumer and he still remains the consignor and to that rights, the Insurance company becomes subrogated. It is contended for the respondent that thus the insurance company is having the rights of the consignor as consumer by virtue of the rights

subrogated to it and is also entitled to maintain the complaint as an assignee in its own right.

It is pointed out for the respondents that, in fact, the result of the judgment of the three judge bench has been that a large number of cases which have been decreed in favour of the consignees in various consumer fora in this country have been rendered infructuous. The insurance company and the consignors became compelled to move the civil court once again after several years and to seek the benefit of section 14 of the Limitation Act. There was no other benefit accruing to the transporter. It is contended that a purposeful interpretation is to be given to the provisions of the Consumer Protection Act and one of the purpose is that consumers might get expeditious relief outside the civil courts.

It is contended alternatively that looking at the matter from another angle, the insurance company as a third party - indemnifier pays compensation to the consumer and redresses an immediate grievance and makes the insured to go back into this business. In such a situation, merely because a third party indemnifier pays money to the insured, the latter does not cease to be a consumer and the status of the consignor as a consumer still continues. Because there is a breach of contract the consumer can sue for compensation along with the insurance company and does not lose his right to sue for compensation. The right to sue before the consumer court is available either with the consignor or with the consignee and does not vanish into thin air, in spite of the assignor and assignee being co-complainants. In this connection, the decision in Compania Colombia De Sequros vs. Pacific Steam Navigation Co. etc., reported in 1964 (1) ALL ER 216 is also relied upon for the respondent. It contains an extensive discussion of the point involved. There the assignment was obtained after the accident and after the Insurance Company paid the money to the consignor.

In our view, the above contention of the respondent are substantial and a case is made out for reconsideration of Oberai Forwarding Agency.

7. The appellant contends that Oberai lays down the law correctly. It is submitted that what is executed in favour of the Insurer, though termed a `subrogation' is an assignment, and therefore, the Insurer was not entitled to maintain the complaint. Relying on the observations in para 23 of Oberai Forwarding Agency, it was contended that once the goods entrusted to the appellant for transportation were lost/damaged, no `service' remained to be rendered or performed by the appellant as carrier; that what was assigned and transferred by the Assured to the Insurer was only the right to recover compensation for the loss and there was no question of Insurer being the beneficiary of any service, for which the Assured had hired the appellant; and therefore such post-loss assignment of the right to recover compensation, did not result in the Insurer becoming a `consumer' under the Act. The Respondents, on the other hand, contended that the decision in Oberai required reconsideration on several grounds, set out in the reference order.

8. On the contentions urged, the following questions arise for consideration:

> (a) Where the letter of subrogation executed by an assured in favour of the insurer contains, in addition to words referring to subrogation, terms which may amount to an assignment, whether the document ceases to be a subrogation and becomes an

assignment?

(b) Where the insurer pays the amount of loss to the assured, whether the insurer as subrogee, can lodge a complaint under the Act, either in the name of the assured, or in the joint names of the insurer and assured as co-

complainants?

(c) Where the rights of the assured in regard to the claim against the carrier/service provider are assigned in favour of the insurer under a letter of subrogation-cum- assignment, whether the insurer as the assignee can file a complaint either in its own name, or in the name of the assured, or by joining the assured as a co-complainant.

(d) Whether relief could be granted in a complaint against the carrier/service provider, in the absence of any proof of negligence?

Re : Questions (a) to (c) and the correctness of Oberai

9. A `complaint', in the context of this case, refers to an allegation in writing made by a `consumer' that the services availed of or hired (or agreed to be availed of or hired) suffer from `deficiency' in any respect (vide section 2(c) of the Act). A `consumer' is defined under section 2(d) of the Act, relevant portion of which is extracted below :

"Consumer" means any person who -

x x x x x

(ii) hires or avails of any services for a consideration which has been paid or promised or partly paid any partly promised, or under any system of deferred payment and includes and beneficiary of such services other than the person who hires or avails of the services 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 ....."

"Deficiency" means any fault, imperfection, short-coming, or inadequacy in the quality, nature and manner of performance which is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service (vide section 2(g) of the Act).

10. The assured entrusted the consignment for transportation to the carrier. The consignment was insured by the assured with the insurer. When the goods were damaged in an accident, the assured, as the consignor- consumer, could certainly maintain a complaint under the Act, seeking compensation for the loss, alleging negligence and deficiency in service. The fact that in pursuance

of a contract of insurance, the assured had received from the insurer, the value of the goods lost, either fully or in part, does not erase or reduce the liability of the wrongdoer responsible for the loss. Therefore, the assured as a consumer, could file a complaint under the Act, even after the insurer had settled its claim in regard to the loss.

11. A contract of insurance is a contract of indemnity. The loss/damage to the goods covered by a policy of insurance, may be caused either due to an act for which the owner (assured) may not have a remedy against any third party (as for example when the loss is on account of an act of God) or due to a wrongful act of a third party, for which he may have a remedy against such third party (as for example where the loss is on account of negligence of the third party). In both cases, the assured can obtain reimbursement of the loss, from the insurer. In the first case, neither the assured, nor the insurer can make any claim against any third party. But where the damage is on account of negligence of a third party, the assured will have the right to sue the wrongdoer for damages; and where the assured has obtained the value of the goods lost from the insurer in pursuance of the contract of insurance, the law of insurance recognizes as an equitable corollary of the principle of indemnity that the rights and remedies of the assured against the wrong-doer stand transferred to and vested in the insurer. The equitable assignment of the rights and remedies of the assured in favour of the insurer, implied in a contract of indemnity, known as `subrogation', is based on two basic principles of equity :

> (a) No tort-feasor should escape liability for his wrong;
>
> (b) No unjust enrichment for the injured, by recovery of compensation for the same loss, from more than one source.

The doctrine of subrogation will thus enable the insurer, to step into the shoes of the assured, and enforce the rights and remedies available to the assured.

12. The term `subrogation' in the context of insurance, has been defined in Black's Law Dictionary thus :

> "The principle under which an insurer that has paid a loss under an insurance policy is entitled to all the rights and remedies belonging to the insured against a third party with respect to any loss covered by the policy."

Black's Law Dictionary also extracts two general definitions of `subrogation'. The first is from Dan B. Dobb's Law of Contract (2nd Edn. - # 4.3 at 404) which reads thus :

> "Subrogation simply means substitution of one person for another; that is, one person is allowed to stand in the shoes of another and assert that person's rights against the defendant. Factually, the case arises because, for some justifiable reason, the subrogation plaintiff has paid a debt owed by the defendant."

The second is from Laurence P. Simpson's Handbook on Law of Suretyship (1950 Edn. Page 205) which reads thus :

> "Subrogation is equitable assignment. The right comes into existence when the surety becomes obligated, and this is important as affecting priorities, but such right of subrogation does not become a cause of action until the debt is duly paid. Subrogation entitles the surety to use any remedy against the principal which the creditor could have used, and in general to enjoy the benefit of any advantage that the creditor had, such as a mortgage, lien, power to confess judgment, to follow trust funds, to proceed against a third person who has promised either the principal or the creditor to pay the debt."

`Right of Subrogation' is statutorily recognized and described in section 79 of the Marine Insurance Act, 1963 as follows:

(1) 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, the thereupon becomes entitled to take over the interest of the assured in whatever may remain of the subject-matter so paid for, and he is thereby subrogated to all the rights and remedies of the assured in and in respect of that subject-matter as from the time of the casualty causing the loss.

(2) Subject to the foregoing provisions, where the insurer pays for a partial loss, he acquires no title to the subject matter insured, or such part of it as may remain, but he is thereupon subrogated to all rights and remedies of the assured and in respect of the subject matter insured as from the time of the casualty causing the loss, in so far as the assured has been indemnified, according to this Act, by such payment for the loss".

Section 140 of Contract Act, 1872, deals with the principle of subrogation with reference to rights of a Surety/Guarantor. It reads :

> "140. Rights of surety on payment or performance : Where a guaranteed debt has become due, or default of the principal - debtor to perform a guaranteed duty has been taken place, the surety, upon payment or performance of all that is liable for, is invested with all the rights which the creditor had against the principal - debtor."

The concept of subrogation was explained in the following manner by Chancellor Boyd in National Fire Insurance Co. vs. McLaren - 1886 (12) OR 682 :

> "The doctrine of subrogation is a creature of equity not founded on contract, but arising out of the relations of the parties. In cases of insurance where a third party is liable to make good the loss, the right of subrogation depends upon and is regulated by the broad underlying principle of securing full indemnity to the insured, on the one hand, and on the other of holding him accountable as trustee for any advantage he may obtain over and above compensation for his loss. Being an equitable rights, it

> partakes of all the ordinary incidents of such rights, one of which is that in administering relief the Court will regard not so much the form as the substance of the transaction. The primary consideration is to see that the insured gets full compensation for the property destroyed and the expenses incurred in making good his loss. The next thing is to see that he holds any surplus for the benefit of the insurance company."

In Banque Financiere de la Cite vs. Parc (Battersea) Ltd. [1999 (1) A.C.221], the House of Lords explained the difference between subrogations arising from express or implied agreement of the parties:

> "....there was no dispute that the doctrine of subrogation in insurance rests upon the common intention of the parties and gives effect to the principle of indemnity embodied in the contract. Furthermore, your Lordships drew attention to the fact that it is customary for the assured, on payment of the loss, to provide the insurer with a letter of subrogation, being no more nor less than an express assignment of his rights of recovery against any third party. Subrogation in this sense is a contractual arrangement for the transfer of rights against third parties and is founded upon the common intention of the parties. But the term is also used to describe an equitable remedy to reverse or prevent unjust enrichment which is not based upon any agreement or common intention of the party enriched and the party deprived. The fact that contractual subrogation and subrogation to prevent unjust enrichment both involve transfers of rights or something resembling transfers of rights should not be allowed to obscure the fact that one is dealing with radically different institutions. One is part of the law of contract and the other part of the law of restitution."

13. An `assignment' on the other hand, refers to a transfer of a right by an instrument for consideration. When there is an absolute assignment, the assignor is left with no title or interest in the property or right, which is the subject matter of the assignment. The difference between `subrogation' and `assignment' was stated in Insurance Law by MacGillivray & Parkington (7th Edn.) thus :

> "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, as 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 assured's 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 assured's 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.
>
> 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 assured's rights under statue should proceed in his own name ..."

The difference between subrogation and assignment was highlighted by the Court of Appeals thus in James Nelson & Sons Ltd. Vs. Nelson Line (Liverpool) Ltd. (No.1) - 1906 (2) KB 217 :

> "The way in which the underwriters come in is only by way of subrogation to the rights of the assured. Their right is not that of assignees of the cause of action; ..... Therefore, they could only be entitled by way of subrogation to the plaintiffs' rights. 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 have provided the means of conducting the action to a termination. It is not a case in which one person is using the name of another merely as a nominal plaintiff for the purpose of bringing an action in which he alone is really interested; for the plaintiffs here have real and substantial interest of their own in the action."

The difference between assignment and subrogation was also explained by the Madras High Court in Vasudeva Mudaliar vs. Caledonian Insurance Co. - [AIR 1965 Mad. 159] thus :

> "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. The 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.
>
> 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 tortuous 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 of the assured does not ipso jure enable him to sue third parties in his own name. It will only entitle the insurer to sue in the name of the assured, it being an obligation of the assured to lend his name and assistance to such an action. By subrogation, the insurer gets no better rights or no different remedies than the assured himself. Subrogation and its effect are therefore, not to be mixed up with those of a transfer or any assignment by the assured of his rights and remedies

> to the insurer. An assignment or a transfer implies something more than subrogation, and vests in the insurer the assured's interest, rights and remedies in respect of the subject matter and substance of the insurance. In such a case, therefore, the insurer, by virtue of the transfer or assignment in his favour, will be in a position to maintain a suit in his own name against third parties."

14. Subrogation, as an equitable assignment, is inherent, incidental and collateral to a contract of indemnity, which occurs automatically, when the insurer settles the claim under the policy, by reimbursing the entire loss suffered by the assured. It need not be evidenced by any writing. But where the insurer does not settle the claim of the assured fully, by reimbursing the entire loss, there will be no equitable assignment of the claim enabling the insurer to stand in the shoes of the assured, but only a right to recover from the assured, any amount remaining out of the compensation recovered by the assured from the wrongdoer, after the assured fully recovers his loss. To avoid any dispute with the assured as to the right of subrogation and extent of its rights, the insurers usually reduce the terms of subrogation into writing in the form of a Letter of Subrogation which enables and authorizes the insurer to recover the amount settled and paid by the insurer, from the third party wrong-doer as a Subrogee-cum- Attorney. When the insurer obtains an instrument from the assured on settlement of the claim, whether it will be a deed of subrogation, or subrogation-cum-assignment, would depend upon the intention of parties as evidenced by the wording of the document. The title or caption of the document, by itself, may not be conclusive. It is possible that the document may be styled as `subrogation' but may contain in addition an assignment in regard to the balance of the claim, in which event it will be a deed of subrogation-cum-assignment. It may be a pure and simple subrogation but may inadvertently or by way of excessive caution use words more appropriate to an assignment. If the terms clearly show that the intention was to have only a subrogation, use of the words "assign, transfer and abandon in favour of" would in the context be construed as referring to subrogation and nothing more.

15. We may, therefore, classify subrogations under three broad categories: (i) subrogation by equitable assignment;

(ii) subrogation by contract; and (iii) subrogation-cum- assignment.

15.1) In the first category, the subrogation is not evidenced by any document, but is based on the insurance policy and the receipt issued by the assured acknowledging the full settlement of the claim relating to the loss. Where the insurer has reimbursed the entire loss incurred by the assured, it can sue in the name of the assured for the amount paid by it to the assured. But where the insurer has reimbursed only a part of the loss, in settling the insurance claim, the insurer has to wait for the assured to sue and recover compensation from the wrongdoer; and when the assured recovers compensation, the assured is entitled to first appropriate the same towards the balance of his loss (which was not received from the insurer) so that he gets full reimbursement of his loss and the cost, if any, incurred by him for such recovery. The insurer will be entitled only to whatever balance remaining, for reimbursement of what it paid to the assured. 15.2) In the second category, the subrogation is evidenced by an instrument. To avoid any dispute about the right to claim reimbursement, or to settle the priority of inter-se claims or to confirm the quantum of

reimbursement in pursuance of the subrogation, and to ensure co-operation by the assured in suing the wrongdoer, the insurer usually obtains a letter of subrogation in writing, specifying its rights vis-`-vis the assured. The letter of subrogation is a contractual arrangement which crystallizes the rights of the insurer vis-`-vis the assignee. On execution of a letter of subrogation, the insurer becomes entitled to recover in terms of it, a sum not exceeding what was paid by it under the contract of insurance by suing in the name of the assured. Even where the insurer had settled only a part of the loss incurred by the assured, on recovery of the claim from the wrongdoer, the insurer may, if the letter of subrogation so authorizes, first appropriate what it had paid to the assured and pay only the balance, if any, to the assured.

15.3) The third category is where the assured executes a letter of subrogation-cum-assignment enabling the insurer retain the entire amount recovered (even if it is more than what was paid to the assured) and giving an option to sue in the name of the assured or to sue in its own name. In all three types of subrogation, the insurer can sue the wrongdoer in the name of the assured. This means that the insurer requests the assured to file the suit/complaint and has the option of joining as co-plaintiff. 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.

The assured has no right to deny the equitable right of subrogation of the insurer in accordance with law, even whether there is no writing to support it. But the assured whose claim is settled by the insurer, only in respect of a part of the loss may insist that when compensation is recovered from the wrongdoer he will first appropriate the same, to recover the balance of his loss. The assured can also refuse to execute a subrogation-cum-assignment which has the effect of taking away his right to receive the balance of the loss. But once a subrogation is reduced to writing, the rights inter-se between the assured and insurer will be regulated by the terms agreed, which is a matter of negotiation between the assured and insurer.

16. If a letter of subrogation containing terms of assignment is to be treated only as an assignment by ignoring the subrogation, there may be the danger of document itself becoming invalid and unenforceable, having regard to the bar contained in section 6 of the Transfer of Property Act, 1882 (`TP Act' for short). Section 6 of Transport of Property Act, 1882, provides that property of any kind may be transferred except as otherwise provided by that Act or by any other law for the time being in force. Clause (e) of the said section provides that mere right to sue cannot be transferred. Section 130 provides the manner of transfer of actionable claims. Section 3 defines an `actionable claim' as : (i) any debt (other than a debt secured by mortgage of immovable property or by hypothecation or pledge of movable property) or (ii) any beneficial interest is movable property not in the possession, either actual or constructive of the claimant, which the civil courts recognizes as affording grounds for relief. A `debt' refers to an ascertained sum due from one person to another, as contrasted from unliquidated damages and claims for compensation which requires ascertainment/assessment by a Court or Tribunal before it becomes due and payable. A transfer or assignment of a mere right to sue for compensation will be invalid having regard to section 6(e) of the TP Act. But when a letter of subrogation-cum-assignment is executed, the assignment is interlinked with subrogation, and not being an assignment of a mere right to sue, will be valid and enforceable.

17. The principles relating to subrogation can therefore be summarized thus :

> (i) Equitable right of subrogation arises when the insurer settles the claim of the assured, for the entire loss. When there is an equitable subrogation in favour of the insurer, the insurer is allowed to stand in the shoes of the assured and enforce the rights of the assured against the wrong-

doer.

(ii) Subrogation does not terminate nor puts an end to the right of the assured to sue the wrong-doer and recover the damages for the loss. Subrogation only entitles the insurer to receive back the amount paid to the assured, in terms of the principles of subrogation.

(iii) Where the assured executes a Letter of Subrogation, reducing the terms of subrogation, the rights of the insurer vis-`-vis the assured will be governed by the terms of the Letter of Subrogation.

(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 insured becomes entitled to the entire amount recovered from the wrong- doer, that is, not only the amount that the insured 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.

18. We may clarify the position with reference to the following illustration: The loss to the assured is Rs.1,00,000/-. The insurer settles the claim of the assured for Rs.75,000/-. The wrong-doer is sued for recovery of Rs.1,00,000/-.

Where there is no letter of subrogation and insurer relies on the equaitable doctrine of subrogation (The suit is filed by the assured)

(i) If the suit filed for recovery of Rs.100,000/- is decreed as prayed, and the said sum of Rs.1,00,000/- is recovered, the assured would appropriate Rs. 25,000/- to recover the entire loss of Rs. 100,000/- and the doctrine of subrogation would enable the insurer to claim and receive the balance of Rs.75,000

(ii) If the suit filed for recovery of Rs.100,000/- is decreed as prayed for, but the assured is able to recover only Rs.50,000/- from the Judgment-Debtor (wrong-doer), the assured will be entitled to

appropriate Rs.25,000/- (which is the shortfall to make up Rs.100,000/- being the loss) and the insurer will be entitled to receive only the balance of Rs. 25,000/- even though it had paid Rs. 75,000/- to the assured.

(iii) Where, the suit is filed for recovery of Rs.100,000/- but the court assesses the loss actually suffered by the assured as only Rs.75,000/- (as against the claim of the assured that the value of goods lost is Rs.100,000/-) and then awards Rs.75,000/- plus costs, the insurer will be entitled to claim and receive the entire amount of Rs.75,000/- in view of the doctrine of subrogation.

Where the assured executes a letter of subrogation entitling the insurer to recover Rs. 75,000/- (The suit is filed in the name of the assured or jointly by the assured and insurer).

(iv) If the suit is filed for recovery of Rs.1,00,000/-, and if the court grants Rs.1,00,000/-, the insurer will take Rs.75,000/- and the assured will take Rs.25,000/-.

(v) If the insurer sues in the name of the assured for Rs.75,000/- and recovers Rs.75,000/-, the insurer will retain the entire sum of Rs.75,000/- in pursuance of the Letter of Subrogation, even if the assured has not recovered the entire loss of Rs.1,00,000/-. If the assured wants to recover the balance of the loss of Rs.25,000/- as he had received only Rs. 75,000/- from the insurer, the assured should ensure that the claim is made against the wrongdoer for the entire sum of Rs.100,000/- by bearing the proportionate expense. Otherwise the insurer will sue in the name of the assured for only for Rs. 75,000/-.

(vi) If the letter of subrogation executed by the assured when the insurer settles the claim of the assured uses the words that the "assured assigns, transfers and abandons unto the insurer, the right to get Rs.75,000/- from the wrong-doer", the document will be a `subrogation' in spite of the use of words `transfers, assigns and abandons'. This is because the insurer has settled the claim for Rs.75,000/- and the instrument merely entitles the insurer to receive the said sum of Rs.75,000/- which he had paid to the assured, and nothing more.

Where the assured executes a letter of subrogation-cum- assignment for Rs.100,000/-

(vii) If the document executed by the assured in favour of the insured provides that in consideration of the settlement of the claim for Rs.75,000/-, the assured has transferred and assigned by way of subrogation and assignment, the right to recover the entire value of the goods lost and retain the entire amount without being accountable to the assured for any excess recovered (over and above Rs.75,000/-) and provides that the insurer may sue in the name of the assured or sue in its own name without reference to the assured, the instrument is a subrogation-cum-assignment and the insurer has the choice of either suing in the name of the assured or in its own name.

Where the assured executes a letter of assignment in favour of a third party to sue and recover from the carrier, the value of the consignment

(viii) If the assured, having received Rs.75,000/- from the insurer, executes an instrument in favour of a third party (not being the insurer) assigning the right to sue and recover from the carrier, damages for loss of the consignment, such a document will be an Assignment. The assignee cannot file a complaint before the consumer fora, as he is not a `consumer'. Further, such a document being a transfer of a mere right to sue, will be void and unenforceable, having regard to section 6(e) of Transfer of Property Act, 1882. It is well settled that a right to sue for unliquidated damages for breach of contract or for tort, not being a right connected with the ownership of any property, nor being a right to sue for a debt or actionable claim, is a mere right to sue and is incapable of being transferred.

19. Whether the document executed by the assured in favour of the insurer is a subrogation simpliciter, or a subrogation-cum-assignment is relevant only in a dispute between the assured and the insurer. It may not be relevant for deciding the maintainability of a complaint under the Act. If the complaint is filed by the assured (who is the consumer), or by the assured represented by the insurer as its attorney holder, or by the assured and the insurer jointly as complainants, the complaint will be maintainable, if the presence of insurer is explained as being a subrogee. Whether the amount claimed is the total loss or only the amount for which the claim was settled would make no difference for the maintainability of the complaint, so long as the consumer is the complainant (either personally or represented by its attorney holder) or is a co-complainant along with his subrogee. On the other hand, if the assured (who is the consumer) is not the complainant, and the insurer alone files the complaint in its own name, the complaint will not be maintainable, as the insurer is not a `consumer', nor a person who answers the definition of `complainant' under the Act. The fact that it seeks to recover from the wrongdoer (service provider) only the amount paid to the assured and not any amount in excess of what was paid to the assured will also not make any difference, if the assured - consignor is not the complainant or co-complainant. The complaint will not be maintainable unless the requirements of the Act are fulfilled. The remedy under the Act being summary in nature, once the consumer is the complainant or is a co- complainant, it will not be necessary for the Consumer Forum to probe the exact nature of relationship between the consumer (assured) and the insurer, in a complaint against the service provider.

20. In this context, it is necessary to remember that the nature of examination of a document may differ with reference to the context in which it is examined. If a document is examined to find out whether adequate stamp duty has been paid under the Stamp Act, it will not be necessary to examine whether it is validly executed or whether it is fraudulent or forged. On the other hand, if a document is being examined in a criminal case in the context of whether an offence of forgery has been committed, the question for examination will be whether it is forged or fraudulent, and the issue of stamp duty or registration will be irrelevant. But if the document is sought to be produced and relied upon in a civil suit, in addition to the question whether it is genuine, or forged, the question whether it is compulsorily registrable or not, and the question whether it bears the proper stamp duty, will become relevant. If the document is examined in the context of a dispute between the parties to the document, the nature of examination will be to find out that rights and obligation of one party vis-`-vis the other party. If in a summary proceedings by a consumer against a service provider, the insurer is added as a co-complainant or if the insurer represents the consumer as a power of attorney, there is no need to examine the nature of rights inter-se between the consumer

and his insurer. When the complaint is by the consignor - consumer, with or without the insurer as a co-complainant, the service provider cannot require the consumer forum to consider the nature of relationship between the assured and the insurer or the nature and true purport of the document produced as a letter of subrogation. A wrong-doer cannot sidetrack the issue before the consumer forum. Once the `consumer', that is the assured, is the complainant, the complaint will be maintainable subject to fulfillment of the requirements of the Act.

21. At this juncture we should also take note of the fact that insurance companies, statutory corporations and banks use standardized forms to cover all types of situations and circumstances and several of the clauses in such forms may be wholly inapplicable to the transaction intended to be covered by the document. Necessarily such redundant or inapplicable clauses should be ignored while trying examining the document and make sense out of it. To demonstrate this position, we extract below the letter of subrogation-cum-special power of attorney dated 15.2.1996 executed by the assured in this case, by highlighting the irrelevant clauses by bold letters:

"Letter of Subrogation & Special Power of Attorney"

To M/s National insurance Co.Ltd., Dindigal In consideration of your paying to us a sum of Rs. 4,47,436.00 (Rupees Four Lakhs Forty Seven Thousand Four Hundred & Thirty Six only) in respect of loss/damage to the under mentioned goods and/or duly payable thereon insured under policy no. 500703/21/24/95/007 issued by National Insurance Co. Ltd., we hereby assign, transfer and abandon to you all our actionable rights, title and interest in and to the said goods and proceeds thereof (to the extent provided by law) and all rights and remedies against Railway Administration and/or sea carriers and/or agents of Sea Carriers and/or Port Authorities and/or Customs Authorities and/or persons or persons whosoever is liable in respect thereof.

We hereby guarantee that we are the persons entitled to enforce the terms of contracts of transportations set forth in the bills of lading and/or railway receipt and/or any other documents of title evidencing the contract of transportation or bailment relating to land covering the property described below for transportation or bailment and agree to indemnify you for all and any losses and consequences should it turn out that we are not the persons to enforce the terms of the contract. And we hereby subrogate to you that rights and remedies that we have in consequence of or arising from loss/damage to the under mentioned goods and we further hereby grant to you full power to take and use all lawful ways and means to demand, recover and to receive the said loss/damage, customs penalty or refund of customs duty and all and every debt from whom it may concern.

And we also hereby authorize you to use our name in any action or proceedings that you may bring either in your own name or in our name in relation to any of the matters hereby assigned, transferred and/or abandoned to you and we undertake for ourselves to assist and concur in any matters or proceedings which you may deem expedient or necessary in any such actions or proceedings and to execute all deeds, assignments and or documents including any and all pleadings and releases which may be necessary therefor and generally to assist therein by all means in our power.

We hereby authorize you to file a suit or suits in courts of law against the Union of India owning and representing Indian Railways, the Sea Carriers Charterers Agents of Sea Carriers and/or Port Authorities or any other carriers and or bailees and/or person or persons, firm or firms, corporation or corporation, to recover the claim moneys of the aforesaid claim or claims and for the said purposes to join us as a co-plaintiffs if you so intend. We further hereby give you authority to sing, declare, verify and affirm and execute jointly and severally in our name and on our behalf, plaints, affidavits, vakalatnamas, petitions and such other applications and/or notices and documents as may be found necessary for the commencement or continuation of proceedings to recover the claim moneys.

We further undertake if called upon by you to do so ourselves to institute any such action or proceedings that you may direct on your behalf; it being understood that you are to indemnify us and any other persons whose names may necessarily be used, against any costs, charges or expenses which may be incurred in respect of any action or proceeding that may be taken by virtue of this agreement.

The payment received for herein is accepted with the understanding that the said payment shall not enure to the benefit of any carrier or bailees under the provision of any contract of carriage or otherwise; that in making the said payment the underwriter does not waive any rights of subrogation or otherwise against any carrier or bailee and acceptance of this receipt shall not prejudice or take away any rights or remedies which the said underwriter would otherwise have by virtue of such payment.

We further agree that any moneys collected from any carrier port authorities or any persons or persons, shall be your property, and if received in the first instance by the undersigned we undertake to make over to you immediately the amount so received.

We hereby further agree that in event of the loss packages and/or contents thereof subsequently being traced, we undertake to accept and take delivery of the same and the claim shall then be readjusted on the correct basis of the then loss/damage and in the event of any refund providing to be due to the underwriter, we undertake on demand to make such refund to you.

We hereby appoint you, your officers and agents and there successors severally our agents and attorneys-in-fact with irrevocable power to collect any and all such claims and to begin, prosecute, compromise, arbitrate or withdraw either in our own name or in your name but at your expense any and all legal proceedings which you may deem necessary to enforce such claim or claims including proceedings before any international tribunal and to execute in our name any documents which maybe necessary to carry into effect the purpose of this agreement, and for that purpose we further authorize you to do all or any of the acts, deeds and things herein mentioned, for us, on our behalf and in our name.

xxxxx (emphasis supplied) The use of the words "we hereby assign, transfer and abandon to you all our actionable rights, title and interest" in the document, is in regard to rights and remedies against (1) railway administration (2) sea carriers (3) agents of sea carriers (4) port authorities (5) customs

authorities and (6) persons whomsoever is liable in respect thereof. Even though, the matter relates to carriage of goods by road, the claims or remedies against a road carrier are not even mentioned. Excluding the irrelevant clauses, the document continues to be a letter of subrogation.

22. A document should be transaction-specific. Or at least an effort should be made to delete or exclude inapplicable or irrelevant clauses. But where a large number of documentation is required to be done by officers not- conversant with the nuances of drafting, use of standard forms with several choices or alternative provisions is found necessary. The person preparing the document is required to delete the terms/clauses which are inapplicable. But that is seldom done. The result is that the documents executed in standard forms will have several irrelevant clauses. Computerisation and large legal departments should have enabled insurance companies, banks and financial institutions to (i) improve their documentation processes and omit unnecessary and repetitive clauses; (ii) avoid incorporation of other documents by vague references; and (iii) discontinue pasting or annexing of slips. But that is seldom done. If documents are clear, specific and self-contained, disputes and litigations will be considerably reduced.

23. Let us now consider the decision in Oberai. The assured therein had executed two documents in favour of the insurer, on settlement of the claim. The first was a letter of subrogation and the second was a special power of attorney. The letter of subrogation stated as follows :

> "In consideration of your paying to us the sum of Rs.64,137 only in full settlement of our claim for non-delivery/shortage and damage under Policy No. 2142140400015 issued by you all on the under- mentioned 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 reasonable require for the purpose of carrying out this agreement."

The special power of attorney authorized the insurer to file a suit in court against the Railway Administration, for recovery of the claim on behalf of the assured, in the name of the assured, and to give a valid discharge and effectual receipt therefor. On the basis of the said documents, the complaint was initially filed by the insurer. Subsequently, the assured was added as a party. Though the claim of the assured therein was settled by the insurer for Rs.64,137/- as against the consignment value of Rs.93,925/-, the insurer appears to have sued for the full value of Rs.93,925/- which was awarded by the District Forum and affirmed by the National Commission. This Court held that where there is a subrogation simpliciter, the insurer can sue the wrong-doer in the name of the assured, and where there is an assignment, the insurer is entitled to sue the wrong-doer in his own name. This Court held that the document executed by the assured though titled as `letter of

subrogation' was, in fact, an assignment by the assured of its rights in favour of the insurer. This Court held that the use of the following words in the document amounted to an absolute assignment, as contrasted from subrogation:

> "(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.
>
> (ii) We hereby subrogate to you the same rights as we have in consequence of or arising from the said loss or damage."

23.1) There is no doubt that the first portion which stated that all rights were assigned, transferred and abandoned in favour of the insurer and also empowered the insurer to sue in its own name, if read in isolation would amount to an assignment. But if those words are read with the other recitals and the words "in consideration of your paying to us the sum of Rs.64,137/- only in full settlement of our claim for non-delivery/shortage and damage, under policy issued by you...." make it clear that it was a subrogation-cum-assignment. Further, the second operative portion which states that "we hereby subrogate to you the same rights as we have in consequence of or arising from the said loss or damage" are not words of assignment. When the words used are : "we hereby subrogate to you" and not "we hereby transfer or assign in your favour", having regard to the settled meaning of "subrogate", the said words could not operate as an absolute assignment, but only as an subrogation. The genesis of the document is subrogation. The inclusion of an assignment is an additional right given to the insurer. The document did not cease to be a subrogation by reason of enlargement of subrogation by granting such additional right. In para 22 of the judgment, this Court negatived the contention that the letter of subrogation and the special power of Attorney should be read together and if so read, the document would be a subrogation. But the special power of attorney when read with the term in the letter of subrogation, "we hereby subrogate to you the same rights as we have in consequence of or arising from the said loss of damage" will certainly show that the document was intended to be a subrogation also and not a mere assignment. With great respect to the learned Judges who decided Oberai, it has to be held that Oberai was not correctly decided, as it held a `subrogation-cum-assignment' as a mere `assignment'. It ignored the fact that, shorn of the cover and protection of subrogation, the document, if read as a simple assignment would fall foul of section 6(e) of Transfer of Property Act and thus would be unenforceable. But the ultimate decision in Oberai may be correct as the complaint was filed by the insurer, in its own name and on its own behalf making a claim for the entire value of the goods, in excess of what was paid to the assured. Though the assured was belatedly impleaded as a co-complainant, the nature and contents of the complaint was not apparently changed, and continued to be one by the insurer as assignee. On those peculiar facts, the finding that the complaint under the Act by the insurer (who was not a consumer) was not maintainable, was justified.

23.2) We may also refer to the frequent misconstruction of para 23 of the decision in Oberai by some carriers. The said para does not mean that when the consignment is received by the carrier from the

consignor and put it in the course of transportation, the carrier has provided the service and thereafter either ceases to be a service provider or ceases to be responsible for delivery of the goods, and that consequently, the consignor ceases to be a `consumer'. All that para 23 of Oberai meant was that in a contract for carriage of goods between the consignor (assured) and the carrier, if the consignor assigns the right to claim damages to an assignee, after the goods are lost or damaged, the assignee cannot claim to be a "consumer" under the Act. It impliedly meant that if the assignment had been done before the loss or damage to the goods, then the assignment would have been in regard to `property' and not a mere right to sue, and the assignee as consignee would be entitled to sue the carrier. Be that as it may.

24. We therefore answer the questions raised as follows:

> (a) The insurer, as subrogee, can file a complaint under the Act either in the name of the assured (as his attorney holder) or in the joint names of the assured and the insurer for recovery of the amount due from the service provider. The insurer may also request the assured to sue the wrong doer (service provider).
>
> (b) Even if the letter of subrogation executed by the assured in favour of the insurer contains in addition to the words of subrogation, any words of assignment, the complaint would be maintainable so long as the complaint is in the name of the assured and insurer figures in the complaint only as an attorney holder or subrogee of the assured.
>
> (c) The insurer cannot in its own name maintain a complaint before a consumer forum under the Act, even if its right is traced to the terms of a Letter of subrogation-cum-assignment executed by the assured.
>
> (d) Oberai is not good law insofar as it construes a Letter of subrogation-cum-assignment, as a pure and simple assignment. But to the extent it holds that an insurer alone cannot file a complaint under the Act, the decision is correct.

25. We may also notice that section 2(d) of Act was amended by Amendment Act 62 of 2002 with effect from 15.3.2003, by adding the words "but does not include a person who avails of such services for any commercial purpose" in the definition of `consumer'. After the said amendment, if the service of the carrier had been availed for any commercial purpose, then the person availing the service will not be a `consumer' and consequently, complaints will not be maintainable in such cases. But the said amendment will not apply to complaints filed before the amendment.

Re : Question (d)

26. Section 14(1)(d) of the Act provides that the Forum under the Act can direct payment of compensation awarded by it to the consumer for any loss or injury suffered by the consumer due to the negligence of the opposite party. This, according to the appellant, makes it mandatory for the

complainant to establish negligence on the part of the opposite party, i.e. the carrier. It is further contended that presumption of negligence under Section 9 of the Carriers Act, 1865 (which provides that in any suit brought against a common carrier for the loss, damage or non- delivery of the goods entrusted to him for carriage, it shall not be necessary for the plaintiff to prove that such loss, damage or non-delivery of goods was owing to the negligence or criminal act of the carrier, his servants and agents) is applicable only to a civil suit, and not to a complaint under the Act which specifically contemplates establishment of negligence by evidence. It is submitted that in this case the compensation has been awarded even though no evidence was led by the complainants about negligence of the driver of appellant.

27. It is no doubt true that Section 14(1)(d) of the Act contemplates award of compensation to the consumer for any loss suffered by consumer due to the negligence of the opposite party (Carrier). Section 9 of Carriers Act does not lay down a preposition that a carrier will be liable even if there was no negligence on its part. On the other hand, it merely raises a presumption that when there is loss or damage or non-delivery of goods entrusted to a carrier, such loss, damage or non-delivery was due to the negligence of the carrier, its servant and agents. Thus where the consignor establishes loss or damage or non- delivery of goods, it is deemed that negligence on the part of the carrier is established. The carrier may avoid liability if it establishes that the loss, damage or non-delivery was due to an act of God or circumstances beyond its control. Section 14(1)(d) of the Act does not operate to relieve the carrier against the presumption of negligence created under Section 9 of the Carriers Act.

28. The contention of appellant that the presumption under section 9 of the Carriers Act is available only in suits filed before civil courts and not in other civil proceedings under other Acts, is not tenable. This Court in Patel Roadways Ltd. v. Birla Yamaha Ltd. [2000 (4) SCC 91] has observed:

> "The principle regarding the liability of a carrier contained in S.9 of Carriers Act namely, that the liability of a carrier is that of an insurer and that in a case of loss or damage to goods entrusted to the carrier the plaintiff need not prove negligence, are applicable in a proceeding before the Consumer Forum. The term "suit" has not been defined in Carriers Act nor it is provided in the said Act that the term `suit' will have the same meaning as in Civil PC. Therefore, the term `suit' has to be understood in its ordinary dictionary meaning. In that sense, term `suit' is a generic term taking within its sweep all proceedings initiated by a party for valuation of a right vested in him under law. It is true that a proceeding before Consumer Forum is ordinarily a summary proceeding and in an appropriate case where the commission feels that the issues raised are too contentious to be decided in summary proceedings it may refer parties to Civil Court. That, however, does not mean that proceedings before the Consumer Forum is to be decided by ignoring the express statutory provision of Carriers Act in a proceeding in which a claim is made against a common carrier. A proceeding before the Consumer Forum comes within the sweep of term `suit."

29. Again in Economic Transport Organization vs. Dharward District Khadi Gramodyog Sangh - 2000 (5) SCC 78, this Court reiterated the principle stated in Patel Roadways and added the

following :

> "Even assuming that section 9 of the Carriers Act, 1865 does not apply to the cases before the Consumer Fora under Consumer Protection Act, the principle of common law above- mentioned gets attracted to all these cases coming up before the Consumer Fora. Section 14(1)(d) of the Consumer Protection Act has to be understood in that light and the burden of proof gets shifted to the carriers by the application of the legal presumption under the common law. Section 14(1)(d) has to be understood in that manner. The complainant can discharge the initial onus, even if it is laid on him under section 14(1)(d) of the Consumer Protection Act, by relying on section 9 of the Carrier Act. It will, therefore, be for the carrier to prove absence of negligence."

We reiterate the said settled position and reject the contention of the appellant that the presumption under section 9 of Carriers Act is not available in a proceeding under the Consumer Protection Act and that therefore, in the absence of proof of negligence, it is not liable to compensate the respondents for the loss. Conclusion

30. The loss of consignment by the assured and settlement of claim by the insurer by paying Rs.4,47,436/- is established by evidence. Having regard to the presumption regarding negligence under section 9 of Carriers Act, it was not necessary for the complainants to prove further that the loss/damage was due to the negligence of the appellant or its driver. The presumption regarding negligence was not rebutted. Therefore, the District Forum was justified in allowing the complaint brought by the assured (first respondent) represented by the insurer and the insurer for recovery of Rs.447,436. The said order was affirmed by the State Forum and the National Forum. We find no reason to interfere with the same. The appeal is, therefore, dismissed.

.....J [Chief Justice of India] .....J [R. V. Raveendran]
.....J [D. K. Jain] .....J [P. Sathasivam]
.....J [J. M. Panchal] New Delhi;

February 17, 2010.