IN THE HIGH COURT OF HIMACHAL PRADESH
SHIMLA

FAO (MVA) No. 575 of 2008.
Date of decision: 31st July 2015.

National Insurance Company Ltd. …..Appellant.
Versus
Rohit Thakur and others …Respondents

Coram:
The Hon'ble Mr. Justice Mansoor Ahmad Mir, Chief Justice.

Whether approved for reporting ?[1] *Yes.*

For the appellant: *Mr. Suneet Goel, Advocate.*
For the respondents: *Mr.D.S. Nainta, Advocate, for respondent No.1.*
Mr. Neeraj Gupta, Advocate, for respondents No. 2 and 3.

Mansoor Ahmad Mir, Chief Justice *(Oral)*

This appeal is directed against the judgment and award dated 30.6.2008, made by the Motor Accident Claims Tribunal, Solan in MAC Petition No. 14-S/2 of 2007, titled *Sh. Rohit Thakur versus M.N. DAV Dental College and others,* whereby compensation to the tune of Rs.68,852/- was awarded in favour of the claimant and insurer/appellant herein came to be saddled with the liability, hereinafter

[1] ***Whether the reporters of Local Papers may be allowed to see the judgment ?.***

referred to as “the impugned award”, for short, on the grounds taken in the memo of appeal.

2. Mr. Suneet Goel, Advocate, for the appellant argued that the claimant has received Rs.48912/- from another insurance company and rest amount has to be paid by the appellant. The argument is misconceived for the following reasons.

3. The Tribunal has discussed the issue in para 13 of the impugned award and has relied upon the judgment delivered by the Delhi High Court in case titled ***Dr. A.C. Mehra vs. Behari Lal and another*** reported in ***1998 ACJ 379***. It is apt to reproduce para 9 of the said judgment herein:

> *“9. Refuting the arguments of Mr. Salwan that once Insurance Company of the appellant paid to M/s. Saran Motors, the right of the appellant stood subrogated, Mr. Dhanda contended that the question of subrogation in this case did not arise. The present case is covered by the provisions of Motor Vehicles Act, hence the doctrine of subrogation does not apply automatically. It will come into operation only when there has been express agreement of transfer of rights. This has been so held by the King's Bench in the case of Nelson (James) & Sons Ltd. v. Nelson Line (Liverpool) Ltd.,1906 2 MB 217. Actions, therefore, to enforce such rights must be brought in the name of the assured as a rule, any defence which is valid against the assured as, for example, that he has released*

> *or compromised his right of action, is available to the defendant in such proceedings. Nothing has been placed on record in this case by the respondent to show that the appellant gave away his right of filing claim under the Act. In fact the Supreme Court in the case of Union of India v. Sri Sarda Mills Ltd., 1973 AIR(SC) 281 held that subrogation does 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 thing insured. Supreme Court in that case went to the extent of justifying the filing of the suit by the mill. In that case the mill which was insured against fire and the fire having taken place, lodged a claim for loss and damages. The Insurance Company with which the mill was insured against fire on claim being lodged satisfied the claim of the mill, insurer subrogated to the right of the mill. Suit in that case was filed by the mill against the Railway Administration. Railway Administration took the plea that right of the mill stood subrogated. Negating these contentions the Supreme Court held that such a claim by the mill was not barred. Relying on the above observations of Apex Court it can safely be said that even if there had been a subrogation, which fact has not been proved on record, still one right of the appellant to file a claim under the Act did not get barred."*

4. The above referred judgment finds support from the judgment delivered by the Allahabad High Court in ***Union of India versus Deoria Sugar Mills ltd.*** reported in ***1980 ACJ 140***. It is apt to reproduce paras 9 and 10 of the said judgment herein:

> *"9. Arnold in his classic on Marine Insurance (British Shipping Laws Vol. 10, page 1193) has stated the position thus:*

"..... it is entirely foreign to the spirit of contracts of indemnity that a person damnified should recover his loss more than once; it is, therefore, clear that if he has already recovered from a third party, there can be no liability under the contracts of indemnity; on the other hand, if he has not previously recovered from such third party, but has the right to do so, there is no reason why such third party should be allowed to allege that his liability has been satisfied or reduced by a payment made by a stranger to him, under a contract with which he has nothing to do. The third party remains liable to the person indemnified just as if there had been no contract of indemnity. But the person indemnified can only take the sum recovered from the third party as trustee for the indemnifier, and similarly, if he has not himself received any sum to which he is entitled he is bound to afford the latter all facilities for doing so. In practice, the commonest way in which the principle of subrogation is applied to insurance is for the insurer to pay the claim of the assured and then to institute proceedings in the name of the latter, but for his own benefit against the parties ultimately liable."

In Macgillivary on Insurance Law, 5th Edition para 1882, the learned author has pointed out that the right of subrogation is a corollary of the general principle that insurance is only a contract to indemnify the assured, that the insurer's right of subrogation arises whenever

he pays a loss for which he is liable under his policy, and that it arises upon payment of a partial as well as upon payment of a total loss. The learned author states in para 1886:

"The legal right to compensation remains in the assured, and, therefore, unless there hag been an express assignment of the legal right, actions at law brought for the benefit of the insurer are brought in the name of the assured. In courts of Equity or of Admiralty the insurer has always been allowed to sue in his own name."

Another instructive passage from Porters' Laws Insurance, 8th Edition, at page 232 the position is stated thus:

"The insurer, having contracted to indemnify, could not insist on others being sued first who were primarily liable or on consolidation of his action with others by the same assured against other insurers in respect of the same loss. The mere payment of a loss by the insurer does not afford any defence to a person whose fault has been the cause of the loss in an action brought against the latter by the assured but the insurer required by such payment a corresponding right in any damages recoverable by the assured against the wrong-doer or other party responsible for the loss."

A perusal of the aforesaid authorities shows that the position of the insurance company in the circumstances was, that of an indemnifier. The railway company continues to be primarily liable for the damages sustained by

the plaintiff and it not being a party to the contract of indemnity, cannot be absolved of its liability to pay the damages to consignor merely because the consignor had already recovered the money from the insurance company, under a contract of insurance. In such a case the consignor will receive the compensation for damage suffered by him in trust for the insurance company. After the consignor receives the amount from the railway company, he will have to make it over to the insurance company to the extent to which it had already indemnified him. This is how the consignor is prevented from being doubly compensated in respect of the loss suffered by him i.e. once by receiving the compensation from the insurance company and again receiving the same directly from the railway company. Viewed in this light the observations of Natesan, J. in Trustees of the Port of Madras case (AIR 1970 Mad 48) (supra) relied upon by the learned counsel for the appellant do not support his submission.

10. We are accordingly of opinion that the right of the plaintiff to claim compensation to the extent of Rupees 37,860.94 was not in any way affected because the plaintiff had received a sum of Rs. 33,135 from the insurance company. Of course from out of a sum of 'Rs. 37,860 which the plaintiff would receive from the Union of India, a sum of Rs. 33,135 would be held by him as a trustee for the insurance company which had insured the machinery involved in the suit. We, therefore,

find no force even in the second submission made by the appellant."

5. Applying the test, the claimant's right to claim compensation for the third party under different contracts, cannot be taken away or defeated even if he has already received compensation from the insurance with whom he has contracted.

6. Having said so, the Tribunal has rightly made the impugned award. The impugned award is upheld and the appeal is dismissed, alongwith pending applications, if any.

7. Registry is directed to release the amount in favour of the claimant strictly, in terms of the conditions contained in the impugned award, through payee's cheque account.

8. Send down the record, forthwith, after placing a copy of this judgment.

July 31, 2015, **(Mansoor Ahmad Mir)**
(cm Thakur) **Chief Justice.**