
(2003) 12 P&H CK 0022
In the Punjab And Haryana At Chandigarh
Case No : Second Appeal No. 2323 of 1982

Punjab National Bank

APPELLANT

Vs

Khazan Singh and Others

RESPONDENT

Date of Decision : 19-12-2003

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10
Contract Act, 1872 — Section 10, 2
Evidence Act, 1872 — Section 115, 85

Citation : AIR 2004 P&H 282 : (2005) 2 BC 38 : (2004) 138 PLR 458 : (2004) 3 RCR(Civil) 96

Hon'ble Judges : M.M. Kumar, J

Bench : Single Bench

Advocate : S.M.L. Arora, for the Appellant; B.S. Sehgal, for the Respondent

Final Decision : Dismissed

Judgement

M.M. Kumar, J.—This is plaintiffs appeal filed u/s 100 of the Code of Civil Procedure, 1908 challenging the judgment and decree passed on 27-7-1982 by the District Judge, Gurdaspur dismissing the suit of the plaintiff appellant and also setting aside the judgment and decree dated 8-4-1982 passed by the Sub-Judge Ist Class, Batala.

2. The plaintiff-appellant which is a body corporate under the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 filed Civil Suit No. 12 of 1979 on 8-1-1979 for recovery of Rs. 15255-94 paise against defendant-respondent No. 1 Khazan Singh. The suit was filed through Dev Raj Khanna, their general attorney. It was asserted that on a request made by defendant-respondent No. 1, loan of Rs. 11,000/-was advanced by the appellant-Bank through its Qadian Branch. The purpose of the loan was purchase of a Bajaj Tempo three-wheeler auto-rikshaw. The loan amount, on the instructions of defendant respondent No. 1, was paid to M/s. Doaba Automobile, Amritsar, a firm dealing in Bajaj Tempo three-wheeler. Defendant -respondent No. 1

executed a number of documents which included a promissory note in favour of the plaintiff-appellant as a token of receipt of the loan amount. He also hypothecated the three wheeler by way of security for re-payment of the loan and executed a letter of hypothecation in favour of the plaintiff appellant-Bank. Defendant-respondent No. 1 also furnished a guarantee for re-payment of the loan by bringing guarantors, namely, defendant-respondents 2 and 3 who stood sureties. According to the terms of the agreement, the loan amount along with interest was to be re-paid by defendant-respondent No. 1 through thirty six equal monthly instalments.

3. In their joint written statement, it was admitted that loan was obtained and defendant respondents 2 and 3 stood sureties for re-payment of the loan. The hypothecation of three-wheeler in favour of the plaintiff-appellant was also admitted. However, it was averred that the three wheeler was under a comprehensive insurance with which defendant-respondent No. 1 had taken on the instructions of the plaintiff-appellant and according to the terms of the insurance policy, the liability to pay the entire premium was of defendant-respondent No. 1. The sole beneficiary under the insurance policy was the plaintiff-appellant because the insurer had undertaken to indemnify the Bank in case of loss of the vehicle. It was further asserted that defendant-respondent No. 1 paid insurance premium regularly till the date the vehicle was involved in an accident. According to the defendants, the insurance cover was intact and the plaintiff-appellant was entitled to invoke the indemnity clause after the three-wheeler had been involved in the accident. In the accident, the three-wheeler had caught fire in which defendant-respondent No. 1 also received serious injuries. He was removed and admitted to hospital from the scene of the accident. The plaintiff-appellant took possession of the vehicle. In sum and substance, the case of the defendant respondents is that as per the stipulations between the parties, it was agreed that outstanding amount of loan was to be recovered either from the Insurance Company or by way of sale/auction of three-wheeler. Defendant-respondent No. 1 was responsible only to make good any shortfall. It was further asserted that the plaintiff-appellant filed claim and received from the Insurance Company the money equal to the full value of the three-wheeler.

4. On the basis of pleadings of the parties, the following issues were framed :--

1. Whether Sh. Dev Raj Khanna is competent to file present suit : OPP
2. Whether defendants 2 and 3 stood guarantor for the repayment of the alleged loan? OPP
3. Whether the suit is within limitation? OPP
4. Whether this Court has territorial jurisdiction to try the present suit? OPP
5. Whether suit is bad for non-joinder of necessary parties ? OPD
6. Whether tempo in question was insured with Oriental Insurance Company ?

OPD

7. Whether the tempo was damaged in accident. If so, its effect ? OPD
8. Whether the Reserve Bank has paid disputed amount to the plaintiff? OPD
9. Whether plaintiff is estopped to file this suit by his act and conduct ? OPD
10. Whether the suit is not maintainable in the present form ? OPD
11. Relief.

Views of the trial Court

5. On issue No. 1, the trial Court held that Dev Raj Khanna being general attorney of the plaintiff-appellant was competent to file the present suit. On issue No. 2 also, it was held that defendant-respondents 2 and 3 stood guarantors for re-payment of the loan in question. The suit was held to be filed within the period of limitation and issue No. 3 was decided in favour of the plaintiff-appellant. The jurisdiction of Court at Batala was also upheld under issue No. 4 and accordingly, the issue was decided in favour of the plaintiff-appellant. Issue No. 5 was decided against the defendant-respondents as the same was not pressed. The finding recorded on issue No. 6 was that the three-wheeler was insured with the Oriental Insurance Company and the issue was decided accordingly. On issue No. 7, it was held that although the three-wheeler was damaged in the accident on account of fire, but as the insurance was got effected by defendant-respondent No. 1, he could have filed any claim with the Insurance Company and could have recovered the amount: of damages under the insurance cover. It was further held that right of the plaintiff-appellant to recover the loan amount from the defendant respondents was not adversely affected. Issue No. 8 was also decided against the defendant-respondents as no evidence was led to prove that the Reserve Bank had paid the loan in dispute to the plaintiff-appellant. Both issues 9 and 10 were decided against the defendant-respondents on account of lack of evidence. The suit of the plaintiff-appellant was decreed for recovery of a sum of Rs. 15255.94 Ps. with costs against defendant-respondent No. 1 and defendant-respondent No. 2, Baldev Singh alias Gurdev Singh because defendant respondent No. 3 Assa Singh had died during the pendency of the suit.

Views of the Ist Appellate Court

6. The District Judge, however, set aside the judgment and decree dated 8-4-1982 passed by the Sub-Judge Ist Class and dismissed the suit by holding that Dev Raj Khanna was not duly constituted and nominated general attorney to institute the suit on behalf of the plaintiff-appellant. The District Judge also refused to raise any presumption in favour of the plaintiff-appellant observing that the presumption does extend to the authority of the person executing the power of attorney whereas the presumption contemplated by Section 85 of the Indian Evidence Act, 1872 is available to a particular class of power of attorneys

described in the section which is confined to its execution and authenticity alone.

7. The District Judge has further held that besides the promissory note Exhibit P-3, an instrument of hypothecation Exhibit P-2 was also executed by defendant-respondent No. 1 and both the documents have to be read together. According to the learned District Judge, although the instrument of hypothecation Exhibit P-2 was executed by defendant respondent No. 1 in favour of the plaintiff-appellant yet it was not a unilateral document in the sense that the defendant respondent No. 1 alone has to do certain acts without casting any corresponding obligation on the plaintiff-appellant. It was necessarily an instrument executed with the object of securing re-payment of the loan which conferred valuable rights on defendant-respondent No. 1, such as re-payment through easy instalments, therefore, all the terms and conditions incorporated in the instrument of hypothecation Ex. P-2 have to be read as a part and parcel of the promissory note Ex. P-3 and both the sides were held bound by its terms and conditions. The District Judge examined various terms and conditions of the instrument of hypothecation and held as under :--

"Let us now proceed to examine the relevant clauses of Ex. P2. Clause (1) deals with the undertaking given by the debtor whereby he hypothecated his three-wheeler tempo (Bajaj) in favour of the Bank with the added clause that the loan amount shall be charged to the vehicle. Debtor further undertook not to sell, mortgage or otherwise part with the possession of the vehicle or encumber the same in any way till the repayment of entire loan amount together with the interest thereon.

The second clause enjoined upon the debtor to get the vehicle ensured by taking out a comprehensive insurance policy in the name of the Bank as mortgagee and himself as a mortgagor with agreed Bank clause.

The third clause gave the debtor a facility to re-pay the debt through equal monthly instalments spreading over a period of three years, but a rider was added to the effect that the debtor would be paying regularly and punctually and in case he committed a breach by failing to pay three consecutive instalments, the Bank would get the right to re-call the entire outstanding loan and in that eventuality debtor would be obliged to re-pay the same in lump sum.

The fourth clause is also quite relevant. It says that in the event of breach committed by the debtor in the matter of repayment of loan according to agreed mode the bank shall make a demand in writing calling upon the debtor to deliver the possession of the hypothecated vehicle and on debtor's failure to comply, the Bank was authorised to effect seizure of hypothecated security and sell the same through a private contract or otherwise and appropriate the proceeds thereof towards their outstanding loan amount and in case the sale proceeds did not square up their claim an obligation was cast on the debtor to pay the amount of shortfall."

8. The learned appellate court has further held that after the vehicle was

extensively damaged on account of accidental fire in which defendant-respondent No. 1 also suffered serious injuries, the appellant-bank preferred to serve a notice on defendant-respondent No. 1 Ex. P-11 by relying on Clause 4 (supra) of the instrument of hypothecation calling upon defendant-respondent No. 1 to deliver to the Bank the possession of hypothecated three-wheeler. The notice expressly disclosed that recourse to forcible seizure of the vehicle would be taken in case defendant-respondent No. 1 failed to deliver possession voluntarily. It was further recorded in the notice Ex. P-11 that the vehicle was to be disposed of through a private sale or otherwise, and in case the sale proceeds fell short of outstanding amount then the balance was to be recovered from the defendant-respondents, The plaintiff-appellant did not disclose all these facts in the plaint, but the fact remains that the plaintiff-appellant was the sole beneficiary under the insurance policy which had been taken by defendant-respondent No. 1 in pursuance to second clause (supra). All these facts have been proved by defendant-respondent No. 1 because no cross-examination was directed against him in respect of these facts. It is in these circumstances that the District Judge arrived at the conclusion that the plaintiff-appellant should have impleaded the Insurance Company and recovery could have been effected from it. The views of the District Judge in this regard read as under :--

"Defendant No. 1 has deposed to prove all these facts and no cross-examination was directed again him touching these facts. It is clearly established on the record that as per requirement of Ex. P2, defendant No. 1 did not comply with the insurance clause and the insurance policy was renewed for the year 1974-75. Shri Kamal Rai (D. W. 2), an employee of the Insurance Company has deposed that the vehicle was insured on 18-6-1974 for a period of one year. The necessary premium was- paid. The insurance cover was to last till 17-6-1975. The accidental fire involving the vehicle in question took place on 25-4-1974, i.e. during the currency of the insurance policy.

Shri Rajinder Kumar Puri (P. W. 2) in his deposition has, candidly conceded that the tempo was under comprehensive insurance cover the day it was involved in the accidental fire. He has further admitted that he did file a claim before the Insurance Company seeking compensation as a beneficiary under the insurance policy but the claim was declined on the plea that at the time of accident upto date road tax on the ill-fated vehicle had not been paid. Obviously, the company had unreasonably and illegally turned down the claim. The non-payment of token tax, if any, was hardly a relevant consideration for allowing or disallowing the claim. Moreover, there is nothing on the file to show that really defendant No. 1 had committed default in the payment of road-tax. The officers of the Bank like a good boy accepted the arbitrary and patently illegal verdict of the company. The Bank should not have allowed the Insurance Company to get away by offering a wholly untenable excuse and be a judge in their own cause. The matter should not have been allowed to rest there, rather the same should have been taken to the Court for scrutiny and final adjudication. In this view of the matter the Insurance Company was a necessary party. The liability of defendant No. 1 and

for that matter the liability of all the defendants was enforceable only after exhausting the other remedies envisaged by the parties. After all defendant No. 1 had been paying premium to Insurance Company at the instance of the plaintiff-Bank and was legally entitled to the benefits accruing from this insurance.

The payment of compensation under subsisting policy on the happening of a specified contingency does not depend upon the sweet-will of the Insurance Company. Law has to take its course. The Bank and the Company cannot be allowed to join hands for the sinister motive of harming the cause of defendant No. 1. The decline by the Company to indemnify the Bank was not within the discretion of the company. Rather company was under a legal obligation and if without a justifiable cause it had refused to honour the claim under the policy, the obligation could be enforced through the intervention of the Court. The way the Bank approached the company and the company got scot free by offering an excuse which only too credulous mind could swallow, one is led to conclude that the two had either colluded or connived to injure the interests of defendant No. 1. The right course for the plaintiff-Bank in such a situation was to drag the company to the Court by impleading it as a defendant."

Rival contentions

9. Mr. S.M.L. Arora, learned counsel for the plaintiff-appellant has argued that the finding recorded by the learned District Judge on the authority of Dev Raj Khanna, general power of attorney is absolutely erroneous in law as presumption u/s 85 of the Indian Evidence Act, 1872 would still be available and, therefore, it cannot be held that the suit filed by the plaintiff-appellant did not suffer from any legal infirmity. In support of his submission, learned counsel has placed reliance on a judgment of this Court in the case Punjab National Bank v. Parmesh Knitting Works, AIR 1986 Pun] & Mar 214. Learned counsel has also argued that the power of attorney in favour of Dev Raj Khanna was executed by S. B. Mohan Singh, one of the Directors and Staff Controller of the plaintiff-appellant and the same was witnessed by two employees of the Bank. According to the learned counsel, S. B. Mohan Singh had been duly authorised to execute, constitute and appoint a general attorney on behalf of the plaintiff-appellant Bank vide Resolution 26, dated 26-5-1959 of the Board of Directors. Learned counsel has maintained that merely because the resolution was not formally proved before the Court the same would not result into such an illegality which may prove fatal to the filing of the suit because u/s 85 of the Indian Evidence Act, 1872, such a presumption can be raised in favour of the plaintiff-appellant as long as no one else raised objection to the filing of the suit through Dev Raj Khanna.

10. Another argument raised by the learned counsel is that the suit could not have been dismissed by the District Judge once it is remembered that there was no "privity of contract" between the plaintiff-appellant and the Oriental Insurance Company with which the vehicle was insured, albeit at the instance of the plaintiff-appellant. According to the learned counsel, the trial Court has rightly

held that the right of the plaintiff-appellant to recover the loan amount cannot be defeated on account of the fact that the Insurance Company could have been sued by defendant-respondent No. 1 by filing a claim for damages at an appropriate Forum. In support of his submission, learned counsel has placed reliance on a judgment of the Supreme Court in the case of Central Bureau of Investigation, SPE, SIU (X), New Delhi Vs. Duncans Agro Industries Ltd., Calcutta, and two judgments of this Court in the cases of S. P. Bajaj v. State of Haryana 2003 (1) R C R 583 and City Bank N. A. v. State of Haryana 1997 (3) R C R 247 and argued that in the case of hypothecation, charge over the assets continues to be with the debtor and he would always be entitled to remove any part of the hypothecated goods. Learned counsel maintained that this is basic difference between pledge and hypothecation because in the case of pledge the goods are given in possession of the bank which are kept under a lock and key of the Bank whereas in case of hypothecation the possession of the goods remains with the owner of the property. As the possession of the goods remained with the defendant-respondent No. 1, he could not escape the liability to re-pay the balance loan amount to the plaintiff-appellant along with interest.

11. It has also been argued that erroneous approach has been adopted by the District Judge by holding that once a particular mode of recovery was adopted by the plaintiff-appellant as contemplated by Clause 5 of the letter of hypothecation then only that mode has to be exhausted. According to the learned counsel, such an approach adopted by the District Judge would defeat the right of the plaintiff-appellant to recover the loan amount. Referring to Clause 5 of the letter of hypothecation, learned counsel asserted that the vehicle was never handed over to the plaintiff-appellant and, therefore, the provisions of Clause 5 of the letter of hypothecation could not be deemed to have been fulfilled.

12. Mr. B. S. Sehgal, learned counsel for the defendant-respondents has argued that the learned District Judge has rightly discovered a grave negligence on the part of the plaintiff-appellant, inasmuch they had failed to implead the Insurance Company as a party. According to the learned counsel, a comprehensive insurance cover was obtained by defendant-respondent No. 1 in pursuance to Clause 2 of the letter of hypothecation in which the Bank has been named as mortgagee and defendant-respondent No. 1 has been declared as mortgagor. The learned counsel has referred to documents Exhibits D-1 and D-2 to show that the plaintiff-appellant has corresponded with the Insurance Company and the Insurance Company was a necessary party in the instant suit because the plaintiff-appellant has been named as mortgagee in the insurance cover. Moreover, plaintiff appellant was the sole beneficiary under Clause 2 of the letter of hypothecation. Learned counsel maintained that no insurance cover could have been obtained by defendant-respondent No. 1 alone in accordance with Clause 2 of letter of hypothecation. Learned counsel has urged that had the plaintiff-appellant impleaded the Insurance Company as a party defendant, then the whole amount would have been realized from the Insurance Company and no decree could be passed against defendant-respondent No. 1 or any of the

guarantors.

13. I have thoughtfully considered the rival contentions advanced by the learned counsel for the parties and am of the view that this appeal is liable to be dismissed because it has been found as a fact by the learned District Judge that under Clause 5, of the letter of hypothecation, the plaintiff-appellant preferred to pursue a course of taking possession of the vehicle and selling the same at an auction. Once that mode has been adopted, then prayer for a personal decree by filing a suit would be impermissible. According to Clause 2 of the letter of hypothecation, the plaintiff-appellant were to be mortgagee in the policy of comprehensive insurance which was required to be taken by defendant-respondent No. 1. Accordingly, defendant-respondent No. 1 had taken a policy of insurance and it was renewed in the year 1974-75. The plaintiff-appellant was the sole beneficiary of the insurance. Mehnga Singh DW-2 has proved the fact that the vehicle was insured on 18-6-1974 for a period of one year which had expired on 17-6-1975. The three-wheeler was damaged on 25-4-1974 in an accident when the insurance policy was intact. The plaintiff-appellant pursued the claim as was deposed by PW-2 Rajender Kumar and the same was declined by the Insurance Company on the ground that at the time of the accident, up-to-date road tax of the three-wheeler had not been paid. It shows that the claim of the plaintiff-appellant by the Insurance Company was illegally rejected and there was nothing on the record to conclude that there was a default committed by defendant-respondent No. 1 in depositing the road tax. It has also been established that the plaintiff-appellant took keen interest in making the claim from the Insurance Company but at the time of filing of the suit, it preferred not to implead the Insurance Company as party. It appears to be well settled that once a person in the foot-steps of mortgagee has been claiming an amount under the insurance cover, then the Insurance Company has to be impleaded as it is a necessary party. Reliance in this regard could be placed on the judgment of the Supreme Court in the case of Chief Executive Officer and Vice-Chairman, Gujarat Maritime Board Vs. Haji Daud Haji Harun Abu and Others, .

14. It is also well settled that failure to implead a necessary party would result into dismissal of the suit. Reliance in this regard can be placed on two judgments of the Supreme Court in the case of Devidas and Others Vs. Shrishailappa and Others, and Ramagya Prasad Gupta and Others Vs. Shri Murli Prasad and Others, . Moreover, in the instant case, the suit was filed as far back as on 8-1-1979 and more than 23 years have gone by. If the request of the plaintiff-appellant is accepted at this stage that the Insurance Company be permitted to become party now and the case be remanded back, such a claim against the Insurance Company would be time barred. Therefore, I am not inclined to accept the request made by the learned counsel for the plaintiff-appellant.

15. However, the hyper-technical objection sustained by the District Judge with regard to the competence of Shri Dev Raj Khanna to file the suit does not seem to be well founded. The absence of proof of resolution authorising S. B. Mohan

Singh to execute the power of attorney in favour of Shri Dev Raj Khanna cannot be sustained and that a presumption in favour of Shri Dev Raj Khanna u/s 85 of the Indian Evidence Act, 1872 would arise. A similar argument was raised in the case of Parmesh Knitting Works (AIR 1986 Punj & Har 214) (supra) and the competence for filing the suit by such a plaintiff was upheld by this Court. Moreover, the specific averment made by the plaintiff-appellant in its plaint that general attorney Shri Dev Raj Khanna was duly authorised to sign and verify the plaint has not been specifically controverted. The power of attorney executed in favour of Shri Dev Raj Khanna has been proved on record as a Exhibit P-12 by proving its copy which has been signed by S. B. Mohan Singh who was duly authorised by the Board of Directors vide Resolution No. 26 dated 20-2-1959. Therefore, it cannot be held that the suit was filed by a person who was not authorised to file the same. I am further of the view that the hyper-technical objection cannot be sustained as has been pointed out by the Supreme Court of India in the case of UBI v. Naresh Kumar AIR 1997 SC 3. The aforementioned proposition has also been followed by this Court in the cases of Municipal Corporation Vs. Preet Builders Pvt. Ltd. and Others, and Municipal Committee, Sirhind v. Baba Uttam Gir 2001 (3) P LR 533 : (2001 AIHC 4643).

16. The argument of Mr. S.M.L. Arora that the insurance contract between the plaintiff-appellant and the Insurance Company could not have been enforced at the instance of the plaintiff-appellant because there was no privity of contract between them and, therefore, the Insurance Company could not have been impleaded as a party has not impressed me. It is patent from the record that under Clause 2, the plaintiff-appellant was the sole beneficiary of the insurance which has been got effected by defendant respondent No. 1. The plaintiff-appellant pursued the insurance claim with the Insurance Company by accepting Clause 2 of the letter of hypothecation that they were the sole beneficiary of the insurance. It is also established on record that the plaintiff-appellant has accepted their status as mortgagees. If the aforementioned facts are kept in view then it cannot be concluded that the plaintiff-appellant was not interested in the insurance and could have avoided impleading the Insurance Company. u/s 2 of the Indian Contract Act, 1872 "consideration" in support of a contract could move from a third party for the benefits of another party. Once an interest has been created in the insurance cover by the defendant-respondent No. 1 in favour of the plaintiff-appellant then the case would be covered by the exception to the rule of the privity of contract. A reference in this regard be made to the case of AIR 1938 245 (Privy Council) . Moreover, the plaintiff-appellant has acknowledged by corresponding with the Insurance Company and making efforts to recover the amount that it was the beneficiary of the insurance cover. In view thereof it cannot deny the subsisting contract with the Insurance Company. The claim of the plaintiff-appellant by the Insurance Company has not been rejected on the ground that it was not a party to the insurance contract. The sole basis for rejecting the claim made by the plaintiff-appellant from the Insurance Company is that the road tax has not been deposited by defendant-respondent No. 1 upto

that date. Once it is so, then the principle of estoppel would also come in play and the plaintiff-appellant cannot take the stand that since it was not a party to the contract with Insurance Company, therefore, it was not necessary to implead the Insurance Company. Therefore, I do not find any substance in the argument raised by Shri S. M. L. Arora, learned counsel for the appellant.

17. For the reasons recorded above, the finding of the learned District Judge on the issue of filing of the suit by Dev Raj Khanna is reversed. However, findings on other issues are affirmed. As a result, the appeal fails and the same is dismissed. No costs.