

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Miscellaneous No.10148 of 2013

Arising Out of PS.Case No. -906 Year- 2011 Thana -SAMASTIPUR COMPLAINT CASE District-
Samastipur

Sailesh Vatsa S/o Shri Praveen Kumar Singh, Branch Manager, Mahindra and Mahindra Financial Services Ltd., Above Golu Suzuki, N.H.- 31, P.O. and P.S.- Begusarai, District- Begusarai, Pin Code- 851101

.... Petitioner

Versus

1. The State of Bihar
2. Ram Pukar Thakur S/o Late Kapildev Thakur Resident of Village- Mohiuddinpur, Gram Panchayat Raj- Mohiuddinpur, P.O.- Hansa, P.S.- Varisnagar, District- Samastipur

.... Opposite Parties

Appearance :

For the Petitioner : Mrs. Sheela Sharma, Advocate
Mr. Shivendra Kumar Roy, Advocate
For the Opposite Party No.2: Mr. Sufiyan, Advocate
Mr. Thakur Brajesh Singh, Advocate

CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH

ORAL JUDGMENT

Date: 07-07-2015

Heard learned counsel for the petitioner learned counsel
for the State and learned counsel for the opposite party no. 2.

2. This application under Section 482 of the Code of Criminal Procedure, 1973 (For short 'the Code') is directed against the order dated 16th March, 2012 passed by the learned Judicial



Magistrate-1st Class, Samastipur in Complaint Case No. 906(C)/2011 whereby and whereunder the learned Magistrate after taking cognizance of the offence punishable under Sections 420 and 504 of the Indian Penal Code summoned the petitioner for trial in exercise of powers conferred under Section 204 of the Code.

3. The complainant/opposite party no. 2 had filed the present complaint against the petitioner and one Ravi Bhushan Thati alleging, inter alia, that on 13th September, 2009, he had approached M/s. Chandana Auto Centre, Mohanpur, Samastipur for the purchase of a tractor for agricultural purposes. He paid Rs. 1,20,000/- on his own and further had taken loan of Rs. 3,00,000/- from the employer company of the petitioner, Mahindra and Mahindra Financial Services Ltd. (For short 'the company') which is a Non-Banking Financial Company. In accordance with the agreement between the parties, he had signed the loan agreement and further, he had also deposited blank cheques with the company for getting the loan amount. After completion of all the aforesaid formalities, he got the loan amount for purchasing the tractor bearing registration no. BR 33I-9277. It has been further alleged that in accordance with the agreement, the complainant had to pay back the loan amount along with the finance charges in 35 monthly installments of Rs. 9800/- each which were being regularly paid by



him. However, in the year 2010 due to certain natural calamities and drought, the rabi and kharif crop of the complainant was spoilt and because of the same, his financial capacity took some toll and as a result of that he could not repay the installments in time. It has been alleged that as a consequence of non-payment of the installments amount on 02.09.2010, the petitioner along with 3-4 unknown persons had come to the doors of the complainant and asked him to surrender the custody of the vehicle as he had not paid the installments and had further said that when the installments would be paid by him, he would be free to collect the vehicle from Chandana Auto Centre. Thereafter, the complainant surrendered the custody of the vehicle and under the pressure of the accused persons, he had written on a plain paper that the vehicle is being surrendered in M/s. Chandana Auto Centre on his own volition. The complainant has further alleged that after the surrender of the vehicle he faced financial hardships, however, still he managed the amount and went to the petitioner to deposit the same but the petitioner asked him to leave his office using abusive language. He also said that the vehicle has already been sold. When the complainant came back, he was served with a notice on 27th January, 2011 whereby he was asked to pay the entire loan outstanding within 7 days or else the vehicle would be sold to

recover the said amount. Lastly, it has been alleged that after receiving the notice when the complainant went to the petitioner with the money, the petitioner refused to accept the same and told him that he will not get the tractor and further asked him to leave in abusive language.

4. The complainant was examined on oath and in support of the complaint two witnesses were examined in course of inquiry. After conducting inquiry, the learned Magistrate summoned the petitioner vide impugned order dated 16.03.2012.

5. Learned counsel for the petitioner has contended that the impugned order passed by the court below is bad in law as well as on facts of the case. He has submitted that admittedly the complainant had entered into an agreement with the company for availing a loan facility of Rs. 3,00,000/- for purchase of a Mahindra 295 DI Tractor. According to him, the company in question is a company incorporated under the Indian Companies Act, 1956 having its registered office at Mumbai and it is involved in the business of providing credit facilities of different nature. At the relevant time, the petitioner was posted as Branch Manager of the company at its Samastipur Branch.

6. He has contended that the company having not been made accused in the present case, the court below ought not to have

taken cognizance of the offences against its employee. He submitted that the company is a juristic person having right to sue with a liability to be sued. According to him, under no circumstance, the petitioner can be made vicariously liable for any act of the company.

7. He has further contended that the present complaint has been filed only with intent to defeat the rightful claim of the company and the petitioner has been made accused only to wreak vengeance against him for his work done in the official capacity as an employee of the company. He contended that according to the aforesaid loan agreement dated 12.10.2009, the loan amount along with finance charges was repayable in 35 monthly installments in a time span of three years commencing from 12.10.2009 and ending on 12.08.2012. The vehicle was hypothecated in favour of the company as a security for the loan amount. According to Clause 12 of the loan agreement in the event of default by the borrower, the borrower was obligated to surrender the vehicle and in case of failure by the borrower to surrender the vehicle the lender company and its employees were entitled to take possession of the vehicle and to sell the same in order to recover the amount standing due towards the loan amount of the borrower.

8. He has contended that since the complainant



miserably failed in payment of installment and, therefore, he surrendered the custody of hypothecated vehicle in accordance with Clause 12 of the Loan Agreement as aforesaid and thereafter, he failed to make payment of the loan amount. A notice dated 27.01.2011 was sent to him to make payment of the entire amount within seven days of receipt of notice. Since the complainant failed to make payment of the loan advanced to him even after aforesaid notice, the company sold the vehicle on 30th March, 2011 in favour of the highest bidder, namely, Shri Manoj Kumar for a sum of Rs. 2,60,000/-. He has contended that even after adjusting the sale value against the outstanding loan of the petitioner, some amount still remained due towards his loan account and the same stands as the rightful dues of the company towards the loan account of the complainant.

9. Based on the aforesaid submissions, learned counsel for the petitioner has contended that the nature of dispute as alleged in the present complainant arises out of contract under which loan was granted to the complainant and by no stretch of imagination, the same would attract the ingredients of the offence under Section 420 of the Indian Penal Code. He has further contended that as far as the allegations made in the complaint with regard to an offence under Section 504 IPC is concerned, the said allegation has been

made against the petitioner only to wreak vengeance against him for the acts done in his official capacity.

10. On the other hand, learned counsel for the opposite party no. 2 has submitted that the allegations made in the complaint do attract the ingredients of the offences alleged. The vehicle in question was repossessed by the petitioner and others under threat, coercion and duress. When the complainant wanted to arrange money to discharge his liability of loan and make the payment, the petitioner refused to hand over the vehicle to the complainant and used abusive language and, hence, the ingredients of the offences under Section 420 and 504 IPC are clearly attracted against him.

11. Having heard respective counsel for the parties and perused the record, I find substance in the argument advanced by the learned counsel for the petitioner. Admittedly, the petitioner had entered into a loan agreement with the company in question. As per the complaint itself, the complainant had handed over the vehicle to the employees of the company when he failed to repay the installments in time. Clause 12 of the Loan Agreement as contained in Annexure-2 to this application reads as under:-

“12) consequences upon event of default:

12.1 Upon the occurrence of any event of default and any time thereafter, the Lenders shall without prejudice to its rights in law, be entitled to declare



all sums due and to become due hereunder for the full terms of the agreement as immediately due and payable including that the Borrower shall be liable to pay to the Lender foreclosure charges calculated as the percentage (as per Schedule 1) of the balance principal outstanding along with other dues including unpaid installments, service taxes, late charges etc., due as on date of such declaration and upon the Borrower failing to make the said payment in full within 7 days thereof, the Lender may, at its sole discretion, do any one or more of the following:

- (i) Upon notice to the Borrower terminate this agreement;
- (ii) Demand that the Borrower should return the Product to the Lenders at the risk and expense of the borrower, in the same condition it was delivered to him (Ordinary wear and Tear Excepted) at such Location as the lender may designate and upon failure of the borrower to do so within the period of demand the lender/agents/allies as agent and constituted attorney of the Borrower can enter upon premises where the product is located and take immediate possession of and remove the same without liability to the lenders or their agents of such entry or for damage to property or otherwise. Upon such return of the product or upon the lender taking possession of the product as herein before stated the loan



agreement can be foreclosed or terminated by the lender at its discretion and provided however the remedies available to the lender as herein given shall survive such foreclosure and termination of loan and the lender shall be entitled and authorized to exercise its rights herein including in connection with the product to recover its dues under this Agreement.

(iii) Of such terms and conditions and for such consideration as the Lender may deem fit with or without any notice to the Borrower sell the Product at a public or private sale, otherwise dispose of upon such return of the Product or use, or operate, lease to others to keep idle such Product, all free and clear of any rights to the Borrower and without any duty to account to the Borrower for such action or inaction or for any proceeds in respect thereof.

(iv) By written notice to the Borrower, require the Borrower to pay to the Lender (as liquidated damages or loss of bargain and not as a penalty) on the date specified in such notice an amount (plus interest at the rate of 3% per month) for the period until receipt of the said amount) equal to all unpaid periodical installment payments and all other payments which, in the absence of a default, would have been payable by the Borrower hereunder for the full terms hereof, or

(v) Exercise any other right or remedy which may be available to them under the applicable law.



(vi) It being agreed and understood by the Borrower that the right to of the Lender to recover the amount payable and/or repayable or reimbursable to the satisfaction of the Lender shall survive any such Cancellation of Loan and/or termination if attached and the Lender's rights wherever given in connection with initiating of action for enforcing its right to recover the amount shall also survive the Cancellation of the Loan or the termination of the agreement as the case may be and the Lender shall be entitled to take all or any of the steps therefore and the Borrower shall not take defense of such termination or cancellation of Loan under this agreement.

12.2 a) Distribution on realization

The net proceeds of sale, realization, recovery and/or insurance claim proceeds relating to the Product herein, on receipt by the Lender shall be applied at the Lender's absolutely discretion in the manner it thinks fit. The Borrower shall continue to be liable for any deficiency in the amount due to the Lender by the Borrower after adjustment of the net proceeds of sale, realization, recovery and/or insurance claim as above.

b) No interest or compensation shall be payable by the Lender to the Borrower on the proceeds to be held by the Lender or during the period the same shall be held by the Lender for being applied in terms of clause 12.2 (a) on distribution of

realization.

c) Upon termination or earlier determination of this Agreement or the Cancellation of the Loan as the case may be the Lender shall as the absolute Lender of the Product be at liberty to sell or otherwise dispose of the same in such manner as they may deem fit including by private sale which shall not be questioned or challenged by the Borrower or exercise, any one or more of the rights and remedies set out in this Agreement.

d) If the price recovered on such sale or disposal falls short of the aggregate amount of installments remaining due and payable, the Lenders may, by a notice in writing, call upon the Borrower to pay the difference within such days of the receipt of the Notice by the Borrower, together with all overdue some, owing and payable by the Borrower to the Lenders under or by virtue of these presents and the Borrower agrees to make such payment without demur.

12.3 In addition and without prejudice, to what is stated above, the Borrower shall be liable for all legal and other costs and expenses resulting from the forgoing defaults from exercise of the Lender's remedies, including but not limited to possession of any of the Product and/or collection recovery of all or any charges payable by the Borrower/Co-Borrower as the case may be.

12.4 No remedy referred to hereinabove is intended

to be exhaustive, but the same shall be in addition to any other remedy available to the Lenders at law. The Lenders reserves the rights to appoint bankers or financial institutions or any other persons it deems fit as their attorney or agent for the purposes of enforcing their right and remedies under this agreement.”

12. A bare perusal of the aforesaid clause would make it evident that in terms of the agreement in the event of default, the borrower is obligated to surrender the vehicle and if he fails to surrender then the lender company and its employees would be entitled to take possession of the vehicle and to sell or otherwise dispose of the same in such manner as they may deem fit including by private sale in order to recover all the overdue from the borrower.

13. It would be evident from the statement made by the complainant on oath as also from the complaint that the complainant had surrendered the custody of the hypothecated vehicle in accordance with clause 12 of the loan agreement as aforesaid. The terms of agreement gave a right to the company to sell the vehicle and despite receipt of notice the complainant failed to pay the entire loan outstanding.

14. In my opinion, if the complainant had failed to repay the due amount within the time stipulated in clause 12 of the

loan agreement, no fault can be found with the action of the company if it had sold the vehicle to a third party.

15. The element of dishonest intention which is essential element to constitute an offence under the Indian Penal Code is lacking in the present case. The offence of cheating is defined in Section 415 of the Indian Penal Code. So far as it is relevant, section 415 of the Indian penal Code reads as under:-

“415. Cheating- Whoever, by deceiving any person, fraudulently or dishonestly induces the persons so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to “cheat”.”

16. The essence of cheating is that there should be deception either by express words or implied by conduct which may be direct or indirect or dependent upon facts and circumstances of each case. Section 415 of the Indian Penal Code consists of two distinct parts. The first part contemplates where by deception practiced upon a person the accused dishonestly or fraudulently induces that person to deliver property to any person or to consent



that any person shall retain any property. The second part, on the other hand, envisages where by deception practiced upon a person the accused intentionally induces that person to do or omit to do anything which he would not do or omit to do, if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property. The offence under second part of the section cannot be made out in absence of any evidence to show that the accused had any intention of causing damage or harm to the victim in body, mind, reputation or property.

17. Section 420 IPC deals with cheating which reads as under:-

“420. Cheating and dishonestly inducing delivery of property.- Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.”

18. The essential ingredients of Section 420 IPC are as follows:-

(i) cheating;

(ii) dishonest inducement to deliver property or to make, alter or destroy any valuable security or anything which is sealed or signed or is capable of being converted into a valuable security, and

(iii) mens rea of the accused at the time of making the inducement.

19. In the present case even from the admitted facts of the complainant, there is nothing to suggest that the petitioner in any manner induced the complainant fraudulently or dishonestly or the complainant parted with any property in favour of the petitioner out of such inducement or deception. There is nothing to suggest that the petitioner intentionally induced the complainant to do or omit to do anything which he would not do or omit if he was induced.

20. When a person is in possession of a property to which is not legally entitled to, he cannot suffer any damage or harm in body, mind, reputation or property, if the property is taken away by the person, who is legally entitled thereto. When the lender company acquires the right to repossess the property in terms of the agreement, there is corresponding loss of right to retain the property by the hirer. In such an event, if the lender company repossesses the property, it cannot be said to have deprived the hirer of the property to which the hirer is otherwise legally entitled to.



21. The issue involved in the present case is no more res integra. In **Sardar Trilok Singh and Others Vs. Satya Deo Tripathi [(1979) 4 SCC 979]**, the Supreme Court examined a similar case wherein the truck had been taken in possession by the financier in terms of hire-purchase agreement as there was default in making the payment of installment, a criminal case has been lodged against the petitioner under Sections 395, 468, 465, 471, 412 and 120-B read with 34 of the Indian Penal Code. The accused had filed an application under Section 482 of the Code before the High Court for quashing of the criminal prosecution but it was refused by the High Court on the ground that the financier had committed an offence. However, reversing the said judgment, the Supreme Court held that proceedings initiated were clearly an abuse of the process of court. The dispute involved was purely of civil nature, even if the allegations made by the complainant were substantially correct. It further held that under the hire-purchase agreement, the financier had made the payment to alleged company, the owner of the vehicle. The terms and conditions incorporated in the agreement give rise in case of dispute only to civil rights and in such a case the civil court must decide as to what was the meaning of terms and conditions.

22. In **K.A. Mathai alias Babu and Another Vs.**



Kora Bibbikutty and Another [(1996) 7 SCC 212], the Supreme Court took a similar view holding that in case of default to make payment of installments, the financier had the right to resume possession of the vehicle even if the hire-purchase agreement does not contain a clause of resumption of possession for the reasons that such a condition is to be read under the agreement. It further held that in such an eventuality it cannot be held that the financier had committed the offence of theft and that too, with the requisite mens rea and requisite dishonest intention.

23. In **Charanjit Singh Chadha and Others Vs. Sudhir Mehra [(2001) 7 SCC 417]**, the Supreme Court held that recovery of possession of vehicle by the financier-owner as per terms of the hire-purchase agreement does not amount to a criminal offence. Such an agreement is an executory contract of sale, conferring no right *in rem* on the hirer until the conditions for transfer of the property to him has been fulfilled and in case default is committed by the hirer under hire-purchase agreement and possession of vehicle is resumed by the financier, it does not constitute any offence for the reason that such a case has to be resolved on the basis of terms incorporated in the agreement. The Supreme Court further held that in such a contract of bailment an allegation of sale are involved in the sense that it contemplates an



eventual sale. While deciding the said case, the Supreme Court placed reliance upon its earlier judgments in **M.S. Damodar Valley Corporation Vs. The State of Bihar AIR 1961 SC 440; Installment Supply (Pvt.) Ltd. and another Vs. Union of India and Ors. AIR 1962 SC 53; K.L. Johar & Company Vs. The Deputy Commercial Tax Officer, Coimbatore 111 AIR 1965 SC 1082; Sundram Finance Ltd. Vs. State of Kerala and Another AIR 1966 SC 1178; and Sardar Trilok Singh and Others Vs. Satya Deo Tripathi (supra).**

24. **The Managing Director Oirx Auto Finance (India) Ltd. Vs. Sri Jagmander Singh and Another [(2006) 2 SCC 598]**, is yet another case where the financiers who had financed the truck on the basis of a hire-purchase agreement took over the possession of a truck from the hirer due to default in payment of installments and the hirer lodged a complaint with the Reserve Bank of India and also instituted a suit for inter alia mandatory injunction, the Supreme Court observed as under:-

“9. Before we part with the case, it is relevant to take note of submission of learned counsel for the hirer that in several cases different High Courts have passed orders regarding the rights to repossess where the High Court have entertained writ petitions including writ petitions styled as PIL on the question of right of financiers to take



possession of the vehicle in terms of the agreement, it is stated that directions have been given to R.B.I. for framing guidelines in this regard. If it is really so, the orders prima facie have no legal foundation, as virtually while dealing with petitions subsisting contracts are being rewritten. It is still more surprising that petitions styled as PIL are being entertained in this regard. Essentially these are matters of contract and unless the parties succeeds in showing that the contract is unconscionable or oppose to public policy the scope of interference in writ petitions in such contractual matters is practically non-existent. If agreements permit the financier to take possession of the financed vehicles, there is no legal impediment on such possession being taken. Of course, the hirer can avail such statutory remedy as may be available. But, mere fact that possession has been taken, cannot be a ground to contend that the hirer is prejudiced.”

25. From the observations made above in the Managing Director Orix Auto Finance (India) Ltd. (supra), it is abundantly clear that if an agreement permits the financier to take possession of the vehicle, if the hirer defaults in making repayment of installments, there is no impediment on the part of the financier to take possession of the vehicle.

26. From the law laid down by the Supreme Court as discussed above, in my opinion, if the loan agreement arrived at between the lender company and the hirer permitted the lender company to take possession of the vehicle in the event of the hirer's failure to make payment of the installments, there was no impediment on the part of the lender company in taking possession of the vehicle if the hirer defaulted in making payment of the installments.

27. In the result and for the reasons discussed above, this application is allowed. The impugned order dated 16th March, 2012 passed by the learned Judicial Magistrate-1st Class, Samastipur in Complaint Case No. 906(C)/2011 is set aside. Consequently, Complaint Case No. 906(C)/2011 and all proceedings emanating therefrom are also quashed.

(Ashwani Kumar Singh, J.)

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