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HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Misc. Petition No. 719 of 2016

Shri Ram Transport Finance Company Limited Through Its Credit Manager Vishnu Kumar Nishad, Aged About 35 Years, S/o Dukalu Ram Nishad, Near New Bus Stand, G.E. Road Rajnandgaon, Police Station, Tahsil, Civil And Revenue Distt. Rajnandgaon Chhattisgarh. (Wrongly Metioned In Impugned Judgment District Balod).

---- Petitioner

Versus

Leela Ram Sahu S/o Shiv Prasad Sahu Aged About 38 Years R/o Village Ranakhujji, Police Station & Tahsil Deori, Civil And Revenue Distt. Balod Chhattisgarh.

---- Respondent

For Petitioner: Shri Ratnesh Kumar Agrawal, Advocate

Hon'ble Shri Justice P. Sam Koshy

Order On Board

11.07.2016

1. The present Cr.M.P. has been preferred challenging the order dated 03.05.2016 passed by the Judicial Magistrate First Class, Doundilohara District Balod (C.G.) in a Complaint Case No. 104/2015. Vide the said impugned order the Court below has rejected the complaint filed by the present Petitioner under the provisions of Section 138 of the Cr.M.P.

2. Learned Counsel for the Petitioner submits that present Petitioner was the financier of the vehicle purchased by the Respondent. Subsequently since there was default on the part of the Respondent in the payment of the monthly installments the present Petitioner is said to have recovered the vehicle and the vehicle is lying in the possession of the Petitioner. Meanwhile, one of the

cheques which has been provided by the Respondent for repayment of the loan amount was put for clearance by the Petitioner company which was got dishonoured with a note 'insufficient fund' on the basis of the complaint under Section 138 of Negotiable Instrument Act was instituted by the present Petitioner. After the conclusion of the trial the Court below vide impugned order dated 03.05.2016 taking into consideration the factual matrix of the case particularly the fact that the present Petitioner had recovered the vehicle which was lying in their possession and also it is admitted fact based on the evidence adduced by the officers of the Petitioner company itself and further it is also the finding of fact by the Court below that the Petitioner company had failed to establish the fact that the cheque given by the present Respondent was towards repayment of the loan rather the cheques were retained as security to the loan for the vehicle and the company has already recovered and seized the said vehicle, the offence under Section 138 of N.I. Act against the Respondent would not be made out.

3. In the opinion of this Court finding of the Court below is not contrary to the law or for that matter considering the evidence which has come on record, that the vehicle was recovered by the Petitioner company even before the cheque being presented for clearance, is a sufficient indication that the cheque which was lying in their possession was not towards repayment of the monthly installment but were retained by the Petitioner company as security which now they are using for the purpose of implicating the Respondent for offence under Section 138 of N.I. Act.

4. Having considered the rival contentions advanced by either side, it is necessary to refer to a couple of decisions rendered by a few High Courts in this regard where on similar set of facts the proceedings under Section 138 of the N.I. Act was challenged. One of the decisions in this regard was a judgement passed by the High Court of Kerala on 2.4.2004 in the case of *Sudha Beevi* v. *State of Kerala* IV (2004) BC 71 = 2004 CriLJ 3418, wherein under similar factual background, the High Court of Kerala had held that if the hire-purchase agreement involved in the case between the financial institution and the hirer stood determined by the act of parties, the cheques which were accepted by the financial institution towards advance for repayment of the hire would become instruments without consideration and that they will be instruments for which consideration had failed and under the said circumstances the remedy available to the financial institution is only to realize the balance hire due by filing appropriate suit for damages on account of breach of terms of agreement. It was also held that since the financial institution had admittedly got repossession of the vehicle and that the said repossession was even before the filing of the complaint case, the hire-purchase agreement between the parties stood “determined *ipso facto*”. Thus, as a consequence of the seizure of vehicle the financial institution had exercised one of the options available to him under the agreement and as such the cheques in its hands given as a security thereafter becomes instruments for which a consideration had failed and if presented for

payment and gets dishonoured, no offence punishable under Section 138 of the N.I. Act would be attracted.

It is also pertinent to mention that in order to attract the penal provisions under the N.I. Act “debt or other liability” must be a “legally enforceable debt or liability”. If the said instrument is not supported by consideration, there is no question of attracting Section 138 of the N.I. Act.

In the instant case it is all the more necessary to take note of the fact that apart from taking repossession of the said vehicle, the Respondent has also sold the vehicle and have adjusted the sale proceeds of the vehicle against the liabilities of the Petitioner and which also leaves the Respondent with the only remedy for realization of the balance amount from the hirer is by way of filing a suit for damages or a suit for recovery, as the case may be.

5. The said view taken by the Kerala High Court has been further relied upon by the Madurai Bench of Madras High Court in the case of *N. Rajangan* v. *Centurion Bank Ltd.,* decided on 13.10.2009, wherein also the Madurai Bench of Madras High Court reached to the conclusion that once the financier had exercised the option of seizure of vehicle, the postdated cheques cannot be permitted for encashment, particularly, after the seizure of the vehicle and the only recourse available to the said financier is to initiate appropriate legal remedy for recovery of the balance amount.

Likewise, the Punjab and Haryana High Court at Chandigarh also in a recent decision made on 31.7.2013 in the case of *M/s Guru Nanak Tractors* v. *Swarn Singh*, took the same view that as per the

Section 138 of the N.I. Act in order to attract the penal provision the debt or other liability must be legally enforceable debt or liability and if the instrument is not supported by consideration, there is no question of attracting the provisions of Section 138 of the N.I. Act.

6. The decisions of the High Courts referred to above is further fortified by the recent decision of the Hon'ble Supreme Court in the case of *M/s Indus Airways Pvt. Ltd. and others* v. *M/s Magnum Aviation Pvt. Ltd. and another* [2014 (3) M.P.H.T. 28 (SC)].

7. In light of the aforesaid decisions rendered by the different High Courts and in respectful agreement to the ratio laid down in these judgements, in the instant case also, as is evident from the record, the Respondent having taken repossession of the vehicle, this Court is of the opinion that the hire-purchase agreement entered into between the Petitioner and the Respondent gets determined *ipso facto*.

8. A similar view has also been taken by this Court in the matter of *Rajkumar Sharma Vs. Shriram Finance Co. Ltd.* reported in 2015 (1) M.P.H.T. 13 (CG).

9. Section 138 of the N.I. Act treats dishonoured cheque as an offence, if the cheque has been issued in discharge of any debt or other liability. The Explanation leaves no manner of doubt that to attract an offence under Section 138, there should be legally enforceable debt or other liability subsisting on the date of drawal of the cheque. The very fact that the Respondent has taken repossession of the vehicle, the agreement on the basis of which the postdated cheques were issued cannot be put for clearance for the

reason that the Respondent by virtue of the act of taking possession of the vehicle the agreement stood determined. Therefore, the cheques which have been subsequently put for clearance and got dishonoured would not fall within the ambit of legally enforceable debt or other liability.

10. In this opinion of this Court no strong case made out by the Petitioner calling for interference with the impugned order.

11. Accordingly, the present Cr.M.P. is sans, leave to appeal stands rejected. Consequently, the Acquittal appeal stands rejected.

Sd/-

(P. Sam Koshy)
JUDGE

kishore