

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Miscellaneous No.46785 of 2016

Arising Out of PS.Case No. -351 Year- 2016 Thana -KOTWALI District- PATNA

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Shailendra Mohan Jha, aged about 39 years son of Shri Baikunth Jha residing at
Flat No. 402, Hari Tower, Budha Colony, P.S.- Budha Colony, Patna.

.... Petitioner

Versus

1. The State of Bihar
2. Ishrar Ansari Son of Late Samsuddin Ansari resident of Village- Nauwa, P.O.-
Vairha, P.S.- Diyara, District- Rohtas.

.... Opposite Party

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Appearance :

For the Petitioner/s	:	Mr. Jitendra Singh, Sr. Advocate Mr. Sanket, Advocate Mr. Prince Kumar Mishra, Advocate
For the State	:	Mr. Kumar Virendra Narayan, APP
For the Informant	:	Mr. Harish Kumar, Advocate Mr. Raj Kumar Jha, Advocate

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CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH

ORAL JUDGMENT

Date: 12-07-2017

This application invoking inherent jurisdiction of this Court as enshrined under Section 482 of the Code of Criminal Procedure (hereinafter referred to as 'Cr.P.C.') has been filed seeking quashing of the first information report (hereinafter referred to as 'FIR') vide Kotwali P. S. Case No. 351 of 2016 dated 25.07.2016 instituted at the instance of the informant / opposite party no. 2 (hereinafter referred to as 'the borrower') under



Sections 420 and 406/34 of the Indian Penal Code.

2. The FIR is based on a typed report submitted by the borrower to the Station House Officer, Kotwali Police Station, Patna wherein it is stated that the borrower is the registered owner of the truck bearing Registration No. BR-44-G/0442. He purchased the said truck under hire-purchase agreement. He was supposed to pay the value thereof amounting to Rs. 26,41,510/- in 44 monthly instalments. He paid 42 instalments till January, 2016 amounting to Rs.25,05,804. It is further stated that on 10.03.2016, M/s. Shankar Maurya Motors has seized his truck whereafter on 29.03.2016, he met the Branch Manager and Managing Director of M/s. Shankar Maurya Motors with a sum of Rs.1,35,706/- and requested them for release of the truck. However, they apprised him that as against the truck in question Rs.2,80,000/- is due, which is over and above the dues of the instalments and it is only after the dues of the instalments and overdue charges are received, the truck shall be released. Thereafter, the borrower returned home and made arrangement for the demanded money. He again approached them on 29.06.2016 with overdue charges plus dues of instalments and requested the said M/s. Shankar Maurya Motors to release the truck. However, he was sent to the office of Tata Motors Finance Limited (hereinafter referred to as 'the Lender Company')



whereafter he approached the office of the Lender Company and explained him the entire situation. It is further stated that the Manager of the Lender Company sent him back to M/s. Shankar Maurya Motors whereafter he became disappointed and went to M/s. Shankar Maurya Motors. However, on seeing him, they got agitated and told him why he had returned. It is alleged that he again approached the Lender Company, but he was informed that the truck has already been sold and now nothing can be done.

3. On the basis of aforesated allegations, the borrower alleged that the accused persons cheated him in a planned manner in conspiracy with each other and dispossessed him of his truck.

4. Mr. Jitendra Singh, learned Senior Advocate appearing for the petitioner submitted that the instant FIR is manifestly attended with *mala fide*. He submitted that the petitioner is state in-charge of the Lender Company which co-relates him to the accused no. 3, i.e., the Manager of the Lender Company. He submitted that the accused no. 3 in the FIR is not an individual but an artificial person named by his designation. He has no role whatsoever in connection with the present incident as narrated in the FIR. He submitted that the borrower set the criminal investigation in motion by concealing material facts. He submitted that the Lender Company is a Non-Banking Finance Company of Tata Motors



incorporated under Indian Companies Act, 1956 and has obtained Non-Banking Finance Company Licence. He submitted that the truck in question was financed by the Lender Company under Loan Cum Hypothecation Cum Guarantee Agreement (hereinafter referred to as 'loan agreement') in which one Shri Rajeshwar Singh stood as guarantor of the borrower and the agreement was executed on 26.03.2012. According to him, the truck in question was hypothecated with the Lender Company and it was handed over to the borrower, who was under obligation to pay first instalment of Rs.60,435/- and, thereafter, Rs.60,025/- per month for 43 months as per agreement. However, he repeatedly defaulted in making of instalments, as agreed between the parties and, therefore, the Lender Company proceeded against him as per the terms and conditions of the agreement and issued various notices upon him as well as upon his guarantor to settle the dues and regularize his accounts. However, the borrower failed to do so. Thereafter, legal notice was issued on 16.09.2014 terminating the loan agreement and the borrower was asked to settle the accounts and in the event of non-settling the same to return the truck.

5. Mr. Singh has submitted that as the borrower did not settle the dispute in order to recover the outstanding dues, a reference was made to the sole Arbitrator by the Lender Company



in terms of the loan agreement. Accordingly, an arbitration case was registered and notice of arbitration sitting was sent to the borrower. However, the borrower opted not to appear and contest the arbitration proceeding nor did he settle the dues. He has further contended that upon an application filed by the Lender Company for granting *ad interim* relief with regard to restraining the borrower from selling, transferring, creating third party charge or parting with the possession of the truck in any manner, whatsoever and handing over the truck, the learned Arbitrator passed an *ad interim* relief by order dated 23.04.2011 restraining the borrower from selling, transferring, creating third party rights or charge or parting with the possession of the said truck and the borrower was directed to hand over the said truck to the duly authorized representative of the Lender Company.

6. Mr. Singh, learned Senior Advocate has submitted that in the subsequent hearing also, the borrower chose not to appear. On 08.11.2014, the learned Arbitrator passed order for proceeding *ex parte* in the case and ultimately on 10.11.2014, the final award was passed in the arbitration case wherein it was held that the Lender Company is entitled to recover the sum of Rs.12,48,096.56/- with further interest at the rate of 18 per cent from 18.09.2014 till the date of payment. The learned Arbitrator



also directed that the Lender Company is entitled to re-possess the truck in question and to sell the same for realization of its due. In compliance of the award, ultimately, after more than a year, the truck could be intercepted on 28.03.2016 from one Mr. Sabir at Varanasi in the State of U.P. Even after re-possession, the borrower was afforded opportunity to get the truck back and, accordingly, the Lender Company sent letters to the borrower as well as to the guarantor calling upon them to pay the outstanding amount and take back the truck, but they failed to respond. Mr. Singh has submitted that since the borrower did not turn up and the truck was lying idle as well as loosing its market value every day besides the parking charges were to be paid by Lender Company, it was thought proper to sell the truck in question in the best interest of all concerned, to the highest bidder and, accordingly, the same was sold on 20.04.2016 by the Lender Company from the office at Varanasi, Uttar Pradesh, where the truck was seized.

7. In the background of the aforementioned submissions, it is contended by Mr. Jitendra Singh, learned Senior Advocate that the FIR lacks foundation also for initiating and maintaining the criminal prosecution against the petitioner. In support of his submission, he has placed reliance on the decisions of Supreme Court in *Sardar Trilok Singh and Others Vs. Satya Deo Tripathi*



[(1979) 4 SCC 979], K. A. Mathai alias Babu and Another Vs. Kora Bibbikutty and Another [(1996) 7 SCC 212] and Charanjit Singh Chadha and Others Vs. Sudhir Mehra [(2001) 7 SCC 417].

8. *Per contra*, Mr. Kumar Virendra Narayan, learned Additional Public Prosecutor appearing for the State submitted that there is allegation in the FIR that the accused persons including the petitioner in conspiracy with each other, in order to cheat the borrower, took away his truck. He submitted that allegations made in the FIR do attract the ingredients of the offence alleged. He submitted that once the ingredients of cognizable offence are attracted, it is the duty of the police to register an FIR and investigate the case and on completion of investigation submit police report to the Magistrate concerned. Accordingly to the learned Additional Public Prosecutor, the defence taken by the petitioner can be considered by the police during investigation of the case and if the allegations are found to be false, the police may submit report under Section 173(2) of the Cr.P.C. holding the accusation to be false. However, at the stage of investigation, it would not be proper for the Court to interdict the criminal prosecution merely on the basis of the pleadings advanced by the petitioner in defence of the case. He has submitted that the instant application being premature is fit to be dismissed.



9. Echoing the submissions made by the learned Additional Public Prosecutor appearing for the State, Mr. Harsih Kumar, learned Advocate appearing for the borrower submitted that the instant application under Section 482 of the Cr.P.C. has been filed only with an intent to defeat the rightful claim of the borrower over the truck in question.

10. Mr. Harish Kumar, learned Advocate contended that inadvertently, it has been stated in the FIR that the truck in question was purchased by the borrower under hire-purchase agreement. He has stated that the said truck was financed by Lender Company under loan agreement. He has submitted that the award passed by the learned Arbitrator is collusive and the same cannot be deemed to be a final decree in favour of the Lender Company. He submitted that the award passed by the learned Arbitrator can be set aside under Section 34 of the Arbitration and Conciliation Act, 1996 by the civil court on more than one grounds and only because there was an award in favour of the Lender Company, the action of the Lender Company in taking possession of the truck in question and selling the same to the third party cannot be justified.

11. I have heard learned Advocates appearing on behalf of the parties and perused the record.

12. I find substance in the argument advanced by Mr.



Jitendra Singh, learned Senior Advocate appearing for the petitioner. Admittedly, the Lender Company had entered into a loan agreement with the borrower.

13. It would be pertinent to note here that the petitioner has brought on record the copy of loan agreement, notices issued to the borrower by the Lender Company, the reference of dispute arising in connection with the loan agreement executed between the Lender Company and the borrower, the claim application filed in respect of the loan agreement before the sole Arbitrator, the minutes of meetings before the Arbitrator, the notices issued by the learned Arbitrator to the informant, the order dated 23.09.2014 passed by the learned Arbitrator granting *ad interim* relief to the Lender Company and the final award dated 10.11.2014 passed by the learned Arbitrator by annexing them with the application filed under Section 482 of the Cr.P.C.

14. Though the borrower has appeared through lawyer, no counter-affidavit has been filed on his behalf. The learned Advocate appearing for the borrower has not disputed the facts that the borrower had entered into loan agreement and an award was passed against him by the learned Arbitrator in an Arbitration proceeding. Mr. Harish Kumar, learned Advocate for the borrower has also admitted that the borrower was a party to the



loan agreement as contained in Annexure-2 to the present application.

15. Since the existence of the loan agreement is not in dispute, let me extract its Clause 17, which deals with the events of default and reads as under :-

“17. EVENTS OF DEFAULT

17.1 At the option of the lender, and without necessity of any demand upon or notice to the Obligors, all of which are hereby expressly waived by the Obligors, and notwithstanding anything contained herein or in any security documents executed by/ to be executed by the Obligors in the Lender’s favour pursuant to this Agreement, all amounts due and payable by the Obligors to the Lender under this Agreement and all of the obligations of the Obligors to the Lender hereunder, shall immediately become due and payable, irrespective of any agreed maturity upon the happening of any of the following events (hereinafter referred to as **“the Events of Default”**).

(a) The Obligors shall commit default in;

(i) Payment of Installments on the respective due dates in respect of the Assets;

(ii) Payment of any other amount(s) due and payable by the Obligors to the Lender in terms of this Loan Agreement;

(iii) The performance of any of the terms and conditions of this Loan Agreement;

(iv) If any attachment or restraint has been levied on the Assets or the Assets are confiscated by any authority and/or the properties hereby agreed to be charged and/or any proceedings have been taken or commenced for recovery of any dues from



the Borrower by any person or persons including the Lender; or

(v) Taking delivery of the Assets.

(b) Any of the Obligors dies or any action or other steps are taken or legal proceedings are initiated for winding up, insolvency, dissolution, or reconstitution of any of the Obligors or for the appointment of a liquidator, receiver, and trustee or similar officer on its properties or assets (including the Assets) of the Obligors or any of the Obligors otherwise becomes incapacitated to enter into a contract under the applicable laws;

(c) Any of the post dated cheques and/or cheques delivered by the Borrower to the Lender in terms and conditions hereof are dishonored for any reason whatsoever on presentation including due to instructions given by the Borrower for stop payment;

(d) The Assets are confiscated, attached, taken into custody by any authority or subject to any execution proceeding;

(e) The Assets are endangered or badly damaged due to accident or any other reason whatever causing the same to be a total loss in the opinion of the Lender or caused bodily injury to any person due to any accident or otherwise;

(f) Any distraint or seizure order is levied on the Assets;

(g) The Borrower fails to pay any tax, impost, duty or other imposition or comply with any formalities required for the Assets under law from time to time;

(h) The Assets are stolen or untraceable for a period of 30(thirty) days for any reason whatever;

(i) The Borrower fails to adhere to the time frames specified in this Agreement (including timeframes as to supply of a copy of the Registration Certificate and Insurance Certificate);



(j) The Assets are destroyed for any reason whatsoever and/or is incapable of being used for any permissible use under any law or regulation or is used or alleged to be used for any illegal purpose;

(k) Any information or representation or warranty given by the Borrower under this Loan Agreement is found to be misleading or incorrect in any respect;

(l) Any circumstances arises which gives reasonable grounds in the sole opinion of the Lender that it is likely to prejudice or endanger the Assets or the ability of the Obligors to fully discharge any of their obligations under this Loan Agreement; or

(m) Death of Borrower;”

16. It is relevant to note here that the borrower and guarantor have been collectively referred to as the ‘**Obligors**’ in the aforesated loan agreement. The consequences of events of default have been put in Clause 18 of the loan agreement, which reads as under :-

“18. CONSEQUENCES OF EVENT OF DEFAULT

18.1 If one or more of the events specified in Clause 17 above occurs (“**Event of Default**”), the Lender by notice in writing to the Obligors, shall be entitled to declare the Loan to be immediately due and payable (whereupon the same shall become due and payable together) and forthwith recall the Loan together with all interests and other monies payable by the Obligors pursuant to this Loan Agreement, and in default of such payment enforce the charge created in terms of this Loan Agreement. Further, the Lender shall be entitled, at all times, to take possession, seize, recover,



appoint a receiver/manager, remove the Assets from its place of standing, and also be entitled, on such terms as may be deemed fit by the Lender, without the intervention of court or authority, to sell the Assets by public auction or by private contract at the best available prices according to the prevailing market condition including as regards repossessed Assets, realize its claims in respect of the Loan, without being bound or being liable for any loss/ losses that the Obligors may suffer due to such action and without prejudice to the Lender's other rights and remedies as stated herein or otherwise in law entitled to.

- 18.2 The Lender may further deal with all or any part of the Assets, to enforce, realize, settle, and compromise with any rights or claims relating thereto. It shall not be bound to exercise any of these powers or be liable for any losses arising therefrom. Without prejudice to the Lender's rights and remedies of legal action or otherwise and notwithstanding any pending proceeding/s, the Obligors undertake to give immediate possession of the Assets to the Lender or to the nominee's of the Lender on demand of the Assets, and transfer and deliver all relative bills, contracts, securities and documents (including all registrations, policies, certificates and documents relating to the said Assets) to the Lender. The Obligors hereby also agree, to accept the Lender's account of sales and realization as sufficient proof of amounts realized and relative expenses incurred, and to pay on demand by the Lender, any deficiency shown in the accounts, provided however, that the Lender shall not be liable or responsible for any loss, damage or depreciation that the Assets may suffer or sustain in the course of seeking repossession and/or while the same is in possession of the Lender or its nominee/s or by reason of exercise or non-exercise of rights and remedies available to the Lender as aforesaid.
- 18.3 In the event of the Lender deciding to take possession of the Assets, the Lender shall give the Borrower and Guarantor, a notice of not less than



7 days, specifically informing the Borrower and the Guarantor of the Lender's intention to repossess the Assets (hereinafter collectively referred to as the **"Repossession Notice"**). Provided however that, where the Lender has specifically informed the Obligors of its decision to take possession of the Assets in any notice issued to the Obligors for any reason whatsoever, such notice shall be deemed to be the Repossession Notice, as defined in this Clause 18.3, and no separate notice shall be necessary in relation to the same.

18.4 Notwithstanding anything contained in Clause 18.3 above, the Assets may be immediately repossessed, and no notice prior to such repossession will be required to be given by the Lender to the Obligors, in the event of the happening or any of the following:

18.4.1 where the first two installments have not been paid;

18.4.2 change of either the Obligor's place of residence without intimation to the lender; or

18.4.3 any situation which in the view of the Lender may constitute an event of fraud or evasion by the Obligors including without limitation (a) change of any registration plates/ special marks and numbers embossed on engine/ chassis in relation to any of the Assets; (b) non availability of the Obligors for any period of time and any suggestion made to the Lender by any neighbor/relatives/ persons associated with the Obligors, other lenders and the likes, that any of the Obligors are absconding; (c) the Obligors avoiding payment to its other lenders; (d) the endorsement of hypothecation recorded with the concerned regional transport office has been deleted, altered / manipulated, without prior written consent/ approval of the Lender; or (e) the Obligors creating third party rights / encumbrance on the Assets, without prior written consent / approval of the Lender.



18.5 At the expiry of the notice period as stipulated in the Repossession Notice, or at any time thereafter, any amounts declared due and payable by the Obligors to the Lender under this Loan Agreement remaining unpaid, the Lender shall have the right to take possession of the asset at anytime through its repossession/recovery service provider, anywhere within the territory of India.

18.6 The Lender may, at anytime prior to the sale/auction of the Asset(s), inform the Obligors its intention to sell/auction such Assets in the event the Obligors do not clear all outstanding dues (**“Post-Repossession Notice”**). Such notice shall, inter alia, contain the following:

18.6.1 The final date on which the Obligors should pay the aggregate amounts due and payable to the Lender.

18.6.2 Provision for release of the Assets upon the repayment of the amounts due.

18.6.3 Provision for the sale/auction in case of nonpayment of the amounts due, by such final date, for the amounts due by the Obligors:

18.6.4 Upon repayment of money due and payable by the Obligors to the satisfaction of the Lender, the Obligors may take possession of the Assets in accordance with the terms of the Post-Repossession Notice.

18.7 In the event that the Obligors fail to complete the repayment as contemplated in Clause 18.6 above, the Lender shall be entitled to sell the Assets either through an auction or through a private contract. In the event the sale of the Assets takes place through an auction, the following process will be followed:

18.7.1 The Lender will assign a base price to the Assets.

18.7.2 The Lender will obtain a minimum of 2



(two) bids for the Assets prior to the sale and the sale shall be made to the highest bidder or otherwise.

- 18.8 Notwithstanding anything contained in Clause 16.7 and without prejudice to any other rights available to the Lender under this Loan Agreement, the Lender shall be entitled, in its sole absolute discretion, subsequent to the completion of the auction process as set out in Clause 16.7, to acquire the Assets for itself by quoting a price higher than the highest price quoted in the auction.
- 18.9 In case the Assets are sold through auction, the cost incurred by the Lender for affecting such a sale shall be borne by the Obligors. In case the net sale proceeds, after deducting all costs, charges and expenses incurred by the Lender are not sufficient to meet in full, the dues payable to the Lender under this Loan Agreement, the Obligors shall make good and pay such deficiency to the Lender.
- 18.10 The Lender may, in the event of death, lunacy or insolvency of any of the Obligors or any of the Obligors having received an order from any adjudicating authority or insolvency notice served upon it/him or an attachment levied on any of it/his property or the Obligors having allowed the Assets to be seized in distress or execution or under any other process of law, also forthwith recall the Loan together with all interest and other monies payable by the Obligors and retake the possession of the Assets.
- 18.11 The Lender shall, in addition to the various rights and remedies of the Lender referred to in the clauses above, be irrevocably entitled and authorized to contract and require the Obligors' employers to make deduction/s from the salary/wages payable by the employer to the Obligors and to remit the same to the Lender until all the dues outstanding from the Obligors to the Lender is/are completely discharged. The deductions shall be of such amounts, and to such



extent, as the Lender may communicate to (and instruct) the Obligors' employers. The obligors shall not have, or raise/create, any objections to such deductions. No law or contract governing the Obligors and/or Obligors' employer prevents or restricts in any manner the aforesaid right of the Lender to require such deduction and payment by the Obligors' employer to the Lender. Provided however that in the event the said amounts so deducted are insufficient to repay the outstanding dues to the Lender in full, the unpaid amounts remaining due to the Lender shall be paid by the Obligors in such manner as the Lender may in its sole discretion decide and the payment shall be made by the Obligors accordingly."

17. On a conjoint and comprehensive reading of Clause 17 and 18 of the loan agreement, it would transpire that the parties had agreed that in the events of default, the Lender Company by notice in writing to the borrower and guarantor collectively would be entitled to declare the loan to be immediately due and payable and forthwith recall the loan together with all interests and other monies payable by the borrower and the guarantor pursuant to the loan agreement, and in default of such payment enforce the charge created in terms of the loan agreement. It would also be evident that the parties had agreed that under such eventuality, the Lender Company shall be entitled to take possession, seize, recover, appoint a receiver/manager, remove the assets from its place of standing without the intervention of court or authority and to sell the assets by public auction or by private contract at the best



available prices. From a reading of Clause 18.3 of the loan agreement, it would be manifest that in case of the Lender Company deciding to take possession of the asset, it was required to give the borrower and guarantor, a notice of not less than 7 days, specifically informing them of Lender Company's intention to repossess the asset.

18. Admittedly, in the present case, the borrower had failed to repay the dues amount within the time stipulated in the loan agreement. Under such circumstance, no default can be found with the action of the Lender Company, if it had taken the possession of the truck in case of default in repayment of loan specially when, the truck in question was repossessed strictly in accordance with terms and condition agreed into between the parties under the loan agreement. Similarly, subsequent action by the Lender Company whereby it had sold the truck to a third party was also one of the consequences of the event of default as noted hereinabove.

19. The element of dishonest intention which is essential element to constitute an offence under Section 406 and 420 of the Indian Penal Code is lacking in the present case. 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. In the present case, even from the admitted facts of the FIR, there is nothing to suggest that the petitioner or any other accused persons in any manner induced the borrower dishonestly or fraudulently or the borrower parted with any property in favour of the accused out of such inducement or deception. There is also nothing to suggest that the accused persons intentionally induced the borrower to do or omit to do anything which he would not do or omit to do, if he was not induced.

20. It is well settled in law that when a person is in possession of a property to which he 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. In the present case, when the Lender Company acquires the right to repossess the property in terms of the arbitral award, there was corresponding loss of right to retain the property by the borrower. In such an event, if the Lender Company repossesses the property, it cannot be said to have deprived the borrower of the property to which the borrower was otherwise legally entitled to.

21. The issue involved in the present case is no more *res integra*. In this regard, the learned Advocate has rightly placed



reliance on the decisions of the Supreme Court in *Sardar Trilok Singh Vs. Satya Deo Tripathi* (Supra), *K. A. Mathai alias Babu Vs. Kora Bibbikutty* (Supra) and *Charanjit Singh Chadha Vs. Sudhir Mehra* (Supra).

22. In *Sardar Trilok Singh Vs. Satya Deo Tripathi* (Supra), the Supreme Court examined a 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 instalment pursuant to which a criminal case has been lodged against the financier under Sections 395, 468, 465, 471, 412 and 120-B read with 34 of the Indian Penal Code. Thereafter, the financier had filed an application under Section 482 of the Cr.P.C. 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 in that case that the proceedings initiated were clearly an abuse of the process of court. It further held that even if the allegations made by the complainant were substantially correct, the dispute involved was purely of civil nature. 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.

23. In *K. A. Mathai alias Babu Vs. Kora Bibbikutty* (Supra), the Supreme Court held that the assertion of rights and obligations, accruing to the parties under the aforesaid hire-purchase agreement wiped out any dishonest pretence in that regard from which it could be inferred that they had done so with a guilty intention.

24. In *Charanjit Singh Chadha Vs. Sudhir Mehra* (Supra), it has been held by the Supreme Court that a hire-purchase 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 dispute has to be resolved on the basis of terms incorporated in the agreement.

25. Apart from the aforesated decisions of the Supreme Court, this Court may like to refer to the judgment of the Supreme Court in *Anup Sharma Vs. Bhola Nath Sharma [(2013) 1 SCC 400]*, wherein the Supreme Court made it clear that in case the vehicle is seized by the financier, no criminal action can be taken



against him as he is repossessing the goods owned by him.

26. From the ratio laid down by the Supreme Court in the aforesaid decisions, it is abundantly clear that if an agreement permits the lender/financer to take possession of the vehicle, if the hirer defaults in making payment of instalments and the lender/financer takes possession of the vehicle in terms of the agreement and sells it to the third party, no criminal action can be taken against it.

27. In the present case, since the borrower defaulted in making payment of instalments, as agreed between the parties and the Lender Company proceeded against the borrower, as per terms and conditions incorporated in the loan agreement and issued various notices upon him as well as upon his guarantor to settle the dispute and regularize his account and the account was not regularized whereafter the Lender Company sent legal notice terminating the loan agreement and the borrower was directed to settle the account and, in default of settling the same, the Lender Company referred the dispute to the sole Arbitrator and despite there being service of notice by the learned Arbitrator, the borrower failed to appear in the arbitration proceedings whereafter the learned Arbitrator granted *ad interim* relief to the Lender Company and ultimately final award was passed in its favour making it



entitled to recover a sum of Rs.12,48,096.56/- with further interests at the rate of 18 per cent from 18.09.2014 till the date of payment and the Lender Company was further made entitled to repossess the truck in question and sell the same for realization of its dues, no criminal case could have been launched by the borrower against the Lender Company or any of its officers for repossessing the truck and selling it to the third party. The dispute, if any, was purely of civil nature.

28. I find no substance in the argument of Mr. Harish Kumar, learned Advocate appearing for the borrower that the arbitral award being not final, the Lender Company could not have transferred the truck to a third party. It is true that an arbitral award can be challenged under Section 34 of the Arbitration and Conciliation Act, 1986. However, one of the important changes in the new Arbitration Act, i.e. Arbitration and Conciliation Act, 1996 as amended in 2015 has been brought on record in the matter relating to the finality of arbitration award under the replaced Section 36 of the New Arbitration Act which is now stated that “where an application to set aside the arbitral award has been filed in the Court under section 34, the filing of such an application shall not by itself render that award unenforceable, unless the Court grants an order of stay of the operation of the said arbitral award in



accordance with the provisions of sub-section (3), on a separate application made for that purpose.” The aforesaid provision makes it clear that unless a stay is specifically granted, mere filing of an application for setting aside an award shall not by itself render that the award unenforceable. It is not even the case of the borrower in the present case that he has filed any application under Section 34 for setting aside the award passed by the learned Arbitrator against him. Hence, the award was very much unenforceable in law likely a decree of a court.

29. In my considered opinion, even if the entire allegations contained in the FIR are taken to be true on their face value, the ingredients of the offences under Section 420 or Section 406 of the Indian Penal Code are not attracted.

30. Apparently, the borrower has launched the criminal prosecution with *mala fide* intent for wreaking vengeance against the accused persons.

31. By now, it is well-settled in law that where a criminal prosecution is manifestly attended with *mala fide* or where the prosecution is maliciously instituted with an ulterior motive for wreaking vengeance on the accused person and with a view to spite them due to private personal grudge then the criminal proceeding has to be quashed.



32. Accordingly, the impugned FIR being Kotwali P. S. Case No. 351 of 2016 and the ongoing investigation of the police case are hereby quashed.

33. The writ petition stands allowed.

(Ashwani Kumar Singh, J.)

Kanchan/-

AFR/NAFR	NAFR
CAV DATE	NA
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