HIGH COURT OF CHHATTISGARH, BILASPUR

FA No. 23 of 2003

Anil Kumar Saraf, son of Shri Kunj Bihari Saraf, aged about 32 years, r/o Bamnidih, Tah. Champa, Distt. Janjgir Champa
(Defendant No.3) Appellant

Versus

(1) Hemdatt Kesharwani son of Shri Shobha Ram, aged about 33 years, resident of Chandupara, Tahsil Champa Distt. Janjgir *(Plaintiff)*

(2) Shivam Motor Dealer, Mohalla Sirgitti, through Manager, Mohalla Sirgitti, Distt. Bilaspur *(Defendant No.1)*

(3) Tata Engineering & Locomotive Co., Bombay, through Manager, Tata Locomotive Co., Mumbai. *(Defendant No.2)*

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For the Appellant	:	Mr. Manoj Paranjpe & Mr. Vikram Dixit, Advocates
For Respondent No.1	:	Mr. Malay Shrivastava, Advocate
For Respondent No.2	:	Mr. Saleem Kazi, Advocate
For respondent No.3	:	Mr. Rajeev Bharat, Advocate

Hon'ble Shri Justice Goutam Bhaduri

Order on Board

06.10.2018

1. The instant appeal is against the judgment and decree dated 24.11.2002 passed by the second Additional District Judge, Bilaspur, in civil Suit No. 18-B/2002 whereby decree of Rs.2,29,441/- with interest @ 6% per annum from 13.03.1997 has been awarded in favour of the plaintiff/ respondent no.1 herein.
2. The instant appeal is by one of the defendant Anil Saraf who was defendant No.3, appellant herein. Initially a suit was filed by Hemdutt Kesharwani the plaintiff (R-1) with the

plaint averments that the plaintiff/respondent no.1 entered into an agreement to purchase a Mini Bus bearing M.P.26-C/5380 from appellant.

3. According to the plaintiff, the said vehicle was initially purchased by appellant Anil Saraf (D-3), on hire purchase from defendants 1 & 2 i.e., Shivam Motors and Tata Engineering, respondents 2 & 3 herein. The vehicle was obtained under a loan which was to be repaid in 23 Equated Monthly Installments (EMI). Out of the instalments, the first instalment was fixed at Rs.13,481/- and the rest of instalments were fixed @ Rs.11,300/- each. The agreement of sale was executed on 06.09.1993 between the plaintiff Hemdutt and the seller Anil Saraf (D-3). The plaintiff (R-1) averred that It was told by appellant (D-3) that the instalments which were due prior to 06.09.1993 were completely paid and from 07.09.1993 the rest of the instalments @ Rs.11,300/- are to be paid by the plaintiff and Rs.1,50,000/- was the sale consideration for purchase of Mini Bus. Apart from the installment of Rs.11,300/-, Value Added Tax (VAT) was to be paid directly to the financier.

4. The plaintiff further averred that appellant Anil Saraf who was seller agreed to transfer all the documents in favour of the plaintiff and consequently as per agreement of purchase, Rs.1,00,000/- was paid and subsequent payment of Rs.50,000/- was to be paid within a period of 45 days. Thereafter, according to the agreement, on 21.10.1993 the plaintiff has paid Rs.50,000/- to appellant (D-3) and receipt thereof was obtained. The plaintiff had further pleaded that apart from Rs. 1,50,000/- he had paid two instalments of

Rs.11,300/- each on different dates and Rs.49,000/- by way of bankers cheque on 21.10.1993. It was further pleaded by the plaintiff that while the vehicle was driven it met with an accident and the insurance claim of Rs.27,541/- was received by the appellant from Insurance Company and the said amount was to be adjusted towards the payment of instalments and in addition, Rs.20,000/- was paid on 05.03.1994 by the plaintiff to the financier when the vehicle was taken into possession as the instalment was not paid. It was stated that the amount of Rs.5000/- towards repossession charges were also paid on 07.03.1994. Thereafter again Rs.11,300/- was deposited towards instalment on 29.04.1994. As such, Rs.1,30,441/- was paid by the plaintiff to the defendant No.1 financier. The plaintiff further pleaded that caution money of Rs.15,000/- was deposited through Anil Sharaf and repossession charge of Rs.5000/- was also paid, thus a total amount of Rs 1,50,441/- (i.e., 1,30,441 Plus Rs.20,000) was deposited with financier (Defendant No.1) Shivam Motors on behalf of appellant (D-3). The plaintiff also pleaded that apart from the amount of Rs.1,50,441/-, Rs.1,50,000/- was paid as sale consideration to seller Anil Saraf from whom he has purchased the vehicle thereby a total amount of Rs.3,00,441/- (Rs.1,50,441 + 1,50,000) was paid by the plaintiff for purchase of Mini Bus.

5. It was further pleaded that the instalments were to be paid from 03.12.1992 till 03.10.1994 whereas the plaintiff had deposited the amounts to the financier in the name of Anil Saraf by 29.04.1994 that is well before the final due date of the instatment i.e., 03.10.1994. Further the plaintiff stated

that despite the payment made, on 01.08.1994 the vehicle was forcibly taken into possession by financier Shivam Motors and Tata Engineering and demand of Rs.1,18,000/- was raised as an outstanding amount. It was stated that taking advantage of the said seizure, the seller appellant herein paid that amount directly to the financier and took away the delivery of the vehicle and thereafter sold the vehicle to 3rd party which further changed the hand of different purchaser. As such, he has suffered loss of Rs.6000/- per month from 01.08.1994 till date which comes to Rs.1,86,000/- for 31 months apart from Rs. 1,48,996/- towards instalments paid by him on behalf of appellant and Rs.1,50,000/- paid to the appellant as sale consideration. Thus on different heads, he claimed a total sum of Rs.4,84,996/- (Rs.1,86,000 + 1,48,996 + Rs.1,50,000).

6. The defendants 1 & 2 in their written statement contended that they were not aware of the fact of any transaction between the purchaser of vehicle Anil Sharaf and the plaintiff Hemdat Kesharwani. It was stated that the said vehicle was purchased by Anil Sharaf on hire purchase on a loan financed by the Tata Engineering Company. Since the purchaser Anil Sharaff committed default in payment of loan instalments, according to the terms of the hire purchase agreement, the vehicle was taken into possession and was released after the entire dues were paid eventually in the month of October, 1994. It was further stated that they are not the necessary parties as such the damages was also claimed for.

7. Defendant no.3 Anil Sharaf (appellant) stated that as per the agreement dated 06.09.1993, the Mini Bus was sold to the

plaintiff (Respondent No.3) with an understanding that Rs.1 lakh would be paid and remaining amount of Rs.50,000/- would be paid within 45 days from 07.09.1993 and subsequently the amount of remaining installments @ Rs.11,300/- each would be paid from 07.09.1993 and the documents of the vehicle were handed over to the plaintiff. It was stated that the plaintiff Hemdutt failed to deposit the installments in the account of financier as per the agreement and as such the vehicle was seized on two occasions. It was stated that lastly when the seizure was made and outstanding dues were claimed by financier, an amount of Rs.,1,18,000/- was paid by him after the notice was served by the financier to pay the same which he paid and got the vehicle released. It was further stated that because of the default committed by the plaintiff Hemdutt, the appellant has suffered the loss and in order to save his dignity and image in the market, he got the vehicle released. It is further stated that the plaintiff had used the vehicle for the period from 06.09.1993 to 01.08.1994, therefore, he is not entitled to get any damages as was claimed for. This defendant/ appellant further claimed damages of Rs.50,000/- by way of counter claim.

8. The plaintiff on his behalf examined two witnesses namely Goutam Chawariya (P.W.1) and Hemdat, the plaintiff himself as P.W.2 whereas defendants 1 & 2 had examined one witness Keshav Prasad Tiwari. The appellant defendant Anil Kumar Sharaf examined himself.

9. The trial Court had framed 7 issues. In respect of issue no.6 as to whether the plaintiff was entitled to damages of

Rs.4,85,996/-, the Court held that he is entitled to Rs.2,29,441/- and the counter claim of defendant No.3 was dismissed. The liability to pay the decretal amount was fastened over defendant No.3/appellant along-with interest @ 6% per annum from 13.03.1997 till the date of suit. The said decree of Rs.2,29,441/- is subject of appeal before this Court.

10. In respect of dismissal of the counter claim the court fee has not been paid. The court fee has been paid on Rs.2,29,441/- which comes to Rs.27,333/-. Therefore, the only adjudication in this appeal is confined to the decree passed for Rs.2,29,441/-.

11. Learned counsel for the appellant would submit that the entire plaint was based on the pleading of damages and since the plaintiff himself has committed default in payment of installments, he cannot claim the damages for his own fault. It is contended that if the plaintiff would not have defaulted, this occasion would not have arisen at all. It was stated that consequently, the entire claim so made was frivolous as the plaintiff cannot be allowed to reap the harvest for his own fault.

12. Per contra, Mr. Malay Shrivastava, learned counsel appearing for the plaintiff/respondent No.1 supports the decree. It is stated that no decree for damages has been passed instead the amount which was paid by the plaintiff to defendant No.3 as also the amount paid to the financier on behalf of defendant no.3 have been directed to be returned for the reason that the appellant/defendant no.3 after possession of the vehicle has sold the same for Rs.1,70,000/-. It is,

therefore, stated that the amount which has been paid by the plaintiff Hemdutt Kesharwani along-with amount of insurance claim, which was realized by Anil Sharaf was directed to be returned, as such, the impugned judgment/decree is well merited which do not call for any interference.

13. Mr. Salem Kazi & Mr. Rajeev Bharat learned counsel appearing for respondents 2 & 3 respectively would submit that no decree was passed against these defendants and the finding which is arrived at between the parties are also not disputed. They submit that there is no perversity in the judgment and decree of the trial Court warranting interference by this appellate court.

14. Heard learned counsel for the parties at length and also perused the records and documents.

15. Ex.P-1 is the agreement of purchase entered into between Anil Sharaf (D-3) and Hemdutt Kesharwani, the plaintiff. As per the terms of sale, the Tata vehicle bearing Regn. No. M.P.26/C-5380 was sold and possession was also handed over. As per the agreement, Rs.1 lakh was paid in cash whereas the rest of Rs.50,000/- was to be paid within a period of 45 days. It was further agreed that remaining instalments @ Rs.11,300/- each would be paid by purchaser Hemdutt Kesharwani from 07.09.1993 till the last dues are liquidated. Therefore, this would reveal that when the vehicle was purchased by plaintiff Hemdutt, the loan was outstanding on it and this fact was known to the plaintiff who agreed to pay the instalments to the financier on behalf of Anil Saraf, the original loanee.

16. After payment of Rs.1 lakh in terms of agreement dated 06.09.1993, two instalments of Rs.11,300/- each were paid by the plaintiff vide Ex.P-4 & Ex.5. Ex.P.4 is dated 07.09.1993 and Ex.P.5 is dated 07.10.1993. Ex.P-3-C is the receipt given by the appellant which shows that after receiving the remaining amount of Rs.50,000/- the original documents have been handed over by seller Anil Kumar Saraf to the plaintiff. The plaintiff claimed that bankers cheque of Rs.49,000/- was given. A perusal of Ex.P-8-C shows that the bankers cheque of Rs.49,000/- was prepared in favour of Anil Sharaf on 20.01.1993 but there is no evidence to show that the said bankers cheque was deposited in the account of the financier defendant No.1 to repay the debt. The statement of D.W.1 Keshav Prasad Tiwari on behalf of the financier also remains unrebutted that the said bankers cheque was not credited to the account of Anil Saraf. This finding is not under challenge by the defendant No.3 also, therefore, the finding that amount of Rs.50,000/- i.e., Rs.49,000/- as has been stated by Anil Kumar Saraf, that he received bankers cheque of Rs.49,000/- and cash of Rs.1000/- from Hemdutt is supported by the corroborative evidence of each other.

17. Further as per the receipt Ex.P-7-C, Rs.20,000/- was paid to the financier Tata Engineering on 05.03.1994 by Hemdutt. Further on 29.04.1994 another instalment of Rs.11,300/- was deposited with the financier Tata Engineering by the plaintiff. The evidence shows that defendants 1 & 2 have stated that out of the amount deposited of Rs.20,000/- by Hemdutt the subsequent purchaser of vehicle, Rs.18,000 was set off

against the outstanding dues whereas Rs.2000/- was charged as over due interest. Therefore, the finding of the court below that the over due interest of Rs.2000/- the plaintiff is not entitled to recover cannot be faulted as the purchaser Hemdutt who promised to repay the loan after purchase committed default in payment of installments.

18. The payment of amounts made by plaintiff Hemdutt to the financier is proved by Ex.P-4 dated 07.09.1993 for Rs.11,300, Ex.P.5 dated 07.10.1993 for Rs.11,300/-, Ex.P.7 dated 05.03.1994 for Rs.18,000/- and vide Ex.P-6 dated 29.10.1994 for Rs.11,300/-. Thereby, the amount of Rs.51,900 (i.e., 11300 + 11300 + 11300 + 18000) was paid by the plaintiff to the financier apart from the sale consideration of Rs.1,50,000/- paid to original loanee Anil Saraf from whom the vehicle was purchased. Though the re-possession charges of Rs.5000/- was paid by the plaintiff vide Ex.P-10-C dated 07.03.1994, but the same cannot be considered as the amount paid as it was paid for the default of plaintiff himself since he failed to pay the instalments as per the terms of the sale agreement after he was in possession of the vehicle.

19. As per the plaintiff, further the vehicle met with an accident for which claim of Rs.27,541/- was passed. Witness Keshav Prasad Tiwari (D.W.1) on the basis of Ex.D-1 the account sheet of the Company has deposed that the amount of Rs.27,541/- was not deposited in the account of Anil Sharaf. It was stated that Cheque was issued in the name of Anil Sharaf with the NOC of the Company. The said statement is corroborated by the statement of account book (Ex.D-1). The said statement of account is stated to be maintained by

the Company in its usual course of business transactions. As such, the said finding by the court below is also supported by the evidence.

20. With respect to caution money of Rs.15,000/- initially deposited by Anil Saraf which was stated by the plaintiff that it was lying with defendant No.1 & 2, no evidence is on record to show that the said caution money of like nature was held by defendants 1 & 2 and as such the finding of fact by the Court below that the caution money was not deposited cannot be faulted. The evidence would further show that default was committed by plaintiff Hemdutt, the subsequent purchaser, in payment of loan instalments to the defendants 1 & 2, for which, a notice was served by the financier by Ex.D-3-1. The notice was served and the acknowledgement was proved as Ex.D-3-3. The plaintiff has also filed reply to such notice and as per the original loanee Anil Kumar Sharaf, the appellant, since the purchaser Hemdutt Kesharwani could not repay the loan amount, as such, Rs.1,09,195/- was deposited by Anil Sharaf on different dates i.e., 12.09.1994 & 13.09.1994 to get the vehicle released from defendants 1 & 2. The said payment is further corroborated by Ex.D-3-7. Ex. D.3-6 pertains to payment of re-possession charges on 12.09.1994 whereas Ex.D-7 is of receipt of cheque for Rs.1,09,195/-, therefore, it would reveal that Anil Sharaf the original loanee has got the vehicle again into his possession from Shivam Motors and Tata Engineering by payment of dues.

21. As per averments of defendant No.3/appellant, he thereafter sold the vehicle for a consideration of Rs.1,70,000/- and

admitted such fact and again realized the sale consideration of the vehicle. The facts would reveal that though the plaintiff has claimed total amount of Rs.4,84,996/- but the Court below has granted Rs.2,29,441/-. Defendant no.3 had made a counter claim, however, the said claim was dismissed and the same was not subject of challenge in appeal before this Court.

22. Therefore, if all the evidence is considered together it would show that the plaintiff has paid an amount of Rs.1,50,000/- to defendant No.3 and further paid the instalment to the loanee defendants 2 & 3 in discharge of liability of Rs.51,900/- after deducting the over-due interest. Thus the payment made by the plaintiff was of Rs.2,01,900/-. Subsequently the amount of claim on insurance of Rs.27,541/- was received by defendant No.3 as it was stated that the amount was directly paid to him. Therefore, by addition of Rs.27,541/- an amount of Rs.2,29,441/- (i.e., Rs.1,50,000 + 51,900 + 27,541) was realized by the erstwhile seller before the Vehicle was repossessed from financier and resold the same again.

23. Thus the finding of the court below therefore granting a decree of Rs.2,29,441/- cannot be faulted for the reason that defendant no.3 had subsequently again sold the vehicle and realized the sale consideration. Thus the amount which was paid to him and further instalments paid on his behalf for discharge of loan of the vehicle has to be made good to the plaintiff. The court below has not awarded any damages to the plaintiff and the plaintiff has not preferred any appeal and against dismissal of counter claim, the appellant has also not preferred the appeal. Therefore, the finding of fact

arrived at by the Court below cannot be faulted.

24. In the result, I do not find any merit in the appeal warranting interference by this Court. The appeal is dismissed. No order as to cost.

Sd/-

GOUTAM BHADURI
JUDGE

Rao