

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CRM-M-37409-2014 (O&M)

Date of decision: 17.08.2018

Balwinder Kumar

... Petitioner

Vs.

M/s R.N. Highways (P) Ltd.

... Respondent

CORAM: HON'BLE MR. JUSTICE ARVIND SINGH SANGWAN

Present: Mr. A.D.S. Sukhija, Advocate
for the petitioner.

Mr. Raghav Gulati, Advocate for
Mr. Bhupinder Ghai, Advocate
for the respondent.

ARVIND SINGH SANGWAN, J. (ORAL)

Prayer in this petition is for quashing of criminal complaint No.11154 of 05.06.2008 titled as R.N. Highways (P) Ltd. Vs. Balwinder Singh and others (Annexure P-1) and the summoning order dated 24.08.2009 (Annexure P-2), vide which the petitioner has been summoned to face the trial under Section 406 of the Indian Penal Code (for short 'IPC').

Brief facts of the case are that the respondent-complainant (hereinafter referred as 'complainant') filed the aforesaid complaint in the year 2008 against petitioner Balwinder Kumar, Recovery Manager of HDFC Bank (for short 'Bank') along with J.P. Singh, Regional Manager, Rajesh Bhatia, Manager Legal Cell and one Tarun Likha, Manager of the Bank, Branch Sector-8, Chandigarh under Sections 390, 392, 403, 406, 420, 424,

426, 427 IPC with the allegations that the complainant is Director of R.N. Highways Pvt. Ltd. and is authorized to file the complaint by virtue of resolution dated 16.05.2008. The complainant-company had purchased a machine Tata Hitachi Ex-110 by availing the loan/finance from the Bank. Later on, due to financial problem of the complainant-company, installments of the loan amount could not be paid and on 30.01.2008, the petitioner along with other accused named in the complaint, who were employees of the Bank, had taken possession of the aforesaid machine in a reckless manner and the same was kept in the stock yard under their supervision. Thereafter, the complainant lodged the complaint with the police where conciliation efforts were made. The accused persons produced a letter dated 20.08.2006 given by Kamal Kant Puri, authorized representative of complainant, requesting the Bank to take possession of the machine. It is further stated that said Kamal Kant Puri had misappropriated the company's asset. Later on, a Memorandum of Settlement was effected between the Bank and the complainant and as per the settlement (Annexure P-3), the complainant paid an amount of Rs.13,75,000/- to the Bank on 14.03.2008 as full and final payment towards the loan amount and the Bank issued receipts dated 17.03.2008. The Bank further issued a release memo in respect of the machine, addressed to M/s Sanjeev Goel, Stock Yard, Panchkula on 20.03.2008. It is further stated on 21.03.2008, the complainant was allowed to inspect the machine along with an Engineer and found that some vital parts of the machine are missing and there are dents and damage due to careless mishandling. A list of damages and deficiencies was prepared and given to the petitioner, however, there was no response. Later on, the complainant

approached Mr. J.P. Singh, Regional Manager of the Bank and gave a complaint dated 03.04.2008 and the complainant was assured that needful will be down within 72 hours. Thereafter, the complainant-company issued a notice dated 20.04.2008 but there was no response from the accused persons. It is further stated in the complaint that since the complainant is suffering loss of earning of Rs.7,000/- per day, which amounted to Rs.7.00 lacs, w.e.f. 30.01.2008 onwards, thus, it was prayed that the accused be summoned and punished according to law.

After the complainant led its preliminary evidence, in which the complainant appeared as CW1 and proved on record the settlement as Ex.C2, the trial Court vide impugned order dated 24.08.2009 (Annexure P-2) summoned the petitioner under Section 406 IPC only, however, no summoning order was passed against accused No.2 to 5, other office bearers of the Bank. The trial Court relied upon Clauses 1 & 3 of the settlement Ex.C2, where it was specifically mentioned that the Bank shall keep the machine in its trust and good condition and shall return the same to the complainant in the same good condition, in which it is being taken into trust.

This petition was filed in the year 2014 and vide order dated 03.11.2014, further proceedings before the trial Court were stayed.

Learned counsel for the petitioner has submitted that at the time, when the loan was obtained by the complainant, the petitioner was not a signatory and he is only a signatory to the settlement Ex.C2 and in response to the said settlement, the Bank has offered to hand over possession of the machine to the complainant and it is the vicarious liability of the Bank, who has entered into the settlement with the complainant. It is further submitted

that the complainant had inspected the machine and thereafter, he had entered into the settlement and the Bank consistently requested the complainant to take possession of the machine, but he denied. Counsel for the petitioner has further submitted that even the complainant has filed a suit for mandatory injunction praying for a decree to direct the Bank/its officials to hand over the possession of the machine in perfect working condition and vide judgment dated 20.01.2016, the Civil Court dismissed the suit by making the following observations: -

“The plaintiff has also relied upon the evidence of PW-2 Amrinder Singh. Though, he had tendered in evidence his affidavit when the plaintiff had a chance to lead evidence, but did not again step into the witness box for the purpose of cross-examination and the evidence of the plaintiff was closed by the orders of the Court. However, he again stepped into the witness box during rebuttal evidence, which was objected to by the counsel for the defendants before the cross-examination. Since in the rebuttal evidence the plaintiff can only be allowed to lead evidence on the issues the onus of which was upon the defendants, and therefore, his affidavit during rebuttal evidence cannot be read in evidence particularly when he failed to appear for cross-examination when the plaintiff had a chance to lead evidence in affirmative. Even otherwise, his cross-examination is very vital wherein he had stated that he does not have any proof regarding his presence on the spot or in the police station as mentioned by him in the affidavit. He had not

signed any of the documents relied upon by the plaintiff alleged to have been executed on 30.1.2008 when the machine was confiscated by the defendant bank. He has never been named in the plaint to have been present on the said date and his evidence appears to be only an afterthought just to fill up the lacuna in the present case. Moreover, he has specifically deposed in the cross-examination that he does not have any proof to show that there is any difference in the condition of the machine when it was picked up and when the release order of the same was issued by the bank on 20.3.2008. He has further deposed that he cannot tell if there is any mechanical or technical defect in any machine or vehicle. Therefore, the fact remains that the oral evidence relied upon by the plaintiff is not trustworthy and the Director of the plaintiff company namely Mohinder Singh through whom the present suit has been filed, has not stepped into the witness box and an adverse inference in this regard is to be raised against the plaintiff.

Much reliance has been placed by learned counsel for the plaintiff on the documents Ex.PE and Ex.PF. At the very outset, it is pertinent to observe here that firstly the original of these documents have never seen the light of the day and it is a settled law that a photocopy of the document is not admissible in evidence. Learned counsel for the plaintiff has stated that the execution of Ex.PF has not been denied by the defendants. Even in such a scenario the contents of the said documents are

inadmissible in evidence only being a photocopy thereof as it is only the execution which has been admitted, but the contents thereof have nowhere been admitted by the defendants. Moreover, a perusal of the said document nowhere suggests that the machine was in working condition at the time when the same was confiscated by the defendant bank on 30.1.2008. The same only refers to the fact that the machine was in a good condition. However, the same is a relative term and it nowhere raises a presumption that the machine was in a working condition on the said day. Moreover, the plaintiff has also failed to prove that the machine was not in working condition on the day the release memo was issued to him by the defendant bank. As far as the document Ex.PE is concerned, the same is also a photocopy of document and even otherwise the same has been nowhere purported to have been signed by any of the official of the defendant bank. Therefore, in these circumstances, I am of the considered opinion that the plaintiff has miserably failed to prove the allegations leveled by it in the plaint, and as such, both these issues are decided against the plaintiff and in favour of the defendants.

ISSUE NO.3.

The plaintiff has filed the present suit for mandatory injunction and recovery of losses suffered by it. Although, the plaintiff has failed to prove its case on merit, but the same is maintainable under the provisions of Specific Relief Act, 1963

and Section 9 of Code of Civil Procedure, 1908. This issue is, therefore, decided in favour of the plaintiff and against the defendants.

ISSUE NO.4.

The plaintiff has filed the present suit for mandatory injunction and recovery of losses suffered by it. Though, in the head note of the plaint and the relief clause, the plaintiff has not stated the amount which is sought to be recovered in view of the losses suffered by him as alleged in the plaint, but in Para no. 23(ii) of the plaint, he has quantified the alleged losses to the tune of Rs. 43,37,500/-. The plaint is to be read in its entirety and merely because no amount has been written in the head note and the relief clause of the plaint and particularly when the alleged losses have been quantified by him in Para no. 23(ii) of the plaint, is no ground not to file the ad-valorem court fee. Therefore, the suit is to be valued on the relief of recovery of Rs. 43,37,500/- for the purposes of court fee and jurisdiction. However, the plaintiff has only affixed the court fee of Rs.35/-, and is liable to pay the ad-valorem court fee on the amount of recovery, but has failed to pay the same. Therefore, this issue is decided against the plaintiff and in favour of the defendants.

RELIEF.

Thus, in view of my findings made on the issues supra, the suit of the plaintiff fails and the same stands dismissed with no order as to costs.”

Learned counsel for the petitioner has argued that process of advancement of loan, its repayment and taking the possession of the machine was done by the Bank, which is not arrayed as an accused and only role assigned to the petitioner was that he was a signatory to the Memorandum of Settlement. It is further argued that the trial Court has summoned the petitioner only under Section 406 IPC and no other official of the Bank was summoned in this regard. Learned counsel has further argued that from the bare perusal of the complaint and the statement of the complainant, no offence under Section 406 IPC is made out against the petitioner.

Learned counsel for the petitioner has relied upon **Anup Sarmah Vs. Bhola Nath Sharma and others, 2013 (1) RCR (CrI.) 62**, in which the Hon'ble Supreme Court has held as under: -

“In view of the above, the law can be summarised that in an agreement of hire purchase, the purchaser remains merely a trustee/bailee on behalf of the financier/financial institution and ownership remains with the latter. Thus, in case the vehicle is seized by the financier, no criminal action can be taken against him as he is re-possessing the goods owned by him.

If the case is examined in the light of the aforesaid settled legal proposition, we do not see any cogent reason to interfere with the impugned judgment and order. The petition lacks merit and, accordingly, dismissed.”

Learned counsel for the petitioner has further relied upon a judgment of the Hon'ble Supreme Court in **Sharad Kumar Sanghi Vs. Sangita Rane, 2015 (2) RCR (CrI.) 120**, to submit that where the allegations

are pertaining to the Managing Director or any officer of the Company and the complaint is filed only against the officials, by not impleading the company, in the absence of any specific allegation against the officials, complaint is liable to be quashed.

Learned counsel has also relied upon **S.K. Alagh Vs. State of U.P. and others, 2008 (2) RCR (CrI.) 79**, where the allegations against the company were made under Section 406 IPC and the complaint was filed against the Managing Director of the Company and the Company was not arrayed as an accused, the proceedings were quashed.

Learned counsel for the petitioner has also relied upon **M/s GHCL Employees Stock Option Trust Vs. M/s India Infoline Limited, 2013 (2) RCR (CrI.) 519**, wherein the Hon'ble Supreme Court has held that breach of trust or cheating are both civil wrong as well as criminal offence and under certain situations, where the act alleged would predominantly be a civil wrong, such an act does not constitute a criminal offence.

Learned counsel for the petitioner has lastly argued that in view of the judgment of the Hon'ble Supreme Court in **Dhariwal Tobacco Products Ltd. and others Vs. State of Maharashtra and another, 2009 (1) RCR (CrI.) 677**, the petitioner though has a remedy of filing revision petition against the summoning order under Section 397 Cr.P.C. yet can also file a petition under Section 482 Cr.P.C. as alternative remedy and the petition filed under Section 482 Cr.P.C. cannot be dismissed only on the ground that remedy of revision was available to the accused persons.

In reply, learned counsel for the respondent has argued that from the bare perusal of the complaint, offence under Section 406 IPC is made out

against the petitioner, as he being the representative of the Bank, had entered into the settlement and promised to keep the machine in its trust and good condition. The petitioner had further undertaken that the machine shall be returned in the same good condition, in which it has been taken in trust. It is further submitted that in pursuance to the Memorandum of Settlement, the complainant has performed his part of the settlement and has paid the entire loan amount and when he had gone to inspect the machine on 21.03.2008, he found that vital parts of the machine were missing and some parts are replaced with junk and there is damage to the machine. It is also submitted that despite issuance of a notice and assurance given by the Bank, the machine was not restored to its original condition and therefore, prima facie offence under Section 406 IPC is made out and the trial Court has rightly summoned the petitioner, as he was the official incharge of the Bank, on whose representation, the complainant deposited the entire loan amount, trusting that the machine will be restored to its original condition.

Learned counsel has further submitted that till date, despite a period of more than 10 years has been passed, the machine is still lying with the Bank and the complainant has already filed an appeal challenging the aforesaid Civil Court judgment dated 20.01.2016, vide which the civil suit for mandatory injunction filed by the complainant, was dismissed.

After hearing learned counsel for the parties, I find merit in the present petition, for the following reasons: -

- (a) Admittedly, the petitioner is an employee of the Bank and the Bank is not arrayed as an accused in the complaint. As per own case of the complainant, it had obtained the loan from the Bank

and after having failed to repay the same, possession of the machine was taken by the Bank. It is only subsequent thereto, when the talks for some settlement were there between the parties and the Memorandum of Settlement was arrived at between them, the petitioner, being an official of the Bank, had signed the same on behalf of the Bank and therefore, the vicarious liability, if any, is of the Bank, who is not arrayed accused in the complaint.

- (b) There is no allegation in the complaint that the petitioner is incharge of the yard, where the machine is lying and even there is no allegation that the petitioner had removed vital parts of the machine. In the absence of any such allegation in the complaint, or in the statement of the complainant, the petitioner alone cannot be held guilty to have committed the offence under Section 406 IPC remotely, especially when the Bank is not arrayed as an accused. Therefore, in view of judgment of the Hon'ble Supreme Court in **Sharad Kumar Sanghi's** case (supra) and **S.K. Alagh's** case (supra), the prosecution of the petitioner is not maintainable.
- (c) Even otherwise, from the bare perusal of the complaint, offence of criminal breach of trust is not made out. It has been held by the Hon'ble Supreme Court in **Ashok Basak Vs. State of Maharashtra and others, 2014 (4) RCR (Crl.) 789** that in order to prove the offence of criminal breach of trust, the complainant should satisfy that the accused was entrusted with the property or entrusted with dominion over the property; secondly that such

person has dishonestly misappropriated or converted to his own use of that property or dishonestly used or disposed of the property or willfully suffered any person to do so; and thirdly, such misappropriation, conversion, use or disposal was in violation of any direction of the law prescribing the mode, in which such trust is to be discharged or of any legal contract, which the person has made touching the discharge of the trust. Therefore, it is apparent that there are no allegation against the petitioner that he was entrusted with the machine, which was taken into possession by the Bank and it is also not the case of the complainant that the petitioner was entrusted with dominion over the property. The complaint also does not reveal the second and third condition as the machine is lying in the yard of the Bank and therefore, the petitioner has not dishonestly misappropriated any property of the complainant, as he was discharging his job as an official of the Bank and only allegation against him is that he was signatory to the Memorandum of Settlement.

- (d) In view of the judgment of the Hon'ble Supreme Court in **V.Y. Jose and another Vs. State of Gujarat and another, 2009 (1) RCR (Cr1.) 869**, the primary dispute between the complainant and the petitioner is with regard to return of the machine, in the condition, in which its possession was taken and qua this, the complainant had already filed a civil suit for mandatory injunction, which stands dismissed at first instance and therefore,

primarily, the dispute is of civil nature, as the complainant can claim the relief of mandatory injunction as well as can seek compensation from the Bank, in accordance with law.

- (e) Though the petitioner has levelled allegations against four officials, however, the trial Court has summoned only the petitioner to face the trial and the complainant has not challenged the summoning order qua other officials, against whom, there are similar allegations, as against the petitioner. Even otherwise, though the complainant has filed the complaint under various Sections of the Indian Penal Code, the trial Court has summoned the petitioner only under Section 406 IPC and from a bare perusal of the complaint, the ingredients of Section 406 IPC are not made out, as the Bank had repossessed the vehicle in accordance with law.
- (f) The arguments raised by counsel for the respondent that the petitioner has alternative remedy of filing the revision petition before the Court of Sessions, at this stage, when the present petition is pending for the last 04 years and the proceedings were stayed, cannot be entertained, as even otherwise, in view of the judgment of the Hon'ble Supreme Court in **Dhariwal Tobacco Products Ltd.**'s case (supra), present petition cannot be dismissed only on this account.
- (g) In view of the judgment of the Hon'ble Supreme Court in **M/s GHCL Employees Stock Option Trust**'s case (supra), it is apparent that dispute between the complainant and Bank is

predominant qua civil wrong and therefore, the act on behalf of the petitioner being an official of the Bank, does not constitute a criminal offence.

For the reasons stated above, present petition is allowed. The criminal complaint No.11154 of 05.06.2008 titled as R.N. Highways (P) Ltd. Vs. Balwinder Singh and others (Annexure P-1) and the summoning order dated 24.08.2009 (Annexure P-2) are hereby quashed.

17.08.2018
vishnu

[ARVIND SINGH SANGWAN]
JUDGE

Whether speaking/reasoned : Yes/No

Whether Reportable : Yes/No