

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION
APPELLATE SIDE**

Present:

The Hon'ble Justice Ajoy Kumar Mukherjee

C.R.R. 3269 of 2018

With

CRAN 1697 of 2019

CRAN 3601 of 2019

Tata Motors Finance Limited

-vs-

Smt. Sarmistha Sarkar Saha & Anr.

For the Petitioner	: Mr. Sabir Ahmed Mr. Subhankar Chakraborty Mr. Mujibar Ali Naskar Mr. Saptarshi Bhattacharjee Ms. Ruchira Manna
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Heard on	: 26.7.2022
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Judgment on	: 02.08.2022
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Ajoy Kumar Mukherjee, J.

1. Present application has been preferred for quashing of the proceeding being Complaint Case No.260 of 2018 under Sections 420/447/448/500/506/34 of the Indian Penal Code pending in the Court of learned Judicial Magistrate, Krishnagar, Nadia.

2. The petitioner contended that the petitioner is a finance company and the opposite party no.1/complainant took a loan of Rs.6,23,000/- for purchase of a vehicle. It was agreed that the opposite party no.1 shall repay the said loan by monthly installments and accordingly, a loan-cum-hypothecation-cum-guarantee agreement was executed in between the parties on September 26, 2014 and as per the said agreement, the opposite party no.1 was under

obligation to repay the loan amount by 60 monthly installments at a sum of Rs.16,059/-.

3. The opposite party no.1 had defaulted in making payment to the monthly installment and a sum of Rs.2,08,409/- became overdue amount and accordingly, due to non-payment of the monthly installment, the said loan cum hypothecation-cum-guarantee agreement was terminated pursuant to the clause as enumerated in the said agreement.

4. After such termination of agreement, due to default on the part of the opposite party no.1 in making payment, the monthly installment amount in regard to the terms and conditions, the petitioner/complainant through its authorized agents had repossessed the said vehicle on May 2, 2008.

5. It is further contended by the petitioner that the petitioner before taking over the possession of the said vehicle for violation of the terms and conditions a pre-repossession intimation was sent to the local police station where the said vehicle was roaming and after inventory on May 2, 2018, the said vehicle has been placed at the godown of National Parking. Moreover, after repossession of the said vehicle, an intimation was sent to the opposite party no.1 by a covering letter dated May 3, 2018.

6. Further contention of the petitioner is that before repossession of the vehicle in question, the loan agreement was terminated and pursuant to the agreed terms of resolving the dispute through arbitration, the said company approached before the learned Arbitrator under Section 17 of the Arbitration and Conciliation Act and learned Arbitrator has passed an order on February 16, 2018 for repossession of the said vehicle by passing an award in favour of the said company. In the meantime, the opposite party no.1 has filed an application under Section 156(3) of the Code of Criminal Procedure on August

13, 2018 which was treated as complaint under Section 200 of the Code of Criminal Procedure with an allegation of commission of offence under Sections 420/447/448/500/506/34 of the Indian Penal Code referring to an alleged incident of April 23, 2018 that is after a lapse of four months, which is registered as complaint case No. 260 of 2018 before the court of learned Chief Judicial Magistrate, Krishnanagar, Nadia and thereafter, after taking cognizance, the case was made over to the learned Judicial Magistrate, 3rd Court, Krishnanagar for further proceeding.

7. Mr. Sabir Ahmed, learned counsel for the petitioner, submits that on perusal of the said complaint, it would be clear that there has been no disclosure of any offence and learned Magistrate without applying his judicial mind, has mechanically took cognizance of the offence without mentioning the offence in respect of which he has taken cognizance. Moreover, the learned Magistrate has issued process against the petitioner under Section 420 of the Indian Penal Code which deals with cheating and dishonestly inducing delivery of property but in the instant case, there has been no inducement on the part of the petitioner. On the other hand, complainant was under an obligation that pursuant to the agreement, he would pay the monthly installments but she has failed to do so and in such circumstances, the ingredient under Section 420 of the Indian Penal Code is seriously lacking which the Magistrate should have considered.

8. Mr. Ahmed further contended that the petitioner company nor any of the employees of the petitioner company wrongfully gained anything nor the complainant wrongfully lost anything. The transaction is purely commercial in nature in terms of the agreement arrived at by and between the parties and as

such, there has been no ingredient of the offence as alleged under Section 420 of the Indian Penal Code.

9. He further contended that Section 506/447/448/500 of the Indian Penal Code have not been made out in the complaint, since there has been no allegation of illegal trespass or criminal intimidation. The story of abusing over phone as has been narrated, has been cooked up only for the purpose of initiation of litigation.

10. Accordingly, Mr. Ahmed submits that continuation of the proceeding is out and out an abuse of process of law and it is settled position of law that no proceeding can be initiated against the finance company, when the opposite party no.1 has defaulted in making payment of monthly installment as per terms of agreement. Moreover, the learned Magistrate has issued summons mechanically without applying the provisions as laid down under Section 202 of the Code of Criminal Procedure. He should have caused an inquiry or investigation in order to decide whether or not there is sufficient ground for proceeding against the accused persons. Accordingly, Mr. Ahmed submits that no proceeding should be made to undergo trial on the basis of false, concocted allegation and more so, when the materials on record clearly reveals that it does not disclose any offence and specially, when the complainant has defaulted in making monthly payment.

11. Mr. Ahmed further submits that in a catena of judicial decisions, it has been held that no person can be allowed to lodge complaint against a financial company and/or its employees when they are discharging their official duty in the process of recovery of loan amount. Accordingly, petitioner has prayed for quashing of the said proceeding.

12. Inspite of service of notice opposite party No.1/ complainant remained un-represented.

13. I have perused the annexure including the complaint and copies of related documents.

14. It appears that the parties had entered into a loan-cum- hypothecation-cum-guarantee agreement on September 26, 2014, which contains agreed clause relating to events of default in paragraph 17, consequence of event of default in paragraph 18, arbitration clause in paragraph 23. In Clause 18 of the said agreement under the heading 'Consequences of event of default' it has been clearly stated that in case of default, the lender shall be entitled at all times to take possession, seize, recover, appoint of receiver.

15. It further appears that in terms of the aforesaid agreed arbitration clause, the petitioner approached before the learned Arbitrator and learned Arbitrator by his interim order under Section 17 of the Arbitration and Conciliation Act, 1996, was pleased to pass order as follows:-

ORDER

- A.** *"The Respondents are directed to forthwith hand over possession of the vehicle being SUMO GOLD EX bearing Registration No.WB51A9295, Engine No.30CR401FVY624658 and Chasis No. MAT44248EEG05661 to the authorized representative of the Claimants.*
- B.** *In case the Respondents fails to handover the possession of the Vehicle as above, the Receiver is allowed to take possession, seize and recover the vehicle being SUMO GOLD EX bearing Registration No.WB51A9295, Engine No.30CR401FVY624658 and Chasis No. MAT44248EEG05661 from the Respondents and/or from any other person, who may be in possession of the said Vehicle wherever it may be situated with the help of police if necessary.*
- C.** *Its further ordered that, the Authorized Representative shall keep the said Vehicle in safe custody without causing loss or damages and are also allowed to sell the vehicle by complying with the due process of law. the Claimants after deducting the charges/cost/expenses if any, incurred, shall appropriate the net sale proceeds towards the claim amount.*

D. Till the possession of the Vehicle is handed over or taken by the Receiver, the Respondent, their servants and agents are hereby restrained from selling, transferring, creating third party rights or charge or parting with possession of the said vehicle in any manner whatsoever.”

16. It further appears that the petitioner has given due intimation to the complainant/opposite party no.1 on 03.05.2018 informing that complainant has failed to disburse the outstanding amount in terms of loan agreement and as such they have taken peaceful possession of the vehicle in their safe custody.

17. In view of the aforesaid documents, it is clear that the petitioner has repossessed the vehicle in question after taking due course of law, in terms of their loan-cum-hypothecation cum-guarantee agreement. It is not in dispute in the present case that the complainant/opposite party no. 1 was agreed to repay the loan in terms of the aforesaid loan agreement and that she has failed to repay the monthly installments.

18. In the written complaint, complainant Sarmistha Sarkar Saha has mainly levelled following allegations:-

(a) Accused No. 1 & 2 claimed Rs. 50,000/- towards insurance for the purchased Vehicle, which the complainant paid in two installments but inspite of such payment, the Vehicle was not insured nor gave any receipt in support of insurance.

(b) On 23.04.2018 accused no. 2 & 3 have threatened and abused her with filthy languages coming to her house and also threatened to implicate them with false litigations.

(c) Accused persons claimed transfer of the Vehicle in their favour and court's order is in their favour but on demand of courts

order in their favour, accused persons made indecent behavior and abused the complainant, who is a woman and a school teacher.

(d) Day after day she is being threatened and also being abused with filthy languages over phone and at times by sending different persons who threatened and frightened her.

(e) Accused persons have hatched up false story and inspite of issuance of three cheques at the time of purchase, accused no. 1 to 3 are creating pressure upon her and threatening her to implicate her with false cases.

19. On the basis of said complain and after taking initial deposition Magistrate issued process vide order dated 18.06.2018 as he found sufficient materials to proceed against accused persons and said printed order dated 18.06.2018 is lying blank, the column, under which sections he found sufficient materials to proceed against the accused persons and for committing what offences cognizance was taken for the second time, because cognizance was taken for the first time vide order dated 01.05.2018, through there also , it has not been mentioned under which section (s) cognizance is taken. The order dated 01.05.2018 and order dated 18.06.2018 may be reproduced below for better understanding.

ORDER

Dated:-01.05.2018

*A complaint has been filed by the the complainant **Sharmistha Sarkar Saha** along with vokatatnama against the Accused Person(s) **Naraman Majumdar & others** praying for treating the complaint as **u/s. 420/447/448/500/506/34, Indian Penal Code.***

*Heard the ld lawyer for the Complainant.
Register the complaint as C.R. Case.*

Cognizance is taken.

The case is made over to the file of Ld. Judicial Magistrate, 3rd Court, Krishnnagar, Nadia for judicial inquiry and trial.

*To **18.06.2018** is fixed for examination on S/A and appearance of the complainant of this case.*

*Chief Judicial Magistrate, Nadia
At Krishnagar*

Order dt. 18-06-2018

Today is fix for examination of SA. The complainant Sarmistha Sarkar and one witness namely Tarak Saha are present with the Ld Advocate. They are examined on SA under section 200 CrPC and discharged and the same is kept with the record.

Perused the complaint. I find sufficient materials to proceed against the accused persons for an offence punishable u/s _____ IPC.

Cognizance is taken.

Issue summons accordingly.

Fix 29-9-18 for SR.

Complainant to file requisites.

*Judicial Magistrate 3rd Court,
Krishnagar, Nadia*

20. Needles to say it is *sine quo non* non for taking cognizance of the offence, is the application of mind by the Magistrate and his satisfaction that the allegations if proved, would constitute an offence. It is therefore imperative that on a complaint Magistrate is bound to consider the question as to whether the complaint discloses commission of an offence and is also required to form an opinion in this respect. When he does so and decides to issue process, he shall be said to have taken cognizance. Section 190 of the code empowers taking cognizance of an offence and not to deal with offender. Therefore, cognizance can be taken even if offender is not known or named when the complaint is filed. On the other hand, section 204 of the code deals with the issue of process if in the opinion of the Magistrate after taking cognizance of an offence, there is sufficient ground for proceeding.

21. Here taking cognizance twice without mentioning offence and putting signature on a printed order, keeping place of mentioning offence as blank, clearly shows that Magistrate did not at all apply his judicial mind upon complaint either for initiation of proceeding by taking cognizance or for commencement of proceeding by issuance of process under section 204 of the code. Merely parrot like repetition of printed words “perused the complaint I find sufficient materials against the accused persons” does not imply that Magistrate has considered judicially that there are sufficient grounds for proceeding against the accused persons. This is also evident from the fact that admittedly accused No.1/ petitioner’s address is not within the jurisdiction of court but the Magistrate violating mandatory provision of section 202 of the code as amended in 2005, issued process against accused person without conducting an inquiry or investigation as required under that section. Furthermore such type of practice by Magistrate i.e. passing order by filling up printed order form is violative of Rule 183 of Criminal Rules and order of High Court at Calcutta. Accordingly order dated 18.06.2018 read with 01.05.2018 *prima facie* discloses that initiation of proceeding and commencement of present proceeding both are made mechanically and in routine manner and as such the very initiation of present proceeding against accused person is bad in law.

22. In the present context complainant in her complaint has prayed for making inquiry/investigation under section 506, 420, 447,448,500/34 Indian Penal Code and it has been already pointed out that there existed a valid loan cum hypothecation cum guarantee agreement executed by both the parties dated 26.09.2014.

23. It also appears that due to non-payment of installments accused/company approached before arbitrator in terms of aforesaid agreement and obtained interim order for repossessing the vehicle and accordingly accused/company repossessed the vehicle and had taken it's safe custody. In **Charanjit Singh Chadha & others Vs. Sudhir Mehra** reported in **(2001) 7 SCC 417** it was observed by Apex Court in para 11.

“11. The whole case put forward by the respondent complainant is to be appreciated in view of the stringent terms incorporated in the agreement. If the hirer himself has committed default by not paying the instalments and under the agreement the appellants have taken repossession of the vehicle, the respondent cannot have any grievance. The respondent cannot be permitted to say that the owner of the vehicle has committed theft of the vehicle or criminal breach of trust or cheating or criminal conspiracy as alleged in the complaint. When the agreement specifically says that the owner has got a right to repossess the vehicle, there cannot be any basis for alleging that the appellants have committed criminal breach of trust or cheating.”

24. Apex Court also had occasion to consider the same question in an earlier decision **Sardar Trilok Singh and others Vs. Satya Deo Tripathi** reported in **(1979) 4 SCC 396** wherein in paragraph 5 it was observed:-

“5. We are clearly of the view that it was not a case where any processes ought to have been directed to be issued against any of the accused. On the well-settled principles of law it was a very suitable case where the criminal proceeding ought to have been quashed by the High Court in exercise of its inherent power. The dispute raised by the respondent was purely of a civil nature even assuming the facts stated by him to be substantially correct. Money must have been advanced to him and his partner by the financier on the basis of some terms settled between the parties. Even assuming that the agreement entered on March 29, 1973 was duly filled up and the signature of the complainant was obtained on a blank form, it is to be noticed that the amount of the two monthly instalments admittedly paid by him was to the tune of Rs 3566 exactly at Rs 1783 per month. The complaint does not say as to when these two monthly instalments were paid. In the first information report which he had lodged he had not stated that the third monthly instalment was payable on July 31, 1973. Rather, from the statement in the first information report it appears that the instalment had already become due on July 28, 1973 when the complainant went out of Kanpur according to his case. The question as to what were the terms of the settlement and whether they were duly incorporated in the printed agreement or not were all questions which could be properly and adequately decided in a civil court. Obtaining signature of a person on blank sheet of papers by itself is not an offence of forgery or the like. It becomes an offence when the paper is fabricated into a document of the

kind which attracts the relevant provisions of the Penal Code making it an offence or when such a document is used as a genuine document. Even assuming that the appellants either by themselves or in the company of some others went and seized the truck on July 30, 1973 from the house of the respondent they could and did claim to have done so in exercise of their bona fide right of seizing the truck on the respondent's failure to pay the third monthly instalment in time. It was, therefore, a bona fide civil dispute which led to the seizure of the truck. On the face of the complaint petition itself the highly exaggerated version given by the respondent, the appellants went to his house with a mob armed with deadly weapons and committed the offence of dacoity in taking away the truck was so very unnatural and untrustworthy that it could take the matter out of the realm of civil dispute. Nobody on the side of the respondent was hurt. Even a scratch was not given to anybody."

25. In view of above it is clear that the allegations levelled under sections 420/447/448 do not attract in the present case. In the complaint also there is no specific allegation of trespass or house trespass. In view of undisputed agreement and repossession of vehicle in terms of agreed terms and in terms of order of arbitrator also, allegation made in complaint does not disclose any deception or fraudulent or dishonest inducement as required under section 415 of IPC for committing offence of cheating.

26. Now as regards allegation of defamation and criminal intimidation the basic ingredient is that the accused did so with intent to cause harm to victim. In the written complaint beside making some evasive allegation and mentioning of the sections, complainant has not brought to the notice of the court, the particulars of offence, committed by each and every accused and the role played by each and every accused in committing of that offence. When the petitioner company has taken due course of law in moving before Arbitrator and obtained order of repossession granted by Arbitrator on 16.02.2018 for default in payment of loan amount, they cannot have any reason or *mens rea* to commit defamation or criminal intimidation to the complainant on 23.04.2018. Section 499 of the IPC makes it amply clear that the accused must either intend to harm the reputation of a particular person or reasonably

know that his /her conduct could cause such harm. With regard to the complaint in question, there is neither any intent on the part of the petitioner to cause harm to the reputation of the complainant nor it can be discerned from complaint that any actual harm done to her reputation. In short both the elements i.e. *mens rea* and *actus reus* are missing in the complaint and if accused had any guilty mind in committing those offences, they would not have taken the legal recourse for repossession of vehicle. Furthermore it remains unexplained in the complaint as to why complaint was lodged on 13th August , 2018, when allegedly occurrence took place on 23rd April, 2018, which also raises serious doubt about genuineness of the allegations.

27. It is true that at the time of disposal of an application under section 482 of the code what is to be seen only the contents of complaint and if there appeared the basic contentions indicating committing of crime by the accused, then the court would not interfere with the same and leave the parties to lead evidence during the trial. In this context there can be no dispute about the law laid down in ***State of Haryana & others Vs. Bhajan Lal & others*** reported in **1992 supp (1) SCC 335**. However where on the face of the complaint it appears that absurd allegations are levelled and there is attempt to criminalize civil dispute, if any, over non-compliance of hire purchase agreement issue and also there is a whole lack of the *bona fides* of complainant there would be no fetter in quashing the proceeding, invoking power under section 482 of the code.

28. Accordingly, CRR 3269 of 2018 is allowed.

29. All further proceeding in Complaint Case No.260 of 2018 under Sections 420/447/448/500/506/34 of the Indian Penal Code pending in the Court of learned Judicial Magistrate, 3rd Court, Krishnagar, Nadia is quashed.

30. Connected applications also accordingly disposed of.

However, there will be no order as to costs.

Urgent photostat certified copies of this order may be delivered to the learned Advocates for the parties, if applied for, upon compliance of all formalities.

(AJOY KUMAR MUKHERJEE, J.)