

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

CWP-2196-2021 (O&M)

Reserved on: 04.03.2022

Date of Decision: 10.03.2022

Amarjit Kaur

. . . . Petitioner

Vs.

The Governor Reserve Bank of India and others

. . . . Respondents

CORAM: HON'BLE MR JUSTICE M.S. RAMACHANDRA RAO

HON'BLE MR JUSTICE H.S. MADAAN

Present: - Ms.Satinder Kaur, Advocate, for the petitioner.

Ms.Tuneet Walia, Advocate, for respondents No.5 & 6.

M.S. RAMACHANDRA RAO, J.

In this writ petition, the petitioner seeks a Writ in the nature of Certiorari to quash the Seizure Memo dt. 17.01.2021 (P3) issued by the Kotak Mahindra Bank (respondent No.5) whereby, petitioner's Tip Trailer bearing registration No. PB-05-AK-4075 (for short 'the vehicle') was allegedly seized forcibly.

The background facts

The said vehicle had been purchased by seeking finance from respondent No.5 and was hypothecated to respondent No.5. A further loan was also obtained on the trolley of the said vehicle. Put together the total loan amount is ₹28,25,000/- and the total loan installment is ₹62,570/-.

Petitioner alleges that this vehicle was coming to Punjab, and on 17.01.2021 in the morning, a repo-agency forcibly seized the said vehicle at Khajuria, District Gopalganj in the State of Bihar. It is alleged that repo-agents had entered in the cabin of the vehicle, locked it forcibly, then took signatures of the driver on some blank papers, left the driver and helper in an open area; and took the truck to a yard and sent the Seizure Memo to the petitioner on Whatsapp.

As per the statement on accounts dt. 24.09.2020 (P1 & P2) filed by the petitioner, as on 04.12.2020 Re: loan Account No.CV-3847558, out of 34 installments, 16 installments were cleared and 18 installments were due; and Re: loan Account No.CV-3847562, out of 29 installments, 11 installments were cleared and 18 installments were due.

According to respondents No.4&5, they have issued a notice to the petitioner on 16.12.2020 (R2) with regard to the dues under the loan agreement CV-3847558 through registered post, pointing out that the petitioner had failed and neglected to pay the regular monthly installments to respondent No.5 & 6; that they are liable to pay ₹19,69,747/- as on 03.12.2020, and in default of such payment respondents No.5 & 6 would initiate appropriate legal proceedings against the petitioner to recover the aforesaid amount outstanding including enforcement of security right by initiating appropriate legal proceedings Civil as well as Criminal i.e. DRT/SARFAESI proceedings.

Respondents No.5 & 6 have issued another notice on 19.12.2020 (R3) with regard to loan agreement No.CV-3847562 demanding ₹4,22,886/- with similar assertions.

Subsequent to taking possession, respondents No.4&5 claim o have informed the Station House Officer, Dumariya Ghat, Motihari on 18.01.2021 (R4 & R5) about the seizure of the vehicle referred to above. Annexure R6 is a statement in Format 9 of a repo agent by name Sandeep Singh and the said document purports to contain the signatures of the person allegedly surrendering the vehicle.

Thereafter notice dt. 19.01.2021 (R8) was issued to the petitioner demanding payment of ₹23,86,436/-.

Events After Filing Of The Writ Petition

The instant writ petition was filed on 21.01.2021, and on account of a boycott call given by the Bar Association it was not taken up on 01.02.2021 and 02.02.2021.

On 24.02.2021, notice was issued to respondents No.5 & 6 only for 10.03.2021.

After appearance was filed by respondents No.5 & 6 matter was adjourned to 10.3.2021 on which date it was adjourned to 19.05.2021.

Due to the pandemic, the NIC postponed the date of hearing to 07.09.2021 but, CM-8489-2021 was filed by the petitioner for preponment of the date of hearing from 07.09.2021.

Notice of the said application was issued for 17.08.2021.

On 17.08.2021, a statement was made by counsel for respondents No.5 & 6 that the seized vehicle would be immediately released on furnishing of an undertaking by the petitioner or any person duly authorized by her subject to the ownership of the hypothecated vehicle not being alienated to any third party during the pendency of the proceedings.

In response, counsel for the petitioner agreed to do the needful for securing the release of the vehicle.

The vehicle was then released to the petitioner on 07.09.2021.

It appears that respondents No.5 & 6 filed an application ARB/209/2021 under Section 9 of the Arbitration and Conciliation Act, 1996 [for short 'the Act'], obtained an order under Section 9 of the Act, permitting seizure of the vehicle through a receiver vide order dt. 14.09.2021 (R10) passed by the Additional District Judge Ludhiana and again seized it.

The consideration by the Court

The second time seizure made after release of the vehicle on 07.09.2021 pursuant to the order dt.17.08.2021 passed by this Court is not the subject matter of this Writ Petition, and we do not propose to say anything about it.

According to the petitioner, she suffered business loss on account of the illegal and forceful seizure of the vehicle on 17.01.2021 and she is entitled to claim damages of the same.

The relief of damages/compensation for illegal and forceful seizure have to be sought in a Civil Court and that particular aspect we do not intend to go into this Writ Petition.

However, we propose to deal with only one question, i.e.,
“ *whether the seizure made on 17.01.2021 of the vehicle in question by respondents No.5 & 6 was through force and whether any due process was followed by them before effecting such seizure?* ”

We have already noticed that there is a specific pleading in para 5 of the Writ Petition that a repo agency engaged by respondents No.5 & 6 forcibly seized the vehicle on 17.1.2021 at Khajuria, District Gopalgaj in the State of Bihar and that the said agents entered into the cabin of the vehicle, locked it forcibly, took signatures of the driver on some blank papers, left the driver and helper in some open place, took away the vehicle to a yard and issued a Seizure Memo to the petitioner on Whatsapp.

It is also not in dispute that pursuant to a hypothecation arrangement, the vehicle was being utilized by the petitioner though financed by respondents No.5 & 6 although the hypothecation agreement has not been placed on record by the petitioner or respondents No.5 & 6.

In the written statement filed by respondents No.5 & 6, it is contended that since the petitioner had not responded to the notices given for repayment of the loan installments, respondent No.6 repossessed the vehicle in Bihar on 18.01.2021, but before the repossession, the concern Police Station was informed about such repossession.

It is contended that after the vehicle was released on 06.09.2021 an order was obtained by respondent No.6 under Section 9 of the Act for repossession of the vehicle and the same had been repossessed on 19.11.2021 by following due process of law.

According to respondent No.5 & 6, petitioner had also been given a moratorium as per the RBI guidelines for six months; and that after release of vehicle as per orders of the Court on 06.09.2021, petitioner had defaulted 10 EMI and till date the pending EMIs are 14 in number.

It is denied that respondent No.6 forcibly seized the vehicle and it is claimed that it has followed due/proper procedure for possession of hypothecated vehicle of the petitioner.

The only procedure which respondent No.6 appears to have followed is that it had issued notices to the petitioner threatening to take possession of the vehicle before actually taking possession of the vehicle on 17.01.2021.

It is not the case of respondents No.5 & 6 that they had invoked the SARFAESI Act, 2002 and had issued notices under Section 13(2) of the said Act, thereafter a notice under Section 13(4) of the said Act, and then obtained an order from a District Magistrate under Section 14 thereof to take possession of the vehicle with Police help.

It is also not the case of respondents No.5 & 6 that prior to the seizure of the vehicle on 17.01.2021, they had filed an application under Section 9 of the Act and obtained possession of the hypothecated vehicle from the petitioner's custody through a receiver, though this process appears to have been followed at the time of the seizure of the vehicle for the second time in November 2021.

The decision in *Parkash Kaur* (2007)

The question whether a financier can use goons or recovery agents and repossess a hypothecated vehicle from the borrower was considered in **ICICI Bank Ltd. v. Prakash Kaur¹**. The Supreme Court deprecated this practice and held:

“16. Before we part with this matter, we wish to make it clear that we do not appreciate the procedure adopted by the Bank in removing the vehicle from the possession of the writ petitioner. The practice of hiring recovery agents, who are musclemen, is deprecated and needs to be discouraged. The Bank should resort to procedure recognised by law to take possession of vehicles in cases where the borrower may have committed default in payment of the instalments instead of taking resort to strong-arm tactics.” (emphasis supplied)

The decision in Citicorp (2012)

In **Citycorp Maruti Finance Ltd. Vs. S. Vijaylaxmi²** also the same principle was laid down, which read as under: -

“27. Till such time as the ownership is not transferred to the purchaser, the hirer normally continues to be the owner of the goods, but that does not entitle him on the strength of the agreement to take back the possession of the vehicle by use of force. The guidelines which had been laid down by Reserve Bank of India as well as the appellant Bank itself, in fact, support and make a virtue of such conduct. If any action is taken for recovery in violation of such guidelines or the principles as laid down by

¹ (2007) 2 SCC 711, at page 714

² (2012) 1 SCC 1

this Court, such an action cannot but be struck down.”(emphasis supplied)

The decision in Magna Fincorp Ltd (2020) of the Supreme Court

The Supreme Court in **M/s Magna Fincorp Limited Vs. Rajesh Kumar Tiwari**³ had held that financier is the real owner of the vehicle which is the subject of a hire purchase agreement, and there cannot be any impediment to the financier taking possession/repossession of the vehicle, when the hire does not make payment of the installments in terms of the Hire Purchase Agreement. It also held that if the hirer commits breaches of the conditions of the Hire Purchase Agreement, which expressly provides for immediate repossession of a vehicle without further notice of the hirer, in case of default in payment of hire charges and/or hire installments, repossession would not be vitiated for want of notice.

The said case arose under the provisions of the Consumer Protection Act, 1986 and the question which the Supreme Court was considering was *whether repossession of a vehicle under ‘Hire’ in accordance with the terms and conditions of the Hire Purchase Agreement, upon default in payment of the hire installment, and refusal to release the same on mere assurance of the complainant to clear outstanding arrears of higher installments, and pay future installments in time, is a ‘deficiency in service’ under the said Statute or not.*

The Court answers the said question in negative and held that it will not be considered as ‘deficiency of service’.

More importantly, the Court reiterated :

“ 87.The financier being the owner of the vehicle which is the subject of a hire-purchase agreement, there can be no impediment to the financier taking

³ 2020 (10) SCC 399

possession of the vehicle when the hirer does not make payment of instalments/hire charges in terms of the hire-purchase agreement. However, such repossession cannot be taken by recourse to physical violence, assault and/or criminal intimidation. Nor can such possession be taken by engaging gangsters, goons and musclemen as so-called recovery agents.

So though there can be no impediment to the financier taking possession of the vehicle when the hirer does not make payment of installments/hire charges in terms of the Hire Purchase Agreement, such repossession cannot be taken by recourse to physical violence, assault and/or criminal intimidation; and nor can such possession be taken by engaging *gangsters, goons and musclemen and so called Recovery Agents*.

In **M/s Magma Fincorp Limited (3 Supra)**, these two decisions of **Parkash Kaur (1 supra)** and **City Corp (2 Supra)** were considered; and it was held that in the **Citycorp** decision, for the word ‘lender/financier’ there was a typographical error and the word ‘hirer’ was used.

In view of the above three decisions, it is clear that repossession of the hypothecated vehicles cannot be taken by the financiers by engaging *gangsters, goons and musclemen and so called recovery agents by use of force*.

In the instant case, while the petitioner specifically made such an allegation, the respondents No.5 & 6 in the written statement, merely said that they took possession on 18.01.2021 and that before they took repossession they inform the concerned Police Station about it.

But the Whatsapp message/Seizure Memo (P3) has not been denied by respondents No.5 & 6. It indicates that the vehicle was taken in possession on 17.01.2021 at 7:20 AM. Thus, the information given to the Police Station appears to be *subsequent* to the seizure and not prior to the seizure.

That apart in 'Repossession Kit - Inventory List' i.e. FORMAT 9 (R6) filed by the respondents No.5 & 6, one Sandeep Singh signed as the Collector taking custody of the vehicle and there is also a signature of one Ajay Kumar on 18.01.2021 representing Bajrang Yard in Village Madhopur in East Champaran District of the State of Bihar.

The said Sandeep Singh is not stated to be an employee of respondents No.5 & 6 and therefore, he has to be only construed as an agent for recovery of the possession of the vehicle, employed by respondents No.5 & 6.

In our opinion, the driver of the vehicle cannot be presumed to voluntarily delivered possession of the vehicle to the respondents 5 and 6, that too at Khajuria in Bihar State.

In the absence of any material to show that repossession of the vehicle was taken by following the procedure under the SARFAESI Act, 2002 or by approaching the Civil Court under Sec.9 of the Arbitration and Conciliation Act,1996,which are the lawful means of taking possession , and in the absence of any evidence to show that petitioner voluntarily delivered possession, we are constrained to hold that respondents No.5 & 6 have *forcibly* possessed the vehicle by employing *recovery agents* on 17.01.2021 at Khajuria, District Gopalganj in the State of Bihar.

Accordingly, Writ Petition is allowed in part, with cost of ₹10,000/-, and it is declared that seizure of the vehicle in question by respondents No.5 & 6 on 17.01.2021 through *recovery agents* is by use of force and in violation of due process of law and Art.300-A of the Constitution of India. However, petitioner is permitted to avail civil remedy for recovery of damages for loss of her business for the period 17.01.2021 till 06.09.2021 on account of the said seizure in an appropriate Forum.

We are not expressing any opinion about the validity of the possession taken in November 2021 by respondents No.5 & 6 of the hypothecated vehicle from the petitioner, since the same is not subject matter of this Writ Petition.

(M.S. Ramachandra Rao)
Judge

10.03.2022
Vivek

(H.S. Madaan)
Judge

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| 1. Whether speaking/reasoned? | Yes |
| 2. Whether reportable? | Yes |