13.02.2023

Court No.35
Item No. 73

I.T (p.a)

CRR 582 of 2016
With
CRAN 6 of 2017 (Old No. CRAN 4859 of 2017)
With
CRAN 7 of 2021

Kotak Mahindra Bank Ltd. & Anr.
Vs.
Anup Kr. Jana

Mr. Avik Ghatak,
Mr. Saibal Dasgupta,
Mr. Santosh Kr. Ray,
Ms. Antalina Guha.

... for the petitioners

Petitioners and the opposite parties are related vide a higher purchase agreement. Execution of the said agreement has resulted into the petitioner No.1 through petitioner No.2 to disburse a vehicle purchaser loan to the opposite party, to the tune of Rs. 4,38,173.76/-.

As pointed out by Mr. Avik Ghatak, appearing for the petitioners the 'loan-cum-guarantee agreement' has categorically specified the terms in case of default in repayment, provisions regarding notice pursuant to such default and the remedies available to the financier, in this case the petitioner no.1 through petitioner no.2.

Petitioners' case is that the borrower/opposite party no.1 defaulted in repayment and as such the petitioner has undertaken stipulated measures/steps as envisaged in the said 'agreement'. Petitioner has further emphasized that the present criminal case against them is only an aftermath of such steps taken by the petitioners against the opposite party and also an endeavour by him to evade the liability under the said 'agreement'.

The opposite party no.2 is the complainant to lodge a complaint dated July 11, 2014, in the Court of the Ld. Additional Chief Judicial Magistrate at Haldia, East Medinipur under Section 156 (3) Cr.P.C, 1973. The allegations in a nutshell may be narrated to be that he has taken the car upon obtaining loan from the petitioners in 2012, hence admitted in this case. That the petitioners have not issued a 'road permit' to the said borrower resulting to his inability to run the vehicle on road. Complainant/opposite party no.2 has accepted that, after remitting some of the instalments, he could not arrange for further repayment of loan. He further alleges that without any notice to him, on August 24, 2013, the petitioners have recaptured and seized his vehicle, during his absence. He has further alleged that through his lawyer he has sent a notice to the bank dated December 3, 2013, to undertake repayment of loan duly in future days. However, he was informed that the ownership of the car, which was earlier seized, have already been handed over to third person by that time. The complainant/opposite party no.1 has thus alleged of deception and cheating by the present petitioners in confiscation of the vehicle and handing over it to the other party, by the present petitioners.

Inspite of due to service of notice no one is appearing in this case on behalf of the opposite party no.2.

Mr. Ghatak for the petitioners points out to the fact that in compliance with the terms of the said 'loan-cum-guarantee agreement' entered into between the parties two notices were issued to the opposite party no. 2 after he started defaulting in repayment of loan. It has also been submitted only when the opposite party no.2 did not reply or take any steps, the petitioners/bank has proceeded to dispose of the vehicle the same being security to the loan which had become enforceable. It has also been pointed out by referring to the said agreement that the petitioner has never taken any steps for 'revival of contract' as envisaged in the said agreement.

After emphasizing on these points on facts ultimately Mr. Ghatak has argued on the point that during subsistence of the agreement of higher purchase, the purchaser, i.e, the complainant/opposite party no.2 in this case, remains to be merely a trustee of the secured property, which is the car in this case and the ownership of the said property during the period of subsistence of the agreement remains with the petitioners, i.e, financiers. He says that it is a settled law that in case the said vehicle is seized by the financier, no criminal action can be taken against him as the goods would be deemed to be owned by him as per law. On this he has relied on a judgment of the Hon'ble Apex Court reported in **(2013) 1 SCC 400** (**Anup Sarmah vs. Bhola Nath Sharma & Ors.**)

No doubt it is a settled law that in case of a higher purchase agreement the financier would be the owner of the property until and unless the borrower repays the entire amount of loan with interest in terms of the higher purchase agreement. In case of default by the borrower the financier would be at liberty in terms of the agreement to take appropriate steps as regards the secured property, to enforce the loan. In the judgment referred to by the petitioner, it has been categorically held that the during period of subsistence of loan, the financier would be the owner in affect of the property whereas the borrower would be only a trustee or bailee of the same. It has also been held without any scope of doubt that in such a situation no criminal case would be maintainable against the financier if in order to enforce repayment of the loan, the financier undertakes steps in terms of the loan agreement. From the materials in this case it is evident that after default of the opposite party no.1/complainant in repayment of loan the petitioners being the financiers of the concerned vehicle have taken steps in terms of the agreement entered into between the parties and have not acted beyond the scope of its lawful boundaries, in enforcing repayment of the loan. Under such circumstances the ratio decided in the judgment as mentioned above would squarely come to the rescue of the petitioners in this case. Therefore, following the settled law, it can be very well said that the present complaint would not be maintainable against the petitioners.

On the findings as above this revision succeeds. The complaint by the opposite party no.2 dated July 11, 2014 is hereby quashed and set aside.

Criminal revision being CRR 582 of 2016 is allowed.

Connected applications being CRAN 6 of 2017 (Old No. CRAN 4859 of 2017) with CRAN 7 of 2021 are disposed of.

Urgent certified website copy of this order, if applied for, be supplied to the parties upon usual undertaking.

(Rai Chattopadhyay, J.)