IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION
APPELLATE SIDE

The Hon'ble **JUSTICE BIBEK CHAUDHURI**

CRR 1448 of 2022

Amir Sk.

-Vs-

State of West Bengal & Ors.

For the Petitioner	: Mr. Dipanjan Chakraborty, Adv., Ms. Sumita Sarkar, Adv., Ms. Ananya Sau, Adv., Ms. Mousumi Dhali, Adv.
For the Opposite Party No.2	: Mr. Sabir Ahmed, Adv., Mr. Abdur Rakib, Adv., Mr. Dhiman Banerjee, Adv.
For the State	: Mr. Arijit Ganguly, Adv., Mr. Avik Ghatak, Adv.

Heard on: 20 January, 2023.
Judgment on: 14 March, 2023.

BIBEK CHAUDHURI, J. : –

1. The petitioner purchased a vehicle, bearing no. WB 57D 6334 under a loan cum hypothecation cum guarantee agreement obtaining loan for purchase of the said vehicle. Further case of the petitioner is that the opposite party no. 2/ lender tried to take forcible possession of the vehicle of the petitioner on 14th January, 2022. However, the driver of the said vehicle somehow managed to escape from the place with the vehicle and reported the incident to the petitioner. The petitioner then filed a suit for

declaration and injunction in the City Civil Court at Calcutta, XII Bench which was registered as Title Suit no. 118 of 2022. In the said suit, the petitioner obtained an order of interim injunction against the opposite party no. 2 restraining it to cause any disturbance in peaceful possession of the vehicle in question by the petitioner. The opposite party no. 2 was also restrained from seizing the said vehicle otherwise than due process of law. However, during subsistence of the order of interim injunction, some miscreants appointed by the opposite party no. 2 forcibly took possession of the said vehicle on 3rd February, 2022. The driver of the vehicle was also harassed by them. On the same date the driver lodged a written complaint with the Officer-in-Charge of Kotwali Police Station, Nadia on the basis of which FIR case no. 114 of 2022 under Section 341/188/384/34 of the Indian Penal Code was registered. On 14th February, 2022, the petitioner filed an application before the Learned Chief Judicial Magistrate, Nadia and prayed for return of the said vehicle. The said application was rejected by the Learned Chief Judicial Magistrate, Nadia vide Order Dated 1st April, 2022. The said order is under challenge in the instant revision.

2. It is contended by the Learned Advocate for the petitioner that the petitioner purchased the above mentioned vehicle obtaining loan from Tata Motors Finance Limited, the opposite party no. 2 herein. After obtaining loan the petitioner was all along very regular in payment of Equal Monthly Installments (EMI) however during covid pandemic there was absolute disruption of petitioner's business of transportation.

Petitioner could not earn any money to make payment of loan in favour of the opposite party no. 2. when the opposite party no. 2 and its men and agents tried to take illegal possession of the said vehicle on 14th January, 2022, the petitioner approached the Civil Court and obtained an order of interim injunction, the said order of interim injunction restraining the opposite party no. 2 from disturbing possession of the petitioner in respect of the said vehicle and from seizing the vehicle was in force on the date of seizure i.e. on 3rd February, 2022. It is urged by the Learned Advocate for the petitioner that opposite party no. 2 cannot seize the vehicle in violation of the order of injunction passed by the Civil Court.

3. The opposite party no. 2 has filed an affidavit-in-opposition controverting the allegations made by the petitioner. It is the specific case of the opposite party no. 2 that the petitioner purchased the vehicle in question obtaining loan from opposite party no. 2 by executing an agreement, the agreement clearly stipulates that in case of failure on the part of the petitioner to make payment of EMI regularly, the lender shall have the right to take possession of the vehicle. It is also urged on behalf of the opposite party no. 2 that the agreement executed by and between the petitioner and the opposite party no. 2 contains an arbitration clause giving liberty to the parties to resolve all sorts of disputes and differences arising out of the agreement to be referred to arbitration.

4. Learned advocate for the opposite party no. 2 submits that an arbitrator was appointed by the opposite party no. 2 to resolve the dispute and the sole arbitrator passed an award holding, inter alia, that the

respondents jointly and severally, will pay to the claimant a sum of Rs. 1,891,539.84 inclusive of interest and other charges and further interest at the rate of 18% over the aforesaid sum to be computed from 22nd June, 2021 till the date of payment of realization**.** The claimant is entitled to possession of the said vehicle and the respondent was directed to surrender and handover the said vehicle to the claimant, if not handed over pursuit to the earlier order. It is urged by the learned advocate for the opposite party no. 2 that the opposite party took possession of the said vehicle as per arbitration award. It is further submitted on behalf of the opposite party no. 2 that the petitioner previously filed Title Suit no. 129 of 2021 in the court of Learned Civil Judge (Junior Division) 2nd Court at Jangipur, Murshidabad for declaration and injunction and the Learned Civil Judge (Jr. Div.) vide. order dated 16th November, 2021 rejected the prayer for ad-interim injunction filed by the petitioner. Suppressing the said fact, on the self same cause of action and factual circumstances, the petitioner filed subsequent Title Suit no. 118 of 2022 and obtained an order of injunction from the Learned Judge, XII bench of the City Civil Court at Calcutta. It is submitted by the Learned Advocate for the opposite party no. 2 that the order of injunction passed in Title Suit no. 118 of 2022 cannot be taken into consideration on the ground that on self same cause of action there is a previously instituted suit and in the said suit prayer for ad-interim injunction was refused by another court of law.

5. Though the issue in hand can be disposed of by a cryptic judgment, but this court is of the view that an elaborate discussion is necessary to adjudicate the instant revision because almost regularly applications of similar type with prayer for return of the seized vehicle are filed before the Magistrates and contradictory orders are passed by them on the basis of their knowledge of legal issues involved in the matter.

6. Whatever may be the name and nomenclature of the agreement all such agreements are in the form of Hire Purchase Agreements. It is needless to say that the Hire purchase agreement is within the category of the contract of Bailment with an element of sale of property in favour of the hirer on successful completion of the terms of agreement. Section 148 of the Contract Act defines bailment as delivery of goods by one person to another for some purpose, upon a contract that they shall, when purpose is accomplished, be returned or otherwise dispose of according to the directions of the persons delivering them. Whether an agreement is a hire purchase agreement or not, the following tests are essentially important :-

a) Whether there is a binding obligation on the hirer to purchase the goods;
b) Whether there is a right reserved to the hirer to return the goods at any time during the subsistence of contract. If such a right is reserved, the contract cannot be termed as an agreement for sale or out an out sale.

7. In **Sundaram Finance Ltd. Vs State of Kerala and Anr**. reported in **AIR 1966 SC 1178**, it was held by the Hon'ble Justice Shah and Hon'ble Justice Sikri, as their Lordships then were :-

> "A hire-purchase agreement is a complex transaction.The owner under a hire-purchase agreement enters into an transaction of hiring out goods on the terms and conditions set out in the agreement, and the option to purchase exercisable by the customer on payment of all the Instalments of hire arises when the instalments are paid and not before. In such a hire-purchase agreement there is no agreement to buy goods; the hirer being under no legal Obligation to buy, has an option either to return the goods or to become its owner by payment in full of the stipulated hire and the price for exercising the option. This class of hire purchase agreements must be distinguished from transactions in which the customer is the owner of the goods and with a view to finance, his purchase he enters into an arrangement which is in the form of a hire purchase agreement with the financier, but in substance evidences a loan transaction subject to a hiring agreement under which the lender is given the licence to seize the goods."

8. Again, there are third kind of agreement. This is agreement of hypothecation. The vehicle is hypothecated to the bank or other financial institution for security of repayment of loan. If such agreement stipulates a clause giving right to the bank to seize the vehicle and sell the same for realization of loan amount which the hirer fails to repay, the bank and/or financial institution have every right to take possession of the vehicle as per the terms of the agreement. In order to come to such conclusion it is

not necessary to have brainstorming discussion because only reason that requires to be considered is that the contractual obligations having been recognized should be honoured.

9. Section 2(30) of the Motor Vehicles Act, 1988 defines "Owner" in the following words :-

> (30) "owner" means a person in whose name a motor vehicle stands registered, and where such person is a minor, the guardian of such minor, and in relation to a motor vehicle which is the subject of a hire-purchase, agreement, or an agreement of lease or an agreement of hypothecation, the person in possession of the vehicle under that agreement.

Therefore a person in possession of the vehicle under a hire purchase agreement or loan agreement may be treated as the registered owner of a vehicle and the registering authority is statutorily permitted to register the name of the person in possession of a vehicle under hypothecation as its owner. However, he does not become an owner as per the contract of sale. In other words, his ownership over the vehicle is not unencumbered. A hirer is recognized as an owner to obtain registration certificate in respect of a vehicle which is subject of hire purchase agreement. It is also to facilitate him to obtain fitness certificate, get the vehicle insured, road permit etc. under the relevant provisions of Motor Vehicles Act so that he can run the vehicle on road.

10. I have already observed that like all kinds of agreements, hire purchase agreement is a creature of contract therefore the parties are

under obligation to perform the contractual agreements and their reciprocal promises and obligations in terms of such agreement. Clause 6 of the agreement deals with security. Clause 6 runs thus :-

> “6.1 In pursuance of this agreement and for the consideration aforesaid the borrower does hereby hypothecate and charge in favour of the lender all the present and future (i) Additional properties (ii) Subsidy (iii) Asset(s), including its body, engine and all the accessories and equipments attached, annexed or fixed and/or to be attached, annexed or fixed or replaced from time to time to the Asset(s) and all spares, tools pertaining to the Asset(s) whether lying loose or fixed to the Asset(s) and where ever the same may be lying or stored whether in the premises of the borrower or wherever situated and whether the same would be held by any person on behalf of or disposition of the Borrower or in the course of transit or otherwise which shall also include all present assets as well as assets by way of substitution, addition, replacement, conversion or otherwise, as security for due payment and repayment of the Loan hereunder including principal together with interest and other monies and charges, Taxes payable by the Obligors under this Agreement and the Schedule hereto (including Taxes on reimbursements, if any) in full on their respective Due Dates to the Lender and for due and timely discharge of all the Obligor’s obligations to the Lender under this Agreement and the Schedule hereto in full or on their respective Due Dates. The brief particulars of Asset(s) will be described in the Schedule hereto.
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> 6.2 The charge/hypothecation so created shall continue to be in full force so long as all the amounts due under the terms of this Agreement have been paid by the Borrower to the Lender and until the Lender issues are No Objection Certificate and the charge shall not be affected, impaired or discharged by the winding up or

insolvency (voluntary or otherwise) or by any merger or amalgamation, reconstruction, takeover of the management, dissolution or appropriation of the business or assets or nationalisation (as the case may be) of the Borrower. Any direct or indirect transfer of the Assets otherwise than by the Lender would be deemed to be criminal breach of trust and a case of cheating entitling the lender to file/pursue a First Information Report or a criminal complaint against the Obligors.

6.3 The borrower shall comply with and fulfill all requirements under law for and towards an in relation to creation of charge and hypothecation as aforesaid on the Asset(s) and recording/registering the same with the Relevant Authority, applicable registries including Registrar of Companies (where applicable), filing necessary forms, obtaining necessary endorsement/acknowledgements thereof including on the RC book etc.

6.4 The borrower shall deliver to the Lender necessary proof of having complied with the obligation as aforesaid in full, including copy of the RC book of the Asset(s), with the due endorsement thereon of the Loan and hypothecation and charge in favour of the Lender within 30(thirty) days of Disbursement of the Loan. The Borrower shall deliver to the Lender the RC book and insurance policy and of the Asset(s) forthwith upon surrender to or repossession of the Asset(s) by the Lender.

6.5 If at any time during the subsistence of this Agreement, the Lender is of the opinion that any of the security provided by the Obligors has become inadequate to cover the balance of the Loan than outstanding and the dues thereudner, then whenever required by the Lender, the Obligors shall provide and furnish such additional security/securities including hypothecation of the Obligors other assets and/or mortgage of or charge over such of the Borrower's movable or immovable properties, as may be acceptable to the Lender to cover such deficiency. The Obligors shall make out to the satisfaction of the Lender a good and marketable title to the properties free form all encumbrances to be mortgaged as security (if any) are collectively referred t as the "Security". The Obligors shall, whenever required by the Lender, give full particulars to the Lender of all the assets of the Obligors and shall furnish and verify all statements, reports, return, certificates and information from time to time and execute all necessary documents to give effect to the Security.

6.6 The Obligors shall execute, sign and deliver al such documents, papers, acknowledgements and representations as may be required by the Lender at any time during the term of this Agreement or while any monies due and/or payable to the Lender under this Agreement are outstanding with a few to fully and effectively secure the monies due and payable to become due and payable by the Obligors to the Lender.

6.7 Until the balance owed by the Borrower or the Guarantor to the Lender has been paid or satisfied if full, the Lender shall have a lien on all properties and assets of the Borrower and the Guarantor from time to time in the possession of the Borrower and the Guarantor and, a change over all stocks, shares and marketable or other securities from time to time and get any or all of them registered in the name of the Lender or its nominees whether the same be held for safe custody otherwise.

6.8 The Borrower expressly accepts that if the Borrower fails to pay any monies when due or which may be declared due prior to the date when it would otherwise have become due or commits any other default under any financing and/or loan agreement (including this Agreement) with the Lender under which the Borrower is enjoying any financial/credit/other facility, then and is such even the Lender shall, without prejudice to any of the specific rights under each of the agreements, be absolutely entitled to exercise all or any of rights under any of the Borrower's agreement (including this Agreement) with then Lender and the security created under each of those agreements and for any of those obligations shall be deemed to a security created also for the obligations and liabilities of the Obligors hereunder and the Lender shall be entitled to enforce any of such security for recovery of its dues hereunder as also exercise its general right of lien and set-off in respect of the securities crated under such agreements. Similarly the Security created under or pursuant to this Agreement shall also be deemed to be a security created for any of the Obligors' liabilities or obligations to the Lender in respect of any other loans/facilities/transitions and can be enforced by the Lender for recovery of any dues of the Obligors in respect of any such other obligations/liabilities.

6.9 The charge created by the Borrower in favour of the Lender as aforesaid shall be a continuing charge for repayment to the Lender of the entire Outstanding Balance including all the Loans together with interest, Overdue Interest, Prepayment Charges, costs, damages, fees, and expenses and repayment or payment of all other monies outstanding and the liability of the Obligors shall not be affected, impaired or discharged by insolvency of any the Obligors.

6.10 The Obligors undertake that the Asset(s), the sale realisations insurance proceeds and all documents related to the Security shall always be held at the order of the Lender, and will be dealt according to the directions issued by the Lender. The Obligors shall not suffer or allow to suffer any attachment or distress to the Asset(s) or any parts thereof or sell, create, or cause to be created, any charge by way of hypothecation, pledge, lien, third party interests or any encumbrance otherwise on the Asset(s) or any of them or any part thereof, or allow anything that may prejudice or endanger the Security nor shall they, without the consent of the Lender in writing, sell, transfer or shift (except in the ordinary course of its business of transportation) the Asset(s) to any other state of place other than the one where it is registered. The Lender shall be at liberty to incur all such expenses and Taxes as may be necessary, which shall be reimbursed by the Obligors to the Lender forthwith upon Lender incurring such expenses together with Taxes on reimbursements itself, if any, to the extent of which there shall be a charge on the Asset(s), to preserve and perfect the Lender's security on the Asset(s). The Lender shall incur the expenses as pure agent of the Obligor."

11. Thus plain reading of the above clause clearly suggests that in pursuance of the agreement, the borrower hypothecates and charges in favour of the lender all the present and future (i. Additional properties, ii. Subsidy, iii. Assets, including its body, engine and all the accessories and equipments attached, annexed or fixed and/or to be attached, annexed or fixed or replaced from time to time to the assets and all spares and tools pertaining to the assets etc). Hypothecation can only be discharged after payment of the loan amount. Clause 11 of the agreement deals with the circumstances in case of Events of Default. If the borrower defaults in payment of EMI the lender shall have the right to take possession of the vehicle. Clause 21 of the agreement speaks about Arbitration clause.

12. It is submitted by the learned advocate for the opposite party that upon failure to pay monthly installment in favor of the opposite party no. 2 by the petitioner, the dispute was referred to arbitration as per clause

21 of the agreement. The arbitrator issued notice to the petitioner but he remained absent thereafter on 2nd November 2021, the sole arbitrator passed an award directing the petitioner and the guarantor/respondents jointly and severally to pay to the claimant/opposite party no. 2 a sum of Rs. 1,891,539.84 inclusive of interest and other charges and further interest at the rate of 18% per annum on the said vehicle and the respondents were directed to surrender and hand over the possession of the vehicle to the claimant. After the said order being passed, possession of the vehicle was taken by the opposite party no. 2 on 3rd February, 2022.

13. It is unfortunate to note that the learned Judge, City Civil Court, XII Bench at Calcutta passed an interim order of injunction ex-parte holding, inter alia, that the said vehicle was seized otherwise than due process of law. The learned judge failed to consider the nature of agreement between the parties. Factum of arbitration proceeding was concealed to him. The petitioner also suppressed that he filed Title Suit No. 129 of 2021 before the learned Civil Judge (Jr Div) 2nd court, Jangipur, Murshidabad and moved an application for ad-interim and temporary injunction. The learned Civil Judge (Jr Div) 2nd court, Jangipur rejected the prayer for ad interim injunction.

14. I am constrained to note that what a Civil Judge (Jr Div) could understand, the learner Judge City Civil Court, XII Bench, Calcutta failed to conceive the basic principles of granting ad-interim or temporary order of injunction.

15. If the act of taking possession of the vehicle is considered in accordance with the terms of hire purchase agreement, it becomes abundantly clear that mens rea is totally absent in the person seizing the vehicle and as by mutual agreement the right has been given to the financer to take possession of the vehicle it does not amount to taking possession of vehicle dishonestly, because such an act does not fall under the category of cases in which the person seizing gains possession wrongfully not the hirer loses possession wrongfully so as to make such act of seizure an offence falling under Section 379 of the IPC. In other words, the lender/ financer would be entitled to possession of the vehicle under the agreement on the happening of an event stipulated in the agreement application of this nature and it is not necessary to determine whether taking over possession by the lender was with an intention to cause wrongful loss to the hirer and wrongful gain to himself. The hirer by his conduct becomes disentitled to the possession of the vehicle. However, this court is not going to formulate a precedent which is to be relied on by the learned Magistrates in all cases where hire purchase agreement is involved relating to return of the seized vehicle. What the court tries to impress upon is that the contractual obligation between the parties are essentially to be looked into by the learned Magistrate while passing an order of return of the seized vehicle. Similarly while granting or refusing an application for temporary/ad-interim injunction the court must look into the terms of the written agreement to come to a finding as to whether a prima facie case has been established by the hirer or not.

16. In view of the above discussion, this court finds that the impugned order dated 1st April, 2022 passed by the learned Chief Judicial Magistrate, Nadia, Krishnanagar in Kotwali police station case no. 114 of 2022 does not call for any interference and the instant criminal revision is dismissed on contest however without cost.

17. This court is of the view that a copy of this judgment should be circulated amongst the learned Judicial Officers of the state through the learner District Judges of the respective Districts as a guideline on the subject relating to return of the vehicle to the hirer, the possession of which has been taken by the lender on failure of the terms of hire purchase agreement and also on the principle of granting ad-interim injunction in favour of the hirer in similar types of cases.

(Bibek Chaudhuri, J.)