

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPLICATION No.4118 OF 2010

1.Tata Capital Ltd.	)	
A Company incorporated under the	)	
Companies Act, 1956, having its	)	
Registered office at One Forbes,	)	
Dr. V.B. Gandhi Marg, Fort,	)	
Mumbai – 400 001	)	
2.Mr. Vipul Upadhyay,	)	
Aged 36 years,	)	
Regional Collection Manager,	)	
Tata Capital Ltd.,	)	
having its Registered Office at	)	
One Forbes, Dr. V.B. Gandhi Marg,	)	
Fort, Mumbai – 400 001	)	...Applicants

Versus

1. Mr. Umeshkumar Hanumandas Goyal	)	
Residing at Flat No.5, 5 th Floor,	)	
Jai-Hind Building, B-218, Dr. A.M. Road,	)	
Bhuleshwar, Mumbai – 400 002	)	
2. The Senior Inspector of Police,	)	
Kulgaon Police Station,	)	
Thane Rural, Dist. Thane	)	
3. The State of Maharashtra	)	...Respondents

Mr. Subodh Desai for Applicants.
Ms. Mahalakshmi Ganpanty, APP for State-Respondent Nos.2 and 3

CORAM : A.S. GADKARI AND
SHYAM C. CHANDAK, JJ.

RESERVED ON : 3rd NOVEMBER,2023
PRONOUNCED ON : 11th DECEMBER, 2023

JUDGMENT PER- [SHYAM C. CHANDAK, J.]

1) Present Application is filed under Section 482 of the Code of Criminal Procedure, seeking quashing and setting aside of F.I.R. bearing C.R.No. I-28 of 2010, registered with Respondent No.2-Kulgaon Police Station, Thane (Rural) for the offence punishable under Section 379 read with 34 of the Indian Penal Code, 1860 against Applicant No.2 and others on the report lodged by Respondent No.1. Respondent No.1 opposed the Application by his affidavit-in-reply.

2) Rule was issued dated 12th October, 2012.

3) The case in hand, to some extent, is similar to the case of *Priyanka Srivastava and anr. vs. State of U.P and Othrs*, reported in (2015) 6 SCC 287, wherein the Apex Court observed as to, “how some unprincipled and deviant litigants can cleverly design in a casual manner to knock at the doors of the Court and Police, as if, it is a test center where multifarious experiments can take place and such clever persons can ably abuse the process of the law at their own will and desire by painting a canvas of agony by assiduous assertions made in their case though the actual intention is to harass financial institutions, without any remote remorse, to create a mental pressure on it, for it would not like to be dragged to a Court of law to face civil/criminal cases and further pressurize in such a fashion so that such

financial institution would ultimately be constrained to accept 'one time settlement' with the fond hope that, the obstinate defaulters who had borrowed money from it would withdraw the cases instituted against them".

3) The facts which need to be stated are as under:

3.1) That, Applicant No.1 is a public limited Company, engaged in the business of finance. Applicant No.2 is the Regional Collection Manager of the Applicant No.1 and is *inter alia* delegated the function of collecting due amounts from defaulting customers and take necessary steps to safeguard the interest of Applicant No.1.

3.2) That, in June-July, 2008, Respondent No.1 obtained a loan of Rs.39,00,350/- from Applicant No.1 under a 'Loan-cum-Hypothecation-cum-Guarantee Agreement' dated 21st July, 2008 and purchased a construction equipment viz. an Excavator being L&T Komatsu PC-200, worth Rs.47,10,000/-, out of that loan amount. Besides that, Respondent No.1 also executed an 'Irrevocable Power of Attorney', thereby authorizing Applicant No.1 and/or its representatives to do such act in the manner specified therein. The charge created by way of Hypothecation of the said equipment in favour of the Applicant No.1 was duly endorsed in the Insurance Policy of the said equipment. Said security was enforceable on the occurrence of any of the defaults contemplated in the Loan Agreement. Respondent No.1 also

issued postdated cheques, as provided by the Loan Agreement, for the discharge of the Equated Monthly Installments (EMIs). By virtue of the terms and conditions contained in the Loan Agreement as well as irrevocable Power of Attorney, Applicant No.1 had, inter alia, a right to take possession of the equipment on occurrence of any of the events and defaults by Respondent No.1.

3.3) Respondent No.1 was obligated to repay the finance availed by him in 35 equated monthly installments (EMIs) of Rs.1,33,600/- each, covering a period of 3 years commencing from 3rd September, 2008 to 3rd August, 2011. However, from around October, 2008 itself, the cheques issued by Respondent No.1 were dishonored for the reasons “Funds Insufficient” and the above account of the Respondent No.1 was irregular. By November, 2009, there was an outstanding of about Rs.5,20,800/- against Respondent No.1. Therefore, Applicant No.1 issued a notice dated 27th November, 2009 and informed Respondent No.1 and the guarantor that Respondent No.1 failed to repay the loan amount as agreed, hence, the loan facility is recalled with immediate effect. Further, it called upon Respondent No.1 to give inspection of the equipment at certain place, as provided for in the Loan Agreement. The said notice also demanded the arrears of repayment of due under the Loan Agreement. Respondent No.1, however, failed and neglected to comply with the said Notice.

3.4) It is stated that despite the above said notice, Respondent No.1 continued in his defaults, therefore, Applicant No.1 issued similar notices repeatedly on 22nd December, 2009, 15th January, 2010, 22nd February, 2010, 23rd March, 2010 and 22nd April, 2010 (Exh. 'B' colly) and brought to the notice of Respondent No.1 that if he failed to produce the equipment for inspection at the given place, the Applicant would initiate necessary criminal proceedings or take repossession of the said equipment whenever the same is traced.

3.5) Meanwhile, Respondent No.1 filed Summary Civil Suit No.1703 of 2009 in the City Civil Court at Mumbai for perpetual injunction against Applicant No.1. But, the said Court held that it has no jurisdiction to try the Suit and directed the parties to approach the Arbitrator for redressal of their grievance, as per terms and conditions of the Loan Agreement. Respondent No.1 did not challenge that order before the Higher Court.

3.6) Thus, there being gross breach of the Loan Agreement, Applicant No.1 sought to repossess the said equipment and authorized M/s. Dev Associates to repossess the said equipment in accordance with the law. Accordingly, Applicant No.2 gave an Intimation Letter dated 20 May, 2010 to Respondent No.2 (Exh.-'F'). On the same day Applicant No.2 visited the premises where the equipment was stationed for the purposes of repossession and took its possession. An Inventory-List was prepared

containing all the details of the repossession (Exh.-'E'). The Inventory List was handed over to the representative of Respondent No.1. Then, on the same day Applicant No.2 informed to Respondent No.2 about taking the repossession of the equipment.(Exh.-B) But, thereafter, Respondent No.1 approached to Respondent No.2 and lodged a belated complaint (Exh.-'G'), alleging that by taking repossession of the equipment the Applicants have committed the theft, an offence under Section 379 r/w. 34 of the Indian Penal Code. Hence this Application.

4) Learned counsel for the Applicants vehemently submitted that, admittedly there was a validly executed Loan Agreement-cum-Contract between the parties for the rights and liabilities, *inter-se*. The non-compliance and breach of the terms and conditions in the Loan Agreement invite certain actions by Applicant No.1. The said actions have a sanctity under law. Therefore, on account of the default in repayment of the loan amount by way of the agreed EMIs, Applicant No.1, acting under the Loan Agreement bonafidely and legally, issued the notices (Exh.-'B' Colly.) and called upon Repsondent No.1 to give inspection of the equipment. Further, it is made clear that in the event of such default including failure to make the repayments due under the Loan Agreement, Applicant No.1 would repossess the equipment. Besides that, as a matter of prudent business practice Applicant No.1 issued pre and post repossession intimation to Respondent

No.2. In view of the above circumstances and more particularly, the right given under the Loan Agreement thereby authorizing Applicant No.1 to take repossession of the equipment, it cannot be said that there was illegality and dishonest intention on the part of the Applicants in taking repossession of the equipment. As such, registration of the impugned F.I.R. against the Applicants and its continuation is nothing but a clear misuse or abuse of the process of law. Hence, the said F.I.R. is liable to be quashed and set aside.

5) Per contra, learned APP submitted that there is no sufficient material to understand that Applicant No.1 served the necessary notice intending to take repossession of the equipment from Respondent No.1. It can be easily discernible from the loan Agreement that service of such notice was must prior to taking the repossession. Therefore, the action of taking the repossession was in contrast to the Loan Agreement, thus illegal. As such, the registration of the F.I.R. by Respondent No.2 at the instances of Respondent No.1 is legal. Therefore, this Application is liable be dismissed.

6) None appeared for Respondent No.1.

7) We have carefully considered the Application, the documents annexed and the rival submissions. In this context, the whole case put forward by Respondent No.1 is to be appreciated in view of the stringent terms and conditions incorporated in the 'Loan Agreement'.

8) Undisputedly, the parties had entered into the Loan Agreement before disbursing the loan. This fact is conceded in the F.I.R. It is also conceded that the loan amount was to be repaid @ Rs.1,33,000/- per month EMI within the stipulated 3 years. In this regard, following terms and conditions in the Loan Agreement are relevant.

12. SECURITY

12.1. Security by hypothecation of Asset:

(a) The Loan together with all interests, costs, fees and expenses and all other monies payable in terms of this Loan Agreement and stipulated herein or any other finance or monies due from time to time from the Borrower to the Lender in whatsoever capacity shall be secured by way of a first and exclusive charge by way of hypothecation of the Asset (equipment) in favour of the Lender and in the form and manner acceptable to the satisfaction of the Lender.
.....

(b) In pursuance of this Loan Agreement and for the consideration aforesaid Borrower does hereby hypothecate and charge in favour of the Lender the Asset(s) (the brief particulars whereof are as described in Serial No.3 respectively of Annexure '1' and / or as the case may of Annexure '1.1' hereto) including body, engine and all the accessories and equipment attached, annexed or fixed and/or to be attached, annexed or fixed or replaced from time to time to the Asset and all spares, tools pertaining to

the Asset, whether lying loosed or fixed to the Asset and where ever the same are now lying or stored whether in the premises of the Borrower or wherever situated and whether the same is 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 asset as well as assets by way of substitution, addition, replacement, conversion or otherwise.

*(c) The charge/hypothecation so created shall continue 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 a certificate discharging the security created pursuant to this Loan Agreement and stating that the Loan and the other amounts payable under this Loan Agreement have been discharged
..... . The Asset shall be in the custody of the Borrower in its capacity as bailees.*

*(d) The charge/hypothecation shall be deemed to be created immediately on the execution of this Loan Agreement or delivery of the Asset, as the case may be.
.....*

17. EVENTS OF DEFAULT:

17.1 At the option of the Lender, and without necessity of any demand upon or notice to the Obligors, all of which are hereby expressly waived by the Obligors and notwithstanding anything contained herein or in any

security documents executed by/to be executed by the Obligors in the Lender's favour pursuant to this Agreement, all amounts due and payable by the Obligors to the Lender under this Agreement and all of the obligations of the Obligors to the Lender hereunder, shall immediately become due and payable, irrespective of any agreed maturity upon the happening of any of the following events, hereinafter referred to as the 'Events of Default'.

- (a) the Obligors shall commit default in;*
- (i) Payment of Installments on the respective due date whether in respect of the Purchased Assets or, as the case may be, Body Building Assets.*
- (ii)..... (iii) (iv)..... (v).....*

18. CONSEQUENCES OF EVENT OF DEFAULT:

- (a) Further, the Lender shall be entitled to, at all times to, take possession, seize, recover, appoint a receiver/manager, remove the Asset from its place of standing, and also be entitled, on such terms as may be deemed fit by the Lender, without the intervention of Court or authority to sell the Asset by public auction or by private contract at the best available prices according to the prevailing market condition including as regards repossessed vehicles/assets, realise its claims in respect of the Loan, without being bound or being liable to loss/losses that the Obligors may suffer due to such action and without*

prejudice to the Lender's other rights and remedies as stated herein or otherwise in law entitled to.

22. NOTICE/COMMUNICATION:

22.2 Any notice or communication shall be deemed to have been sufficiently served if delivered by hand or addressed by Registered A.D. post at the address mentioned in Annexure '1' and/or, as the case may be, Annexure '1.1' or as contained in the records of the Lender (if notice is to Obligor) and at the address mentioned in the title (if notice is to the Lender) and such services shall be deemed to have been effected in case of delivery by hand on the date on which it is delivered and in case of delivery by registered A.D. post on the expiry of the 5th day from such posting.

23. ARBITRATION:

All disputes, differences and/or claims arising out of this Loan Agreement or as to the construction, meaning or effect hereof or as to the rights and liabilities of the parties hereunder shall be settled by arbitration to be held in Mumbai in accordance with the Arbitration and Conciliation Act, 1996, or any statutory amendments thereof and shall be referred to a person to be appointed by the Lender.

9) In view of the forgoing paras, the F.I.R assumes significance. As stated in the F.I.R., Respondent No.1 regularly paid the EMIs from July, 2008

to May, 2009. But two installments remained unpaid due to recession in the business. Therefore, representative of Applicant No.1 came to take repossession of the equipment. But for want of necessary Court Order, the said representative went away. Thereafter, Respondent No.1 filed the Civil Suit in August, 2009 and secured a 'Stay Order' thereby restraining the Applicants from taking repossession of the said equipment. Then, at the request of Respondent No.1, the said suit came to be transmitted to the Arbitrator. In that suit, Applicant No.1, had requested for full and final payment. But till date there is no such decision in this regard. Hence, Respondent No.1 did not pay the remaining EMIs. However, on 20th May, 2010, when the equipment was functioning in the crusher of Respondent No.1, at M/s. Goyal Industries, *Ambernath*, Officers of Applicant No.1, Applicant No.2 and others took repossession of the equipment, dishonestly. Thus, they committed the theft.

10) But no document or any Order of the Court (Arbitrator) is produced by Respondent No.1 to show that there was request by Applicant No.1 for full and final settlement of the loan amount. If it was so, Applicant No.1 would not have issued the notices (Exh-'B' colly.) and intimated the Police Station (Exh-'F') before taking the repossession of equipment. That apart, when Respondent No.1 himself was going through the financial crisis due to recession, it was not possible to him to make the full and final

payment at once. As such it is highly unreliable that Applicant No.1 had requested for the full and final payment but there was no Order of the Court (Arbitrator), hence, Respondent could not pay the EMIs. In fact, looking at the terms and conditions of the Loan Agreement, such request for full and final payment and Order of the Court/Arbitrator was not at all necessary. In the backdrop, Respondent No.1 was duty bound to pay the loan amount towards the defaulted EMIs and the EMI onwards. However, the EMIs were not paid till filing of the F.I.R. Therefore, Applicant No.1 swung in action to take repossession of the equipment.

11) It is important to note that, notwithstanding the 'Arbitration Clause', Respondent No.1 started litigating by filing the Suit to avoid repayment of the loan amount and obtained the interim stay to restraint taking possession of the equipment by the Applicants. But as expected, the Civil Court shown him the doors of the Arbitrator. Immediately thereafter, Applicant No.1 filed the Arbitration Claim No. 294 of 2009. Yet it was of no effect, as Respondent No.1 continued the defaults till date of the F.I.R. i.e. 25th August, 2010. From these circumstances it is evident that there was willful and deliberate default in payment of the EMIs by Respondent No.1.

12) Therefore, the charge created on the equipment by way of the hypothecation become active and in view of the other terms and conditions in the Loan Agreement, Applicant No.1 was entitled to take possession of the

equipment without interruption of the Court/Authority etc. Accordingly, Applicant No.1 issued the registered notices at (Exh.-'B' Colly.) which clearly show that on account of repeated defaults in the EMIs, Applicant No.1 repeatedly called upon Respondent No.1 to produce the equipment for its inspection at the given address failing which Applicant No.1 would take the possession of the said equipment whenever the same is traced.

13) In the reply filed in the arbitration claim on dated 25th March, 2010, Respondent No.1 admitted the receipt of one notice dated 14th October, 2009, issued by Applicant No.1. This notice is similar to the notices above (Exh.'B' colly). The address of Respondent No.1 in all these notices, in the Loan Agreement and in the F.I.R., is same. Moreover, Respondent No.1 has not come forward and contended that these notices were not at all received to him. This leads to a logical conclusion that all these notices were duly served upon Respondent No.1 before taking repossession of the equipment. But he was least concerned for repayment of the loan amount.

14) Here it may be noted that, possession of the equipment has been taken from the parking yard of M/s. Sai Baba Enterprises, *Reti Bunder, Kalwa*. As submitted by learned Counsel for the Applicants, after taking possession of the equipment, the Inventory List (Exh.-'E') was prepared and its copy was served along with the relevant documents to Shri Avdesh

Kumar, representative of the parking yard. Respondent No.1 has not come forward to explain as to how and when the equipment was removed from said crusher industry and brought at the said parking yard. There is nothing on record indicating that possession of the equipment was taken forcibly. From these circumstances it seem that as various EMIs were defaulted and it was followed by the notices (Exh.-'B' Colly.), Respondent No.1 himself produced the equipment at the parking yard as compliance of the notices (Exh.-'B' Colly.) and then allowed Applicant No.2 to take possession of the equipment on behalf of Applicant No.1. However, after 3 months of taking possession of the equipment, Respondent No.1 filed the belated F.I.R. concocting the story of theft by consulting with his lawyer. This Respondent No.1 did only to harass Applicant No.1, so that, either it may give up its legitimate monetary claim or agree to settle the loan dispute at the terms and conditions decided by Respondent No.1.

15) As observed and held in the case of *Iqbal alias Bala and Othrs .vs. State of U.P and Othrs.*, reported in 2023 SCC Online SC 949, whenever an Application under Section 482 of Cr.P.C. or a Petition under Article 226 of the Constitution seeks the F.I.R. or the criminal proceedings quashed essentially on the ground that such proceedings are manifestly frivolous or vexatious or instituted with the ulterior motive for wreaking vengeance, then in such circumstances the Court owes a duty to look into

the F.I.R. with care and a little more closely. Because once the complainant decides to proceed against the accused with an ulterior motive for wreaking personal vengeance, etc., then he would ensure that the FIR/complaint is very well drafted with all the necessary pleadings disclosing the necessary ingredients to constitute the alleged offence. The above referred observations of the Apex Court are clearly applicable to the case in hand.

16) 'Dishonest Intention' is an essential concomitant of the offence punishable under Section 379 of the IPC. In this regard it is material to note that before taking possession of the equipment, Applicant No.2 gave the written intimation (Exh.-'F') to the Police thereby disclosing his intention to take possession of the equipment on 20th May, 2010. Similar intimation (Exh.-'D') was given to the same Police after taking the possession. If indeed the Applicants wanted to take possession of the equipment dishonestly and without permission of Respondent No.1, they could have done so stealthily immediately after the first default in payment of the EMI and without giving the notices (Exh.-'B' cooly.) and the intimations (Exh.-'F & D'). As held in the case of *Priyanka Srivastava and Another vs. State of Uttar Pradesh and Ors*, (*Supra*), "when a citizen avails a loan from a financial institution, it is his obligation to pay back and not play truant or for that matter play possum".

17) In the backdrop, we are of the considered opinion that prima-

facie there is no material to hold that the act of taking possession of the equipment by the Applicants, is an offence punishable under Section 379 r/w. 34 of the Indian Penal Code. On the contrary, the said act was well within the terms and conditions stated in the Loan Agreement. To fortify this conclusion, we have relied upon the judgment in the case of *Magma Fincorp Limited vs. Rajesh Kumar Tiwari*, reported in (2020) 10 SCC 399, cited by learned Counsel for the Applicants. In this case it is laid down that, even a loan transaction, secured by right of seizure of a financed vehicle, confers licence to the financier to seize the vehicle. In the case in hand also the equipment was hypothecated under the Loan Agreement, hence it was a security for repayment of the loan amount. We have also considered the judgment in the case of *Anup Sarmah vs. Bhola Nath Sharma and Othrs*, reported in (2013) SCC 400, cited by learned Counsel for the Applicants. In this case it is held 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 later. Thus, in case the vehicle is seized by the financier, no criminal action can be taken against him as he is repossessing the goods owned by him.

18) In view of the above discussion, registration of the impugned FIR No. I-28 of 2010 with Kulgaon Police Station, Thane (Rural) for the offence under Section 379 r/w. 34 of the Indian Penal Code *qua* Applicant

No.2 is nothing but a clear case of abuse of the process of law by Respondent Nos.1. Therefore, the said F.I.R. is liable to be quashed and is accordingly, quashed and set aside.

19) The Application is allowed in the above terms. Rule is made absolute.

(SHYAM C. CHANDAK, J.)

(A.S. GADKARI, J.)