

(2008) 06 CAL CK 0005
In the Calcutta High Court
Case No : Writ Petition No. 19997 (W) of 2007

Bhupen Purakait		APPELLANT
	Vs	
State of West Bengal and Others		RESPONDENT

Date of Decision : 27-06-2008

Acts Referred:

Constitution of India, 1950 — Article 226
Criminal Procedure Code, 1973 (CrPC) — Section 190, 200
Penal Code, 1860 (IPC) — Section 379

Citation : (2008) 4 CHN 78

Hon'ble Judges : S.P. Talukdar, J

Bench : Single Bench

Advocate : Shyamal Chakraborty and Swarup Kr. Ghosh, for the Appellant;
Joydip Kar, Paritosh Sinha, Kishore Dutta, M. Bose and Amitava Mitra for
Respondent No. 5 and Pratima Pratibha Chowdhuri, for the Respondent

Final Decision : Dismissed

Judgement

S.P. Talukdar, J.—Grievances raised in the present writ application may briefly be stated as follows:

On being approached by the writ petitioner, the respondent No. S/ICICI Bank advanced loan for an amount of Rs. 6,68,000/- on 7.2.2007. The writ petitioner was made to sign some blank papers and printed forms for getting his loan duly processed and sanctioned. He purchased the vehicle being No. WB-41C-4398 at a price of Rs. 7, 72,349/-. He got discount of Rs. 30,000/- thus, requiring to pay an amount of Rs. 7,42,349/-. He made down payment of Rs. 74,349/- and the aforesaid amount of Rs. 6,68,000/- was granted as loan. The petitioner was duly paying instalments at the rate of Rs:15,126/- but due to severe ailment of his wife, there had been interruption. He was served with a demand notice dated 30th June, 2007 whereby respondent/ICICI Bank asked for payment of Rs. 11,786/- only. The vehicle was picked up from the route on 18th August, 2007 by hired muscleman of such respondent No. 5. The petitioner rushed to the office

of the respondent No. 5 on 7.9.2007. He took with him the demanded amount of Rs. 11,786/- as well as a sum of Rs. 15,126/- being the instalment amount for a month. The petitioner during his visit to the office of the respondent No. 5 on 7.9.2007 was threatened with dire consequences by the bank officials. He was asked to pay off the entire loan amount which according to them was Rs. 7,10,096/-. He was further told that unless the said amount was paid, the vehicle would be sold out.

2. The petitioner went to the local police station on 7.9.2007 but he was not entertained. He was, thus, left with no option but to send a written complaint by registered post with A/D addressed to I.C., Karaya Police Station and the copy of the same was sent to Deputy Commissioner of Police, Detective Department, Lalbazar, Calcutta. The police authority chose not to take any action. Such calculated indifferences on the part of the police authority and high-handedness of the respondent No. 5 brought the petitioner to the door of this Court for redressal of his grievances.

3. In response¹ to this, respondent No. 4 filed an affidavit-in-opposition thereby denying all the material allegations made by the petitioner. It was categorically claimed that the writ petitioner never approached such police authority for any assistance. It was further claimed that the dispute essentially is between the two private parties i.e., petitioner and the respondent No-5/ICICI Bank leaving very little for the said respondent to do.

4. Affidavit-in-opposition was also filed by respondent No. 5/Bank, inter alia, denying the material allegations. It was specifically claimed by respondent No. 5 that the writ petitioner took loan from the respondent/bank and failed to pay the instalments thereby compelling the respondent/bank to take recourse to legal action. The said respondent categorically claimed that the terms and conditions of the document which was executed by the writ petitioner was not complied with. In view of the failure to pay instalments and to comply with such terms and conditions, a demand notice was sent but there was no response. The respondent No. 5 did not admit that the vehicle in question was repossessed by any unlawful means or with the assistance of hired musclemen of the respondent/bank.

5. Dismissal of the writ petition was, thus, prayed for by the respondents.

6. It is not in dispute that the writ petitioner approached the respondent No. 5/bank for loan and it was in connection with purchase of a vehicle. Admittedly, such loan was granted in his favour. It is not in dispute that various documents including deed of hypothecation were prepared at the time of granting of such loan in favour of the writ petitioner. The writ petitioner was required to repay the loan amount together with interests thereon by instalments. As it appears that there had been failure on the part of the writ petitioner to pay instalments regularly. This could be for reasons beyond his control but the fact remains, there had been default in payment of such instalments. It is also not in dispute

that the demand notice dated 30.6.2007 was sent. It is not claimed that such notice received the attention it deserved. The petitioner alleged that when the vehicle in question was plying on the route, it was forcibly picked up by the hired musclemen of the respondent No. 5/Bank. Such taking of possession of the vehicle forcibly and the consequent inaction on the part of the police authority, is the crux of the controversy raised in the present application.

7. Mr. Chakraborty, appearing as learned Counsel for the writ petitioner, at the very outset submitted that the law of the land did not permit the respondent/bank to take law in its own hands. It could be that in case of failure to pay instalments, the bank could repossess the vehicle but such repossession cannot be made in an illegal manner and by applying force. The petitioner made serious allegations over wilful and conscious inaction on the part of the police authority.

8. In response to such stand as ventilated by Mr. Chakraborty on behalf of the writ petitioner, it was submitted by Mr. Joydip Kar on behalf of respondent No. 5/bank that the respondent/bank has the right to repossess the vehicle since admittedly the writ petitioner failed to pay the instalments.

9. Mr. Chakraborty, as learned Counsel for the writ petitioner, while referring to the consistent inaction on the part of the police authority submitted that such authority virtually acted in connivance with the respondent/bank.

10. On the other hand, Mr. Joydip Kar, on behalf of the respondent/bank, submitted that the writ petition does not deserve to be entertained since it is not in the true sense maintainable.

11. Learned Counsel for the State/respondent relying upon the written instruction dated 10th April, 2008 submitted that the police authorities could not go ahead with proper enquiry or investigation since there was no effective response from the writ petitioner.

12. Grievance that the writ petitioner was compelled to put his signature on various printed forms which were not even duly filled in cannot possibly be raised now and that too, within the scope of the present application. In fact, there is no controversy that on being approached by the writ petitioner, the respondent/bank granted loan of the amount of Rs. 6,68,000/- and this was in connection with his purchase of a vehicle. Attention of the Court was invited to the various Clauses of the deed of hypothecation, which was executed at the relevant time.

13. One of the sub-clauses is reproduced as follows:

Sub-clause (iii) of Clause (ii).- In the event of any breach or default by the Borrower in the performance of its obligations hereunder or any of the terms, covenants, obligations and conditions stipulated in the Loan Terms and/or the other Transaction Documents or in the event of the charge on the Assets having become enforceable for any reason whatsoever, the Bank or their nominees or authorized persons shall, in case such breach or default is not remedied by the Borrower to the satisfaction of the Bank, without any notice and without

assigning any reason and at the risk and expense of the Borrower and if necessary as attorney for and in the name of the Borrower, be entitled (without prejudice to any other rights and remedies) exercise such rights and remedies, including (but not limited to): (i) to enter into and upon the premises of the Borrower and/or any other person who then has possession of the Assets, (ii) to seize, recover, collect, withdraw, receive the Assets an/or any income, profits and benefits thereof without interruption or hindrance by the Borrower and/or by any person (s), (iii) to remove, and/or sell by public auction or by private contract, despatch or consign for realization or otherwise dispose of or deal with all or any part of the Assets and enforce, realize, settle, compromise and deal with any rights or claims relating thereto without being bound to exercise any of these powers or be liable for any losses in the exercise or non-exercise thereof, (iv) to be freed and discharged and well and sufficiently saved and kept harmless and indemnified of, from and against all former and other estates, titles, claims, demands, charges and encumbrances whatsoever, or to direct the Borrower and/or other concerned person to sell, assign or otherwise liquidate, any or all of the Assets, (v) to claim the proceeds of any such sale or liquidation, (vi) to retain all amounts and/or other proceeds received or receivable by the Bank in respect of the Assets and use them, in whole or part, towards repayment/payment of all amounts in respect of the Facilities, (vii) to direct the Borrower and/or other concerned person in writing to deliver the Assets to the Bank on a date and time indicated by the Bank, in which event the Borrower shall, as its own expense:

(a) deliver/forthwith cause the same to be delivered to the Bank;

(b) provide/cause to be provided such guards and maintenance services as shall be necessary to protect the same.

14. Notwithstanding any pending suit or other proceeding, the Borrower undertakes to give immediate possession of the Assets and all records/documents in relation thereto to the nominees or authorized persons of the Bank, on demand, and to transfer and to deliver to the Bank all relative bills, contracts, securities and documents and the Borrower hereby agrees to accept the Bank's account of sales and realizations as sufficient proof of amounts realized and relative expenses and to pay on demand any shortfall thereby shown. Provided, however, that the bank shall not in any way be liable or responsible for any loss, damage or depreciation that the relevant Assets may suffer or sustain on any account whatsoever whilst the same are in possession of the Bank or by reason of exercise or non-exercise of rights and remedies available to the Bank as aforesaid.

15. On behalf of the State/respondent, learned Counsel Ms. Chowdhuri referred to the decision in the case of Aleque Padamsee and Others Vs. Union of India (UOI) and Others, . This was in support of his contention that in case police does not take any action even on receipt of information regarding commission of cognizable offence, the complainant is given power u/s 190 read with Section 200 of the Code of Criminal Procedure to lay the complaint before the Magistrate.

Then the Magistrate is required to enquire into the complaint as provided in Chapter XV Cr.PC. She emphatically mentioned that even in such a case, the writ application is not maintainable.

16. Mr. Kar, as learned Counsel for the respondent/bank, while echoing the submission of learned Counsel for the State/respondent contended that the financier has right to resume possession even if the agreement does not contain a Clause of resumption of possession. Deriving inspiration from the decision in the case of K. A. Mathai alias Babu v. Kora Bibbikutty, (1996) 7 SCC 212 , it was submitted by Mr. Kar that a Clause of resumption of possession has to be read in the agreement. The said decision was in the context of an appeal in connection with a case of theft u/s 379 of IPC. The Apex Court held that in absence of mens rea, question of any conviction under the aforesaid Section could hardly arise. Mr. Kar, thereafter, referred to two decisions of the Division Bench of this Court i.e., the case of Arindam Basu and Ors. v. Atrial Kumar Bose and Ors. reported in 2006 CWN 826 and Bhanu Pratap Singh v. State of West Bengal and Ors. reported in 2007 (3) CHN 975. The learned Division Bench in the case of Bhanu Pratap (supra) held that "the lender is entitled to take possession of the vehicle, but while taking possession excess force should not be used and in the process of taking possession, no offence punishable under the law should be committed.

17. The Division Bench derived inspiration from the decision in the case of Hari Singh Vs. The State of U.P., . The Apex Court in the said case held that merely because the police had not taken any action on the basis of complaint lodged by a person alleging criminal offence, a writ application is not maintainable but appropriate remedy of the petitioner lies before the Criminal Court under the provisions of the Code of Criminal Procedure.

18. In course of submission reference was also made the decision in the case of The Managing Director, Orix Auto Finance (India) Ltd. Vs. Shri Jagminder Singh and Another, .

19. In the backdrop of facts and circumstances of the present case, it cannot be denied that repossession is quite permissible in terms of the higher purchase agreement. It is also not in dispute that such matters are purely contractual in nature and it is not for this Court to rewrite or to redraft the contract.

20. As observed in the case Orix Auto Finance (India) Ltd. (supra), interference is permissible only where such contracts are unconscionable or opposed to public policy. There was a word of caution that there cannot be any generalization that the mode of repossession is improper. It is to be decided on a case-to-case basis.

21. Referring to the aforesaid decisions, it was categorically submitted by learned Counsel for the respondent/Bank that the writ application in its present form does not deserve to be entertained since it is not maintainable.

22. It was contended that if the writ petitioner is aggrieved by any inaction on the part of the police authority, it was open for him to approach the learned

Court of Magistrate for necessary redress. Since the relevant provisions of the Code of Criminal Procedure can effectively deal with such grievances as sought to have been raised in the present application, this Writ Court is not ordinarily expected to entertain such application. It was further submitted that the parties to the transaction are under legal as well moral obligation to comply with the terms and conditions. The property in question being the vehicle cannot be said to be owned by the writ petitioner who in discharge of his obligation to repay the loan, could only succeed to pay a nominal amount. It was also brought to the notice of the Court that the matter was brought to the notice of the writ petitioner who admittedly received a notice in this regard. In this context, much was submitted on behalf of the respondent/bank in regard to the availability of an alternative remedy and the consequent justification for not entertaining the application.

23. In response to this challenge, learned Counsel for the petitioner referred to the decision in the case of Kavalappara Kottarathil Kochunni Moopil Nayar Vs. The State of Madras and Others, , wherein it was held that existence of adequate alternative remedy by itself is no bar to maintainability of a writ application. Learned Counsel for the petitioner further referred to the decision of the Division Bench in the case of The Committee for Protection of Democratic Rights and Anr. v. State of West Bengal and Ors. reported in 2001(1) CLJ 359.

24. The factual backdrop of the said case is significantly different from that of the present case. In fact, it was observed in the said decision that in order to do justice in the case and in order to maintain impartiality and fairness in the investigation and to uphold the Rule of Law, the enquiry was required to be conducted by an independent agency i.e., C.B.I. It was a Public Interest Litigation before this Court. But that by itself does not bring about any change in complexion so far the legal principle is concerned. It may be worth mentioning that learned Single Bench of this Court in the case Niranjana Chakraborty v. State of West Bengal and Ors. reported in 2003(1) CLJ 431, held that the Writ Court cannot be prevented, from passing any order compelling the police in carrying out orders of different Courts.

25. It may be mentioned that the Apex Court in the case of Manager, ICICI Bank Ltd. Vs. Prakash Kaur and Others, , held that the practice of hiring recovery agents, who are musclemen, needs to be discouraged. Banks should resort to procedure recognized by law to take possession of vehicles in cases where borrower has committed default instead of resorting to strong-arm tactics.

26. No doubt, the Division Bench of this Court took the said decision into consideration in the case of Bhanu Pratap Singh (supra) as referred to earlier. There is reference in it that the Supreme Court expressed its desire that law should be enacted for the purpose of resolving this type of dispute and a separate wing should be created wherein appropriate training should be given in accordance with the RBI guidelines, which would facilitate in its recovery process and also would provide more responsibilities to the persons so engaged. The said

decision, as was held by the Division Bench in that case, cannot be used as a precedent in view of a contrary decision of the Apex Court of the larger Bench.

27. Thus, it appears that learned Counsel for all the parties have sought to derive support and strength from the various decisions in support of their respective stand. Apart from dealing with the laws on precedent, it need be mentioned that it is one thing to have a right and it is another thing to exercise that right and in a right manner.

28. As citizens of India, we take it as our privilege to borrow ideas from our Father of the Nation, Mahatma Gandhi. Contrary to Machiavellian Code of Ethics that ends justify the means, our Father of the Nation taught us that ends and means are convertible and right means must be employed to achieve right ends.

29. Thus, nobody can dispute, in the factual backdrop of the present case, the right of the respondent/Bank to repossess the vehicle. But it is difficult to appreciate that the musclemen engaged by such bank can forcibly take possession of a vehicle without taking recourse to law, without approaching the Court of Magistrate for issuance of a search warrant or a Civil Court for enforcement of a civil right. Our laws do not permit any individual or any organization to take law in one's own hands. Thus, the practice of taking possession by force cannot be appreciated.

30. But as a Writ Court, this Court has its own constraints. It cannot get into the factual disputes. It is also settled position of law that the Court of Magistrate has ample power to take necessary action in case of any inaction on the part of the police authority.

31. Considering all these aspects, I do not think it just and proper to allow the writ application thereby directing the concerned police authority to recover the vehicle in question and return it to the writ petitioner.

32. It is also important to note that the vehicle in question has reportedly been already transferred in favour of a third party. Naturally, this imposes further restriction in exercise of power under Article 226 of the Constitution and that too, without having the said third party before the Court. Accordingly, the writ application being W.P. No. 19997 (W) of 2007 be dismissed.

33. Needless to add, in view of the discussion made above, it is open for the parties to approach the appropriate forum for necessary redressal of their grievances and in that event, any observation made hereinbefore will not prevent such forum from doing justice in accordance with law.

34. No order as to costs.

35. Xerox certified copy of this judgment, if applied for, be supplied to the parties upon due compliance with the legal formalities.