
(2018) 08 P&H CK 0440

In the Punjab And Haryana At Chandigarh

Case No : Criminal Miscellaneous Petition (M) No. 37982 Of 2015 (O&M)

K. Soundarrajan @ Rajan Kumar

APPELLANT

Vs

Kulwant Singh

RESPONDENT

Date of Decision : 18-08-2018

Acts Referred:

Indian Penal Code, 1860 — Section 34, 323, 382, 406, 506
Code Of Criminal Procedure, 1973 — Section 156(3), 210

Citation : (2018) 08 P&H CK 0440

Hon'ble Judges : Arvind Singh Sangwan, J

Bench : Single Bench

Advocate : A.S. Virk

Final Decision : Allowed

Judgement

Arvind Singh Sangwan, J

Prayer in this petition is for quashing of criminal complaint No.107-I of 12.04.2008 titled as Kulwant Singh Vs. Rajan Kumar and others (Annexure P-17) and the summoning order dated 12.06.2014 (Annexure P-23), vide which the petitioner was summoned to face the trial under Section 382 of the Indian Penal Code (for short 'IPC') read with Section 34 IPC.

It may be worth noticing here that the present petition was filed in the year 2015 and personal appearance of the petitioner was exempted vide order dated 05.11.2015 and thereafter, on 09.08.2017, the trial Court was directed to adjourn the case beyond the date fixed by this Court. The respondent has taken number of dates for filing written statement, however, till date, no reply has been filed. None appeared on the last date of hearing and even today, there is no representation on behalf of the respondent.

Brief facts of the case are that the petitioner, at the relevant time, was posted as Branch Head of IndusInd Bank Limited (hereinafter referred as 'Bank'), at Bathinda. The petitioner resigned from the Bank in the year 2013 and thereafter,

he rejoined the Bank w.e.f. 05.05.2014. The respondent-complainant (hereinafter referred as 'complainant') namely Kulwant Singh availed loan of Rs.5.00 lacs, being the 100% invoice value of Ashoka Leyland Stag ALPSV (Mini Bus) vide agreement No.JH001063H dated 14.11.2003, from Ashoka Leyland Finance Limited (now undertaken by the Bank). The loan amount was to be repaid in 34 monthly installments, starting from 14.12.2003 to 14.09.2006. The aforesaid vehicle (mini bus) was registered vide registration No.PB-05J-9543. Since the complainant failed to repay monthly installments, the Bank issued a notice for clearing the amount on 10.06.2005 and thereafter, the Bank issued notice of repossession, after giving due intimation to Senior Superintendent of Police, Ferozepur as well as SHO, Police Station Sadar Ferozepur (Annexures P-5 & P-6). The Bank, after repossessing the vehicle on 12.10.2006, again issued notices to the complainant to make payment of the defaulted amount (Annexures P-10 & P-11), however, the complainant failed to do so and rather he filed the complaint before the Illaqa Magistrate, Ferozepur under Section 156 (3) Cr.P.C. and on the direction issued by the Id. Chief Judicial Magistrate, Ferozepur, an FIR No.319 dated 17.11.2006 under Sections 382, 506, 323, 34 IPC was registered at Police Station Sadar Ferozepur against the petitioner and three other persons namely Bohar Singh, Ranjit Singh and Dimpny.

During investigation of the aforesaid FIR, the petitioner moved an application (Annexure P-13) on 24.11.2006, highlighting the details of the notices issued by the Bank before repossessing the vehicle and even thereafter, the notices issued for payment of the defaulted amount given to the complainant.

The petitioner was granted anticipatory bail during pendency of the aforesaid FIR. Later on, the police prepared a cancellation report in the said FIR and submitted in the office of Senior Superintendent of Police, Ferozepur, however, the same was not presented before the Illaqa Magistrate and is still pending. In the meantime, during the investigation, the police had taken possession of the vehicle from the Bank and the complainant, by moving an application before the concerned Illaqa Magistrate, had taken custody of the vehicle on superdari on 09.01.2007 and still is in possession of same and no further installment is paid.

Thereafter, the complainant has filed the impugned complaint (Annexure P-17) on 12.04.2008 with the allegations that the petitioner and aforesaid three employees of the Bank, while repossessing the vehicle (mini bus) on 12.10.2006, have forcibly taken Rs.50,000/- from the dashboard of the vehicle. In the preliminary evidence, the complainant himself appeared as CW1 and deposed on the lines of version given in the complaint. The trial Court vide impugned summoning order dated 12.06.2014 (Annexure P-23) summoned the petitioner to face the trial under Section 382/34 IPC.

Learned counsel for the petitioner has submitted that it is undisputed case that the vehicle in dispute was purchased by the complainant after availing 100% loan of Rs.5.00 lacs from the Bank at Bathinda, where the petitioner was working as Branch Manager. It is further submitted that in the complaint, the Bank has

not been impleaded as an accused, as the agreement was between complainant and the Bank and having failed to make the payment, the vehicle was repossessed by the Bank and in the absence of the Bank being an accused, having vicarious liability, the prosecution of the petitioner is bad in the eyes of law. Learned counsel has relied upon *Ashok Basak Vs. State of Maharashtra and others*, 2014 (4) RCR (CrL.) 789 and *M/s GHCL Employees Stock Option Trust Vs. M/s India Infoline Limited*, 2013 (2) RCR (CrL.) 519, where the Hon'ble Supreme Court has held that the complaint filed against an employee of the company, in the absence of company being an accused, is not maintainable.

Learned counsel for the petitioner has further submitted that at the relevant time, the petitioner was posted as Branch Head of the Bank at Bathinda, whereas possession of the vehicle was taken at Ferozepur by the agency of the Bank and therefore, the petitioner was not directly involved in repossessing the vehicle, as the allegations are that the loan was taken from the branch at Bathinda, where the petitioner was Branch Head.

Learned counsel for the petitioner has argued that on the same set of allegations, when the complainant got an FIR No.319 registered against the petitioner, which was duly enquired into and a cancellation report has already been submitted the office of SSP, Ferozepur, after coming to know about this fact, as it is so mentioned in the complaint as well as in the statement of the complainant itself, the trial Court was not justified in issuing the summoning order in view of provisions of Section 210 Cr.P.C., which reads as under:-

"210. Procedure to be followed when there is a complaint case and police investigation in respect of the same offence.

(1) When in a case instituted otherwise than on a police report (hereinafter referred to as a complaint case), it is made to appear to the Magistrate, during the course of the inquiry or trial held by him, that an investigation by the police is in progress in relation to the offence which is the subject- matter of the inquiry or trial held by him, the Magistrate shall stay the proceedings of such inquiry or trial and call for a report on the matter from the police officer conducting the investigation.

(2) If a report is made by the investigating police officer under section 173 and on such report cognizance of any offence is taken by the Magistrate against any person who is an accused in the complaint case, the Magistrate shall inquire into or try together the complaint case and the case arising out of the police report as if both the cases were instituted on a police report.

(3) If the police report does not relate to any accused in the complaint case or if the Magistrate does not take cognizance of any offence on the police report, he shall proceed with the inquiry or trial, which was stayed by him, in accordance with the provisions of this Code."

It is thus submitted that the trial Court, while summoning the petitioner, has not

followed the proper procedure.

Learned counsel for the petitioner has further argued that the complainant has already taken the vehicle on superdari on 09.01.2007, as per order of the Court and thereafter, he has not paid any amount to the Bank and as such, the complainant is enjoying possession of the vehicle and the petitioner is facing prosecution at the hands of the complainant, who is defaulter of the Bank. Counsel for the petitioner has further relied upon *Anup Sarmah Vs. Bhola Nath Sharma and others*, 2013 (1) RCR (Crl.) 62, wherein the Hon'ble Supreme Court has held as under: -

"We have considered the rival submissions raised by the learned counsel for the parties and perused the records.

In *Sardar Trilok Singh & Ors. v. Satya Deo Tripathi*, this Court examined the similar case wherein the truck had been taken in possession by the financier in terms of hire purchase agreement, as there was a default in making the payment of instalments. A criminal case had been lodged against the financier under Sections 395, 468, 465, 471, 120-B/34, I.P.C. The Court refused to exercise its power under Section 482, Cr.P.C., 1973 and did not quash the criminal proceedings on the ground that the financier had committed an offence. However, reversing the said judgment, this Court held that proceedings initiated were clearly an abuse of process of the Court. The dispute involved was purely of civil nature, even if the allegations made by the complainant were substantially correct. Under the hire purchase agreement, the financier had made the payment of huge money and he was in fact the owner of the vehicle. The terms and conditions incorporated in the agreement gave rise in case of dispute only to civil rights and in such a case, the Civil Court must decide as what was the meaning of those terms and conditions.

In *K.A. Mathai alias Babu & Anr. v. Kora Bibbikutty & Anr.*, this Court had taken a similar view holding that in case of default to make payment of instalments financier had a right to resume possession even if the hire purchase agreement does not contain a clause of resumption of possession for the reason that such a condition is to be read in the agreement. In such an eventuality, it cannot be held that the financier had committed an offence of theft and that too, with the requisite mens rea and requisite dishonest intention. The assertions of rights and obligations accruing to the parties under the hire purchase agreement wipes out any dishonest pretence in that regard from which it cannot be inferred that financier had resumed the possession of the vehicle with a guilty intention.

In *Charanjit Singh Chadha & Ors. v. Sudhir Mehra*, this Court held that recovery of possession of the vehicle by financier-owner as per terms of the hire purchase agreement, does not amount to a criminal offence. Such an agreement is an executory contract of sale conferring no right in rem on the hirer until the transfer of the property to him has been fulfilled and in case the default is committed by the hirer and possession of the vehicle is resumed by the financier,

it does not constitute any offence for the reason that such a case/dispute is required to be resolved on the basis of terms incorporated in the agreement. The Court elaborately dealt with the nature of the hire purchase agreement observing that in a case of mere contract of hiring, it is a contract of bailment which does not create a title in the bailee. However, there may be variations in the terms and conditions of the agreement as created between the parties and the rights of the parties have to be determined on the basis of the said agreement. The Court further held that in such a contract, element of bailment and element of sale are involved in the sense that it contemplates an eventual sale.

"8..... The element of sale fructifies when the option is exercised by the intending purchaser after fulfilling the terms of the agreement. When all the terms of the agreement are satisfied and option is exercised a sale takes place of the goods which till then had been hired.

While deciding the said case, this Court placed reliance upon its earlier judgments in *M/s. Damodar Valley Corporation v. The State of Bihar, Instalment Supply (Private) Ltd. & Anr. v. Union of India & Ors.*, (SCC p. 744 para 8), *K.L. Johar & Co. v. The Deputy Commercial Tax Officer, Coimbatore III*, and *Sundaram Finance Ltd. v. State of Kerala*.

In view of the above, the law can be summarised 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 latter. Thus, in case the vehicle is seized by the financier, no criminal action can be taken against him as he is re-possessing the goods owned by him.

If the case is examined in the light of the aforesaid settled legal proposition, we do not see any cogent reason to interfere with the impugned judgment and order. The petition lacks merit and, accordingly, dismissed."

Learned counsel has thus submitted that in the eventuality of repossessing the vehicle, it cannot be held that the financier/Bank has committed an offence of theft, as there was no mens rea or dishonest intention on the part of the financier.

Learned counsel for the petitioner has next argued that the complainant was duly served with the notice (Annexure P-4) and prior to repossessing the vehicle, even the intimation was sent to the SHO, Police Station Sadar Ferozepur as well as SSP, Ferozepur (Annexures P-5 & P-6) and even subsequent to repossessing the vehicle, the intimation was sent to the aforesaid officials vide notices (Annexures P-7 and P-8). It is further submitted that the impugned complaint has been filed after a long lapse of time, in the year 2008 when the complainant had already taken possession of the vehicle on superdari on 09.01.2007 as per order of the Court and FIR got registered by the complainant, was recommended to be cancelled as per order of the SSP, Ferozepur and therefore, prosecution of the petitioner is not maintainable.

Learned counsel for the petitioner has further relied upon The Managing Director, Orix Auto Finance (India) Ltd. Vs. Jagminder Singh and anr., 2006 (2) RCR (Criminal) 386, wherein the Hon'ble Supreme Court has held that when a vehicle is purchased under the hire purchase agreement, in case of default in the payment, the financier can repossess the vehicle as per the agreement and there is no legal impediment on such possession being taken. It is thus submitted that repossession of the vehicle was done in pursuance to the hire purchase agreement between the Bank and the complainant.

There is no representation on behalf of the respondent.

After hearing learned counsel for the petitioner, I find merit in the present petition, for the following reasons: -

(a) It is own case of the complainant that he has purchased the vehicle after obtaining 100% loan facility from the Bank and when the complainant failed to pay the monthly installments, the Bank, after issuing the notice of repossession (Annexure P-4), has taken possession of the vehicle and therefore, action of taking repossession of the vehicle was on behalf of the Bank and no individual liability can be fastened upon the petitioner in view of Ashok Basak's case (supra).

(b) It is also case of the complainant, as set up in the complaint that prior to filing of the complaint, he had registered an FIR No.319 with the similar set of allegations and thereafter, when the police has prepared the cancellation report, he filed the impugned complaint with the same allegations relating to the same incident. This fact was mentioned in the complaint and is also mentioned in the impugned summoning order that prior to filing of the complaint, FIR No.319 stands registered on the same set of allegations and therefore, the trial Court has not followed the proper procedure under Section 210 Cr.P.C. and has not sought the report of police.

(c) In view of judgment of the Hon'ble Supreme Court in Anup Sarmah's case (supra), as per agreement between the Bank and the complainant, complainant remained merely a trustee/bailee on behalf of the Bank and the ownership of the vehicle remained with the Bank, therefore, in the event of repossessing the vehicle, no criminal action can be taken against the petitioner.

(d) Even otherwise, no mens rea on the part of the petitioner to commit the offence is made out from the bare perusal of the complaint. There is no rebuttal that prior to repossessing the vehicle, the Bank had not issued a notice to the complainant to clear the outstanding installments and thereafter, after giving due information to the SHO and SSP, Ferozepur, the vehicle was repossessed. Even there is no rebuttal that subsequent to repossessing the vehicle, intimation was not given to the complainant to clear the installments and similar intimation was again given to SHO and SSP.

(e) Even otherwise, a perusal of the complaint shows that the petitioner was the

Branch Head of Bathinda Branch, from where the loan was sanctioned and he remained there as such, whereas the vehicle was repossessed by the Bank's branch at Ferozepur. As noticed above, the Bank was never arrayed as accused and therefore, on the face of it, there are no direct allegations against the present petitioner.

(f) A perusal of the FIR, the order dated 09.01.2007, vide which the complainant had taken possession of the vehicle back on superdari from the Court and subsequently filing of the impugned complaint, shows that the action of the complainant is otherwise malafide. Under the garb of the present criminal litigation, the complainant has not paid any amount of the defaulted installments. Since no reply has been filed, it is apparent that the complainant, since 2007, is enjoying possession of the vehicle and has filed a criminal complaint to deter the Bank from effecting recovery of the defaulted amount.

(g) From bare perusal of complaint and statement of complainant, prima facie no offence under Section 406 IPC is made out against the petitioner.

For the reasons stated above, present petition is allowed. Criminal complaint No.107-I of 12.04.2008 titled as Kulwant Singh Vs. Rajan Kumar and others (Annexure P-17) and the summoning order dated 12.06.2014 (Annexure P-23) are hereby quashed.