
(2004) 04 KL CK 0030

In the High Court Of Kerala

Case No : Criminal M.C. No. 8638 of 2001

Sudha Beevi

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 02-04-2004

Acts Referred:

Negotiable Instruments Act, 1881 (NI) — Section 138

Citation : (2004) 4 BC 71 : (2004) 2 CivCC 553 : (2004) CriLJ 3418 : (2004) 3 ILR (Ker) 312 : (2004) 2 KLT 746 : (2004) 3 RCR(Criminal) 618

Hon'ble Judges : A.K. Basheer, J

Bench : Single Bench

Advocate : Vinoy Varghese Kallumoottill, for the Appellant; M. Balagovindan and R. Jagadish Kumar and Deepthi, Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

A.K. Basheer, J.—Is the hirer of a motor vehicle liable to be prosecuted u/s 138 of the Negotiable Instruments Act after the vehicle has been repossessed by the owner and the hire purchase agreement has been terminated? This interesting question has arisen in the following facts and circumstances.

2. The petitioner entered into a "hire purchase agreement" with respondent No. 2 on June 28, 1997 for purchase of a motor vehicle on the basis of the terms and conditions incorporated in Annexure A8 agreement. The hirer (the petitioner) agreed to pay the "hire" to the owner (respondent No.2) in 48 equal monthly instalments. The hirer handed over post-dated cheques to the owner towards the instalments payable as hire. There is no dispute that the hirer committed default in repayment of the hire. According to the hirer, default occurred in view of the dispute about "additional financial charges" levied by the owner against the terms of the agreement.

3. Annexure A1 complaint was filed by respondent No.2 against the petitioner/hirer alleging that the cheque dated September 5, 1999 for a sum of Rs. 20034/-

issued by her in favour of respondent No.2/owner was dishonoured when it was presented for encashment. The complaint was filed after complying with all statutory formalities and within the statutory period of limitation.

4. It is contended by learned counsel for the petitioner that the proceedings initiated under Annexure A1 complaint is a sheer abuse of process. The cheque was presented for encashment after the vehicle was repossessed by the owner. By such re-possession the hire purchase agreement had been "determined ipso facto". Under such circumstances, the owner was not entitled to present any of the post dated cheques for encashment, since those cheques had become unenforceable. The cheques were not supported by any consideration and as such there was no legally enforceable debt or liability.

5. However, it is contended by learned counsel for respondent No. 2/complainant that as long as the hire remained unpaid, the owner is entitled to recover the liability by encashing the cheques issued by the hirer towards payment of the hire. The post dated cheques issued by the hirer are for the discharge of the liability which is a legally enforceable debt as provided u/s 138 of the Act. If the cheque is dishonoured, the penal consequences as provided under the Act would follow. Unless and until the debt or liability is discharged, the drawer of the cheque is liable to be prosecuted. Thus it is contended by the learned counsel that Annexure A1 complaint filed against the petitioner is not liable to be quashed invoking the power of this Court u/s 482 of the Code of Criminal Procedure.

6. Heard learned counsel for the petitioner, and respondent No. 2.

7. It is not disputed by the petitioner/accused that 48 post dated cheques were handed over by her to the complainant/owner at the time when the hire purchase agreement was executed. It is also admitted that the cheque which is the subject matter of Annexure A1 complaint is one of the above 48 cheques. The said cheque was dated September 5, 1999.

8. But it is contended by learned counsel that the vehicle was re-posessed by the complainant in May 1999. The factum of seizure is admitted by the complainant also, though there is some confusion about the exact date. According to the petitioner, the vehicle was seized on May 18, 1999, whereas the complainant would contend that it was taken into custody on May 24, 1999. Anyhow, the fact remains that the vehicle was in the custody of the owner long before the cheque in question was presented for encashment in September 1999. It is therefore contended by the petitioner that the owner having exercised his option available under the agreement by effecting seizure of the vehicle, it was not open to him to present any of the post dated cheques for encashment thereafter, unless and until the dispute was settled as provided under the terms of the hire purchase agreement.

9. In this context a brief reference to two of the covenants in Annexure A8 Hire purchase Agreement is necessary. Clause 8 which deals with the power of the

hirer "to terminate the hiring" reads thus:

"The hirer may at any time terminate the hiring by returning the vehicle to the owner (in the same order and condition in which it was delivered to the Hirer, fair wear and tear excepted) and at the Hirer's risk and expenses. The determination of the hiring as aforesaid shall not affect or prejudice the claim of the owner for arrears of hire payment due upto to the date of return of the vehicle or to sue for damages for breach of the agreement due to default in payment of instalments".

10. It is evident from a perusal of the above clause that the hirer can terminate the "hiring" by returning the vehicle to the owner. But the owner's right to claim arrears of hire charges which are due upto the date of return of the vehicle and to sue for damages for breach of the agreement is safeguarded.

11. The next clause deals with the rights of the owner if the hirer commits breach of any of the terms and conditions. Relevant portions of clause 9, which are extracted hereunder, may be noticed.

"9. In case the hirer shall during the continuation of the agreement, do or suffer any of the following act or thing viz., either

(a) fail to pay any of the hiring instalments within the stipulated time, whether demanded

or not; -

(b)

(c)

(d)

(e)

(f)

(g)

(h)

(i) break or fail to perform or observe any conditions on his part herein contained, then and on the occurrence of any such event the rights of the Hirer under the Agreement shall forthwith stand determined ipso facto without any notice to the Hirer and all the instalments previously paid by the Hirer shall be absolutely forfeited to the Owner who shall thereupon be entitled to enter any house or place where the said vehicle may then be, remove or retake possession of the same and to sue for the balance amount of the instalments due and specified under this Agreement and or damages for breach of the Agreement and for all the cost or retaking possession of the said vehicle and all costs occasioned by the Hirer's default for realisation of the amount due to them and the owner shall, also be entitled to sell the vehicle. If in the event of sale, there is any

deficiency in respect of the amount due to them, the owner will also be entitled to proceed against the Hirer and Guarantor jointly and severally for the recovery of such deficiency".

Relying on the above clause in the agreement it is contended by learned counsel for the petitioner that the remedy available to the owner on termination of the agreement is to sue for the balance amount of instalments and for damages, if any. All the rights and liabilities of the parties have to be worked out in terms of the above clause. It is also pointed out that once the agreement "stands determined ipso facto" and the vehicle is consequently re-possessed, the post dated cheques issued by the hirer towards instalment payment of hire cannot be encashed. The outstanding liability, if any, cannot be enforced by presenting those cheques for encashment. Is this contention tenable?

12. There is no dispute that the owner had accepted 48 post dated cheques from the petitioner. The contention of the petitioner is that these cheques were issued as security for payment of the monthly instalments. But it has to be noted that the cheques issued by the hirer were undoubtedly supported by consideration since it was undertaken by the hirer in the agreement that he would pay the hire on a stipulated date every month. The monthly remittance of the "hire" was, in effect, repayment of the loan/money advanced by the owner for purchase of the vehicle. Thus, it can be said that on the date of payment the cheque is supported by consideration. But the above position will prevail only as long as the agreement remains in force.

13. It is undoubtedly true that the owner/financier is entitled to enforce payment of monthly instalments as undertaken by the hirer. The post dated cheques issued by the hirer towards equated monthly hire can be presented for encashment every month. Those cheques represent payments towards discharge of the liability covered under the agreement between the parties. According to the petitioner 48 post dated cheques were handed over to the owner at the time when Annexure A8 agreement was executed. This assertion made by the petitioner has not been controverted by respondent No. 2/owner in the counter affidavit filed before this Court. The details of these cheques are given in the agreement itself. Each of these cheques had to be presented for encashment on an agreed date every month. The due date for payment of monthly hire charges as stipulated in Annexure A8 agreement was 5th of every month. Thus, every cheque issued by the petitioner albeit in advance can be said to be supported by consideration at least on the date when the hire charges would become due. But a reading of Clause 9 extracted above, will clearly show that the agreement gets "determined ipso facto" if and when the hirer commits default in payment of any of the instalments of hire. Various other contingencies which would result in determination of the agreement are also enumerated in the agreement with which we are not concerned in this case.

14. The short question is: Will the post dated cheques issued by the hirer at the time of execution of the agreement continue to remain as valid instruments

supported by consideration once the agreement gets "determined ipso facto"?

15. "Consideration" means a reasonable equivalent or other valuable benefit passed on by the promisor to the promisee or by the transferor to the transferee. *Km. Sonia Bhatia Vs. State of U.P. and Others*, . Consideration is sine qua non for any legally enforceable contract. Absence, inadequacy or failure of consideration in any contract are mixed questions of law and fact. Rules of evidence governing the law of contracts are well settled.

16. Section 43 of the Negotiable Instruments Act deals with a negotiable instrument made without consideration. Relevant portion of the section reads thus:

"43. Negotiable instruments made, etc. without consideration :-

A negotiable instrument made, drawn accepted, endorsed, or transferred without consideration, or for a consideration which fails, creates no obligation of payment between the parties to the transaction.....".

If a negotiable instrument is made or drawn without consideration, it creates no obligation of payment between the parties to the transaction. Similarly, if the consideration for which the instrument was made or drawn has failed subsequently, then also the instrument creates no obligation at all. Therefore, if the hire purchase agreement in this case between the owner and the hirer had stood determined by act of parties, the cheques which were accepted by the owner in advance for re-payment of the hire would become instruments without consideration; or in other words, they will be instruments for which consideration had failed. Then the remedy available to the owner is to realise the balance hire due from the hirer or to sue for damages for breach of the terms of the agreement.

17. In this context, learned counsel for the petitioner invites my attention to a decision reported in *Commercial Credit Corporation v. Mohammed Idris* AIR 1933 Lah 470. In the above decision it was held that when the owner re-possessed the hired vehicle for default in repayment of the hire charge, the remedy open to the owner was "to hold the hirer to his contract" and to take action if he commits default in repayment, of the balance amount as specified in the agreement. It was also held that Section 43 of the Negotiable Instruments Act would come into play in such cases and in the absence of consideration, the instrument would not be legally enforceable.

18. The above decision was rendered by the Lahore High Court in the following circumstances: The hirer had purchased a car from the appellant for a total consideration of Rs. 2100/- under a hire purchase agreement. A sum of Rs. 1,000/- was agreed to be paid as advance and the remaining sum of Rs. 1100/- was to be paid in instalments spread over a period of 8 months. The hirer paid Rs. 50/- in cash. A cheque for the balance sum of Rs. 950/- was handed over to the owner. But the drive by the hirer from, Delhi to Kathgodam was not so

uneventful. The radiator of the car developed major problems. It was noticed that there was a leak in the radiator. Contrary to the promise, the tyres were also in bad shape. Somehow, the hirer managed to reach his village despite the leak in the radiator and the poor condition of the tyres. Immediately after reaching his village, the hirer intimated his Bank to stop payment of the cheque. The matter was communicated to the owner. Though some negotiations were held between the parties, an amicable solution eluded them. Consequently, the car was seized by the owner. Thereafter a suit was filed by the owner for recovery of Rs. 950/-, which was the amount covered under the cheque issued by the hirer.

19. The suit was decreed by the trial court. But on appeal, the District Court reversed the decree and judgment. It was thus that the matter came up before the High Court. The learned Judge took the view that a decree for recovery of the amount covered under the cheque could not have been passed since the cheque in question was not supported by any consideration. Learned Judge held that Section 43 of the Act would apply in the facts and circumstances of the case. The owner had "put an end" to the contract by seizing the car which had the effect of absolving the defendant/ hirer from performing the contract. It was held that "the act of seizure by the owner did not amount to their exercise of any power given to them by the agreement but it amounted to an abrogation of the contract. The case therefore is not one of forfeiture, but it is of cancellation of the contract and the plaintiffs are not entitled to claim anything by virtue of the agreement. They are also not entitled to claim on the basis of the cheque because there was a total failure of consideration". Learned counsel for the petitioner submits that the dictum laid down in the above decision squarely applies in this case.

20. A perusal of various clauses in Annexure A8 agreement, in particular Clauses 8 and 9, would clearly show that the owner is not entitled to present any of the post dated cheques for encashment after termination of the agreement, especially after the vehicle was re-possessioned by him. Even though the post dated cheques issued by the hirer were supported by consideration at the time when they were issued, they had ceased to be so when the vehicle was re-possessioned. The consideration had failed subsequently. Therefore, I have no hesitation to hold that the cheque dated September 5, 1999 which was the subject matter of Annexure A1 complaint Was not Supported by any consideration, since the agreement had stood "determined ipso facto" and also since the owner had admittedly re-possessioned the vehicle even before the cheque was presented for encashment. Thus, there is no doubt that by effecting seizure of the vehicle, the owner had exercised the option available to him under the agreement. The post-dated cheques in the hands of the owner had become instruments for which consideration had failed. In that view of the matter, no offence punishable u/s 138 of the Act would be attracted, since it is trite that in order to attract the above penal provision, the "debt or other liability" must be a "legally enforceable debt or liability". If the negotiable instrument is not supported by consideration, there is no question of the provisions of Section 138 of the Act being attracted.

21. There is yet another reason to take the above view in this case. It is admitted by the complainant that the seized vehicle was sold later and the sale price was adjusted towards the liability payable by the hirer. It is on record that respondent No.2/complainant has already filed a suit before the High Court of Madras (Annexure A9) for recovery of a total sum of Rs. 1284503/- with interest and costs. The plaint claim includes the alleged balance amount payable under the agreement after adjusting the sale proceeds of the vehicle and all other expenses in connection with the transaction between the parties. Thus it is clear that the complainant/owner has already initiated steps to recover the liabilities from the hirer as provided under Clause 9 of the agreement. In that view of the matter, the criminal proceedings initiated against the petitioner cannot be sustained.

22. It is further pointed out by learned counsel for the petitioner that the attempt of the complainant is only to harass the petitioner. To achieve this objective, the complainant has abused the judicial process. Annexure AS is a true copy of the complaint filed by respondent No. 2/complainant against the petitioner under Sections 138 and 142 of the Negotiable Instruments Act before the XVIIIth Metropolitan Magistrate's Court at Saidapet, Chennai. This complaint relates to yet another cheque in connection with the very same transaction. The cheque which was dishonoured in Annexure A5 complaint bears No. 0573 and it is dated October 5, 1999. It was drawn on the very same Bank and for an identical sum of Rs. 20034/-. It is contended by learned counsel that the cheque number involved in Annexure 1 complaint in this case bears No. 0572 and it is dated September 5, 1999. The attempt of the learned counsel is to show that while the complaint involved in this case is filed at Thiruvananthapuram in Kerala, the next cheque for the succeeding month (October 1999) was used for filing a complaint before a Court in Chennai. Similarly, more than 10 cases had been filed by respondent No. 2 using the post dated cheques handed over by the petitioner at the time of execution of the hire purchase agreement. Learned counsel submits that this is sheer abuse of judicial process and such conduct may not be countenanced by this Court.

23. Learned counsel has further invited my attention to a decision of the Punjab and Haryana High Court reported in Tarun Bhargava Vs. State of Haryana and Another, . In the above decision it has been held that the clause in a hire purchase agreement permitting the financier to forfeit the payments made by the hirer in the event of default in payment of subsequent instalments is void. It has also been held that the financier (owner) is not entitled to take forcible possession of the vehicle if the hirer commits default in repayment of the hire.

24. I am not inclined to consider the above questions since they do not arise for consideration in this proceeding. It is true that the learned Judge of the Punjab and Haryana High Court had proceeded to construe the hire purchase agreement in the above case as a loan transaction on the strength of the dictum laid down by their Lordships of the Supreme Court in Sundaram Finance Ltd. Vs. State of

Kerala and Another, . In the above decision their Lordships held that the hire purchase agreement is nothing but a loan agreement. The question that arose for consideration in the case was whether the vehicles which were given on hire to the prospective purchasers by the financiers/dealers were exigible to tax under the Kerala General Sales Tax Act. By a majority decision, their Lordships held that the real intent behind the hire purchase agreement in the above case was only advancement of a loan.

25. The contention of the petitioner that Annexure A8 hire purchase agreement is in essence a loan agreement may have some relevance if we peruse its opening words which are extracted hereunder:

"Whereas the hirer has in terms of the proposal forms signed by him requested for finance for the purchase of a new vehicle the said proposal form is to be regarded as the basis of this contract".

It is pertinent to note that in the second schedule of the agreement the total value of the vehicle and the amount financed, the rate of hire purchase charge in percentage etc. are mentioned. The second schedule also contains the details of 48 instalments, viz., the date on which the hire money becomes due and the amount payable as hire, money every month etc. It is contended by learned counsel for the petitioner that applying the principles laid down in Sundaram Finance's case, the hire purchase agreement in this case (Annexure A8) can be construed only as a loan agreement. If any amount is payable by the loanee towards the liability, the remedy available is only to sue for the balance. Thus the post-dated cheques cannot be said to have been supported by any consideration and therefore there is no legally enforceable debt or liability to attract the provisions of Section 138 of the Negotiable Instruments Act. He submits that the above dictum is apposite to the facts and circumstances of this case.

26. But in the peculiar facts and circumstances of this case, I do not deem it necessary to consider the above contention. The Supreme Court had taken the view that the hire purchase agreement in Sundaram Finance Ltd. 's case (supra) was only a loan agreement in the context of exigibility of sales tax on vehicles for which finance was arranged in collaboration with dealers of those vehicles.

27. In my view, the facts revealed in this case would make it clear that the cheque was presented for encashment after the vehicle was seized by the complainant. The seizure was in May 1999 and the cheque was presented for encashment in September 1999. Thus even going by the terms in Annexure A8 agreement, it stood "determined ipsa facto" on default of the hirer to pay the instalments and also on seizure of the vehicle by the owner. The remedy available to the owner has been provided under Clause 9. It is also on record that the complainant/owner has taken recourse to that remedy as provided under the above clause. A suit has been filed before the High Court of Madras. Under such circumstances, I have no hesitation to hold that Annexure A1 complaint filed against the petitioner is not sustainable.

28. I am also inclined to agree with the contention that once the financier/owner under hire purchase agreement exercised the option of seizure of the vehicle, the post dated cheques obtained from the hirer cannot be presented for encashment after the seizure. The owner has to take recourse to other legal remedies for recovery of the balance amount. If and when the vehicle is sold subsequently, the owner can recover the balance amount after adjusting the sale proceeds of the vehicle. Of course, in the post seizure scenario, it may be open to the parties to agree upon a new schedule of payment or restructuring of the hire transaction.

29. Having regard to the entire facts and circumstances I am satisfied that the criminal proceeding pending against the petitioner in Annexure A1 is liable to be quashed. Accordingly Annexure A1 is quashed.

The Crl.M.C. is allowed.