

IN THE HIGH COURT AT CALCUTTA  
CONSTITUTIONAL WRIT JURISDICTION  
APPELLATE SIDE

**Present : The Hon'ble Justice Dipankar Datta**

W.P. No. 29203(W) of 2015

Omprakash Pandey

vs.

The State of West Bengal & ors.

For the petitioner : Mr. Kishore Datta, Sr. Advocate  
Mr. Sayan Sinha, Advocate

For the respondents : Mr. Tarak Karan, Advocate  
1 to 8

For the respondent no.9 : Mr. Pantu Deb Roy, Advocate  
Mr. Subrata Guha Biswas, Advocate  
Mr. Anit Kumar Das, Advocate

For the respondents : Mr. Hiranmoy Bhattacharya, Advocate  
10 and 11 Mr. Shibnath Bhattacharya, Advocate

Heard on : February 1, 2016

Judgment on : March 2, 2016

1. The short question that emerges for decision on this writ petition is whether the police authorities and the Regional Transport Officer, Howrah (hereafter the RTO), the respondent no.8, in not recovering the trucks bearing nos. WB-11B/1246 and WB-11B/1204 (hereafter the trucks) of the petitioner from the clutches of the respondents 10 and 11, acting on the petitioner's complaints dated December 1 and 4, 2015, have made themselves liable to be commanded by a Mandamus for such purpose.

2. The pleadings in the writ petition are basically to the effect that the hire-purchase agreement between the parties contains an arbitration clause and, therefore, the respondent no.10 (hereafter the company) could not have taken possession of the trucks without an award/order being passed by the arbitrator; also that, such forcible dispossession having been brought to the notice of the police as well as the RTO, it was their bounden duty to set things right by registering an F.I.R. against the respondents 10 and 11 and by restoring possession of the trucks in favour of the petitioner.
3. It is not in dispute that the trucks were purchased by the petitioner with finance provided by the company, of which the respondent no. 11 is a director. It is further not in dispute that the trucks were intercepted at Panagarh, District Burdwan and possession thereof was taken by the agents of the company.
4. In course of hearing, Mr. Bhattacharya, learned advocate for the respondents 10 and 11 placed copy of a 'vehicle loan cum hypothecation agreement' entered into by and between the respondent no.10 and the petitioner. He submitted that the petitioner having failed to pay the agreed equated monthly instalments towards clearance of the dues, the drastic action of re-possessing the trucks was necessitated. Reference was made by him to clause (E) titled 'EVENTS OF DEFAULT, RIGHTS AND REMEDIES THEREON' to support the action of re-possession.
5. Since Mr. Datta, learned senior advocate for the petitioner, has not denied commission of default in payment of equated monthly instalment, that the petitioner is a debtor of the company is also not in dispute.

6. The Bench had on an earlier occasion drawn the attention of Mr. Datta to a decision of the Supreme Court of not too distant origin, reported in (2013) 1 SCC 400 (*Anup Sarmah v. Bhola Nath Sharma*). It was held therein 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, and should there be a default resulting in the financier/financial institution seizing the vehicle, no criminal action could be taken against it since it repossesses goods owned by it.
7. Mr. Datta, however, has contended that there was no hire-purchase agreement between the parties and, therefore, the decision would have no application here. It has further been contended by him that the Supreme Court in various decisions has deprecated the practice of finance companies employing force to take possession of vehicles without taking recourse to law and in view thereof, it was not open to the company to act in the manner it had chosen to act. Referring to the decision of the Supreme Court reported in AIR 1966 SC 1178 (*Sundaram Finance Ltd. v. State of Kerala*), the distinction between a loan agreement and an agreement for sale was sought to be drawn. He also submitted that resuming possession of the trucks without following the procedure prescribed by law be illegal. The petitioners are entitled to an order as prayed for.
8. This Bench has heard learned advocates for the parties and considered the decisions having a bearing on the issue that has emerged for decision (noted at the beginning of this judgment).
9. It is unnecessary for this Bench to examine in depth the decision in *Sundaram Finance Ltd.* (*supra*), for the reasons that follow.

10. The petitioner lodged complaints with various police officers as well as the RTO containing similar contents. Paragraph 4 of the similarly worded complaints that he lodged, reads as follows:

“4. That in spite of acceptance of my payment in respect of dues, the said Paragon Finance Ltd. forcibly and most illegally snatched and/or taken out the said vehicle which was fully loaded by goods on 26.11.2015 near by Panagarh in the District of Burdwan by some unknown 10/12 persons with weapons namely Pipe Gun, Iron Rods etc. and at the material point of time my Driver namely Janak Deo Tiwari and Khalasi made protest regarding snatching such vehicle but they did not pay heed to the words of my Driver and Khalasi on the contrary they taken the said Truck along with some cash money from the said Truck and other some personal belonging to the said Driver and Khalasi and at the time of departure they gave a papers namely repossessed vehicle inventory list wherein and whereby it appears that such vehicles/truck was taken by the said finance company by hiring some Gonda/Mastan.”

11. Section 378, IPC defines theft. It reads as follows:

“Whoever, intending to take dishonestly any moveable property out of the possession of any person without that person’s consent, moves that property in order to such taking, is said to commit theft.”

Section 378 has five ‘Explanations’ of which the last reads as follows:

“Explanation 5.—The consent mentioned in the definition may be express or implied, and may be given either by the person in possession, or by any person having for that purpose authority either express or implied.”

12. Having regard to the aforesaid terms of section 378, the agreement between the private parties and the nature of complaint that was lodged by the petitioner, it is clear that the ingredients of theft are absent insofar as the present case is concerned and, therefore, registration of F.I.R. under section 379 IPC was not called for.

13. The Supreme Court in its decision reported in (1996) 7 SCC 212 [K. A. Mathai v. Kora Bibbikutty] upon considering that the financier’s agreement with the

complainant contained a clause of resumption of possession and in such circumstances the financier having taken possession of the bus from the complainant with the aid of the appellants, observed that the appellants cannot in any way be said to have committed the offence of theft and that too with the requisite mens rea and requisite dishonest intention; further, that the assertion of rights and obligations, accruing to the appellants under the aforesaid two agreements, wiped out any dishonest pretence in that regard from which it could be inferred that they had done so with a guilty intention. Finally it was observed that the appellants had nothing to do in the case since no offence was apparently committed.

14. At this stage, it would be useful to refer to two Division Bench decisions of this Court, which are binding on this Bench i.e. AIR 2006 Calcutta 295 (Arindam Basu & ors v. Amal Kumar Bose & ors.), 2007 (3) CHN 975 (Bhanu Pratap Singh v. State of West Bengal).
15. In the decision in Arindam Basu (supra), it was held that if the owner of a property himself by agreement concedes to give right to the financier to take possession of a moveable property in case of default in payment of instalments and in exercise of that right possession is taken by the financier without committing any offence, the hirer cannot take the shelter of Article 300A of the Constitution and complain that he was deprived of his property without the authority of law.
16. Much the same view was expressed in Bhanu Pratap Singh (supra). The Court proceeded to observe in paragraph 14 that should there be admitted default in the matter of making payment of instalments as per agreement and if there is a

specific stipulation that in the case of default the lender shall have the right to take possession of the vehicle, no prayer could be made before the High Court for a direction upon the police authority to return the vehicle from the lender who has resumed possession of the vehicle for breach of terms of the agreement. Relying on the decision of the Supreme Court reported in 2006(2) SCC 598 [Managing Director, Orix Auto Finance (India) Ltd. v Jagmander Singh], it was held that if the agreements permitted the financier to take possession of the financed vehicle, there is no legal impediment on such possession being taken.

17. In view of the above binding decisions of this Court, and particularly having regard to the finding that the complaint does not disclose any cognizable offence, this writ petition alleging police inaction is absolutely without merit, and accordingly, stands dismissed. There shall be no order as to costs.

Urgent photostat certified copy of this judgment and order, if applied, may be furnished to the applicant at an early date.

(DIPANKAR DATTA, J.)