CALCUTTA HIGH COURT

Rajendra Kumar Ruia

Vs

State of West Bengal

(N.C. Talukdar, J.)

27.09.1967

ORDER

N.C. Talukdar, J.

1. This revisional application is under Sections 439 and 561-A of the Code of Criminal Procedure against an order passed by Shri R. Roy Chowdhury, Magistrate, First Class, Alipore, 24 Parganas, on 1.8.66 in case No. G.R. 2478 of 1965/T.R. No. 28 of 1966 framing a charge against the petitioner under Section 411, I.P.C.

2. The facts leading on to the present rule may be put in a short compass. The present petitioner, Rajendra Kumar Ruia, is the partner of Messrs. Shri Annapurna Credit Co., which is a firm of financiers. Through an agreement dated the 7th July, 1961, purporting to be a hire-purchase agreement, a copy whereof has been marked as Annexure "A" to the supplementary affidavit filed on behalf of the petitioner, entered into between the complainant Sudhindra Kumar Sengupta as the hirer on one part and Messrs. Shri Annapurna Credit Co. as the owners on the other part, a taxi cab being Taxi Cab No. WBT 1298, was purchased by the above-mentioned complainant undertaking to pay the price thereof by regular monthly instalments of Rs. 690 with an initial payment of Rs. 710.50p. in the first month. On the 27th April 1965 a written complaint was lodged at the Jadavpur Police Station by the complainant to the effect that he is the owner of the Taxi Cab No. WBT 1298 and Haradhan Das, the co-accused, is the driver; that on 26.4.65 the said Haradhan took away the Taxi upon signing the Garage Register for plying the same and return it at night but he failed to do so and that on 27.4.65 when the complainant went to his place and enquired about the taxi and the money, the said accused Haradhan Das asked the complainant to get out of his house. After investigation a chargesheet was submitted under Section 406, I.P.C., against the said driver and under Section 411, I.P.C., against the accused petitioner.

3. In the meantime Messrs. Shri Annapurna Credit Co., the aforesaid financier firm, as the

plaintiff, filed a suit in the Original Side of the High Court, being Commercial Cause Suit No. 708 of 1965, against the present complainant as well as the guarantor, as parties defendants, for declaration of title and possession, appointment of a Receiver, Accounts and decree for the balance of unpaid hire-purchase sum of Rs. 5,500 and for costs, etc. In the said suit a Receiver was appointed by this Hon'ble Court and he was directed to take possession of the vehicle and to sell the same. Ultimately, a decree on compromise was passed in the said suit on 5.8.66 for a sum of Rs. 5,500, a copy whereof has been marked as Annexure 'B' to the supplementary affidavit filed on behalf of the accused-petitioner.

4. Thereafter, the case proceeded before the learned trying Magistrate and on 1.8.66 a charge under Section 406, I.P.C., was framed against the co-accused Haradhan Das and one under Section 411, I.P.C., was framed against the present petitioner whereto the accused persons pleaded not guilty. An application was filed on behalf of the present petitioner on the 4th May, 1966, praying that the trial of the present case be stayed till the disposal of the suit instituted in the Original Side of the High Court over the same subject-matter. But the learned trying Magistrate by his order dated 1.8.66 rejected the said prayer. Against that order the present Rule was issued for quashing the charge.

5. Mr. Sudhangsu Sekhar Mukherjee, Advocate (with Mr. Soumendranath Mukherjee, Advocate) appearing on behalf of the accused-petitioner, contended in the first place that the present petitioner who is the partner of a financier firm styled as Messrs. Shri Annapurna Credit Co., is the owner o£ the vehicle under the hire-purchase agreement duly executed between the parties on 7.7.61 and as such there is no question of his having committed any offence under Section 411, I.P.C., with regard to the said property. Moreover, there have been admittedly defaults in payment on the part of the complainant and in terms of condition 5 of the hire-purchase agreement the accused-petitioner as the owner may terminate the contract of hire-purchase and retake and recover the possession of the vehicle forthwith. Mr. Mukherjee has contended in the second place that even if under the hire-purchase agreement, the petitioner be not deemed to be the owner of the vehicle, there was still no dishonesty on his part to bring the case within the ambit of Section 411, I.P.C. The third and last contention advanced by Mr. Mukherjee is that in any event in view of the High Court decree passed, in terms of the settlement arrived at between the present petitioner and the complainant, in Commercial Cause Suit No. 708 of 1965, declaring inter alia that the present petitioner is the owner of the vehicle in question and that there will be a decree for Rs. 5,500 in his favour and against the present complainant, the continuance of the present criminal proceedings will be an abuse of the process of the Court. Mr. Dwijendra Nath Ghosh, Advocate, appearing on behalf of the State, submitted in the first instance that the prayer for quashing at this stage was premature and that there are procedural defects standing in the way of the said prayer for quashing because not only no prayer for quashing was made before the

learned trying Magistrate but also the hire-purchase agreement, which is the basis of the present Rule, was not even filed before the said trying Magistrate. Mr. Ghosh argued in the second place that the agreement concerned is a contract for sale and not of hire and, therefore, the so-called hirer in fact remains the owner; and that the charge under Section 411, I.P.C., being not compoundable, the subsequent compromise decree between the parties cannot cure the offence committed earlier. He finally submitted that in any event the entire proceedings should not be quashed because the case of the driver, namely of the co-accused, Haradhan Das, stands on an entirely different footing and the latter cannot get the benefit of the absence of any 'meus rea'.

6. I will now proceed to consider the respective submissions of the learned advocates appearing on either side. The first contention raised by Mr. Sudhangsu Sekhar Mukherjee, Advocate, is of some importance and relates to the interpretation of the terms and conditions of a hire-purchase agreement and their effect upon the parties thereto and their claims. For a proper determination of the proposition put forward by Mr. Mukherjee that under the terms and conditions of the hire-purchase agreement in this case the accused-petitioner is the owner, I will now examine the terms and conditions of the said hire-purchase agreement which has been marked as Annexure 'A' to the supplementary affidavit filed on behalf of the petitioner. Clauses I to IV of the said agreement read as follows:

Clause I. - The owners being the owners of the motor vehicle with fittings, tools and accessories and additions, more particularly described in the Schedule hereto and hereinafter collectively called "the vehicle" agree to let and the Hirer agrees to hire the vehicle from the date hereof subject to the terms and conditions herein contained and hereto annexed and which shall be taken and read as part of this Agreement.

Clause II. - On the execution of the Agreement, the Hirer shall pay to the owners in cash a sum of Rupee one in consideration of option to purchase given to the Hirer by Clause IV hereof and the said sum shall become the absolute property of the owners.

Clause III. - The Hirer shall pay to the owners on the execution of this Agreement the sum of Rs. 526.34 as an initial payment by way of hire which shall become the absolute property of the owners and will punctually pay to the owners at their address for the time being at Calcutta and without previous demand the sum mentioned in the margin hereof by way of rent, for the hire of vehicle the first payment to be made on the 5th day of Sept. 1961 and each subsequent payment on or before the 5th day of every succeeding calendar month unless the Hirer shall have terminated this Agreement as hereinafter provided.

Clause IV. - If the Hirer shall duly perform and observe all the terms and conditions contained in this Agreement to be performed and observed on his part and shall in manner aforesaid pay to

the owners monthly sums by way of rent amounting together with the said sum of Rs. 526.34 so paid on the execution of the Agreement as aforesaid, to the sum of Rs. 17,106.84 and shall also pay to the owners all other sums of money which may become payable to them by the Hirer under this Agreement, the hiring shall come to an end and the vehicle shall at the option of the Hirer become his property and the owners will assign and make over all their right, title and interest in the name of the Hirer. But until such payments as aforesaid have been made, the vehicle shall remain the absolute property of the owners.

I need not concern myself with other clauses. I would now refer to the conditions Nos. 3, 4, 5 and 6 of the said agreement. The said conditions read as follows:

3. The hirer agrees to pay to the owners interest at the rate of one per cent per mensem on the amount of any sums overdue, including any sum of taxes, fees, repairs and suppliers which may be due from Hirer to the Owners in respect of the vehicle. But the provisions shall not in any way affect or prejudice the right of the Owners as provided herein to recover possession of vehicle and to determine this agreement on default of payment of any of the monthly hire payment. It is further agreed that the payment of hire monies and other sums due under this agreement is not subject to suspension or delay by reason of the vehicle requiring or undergoing repairs or being suspended by any traffic authority or by reason or delay in tion (sic) of the vehicle or its non-registration or by reason of delay of non-receipt of the permit by the Hirer or of the pending register of an insurance claim or by any causes or reasons whatsoever.

4. The Hirer acknowledges that he holds the vehicle as a bailee of the owners and shall not have any proprietary right or interest as purchaser therein until he shall have exercised his option of purchase as therein provided and shall have paid the whole amount due under this agreement or under any term thereof.

5. The owners may terminate with or without notice the contract of hiring and forthwith retake and recover possession of the vehicle:

(a) If any monthly hire or part thereof is in arrear and left unpaid for a period of seven days after the date fixed for its payment or any reason whatsoever and particularly notwithstanding any claim which the Hirer may have in respect of insurance hereinafter mentioned.

(b) If the hirer commits or suffers any breach of the conditions and obligations herein stipulated to be observed and performed by him or does anything or suffers any act to be done which in the opinion of the owners may prejudice their title to the vehicle.

(c) If the Hirer omits to inform the owner within 48 hours thereafter (in case the vehicle is insured), of any accident which causes ?either damage to the vehicle, bodily injury to any third

party or damage to any other vehicle or property.

(d) If the Hirer dies, becomes insolvent or has a receiving order made against him or allows the vehicle to be seized in distress or execution or under any other process of law.

Any such termination shall be without prejudice to the claims the Owners may have in respect of any terms or conditions of this agreement and it is further agreed that if the hiring is terminated by owners or by the hirer in manner herein provided all hire (and damages for the breach of this agreement) up to the date of such termination shall be paid by the Hirer to the Owners and no payment, credit or allowance in respect of payment previously made shall be made or allowed to the Hirer.

6. The Owners shall have the right to dispose of the vehicle after repossession in any manner they think fit by a private sale or re-hire without any notice to the Hirer and at any price that the owners may think fit.

(a) This agreement shall be treated as revived in case the vehicle after repossession by the owners for any breach committed in respect of this agreement by the hirer, is returned to the hirer at his request in writing.

The point that arises for consideration is whether such a hire-purchase agreement amounts to a contract of hire or a contract of sale. Where the owner lets out chattel on hire and undertakes to sell it to the hirer on his making a certain number of payments, there will be no contract of sale until the hirer has made a requisite number of payments and he remains a bailee until then. But some other hire-purchase agreements are in reality a contract of purchase, the price to be paid by instalments, and in these cases the contract is a contract of sale, and not of hiring. Therefore, in each case, it must depend on the terms of the contract. The word 'sale' has been defined by Benjamin on Sale, 8th Edn (1950), p. 2 as 'a transfer of the absolute or general property in a thing for a price in money'. The same connotation has been reiterated by Lord Denning, M.R. in C.E.B. Draper and Son Ltd. v. Edward Turner and Son Ltd. reported in (1965) 1 QB 424. In interpreting Section 4 of the Sale of Goods Act, Pollock and Mulla have underlined the distinction between a contract of hire and a contract ?of sale. With the advancement of modern amenities and the development in commercial life, the form known as the hire-purchase agreement has come to occupy a prominent part in present-day society. As Simonds J. observed in the case of Transport and General Credit Corporation Ltd. v. Morgan (1939) 2 All ER 17, this is a "form of mercantile social service". What is true of England is also true to a lesser degree of India, particularly in the big cities where society is being patterned on Western lines. It will be pertinent in this connection to note that due to the new impact, hire-purchase agreement has also undergone some evolution. In the first stage such hire-purchase used to take place between the

owner or the dealer and the customers but in most cases the owner or the dealer had not always enough financial solvency to wait till such time as the instalments were paid. This led to the next stage of evolution whereunder a financier intervened between the dealer and the customer - the financier purchasing goods from the dealer and then entering into an agreement with, the customer, converting this transaction into merely a financial transaction. In Goode's 'Hire-purchase Law and Practice', this has been described as a 'stocking agreement'. Doubts were expressed as to whether, what has become known as 'stocking agreement', is true in the case of hire-purchase agreement. The 'stocking agreement' was defined as an agreement whereby a dealer procures a finance company to purchase goods to the type in which he deals and let them out to him on hire-purchase so that he can maintain stock on his premises to attract custom. Originally the manufacturer or the supplier invoices the goods to the dealer who would sell them to the finance company and hire them back under a short-term hire-purchase agreement. The dealer would then settle the supplier's account with the advance received from the finance company and subsequently with the finance company's express or implied approval, sell the hired stock to his customers direct, utilising the proceeds of sale, to discharge his liability under the hire-purchase agreement. Later on the finance companies were given greater protection. Under the new procedure the goods though delivered to the dealer, are invoiced by the suppliers direct to the finance company which then procures the dealer's entry into a short-term hire-purchase agreement and thereupon settles the supplier's account itself instead of making payment to the dealer to enable him to pay the supplier. As has been observed by R.M. Goode in his 'Hire-purchase Law and Practice', "from a legal viewpoint the position of the finance company under a stocking agreement even in the modified form is by no means free from difficulty".

7. In a recent case, namely, in the case of Sundaram Finance Ltd. v. State of Kerala , their Lordships of the Supreme Court considered the true character and effect of hire-purchase agreements in their several variations. There, a financing company carrying on the business of financing motor vehicle on the security of those vehicles was proceeded against for realisation of sales tax. The hire-purchase agreement which their Lordships had to consider, contained clauses and conditions similar to those in the agreement which I have to consider. Their Lordships after examining the principles laid down in several English decisions, namely, In re Watson: Ex parte Official Receiver in Bankruptcy (1890) 25 QBD 27; Maas v. Pepper (1905) AC 102; Polsky v. S. and A. Services (1951) 1 All ER 185 (195), made observations relating to the true nature of such transactions. Their Lordships held in that case that the appellants there were carrying on the business of financiers and not dealing in any motor vehicles. Their Lordships held inter alia that 'their right to seize the vehicle is merely a licence to ensure compliance with the terms of the hire-purchase agreement and the customer remains qua the world at largo the owner, and remains in possession and on condition of performing the covenants has the right to continue to remain in possession.... They were accordingly of the view that "the intention of the appellant in obtaining

the hire-purchase and the allied agreements was to secure the return of loans advanced to their customers and no real sale of the vehicle was intended by the customers to the appellants. The transactions were merely financing transactions. I hold that the present transaction forming the subject-matter of the hire-purchase agreement does not differ from the same which was the subject-matter of consideration by their Lordships of the Supreme Court, and is merely a financing transaction.

8. In this connection I may further refer to a recent decision of this High Court in the case of Shyamsundar Bubna v. Manindranath Ghose wherein Mr. justice Binayaknath Banerjee has discussed this point under consideration thread-bare. After traversing the different decisions, on this point, both English and Indian, his Lordship has ultimately held in that case, where also the hire-purchase agreement is similar to that in the instant case, that "The plaintiff was never the owner of the car and had nothing to hire out. I am accordingly of the view that the real intention of the plaintiff in obtaining the hire-purchase agreement was to secure the return of the loan advanced to defendant No. 1 and the transaction was merely a financing transaction. Defendant No. 1 is and always has been the owner of the car by right of purchase from Auto Distributors Ltd., the dealers even though he purchased the car with borrowed money. He had no further right to acquire from the plaintiff and is only liable to pay the debt due to the plaintiff firm. The plaintiff's right under the agreement to take possession of the vehicle need be treated as merely a licence to ensure compliance of the terms as to the repayment under the agreement. In pith and substance the transaction is merely a financing transaction and should not be treated as hire-purchase agreement".

9. I agree with the said views referred to above and hold accordingly that the accused-petitioner cannot be deemed to be the owner of the vehicle in question upon a proper interpretation of the terms and conditions of the hire-purchase agreement, which is really financing transaction and as such I negative the first contention raised by Mr. Mukherjee,.

10. The second contention raised by Mr. Mukherjee has got considerable force behind it. He has urged that even if the accused-petitioner be not deemed to be the owner of the vehicle, he cannot be accused of any dishonesty which is the gravamen of an offence under Section 411 I.P.C. The accused-petitioner, according to him, has merely proceeded to exercise his rights under the hire-purchase agreement duly entered into between the parties, and as such, in any event, there cannot be any mens rea. The case of the 'owner' under the hire-purchase agreement undoubtedly differs from that of the accused driver Haradhan Das. Unless and until there is dishonest receipt or retention of any stolen property, knowing or having reasons to believe the same to be stolen property, the penal provisions of Section 411 I.P.C. would not be attracted. In this connection, Mr. Mukherjee has referred to several cases. He has referred in the first instance to the case oil

Mohammed Abdul Khoyer v. Asgar Khan reported in 58 Cal LJ 434. Sir C.C. Ghosh, acting Chief Justice and Mr. Justice S.K. Ghosh have held therein that where under a hire-purchase agreement entered into between M/S Singer and Co. and the complainant in respect of a sewing machine it was provided by one of its clauses that the company or their employees would be entitled to seize and remove the machine or its parts on the complaint of defaulting in payment of monthly rents agreed upon and where the complainant who was in arrears in respect of the rents for several mouths made the payment on a certain date or rent for one of those months but the accused persons who were the employees of the company overlooking that payment removed parts or the complainant's machine, there was no dishonest intention on the part of the accused to constitute an offence of theft. Mr. Mukherjee next referred to the case of Rama Aiyar v. S.P. Dasgupta, where Mr. Justice Pearson and Mr. Justice Mallick held that where a motor car was hired tinder the hire-purchase system by the opposite party who made various payments in fulfilment of his contract but some dispute arose between the parties when the petitioners managed to take forcible possession of the car from the hirer and removed the same to their own premises and thereafter when the hirer filed a complaint asking for a search' warrant for the car and the Magistrate dismissed the said complaint under Section 203 Cr.P.C., such an order was properly made. Their lordships further held that in such a case 'the determination' of the rights of the parties might be properly sought before the civil court, the dispute being one of a civil nature. The next case relied on by Mr. Mukherjee is the case of Hrishkesh Ghose, v. R.P. Michael . Mr. Justice Bartlcy and Mr. Justice Khundkar held that 'the Court will not permit the use of the processes of the criminal court in order to enforce a purely civil right'. Their Lordships relied on the decision , Brojendra Chandra v. K.S. Sama and held further that where under the hire-purchase agreement a purchaser makes default in payment of instalments and refuses to pay and return the bus and removes it, the case is one of a breach of hire-purchase agreement and is not a criminal matter at all. The next case Mr. Mukherjee relied on is the case of Kalipada Mondal v. Kalikinkar Chatterjee . In that case the complainant sold a gramophone to the accused on instalment system but on his not paying the instalments the complainant asked for the machine. Though it was not immediately produced, it had not been sold and was produced in court. The accused was convicted under Section 406 I.P.C. Mr. Justice M.C. Ghosh held that it was a matter of civil dispute and the mere nonpayment of the monthly instalments could not be considered as a criminal offence. I agree with the principles laid down in the cases referred to above and I find that in [the facts and circumstances of the present lease and in view of the terms and conditions [of the hire-purchase agreement validly entered into between the parties, there was no dishonest intention, which is the sine qua non of an offence under Section 411 I.P.C. on the part of the accused petitioner and as such the present criminal proceedings are not maintainable against him. The third and last ground taken by Mr. S.S. Mukherjee, Advocate is that, in any event, in view of the High Court decree passed, in terms of the settlement arrived at between the present accused-

petitioner and the complainant in Commercial Cause Suit No. 708 of 1965, the continuance of the present criminal proceedings against the accused petitioner would be an abuse of the process of the court. Having gone through the terms of the said decree passed by this court, on compromise, I agree with the contentions of Mr. Mukherjee. The terms of settlement are inter alia as follows: (1) There will be a decree for Rs. 5500/- against the defendant in favour of the plaintiff (2) It is declared that the plaintiff is now the owner of the vehicle bearing No. O.E-21997 on the engine No. III-21992 on the chassis and which was bearing police registration No. WBT 1298. The said suit was finally disposed of by Mr. Justice Binayaknath Banerjee on 12.12.66 and a decree was passed on the basis of the said terms of settlement. In view of the same, it is futile to proceed with the criminal proceedings over the same subject-matter, particularly so in view of the terms and conditions of the hire-purchase agreement, which I have already considered above. In this connection a reference may be made to the case of In re, N.F. Markur, reported in 17 Cri LJ 153 : AIR 1916 Bom 163 wherein Mr. Justice Heaton and Mr. Justice Shah held that where the accused is charged with a criminal breach of trust with regard to certain items and the question of civil liability with respect to those items has been determined by a competent Court, the judgment or that Court would be the best evidence of the civil rights of the party and as such the complaint ought not to be proceeded with during the pendency of the civil proceedings by way of appeal. In this case there is even no pendency of the civil proceedings but already a proper determination thereof on the basis of a settlement as incorporated in the decree referred to above. The inherent jurisdiction of the High Court is for remedying such instances of failure of justice. There is no injustice that cannot be reached by the long arms of this Court and I hold that this is a fit and proper case where the present criminal proceeding, so far as it is against the present accused-petitioner, should not be allowed to be proceeded with. In the ease of Chidambaram Chettiar v. Shanmugham Filial, reported in 39 Cri.LJ. 261 : AIR 1938 Mad 129 Mr. Justice Newsam held that it is not questioned that the inherent jurisdiction of the High Court is for passing any order necessary to prevent an abuse of the process of the Court and the same has been clearly expressed in Section 561(A), Cr.P.C. Since prevention is always better than1 cure the obligation to prevent specious and spiteful criminal prosecution for actions which though strictly dishonourable, yet do not amount to crimes, is one that must never be shirked. In the world of business things are done which are betrayals of confidence and deceptions which arouse moral indignation but are nevertheless civil wrongs which can be righted by civil Courts and are not crimes which can be punished by a criminal Court. It is therefore expedient in the interests of justice that the present proceedings, so far as it is against the accused-petitioner, should be quashed.

The case of the accused driver, Haradhan Das, stands on a different footing and the findings made by me in connection with the case of the present accused-petitioner will not apply to his case. I, therefore, make no observations as to the merits of the said case.

11. In the result, the rule is made absolute; and the charge framed against the accused-petitioner as well as the criminal proceedings, so far as the said petitioner is concerned, are quashed.