(2011) 10 P&H CK 0112

High Court Of Punjab And Haryana At Chandigarh

Case No: Criminal Miscellaneous No. M-32104 of 2009

M/s Sundaram Finance Limited, Chennai		APPELLANT
	Vs	
Raj Kumar and another		RESPONDENT

Date of Decision: Oct. 19, 2011

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 482
- Foreign Exchange Regulation Act, 1973 - Section 13, 18, 18A, 19, 44(2)
- Penal Code, 1860 (IPC) - Section 323, 379, 506

Citation: (2012) 1 CivCC 499 : (2011) 4 RCR(Criminal) 890

Hon'ble Judges: Ranjit Singh, J

Bench: Single Bench

Final Decision: Dismissed

Judgement

Ranjit Singh, J.

Three Criminal Miscellaneous Petition Nos. M-32104 of 2009, 26055 and 32395 of 2010 have been filed by M/s Sundaram Finance Limited, its Area Manager A.V. Narayanan and its Branch Manager of a Branch at Ludhiana respectively, seeking quashing of a criminal complaint No. 37 of 9.8.2004 titled Raj Kumar and Ors. v. Sundaram Finance Limited and the summoning order dated 20.10.2007, summoning the Petitioner-Company along with three other co-accused for offences under Sections 379, 323 and 506 Indian Penal Code.

2. M/s Sundaram Finance Limited is a public limited Company duly incorporated under the Companies Act, 1956 having a registered office at Chennai. The Company has Branches all over India with its Regional Office (North) at New Delhi and is a legal entity. It is a non-banking finance company carrying on business of

hire-purchase/loan facility and leasing of vehicles, equipments, machinery. Respondent-complainant had approached Ludhiana Branch with a request for loan facility for purchase of Bajaj Tempo Trax 2002 model in the month of November 2002. Loan amount of Rs. 2,70,000/- was advanced to Rohit Kumar (Respondent No. 2) for the purchase of this vehicle having a total invoice price of Rs. 3,60,000/-. Raj Kumar (Respondent No. 1) stood as guarantor. Loan agreement was duly executed and signed by the borrower-Respondent No. 2 and Respondent No. 1 signed as guarantor. The amount was repayable in 36 monthly instalments starting from 12.11.2002 and was to end on 10.10.2005.

3. The vehicle was purchased from Goel Automobiles, Sangrur and was hypothecated in favour of the Petitioner-Company. It is pleaded that Respondent No. 2 was irregular in making the payment of the monthly instalments and committed default. A reminder was sent on 2.7.2003 with a copy to the guarantor to pay an arrears of Rs. 30,969/-, failing which Company would feel constrained to re-possess the vehicle in terms of the agreement. Respondent No. 2 is stated to have still continued to remain irregular in making the payment and Ludhiana Branch was, thus, constrained to take steps to re-possess the vehicle. One G.S. Recovery Agency, Ludhiana, was authorised by the Petitioner-Company to re-possess the vehicle through a letter dated 1.12.2003, copy of which is annexed with the petition as Annexure P-6. As per the Petitioner, Respondent No. 2 voluntarily surrendered the vehicle on 4.12.2003. At that time, outstanding amount was Rs. 2,61,714/- besides incidental charges. When Respondent No. 2 did not make payment of the outstanding amount, the vehicle was sold for a sum of Rs. 1,60,000/- on 24.12.2004. Accordingly, it is stated that a sum of Rs. 1,13,042/22P was still outstanding towards Respondent No. 2, for which he had not come forward to make any payment. Notices were then sent on 28.2.2005 and 18.1.2007, requiring Respondent No. 2 to clear the outstanding amount, failing which the matter was to be referred to the Arbitrator. The matter ultimately referred to Arbitrator and Respondent No. 2 even did not appear before him. Arbitrator finally gave his award on 29.10.2009, directing the Respondents to pay the outstanding amount with 18% interest per annum. As per the Petitioner, after 8 months of having surrendered the vehicle, Respondents have filed this complaint and the Petitioner in these three petitions have been summoned on 20.10.2007. They have accordingly filed these petitions for quashing of the complaint and the summoning order.

4. The story, as projected by the Petitioner, is belied by the averments made in the complaint. As per the Respondents, accused Gurjeet Singh, Rajnish Sharma, A.V. Narayanan along with 4-5 persons, who can be identified, came to the Petitioner on the direction issued by the Managing Director of Sundaram Finance Limited and asked the complainant to show the vehicle. These persons told the complainant that they suspect the complainant to have sold the vehicle and so wanted to check the same. The complainant has assured them that the vehicle was in his possession, which was standing near Max Auto Dhuri Road, Sangrur. Driver Jangir Singh

employed by the complainant was at that time sitting in the vehicle. These persons then forcibly snatched the keys of the vehicle and the documents and took it away forcibly. Six days prior to this incident, the Petitioner had paid the instalment of Rs. 9,150/- to the Field Officer of the Company. The accused-petitioners are alleged to have prepared fake documents to cause sale of the vehicle at very low price and, thus, had filed this complaint against the Petitioners.

5. Counsel for the Petitioners has mainly made submissions in the petition filed by the Company accused. His plea is that prosecution can not be launched against the Petitioner-Company for the offences under the Penal Code where mens rea is an essential ingredient of the offence. Conceding that the Company is a legal entity, the counsel submits that it can be prosecuted under social welfare legislation and in this regard has relied upon Radhey Shyam Khemka and Another Vs. State of Bihar, . Plea accordingly is that Company could not have been summoned for offences under Sections 379, 323, 506 Indian Penal Code, for which mens rea is an essential ingredient and the Petitioner company was, thus, summoned in a casual manner in total disregard to the settled principles of law. This has been the sole ground of attack to seek quashing of the complaint and the summoning order.

6. No doubt, the Hon''ble Supreme Court in the case of Radhey Shyam Khemka (supra) has observed that for framing a charge for an offence under Penal Code, the traditional rule of existence of mens rea is to be followed but these observations apparently were made having regard to the facts and the circumstances of the case. The Appellants before the Hon''ble Supreme Court were the Managing Director and the Directors of the Public Limited Company and a case was instituted by C.B.I. against the Appellants and others on the basis of a complaint made by Deputy Secretary, Ministry of Industrial Development and Company Affairs, Government of India. The Appellants had issued prospectus inviting public subscription and it was given out by them to the investors that application was being made to Calcutta Stock Exchange for enlisting the shares of the Company for official quotations. Such application made on behalf of the Company was rejected by Stock Exchange. Despite this position, the share money collected from different investors was held by the Appellants and none of the share holders were either informed or were repaid. Money was lying in the bank and was transferred to another account of the Company. These circumstances were pointing out to show the acts of Appellants clearly indicated their dishonest intention to convert the share application money for their benefit. The C.B.I. after investigation had submitted a charge sheet and in this regard, the Court had made observation that while taking cognizance, the Court must be satisfied that prima-facie an offence under Penal Code was disclosed on the material produced before the Court. In this background, the Hon''ble Supreme Court has observed as under:

But, at the same time, while taking cognizance of alleged offences in connection with the registration, issuance of prospectus, collection of moneys from the

investors and the misappropriation of the fund collected from the share-holders which constitute one offence or other under the Penal Code, court must be satisfied that prima facie an offence under the Penal Code has been disclosed on the materials produced before the court. If the screening on this questions not done properly at the stage of initiation of the criminal proceeding, in many cases, some disgruntled share-holders may launch prosecutions against the promoters, directors and those in charge of the management of the company concerned and can paralyse the functioning of such company. It need not be impressed that for prosecution for offenses under the Penal Code the complainant has to make out a prima facie case against the individuals concerned, regarding their acts and omissions which constitute the different ingredients of the offenses under the Penal Code. It cannot be overlooked that there is a basic difference between the offenses under the Penal Code and acts and omissions which have been made punishable under different Acts and statutes which are in nature of social welfare legislations. For framing charges in respect of those acts and omissions, in many cases, mens rea is not an essential ingredient; the concerned statute imposes a duty on those who are in charge of the management, to follow the statutory provisions and once there is a breach of contravention, such persons become liable to be punished. But for framing a charge for an offence under the Penal Code, the traditional rule of existence of mens rea is to be followed.

7. Rather in this case the Hon''ble Supreme Court declined to quash the proceedings initiating prosecution of the Appellants before the Court. The Hon''ble Supreme Court has observed that in such a situation where the Appellants had retained the share money with dishonest intention, quashing of prosecution pending against them only on the ground that it was open to the applicant share holders to take recourse to the provisions of the Companies Act can not be accepted. The Hon''ble Supreme Court made very pertinent observations in this regard to the following effect:

It is a futile attempt on the part of the Appellants, to close the chapter before it has unfolded itself. It will be for the trial court to examine whether on the materials produced on behalf of the prosecution it is established that the Appellants had issued the prospectus inviting applications in respect of shares of the Company aforesaid with a dishonest intention, or having received the moneys from the applicants they had dishonestly retained or misappropriated the same. That exercise cannot be performed either by the High Court or by this Court. If accepting the allegations made and charges leveled on their face value, the Court had come to conclusion that no offence under the Penal Code was disclosed the matter would have been different. This Court has repeatedly pointed out that the High Court should not while exercising power u/s 482 of the Code usurp the jurisdiction of the trial court. The power u/s 482 of the Code has been vested in the High Court to quash a prosecution which amounts to abuse of the process of the court. But that power cannot be exercised by the High Court to hold a parallel trial, only on basis of

the statements and documents collected during investigation or enquiry, for purpose of expressing an opinion whether the accused concerned is likely to be punished if the trial is allowed to proceed.

8. Rather the Hon''ble Supreme Court in Standard Chartered Bank and Others etc. Vs. Directorate of Enforcement and Others etc., , has clearly held that a Company or a corporate body, though juristic person can not be imposed the sentence of imprisonment as a punishment but when imprisonment and fine is prescribed as punishment, the Court can impose the punishment of fine, which would be enforced against the Company. Such a discretion to be read into the Section so far as juristic person is concerned. This view is expressed by Constitutional Bench of the Hon''ble Court consisting of Five Judges. While rejecting this contention raised before the Court, majority view is that when an offence is punishable with imprisonment and fine, the Court is not left with any discretion to impose any one of them and consequently the Company being a juristic person can not be prosecuted for the offence for which custodial sentence is mandatory punishment. The Court has observed as under:

34. As the company cannot be sentenced to imprisonment, the court has to resort to punishment of imposition of fine which is also a prescribed punishment. As per the scheme of various enactments and also the Indian Penal Code, mandatory custodial sentence is prescribed for graver offences. If the Appellants'' plea is accepted, no company or corporate bodies could be prosecuted for the graver offences whereas they could be prosecuted for minor offences as the sentence prescribed therein is custodial sentence or fine. We do not think that the intention of the Legislature is to give complete immunity from prosecution to the corporate bodies for these grave offences. The offences mentioned u/s 56(1) of the FERA Act, 1973, namely those u/s 13, Clause (a) of Sub-section (1) of Section 18; Section 18A; Clause (a) of Sub-section (1) of Section 19; Sub-section (2) of Section 44, for which the minimum sentence of six months'' imprisonment is prescribed, are serious offences and if committed would have serious financial consequences affecting the economy of the country. All those offences could be committed by company or corporate bodies. We do not think that the legislative intent is not to prosecute the companies for these serious offences, if these offences involve the amount or value of more than one lakh, and that they could be prosecuted only when the offences involve an amount or value less than one lakh.

35. As the company cannot be sentenced to imprisonment, the court cannot impose that punishment, but when imprisonment and fine is the prescribed punishment the court can impose the punishment of fine which could be enforced against the company. Such a discretion is to be read into the Section so far as the juristic person is concerned. of course, the court cannot exercise the same discretion as regards a natural person. Then the court would not be passing the sentence in accordance with law. As regards company, the court can always impose a sentence of fine and

the sentence of imprisonment can be ignored as it is impossible to be carried out in respect of a company. This appears to be the intention of the legislature and we find no difficulty in construing the statute in such a way. We do not think that there is a blanket immunity for any company from any prosecution for serious offences merely because the prosecution would ultimately entail a sentence of mandatory imprisonment. The corporate bodies, such as a firm or company undertake series of activities that affect the life, liberty and property of the citizens. Large scale financial irregularities are done by various corporations. The corporate vehicle now occupies such a large portion of the industrial, commercial and sociological sectors that amenability of the corporation to a criminal law is essential to have a peaceful society with stable economy.

9. Whether a Company can be prosecuted to fasten a criminal liability was discussed in detail by Hon''ble Supreme Court in The Assistant Commissioner, Assessment-II, Bangalore and Others Vs. Velliappa Textiles Ltd. and Others, , which has also been referred to and relied upon by counsel for the Petitioner. In fact, the correctness of the view expressed in this judgement was doubted by another Bench and reference order dated 16.7.2004 reported as ANZ Grindlays Bank Ltd. and Others Vs. Directorate of Enforcement and Others, was made and, thus, the matter was placed before the Court in the case of Standard Chartered Bank''s case (supra). The majority view has held that there is no immunity to the Companies from prosecution merely because the prosecution in respect of offences for which the punishment is prescribed is mandatory imprisonment. The Court specifically overruled the view expressed by the majority in Velliappa Textiles Ltd.''s case (supra) on this point and answered the reference accordingly. Thus, the reference made by the Learned Counsel for the Petitioner to an over-ruled judgement can not be appreciated and is of no avail to him. The counsel are expected to assist the Court and the view, which is over-ruled ought not to have been placed before the Court.

10. Otherwise the Petitioner-Company stands summoned for offences under Sections 379, 323 and 506 Indian Penal Code. The offence u/s 323 Indian Penal Code provides punishment of imprisonment in alternative to fine. So is the case u/s 379 Indian Penal Code. Section 506 Indian Penal Code creates an offence of criminal intimidation and such an intimidation is also recognized through communication. In none of the offences, question of mens rea apparently would arise. It has clearly been held by Hon''ble Supreme Court in the case of Standard Chartered Bank (supra) that a Company or a corporate body, through a juristic person, can be prosecuted for offences for which sentence of imprisonment is a mandatory punishment. Such a discretion is to be read into the Section so far as the juristic person is concerned. While over-ruling the view expressed in Velliappa Textiles Ltd.''s case (supra), the Court in Standard Chartered Bank (supra) had applied the doctrine of impossibility of performance (lex non cogit ad impossibilia) as applied in numerous cases.

11. Even otherwise, the Petitioner can always raise such defences if otherwise available under law during trial. As noticed above, this Court can not usurp the jurisdiction of the Trial Court while exercising jurisdiction u/s 482 Code of Criminal Procedure. The plea that mens rea is needed or if it was there on the part of Company would depend upon the evidence and is to be seen by the Trial Court. It has been consistently held that inherent jurisdiction u/s 482 Code of Criminal Procedure. may be wide enough but has to be exercised sparingly, carefully and with caution and only when such exercise is justified. It is further observed that the High Court would not ordinarily embark upon an enquiry whether evidence in question is reliable or not or whether on a reasonable appreciation of it, accusation would not be sustained. That would be the function of a trial Judge. Section 482 Code of Criminal Procedure. is not an instrument handed over to the accused to short-circuit a prosecution and to bring about its sudden death. It is also observed that it would not be proper for the High Court to analyze the case of the complainant in the light of all probabilities in order to determine whether a conviction would be sustainable and on such premise arrive at a conclusion that the proceedings are to be quashed. Reference here can be made to State of Madhya Pradesh v. Awadh Kishore Gupta and Ors. 2004 (1) R.C.R. (Criminal) 233.

12. In any event, any such pleas as raised have no applicability so far as Criminal Misc. Nos. -M 26055 and 32395 of 2010 are concerned. The Petitioners in all these cases have acted in highhanded manner in snatching the vehicle for which they had accepted an instalment a few days before it was snatched. The Petitioners are also raising controversy to the effect that Respondent No. 2 had voluntarily surrendered the vehicle, which fact is seriously disputed by the Respondents, who have clearly averred and supported the allegation on oath that the goons detailed by the Petitioners had forcibly snatched the vehicle, which is even an aggravated form of theft in the society govern by rule of law. Such a situation and position would be clearly unacceptable.

13. Despite some telling observations made by Hon''ble Supreme Court in regard to the mode adopted by the Banks or Finance Companies to employ recovery/collecting agents, who use aggressive manners and make the people taking credit a victim, the mode as adopted continues to be employed by the Finance Companies like the Petitioner. The facts in the present case would reveal so and would further show that the observations made by the Hon''ble Supreme Court have had no effect on the modes and methods adopted by the Finance Companies like the Petitioner. As observed by the Supreme Court, the Banks are the aggressors and the public is a victim. Referring to the recovery/collection agents to be a dignified term, who in fact are the individuals and independent contractors hired by the Banks and the Finance Companies to detect defaulters and then torture them physically, mentally and emotionally to force them for clearing their dues. As observed by the Hon''ble Supreme Court, a man''s self respect, stature in society are all immaterial to the agents, who are only primed at recovery. Using abusive

language for recovery is noticed to be the norm of the day for most Banks and such institutions. The Hon''ble Supreme Court held that it did not appreciate the procedure adopted by the Bank in removing the vehicle from the possession of the Petitioners therein. The Hon''ble Supreme Court had deprecated the practice of hiring the recovery agents, muscle men and discouraged the said practice. The Supreme Court accordingly has directed that the Bank should resort to the procedure recognized by law to take possession of the vehicle in cases where borrowers may have committed default in payment of instalments instead of taking resort to strong arm tactics. (See Manager, ICICI Bank Ltd. Vs. Prakash Kaur and Others,). This is what has clearly happened in the present case, as has revealed from the facts noticed above. At least, the conduct of the Petitioner-Finance Company needs to be deprecated.

14. In view of the above, I am not inclined to accept the view canvassed by counsel for the Petitioner and would dismiss the petitions as the same lack in merits.