

B.A. No. 1158 of 2018

Gunvanth Chand Khariwal v. State of Kerala

2018 SCC OnLine Ker 1329 : (2018) 2 KLT (SN 49) 43 : (2018) 2 KLJ 680

In the High Court of Kerala at Ernakulam
(BEFORE ANNIE JOHN, J.)

Gunvanth Chand Khariwal Aged 42 years, S/o Charam Chand No.
15, Old No. 35, Erulappan Street, Sowcarpet, Chennai, Tamil
Nadu Petitioner(s)/Accused
By Advs. Sri. P. Samsudin
Sri. Jithin Lukose
v.

1. State of Kerala, Represented by the Public Prosecutor, High Court of Kerala Ernakulam-682 031.
 2. Saidalavikoya Thangal, S/o Imbichikoya Thangal, Pariyangattu Kalathil House, Pathayikkara P.O., Perinthalmanna, Malappuram District.
- (Addl. R2 Impleaded as Per Order Dated 11.04.2018 in CrI.M.A. No. 3512/2018) Respondent(s)/Complainant
R Addl.2 by Adv. Sri. K. Rakesh
R by Sri. K.B. Udayakumar, Sr. Public Prosecutor

B.A. No. 1158 of 2018

Crime No. 815/2017 of Perinthalmanna Police Station, Malappuram

Decided on April 11, 2018

The Order of the Court was delivered by

ANNIE JOHN, J.:— The petitioner is the sole accused in Crime No. 815 of 2017 of Perinthalmanna Police Station for offences punishable under Sections 143, 147, 351 and 379 IPC.

2. The case of the prosecution is that on 21.04.2017, at about 11.30 a.m., the accused committed theft of one Corolla Altis Car from the residence of the de facto complainant on behalf of Finance Company. The crime was registered on the basis of a private complaint forwarded under Section 156(3) of Cr.P.C.

3. The petitioner is a financier in Chennai. The de facto complainant availed a hire purchase loan from the petitioner for purchasing a Corolla Altis Car bearing registration No. KL 10 AM/52.

4. As per the hire purchase agreement dated 19.10.2016, the complainant undertook to repay a sum of Rs. 6,13,000/- in 30 monthly instalments; but he remitted only two instalments. The hire purchase agreement provides that the hirer will surrender the vehicle if he fails to pay any monthly instalments and the financier is free to re-possess the vehicle in such contingencies. The petitioner was served with a demand notice intimating him to repay the instalments or surrender the vehicle. Accordingly, the vehicle was voluntarily surrendered by the complainant to the agents of the petitioner at Manjeri. But the vehicle was not in good condition when it was surrendered. Thereafter, the petitioner has issued Annexure A5 notice to the de facto complainant demanding to pay the instalments due together with expenses and charges and to regain possession of the vehicle. Since there was no response, the

petitioner has thereafter issued Annexure A6 notice to the de facto complainant. In response to the same, the de facto complainant has given Annexure A7 reply admitting the default in repayments.

5. The de facto complainant has been impleaded in the case as additional second respondent and he entered appearance through counsel. According to the de facto complainant, the vehicle has been seized by the petitioner from his residence without his consent. Even though he has defaulted payment of the amount in lieu of the higher purchase agreement executed between himself and the petitioner, the petitioner has no right to take away the vehicle forcefully. It is also submitted that the de facto complainant is the owner of the vehicle and the RC book stands in his name. Now after the seizure of the vehicle, the petitioner is misusing the vehicle and it will definitely give rise to a liability to the petitioner. Therefore, he has sought for a direction to the petitioner to surrender the vehicle before the court and to get possession of the vehicle by an order from the Court.

6. Per contra, the learned counsel for the petitioner has argued that the intention of the petitioner is to get back the vehicle without any authority and in case he surrenders the vehicle before the court, that will give a chance to the de facto complainant to get the vehicle in this custody from the court itself.

7. I have heard the learned Public Prosecutor as well. He has also submitted that the petitioner may surrender the vehicle before the court and get it back by court order.

8. I have perused the Case diary files, in which the learned Public Prosecutor has filed a report wherein it is stated that the petitioner has seized the vehicle which was kept at the residence of the de facto complainant and that the petitioner is not ready to surrender the vehicle before the Police Station. Moreover, the petitioner has seized the said vehicle without the consent of the de facto complainant and that he was riding the vehicle for a long distance in a very high speed, for which notices were issued to him by the concerned authority demanding to remit fine.

9. On the strength of the report filed by the SHO, Perinthalmanna Police Station, the counsel for the de facto complainant has submitted that if the petitioner uses the vehicle for any illegal purpose, that will also create some liabilities to the de facto complainant.

10. The learned counsel for the petitioner has placed reliance on *Charanjit Singh Chadha v. Sudhir Mehra*¹ and *Anup Sarmah v. Bhola Nath Sharma*² and submitted that the petitioner has got a right to re-possess the vehicle in case the de facto complainant fails to repay the instalments and therefore it will not attract Section 379 of IPC.

11. In *Charanjit Singh Chadha*, it is held that recovery of possession of goods by owner-financier as per the terms of the hire-purchase agreement does not amount to a criminal offence and that such an agreement is an executory contract of sale, conferring no right in rem on the hirer until the conditions for transfer of the property to him have been fulfilled. It is also held that in case the default is committed by the hirer and the 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. It is further observed that in a case of mere contract of hiring, it is a contract of bailment which does not create a title in the bailee.

12. In *Anup Sarmah*, it is held that recovery of possession of vehicle by financier-owner as per the terms of hire-purchase agreement does not amount to a criminal offence. When the respondent financiers had forcibly taken away the vehicle financed by them and illegally deprived the petitioner from its lawful possession, it cannot be said to be an offence.

13. It is also held in *K.A. Mathai v. Kora Bibbikutty*¹, the Apex Court has taken a similar view holding that in case of default to make payment of instalments, the 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 assertion 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 the financier had resumed the possession of the vehicle with a guilty intention.

14. In the light of the above decisions, the learned counsel for the petitioner has argued that since his vehicle was seized from the possession of the petitioner as per the terms of agreement, it will not amount to a criminal offence. In this case the petitioner has been charged under Sections 143, 147, 351 and 379 IPC. The offence of theft as alleged against the petitioner under Section 379 IPC is a non-bailable one. In view of the aforesaid decisions cited supra, I find that Section 379 IPC is not attracted because there was an agreement between the petitioner and the de facto complainant and as per the agreement the petitioner has got every right to take possession of the vehicle. Since Section 379 of IPC is not attracted, the petitioner is entitled to get the anticipatory bail as prayed for. It is evident from the report filed by the Public Prosecutor that the petitioner is roughly using the vehicle in an excess speed limit for which notices were sent to remit fine. The apprehension of the de facto complainant is that if the petitioner uses the vehicle for committing offences, it will give rise to a criminal liability to him. So, it is proper to surrender the vehicle before the concerned court and to get back the vehicle legally. The argument of the de facto complainant has got some merit. The petitioner ought to re-possess the vehicle through the help of the police or court. Therefore, the petitioner has to surrender the vehicle before the appropriate authority so as to avoid criminal liability so created by the petitioner.

15. Considering the arguments advanced by both sides, I am inclined to grant anticipatory bail by invoking Section 438 of the Cr.P.C. on the following conditions:

1. The petitioner herein shall surrender before the SHO, Perinthalmanna Police Station, Malappuram on or before 23.04.2018 between 10 a.m and 11 a.m. and he shall be released on bail on executing a bond for Rs. 50,000/- (Rupees fifty thousand only) with two solvent sureties each for the like sum to the satisfaction of the Investigating Officer.
 2. The petitioner shall surrender the vehicle before the SHO, Perinthalmanna Police Station on the date of surrender and get back possession of the same through appropriate orders of Court at the earliest.
 3. The petitioner shall not influence the witnesses or tamper any evidence in this case.
 4. If the petitioner violates any of the above conditions, the bail granted to him shall stand cancelled, forthwith.
16. This application is allowed as above.

¹ (2001) 7 SCC 417

² (2013) 1 SCC 400

¹ (1996) 7 SCC 212