

Civil Revision**Present: The Hon'ble Justice Jyotirmay Bhattacharya****Judgment On : 18th June, 2010*****C.O. No. 3606 of 2007******Sri Basudeb Chakraborty & Anr.******Versus******M/s. Premnath Ramesh Kumar*****POINTS**

RECEIVER'S LIABILITY – Loss occasioned to the property in Receiver's custody, due to his willful default or gross negligence – Whether appropriate proceeding for recovery can be initiated against the receiver – Code of Civil Procedure 1908, O 40 R 4.

FACTS

The petitioner No.1 purchased a Hindustan Tractor of 2001 model bearing Chassis No. 5001017408 with complete accessories by taking loan from the opposite party No.1, financier, under a higher purchase agreement. The said loan was repayable in 24 equal monthly installments. The petitioner No.2 who is the mother of the petitioner No.1 stood as a guarantor for the said loan transaction and in fact, the title deeds relating to immovable property belonging to petitioner No.2 worth Rs. 12 lacs was kept in the custody of the financier by security for repayment of the said loan. The petitioner No.1 paid 16 monthly installments regularly and thereafter committed default in payment of the subsequent installments.

Under such circumstances, the opposite party No.1, namely, the financier, filed an application under Section 9 of the Arbitration and Conciliation Act of 1996 before the Learned Seventh Judge, City Civil Court at Kolkata. An ad interim order was passed in the said proceeding whereby Smt. Rina Banerjee, Advocate, was appointed as a receiver for the purpose of taking over possession of the said vehicle. The receiver was authorised to take all possible steps including the appointment of an agent and also to take necessary police help for taking over the possession of the said vehicle. The receiver was also directed to submit a report on the next adjourned date. It was also provided in the said order that so long as the vehicle would remain in the custody of the receiver or his authorised agent, the receiver would remain responsible for all loss and damage, if any, caused to the vehicle. .

HELD

Order 40 Rule 3 of Code of Civil Procedure provides that it is the obligation of the receiver to ensure that no loss is occasioned to the property in her custody due to willful default or gross negligence. If any loss to the property is occasioned by the willful default or gross negligence of the receiver then the receiver's duties can be enforced under Order 40 Rule 4 of the Civil Procedure Code whereby the Court may direct the receiver's property to be attached and such attached property may be sold and the sale proceeds may be applied for compensating the loss which will be found to have been caused by her and the balance amount, if there be any, may be paid to the receiver.

Para 19

Leave is given to the petitioner to initiate appropriate proceeding under Order 40 Rule 4 of the Civil Procedure Code against the receiver for enforcement of her duties and for realization of the

loss which the petitioner has suffered in the process as mentioned above, before the Learned Trial Judge. Para 21

For the Petitioner : Mr. Jahar Chakraborty
Ms. Sabita Mukherjee

For the O.P. No.1 : Mr. Aniruddha Chatterjee
Mr. Ranobir Roy Chowdhury

For the O.P. No.2 : Mr. Amitesh Banerjee
Mr. Supratick Syamal

THE COURT

1.This revision application has a long chequered history. The petitioner No.1 purchased a Hindustan Tractor of 2001 model bearing Chassis No. 5001017408 with complete accessories by taking loan from the opposite party No.1, financier, under a higher purchase agreement. The said loan was repayable in 24 equal monthly installments. The petitioner No.2 who is the mother of the petitioner No.1 stood as a guarantor for the said loan transaction and in fact, the title deeds relating to immovable property belonging to petitioner No.2 worth Rs. 12 lacs was kept in the custody of the financier by security for repayment of the said loan. The petitioner No.1 paid 16 monthly installments regularly and thereafter committed default in payment of the subsequent installments.

2.Under such circumstances, the opposite party No.1, namely, the financier, filed an application under Section 9 of the Arbitration and Conciliation Act of 1996 being Misc. Case No. 2914 of 2006 before the Learned Seventh Judge, City Civil Court at Kolkata. An ad interim order was passed in the said proceeding on 21st September, 2006 whereby Smt. Rina Banerjee, Advocate,

was appointed as a receiver for the purpose of taking over possession of the said vehicle. The receiver was authorised to take all possible steps including the appointment of an agent and also to take necessary police help for taking over the possession of the said vehicle. The receiver was also directed to submit a report on the next adjourned date. It was also provided in the said order that so long as the vehicle would remain in the custody of the receiver or his authorised agent, the receiver would remain responsible for all loss and damage, if any, caused to the vehicle.

3. In terms of the said order, the receiver appointed one Prasanta Sarkar as her agent by power of attorney executed by the receiver on 21st September, 2006.

4. Subsequently, the possession of the said tractor was taken over by the receiver's agent sometime in February 2007.

5. Immediately thereafter the petitioner filed an application before the Learned Trial Judge for vacating the said ad interim order by which receiver was appointed and for return of the said vehicle to the petitioner.

6. The Learned Trial Judge was pleased to allow the petitioner's such prayer on 2nd August, 2007 vide order No. 11. The receiver was directed to release the vehicle in question to the petitioner herein without any loss and damage with a further rider that after release of the said vehicle, the receiver so appointed by the Court will be discharged from her duties. The Misc. Case under Section 9 of the said Act was dismissed on contest with cost of Rs.500/- to be paid by the financier to the opposite party therein.

7. While passing the said order the Learned Trial Judge held that the opposite party, the financier, is guilty of suppression of material facts as it was not disclosed in his application under Section 9 of the said Act that the petitioner No.2 stood as a guarantor for repayment of the said loan and the title deeds relating to immovable property belonging to the petitioner No.2 worth Rs.12 lacs, were retained by the financier by way of security for repayment of the said loan. Thus, the Learned Trial Judge was of the view that since the defaulted amount is a negligible amount and further since there was sufficient security for realization of the said defaulted amount out of the security as mentioned above, receiver ought not to have been appointed for taking over possession of the said vehicle in such a proceeding.

8. The parties have accepted the said order. Neither party has challenged the propriety of the said order in a higher forum. The said order was communicated to the receiver. But the receiver did not comply with the said order. Even the receiver did not file any report before the learned Trial Judge in terms of the order by which she was appointed as a receiver.

9. In fact, trouble started from this juncture as even the Learned Trial Judge, in spite of his best efforts, could not enforce the said order of release of the said vehicle to the petitioner by the receiver, due to non-cooperation of the receiver as well as the financier. Various orders were passed by the Learned Trial Judge subsequently in the said proceeding as both the receiver and financier made various accusation against each other on the issue regarding taking over possession of the said vehicle. The receiver informed the Learned Trial Judge that she had not taken over the possession of the said vehicle. She stated that immediately after her appointment as receiver, the financier got the power of attorney executed by her in favour of a man of their choice. In fact, the receiver maintained the said stand even up to 7th September, 2007 as will appear from the order

passed by the Learned Trial Judge on 7th September, 2007 in order No.15. The receiver also could not give the whereabouts of the said vehicle to the Learned Trial Judge. Again, the financier expressed his ignorance about the taking over possession of the said vehicle before the learned Trial Judge. The financier also did not disclose the whereabouts of the said vehicle before the Learned Trial Judge.

10.Under such state of confusion, the Learned Trial Judge ultimately believed the receiver and held that the vehicle is in the possession of the financier. Accordingly, the Learned Trial Judge, by his order being No.15 dated 7th September, 2007 directed one Ramesh Kumar Kajrewal, a personnel of the said financier to hand over the vehicle in dispute to the respondent on and before 19th September, 2007. Even the said order was not complied with by the financier.

11.Under such circumstances, the petitioner approached this Hon'ble Court with this application under Article 227 of the Constitution of India seeking appropriate relief.

12.While considering the said application, this Court felt the necessity of the presence of the receiver for effective consideration of the said revisional application and as such the receiver was impleaded as opposite party No.2 in this application. Though service of notice of this revisional application could be effected upon the financier but such service could not be effected upon the receiver who avoided acceptance of service repeatedly. As a matter of fact when this Court proposed to secure the presence of the receiver in Court by issuance of warrant of arrest, then only the financier assured this Court that he would secure the presence of the receiver in Court on the next adjourned date. On such assurance being given by the financier, the warrant of arrest was not ultimately issued by this Court for securing the presence of the receiver. Ultimately, the receiver

appeared before this Court but still then she expressed her ignorance about the whereabouts of the said vehicle. In fact, neither the receiver nor the financier even disclosed before this Court the whereabouts of the said vehicle and both of them expressed their ignorance about the whereabouts of the said vehicle. It is only when this Court passed an order on 11th December, 2007, directing the receiver to deliver the vehicle to the petitioner within a fixed time with a rider that if the receiver fails to deliver the vehicle to the petitioner within the stipulated period then the receiver will have to deposit a sum of Rs.3,00,000/- being the approximate value of the said vehicle by way of security towards due compliance of the said order, the receiver assured this Court that she would deliver the said vehicle to the petitioner in the same condition as it was at the time of seizure of the said vehicle. Even thereafter, instead of delivering the said vehicle to the petitioner, the receiver intimated the petitioner to accompany her at an address at Bihar for taking delivery of possession from a garage where the said vehicle was kept. The petitioner did not agree to the said proposal of the receiver and ultimately an order was passed by this Court directing the receiver to deliver the possession of the said vehicle at address of the petitioner as indicated in the cause title of this revisional application. Then only the said vehicle was brought from Bihar and the petitioner was called upon to receive delivery of the said vehicle from M/s. Kanika International's Garage at Dankuni, Howrah.

13.Ultimately, the said vehicle could be stressed out in the said garage at Howrah. When the petitioner went to take delivery of the vehicle, it was found that the vehicle was not in a running condition and several parts of the vehicle were found missing therefrom. As a result, the petitioner refused to accept deliver of the said vehicle in such a condition.

14. Under such circumstances, this Court appointed an Advocate of this Court as Special Officer for holding an inventory to find out the exact condition of the said vehicle. The learned Special Officer inspected the said vehicle in the presence of both the parties and thereafter he submitted his report stating therein the exact condition of the said vehicle. Missing of several parts from the said vehicle was also reported by the learned Special Officer in his report.

15. The petitioner filed an objection to the said report. The receiver also filed her affidavit in connection therewith disclosing therein her intention to deliver the said vehicle to the petitioner in the said condition. In this scenario a new dispute has cropped up between the parties. A question emerges as to who was responsible for such damage being caused to the said vehicle. The receiver contended in her affidavit that the vehicle was in a damaged condition at the time of taking over possession thereof. The receiver, of course, stated in her affidavit that she had no personal knowledge about the condition of the said vehicle at the time of taking over possession thereof. She stated in her affidavit that her knowledge about the said vehicle right from the time of taking over possession thereof was based on the information which she received from her agent. A copy of the seizure list has also been annexed to the said affidavit wherein it was mentioned that the vehicle was in damaged condition at the time of taking over possession thereof. However, the extent of damage was not mentioned in the said seizure list. Even no inventory was made either by the receiver or by her agent for ascertaining the extent of damage to the vehicle either at the time of taking over possession thereof by the receiver's agent or subsequently thereafter. Thus, the said document cannot be relied upon for ascertaining the exact condition of the said vehicle at the time of taking over possession thereof. On the contrary, the petitioner has produced one seizure list containing the signature of the agent of the receiver wherein it was not mentioned that at the time of taking over possession of the said vehicle, the vehicle was in damaged condition. Even the date of

seizure of the vehicle which is mentioned in the said seizure list differs from the date which is mentioned in the seizure list annexed to the Receiver's affidavit.

16.Mr. Banerjee, Learned Advocate, appearing for the receiver, disputed the acceptability of the said seizure list which was produced by Mr. Chakraborty, the Learned Advocate, as the said document was not produced by the petitioner earlier either before the Learned Trial Judge or before this Court.

17.In my view, the contention of Mr. Banerjee regarding the acceptability of the said document without the same being formally proved, cannot be ignored all together at this stage in view of the submission of Mr. Chakraborty that the said document was not disclosed by the client earlier at any stage of the said proceeding. Accordingly, the said document is kept apart from the consideration of this Court.

18.Another important fact which is required to be mentioned herein is the filing of a supplementary affidavit by the petitioner wherein an estimate for repair of the said vehicle for restoring it in its running condition, issued by the East India Agro Industries (P) Limited, being the manufacturer of the said vehicle was disclosed wherefrom this Court finds that a sum of Rs.3,47,837.05 paise was estimated as the cost of repair of the said vehicle. The correctness of such estimate is also required to be verified from the company which assessed the cost of such repair and such verification can only be made by trial on evidence and until such verification is made, liability for payment of compensation of the said assessed amount, cannot be imposed upon the receiver as per Order 40 Rule 4 of the Civil Procedure Code.

19. Order 40 Rule 3 of Code of Civil Procedure provides that it is the obligation of the receiver to ensure that no loss is occasioned to the property in her custody due to willful default or gross negligence. If any loss to the property is occasioned by the willful default or gross negligence of the receiver then the receiver's duties can be enforced under Order 40 Rule 4 of the Civil Procedure Code whereby the Court may direct the receiver's property to be attached and such attached property may be sold and the sale proceeds may be applied for compensating the loss which will be found to have been caused by her and the balance amount, if there be any, may be paid to the receiver.

20. Considering the conduct of the receiver as well as the financier as a whole, this Court has no hesitation to hold that the receiver and the financier acted in hands in glob. Not only the receiver is guilty for non-compliance of the Court's order regarding delivery of the vehicle to the petitioner and/or submission of report in Court as per the order of the learned Trial Judge but also she is guilty of misconduct as she deliberately misled the Court by giving misleading information about the seizure of the said vehicle as well as the whereabouts thereof to the Court and she did so deliberately to frustrate implementation of the order passed by the Learned Trial Judge regarding return of the said vehicle to the petitioner. Since the receiver admittedly had no personal knowledge about the exact condition of the vehicle at the time of taking over possession thereof and further since she did not make any inventory of the said vehicle for ascertaining the exact condition thereof and/or for ascertaining the extent of damage therein, at the time of taking over possession of the said vehicle, this Court can neither hold that at the time of taking over possession of the said vehicle, the said vehicle was in a damaged condition nor this Court can assess the extent of damages therein without trial on evidence.

21. Under such circumstances, leave is given to the petitioner to initiate appropriate proceeding under Order 40 Rule 4 of the Civil Procedure Code against the receiver for enforcement of her duties and for realization of the loss which the petitioner has suffered in the process as mentioned above, before the Learned Trial Judge. In the event such a proceeding is initiated, the Learned Trial Judge will make an utmost endeavour to dispose of the said proceeding at an early date without granting any unnecessary adjournment to any of the parties.

22. Before parting with, this Court wants to keep it on record that the Receiver is a very desperate and errant lady having no sense of responsibility and is also not courteous and/or faithful in discharge of her duties in compliance of the order of the Court. As such this Court holds that the said receiver is not at all trust worthy and henceforth she should not be taken into confidence for discharging any duty as an officer of the Court.

23. The revisional application is thus disposed of.

24. Urgent xerox certified copy of this order, if applied for, be given to the parties, as expeditiously as possible.

(Jyotirmay Bhattacharya, J.)