

Judgment Sheet

**IN THE PESHAWAR HIGH COURT,
PESHAWAR**
(Judicial Department)

QP No.137-P/2015.

JUDGMENT

Date of hearing. 18.7.2016
Appellant By: Mr. Shafiullah Khan, Advocate
State By: Mr. Mujahid Ali Khan, AAG.

IKRAMULLAH KHAN, J-. Through the instant petition, petitioner has invoked the jurisdiction of this Court in term of the provision contained in section 561-A Cr.PC in order to get the required relief as prayed for as:

“that on acceptance of this petition, the order passed by respondent No.3 may kindly be set aside while the order passed learned ADJ-II, Mardan may please be recalled and the concession granted to respondent No.1 may kindly be withdrawn with direction to return the vehicle in question to the petitioner.”

2. In essence, on information/report of petitioner, reduced into writing by the local police of Police Station Sheikh Maltoon, Mardan vide daily dairy

No.24 dated 19.05.2014, vehicle under consideration, was seized by the said police officials in term of Section 523/550 Cr.PC.

3. Petitioner as well as respondent No.1, applied for the interim custody of the vehicle, before the learned Magistrate Mardan, who in turn by his judgment dated 27.05.2014, dismissed both the applications moved by either party.

4. Both the parties, herein, preferred in appeal revision petitions, against the impugned judgment of learned Magistrate, Mardan ibid, before the learned Sessions Judge, Mardan.

5. The learned Additional Sessions Judge, Mardan to who the matter was entrusted by learned Sessions Judge, thereafter hearing both the parties vide its consolidated judgment dated 24.06.2014, accepted the revision petition of the respondent No.1, and dismissed the one filed by petitioner and consequently the vehicle under consideration was returned to the respondent No.1, subject to proof of payment of installation till June, 2014. Being aggrieved and

dissatisfied, thereby the impugned judgment of learned Additional Sessions Judge, Mardan, petitioner has filed the instant petition.

6. Learned counsel for the petitioner contended that the impugned judgment is against law and respondent has committed default in payment of the return installment as mentioned in the lease agreement dated 08.01.2014, whereby petitioner is legally entitled to take the custody of the vehicle under consideration.

7. On the other hand, learned counsel for respondents argued that the whole exercise of power by police, whereby the vehicle was seized on the pretext of Section 523/550 Cr.PC on the report of the petitioner was void ab-initio, illegal and without jurisdiction and unlawful authority, therefore, the impugned judgment is based on correct appreciation of law, while the vehicle under consideration was taken into possession by the local police, therefrom respondent No.1, was legally entitled to get back the custody of the concern vehicle.

8. I have heard learned counsel for the parties in light of facts on available record and law.

9. The record reveals that the vehicle in question was leased out to the respondent No.1 by the petitioner Bank, and both the parties had entered into an agreement dated 23.10.2012, duly executed and signed by both the parties, Clause 12 of the Agreement *ibid* reads as:

12. "The parties hereto agree that upon (i) failure on the part of the Customer to pay any amount under this agreement on a Due Date or any other specified date of (ii) bankruptcy of the Customer or (iii) the occurrence of any matter adverse event which, in the opinion of the Bank, has or will have an adverse affect on the ability of the Customer to perform its obligations under this agreement or (iv) the Customer (s) committing a breach of the Agreement or any of the security documents or documents relating to the Facility, the Bank will be entitled to demand immediate payment of the entire balance of Purchase Price and other amounts under Agreement remaining due, notwithstanding anything to the contrary contained in this Agreement, and for recovery thereof, after giving the Customer(s) fourteen (14) days advance written notice, to take repossession of the Motor Vehicle and sell the same at the available market price as the Bank may deem fit and/or to debit the amount from any of the Customer's account with the Bank and/or to liquidate any other security

available with the Bank and/or initiate legal proceedings against the Customer(s) for recovery of the outstanding Purchase Price and enforcement of the securities furnished by the Customer(s). Repossession charges will apply as per the schedule of charges of the Bank in force at the date of this Agreement. The Customer shall ensure that any employee or agent of the Customer or the Customer or any other person in control of the Motor Vehicle shall not prevent or obstruct the Bank or any of its agent or authorized or authorized representative from taking possession of the Motor Vehicle, who will have a right to enter the premises of the Customer or premises of its agent or any third party in possession/control of the Motor vehicle.”

Clause 13 of the agreement *ibid* further secures the rights of the petitioner Bank, in case of default of payment or violation of any condition agreed by the lease.

10. The bare perusal of the agreement dated 23.10.2012 reveals that it is a finance facility, granted to respondent, in accordance with Banking rules, for purchase of motor vehicle on mark-up basis.

11. The term finance has been defined, thereunder Section 2(d) of the Financial institutions (Recovery of finances) ordinance 2001 which reads as:

(d) "finance" includes —

(i) *an accommodation or facility provided on the basis of participation in profit and loss, mark-up or mark-down in price, hire-purchase, equity support, lease, rent-sharing, licensing charge or fee of any kind, purchase and sale of any property including commodities, patents, designs, trademarks and copy-rights, bills of exchange, promissory notes or other instruments with or without buy-back arrangement by a seller, participation term certificate, musharika, morabaha, musawama, istisnah or modaraba certificate, term finance certificate;*

(ii) *facility of credit or charge cards;*

(iii) *facility of guarantees, indemnities, letters of credit or any other financial engagement which a financial institution may give, issue or undertake on behalf of a customer, with a corresponding obligation by the customer to the financial institution;*

(iv) *a loan, advance, cash credit, overdraft, packing credit, a bill discounted and purchased or any other financial accommodation provided by a financial institution to a customer;*

(v) *a benami loan or facility that is, a loan or facility the real beneficiary or recipient whereof is a person other than the person in whose name the loan or facility is advanced or granted;*

(vi) *any amount due from a customer to a financial institution under a decree passed by a Civil Court or an award given by an arbitrator;*

(vii) *any amount due from a customer to a financial institution which is the subject matter of any pending suit, appeal or revision before any Court;*

(viii) *any other facility availed by a customer from a financial institution."*

12. According to the provision contained in Section 3 of the Ordinance 2001, the duties of a customer is well defined which reads as:

3. Duty of a customer. : --

(1) *It shall be the duty of a customer to fulfil his obligations to the financial institution.*

(2) *Where the customer defaults in the discharge of his obligation, he shall be liable to pay, for the period from the date of his default till realization of the cost of funds of the financial institution as certified by the State Bank of Pakistan from time to time, apart from such other civil and criminal liabilities that he may incur under the contract or rules or any other law for the time being in force.*

(3) For purposes of this section a judgment against a customer under this Ordinance shall mean that he is in default of his duty under sub-section (1), and the ensuing decree shall provide for payment of the cost of funds as determined under sub-section (2)."

13. It is admitted fact that the petitioner is a financial institution in term of Section 2(a) of the Ordinance, 2001 *ibid* and in case of default or violation of any condition of the finance agreement, may invoked the jurisdiction of the Banking Court established thereunder Section 5 of the Ordinance 2001 *ibid* for the recovery of the finance extended to any customer, alongwith cost of funds, in term of Section 3 of the Ordinance 2001 *ibid*.

14. No doubt, in Section 3 of the Ordinance, the financial institution may proceed against the defaulter, customer in competent Court of law for civil or criminal proceeding subject to any civil or criminal liabilities that the customer may incur under the contract or rules or any other law for the time being in force.

15. The petitioner, instead of invoking the jurisdiction of the Banking Court in this regard, has

opted to initiate criminal proceeding in term of Section 523/550 Cr.PC against the respondent, but the bare perusal of the agreement, mutually executed by parties, no such condition of criminal proceeding or recovery of finance or custody of the lease out vehicle, through criminal proceeding is mentioned thereof.

16. The concern police in term of Section 523 Cr.PC may seize any property taken under Section 51 or stolen, but could not exercise such power to settle a civil dispute, between parties in order to seize a vehicle or any other property not either stolen or recovered therefrom an accused. Section 523 Cr.PC if reproduced would be reads as:

523. "Procedure by police upon seizure of property taken under section 51 or stolen.

(1) The seizure by any police-officer of property taken under section 51, or alleged or suspected to have been stolen, or found under circumstances which create suspicion of the commission of any offence, shall be forthwith reported to a Magistrate, who shall make such order as he thinks fit respecting the disposal of such property to the person entitled to the possession thereof, or if such person cannot be ascertained, respecting the custody and production of such property.

(2) Procedure where owner of property seized unknown.

If the person so entitled is known, the Magistrate may order the property to be delivered to him on such condition (if any) as the Magistrate thinks fit. If such person is unknown, the Magistrate may detain it and shall in such cases, issue a proclamation specifying the articles of which such property consists, and requiring any person who may have a claim thereto, to appear before him and establish his claim within six months from the date of such proclamation.”

Similarly the police could exercise their due power in regard to a property suspected to stolen in term of Section 550 Cr.PC, to seize and suspected property, which reads as:

550. “Powers to Police to seize property suspected to be stolen.

Any police-officer may seize any property which may be alleged or suspected to have been stolen, or which may be found under circumstances which create suspicion of the commission of any offence. Such police-officer, if subordinate to the officer incharge of a police station, shall forthwith report the seizure to that officer.”

17. No any provision could be pointed out in the code, which confers power on any police official, to

seize any vehicle out of ambit of Section 51, 523 or 550 Cr.PC. All the acts, performed by police, in such matter could not be termed as legal, rather violative of law and misuse of power, just to pressurize citizen on behest of influenced persons or institution dealing in leasing or sale purchase of vehicles.

18. Any Court exercising power, under the code in term of Chapter XLIII, Cr.PC may do direction for disposal of any property regarding which any offence appears to have been committed, or which appears to have been used for the commission of any offence is produced before such Court during any inquiry or trial, but the Court shall not legalized or put stamp to the unlawful exercise of power by police, or to secure or recover, the finance facility extended to a customer, by any financial institution.

19. Not only the seizure of the vehicle in question by local police of Police Station Sheikh Maltoon, Mardan, on the instance and report of the petitioner was illegal but also the impugned judgment of

learned Revisional Court below, by placing condition on release of the vehicle in question.

20. Therefore, this petition is disposed of in the above terms, while the vehicle in question, if already handed over to the respondent on furnishing surety bonds, as directed by the learned Court below stands discharged, however, the petitioner if so advised, may proceed against the respondent under the law. The vehicle shall be returned to the respondent forthwith. The office is directed to send a copy of this order/judgment to IGP Police Khyber Pakhtunkhwa as well as the Registrar shall communicate it to all the concern.

Announced:
18.07.2016

J U D G E

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