

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.3456 of 2021

Dhananjay

Versus

1. The Union of India through Secretary Department of Finance and Commerce, New Delhi.
2. The Reserve Bank of India through General Manager South Gandhi Maidan Patna.
3. The State of Bihar through Chief Secretary, Govt. of Bihar, Patna.
4. That Motor Finance Ltd. At. - G.T. Marhia Parao Varanasi with its branch at, Kashi Palace, Patna.
5. Recovery Agent Tata Motor finance Ltd G.T. Marhia Parao, Varanasi with its branch at Kashi Palace, near Hari Niwas complex Patna- 1.

... .. Respondents

with

Civil Writ Jurisdiction Case No. 16155 of 2021

... .. Petitioners

Versus

1. The State of Bihar through the Principal Secretary, Finance Department, Govt. of Bihar, Patna.
2. M.D. and C.E.O., I.C.I.C.I. Bank, Regional Office- I.C.I.C.I. Bank Tower, Near Chakali Circle, Old Padara Road, Vadodara, Gujarat. Corporate Office- I.C.I.C.I. Bank Tower, Bandra Kurla Complex, Mumbai.
3. Zonal Manager, I.C.I.C.I. Bank, Zonal Office, Patna, Plot No. 6B, Sahdeo Mahto Marg, Sri Krishna Puri, Patna.
4. Branch Manager, I.C.I.C.I. Banak, Anisabad, Patna.

... .. Respondents

with

Civil Writ Jurisdiction Case No. 19461 of 2021

Versus

1. Union of India though the Secretary, Department of Finance and Company Act, New Delhi-1.
2. The Chief Manager, Reserve Bank of India at South Gandhi Maidan, Patna-4.
3. Indusind Bank Limited 211 Saran Chambers (ii), 5, Parth Road Lucknow 226001 through its Chief Manager.
4. Branch Manager Indusind Bank Limited at Golu Suzuki, Auto Mobile near Amardeep Cinema Anex-31, Harhar Mahav Chauk Begusarai 851101.



5. The State of Bihar through the District Magistrate, Purnea.
... .. Respondents

with
Civil Writ Jurisdiction Case No. 7944 of 2022

... .. Petitioner

Versus

1. The State of Bihar
2. The Home Commissioner, Government of Bihar, Patna.
3. The Director General of Police, Bihar, Patna.
4. The Secretary, Department of Transport Government of Bihar Patna.
5. The Chief Manager, Reserve Bank of India, South Gandhi Maidan, Patna.
6. Superintendent of Police, Patna.
7. Branch Manager Sri Ram Finance Company Limited at Lav Kush Tower 3rd floor Exhibition Road Police Station- Gandhi Maidan Patna.
8. Amit Kumar at Khabra Muzaffarpur, C/o Sri Ram Transport Finance Company Limited Patna.

... .. Respondents

with
Civil Writ Jurisdiction Case No. 8056 of 2022

1. The State of Bihar Bihar.
2. The Home Commissioner, Government of Bihar, Patna.
3. The Director General of Police, Bihar, Patna.
4. The Secretary, Department of Transport Government of Bihar Patna.
5. The Chief Manager, Reserve Bank of India, South Gandhi Maidan, Patna.
6. Superintendent of Police, Madhepura.
7. M/S Tata Motor Finance Solutions Limited Registered Office 10th Floor 106 A and B maker chamber iii, Nariman, Mumbai 400021 through General Manager.
8. Branch Manager Tata Motor Finance Solutions Limited at 1st Floor Manju Complex Bhata Bazar Purnia 854301.
9. Kare Roy, Himanshu Roy and Sudhanshu Roy, Son of Subhash Roy, At Tetri, Post and Police Station- Naugachiya, District - Bhagalpur.

... .. Respondent/s



Appearance :

(In Civil Writ Jurisdiction Case No. 3456 of 2021)

For the Petitioner/s : Mr. Sanjay Kumar Pandey (Advocate),
Mr. Badri Narayan Singh, Advocate
Mr. Sanjay Kumar Pandey, Advocate
Mr. Manoj Kumar, Advocate
Mr. Sushan Kumar Keshari, Advocate

For the Respondent/s : Mr. Anuj Kumar (Adv.)
Mr. Manoj Kumar, AC to GP 24

Respondent No. 5 : Mr. Rajiv Kumar and Manoj Priydarshi, Advocate
(In Civil Writ Jurisdiction Case No. 16155 of 2021)

For the Petitioner/s : Mr. Anil Kumar Verma, Advocate

For the Respondent/s : Mr. Anil Kumar Singh (Gp26)

For the Respondent No. : Mr. Y.V. Giri, Sr. Advocate

Mr. Prabhakar Nath Rai, Advocate

(In Civil Writ Jurisdiction Case No. 19461 of 2021)

For the Petitioner/s : Mr. Badri Narayan Singh, Advocate

Mr. Sanjay Kumar Pandey, Advocate

Mr. Manoj Kumar, Advocate

Mr. Sushan Kumar Keshari, Advocate

For the Respondent/s : Mr. Dr. Krishna Nandan Singh (ASG)

(In Civil Writ Jurisdiction Case No. 7944 of 2022)

For the Petitioner/s : Mr. Badri Narayan Singh, Advocate

Mr. Sanjay Kumar Pandey, Advocate

Ms. Indira Kumari, Advocate

For the Respondent : Mr. Md. Nadim Seraj (Gp5)

(In Civil Writ Jurisdiction Case No. 8056 of 2022)

For the Petitioner/s : Mr. Badri Narayan Singh, Adv.

Mr. Sanjay Kumar Pandey, Adv.

Ms. Indira Kumari, Adv.

For the Respondent/s : Ms. Divya Verma AC to AAG-3

CORAM: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD

CAV JUDGMENT

Date : 19-05-2023

Heard learned counsel for the petitioners led by Mr. Y.V. Giri, learned Senior Advocate, learned counsel for the contesting respondents and Mr. Abhinav Srivastava, learned Amicus Curiae in all these writ applications.

2. Let it be recorded at the outset that in this batch of six writ applications, earlier five of them were tagged and heard on



different dates by the Hon'ble Division Bench as per the then Roster. In the light of the change of Roster, these writ applications were listed before this Court. Vide order dated 18.04.2023 passed by the learned predecessor Court, CWJC No. 2808 of 2023 (Shivram Singh Vs. The State of Bihar and Others) has also been tagged with the lead case being C.W.J.C. No. 3456 of 2020. In this case no counter affidavit on behalf of the State Bank of India has been filed, hence, this Court thinks it just and proper to de-tag this case from the batch of cases in which the Bank and Finance Companies have taken a stand by filing a counter affidavit. It is once again placed on record that in C.W.J.C. No.3456 of 2021 and C.W.J.C. No. 8056 of 2022 the same and one Finance Company is the contesting respondent. Counter affidavit has been filed in C.W.J.C. No. 3456 of 2021 and the same stand has been taken in both the cases.

3. On the request of learned counsel for the parties, all these writ applications have been taken up together and are being disposed of by this common judgment.

Brief facts of the case

4. In all these writ applications, the petitioners are aggrieved by the action of the contesting respondents, namely, Tata Motor Finance Limited, IndusInd Bank Limited, Shri Ram Finance



Company, ICICI Bank and the State Bank of India. Their common grievance is that their respective vehicles which they had purchased with the financial assistance from these institutions have been forcibly seized with the help of goons and musclemen of the contesting respondents during odd hours.

5. In CWJC No. 3456 of 2021, the allegations is that the vehicle was forcibly seized in the month of February, 2020 but the petitioner got the same released after payment of Rs.3,80,000/-. It is stated that soon thereafter the unprecedented pandemic Covid-19 came because of which the entire country went under a lockdown as a result of which the vehicle could not be run during the period 23.03.2020 to 03.06.2020 so no installment was paid for this period. It is stated that this was the exempted period declared by the Government of India but the Financer (respondent no. 4) seized the truck near village Rahnam through two persons, namely, L.H. Pandit and Kavindra Tiwary along with some goons who were armed. The truck was taken away. It is stated that a sum of Rs.40,000/- was lying in the upper box of the vehicle as the vehicle was returning after sale of sand of Rs.50,000/-. The driver reported the matter to the petitioner whereafter the petitioner contacted L.H. Pandit and Kavindra Tiwary but they did not take any care.



6. It is the case of the petitioner that he had invested Rs.3,00,000/- as down payment against the price of the chassis plus Rs.3,00,000/- in construction of truck body and had also paid a sum of Rs.9,31,000/- as installment. The dues during the Covid period against the petitioner was only Rs.2,15,500/- for which the vehicle in which the petitioner had invested Rs.17,31,000/- was seized with the use of arms.

7. Petitioners have relied upon a judgment of the Hon'ble Supreme Court in the case of **ICICI Bank Vs. Shanti Devi Sharma & Ors arising out of SLP (Crl.) No. 4935 of 2006 reported in (2008) 7 SCC 532** in which the Hon'ble Supreme Court has held such action of the Bank illegal. The petitioner has also relied upon the judgment of this Court in case of **Sujay Kumar Vs. Uco Bank** reported in **2020(1) PLJR 583** wherein this Court has declared the seizure of this nature illegal and ordered the financial institution to return the vehicle to the owner with liberty to claim damage by the owner. This Court also held that the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as the 'SARFAESI Act, 2002' or 'Act of 2002'). and the Rules framed thereunder are to be followed in the matter of seizure of the vehicles.



8. In CWJC No. 16155 of 2021, the case of the petitioner is that he had got a financial assistance of Rs.10,00,000/- from the Bank. He was paying the Equal Monthly Installment (EMI) of the said vehicle properly, it was lastly deposited on 29.06.2021. The Bank had taken post-dated cheques from the petitioner to secure the loan of Rs.10,00,000/- but even as the petitioner was depositing EMI, the Bank got bounced the cheque without any notice to the petitioner. It is his case that during pandemic period, four installments of EMI became due. For this reason, it is stated that the vehicle in question has been pulled down/seized while it was on way. The respondent bank neither followed the procedure prescribed under the SARFAESI Act, 2002 and rules framed thereunder nor gave any notice to the petitioner seeking to re-possess the vehicle. The petitioner tried to approach the authorities of the bank but they did not hear the grievance of the petitioner.

9. In CWJC No. 19461 of 2021, the grievance of the petitioner is that his truck bearing no. BR 53G-1698 was seized forcibly and illegally by the goons of the respondent bank during the pandemic period on 02.09.2021. The petitioner has paid the installments during the period 21.11.2018 to 31.01.2021 which comes to a sum of Rs.20,51,400/-, out of which the petitioner had



already paid Rs.20,11,200/-, thus, only a sum of Rs.40,200/- was due in January, 2021.

10. It is stated that during the pandemic period, the Government of India as well as the Reserve Bank of India had given instruction not to take any coercive measure besides giving a moratorium period of six months. It is stated that in this case, the Bank issued a notice dated 20.09.2021 under Section 13(2) of the SARFAESI Act, 2002 to declare the property as Non-Performing Asset (NPA) but the notice reached five days after the posting. The vehicle had already been re-possessed on 02.09.2021. The petitioner, in response to the notice wrote to the Bank on 27.09.2021 vide Annexures '2', '2A' and '3' to the writ application and informed that he was ready to pay the real dues. Request was made to release the vehicle but it was not paid heed to.

11. In CWJC No. 7944 of 2022, the grievance of the petitioner is that his Bus No. BR 01 PA-9979 was seized forcibly and by the goons of the respondent finance company on 10.05.2022 at Khabra in the District of Muzaffarpur and the vehicle was loaded with passengers. It is stated that the goons led by one Amit Kumar of Khabra with Branch Manager of the Finance Company took possession of the vehicle on the point of pistol and power.



12. In CWJC No. 8056 of 2022, it is the case of the petitioner that his truck bearing no. BR43 GA 5925 was seized forcibly and illegally by the goons of the respondent finance company on 07.02.2021 through a recovery agent. It is his case that the finance company had given an assistance of Rs.29,57,000/- against which the petitioner has paid about Rs.25,00,000/- in different installments before seizure, still the finance company seized the vehicle through goons on road which has become the habit of the private financing institutions. Infact, sensing the threat from the finance company, the petitioner had earlier filed a writ petition in this Court on 18.01.2020 giving rise to C.W.J.C. No. 1480 of 2022 in which he had expressed his apprehension about the seizure of the vehicle by the financier but during pendency of the writ application, the vehicle was seized as a result whereupon the writ application was permitted to be withdrawn with liberty to take recourse to such remedies which are available in accordance with law and in case, the need so arises, he may approach this Court by filing a proper petition.

13. In all these writ applications the petitioners have the grievance against the manner in which their respective vehicles were seized and possessed by the Finance Companies/contesting respondents without taking recourse to the process of law.



14. The petitioners in all these writ applications are seeking a direction to the contesting respondents to hand over their respective vehicles with all papers. They are also seeking compensation to the loss of reputation and other kinds of compensation.

Stand of the contesting respondents

15. It is the stand of the contesting respondents that writ petition as framed is not fit to be entertained in this Court as no part of the cause of action has arisen within the territorial jurisdiction of this Court. It is contended that the writ application involves disputed question of facts, hence, cannot be entertained. Further it is the submission of the contesting respondents that the Banks and Finance Companies which are involved in the financing business are not a State or instrumentality of the State within the meaning of Article 12 of the Constitution of India, hence, no writ may be issued. Lastly, it is submitted that the respondent Bank and Finance Company has an option either to re-possess the hypothecated vehicles in terms of the Loan Agreement and without taking recourse to court or to follow the procedure prescribed under the SARFAESI Act, 2002 and Rules framed thereunder.



16. In CWJC No. 3456 of 2021, the respondent company has taken a plea that the petitioner had surrendered the vehicle on his own free will to the answering respondent and he had given his consent to sell or dispose of the said vehicle at the best possible price and as per instruction of the petitioner in the said case, the vehicle in question was taken possession on 14.12.2020 and sold on 31.12.2020 and the sale proceeded thereof amounting to Rs. 15,25,590/- has been adjusted in the loan amount of the petitioner.

17. Mr. Y.V. Giri, learned Senior Counsel for the ICICI Bank Limited has led the argument which has been adopted by learned counsel representing the contesting respondents in other cases. Learned counsel submits that a writ petition would not lie against the Finance Companies and the Banks involved in financing business. It is his contention that the process of re-possession of the vehicle was initiated as per the rights conferred upon the answering respondents under the loan agreement and it was not incumbent upon the answering respondent to follow the procedures prescribed under SARFAESI Act, 2002 and the rules framed thereunder.

18. Learned counsel has relied upon the judgments of the Hon'ble Supreme Court in the Case of **Magma Fincorp Ltd.**



v. Rajesh Kumar Tiwari reported in **(2020) 10 SCC 399** and in the case of **Maganlal Chhaganlal (P) Ltd. v. Municipal Corpn. of Greater Bombay** reported in **(1974) 2 SCC 402**.

19. On going through the records, this Court finds that by virtue of a direction issued by the Hon'ble Division Bench of this Court in course of hearing of this writ application on 15.11.2022, the State was directed to submit a report from the local Superintendent of Police with regard to the factual aspect of the alleged act of forceful seizure. Mr. Abhinav Srivastava, a learned Advocate of this Court was appointed as an 'Amicus' to assist this Court on the issue with regard to the competence, legality and otherwise of the action of the contesting respondents and what order the Court may pass so as to ensure establishment of rule of law especially with regard to the borrower being protected from recovery procedure in a patently illegal manner by sheer might of people who otherwise do not have authority to do so. In this regard this Court deems it just and proper to reproduce the order dated 15.11.2022 as under:-

“Heard Mr. Badri Singh, learned counsel for the petitioners in all the cases and different learned counsels for the State. In CWJC No.19461 of 2021 Ms. Archana Shahi, learned counsel for the respondents no. 3 and 4 (financial institutions) appears and states that the copy of the brief has



not been served on her and further that she may be given time to file a detailed response.

2. Basically the issue in a nutshell in all these cases is whether the lending institutions, for the purposes of recovery on the ground of default or otherwise, can resort to extra judicial/legal mode of forcibly taking possession of the hypothecated vehicles. By an earlier order the Court had directed the learned State Counsel to take a report from the local police with regard to the factual aspect of the matter in CWJC 3456 of 2021. A report has been submitted by the Superintendent of Police, Kaimur at Bhabua admitting that without any due process of law or information to the local police forcibly the vehicle was seized. The Court being conscious of the prevailing ground reality and taking into account the fact that such things are happening on a regular basis and in a very open and brazen manner and has now almost attained a type of acceptance, in active connivance with the State authorities, especially the local police, the Court request Mr. Abhinav Srivastava, learned counsel to assist the Court on the issue with regard to the competence, legality and otherwise of such action and what order the Court may pass so as to ensure establishment of the rule of law especially with regard to the borrower being protected from recovery procedures in a patently illegal manner by sheer might of people who otherwise don't have authority to do so and with the active connivance of the State authorities, especially the local police.



Let learned counsel for the petitioner serve a copy of the briefs on Mr. Abhinav Srivastava, learned Amicus by day after tomorrow. Copy of CWJC No. 19461 of 2021 be also served on Ms. Archana Shahi by day after tomorrow.

3. In the meantime learned counsel for the petitioners in the other cases will also file an affidavit from where actually the vehicle has been seized and learned State counsels shall also submit a report by filing affidavit with regard to the factual aspect of the alleged act.

4. As jointly prayed for, the matters be listed on 05.12.2022 for admission among the top 5 cases. Learned State counsels would also file their affidavit within two weeks. All the counsels for the concerned respondents besides serving a copy of the counter affidavit on learned counsel for the petitioner shall also serve a copy on the learned Amicus. In the meantime the vehicles, if already not sold, shall not be sold without the leave of the Court.

5. Let the name of Mr. Abhinav Srivastava, learned Amicus be printed in the cause list in the column of the petitioners. In all cases learned State counsels would submit a report from the local S.P. if the place of seizure is disclosed in the writ petition.

6. In the meantime by day tomorrow learned counsel for the petitioners shall file the original hard copy of the writ petition which shall be accepted by the registry.”



20. Again vide order dated 20.12.2022 the Hon'ble Court recorded that in few cases in which the concerned Superintendent of Police of the District have found that there was forceful seizure but at their level no action had been taken for the reason that nobody came forward to lodge any complaint with the Police and further that the matter is sub-judiced in the present proceeding. The Hon'ble Division Bench did not approve the stand of the District Police that nobody came forward to inform may be a ground available to them. The District Police was reminded of the law which require that whenever a cognizable offence is brought to the notice of the authority concerned, the natural consequences have to follow.

21. This Court has perused the counter affidavit filed on behalf of the Superintendent of Police, Kaimur in C.W.J.C. No. 3456 of 2021. He has referred the reports submitted by the S.H.O. of the concerned Police Station. He has stated that the vehicle in question was seized by the Agent of Tata Finance. This counter affidavit says that the vehicle was seized by a recovery agent of Tata Finance, Varanasi on 14.12.2020 and has been sold to one Heyat Ahmad on 31.12.2020 i.e. within 17 days.

22. In C.W.J.C. No. 16155 of 2021, the Senior Superintendent of Police, Patna has submitted a report vide letter



no.1082 dated 13.05.2022 confirming that the vehicle (Scorpio) was seized at the Bypass Toll Tax, Didarganj, Patna by one Amit Raj who is said to be the owner of Amit Raj Consultancy Private Limited which is the Channel Partner of ICICI Bank. The said vehicle has also been auction sold.

Facts Emerging From the Records

23. From the materials available on the record and the submissions made on behalf of the parties referred hereinabove, the following facts would emerge :-

(i) In all these cases, for one reason or the another the contesting respondents have a case that the petitioners had committed default in the matter of payment of EMI against their respective vehicle loan accounts;

(ii) The Banks and Finance Companies who are involved in this case have entered into a hypothecation cum loan agreement whereunder they have a right to repossess the vehicle in case of default. Allegation in all these cases are that the vehicles have been seized/possessed by use of force, in some cases it is alleged use of pistol in the process of seizure.

(iii) These Banks and Finance Companies are governed by the guidelines issued by the Reserve Bank of India in the matter of appointment of Recovery Agents and the procedures which are



required to be followed in the matter of recovery of loans and re-possession /sale of the hypothecated vehicles;

(iv) The contesting respondents in these cases have not followed the provisions of the SARFAESI Act, 2002 and the Rules framed thereunder in the matter of re-possession of movable properties;

(v) A Master Circular DBOD.No.BP.BC.9/21.04.048/2014-15 dated July 1, 2014 consolidating the instructions/guidelines issued to the Banks till June 30, 2014 relating to statutory and other restrictions of loans and advances has been issued on July 1, 2015. A copy of the same has been brought on record with the 5th Supplementary Affidavit filed on behalf of the respondent no. 2 to 4 in C.W.J.C. No. 16155 of 2021.

(vi) In these cases the guidelines of the Reserve Bank of India as contained in its Master Circular in the matter of appointment of Recovery Agent and re-possession of the vehicle have not been followed.

24. In the aforementioned background of the facts which are emerging from the records, Mr. Y. V. Giri, learned Senior Advocate representing the contesting respondents in C.W.J.C. No. 16155 of 2021 has gone to the extent of submitting that the contesting respondents derive its power to seize the



vehicle without recourse to law under the loan agreement hence no fault may be found in the action of the respondents in taking possession of the vehicle and sale thereof.

Consideration

25. Mr. Y.V. Giri, learned Senior Counsel has given much emphasis on his submission that the private respondents who are the Banks and Financial Institutions cannot be subjected to a writ under Article 226 of the Constitution of India. It is his submission that these contesting respondents are neither a State nor an instrumentality of the State or any other authority within the meaning of Article 12 of the Constitution of India, therefore, the petitioners cannot maintain a writ application against their action in the matter of seizure of the vehicles in question.

26. This argument of learned Senior Counsel for the contesting respondents, namely, ICICI Bank Limited in C.W.J.C. No. 16155 of 2021 has been adopted by the learned counsel for the contesting respondents in other writ applications also, therefore, this Court deems it just and proper to answer this issue at the threshold.

27. To this Court, it appears that after the decision of the Hon'ble Constitution Bench of the Supreme Court of India in the case of **Kaushal Kishore Vs. State of Uttar Pradesh and Others**



reported in **(2023) 4 SCC 1**, the submissions as framed above on the question of issuance of a writ to a non-State actor is devoid of merit.

28. Assuming the submission as it is and without going into a question as to whether in these cases the contesting respondents would come within the meaning of Article 12 of the Constitution of India or not, this Court deems it expedient to have a glance over the developments on this aspect by way of judicial pronouncements.

29. The Hon'ble Supreme Court while considering the question no. 2, framed in the case of **Kaushal Kishore (Supra)** has dealt in detail as to how the law has developed so far and has recognized that a fundamental right under Article 19 or 21 can be claimed against anyone other than the State or its instrumentality. The Hon'ble Apex Court has discussed the question as to whether Part III of the Constitution has a "vertical" or "horizontal" effect. It has been held that wherever constitutional rights regulate and impact only the conduct of the government and government actors in their dealings with private individuals they are said to have a "vertical" effect. But wherever constitutional rights impact even the relations between private individuals, they are said to have a "horizontal" effect.



30. In **Kaushal Kishore (supra)**, the Hon'ble Supreme Court has shown that some of the Articles of Part III are in the form of a Directive to the State while others are not. In paragraph '79' of the judgment, their Lordships observed inter alia:-

“This is an indication that some of the rights conferred by Part III are to be honored by and also enforceable against, non-State actors.”

31. Addressing the question as to how the Courts in India have dealt with cases where there were complaints of infringement by non-State actors, of fundamental rights, the Hon'ble Supreme Court referred the judgments in the case of **P.D. Shamdasani Vs. Central Bank of India** reported in (1951) SCC 1237, **Vidya Varma Vs. Dr. Shiv Narain** reported in AIR 1956 SC 108, **Sukhdev Singh Vs. Bhagatram Sardar Singh Raghuvanshi** reported in (1975) 1 SCC 421, **People's Union for Democratic Rights Vs. Union of India** reported in (1982) 3 SCC 235; **S. Rangarajan Vs. P. Jagjivan Ram** reported in (1989)2SCC 574; **Nilabati Behera Vs. State of Orissa** reported in (1993) 2SCC 746; **Lucknow Development Authority Vs. M.K. Gupta** reported in (1994) 1 SCC 243; **Bodhisattwa Gautam Vs. Subhra Chakraborty** reported in (1996) 1 SCC 490; **M.C. Mehta Vs. Kamal Nath** reported in (1997) 1 SCC 388, **Vellore Citizens' Welfare Forum Vs. Union of India** reported in (1996) 5 SCC 647, **M.C. Mehta Vs. Kamal Nath** reported in



(2000) 6 SCC 213; Consumer Education and Research Centre & Ors. Vs. Union of India & Ors. reported in **(1995) 3 SCC 42;** **Vishaka Vs. State of Rajasthan** reported in **(1997) 6 SCC 241;** **Githa Hariharan (Ms.) & Anr. Vs. Reserve Bank of India & Anr.** reported in **(1999) 2 SCC 228;** **Indian Medical Association Vs. Union of India** reported in **(2011) 7 SCC 179;** **Society for Unaided Private Schools of Rajasthan Vs. Union of India** reported in **2012) 6 SCC 1;** **Jeeja Ghosh Vs. Union of India** reported in **(2016) 7 SCC 761;** **Zee Telefilms Ltd. Vs. Union of India** reported in **(2005) 4 SCC 649;** **Janet Jeyapaul Vs. S.R.M. University** reported in **(2015) 16 SCC 530;** **Justice K.S. Puttaswamy Vs. Union of India** reported in **(2017) 10 SCC 1.**

32. At this stage, this Court finds that at least paragraphs '81.15', 81.16', 82 and 83 from the judgment in **Kaushal Kishore (Supra)** are required to be reproduced to end this discussion:-

“81.15. In Jeeja Ghosh v. Union of India [Jeeja Ghosh v. Union of India⁹⁸, the petitioner, a disabled person suffering from cerebral palsy, was unceremoniously ordered off a SpiceJet aircraft by the flight crew on account of the disability. The petition was filed for putting in place a system to ensure such a violation of human dignity and inequality is not meted out to similarly placed persons. This Court observed as follows : (SCC p. 771, para 10)”

98 2016) 7 SCC 761 : (2016) 3 SCC (Civ) 551]



“10. It is submitted by the petitioner that the Union of India (Respondent 1) has an obligation to ensure that its citizens are not subject to such arbitrary and humiliating discrimination. It is a violation of their fundamental rights, including the right to life, right to equality, right to move freely throughout the territory of India, and right to practise their profession. *The State has an obligation to ensure that these rights are protected* — particularly for those who are disabled.”

(emphasis supplied)

This Court awarded compensation to the petitioner against the private Airline on the ground that the airline, though a private enterprise, ought not to have violated her fundamental right.

81.16. In *Zee Telefilms Ltd. v. Union of India* [*Zee Telefilms Ltd. v. Union of India*⁹⁹], this Court held that though BCCI does not fall within the purview of the term “State”, it discharges public duties and that therefore even if a remedy under Article 32 is not available, the aggrieved party can always seek a remedy before the ordinary courts of law or by way of a writ petition under Article 226. This Court pointed out that the violator of a constitutional right could not go scot-free merely because it is not a State. The said logic was extended by this Court to a “Deemed to be University” in *Janet Jeyapaul v. SRM University*,¹⁰⁰

⁹⁹ (2005) 4 SCC 649],

¹⁰⁰ (2015) 16 SCC 530 : 8 SCEC 68



on the ground that though it is a private university, it was discharging “public functions”, by imparting education.

82. All the above decisions show that on a case-to-case basis, this Court applied horizontal effect, considering the nature of the right violated and the extent of obligation on the part of the violator. But to enable the courts to have certain basic guidelines in place, for dealing with such cases, this Court developed a tool in *K.S. Puttaswamy (Privacy-9 J.)*²⁰. While affirming the right to privacy as a fundamental right, this Court laid down the landscape as follows : (SCC p. 539, paras 397-98)

“397. Once we have arrived at this understanding of the nature of fundamental rights, we can dismantle a core assumption of the Union's argument : *that a right must either be a common law right or a fundamental right.* The only material distinctions between the two classes of right—of which the nature and content may be the same—lie in the incidence of the duty to respect the right and in the forum in which a failure to do so can be redressed. *Common law rights are horizontal in their operation when they are violated by one's fellow man, he can be named and proceeded against in an ordinary court of law. Constitutional and fundamental rights, on the other hand, provide remedy against the violation of a valued interest by the “State”, as an abstract entity, whether through legislation or otherwise, as well as by identifiable public officials, being individuals clothed with the powers of the State. It is perfectly possible for an interest to simultaneously be recognised as a common*

20 *K.S. Puttaswamy (Privacy-9 J.) v. Union of India, (2017) 10 SCC 1]*



law right and a fundamental right. Where the interference with a recognised interest is by the State or any other like entity recognised by Article 12, a claim for the violation of a fundamental right would lie. Where the author of an identical interference is a non-State actor, an action at common law would lie in an ordinary court.

398. Privacy has the nature of being [**Ed.** : The word between two asterisks has been emphasised in original.] *both* [**Ed.** : The word between two asterisks has been emphasised in original.] a common law right as well as a fundamental right. Its content, in both forms, is identical. All that differs is the incidence of burden and the forum for enforcement for each form.”

(emphasis supplied)

83. Thus, the answer to Question 2 is partly found in the nine-Judge Bench decision in *K.S. Puttaswamy (Privacy-9 J.)*²⁰ itself. We have seen from the line of judicial pronouncements listed above that after *A.K. Gopalan v. State of Madras*,¹⁰¹ lost its hold, this Court has expanded the width of Article 21 in several areas such as health, environment, transportation, education and prisoner's life, etc. As Vivian Bose, J., put it in a poetic language in *S. Krishnan v. State of Madras*¹⁰² (*S. Krishnan case*¹⁰² SCC p. 524, para 63)

“63. *Brush aside for a moment the pettifogging of the law and forget for the nonce all the learned disputations about this and that, and “and” or “or”;; or “may” and “must”. Look past the mere verbiage of the words and penetrate deep into the heart and spirit of the Constitution.*”

(emphasis supplied)

20 *K.S. Puttaswamy (Privacy-9 J.) v. Union of India*, (2017) 10 SCC 1]
101 1950 SCC 228 :AIR 1950 SC 27
102 1951 SCC 499 : AIR 1951 SC 301]



The original thinking of this Court that these rights can be enforced only against the State, changed over a period of time. The transformation was from “State” to “Authorities” to “instrumentalities of State” to “agency of the Government” to “impregnation with Governmental character” to “enjoyment of monopoly status conferred by State” to “deep and pervasive control”¹⁰³ to the “nature of the duties/functions performed”³⁹ . Therefore, we would answer Question 2 as follows:

“A fundamental right under Articles 19/21 can be enforced even against persons other than the State or its instrumentalities.”

33. In the light of the aforementioned discussion, lwhen this Court considers the facts of these cases, it is noticed that these petitioners are essentially complaining of violation of their fundamental rights to earn their livelihood with dignity. They are complaining of ‘deprivation’ in the hands of the contesting respondents without following the law and by use of force which cannot be permitted in a State governed by rule of law. Article 21 of the Constitution of India guarantees every person that he shall not be deprived of his life and liberty except according to the procedure established by law. The expressions “the State” is not used in Article 21 as has been noticed by the Hon’ble Supreme

103 *Ramana Dayaram Shetty v. International Airport Authority of India*, (1979) 3 SCC 489

39 *Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust v. V.R. Rudani*, (1989) 2 SCC 691



Court in the case of **Kaushal Kishore (supra)**. To put it in the words of the Hon'ble Supreme Court, this Court would reproduce the relevant lines from paragraph '86' of the judgment as under:-

“ Article 21 does not say “the State shall not deprive a person of his life and liberty”, but says that “no person shall be deprived of his life or personal liberty”.

34. The livelihood and all those aspects of life which come to make a man's life meaningful, complete and worth living are included within the meaning of the words “The Right to Life”.

35. In these cases, it is alleged that the contesting respondents have forcibly seized the vehicles while they are on way. Admittedly the petitioners are the owners of the vehicle, they have borrowed loan. In one of the cases, the bus passengers were compelled to de-board the bus on way and then the vehicle was repossessed. While doing so, admittedly, the contesting respondents have not taken recourse to the provisions of the SARFAESI Act, 2002 and the Rules framed thereunder. The deprivation, in the present case, is not only by way of violation of the established procedure of law but is also against the human dignity.

36. To this Court, there is no iota of doubt that the action of the contesting respondents is in contravention of the fundamental policy of the Indian Law and it is in conflict with the



most basic notions of justice. This Court, therefore, rejects the contention of Mr. Giri, learned Senior Counsel that no writ application may be entertained against the contesting respondents.

Loan Agreements-Enforcement Mechanism

37. This leads to an another question as to whether the provision regarding seizure of a vehicle in case of default, under the loan agreement in these cases, may be enforced in the manner it has been sought to be done. In the case of **Kaushal Kishore (Supra)** the Hon'ble Supreme Court has, while discussing the "horizontal" effect noticed the judgment of the Constitutional Court of South Africa in the Governing Body of the **Juma Musjid Primary School & Others vs. Essay N.O. and Others** reported in **2011 SCC Online JACC 13 = (2011) 8 VCLR 61** wherein it was held that the eviction order obtained by the owner of a private land on which a public school was located, could not be enforced as it would impact the students' right to basic education and the best interests of the child under the South African Constitution (Sections 28 and 29). The Court held that a private landowner and non-State actor has a Constitutional obligation not to impair the right to basic education under Section 29 of the Constitution.

38. In the background of the aforesaid issue, this Court has to essentially consider as to whether the provisions of the loan



agreement in these cases may be enforced by adopting a procedure which has no sanction of law and such procedure if permitted to be followed would be violating the provisions of the SARFAESI Act, 2002 and the Rules framed thereunder. Corollary to this is as to whether the contesting respondents have any Constitutional obligation not to act in violation of law or in other words not to act in conflict with the fundamental principles and policy of India in the matter of seizure of movable or immovable properties by a finance company which are contained in a legislative enactment such as SARFAESI Act, 2002 and the rules framed thereunder.

39. To this Court, it appears that the contesting respondents while seeking their private power to recover the loan by repossessing the vehicle can exercise their rights only within the constitutional limitations. A law such as SARFAESI Act, 2002 is a complete code unto itself and even the RBI guidelines have given much emphasis that where Banks have incorporated a repossessions clause in the contract with the borrower and rely on such repossession clause for enforcing their rights, they should ensure that the repossessions clause is legally valid, comply with the provisions of the Indian Contract Act in letters and spirit and ensure that such repossession clause is clearly brought to the notice of the borrower at the time of execution of the contract.



40. According to the RBI guidelines, the terms and conditions of the contract should be strictly in terms of pre-recovery policy and should contain provisions regarding (a) notice period before taking possession; (b) circumstances in which the notice period can be waived (c) the procedure for taking possession of the security (d) a provision regarding final chance to be given to the borrower for repayment of loan before the sale/auction of the property and (e) the procedure for giving repossession of the policy and (f) the procedure for sale/auction of the property. In all these circumstances, the contesting respondents are unable to demonstrate from the records that the loan agreement contains the procedures to be followed.

41. Mr. Giri has relied upon one of the clauses of the hypothecation deed which reads as under:-

“2(iii) (i) to enter into and upon the premise of the borrower and/or in other persons who then has possession of the assets; (ii) to seize, recover, collect, withdraw, receive the Assets and/or any income, profits and benefits thereof without interruption or hindrance by the borrower and/or by any person(s), (iii) to remove and/or sell by public auction or by private contract, dispatch or consign for realization or otherwise dispose of or deal with all or any part of the Assets and enforce, realize, settle, compromise and deal with any rights or claims relating thereof without being bound to exercise any of these powers or be liable for any losses in the exercise or in the exercise thereof (iv) be and discharged and well and sufficiently safe and keep harmless and indemnified of, from and against all former and other estates, titles, claims, dues, charges and incumbrances whatsoever, or to direct the borrower and/or other



concerned person to sell, assign or otherwise liquidate, any or all of the assets, (v) to claim the profits of any such sale or liquidation, (vi) to retain all amounts and/or other receipt so receivable by the Bank in respect of the assets and use them, in whole or part, towards repayment/payment of all amount in respect of the facilities, (vii) to direct the borrower and so far other concerned person in writing to deliver the assets to the Bank on a date and time indicated by the Bank, in which even the borrower shall add its own expense (a) delivery/forthwith cause the same to be delivered to the Bank; (b) providw/cause to be provided such guards and maintenance services as shall be necessary to protect the same.

Notwithstanding any pending suit or other proceeding, the borrower undertakes to give immediate possession of the Assets and all records/documents in relation thereto to the nominee or authorized persons of the Bank, on demand, and to transfer and to deliver to the Bank all relevant bills, contracts, securities and documents and the policy hereby course to accept the Bank account and hence realization as sufficient proof of amount realised and relative expenses and to pay all due any shortfall thereby shown, provided every bank shall under any way be liable or responsible for any loss, damage or depreciation that the relevant assets may suffer or sustain on any kind whatsoever as well the same are in possession of the Bank or by reason of exercise or non-exercise of rights or remedies available to the Bank.”

42. Mr. Giri, learned Senior Counsel has not placed any other clause laying down the procedure as envisaged by RBI. At this stage, it would be interesting to take note of the seizure procedure available in the agreement in C.W.J.C. No. 7944 of 2022 as under:-

“In the event of failure of the Borrower in complying with the demand, the Borrower shall be bound to surrender the asset to the Lender at the cost of the Borrower at such location, as the Lender may designate, in the same condition in which it was when



the loan was granted, ordinary wear and tear excepted, failing which, the Lender shall be entitled to seize the Asset wherever it is, without any further notice, The Borrower shall not prevent or obstruct the Lender from taking possession of the Asset. For this purpose, the Lender's authorised representative, employees and agents will have unrestricted right of entry and shall be entitled to enter upon the premises, or garage, or godown, where the Asset shall be lying or kept, and to possess the Asset. In the event of the Borrower not cooperating, the Lender, if necessary, has the right to break open any such place where the Asset is believed to be kept and to seize the Asset. The Lender will be well within his rights to use towvan or any carrier to carry away the Asset. The Borrower shall be liable to pay any towing charges and any other expenses incurred by the Lender in connection with the seizure of the Asset and for its sale etc.”

43. The Indusind Bank Limited (respondent no. 3 in C.W.J.C. No. 19461 of 2021) seems to have drafted its agreement regarding enforcement of security interest keeping in view the Act of 2002; the relevant clause of the Loan agreement in the said case reads as under:-

“ENFORCEMENT OF SECURITY INTEREST

In the event of any default in the payment of installments, violation of the terms and conditions of the Agreement, the Lender may take all or any of the legal action herein referred and/ or before all the forums and also invoke its remedies available under the Securitisation and reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act) applicable in respect of the recovery of non-performing asset. The Lender is entitled to recover and dispose the Secured asset as per the said Act. The lender



is further entitled to recover the balance dues if any after disposal of the secured asset.

The Borrower and Co-borrower expressly recognize and accept that the Lender shall be absolutely entitled and have full power and authority to sell assign or transfer in any manner, in whole or in part and in such manner and on such terms as the Lender may decide, to any third party of the Lender's choice without reference to or without written intimation to the Borrower and Co-borrower. This includes reserving the right to the Lender to retain its power hereunder to proceed against the Borrower and Co-Borrower on behalf of the purchaser, assignee or transferee, for any or all outstanding dues of the borrower. Any such action and any such sale, assignment or transfer shall bind the Borrower and Co-borrower to accept such third party as creditor exclusively or as a joint creditor with the Lender, or as creditor exclusively with the right to the Lender to continue to exercise all powers hereunder on behalf of such third party and to pay over such outstanding amounts and dues to such third party and/ or to the Lender as the Lender may direct. The Borrower and Co-borrower acknowledge and undertake to pay to third parties the difference between the total loan amount and the amount received the Lender in the event of transfer of the portfolio to a third party. The third party shall have authority of the Lender to collect the due amounts.”

44. On a bare perusal of the aforementioned clause which confers right upon the financier to repossess the vehicle in case of default, it would appear that while in some cases no procedure has been provided, at least in the case of Indusind Bank Ltd., they admit the applicability of the SARFAESI Act 2002, they



have incorporated it in their agreement but have not followed the law.

45. In the counter affidavit filed on behalf of ICICI Bank Limited it is stated that the Bank appointed M/s Amit Raj Consultancy Services Private Limited to take possession of the hypothecated vehicle but there is no statement that this was informed to the petitioner. As per the RBI guidelines contained in the Master Circular (Annexure '18' to the 5th Supplementary Counter affidavit of the ICICI Bank), the Bank should inform the petitioner the details of recovery agency firm/companies while forwarding default cases to the recovery agency. There is no statement at all that this guideline was followed by the Bank. It is further stated in the counter affidavit that before taking possession of the hypothecated vehicle the answering respondents sent an information to the Police Station but it is not stated as to under which procedure the information was given to the Police Station. The copy of the letter showing intimation to the Police Station (Annexure 8 to the counter affidavit) has been brought on record. A perusal of Annexure '8' would show that it is addressed to the S.H.O., Didarganj, Patna, signed on 20.07.2021 and on the same day the vehicle has been shown to have been possessed. This procedure is neither laid down in the RBI guidelines or in the loan



agreement or under the SARFAESI Act 2002 and the Rules framed thereunder. Admittedly, these actions have been taken by the Bank during the Covid-19 period. It further appears that within eight days from the date of re-possession of the vehicle, the ICICI Bank claims to have issued a pre-sale notice to the petitioner on 28.07.2021, they obtained valuation of the vehicle on 29.08.2021 wherein the valuation of the vehicle was assessed at Rs. 6,50,000/- and thereafter the Bank auctioned the vehicle which was informed to the Regional Transport Officer, Chajjubagh, Patna vide letter dated 18.08.2021.

46. Therefore, by their own admission the Bank did not even allow the petitioner to know as to what is the valuation and basis thereof. The manner in which auction sale was notified or brought to the notice of the public at large to fetch maximum amount has not at all been disclosed in the counter affidavit. The statement of the petitioner that he had deposited the last installment on 29.06.2021 but thereafter no notice was given to him has not all been denied.

47. This Court would at this stage take note of the RBI Guidelines in the matter of taking possession of the property mortgaged/hypothecated to banks. The relevant paragraph (xii) is reproduced hereunder:-



“(xii) In a recent case which came up before the Honourable Supreme Court, the Honourable Court observed that we are governed by rule of law in the country and the recovery of loans or seizure of vehicles could be done only through legal means. In this connection it may be mentioned that the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act) and the Security Interest (Enforcement) Rules, 2002 framed thereunder have laid down well defined procedures not only for enforcing security interest but also for auctioning the movable and immovable property after enforcing the security interest. It is, therefore, desirable that banks rely only on legal remedies available under the relevant statutes while enforcing security interest without intervention of the Courts.”

48. As back as in the year 2007 while dealing with the case of **ICICI Bank Ltd. vs. Prakah Kaur and others** reported in **(2007) 2 SCC 711** wherein it was the case of the respondents that the Bank had recovered possession of the vehicle forcibly, the Hon’ble Supreme Court observed as under:-

“**16.** Before we part with this matter, we wish to make it clear that we do not appreciate the procedure adopted by the Bank in removing the vehicle from the possession of the writ petitioner. The practice of hiring recovery agents, who are musclemen, is deprecated and needs to be discouraged. The Bank should resort to procedure recognised by law to take possession of vehicles in cases where the borrower may have committed default in payment of the instalments instead of taking resort to strong-arm tactics.”

49. The Hon’ble Supreme Court in the aforesaid case while directing the the appellant Bank to hand over the vehicles to the respondents recorded that in case of default in payment of



subsequent installments, the Bank will be entitled to repossess the vehicle in accordance with law. Thus, what is important to note is that it was the contention of ICICI Bank that in case of default of payment of the installments and in terms of the agreement, the truck was taken in possession of the Bank authorities, the Hon'ble Supreme Court did not approve the same and while directing the Bank to release the truck and reconcile the account, etc., it was made clear that in case of default in payment of subsequent installments, the Bank will be entitled to repossess the vehicle in accordance with law.

50. Again only after an year in the case **Shanti Devi Sharma (supra)** which was a case against the ICICI Bank, the Hon'ble Supreme Court noticed the facts of the case wherein the motorcycle of the husband of the respondent was repossessed by the Bank through it's recovery agent by use of force whereafter he was carrying the vegetables on his back and the members of the neighbourhood allegedly made snide comments. This led to the husband of the respondent committing suicide as he could not face such a humiliation and discourage in his life. The Hon'ble Supreme Court observed in paragraph 12 as under:-

“**12.** The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) and the Security Interest (Enforcement) Rules, 2002 (SIER) framed thereunder provide some of



the procedures by which security interests may be recovered. In addition to SARFAESI and SIER, Reserve Bank of India (RBI) has promulgated guidelines on the subject. The RBI Guidelines on Fair Practices Code for Lenders dated 5-5-2003 provide at (v)(c) that: “in the matter of recovery of loans, the lenders should not resort to undue harassment viz. persistently bothering the borrowers at odd hours, use of muscle power for recovery of loans, etc.”

51. The Hon’ble Supreme Court noticed that the RBI has expressed its concern about the number of litigations filed against the banks in the recent past for engaging recovery agents who have purportedly violated the law. In the guideline of April, 2008 on the engagement of recovery agents, RBI stated:

“In view of the rise in the number of disputes and litigations against banks for engaging recovery agents in the recent past, it is felt that the adverse publicity would result in serious reputational risk for the banking sector as a whole.”

52. The Hon’ble Supreme Court noted that the RBI has taken this issue seriously, as evidenced by the penalty that banks could face if they fail to comply with the guidelines. In the said case the Hon’ble Supreme Court refused to expunge the remarks made by the Hon’ble Delhi High Court while disposing of the Writ Petition (Criminal) No. 576 of 2006. The respondents in the said case had prayed for a direction to the Commissioner of Police to take action against the appellant Bank and the Hon’ble Delhi High



Court directed accordingly for taking action against those who may be found guilty of abetting the deceased to commit suicide. In paragraph '17' of the judgment in the case of **Shanti Devi Sharma (supra)** the Hon'ble Supreme Court observed as under:-

“17. We deem it appropriate to remind the banks and other financial institutions that we live in a civilised country and are governed by the rule of law.”

53. The Apex Court directed the Deputy Commissioner of Police to expedite the investigation and submit a report to the Delhi High Court and also awarded cost of litigation at Rs. 25,000/- against the Bank.

54. Mr. Y. V. Giri, learned Senior Counsel has relied upon a judgment of the Hon'ble Apex Court in the case of **Magma Fincorp Ltd. v. Rajesh Kumar Tiwari** reported in **(2020) 10 SCC 399**. It is his submission that in the said case the Hon'ble Supreme Court held that a financier is the real owner of the vehicle which is the subject of a hire-purchase agreement, therefore, there would be no impediment to the financier taking possession of the vehicle when the hirer does not make payment of installments/hire charges in terms of the hire-purchase agreement. First of all, let it be recorded that in none of these cases it is the contention of the Bank/Finance Company that there was a hire purchase agreement or that they are the owner of the vehicles. To this Court, it appears that Mr. Giri has referred only one part of the



judgment rendered by the Hon'ble Apex Court in the case of **Magma Fincorp Ltd. (supra)**. In paragraph '87' of the judgment their Lordships of the Hon'ble Supreme Court held as under:-

“87. The question raised by the financier in this appeal, that is, whether the financier is the real owner of the vehicle, which is the subject of a hire-purchase agreement, has to be answered in the affirmative in view of the law enunciated by this Court in *Charanjit Singh Chadha*², *K.L. Johar & Co.*,⁴ and *Anup Sarmah*⁵. The financier being the owner of the vehicle which is the subject of a hire-purchase agreement, there can be no impediment to the financier taking possession of the vehicle when the hirer does not make payment of instalments/hire charges in terms of the hire-purchase agreement. However, such repossession cannot be taken by recourse to physical violence, assault and/or criminal intimidation. Nor can such possession be taken by engaging gangsters, goons and musclemen as so-called recovery agents.”

(underline is mine)

55. It is crystal clear from the aforementioned judgment that the Hon'ble Supreme Court's judgment bans taking over possession by recourse to physical violence, assault and/or criminal intimidation. It completely bans taking such possession by engaging gangsters, goons and musclemen as so called

² *Charanjit Singh Chadha v. Sudhir Mehra*, (2001) 7 SCC 417 : 2001 SCC (Cri) 1557

⁴ *K.L. Johar & Co. v. CTO*, AIR 1965 SC 1082

⁵ *Anup Sarmah v. Bhola Nath Sharma*, (2013) 1 SCC 400 : (2013) 1 SCC (Civ) 513 : (2013) 1 SCC (Cri) 518



recovery agents. From paragraph '11' of the judgment in the case of **Magma Fincorp Ltd. (supra)** it would be crystal clear that **Magma Fincorp Ltd. (supra)** was not a case of forceful possession of the vehicle through so called recovery agents.

56. This Court is of the considered opinion that a recovery agent cannot intercept a bus or a truck or a scorpio vehicle on way and direct the passengers to come down and leave the vehicle, unless they obtain appropriate order in accordance with law and such orders are required to be executed only in accordance with law.

57. This Court had occasion to consider an identical question in the case of **Sujay Kumar (supra)** paragraph '17' and '18' of the judgment read as under:-

“17.The question which really arises for consideration in the present writ application is, firstly, as to whether under the hypothecation agreement which confers a right and power upon the respondent-Bank, in case of default on the part of the borrower to seize and take possession of the vehicles without any notice to the borrower from any place and without recourse to any suit may be interpreted so as to mean that the respondent-Bank has a license to forcefully take possession of the vehicles at any place without giving notice to the borrower or the guarantor and without recourse to any suit or proceeding and permission from a



competent of law. The right and entitlement to seize the vehicle may be one thing, here the manner in which that right and entitlement has been exercised by the respondent- ank has been questioned.

18. The second question which arises for consideration is as to whether after coming into force of the SARFAESI Act, 2002 the respondent-Bank would be justified in ignoring the provisions of the SARFAESI Act, 2002 which has got a legal sanctity and the purpose behind that enactment was to regulate Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest. If the legislatures of this country decided to enact a regulatory law for enforcement of security interest, is it open for the respondent-Bank to take a plea that in terms of its own policy the Bank can appoint a recovery agent and may take possession of the hypothecated/movable in which a security interest has been created by virtue of a hypothecation agreement in a manner which is in teeth of the statutory provision.”

58. This Court dealt in detail the preamble of the Act of

2002 as under:-

“19. Let us see first the scheme of the SARFAESI Act, 2002. The preamble of the Act of 2002 reads as under:-
An Act to regulate securitization and reconstruction of financial assets and enforcement of security interest and for matters connected therewith or incidental thereto.



The dictionary Section 2 defines financial assistance, financial asset, hypothecation, property, secured asset, secured creditor and security interest as under: -

“2.(k) “financial assistance” means any loan or advance granted or any debentures or bonds subscribed or any guarantees given or letters of credit established or any other credit facility extended by any bank or financial institution [including finds provided for the purpose of acquisition of any tangible asset on hire or financial lease or conditional sale or under any other contract or obtaining assignment or licence of any intangible asset or purchase of debt securities];

2(l). "financial asset" means debt or receivables and includes-

(i) a claim to any debt or receivables or part thereof, whether secured or unsecured; or (ii) any debt or receivables secured by, mortgage of, or charge on, immovable property; or

(iii) a mortgage, charge, hypothecation or pledge of movable property; or (iv) any right or interest in the security, whether full or part underlying such debt or receivables; or

(v) any beneficial interest in property, whether movable or immovable, or in such debt, receivables, whether such interest is existing, future, accruing, conditional or contingent; or

[va] any beneficial right, title or interest, in any tangible asset given on hire or financial lease or conditional sale or under any other contract which secures the obligation to pay any unpaid portion of the purchase price of such asset or an obligation incurred or credit otherwise provided to enable the borrower to acquire such tangible asset; or] [any right, title or interest on any intangible asset or licence or assignment of such intangible asset, which secures the obligation to pay any unpaid portion



of the purchase price of such intangible asset or an obligation incurred or credit otherwise extended to enable the borrower to acquire such intangible asset or obtain licence of the intangible asset; or;]

(vi) any financial assistance;

2(n). "Hypothecation" means a charge in or upon any movable property, existing or future, created by a borrower in favour of a secured creditor without delivery of possession of the movable property to such creditor, as a security for financial assistance and includes floating charge and crystallisation of such charge into fixed charge on movable property;

2(t). "property" means--

(i) immovable property;

(ii) movable property;

(iii) any debt or any right to receive payment of money, whether secured or unsecured;

(iv) receivables, whether existing or future;

(v) intangible assets, being know-how, patent, copyright, trade mark, licence, franchise or any other business or commercial right of similar nature;

2(zc). "secured asset" means the property on which security interest is created;

2(zd) "secured creditor" means--

(i) any bank or financial institution or any consortium or group of banks or financial institutions holding any right, title or interest upon any tangible asset or intangible asset as specified in clause (1);

(ii) debenture trustee appointed by any bank or financial institution; or

(iii) an asset reconstruction company whether acting as such on managing a trust set up by such asset reconstruction company for the secularization or reconstruction, as the case may be; or



(iv) debenture trustee registered with the Board appointed by any company for secured debt securities; or
(v) any other trustee holding securities on behalf of a bank or financial institution,

in whose favour security interest is created by any borrower for due repayment of any financial assistance.;

2(zf). "security interest" means right, title or interest of any kind, other than those specified in section 31, upon property created in favour of any secured creditor and includes ---

(i) any mortgage, charge, hypothecation, assignment or any right, title or interest of any kind, on tangible asset, retained by the secured creditor as an owner of the property, given on hire or financial lease or conditional sale or under any other contract which secures the obligation to pay any unpaid portion of the purchase price of the asset or an obligation incurred or credit provided to enable the borrower to acquire the tangible asset; or

(ii) such right, title or interest in any intangible asset or assignment or licence of such intangible asset which secures the obligation to pay any unpaid portion of the purchase price of the intangible asset or the obligation incurred or any credit provided to enable the borrower to acquire the intangible asset or licence of intangible asset.]”

20. Under the scheme of the SARFAESI Act, 2002, a demand notice under Section 13(2) has to be issued to the borrower calling upon him to discharge in full his liabilities to the secured creditor within 60 days from the date of the notice, failing which the secured creditor shall be entitled to exercise all or any of the rights under sub- section (4). If the borrower submits an objection within the aforesaid



period of 60 days, the same is to be considered by the secured creditor and the objections are to be disposed off by communicating the decision to the borrower within 15 days of the receipt of such representation or objection. The reasons for non-acceptance of the representation is to be provided. Under sub-section (4) of Section 13, in case the borrower fails to discharge his liability within the prescribed period the secured creditor may take recourse to one or more of the measures provided under sub-section (4) to recover his secured creditor. It includes taking over the possession of secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realizing the secured asset.

21. We are concerned here with the power to be exercised under Section 13(4)(a) of the SARFAESI Act, 2002. The Security Interest (Enforcement Rules, 2002) lays down the procedures to be followed. For purpose of taking possession of movable property in possession of the borrower, the Authorized Officer shall take possession of such movable property in presence of two witnesses after a Panchnama drawn and signed by the witnesses as merely as possible in Appendix I to the Rules. Under sub-rule (2) of rule 4 after taking possession the Authorized Officer shall make or cause to be made an inventory to the property in Appendix II and deliver a copy of such inventory to the borrower or any person entitled to receive the same on behalf of the borrower. All notices are to be served upon the borrower through electronic mode of service, in



addition to the modes specified under Rule 3. Rule 3 provides for service of notice by registered post with acknowledgment due or by speed post or by courier or by any other means of transmission of documents like Fax message or electronic mail service. Under Rule 5 the valuation of movable secured assets is to be made and thereafter if considered necessary the Authorized Officers would fix in consultation with the secured creditor the reserve price of the assets to be sold in realization of the dues of the secured creditor. Under Rule 6 the Authorized Officer may sell the movable secured assets in one or more lots by adopting any of the methods mentioned under Clause (a), (b), (c) and (d). Clause (b) and (c) talks of inviting tender from the public; or holding public auction including through e-auction mode. Proviso to sub-rule (2) of Rule 6 says that if the sale of such secured asset is being effected by either inviting tenders from the public or by holding public auction, the secured creditor shall cause a public notice in the Form given in Appendix- II-A to be published in two leading newspapers, including one in vernacular language having wide circulation in the locality.”

59. In the light of the aforesaid discussions, this Court is of the considered opinion that the loan agreement which are available on the record are at best creating a security interest in the vehicles which would be covered within the meaning of the words “Secured Asset” under the Act of 2002. The covenants of the loan agreement providing for re-possessing the vehicle do not provide



for a procedure in accordance with the provisions of the Act of 2002 and the Rules framed thereunder. In the garb of a power acquired by the financier under the loan agreement to re-possess the vehicle, they cannot be allowed to take the law into their hands and enforce the loan agreement by violating the legislative mandate and the regulatory law such as as the Act of 2002.

Constitutional Obligation- not to act in violation of Law

60. The Banks and the Finance Companies who are contesting these matters are under a constitutional obligation not to act in violation of law. They cannot act in conflict with the fundamental principles and policy of India which means that no person may be deprived of his livelihood and the right to live with dignity without following the established procedure of law. The right to recovery of these Banks and Financial Institutions if pitted against the constitutional right of 'life' of a person/petitioner to live with dignity and not to be deprived of without following the established procedure of law, the constitutional rights of the person/petitioners shall prevail. In this connection, this Court is tempted to reiterate that these are the rights conferred by Part III of the Constitution of India to 'a person' which are to be honoured by and also enforceable against, non-State actors. The private rights of the contesting respondents must be exercised within the constitutional limitations and in accordance with law.



61. In result, this Court finds that the action of the contesting respondents in seizure/re-possess the vehicle without following the RBI guidelines and the law as also the judicial pronouncements on the subject is wholly illegal. It is in violation of law and deprive the petitioners of their fundamental rights of livelihood and the right to live with dignity which are included in Article 21 of the Constitution of India.

62. This Court, at this stage, must express its anguish on the conduct of the respondents who are acting in violation of law, the judgments of the Hon'ble Apex Court as well as in complete disobedience and disregard to the judgment of this Court. Despite the clear mandate of the Hon'ble Supreme Court that they cannot re-possess the vehicle forcibly through recovery agents, several repeated allegations are coming that these Banks and Financial institutions are indulged in repeatedly doing the same.

63. Mr. Abhinav Srivastava, learned 'Amicus Curiae' has ably assisted this Court. Learned 'Amicus Curiae' has strongly submitted that the manner in which these contesting respondents are repeatedly acting in violation of law and taking the law into their hands, some stringent measures are required to be taken against them and they are liable to be proceeded against by instituting a contempt proceeding for showing their willful



disobedience and dis-regard to the judgment of this Court in the case of **Sujay Kumar (supra)**.

Observations and Directions

64. Having discussed the entire facts and circumstances of the case and the laws on the subject, this Court would make it clear that so far as the allegations against the Banks and Financial Institutions that they had forcibly seized/repossessed the vehicles is concerned, this Court, instead of dwelling much upon that issue in the present proceeding, leaves it open for the Investigating Agency to look into the complaints of the petitioners and investigate them independently and in accordance with law. This Court has mainly concentrated on the plea of the Banks and Financial Institutions that they can seize and repossess the vehicle without taking recourse to law and legal procedures as envisaged under the Act of 2002 and the Rules framed thereunder. Thus, even as the allegations of forceful seizure and possession has been taken note of, the same would not come in the way of an independent investigation. This Court has found that at least in one case (C.W.J.C. No. 16155 of 2021) a first information report being Sadar P.S. Case No. 22 of 2023 dated 08.01.2023 has been lodged by the petitioner's husband. In case other petitioners have also lodged any complaint with the respective police station, the same



will be registered and duly investigated. It is still open to the petitioners to lodge their respective complaint with the jurisdictional police station within whose jurisdiction the vehicle in question has been seized and repossessed allegedly by use of force.

65. Since this Court has come to a conclusion that the covenants in the loan agreement of these cases are at best creating a 'security interest' in the 'secured asset' i.e. the vehicle in favour of the Banks and Financial Institutions, as the case may be, this Court directs that the Banks/Financial Institutions who are contesting respondents in these cases shall henceforth, exercise their power to seize and repossess the vehicle only in accordance with the provisions of the Act of 2002, and the Rules framed thereunder and the RBI guidelines. Their right to seize or repossess is not in question, it is the manner in which it is being exercised is illegal, hence, they cannot continue with the same.

66. The Superintendent of Police of all the districts in the State of Bihar are directed to ensure that within their jurisdiction no recovery agent of the Bank and Financial Institution may take the law into their hands, intercept the vehicles on way and takes possession of the vehicle in default without an order of the competent court of law. Any seizure/repossession of



the vehicle in default may be given effect to only in accordance with the law and the procedure established by law;

67. In all such cases where the vehicles have not been sold, the petitioner(s) and the Bank/Financial Institution through its authorized representative shall sit together and reconcile the account to determine the amount due in the loan account, however, the Bank/Financial Institution shall not charge any interest for the period during which the vehicle remained in seizure and they will treat the Covid-19 period in accordance with lockdown notification. Such reconciliation be made within a period of four weeks from today whereupon the petitioner(s) shall pay 30% of the outstanding amount and get release of the vehicle after giving an undertaking that he will pay the rest of the 70% of the outstanding amount with applicable interest from the date of handing over the possession of the vehicle till the date of payment in suitable installments as may be decided by the Banks/Financial Institutions. In the meantime, the petitioner(s) shall continue to pay the current EMI, failing which it will be open to the Bank/Financial Institution to proceed against the petitioner(s) in accordance with the provisions of the Act of 2002 and the Rules framed thereunder to re-possess the vehicle.



68. In the cases where the vehicle has been sold to a third party and the Bank/Financial Institution is not in a position to restore the vehicle, they would be liable to pay the petitioner(s) to the extent of the value of the vehicle(s) as per their insurance value on the date of their seizure. The said amount shall be adjusted against the outstanding vehicle loan and thereafter if any surplus comes out the same will be made available to the petitioner. It will be open for the petitioners, if so advised to challenge the accounts furnished by the Banks/Financial Institutions and claim any compensation etc. for the loss arising out of seizure of their respective vehicles before appropriate court/forum.

69. Since the action of the Banks/Finance Companies are found illegal, the petitioners who have been made to contest this case shall be entitled for cost of litigation. Accordingly, this Court directs that each of the contesting respondents i.e. Banks/Financial Institutions would be liable to pay a sum of Rs. 50,000/- (fifty thousand) as cost of litigation to the respective writ petitioners within a period of 30 days from the date of receipt/production of a copy of this judgment.

70. These writ applications are disposed of accordingly.



71. Let a copy of this judgment be communicated to the Director General of Police, Bihar to issue necessary instructions to all the Senior Superintendent of Police/Superintendent of Police in the State of Bihar to act in terms of the directions contained in this judgment.

(Rajeev Ranjan Prasad, J)

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AFR/NAFR	AFR
CAV DATE	12.05.2023
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