some money she borrowed from her husband or relations or her husband made some contribution out of love and affection as she was his second wife, no inference can be drawn that transaction was benami.

(34) In this case both the courts below have decided on appreciation of evidence that Smt Shanti was the real owner of the property. Both the courts below have decided that H.C. Malik was not the real owner of the property and that Smt. Shanti Devi was the real owner of the property and that she is rightly shown as the real owner of the property in the record. A decision on a question of fact by two courts below when that decision is supported by evidence on record is binding in second appeal on this Court, Plaintiffs' suit could be viewed as barred by time as the plaintiffs got cause of action after the death of their father H.C. Malik when Smt. Shanti Devi began asserting her exclusive title in these properties. Duting the life time of H.C. Malik, she gave no expression that these properties are her exclusive properties. In this regular second appeal, no substantial question of law arises. Only question of law arose, which was rightly decided by the two courts below.

(35) For the reasons given above, this regular second appeal fails and is dismissed. No order as to costs.

R.N.R.

Before Adarsh Kumar Goel, J

TARUN BHARGAVA—*Petitioner*

versus

STATE OF HARYANA & ANOTHER—*Respondents*

Crl. M. No. 24270/M/1999

29th May, 2002

Contract Act, 1872— Ss. 172 & 176— Indian Penal Code, 1860— Ss. 392/323/506/120-B— Complainant purchasing a vehicle through the Financier— Hire purchase agreement between the parties is only a loan agreement— Complainant real/registered owner of the

vehicle and the petitioner merely a Financier— Rights of the Financier are to be those of a hypothecatee— A hypothecatee cannot forcibly & physically take possession of the hypothecated item— Clauses inserted in the agreement permitting forfeiture of instalments already paid held to be void— Creditor has right only to recover the balance amount— The Financier criminally liable for forcibly taking away the property without intervention of the Court— Complainant entitled to get the vehicle on superdari— Complaint filed against the Financier held to be maintainable and the petition for quashing the same liable to be dismissed.

Held, that :

(A) A hire-purchase agreement may in substance be a loan transacton and the lable of such an agreement is not conclusive. It is open to the Court to determine whether a particular agreement is a loan transaction or a hire-purchase agreement. The parameters to be applied are laid down, inter alia, in the judgment of the Supreme Court in Sundarm Finance Ltd. v. The State of Kerala and another, AIR 1966 SC 1178. The agreement though termed as hire-purchase agreement, is held to be a loan agreement.

(B) In a loan agreement for financing goods on hypothecated basis, the creditor cannot forcibly repossess the hypothecated item, though he can enforce the security through the Court.

(C) If a specific clause is inserted in an agreement authorising repossession of a vehicle or any other goods by the hypothecatee, such a clause may be unconscionable, unless otherwise shown by the hypothecatee and such a clause inserted in the present case is held to be void. In the agreement, clause 4 and clause 7 permitting forfeiture of instalments already paid will be deemed to be void.

(D) Forcible repossesson without intervention of the Court may involve commission of an offence and what offence has been committed will depend on facts of an individual case. The judgments of the Supreme Court in hire

purchase cases holding that in a hire purchase agreement, the owner cannot be guilty of theft of his own property, will not be applicable to cases where the transaction is , in substance, a loan transaction, as in a loan transaction, the ownership will be of the borrower and the priniciple applicable to a hire purchase agreement will not apply.

(Para 32)

Hemant Kumar, Advocate *for the Petitioner*

Rajesh Bhardwaj, AAG Haryana for the respondent.

JUDGMENT

Adarsh Kumar Goel, J.

(1) This petition has been filed for quashing the FIR No. 1237, dated 24th October, 1997, under Sections 392/323/506/120-B of the Indian Penal Code (for short, the Code), Police Station City Gurgaon.

(2) The above FIR was registered on a direction of the Chief Judicial Magistrate under Section 156(3) Cr.P.C. on a complaint filed by respondent No. 2 (hereinafter referred to as the complaint), wherein it was stated that the complainant purchased a car for Rs. 2,44,603 through the accused petitioner (hereinafter referred to as the petitioner) in August, 1995 and paid an initial amount of Rs. 52,511 and paid 26 instalments of Rs. 8944 each amounting to Rs. 2,32,544 and though there was no default by the petitioner in the payment of instalments upto 20th October, 1997, the petitioner alongwith others went to the place of the complainant and snatched the car from him by using a duplicate key which was with the accused. It is further stated that the complainant was the registered owner of the car and though he objected to the car being taken away, the petitioner used filthy language and pushed away the complainant and forcibly took away the car. It is also stated that the complainant was threatened with dire consequences, if he pursued his complaint with the consumer forum and thus, the petitioner committed an offence under Sections 323/506/392/120-B of the Code. It was further stated that though the accused had assured that relevant papers and second key of the car will be given to the complainant, no paper and second key of the car was handed over to the complainant.

(3) In the petition filed in this Court, it is stated that the petitioner company was doing the business of a financier and had entered into an agreement under which if there are more than two consecutive defaults, the financier could take repossession of the vehicle. It is also stated that apart from possession of the vehicle, the petitioner finance company was also entitled to balance amount of Rs. 1,10,796.95 paise and the act of taking possession of the car did not amount to an offence under Section 392 of the Code nor offences under Sections 323/506/120-B of the Code can be said to have been committed. It is also stated in the petition that post dated cheques were given by the complainant and after May, 1997 the cheques were dishonoured, for which a notice dated 28th September, 1997 was given and the petitioner had filed a complaint under Section 138 of the Negotiable Instruments Act, 1881 for dishonour of the cheques, which was pending. The complaint is annexed to the petition as Annexure P-11, which does not support this version and shows that the dishonoured cheques are dated 28th December, 1997, 28th January, 1998 and 28th February, 1998 which are all after the date of repossession i.e., after 20th October, 1997. It is further stated that the complainant has filed a civil suit, a copy of which is Annexure P-8. A reference to the plaint of the said suit, Annexure P-8, shows that the case of the complainant was that the petitioner had given 31 blank undated signed cheques. On a proposal for financing the car, the complainant/plaintiff was made to sign blank agreement with an assurance that a copy of the agreement will be given to the complainant, which was never given ; summary of agreement was given to the plaintiff, which was not as per the agreed terms ; though all instalments were regularly paid, the vehicle was illegally snatched and on demand of the vehicle, the complainant was given threats, which has led to the filing of the complaint and in complaint proceedings, the plaintiff has been given possession of the vehicle on superdari. A declaration is sought that the agreement between the parties was null and void.

(4) It is further stated in the petition that the petitioner had acted under an agreement, a copy of which was Annexure P-1 and under the said agreement, the ownership was with the petitioner and the petitioner could repossess the vehicle at any time, forfeit the

instalments paid and take proceedings for recovery of the balance amount. The complainant has merely right to use the vehicle on certain conditions and under the agreement, the petitioner had unilateral right to hold that there was violation of the conditions and without notice to the complainant, repossess the vehicle.

(5) Counsel for the petitioner relied on judgments of the Supreme Court in ***Instalment Supply (Private) Ltd. Vs. Union of India, (1) M/s K.L. Johar & Co.*** Vs. ***The Deputy Commercial Tax Officer, Coimbatore III (2) The Instalment Supply Ltd.*** Vs. ***S.T.O. Ahmedabad and others, (3) Sundaram Finance Ltd.*** Vs. ***The State of Kerala and another (4) Sardar Trilok Singh*** Vs. ***Satya Deo Tripathi (5) K.A. Mathai*** Vs. ***Kora Bibbikutty (6) Manipal Finance Corpn. Ltd. Vs. T. Bangarappa and another (7)*** and ***Charanjit Singh Chadha*** Vs. ***Sudhir Mehra (8).***

(6) Counsel for the State contested the petition and stated that for the purpose of considering the petition under Section 482 Cr. P.C. allegations in the complaint had to be taken as correct and proceedings cannot be quashed by accepting the defence set up by the accused. It is submitted that a label put on an agreement, which may in substance be a loan agreement, could not be conclusive of the agreement being hire purchase agreement. It is further submitted that conferring of a unilateral right on any party to take forcible possession without intervention of the Court would not be conducive to public policy as the same could lead to breaking of heads or victimisation of a weaker party. It was submitted that the complainant was the registered owner of the vehicle and claimed to have paid back the loan. A financier could not be given a right to decide for himself that the loan had not been repaid and therefore, the financier was not entitled to take forcible possession of the vehicle besides claiming the unpaid amount.

(1) AIR 1992 SC 53
(2) AIR 1965 SC 1082
(3) AIR 1974 SC 1105
(4) AIR 1966 SC 1178
(5) AIR 1979 SC 850
(6) 1996 (7) SCC 212
(7) 1994 Supp. (1) SCC 507
(8) 2001 (7) SCC 417

(7) The following questions arises for consideration :—

(1) Whether the agreement in question, Annexure P-1, termed as hire purchase agreement, is in substance a loan agreement?

(2) If the above agreement is a loan agreement, whether rights of the parties will be different and if so, to what extent ?

(3) (a) Whether clause 7 of the agreement, enabling the petitioner to forfeit all instalments paid by the complainant and entitling the financier to enter the inhouse or place, where the vehicle is, to seize, remove and retake the possession is valid ?

(b) Whether clause 7 of the agreement, which permits the petitioner to refuse to give credit or set off the payment already made, when the vehicle is seized by the petitioner under clause 4 of the agreement or surrendered by the complainant, is valid ?

(4) What is the remedy of the complainant against unjustified repossession by the petitioner/financier ? and

(5) Whether proceedings against the petitioner are liable to be quashed ?

(8) Clauses 4 and 7 of the agreement in question are as under :—

"4. In case the Hirer shall during the continuance of this agreement do or suffer any of the following acts or things viz. either :—

(a) fail to pay any of the hiring instalments within the stipulated time whether demanded or not ;

(b) become insolvent or compound with his/her/their creditors ;

(c) pledge or sell or attempt to pledge or sell or otherwise alienate or transfer the vehicle/s;

(d) do or suffer any act or thing whereby or in consequence of which the said vehicle/s may be distrained, seized or taken in execution under legal process ;

(e) break or fail to perform or observe any condition on their part herein contained ;

then and in such cases rights of the Hirer under this agreement shall forthwith be determined ipso-facto without any notice to the Hirer/s and ***all the instalments previously paid by the Hirer shall be absolutely forfeited to the owner, who shall thereupon be entitled to enter any house or place where the said vehicles may then be and seize, remove and retake possession of it/them and to sue for all the instalments due and for damages for breach of the agreement and for all the costs of retaking possession of the said vehicle/s and all costs occasioned by the Hirer's default.***

7. If the owner should seize the vehicle/s and take possession of it/them under clause 4 thereof; or if the Hirer should at any time return it/them under clause 5 thereof, the Hirer shall remain liable to the owner for arrears of hire amount upto the date of such seizure or return and shall not on any ground whatsoever be entitled to any allowance, credit or set-off for payments previously made."

(9) Since answer to question No. 5, which is the ultimate question in the present petition rests on first four questions, I will first take up the above four questions.

(10) The first question is whether the agreement between the parties is a loan agreement or a hire purchase agreement. Agreement between the parties has been annexed as annuxure P-1, wherein the petitioner is described as the owner and the complainant is described as the hirer. Clause 4 provides for forfeiture of all instalments paid, if the hirer fails to pay any of the instalments or commits other defaults as mentioned in the said clause and the owner will be entitled to take possession of the vehicle. Clause 8 provides that hirer will be permitted

to have the vehicle registered in his name. In *Sundaram Finance Ltd.'s case* (supra), the question posed before the Supreme Court was whether a finance company was liable to pay sales tax on transferring goods on hire purchase basis, as such transfer would amount to sale. After interpreting an identical agreement, the Supreme Court held that the intention of the parties appeared to be only to secure payment and the label of hire purchase was not conclusive and a hire purchase agreement should be read as a loan agreement only.

(11) I am of the view that the present agreement was also merely a loan agreement and the ownership was with the complainant and the petitioner was merely a financier.

(12) Hire purchase agreement is the one under which an owner hires goods to hirer, giving the hirer an option to purchase the goods. On the other hand, when a person borrows money and pays it to vendor, transaction between the customer and the lender will be a loan transaction. In a hire purchase agreement, the hirer is under no obligation to buy. Where the customer is himself the owner and with a view to finance his purchase, he enters into an arrangement in the form of hire purchase agreement, it will be a loan transaction. The present petitioner is not a dealer of motor vehicles, but is in independent business of finance. The vehicle purchased is in the name of the complainant and the complainant is the real owner of the vehicle. Moreover, in quashing proceedings averments made in the complaint have to be accepted as correct, which states that the complainant was the owner and if the accused petitioner wants to dispute this averment and claims that the complainant was not the owner, such an averment cannot be accepted, particularly when the agreement appears in substance to be a loan agreement. Similar agreement was considered by the Supreme Court in *Sundaram Finance Ltd. 's case* (supra), wherein the majority view was that such an agreement would be a loan agreement. Shah J. on behalf of the majority observed as under :—

> "It is also to be noted that the agreement does not contemplate exercise of an option on payment of a nominal sum of money as is to be found in other hire purchase agreements. Execution of the promissory note, the hire purchase agreement and the other document, in our judgment, indicate that it was the intention of the

parties not to transfer any interest in the vehicle by the customer to the appellants : it was intended to give security by hypothecating the vehicle in favour of the appellants and for ensuring repayment of the loan advanced that the customer submitted to the various onerous conditions of the hire purchase agreement."....

"In the light of these principles the true nature of the transactions of the appellants may now be stated. The appellants are carrying on the business of financiers : they are not dealing in motor vehcles. The motor vehicle purchased by the customer is registered in the name of the customer and remains at all material times so registered in his name. In the letter taken from the customer under which the latter agrees to keep the vehicle insured, it is expressly recited that the vehicle has been given as security for the loan advanced by the appellants. As a security for repayment of the loan, the customer executes a promissory note for the amount paid by the appellants to the dealer of the vehicle. The so-called 'sale letter' is a formal document which is not made effective by registering the vehicle in the name of the appellants and even the insurance of the vehicle has to be effected as if the customer is the owner. Their right to seize the vehicle is merely a licence to ensure compliance with the terms of the hier purchase agreement. The customer remains qua the world at large the owner and ramains in possession, and on condition of performing the covenants has a right to continue to remain in possession. The right of the appellants may be extinguished by payment of the amount due to them under the terms of the hire purchase agreement even before the dates fixed for payment. The agreement undoubtedly contains several onerous covenants, but they are all intended to secure to the appellants recovery of the amount advanced. We are accordingly of the view that the intention of the appellants in obtaining the hire purchase and the allied agreements was to secure the

return of loans advanced to their customers, and no real sale of the vehicle was intended by the customer to the appellants. The transactions were merely financing transactions."

(13) The present case appears to be similar to the case before the Supreme Court in ***Sundaram Finance Ltd. 's case*** **(supra).** I am, therefore, of the view that though the agreement is labelled as hire purchase finance agreement, the agreement is a loan transaction.

(14) Learned counsel for the petitioner referred to a judgment of this Court in ***Phul Bus Service*** Vs. ***Financial Commissioner, Taxation, Punjab (9)*** and judgments of the Suprement Court in ***Panna Lal*** vs. ***Shri Chand Mal, (10) Vasantha Viswanathan*** Vs. ***V.K. Elayalwar, (11)*** and ***Dr. T.V. Jose*** Vs. ***Chacko P.M. Alias Thankachan, (12),*** wherein it was laid down that even if a person is not entered as owner, under the provisions of Motor vehicles Act, he can still be owner. There is no dispute with this legal proposition. In holding that the complainant was the owner, I am not going by the mere fact that he was entered as such under the provisions of the Motor Vehicles Act, though this is one relevant circumstance. Similarly, for holding that the petitioner was not the owner, I am not influenced by this factor alone that the petitioner is not entered as owner under the provisions of the Motor Vehicles Act. The ownership claimed by the petitioner is on the basis of an agreement, Annexure P-1, which the petitioner claims to be hire purchase agreement, but is infact a loan agreement and on account of this finding, the complainant is the owner and the petitioner is a financier/creditor.

(15) In *Charanjit Singh Chadha's case* (supra), the Apex Court considered the nature of a hire purchase agreement. In that case, the fact that there was a hire purchase agreement between the parties was an admitted fact, as would be clear from para 4 of the judgment. Question whether hire purchase agreement was in substance a loan transaction was not in issue. It was held that a hirer in a hire purchase agreement is simply paying for the use of

(9) 1968 ACJ 57
(10) 1980 ACJ 233
(11) 2001 (8) SCC 133
(12) 2001 (8) SCC 748

goods and title remains with the financier, who is the owner. Reference was also made to earlier decisions of the Apex Court in *Sardar Trilok Singh's case* (supra) and *K.A. Mathai's case* (supra) and it was held that when a financier takes repossession of a vehicle, he commits no offence. In view of legal position as laid down by the Apex Court in *Charanjit Singh Chadha's case* (supra) and other documents, I have no difficulty in accepting the contention of the petitioner that if the petitioner is the owner and if the agreement between the parties is hire purchase agreement, he cannot be said to have committed any offence in taking possession in accordance with the agreement, but it is not so.

(16) First question is decided accordingly.

(17) Now, I take up second question. In my view, consequences will be different, if the transaction is a loan transaction. Under a loan transaction, the petitioner will not be the owner, but a mere creditor and the agreement would be an agreement to secure repayment of loan.

(18) Section 172 of the Contract Act (for short, the Act) deals with pledge of goods and under Section 176 of the Act, a pownee, to whom the goods are pledged, is entitled to bring a suit and to retain the goods as collateral security or even to sell the goods after giving a reasonable notice. Section 176 of the Act requires the pownee to return the surplus out of proceeds of the security after recovering the loan to the pawnor. The loan transaction of the present nature would be akin to a loan against hypothecation of goods. There is no doubt that in case of a pledge, the pawnee has a right, as recognised under Section 176 of the Act, to bring a suit against the pawnor and to retain the goods as security or to sell the goods pledged on giving pawnor reasonable notice of sale. This right is recognized under Section 176 of the Act.

(19) Question is whether hypothecation stands on the same footing as pledge.

(20) In ***Central Bureau of Investigation*** Vs. ***Duncans Agro Industries Ltd, Calcutta (13),*** it was observed by the Apex Court that :

(13) AIR 1996 SC 2452 para 27

"When some goods are hypothecated by a person to another person, the ownership of the goods still remains with the person who has hypothecated such goods. The property in respect of which criminal breach of trust can be committed must necessarily be the property of some person other than the accused or the beneficial interest in or ownership of it must be in other person and the offender must hold such property in trust for such other person or for his benefit. In a case of pledge, the pledged article belongs to some other person but the same is kept in trust by the pledgee."

(21) While the right of pawnee to sell goods pledged goods without intervention of the Court is statutorily recognized under Section 176 of the Act, it is not so recognized under the said provision in respect of hypothecated goods and even in mercantile usage, pledge and hypothecation have different connotation and though in certain matters, a pawnee and hypothecatee may stand on the same footing, I do not find any justification for taking a view that in the matter of sale without intervention of the Court, a hypothecatee will stand on the same footing as pawnee.

(22) There has been difference of opinion on the question whether hypothecation stands on the same footing as pledge in the matter of sale witout intervention of the Court, I find valid reasons for making a distinction in the right of a pawnee and hypothecatee. Permitting a hypothecatee to physically repossess the hypothecated goods against the wishes of the hypothecator will enable the hypothecatee to take law in his own hands, deprive the hypothecator of his defence by depriving him of the use of goods even when his claim may be that he does not owe any money. A borrower is economically in disadvantageous position and if two interpretations are possible, the one which does not defeat the rights of the borrower has to be preferred. The creditor has definitely remedy of filing suit and taking over the hypothecated goods through Court by making out a case, but a right cannot be conceded to the hypothecatee to physically and forcibly take over the goods on his own unilateral decision that the hypothecator had defaulted in payment of loan. As already seen in the present case, the case of the complainant is that he was not

even aware of what agreement had been signed as not even a copy thereof was given to him. The petitioner has already taken blank post-dated cheques and has already filed proceedings under the Negotiable Instruments Act.

(23) For the above reasons, I conclude that if the agreement in the present case is held to be a loan agreement and rights of the creditor are held to be those of a hypothecatee, rights of the parties under the agreement would be different. A hypothecatee, as already held, cannot take possession of the security without intervention of the Court, though he has a right to take possession or to sell the hypothecated property through Court or to give notice to the hypothecator to enforce the security.

(24) A question may further arise whether hypothecatee can take over the security or acquire higher rights by putting a clause in the agreement authorising him to take over the security and sell the same without intervention of the Court. The Court cannot ignore that in these days of advertisement and consumerism, a common man is tempted to acquire luxury consumer items on account of demonstration effect in the society. On account of that instinct, there is a temptation to fall prey to advertisement for easy loans. Once easy loan is promised and dreams are shown, the financier tends to tighten the noose on the neck of the borrower by making the borrower to sign on dotted lines. Is 'freedom to contract' answer to the situation, in which a common man finds himself after signing the agreement on the dotted lines.

(25) The above findings that the hypothecatee cannot be permitted to take over the hypothecated goods under repossession clause, without intervention of the Court is also supported by events which have been taken cognizance of by the legislature, which shows that the public policy requires safeguards to be provided against arbitrary repossession clauses. The matter has been gone into in the context of hire purchase transaction. Though whether even in a hire purchase agreement, repossession clause will be valid and to what extent may be a different matter, as it has already been held that though termed as a hire purchase agreement, in the present case the transaction was a loan transaction, the developments reinforce the view that a borrower needs protection against arbitrary

repossession. It may be relevant to note that the Law Commission in its 20th report, noticed the abuses and evils in relation to hire purchase agreements and adverse effects on the hirer, who is generally a weaker party to the transaction. It made its recommedations, which led to enactment of Hire Purchase Act, 1972. Though the Act was brought into force, the notification bringing the Act into force was rescinded and the effect is that the Act is not in force. Under the Act, certain restrictions are imposed on owner to take possession of goods, otherwise than through Courts. The owner can terminate the contract as per Section 18 and thereafter can take possession of the goods and adjust the loan amount against the value of the goods and has to return the surplus to the hirer. The burden of proving that the price obtained by him, if goods have been sold, was the best price which could be obtained on the date of seizure, is on the owner under Section 17(4). Section 20 restricts the owner's right to take possession directly where half of the hire purchase price has already been paid, where price is more than 15,000 and where 3/4th has been paid where price is less than 15,000. Sections 17 to 23 of the Act are as under :—

> 17. *Rights of hirer in case of seizure of goods by owner.*— *(1) Where the owner* seizes under clause (c) of Section 19 the goods let under a hire-purchase agreement, the hirer may recover from the owner the amount, if any, by which the hire-purchase price falls short of the aggregate of the following amounts, namely :—
>
> (i) the amounts paid in respect of the hire-purchase price up to the date of seizure ; (ii) the value of the goods on the date of seizure.
>
> (2) For the purposes of this section, the value of any goods on the date of seizure is the best price that can be reasonably obtained for the goods by the owner on that date less the aggregate of the following amounts, namely :—
>
> (i) the reasonable expenses incurred by the owner for seizing the goods ;
>
> (ii) any amount reasonably expended by the owner on the storage, repairs or maintenance of the goods ;

(iii) (whether or not the goods have subsequently been sold or otherwise disposed of by the owner) the reasonable expenses of selling or otherwise disposing of the goods ; and

(iv) the amount spent by the owner for payment of arrears of taxes and other dues which are payable in relation to the goods under any law for the time being in force and which the hirer was liable to pay.

(3) If the owner fails to pay the amount due from him under the provisions of this section or any portion of such amount, to the hirer within a period of thirty days from the date of notice for the payment of the said amount is served on him by the hirer the owner shall be liable to pay interest on such amount at the rate of twelve per cent per annum from the date of expiry of the said period of thirty days.

(4) Where the owner has sold the goods seized by him the onus of proving that the price obtained by him for the goods was the best price that could be reasonably obtained by him on the date of seizure shall lie upon him.

18. ***Rights of owner to terminate hire-purchase agreement for default in payment of hire or unauthorised act or breach of express conditions.*—(1)** Where a hirer makes more than one default in the payment of hire as provided in the hire-purchase agreement then, subject to the provisions of Section 21 and after giving the hirer notice in writing of not less than—

(i) one week, in case where the hire is payable at weekly or lesser intervals ; and (ii) two weeks, in any other case, the owner shall be entitled to terminate the agreement by giving the hirer notice of termination in writing :

Provided that if the hirer pays or tenders to the owner the hire in arrears together with such interest thereon as

may be payable under the terms of the agreement before the expiry of the said period of one week or, as the case may be, two weeks, the owner shall not be entitled to terminate the agreement.

(2) Where a hirer—

(a) does any act with regard to the goods to which the agreement relates which is inconsistent with any of the terms of the agreement ; or

(b) breaks an express condition which provides that, on the breach thereof, the owner may terminate the agreement, the owner shall subject to the provisions of Section 22, be entitled to terminate the agreement by giving the hirer notice of termination in writing.

19. *Rights of owner on termination.*—Where a hire-purchase agreement is terminated under this Act, then the owner shall be entitled,—

(a) to retain the hire which has already been paid and to recover the arrears of hire due :

Provided that when such goods are seized by the owner, the retention of hire and recovery of the arrears of hire due shall be subject to the provisions of Section 17 ;

(b) subject to the conditions specified in clauses (a) and (b) of sub-section (2) of section 10, to forfeit the initial deposit, if so provided in the agreement ;

(c) subject to the provisions of Section 17 and section 20 and subject to any contract to the contrary, to enter the premises of the hirer and seize the goods ;

(d) subject to the provisions of Section 21 and Section 22, to recover possession of the goods by application under Section 20 or by suit ;

(e) without prejudice to the provisions of sub-section (2) of section 14 and of section 15, to damages for non-delivery of the goods, from the date on which termination is

effective, to the date on which the goods are delivered to or seized by the owner.

20. *Restriction on owner's right to recover possession of goods otherwise than through court.*— (1) Where goods have been let under a hire-purchase agreement and the statutory proportion of the hire-purchase price has been paid, whether in pursuance of the judgment of a court or otherwise, or tendered by or on behalf of the hirer or any surety, the owner shall not enforce any right to recover possession of the goods from the hirer otherwise than in accordance with sub-section (3) or by suit.

Explanation.—In this section, "statutory proportion" means,—

(i) one-half, where the hire-purchase price is less than fifteen thousand rupees ; and

(ii) three-fourths, where the hire-purchase price is not less than fifteen thounsand rupees :

Provided that in the case of motor vehicles as defined in the Motor Vehicles Act, 1939 (4 of 1939), "statutory proportion" shall mean—

(i) one-half, where the hire-purchase price is less than five thousand rupees ;

(ii) three-fourths, where the hire-purchase price is not less than five thousand rupees but less than fifteen thousand rupees ;

(iii) three-fourths or such higher proportion not exceeding nine-tenths as the Central Government may, by notification in the Official Gazette, specify, where the hire-purchase price is not less than fifteen thousand rupees.

(2) If the owner recovers possession of goods in contravention of the provisions of sub-section (1), the hire-purchase agreement, if not previously terminated, shall terminate, and—

(a) the hirer shall be released from all liability under the agreement and shall be entitled to recover from the owner all sums paid by the hirer under the agreement or under any security given by him in respect thereof ; and

(b) the surety shall be entitled to recover from the owner all sums paid by him under the contract of guarantee or under any security given by him in respect thereof.

(3) Where, by virtue of the provisions of sub-section (1), the owner if precluded from enforcing a right to recover possession of the goods, he may make an application for recovery of possession of the goods to any court having jurisdication to entertain a suit for the same relief.

(4) The provisions of this section shall not apply in any case in which the hirer has terminated the agreement by virtue of any right vested in him.

21. *Relief against termination for non-payment of hire.*— Where the owner, after he has terminated the hire-purchase agreement in accordance with the provisions of sub-section (1) of section 18, institutes a suit or makes an application against the hirer for the recovery of the goods, and at the hearing of the suit or application, the hirer pays or tenders to the owner the hire in arrears, together with each interest thereon as may be payable under the terms of the agreement and the costs of the suit or application incurred by the owner and complies with such other conditions, if any, as the court may think fit to impose, the court may, in lieu of making a decree or order for specific delivery, pass an order relieving the hirer against the termination ; and thereupon the hirer shall continue in possession of the goods as if the agreement had not been terminated.

22. *Relief against termination for unauthorised act or breach of express condition.*—Where a hire-purchase agreement has been terminated in accordance with the

provisions of clause (a) or clause (b) of sub-section (2) of section 18, no suit or application by the owner against the hirer for the recovery of the goods shall lie unless and until the owner has served on the hirer a notice in writing,—

(a) specifying the particular breach or act complained of ; and

(b) if the breach or act is capable of remedy, requiring the hirer to remedy it, and the hirer fails, within a period of thirty days from the date of the service of the notice, to remedy the breach or act if it is capable of remedy.

23. *Obligation of owner to supply copies and information.*— (1) It shall be the duty of the owner to supply, free of cost, a true copy of the hire-purchase agreement, signed by the owner,—

(a) to the hirer, immediately after execution of the agreement ; and

(b) where there is a contract of guarantee, to the surety, on demand made at any time before the final payment has been made under the agreement.

(2) It shall also be the duty of the owner, at any time before the final payment has been made under the hire-purchase agreement, to supply to the hirer, within fourteen days after the owner receives a request in writing from the hirer in this behalf and the hirer tenders to the owner the sum of one rupee for expenses, a statement signed by the owner or his agent showing—

(a) the amount paid by or on behalf of the hirer ;

(b) the amount which has become due under the agreement but remains unpaid, and the date upon which each unpaid instalment became due, and the amount of each such instalment ; and

(c) the amount which is to become payable under the agreement, and the date or the mode of determining

the date upon which each future instalment is to become payable, and the amount of each such instalment.

(3) Where there is a failure without reasonable cause to carry out the duties imposed by sub-section (1), or sub-section (2), then, while the default continues,—

(a) the owner shall not be entitled to enforce the agreement against the hirer or to enforce any contract of guarantee relating to the agreement, or to enforce any right to recover the goods from the hirer ; and

(b) no security given by the hirer in respect of money payable under the agreement or given by surety in respect of money payable under such a contract of guarantee as aforesaid shall be enforceable against the hirer or the surety by any holder thereof ;

and if the default continues for a period of two months, the owner shall be punishable with fine which may extend to two hundred rupees.

(4) Nothing in sub-section (3) shall be construed as affecting the right of a third party to enforce against the owner or hirer or against both the owner and the hirer any charge or encumbrance to which the goods covered by the hire-purchase agreement are subject."

(26) In ***Central Inland Water Transport Corporation Limited Versus Brojo Nath Ganguly, (14)***, it was held that an unconscionable term in a contract will be void. In para 78 to 82 of the said judgment, it was observed that though in 19th century, freedom of contract was the rule, Courts developed devices for refusing to implement certain agreements on the ground of inequality of bargaining power. The relevant part of the judgment is extracted below :—

"78. Although centain types of contracts were illegal or void, as the case may be, at Common Law, for instance,

(14) AIR 1986 SC 1571

those contrary to public policy or to commit a legal wrong such as a crime or a tort,the general rule was of freedom of contract.This rule was given full play in the nineteenth century on the ground that the parties were the best judges of their own interests, and if they freely and voluntarily entered into a contract, the only function of the Court was to enforce it. It was considered immaterial that one party was economically in a stronger bargaining position than the other; and if such a party introduced qualifications and exceptions to his liability in clauses which are today known as "exemption clauses" and the other party accepted them, then full effect would be given to what the parties agreed. Equity, however, interfered in many cases of harsh or unconscionable bargains, such as, in the law relating to penalties, forfeitures and mortgages. It also interfered to set aside harsh or unconscionable contracts for salvage services rendered to a vessel in distress, or unconscionable contracts with expectant heirs in which a person,usually a money-lender, gave ready cash to the heir in return for the property which he expects to inherit and thus to get such property at a gross undervalue. It also interfered with harsh or unconscionable contracts entered into with poor and ignorant persons who had not received independent advice (See Chitty or Contracts,Twenty-fifth Editions,Volume I, paragraphs 4 and 516).

79. Legislation has also interfered in many cases to prevant one party to a contract from taking undue or unfair advantage of the other. Instances of this type of legislation are usury laws, debt relief laws regulating the hours of work and conditions of service of workmen and their unfair discharge from service, and control orders directing a party to sell a particular essential commodity to another.

80. In this connection, it is useful to note what Chitty has to say about the old ideas of freedom of contract in

modern times.The relevant passages are to be found in Chitty on Contracts,Twenty-fifth Edition, Volune I, in paragraph 4,and are as follows :—

"These ideas have to a large extent lost their appeal today. 'Freedom of contract', it has been said, 'is a reasonable social ideal only to the extent that equality of bargaining power between contracting parties can be assumed, and no injury is done to the economic interests of the community at large.' Freedom of contract is of little value when one party has no alternative between accepting a set of terms proposed by the other or doing without the goods or services offered. Many contracts entered into by public utility undertakings and others take the form of a set of terms fixed in advance by one party and not open to discussion by the other. These are called 'contracts adhesion' by French lawyers. Traders frequently contract, not on individually negotiated terms, but on those contained in a standard form of contract settled by a trade association. And the terms of an employee's contract of employment may be determined by agreement between his trade union and his employer, or by a statutory scheme of employment. Such transactions are nevertheless contracts notwithstanding that freedom of contract is to a great extent lacking.

Where freedom of contract is absent, the disadvantages to consumers or members of the public have to some extent been offset by administrative procedures for consultation and by legislation. Many statutes introduce terms into contracts which the parties are forbidden to exclude, or declare that certain provisions in a contract shall be void. And the Courts have developed a number of devices for refusing to implement exemption clauses imposed by the economically stronger party on the weaker, although they have not recognised in themselves any general power (except by statute) to declare broadly that an exemption clause will not be enforced unless it is reasonable. Again, more recently,

certain of the Judges appear to have recognised the possibility of relief from contractual obligations on the ground of 'inequality of bargaining power'."

What the French call "contracts dadhesion", the American call "adhesion contracts"or "contracts of adhesion". An "adhesion contract" is defined in Black's Law Dictionary Fifth Edition,at page 38 as follows:

" 'Adhesion contract". Standardized contract form offered to consumers of goods and services on essentially 'take it or leave it' basis without affording consumer realistic opportunity to bargain and under such conditions that consumer cannot obtain desired product or services except by acquiescing in form contract. Distinctive feature of adhesion contract is that weaker party has no realistic choice as to its terms. Not every such contract is unconscionable."

81. The position under the American Law is stated in "Reinstatement of the Law—Second" as adopted and promulgated by the American Law Institute,Volume-II which deals with the law of contracts, in Section 208 at page 107,as follows :-

S 208. Unconscionable Contract or Term

If a contract or term thereof is unconscionable at the time the contract is made a Court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term,or may so limit the application of any unconscionable term as to avoid any unconscionable result."

In the Comments given under the section it is stated at page 107:

"Like the obligation of good faith and fair dealing (S 205), **the policy against unconscionable contracts or terms applies to a wide variety of types of conduct.** The determination that a contract or term is or is not unconscionable is made in the light of its setting, purpose

and effect. Relevant factors include weaknesses in the contracting process like those involved in more specific rules as to contractual capacity, fraud and other invalidating causes; the policy also overlaps with rules which render particular bargains or terms unenforceable on grounds of public polity. **Policing against unconscionable contracts or terms has sometimes been accomplished by** adverse construction of language,by manipulation of the rules of offer and acceptance or **by determinations that the clause is contrary to public policy**, or to the dominant purpose of the contract'. Uniform Commercial Code S. 2—302 Comment 1 ..... A bargain is not unconscionable merely because the parties to it are unequal in bargaining position, nor even because the inequality results in an allocation of risks to the weaker party. **But gross inequality of bargaining power, together with terms unreasonably favourable to the stronger party,** may confirm indications that the transaction involved elements of deception or compulsion, or may show that the weaker party had no meaningful choice, no real alternative, or did not in fact assent or appear to assent to the unfair terms."

(Emphasis supplied)

There is a statute in the United States called the Universal Commercial Code which is applicable to contracts relating to sales of goods. Though this statute is in applicable to contracts not involving sales of goods, it has proved very influential in, what are called in the United States, "non-sales" cases. It has many times been used either by analogy or because it was felt to embody a general accepted social attitude of fairness going beyond its statutory application to sales of goods. In the Reporter's Note to the said Section 208, it is stated at page 112 :

"It is to be emphasized that a contract of adhesion is not unconscionable *per se,* and that all unconscionable contracts are not contracts of adhesion. Nonetheless,

the more standardized the agreement and the less a party may bargain meaningfully, the more susceptible the contracts or a terms will be to a claim of unconscionability."

(Emphasis supplied)

The position has been thus summed up by John R. Peden in "the Law of Unjust Contracts" published by Butterworths in 1982, at pages 28-29 :

" . . . . . Unconscionability represents the end of a cycle commencing with the Aristotelian concept of justice and the Roman law laesio enormis, which in turn formed the basis for the medival church's concept of a just price and condemnation of usury. These philosophies permeated the exercise, during the seventeenth and eighteenth centuries, of the Chancery Court's discretionary powers under which it upset all kinds of unfair transactions. Subsequently the movement towards economic individualism in the nineteenth century hardened the exercise of these powers by emphasizing the freedom of the parties to make their own contract. While the principle of pacta sunt servanda held dominance, the consensual theory still recognized exceptions where one party was overborne by a fiduciary, or entered a contract under duress or as the result of fraud. However, these exceptions were limited and had to be strictly proved.

It is suggested that the judicial and legislative trend during the last 30 years in both civil and common law jurisdiction has almost brought the wheel full circle. Both courts and Parliaments have provided greater protection for weaker parties from harsh contracts. In several jurisdictions this included a general power to grant relief from unconscionable contracts, thereby providing a launching point from which the courts have the opportunity to develop a modern doctrine of unconscionability. American decisions on article 2.302 of the UCC have already gone some distance into this

new arena ...." The expression "laesio enormis" used in the above passage refers to "laesio ultra dimidium vel enormis" which in Roman law meant the injury sustained by one of the parties to an onerous contract when he had been overreached by the other to the extent of more than one-half of the value of the subject matter, as for example, when a vendor had not received half the value of property sold, or the purchaser had paid more than double value. The maxim "pacta sunt servanda" referred to in the above passage means "contracts are to be kept".

82. It would appear from certain recent English cases that the Courts in that country have also begun to recognize the possibility of an unconscionable bargain which could be brought about by economic duress even between parties who may not in economic terms be situate differently (See, for instance, Occidental Worldwide Investment Corporation *versus* Skibs A/s Avanti (1976) 1 Lloyd's Rep. 203, North Ocean Shipping Company Limited *versus* Hyundai Construction Company Limited (1979) QB 705, Pao On *versus* Lau Yin Long (1980) AC 614 and Universe Tankships of Monrovia *versus* International Transport Workers Federation (1981) ICR 129, reversed in (1982) 2 WLR 803, and the commentary on these cases in Chitty on Contracts, Twenty-fifth Edition, Volume I, paragraph 486)."

(27) Learned counsel for the petitioner relied on a judgment of this Court in **Nirmal Singh Kandola** *versus* **State of Punjab and others,** Civil Writ Petition No. 16803 of 1998, decided on 6th September, 1999, wherein Section 32(G) of the State Financial Corporation Act, 1951, which authorised issue of certificate for the recovery of the amount due was upheld repelling the contention that conferment of power on such a creditior was against the principles of natural justice 'Nemo Judis In Cause Sua' (a person could not be a judge on his own cause) will not apply. In my view, the power conferred on public authority under a statute stands on different footing than right conferred on an individual under an agreement.

(28) I, therefore, hold that a hypothecatee cannot be allowed to take possession of hypothecated property without intervention of the Court, particularly when there is unequal bargaining power, irrespective of the agreement to the contrary. In the present case, I hold that repossession clause is void. The second question is answered accordingly by holding that the right of the petitioner was to proceed against the complainant only through Court and not to take over the vehicle by force.

(29) Now I take up third question, namely, whether clause 4 in the agreement enabling the financier and permitting him to forfeit the payments already made is valid. In my view, such an agreement would be void. Section 74 of the Act provides compensation for breach of contract. The party complaining breach of contract is entitled to receive from the party, who breaches the contract, reasonable compensation not exceeding the amount named, but it is well settled that if the amount named is by way of penalty, having no nexus to the actual loss suffered, the same cannot be enforced. Reference is made to a judgment of the Supreme Court in **Fateh Chand** *versus* **Balkishan Das,** (15). In **Bridge** *versus* **Cambell Discount Company Limited,** (16). such a clause was held to be not a genuine pre estimate of damages, but a penalty. Similar view was taken in **Galbraith** *versus* **Mitchenall Estates Limited,** (17). I am, therefore, of the view that the clause permitting forfeiture of any amount paid will be void. Any amount paid by the debtor will have to be accounted for and credited to his account and the right of the creditor is only to recover the balance amount.

(30) Now, I take up question No. 4 as to the remedy of the complainant against unjustified repossession by a financier. No doubt, the borrower will have a remedy of going to a civil Court or a consumer Court. Is the remedy of criminal law barred ? Once, it is held that the creditor is not the owner irrespective of the label put on the agreement and as a creditor, the financier cannot take over the property without intervention of the Court, the financier will be criminally liable for forcibly taking away the property. What offence is involved may be decided from case to case. Complaint filed in the present case is held

(15) AIR 1963 SC 1405
(16) 1962 AC 600 (1962 (1) All ER 385)
(17) 1964 (2) All ER 653

to be maintainable, though what offences are involved will be examined by the trail Court. In the present case, the complainant has already been given the vehicle on superdari and in my view the complainant is entitled to get the vehicle on superdari in such a case.

(31) Finally, I take up the fifth question whether the proceedings are liable to be quashed. In view of above discussion, proceedings are not liable to be quashed at this stage. The petitioner will be free to contest the matter in the trial Court in accordance with law. Prayer for quashing is rejected, subject to the observations made in the latter part of the judgment.

(32) I may now summarise my conclusions as follows :—

(A) A hire-purchase agreement may in substance be a loan transaction and the label of such an agreement is not conclusive. It is open to the Court to determine whether a particular agreement is a loan transaction or a hire-purchase agreement. The parameters to be applied are laid down, *inter alia,* in the judgment of the Supreme Court in **Sundaram Finance Limited's case** *(supra).* In the present case, the agreement though termed as hire-purchase agreement, is held to be a loan agreement for the reasons already mentioned.

(B) In a loan agreement for financing goods on hypothecated basis, the creditor cannot forcibly repossess the hypothecated item, though he can enforce the security through the Court.

(C) If a specific clause is inserted in an agreement authorising repossession of a vehicle or any other goods by the hypothecatee, such a clause may be unconscionable, unless otherwise shown by the hypothecatee and such a clause inserted in the present case is held to be void. In the present agreement, clause 4 and clause 7 permitting forfeiture of instalments already paid will be deemed to be void.

(D) Forcible repossession without intervention of the Court may involve commission of an offence and what offence has been committed will depend on facts of an individual

case. The judgments of the Superme Court in hire purchase cases holding that in a hire purchase agreement, the owner cannot be guilty of theft of his own property, will not be applicable to cases where the transaction is, in substance, a loan transaction, as in a loan transaction, the ownership will be of the borrower and the principle applicable to a hire purchase agreement will not apply.

(33) Though in view of above conclusions, this petition for quashing is liable to be dismissed, if the petitioner makes a statement before the trial Court that he will proceed for enforcing his right through the Court and will not insist on forcible repossession, the trial Court will drop the proceedings having regard to facts and circumstances of the case.

(34) This petition to disposed of accordingly.

R. N. R.

Before M. L. Singhal, J

VED SINGH—*Petitioner*

versus

JITENDER SINGH AND OTHERS—*Respondents*

E.P. No. 7 OF 2000

15th March, 2002

Representation of People Act, 1951—Ss. 36(2), 80, 81, 83, 86 and 100—Code of Civil Procedure, 1908—O.7 Rl. 11, O.6 Rls. 2 and 16—Election of Haryana Legislative Assembly—Respondent No. 1 declared elected by a thin margin of 740 Votes—Challenge thereto—Allegation of improper acceptance of the nomination papers of two candidates—Petitioner failing to establish that such wrong acceptance has materially affected the result of the election—S. 83(a) of the 1951 Act provides that an election petition shall contain a concise statement of material facts on which the petitioner relies—Petitioner failing to mention all the material facts in support of his claim that if the two