

(1929) 07 BOM CK 0014
In the Bombay High Court
Case No : O.C.J. Suit No. 629 of 1925

Bhimji N. Dalal

APPELLANT

Vs

The Bombay Trust Corporation Ltd.

RESPONDENT

Date of Decision : 20-07-1929

Acts Referred:

Contract Act, 1872 — Section 74, 78

Citation : AIR 1930 Bom 306 : (1930) 32 BOMLR 64 : (1930) ILR (Bom) 381

Hon'ble Judges : Wadia, J

Bench : Single Bench

Judgement

Wadia, J.—The plaintiff is a solicitor of this Court, and has filed this suit against the defendants in tort for conversion of a Dodge car No. Z8529. On or about May 29, 1924, the plaintiff negotiated with the Bombay Cycle and Motor Agency Limited for the purchase of the car for the sum of Rs, 5150, and the amount was entered in the daily sale book of the said Agency Company against the plaintiff's name, The plaintiff" evidently was not in a position to pay the whole of the purchase price down at once, and he, therefore, through the intervention of one KhersedjiLimji, the Managing Director of the Agency Company, applied to the defendant corporation to arrange for payment of the said sum on certain terms. The said application was made on a printed form of the defendant corporation " for the purchase" of a Dodge car to be used, in Bombay for the " purchase price " of Rs. 5150 on "your Hire Purchase system," meaning the Hire Purchase system of the defendants. The details of the payment were to be as follows :-Rs. 2150 to be paid as cash deposit, and Rs. 3180 to be paid in six monthly instalments of Rs. 530 each. The surplus of Rs. ISO was evidently calculated for interest. The application was accepted by the defendants on May 31, 1924, and the plaintiff by his cheque of even date paid the sum of Rs. 2150 direct to the Agency Company. The cheque was cashed on June 2, 1924, and an entry was accordingly made in the plaintiff's account in the ledger of the Agency Company on that date. The application and its acceptance have been put in as Exhibit Section On June 2, 1924, an agreement between the plaintiff and the defendants was drawn up. But

it was actually executed by the plaintiff at his office on June 9, 1924, as he objected to the term in the agreement prohibiting him from removing the said car from Bombay without the previous consent in writing of the defendants, on the ground that he was a resident of Andheri, and wanted to keep the car at his place, of residence. The clause was accordingly waived by consent of parties, and though the date June 9, 1924, does not appear in the agreement, counsel for the respective parties were agreed that that was the date on which the agreement was executed by the parties. The plaintiff had already taken delivery of the car on May 30, 1924, and must have presumably taken it to his place of residence at Andheri outside Bombay.

2. Under the said agreement which purports to be between the defendants as " the Lessors" of the one part and the plaintiff" as " the Lessee " of the other part, the plaintiff agreed to take j on hire from the defendants the Dodge car " upon a hiring or tenancy" from June 2, 1924, to December 2, 1924, a period of six months, determinable on and subject to certain conditions mentioned therein. That agreement has been put in as Exhibit B, and its true construction is the point in dispute between the parties. Under the agreement, the plaintiff was to pay Rs. 2150 in cash " for the hire" of the car, which sum he paid to the Agency Company as I have stated above, and the balance was payable by six monthly instalments of Rs. 530 beginning with June 2, 1924, and thereafter on the 2nd of each succeeding month. Clause 4 of the agreement provides that on the plaintiff committing a breach of any of the terms of the agreement, and in certain other contingencies, the defendants may terminate " this hiring," and the plaintiff should then return the car to the defendants, for which purpose leave and license was given to them to seize the car and take possession of the same. Clause 5 provides that in the event of Rs. 2150 being paid in cash, and on the due payments of the six monthly instalments punctually, the car was to become " the property" of the plaintiff. Clause 6 provides that the plaintiff should have the option of purchasing the car at any time during the said period of six months on making payment as stated therein. Clause 7 provides that the car was to be delivered to the plaintiff, but that he was to hold the same ftp the defendants" "bailee," and that he should have no property therein until he exercised his option of purchase.

3. The plaintiff paid three instalments to the defendants of Rs. 530 each. These were not paid on their due dates, and letters of demand had to be written to the plaintiff, but nevertheless the payments were accepted by the defendants on July 35 1924, August 23, 1924, and September 6, 1924, respectively. Plaintiff made default in payment of the fourth instalment on October 2, 1924, and after several notices of demand the defendants took possession of the car on October 22, 1924, from the plaintiff's residence during his absence at his office in Bombay. On hearing of the seizure, the plaintiff tendered to the defendants on the telephone the same day the whole amount of the October instalment and asked for the return of the car, but the defendants refused to accept the same, or to redeliver the car. Correspondence ensued between the parties, and the ear was

eventually sold by the defendants on December 11, 1924.

4. It is the plaintiff's contention that on a true construction and interpretation of the terms of the said agreement, notwithstanding the language used, he was the purchaser of the car; that there was really no "hiring," but a sale of the car to him, as the amount paid by him in cash, together with the amount of the instalments, covered the whole purchase price of the car; and that the property in the car had passed to him on the execution of the agreement under which he was under an obligation to purchase the same. Plaintiff further contends that in no event were the defendants entitled to sell the car without his consent, and that the sale amounts to a conversion in law. Plaintiff prays for an order for delivery of the car to him on payment to the defendants of the remaining three instalments, or in the alternative for Rs. 5150 being the purchase price of the car, and certain amounts spent by him thereon, less the total amount of the remaining instalments, or in the further alternative for the sale proceeds of the car, less the said total amount. The defendants seek to interpret the agreement strictly according to the language of its terms, which they say the parties were in a position to understand. They state that they wrote several letters to the plaintiff for payment of the October instalment, and finally gave him notice that in default of payment they would seize the said car, but as the plaintiff made default in payment, they seized the car and took possession of the same, as they were entitled to do under the agreement.

5. The suit came on for hearing before Madgavkar J. in February 1929, when plaintiff applied for amendment of the plaint in order to make it clear that he based his claim on the said agreement, and not merely on the Joan. Plaintiff applied to strike out the words "under colour" in paras 3 and 9 of the plaint, where the words, "under colour of the agreement," occurred. The amendment was allowed, and plaintiff was also allowed to add certain paras in his plaint. The parties came to a hearing before me on the amended plaint, when fresh issues were raised over and above the issues that had been raised at the first hearing of the suit in February 1929. The written statement, however, was not amended by the defendants.

6. The real question in dispute is, what is the true meaning and effect of the agreement in suit. It is the substance of the transaction evidenced by this agreement which has to be looked at by the Court, and not its mere words. And the substance has to be ascertained by a consideration of the rights and obligations of the parties arising from the whole of the said agreement. If the plaintiff agreed to buy the car, then, to use the words of Lord Hershell in the well-known case, *Helby v. Matthews* [1895] Sec 471 to which I will hereafter refer (p. 475):-

The parties cannot, by calling it a hiring, or by any mere juggling with words, escape from the consequences of the contract into which they entered.

7. It was also stated by Lord Hershell in another case, *Me Entire v. Grossley*

Brothers [1895] Section C. 457, to which I will also refer, that (p. 462) :-

The parties cannot, by the insertion of any mere words, defeat the effect of the transaction as appearing from the whole of the agreement into which they have entered. If the words in one part of it point in one direction, and the words in another part in another direction, you must look at the agreement as a whole, and see what its substantial effect is.

8. The point, therefore, to be considered is whether the agreement in suit was only a hire purchase agreement in the sense in which it is so understood in England, namely, that there is no absolute sale of a chattel, but only a hiring of it by a person who has the option of returning it at any time before the instalments mentioned therein are paid, or whether, on the other hand, despite the anguage used by the parties, the transaction is really a sale under which there is an obligation to buy the chattel, such obligation attaching on the execution of the agreement. Every agreement has to be construed in its own terms, and though certain subsequent correspondence was put in as Exhibit O, it is clear that what happened after the execution of the agreement on June 9, 1924, cannot affect the legal relationship of the parties.

9. Various hire purchase agreements have come up for interpretation before the English Courts of Justice, and it has been laid down that under a hire purchase agreement the hirer has only an option to purchase the goods hired to him. He is under no obligation to purchase the goods, and can return the same at any time before the instalments payable by him under the agreement have totally been paid. In other words, he only bargains for an option and nothing more. There are two lines of English authorities on this subject, and they centre round the case of *Lee v. Hutler* [1893] 2 Q.B. 318 on the one hand, or *Helby v. Mathew* [1895] Sec 471 on the other. In *Lee v. Butler* an agreement was entered into in writing for the hire and purchase of certain furniture, and the concluding portion of the fifth clause of the agreement provided in substance that if the hirer paid all the rent for the use of the said furniture as agreed, the furniture was to become the sole and absolute property of the hirer, and that until all the rent was paid, no property or interest in the said furniture other than as a tenant was to vest in the hirer. The Court of Appeal decided that though the agreement began by stating that it was an agreement for the hire and purchase of furniture, it was nevertheless plainly an agreement for purchase. In the other case, *Helby v. Matthews*, the owner of a piano agreed to let it on hire. The hirer was to pay rent by monthly instalments, on the terms that the hirer might at any time terminate the hiring by delivering up the piano to the owner, he remaining liable for all arrears of hire. It was also agreed that if the hirer should punctually pay all the monthly instalments, the piano should become his sole and absolute property, and that until such payment was made, the piano should continue to be the sole property of the owner. The House of Lords held that the hirer was under no legal obligation to buy, and that the hirer could either return the piano, or exercise his option to purchase. It was in this case that Lord Herschell observed that if there

was an agreement to buy the piano, the parties could not " by calling it a hiring, or by any mere juggling with words, escape from the consequences of the contract in which they entered." The hirer did not agree to make all the thirty-six, or any particular number of monthly payments. All that he undertook was to make the monthly payment of 10s. 6d. so long as he kept the piano, and he had an option to buy continuing the stipulated payments for a sufficient length of time. Lord Herschell distinguished this case from *Lee v. Butler*. In *Lee v. Butler* the purchase money was to be paid in two instalments, but as soon as the agreement was entered into, there was an absolute obligation to pay both of them, and further the person who obtained the furniture could not, insist upon returning the same, and so absolve herself from any obligation to make further payments. In *Helby v. Matthews*, Lord Shand states as follows (p. 484):-

I cannot hold that there is such an agreement (that is an agreement to purchase) on the part of one who having the beneficial use of the property of another agrees to pay instalments described as rent or hire instalments, and which he is entitled to treat as payments for hire only, because it is also stipulated that by continuing to make the payments for a certain time he shall acquire the property, he having at the same time the power at any moment and at his own will by returning the property to the owner to put an end to any obligation to pay any further instalments.

10. Both these cases were considered by Channell J. in the case of *Belsize Motor Supply Company v. Cox* [1914] 1 K.B. 244. In that case there was an agreement in writing under which the Belsize Motor Company agreed to let to the Motor Manufacturing Company, and Alfred Burgess Ltd., a taxi-cab for the term of twenty-four calendar months at the rate of ₹15-12-2 per month. The hirer also agreed to pay ₹50 on account of hiring in advance, and if he wanted to purchase the taxi-cab at any time during the said period, he was at liberty to do so by making the amount of hire paid on his account equal to the sum of ₹425-11-6. There was no clause in this agreement empowering the hirer to terminate the hiring at any time during the said period by delivering up the taxi-cab to the owners. Channell J. held that the hirer was under no obligation to purchase the taxi-cab. They never bound themselves to pay the whole sum of ₹424-11-6; they were never bound to pay more than the full amount of the twenty-four instalments, viz., ₹374-12-0. Even after the last instalment was paid, the hirer had an option to decline to proceed with the purchase and to claim a return of the ₹50 deposit, which was treated as a separate item from the other instalments. The provisions for the payment of the twenty-four instalments, and for payment of the ₹50 deposit are contained in two separate clauses. The learned Judge thereupon held that the case came within the principle of *Helby v. Matthews*, and not within *Lee v. Butler*. In the case of *Lewis v. Thomas* [1919] 1 K.B. 319 there was a hiring agreement which distinctly provided that in the event of the hirer being desirous of terminating the hiring, he should be at liberty to do so at his own cost after not less than one-half of the total amount of the instalments had been paid. The Court of Appeal held that there was no absolute

agreement by the hirer to purchase, for he had reserved to himself the right to determine the contract, and the case accordingly fell within the principle of *Helby v. Matthews*. In the case of *Grande Maison D'Automobiles (Limited) v. Beresford* (1909) 25 T.L.B. 522 the Court of Appeal held that the agreement could not be treated as a purchase but as a contract of hiring with an option to purchase. The agreement in the suit also contained a clause that the hirer might determine the agreement by delivering up the car at any time, and the hirer accordingly under such an agreement was not the true owner of the goods hired to him.

11. I will now deal with the Indian cases which are few and far between, and all the reports are not available. In the case of *Gopal v. Sorabji* (1904) 6 Bom. L.R. 871 the first defendant as the hirer, and the 2nd and 3rd defendants as sureties for him, took from the plaintiff a sewing machine of the value of Rs. 105 agreeing to pay Rs. 10 per month for hire thereof. The cash price of the machine was Rs. 92. The hirer paid Rs. 12 as the first month's rent in advance, and agreed to pay Rs. 10 per month regularly in advance, and he further stipulated that he might terminate the hiring by delivering the machine back to the owner. An option was given to the hirer to purchase the machine, but until the purchase was effected, the machine was to continue to be the sole property of the owner. The hirer paid some instalments, but committed default thereafter, nor did he return the machine. The plaintiff brought the suit to recover the price of the machine and the amount due in respect of hire. The suit against defendant No. 1 was abandoned, but continued against the sureties, who contended that the machine was purchased by them. The Subordinate Judge relied on *Hdby v. Matthews*, and construed the agreement as a contract of hiring with an option to purchase. The sureties relied on the case of *Lee v. Butler*, and one of them applied to the High Court under its extraordinary jurisdiction. The appellate Court dismissed the application, holding that the property in the machine could pass only on the performance of the stipulated conditions. In that case the hirer was under no obligation to pay the full price, and could terminate the hiring and return the machine whenever he liked. The case, therefore, came within the principle of *Helby v. Matthews*. In the case of *Emperor Vs. Silas Moses*, there was no question of construction of the hire-purchase agreement relating to the car which was hired by the accused from the Automobile Motor Car Company on the hire-purchase system. Clause 5 of the agreement provided that until the hirer exercised his option of purchase, the car was to remain the absolute property of the owner, and that during the hiring the accused was not to "assign, underlet, or part with the possession" of the same. When the agreement was in force the accused pledged the car to three different persons on three different occasions. He was convicted of criminal breach of trust and sentenced to pay a fine for each offence, and the Appellate Court on its criminal side said that the clause was binding upon him and upheld the conviction.

12. Then there is the case of *A. Cecil Cole Vs. Nanalal Moraji Dave*, . In that case the learned Chief Justice, Mr. Justice Marten as he then was, has discussed the well-known English cases, and considered the agreement in that suit in the light

of the principles laid down in the two lines of English authorities I have above referred to. There the agreement began with the words "I have today agreed to sell to you on the hire purchase system for Rs. 25,000 my nine lorries etc.," and then it mentions how and when the consideration money was to be paid. The learned Judge construed it as an agreement to sell, though there was a clause that the lorries were not to be considered as sold until the final payment had been received, the consideration money being payable by certain instalments. The learned Judge observes as follows (p. 885):-

If then there was a sale, on the true construction of this document, I cannot read this Clause (referring to the clause I have referred to above), as meaning that the property was not to pass notwithstanding that the purchaser definitely agreed to buy the lorries and took delivery of the lorries there and then, and agreed to pay the purchase money by instalments. If one turns to Section 78 of the Indian Contract Act, it is clear that in such a case the property in the goods would ordinarily pass.

13. There are certain broad principles on the subject which can be deduced from a consideration of all the English and Indian authorities I have referred to above. "Firstly, the substance of the agreement must be considered as a whole, not the substance apart from the language used, nor the mere words divorced from the substance, but the substance which must be gathered from the true meaning of the language in which it is sought to be expressed. The true effect of an instrument depends upon the intention of the parties as gathered from its terms, and in construing the terms it is the duty of the Court to regard the intention rather than the form and to give effect to the whole instrument. Secondly, where the agreement imposes an obligation upon the "hirer" to buy the chattel mentioned therein from the other party, such obligation attaches on the execution of the agreement, and the agreement is really an agreement of sale, notwithstanding the use of words, such as, hire purchase agreement, lessor and lessee, hiring, rent, tenancy, etc. Thirdly, such an obligation arises when it is clear from the agreement that the party taking the chattel, called the hirer or lessee, has to pay the full amount of the consideration mentioned in the agreement, even though the payment is by instalments, and that amount is sufficient to cover the purchase price of the chattel; or when it is clear from the agreement that the hirer or lessee cannot at any time during the period mentioned in the agreement return the chattel to the other party, called the owner or lessor, and absolve himself from his obligation to make further payment. Fourthly, it would follow from the above that if the hirer is not bound to pay the full amount of the purchase price, or if he can terminate the hiring at any time by delivering the chattel to the other party, the agreement is in fact as well as in form a true agreement for hire, and all that the hirer has obtained is an option to purchase,

14. I have, therefore, to construe the agreement in this suit in the light of these principles. Counsel for the defendants argued that this was a conditional

agreement to sell, and until the conditions mentioned therein were fulfilled, the car remained with the plaintiff merely as a hirer or bailee, and that there are no such words in this agreement as are to be found at the very beginning of the agreement in the case of *Cole v. Nanalal*, which begins by saying "I have to-day agreed to sell" &c. Now it is clear that every agreement must be considered upon its own terms, and the Court cannot construe the terms of one agreement merely by reference to other analogous agreements, any more than a Court can construe the clauses of one will by reference to clauses contained in other wills. Before the agreement in suit was entered into, the plaintiff applied on the printed form of the defendants (Ex. A) for the purchase of the car on the hire purchase system. The said application was accepted by the defendants, and it appears that the agreement in suit was executed in pursuance of the said application. It was argued that any previous negotiations before a contract is executed must be discarded as they would be merged in the contract, and that if there was any discrepancy between the previous negotiations and the final contract, the latter must prevail. The application which was accepted cannot be said to come, strictly speaking, within the meaning of previous negotiations as being something apart from the agreement, for it is connected with the agreement by various internal references. Nevertheless I wish to base my decision on the terms of the agreement itself, and to construe it according to its true meaning in spite of the use of the words "lessor and lessee, and hiring and tenancy," though in one of the clauses the words "purchase money or price" occur. As I read the agreement, it appears to me that the plaintiff was bound to pay the whole of the purchase price for the said car by instalments, and if he failed to pay any instalments, it would be a breach of contract on which the defendants would be entitled to sue him not only for the arrears of the instalments, but for damages for the breach. There was no option to the plaintiff to return the car to the defendants after he had paid any one or more of the instalments. He was bound to pay the whole amount according to the stipulated instalments. It was, therefore, a sale for a consideration, payment of which was obligatory upon the plaintiff, and the case therefore falls within the principle of *Lee v. Butler*, In the event of the plaintiff committing any default, leave and license was given to the defendants to seize the car, but the defendants had no right to sell the same as the property in the car was in the plaintiff. Counsel for the defendants laid stress upon the provision that whereas in the case of *Cole v. Wanlal* the motor lorries were to be transferred and registered in the name of the purchaser, the car in the agreement in suit was to be registered and insured in the name of the defendants, though the registration charges, insurance premia, and all municipal and police taxes were payable by the plaintiff. My attention was not drawn to the Bombay Motor Vehicle Rules at present prevailing in Bombay, or those that prevailed in the year 1924. But, in my opinion, the clause about registration is not conclusive in favour of the defendants) as I have already held that the agreement imposes an obligation upon the plaintiff to pay the full purchase price of the car, and I have to consider the agreement as a whole. The defendants had the right to seize the car under the provisions of Clause 4 of the agreement, and

they would have been entitled to claim a lien upon it, until the instalments in respect of which there was default, were paid. As the car was to be registered in the name of the defendants, they could in the event of a breach more easily enforce their lien if the car was so registered. I have, however, as I have said before, to look not merely at one clause, but the agreement as a whole, and I have come to the conclusion that the agreement was not a conditional agreement of sale, but that the plaintiffs obligation to purchase was absolute.

15. Counsel for the defendants argued that under the agreement in suit the property in the car passed to the defendants, and that in any event it vested in them when they seized the car on October 22, 1924. He relied on Clauses 5 and 7 under which the plaintiff agreed to hold the car "solely as the bailee" of the defendants, and not to have any property or interest as purchaser therein, until he had exercised his option of purchasing on payment of the whole of the purchase money or price in the manner stipulated. Counsel referred to the case of *McIntire v. Crossley Brothers* [1895] 1 Ch. 457 in which a hiring agreement was entered into for letting out a gas engine at a rent to be paid by instalments amounting in all to £240 with an option to the "lessee" to purchase the engine upon payment in full. Until payment in full, the engine was to remain the sole and absolute property of the "owners and lessors." Under this agreement there was no obligation to purchase the said engine, and Lord Herschell observed at p. 463 that as the intention of the parties was that the property should not pass until the full purchase money was paid, that intention must be given effect to. He, however, added as follows (p. 463):-

I quite agree that if, although the parties have inserted a provision to that effect, they have shown in other parts of the agreement, by the language they have used or the provisions they have made, that they intended the property to pass, you must look at the transaction as a whole ; and it might be necessary to hold that the property has passed, although the parties have said that their intention was that it should not, because they have provided that it shall.

16. I was also referred to the case of *In re Davis & Co. Ex parte Rawlings* (1888) 22 Q.B.D. 193. That was a case in which certain moneys had been lent to dealers in furniture upon the security of certain hire purchase agreements, and on the bankruptcy of the furniture dealers, the trustee in bankruptcy sued for a declaration that he was entitled to the benefit of the said agreements. One of the agreements provided that until the hirer paid a certain sum in full according to the stipulated instalments, the goods were to remain the property of the lenders. Under that agreement also there was no obligation upon the hirer to purchase, and Lord Esher held that the property in the goods did not pass to the hirer until all the instalments had been paid.

17. In India we are governed by Section 78 of the Indian Contract Act under which if the parties to, a contract agree inter alia that payment for the goods sold is to be postponed, the property passes as soon as the proposal for sale is accepted. Such passing of property, it has been said, cannot be postponed by

any agreement between the parties. In the case of *Brij Coomaree v. Salamander Fire Insurance Company* ILR (1905) Cal. 816 Maclean C. J. observed at p. 823 that "if... in a contract [there appear] certain terms from which, when they exist, the legislature says that certain consequences shall ensue, these consequences must ensue;" though there was nothing to prevent traders from making any contract they liked so long as the incidents of that contract were not inconsistent with the provisions of the Indian Contract Act. This case and the observations of Maclean C. J. have been referred to, presumably with approval, in the case of *A. Cecil Cole Vs. Nanalal Moraji Dave*, , which I have referred to above. But the learned commentators of Pollock and Mulla's Indian Contract Act seem to think that the view taken by Maclean C.J. is an extreme and unnecessary view. I have, however, already held that the agreement in suit imposed an absolute obligation upon the plaintiff to purchase the car, in other words, that it was a contract of sale, and, in my opinion, after considering all the clauses together, despite the form and the language used, the property in the car passed to the plaintiff on the execution of the agreement. Nor did the, property vest in the defendants on the seizure of the car. Defendants had leave and license to seize the car according to the provisions of Clause 4 of the agreement, but such leave and license did not confer upon them any property in the car.

18. The next question is, whether on the seizure of the car the defendants were entitled to forfeit all the instalments which the plaintiff had already paid, The plaintiff had paid the July, August and September instalments on the dates which I have referred to above. Under Clause 5 of the agreement the instalments of Rs. 530 p. in., were to be "duly and punctually" paid by the plaintiff in the manner provided in the said agreement. The plaintiff was admittedly not punctual in the payment of the first three instalments, but the irregularity was waived as payment was received not on the due dates but on the dates which I have above referred to. It is, however, provided by Clause 8 of the agreement that such indulgence or variation in any of the due dates should not affect or prejudice any of the provisions in the agreement, and the defendants would have been entitled to insist on payment of the October instalment on its due date. The defendants, however, did not insist on exercising their rights in default of payment on she due date. They sent four letters of demand, and by their last letter written by their pleader on October 16 they intimated to the plaintiff that if the overdue instalment was not paid within forty-eight hours, the defendants would exercise their powers under the agreement and seize the car. They accordingly seized the car on October 22, when the plaintiff was in his office in Bombay. On being informed of the seizure, the plaintiff immediately offered over the telephone to pay the amount of the overdue instalment and demanded the return of the car, and sent the money partly in cash and partly by cheque to the defendants, but the defendant refused to accept the same. On January 8, 1925, the plaintiff asked the defendants to let him know the entire balance of the purchase price that was due to the. defendants, and offered to pay the same, but the defendants in their reply of January 10 and in the subsequent correspondence

contended that they were entitled to terminate the agreement, and retain the car, impliedly meaning thereby that they were also entitled to forfeit the amount of the three instalments already paid. There is no specific clause in the agreement to forfeit the amounts already paid, but Clause 4 provides, as I have stated before, that on breach of any of the terms of the agreement, or in the contingencies therein mentioned, the defendants could, without prejudice to their right, claim arrears of rent and damages, terminate the hiring, and retake possession of the car. Clause 7 provides that the plaintiff is not to have any property or interest in the car, until he has paid all the instalments and exercised his option of purchase. It is the defendants' contention that under the said clauses it was at any rate impliedly agreed that they were entitled to forfeit the instalments already paid. Plaintiff contends that these clauses are penal, or " stipulations by way of penalty," to use the language of Section 74 of the Indian Contract Act. The defendants contend that the said section has no application, because they are not claiming any damages against the plaintiff for breach of contract. Defendants are, however, seeking to forfeit the amount already paid, and the question, therefore, is, whether, even apart from Section 74, the plaintiff is entitled on equitable grounds to be relieved from the forfeiture on reasonable terms. Defendants' counsel relied on Halsbury's Law of England, Vol. I, para. 1125, p. 555, where it is stated with reference to hire purchase agreements, that-

Equity will not relieve the hirer against a forfeiture occasioned by default in the punctual payments of the instalments as they accrue, the proviso not being in the nature of a penalty.

19. That proposition is based on two cases cited in the footnotes. The first case is that of *Cramer v. Giles* (1883) 1 Cab. & El. 151. In that case the plaintiff let a piano on hire which was to be paid in twelve monthly instalments of 5 g. each, and the agreement provided that on payment of all the instalments, the piano was to become the property of the hirer. It also provided that in default of punctual payment the instalments previously paid were to be forfeited. The learned Judge in his judgment, which contains only two lines, held that the plaintiff was entitled to retain the piano, and therefore to forfeit the instalments, as time was of the essence of the contract, though as a matter of fact ten out of twelve instalments had already been paid, and the remaining two instalments of 10 g. were offered in one sum before the action was brought. The other case is that of *Sterne v. Beck* (1863) 1 De G. & Sm. 595; but in that case the proviso was that upon default being made in payment of any instalment, the whole unpaid portion of the debt with interest was to become immediately payable. The debtor made default, and it was held that the proviso was not in the nature of a penalty. That case, however, does not cover the point which arises for consideration in this suit. Counsel for the plaintiff referred to the case of *Kilmer v. British Columbia Orchard Lands, Limited* [1913] Sec 319 In that case there was an agreement by the respondent company to sell certain lands in British Columbia to the appellant for a price to be paid by instalments at specified dates.

It was also agreed that in case of default of punctual payment of any one instalment, the company could forfeit all payments of the past instalments ; and time was declared to be of the essence of the agreement. Default having been made, the company chose to enforce the forfeiture> but their Lordships of the Privy Council held that by the law of British Columbia as well as the English law the condition of forfeiture was in the nature of a penalty from which the appellant was entitled to be relieved on payment of the purchase money due. The judgment was prepared by the late Lord Macnaghten, but was actually delivered by Lord Moulton. It was therein stated that if the penalty was to be enforced according to the strict letter of the agreement, it became more and more severe as the agreement approached completion, and the money liable to confiscation became larger. The trial Judge had dismissed the action, but the Court of Appeal held in favour of the respondent company that there was no ground on which the Court could grant a relief against forfeiture. But the judgment of the Court of Appeal was reversed by their Lordships of the Privy Council, and that of the trial Judge- restored. This case was referred to and explained in the case of *Steedman v. Drinkle* [1916] 1 Sec 275 and Viscount Haldano in delivering the judgment of their Lordships of the Privy Council held that the forfeiture of the money paid under the agreement, which was somewhat similar to the agreement in *Kilmer's* case, was a penalty from which relief should be granted on proper terms. In my opinion, both u/s 74 of the Indian Contract Act and under the general principles of equity, the Court has to carry out the primary contract between the parties. Any further contract, express or implied, to be binding on the promisor if he breaks the primary contract, is secondary or subsidiary, and may be merely intended to secure the fulfilment of the primary contract. The Court may, however, carry out the terms of the secondary contract, if such a contract is just and reasonable, but is not bound to. In my opinion the plaintiff is entitled to be relieved from the forfeiture of the three instalments paid by him. Counsel for the defendants contended that the plaintiff's conduct in committing default in payment of the instalments on the due dates must be taken into consideration in relieving him against the forfeiture on equitable grounds. But at the same time I cannot leave out of consideration the somewhat high-handed action of the defendants themselves in seizing the car when the plaintiff was in his office, and refusing to receive payment, or to return the car, and ultimately in selling off the car without any notice to the plaintiff. The plaintiff will be entitled to relief on payment of the remaining three instalments with interest thereon at six per cent, per annum.

20. The next question is, whether the plaintiff is entitled to recover from the defendants the sum of Rs. 184-5 paid by the plaintiff as premium under the motor car policy of the Royal Exchange Assurance Corporation. That the plaintiff paid the said amount is not disputed. It appears from the ledger account of the plaintiff with the .Bombay Cycle and Motor Agency Ltd. (Ex. H) that the amount was paid. Defendants' counsel contended that as the car passed out of the plaintiff's possession on account of his default, the consideration for the

insurance policy failed, and that the plaintiff is not entitled to recover the sum of Rs. 184-5-0. I have already held that though the defendants were entitled to seize the car, the property was in the plaintiff, and the defendants had no right to deprive him of the same. The defendants cancelled the said insurance policy without any reference to the plaintiff. Such cancellation was wrongful as the property in the car was in the plaintiff in spite of the seizure, and the defendants are liable to pay the said amount to the plaintiff.

21. The defendants seized the car on October 22, 1924, and though the plaintiff in the correspondence that ensued demanded the return of the car, the defendants refused to deliver it, and sold it off on December 11, 1924. The defendants were entitled to seize the car under their leave and license, but they were not entitled to sell it. Their leave and license gave them no power of disposal, and their only right was to keep possession of the car until their claim under the agreement was satisfied. The sale on the part of the defendants, and not merely the demand and refusal, amounts in law to conversion, and plaintiff is entitled to recover damages from the defendants as of the date of conversion. The defendants stated in their written statement that they had insured with the Royal Exchange Insurance Company the due payments by the plaintiff under the agreement, and were bound by the terms of the said insurance to take possession of the car in the event of the plaintiff's default in payment of the instalments, if the insurance company so required, and that they had taken possession of and sold the car under the instructions of the insurance company, Defendants' counsel applied to put in the said policy of insurance, and to lead evidence to show how much of the sale proceeds of the car went to the insurance company, and how much was taken by them. The plaintiff was not a party to this insurance, and had no concern with any arrangements the defendants may have made with the insurance company. It was not even alleged that the defendants entered into the said arrangements with the knowledge of the plaintiff. In my opinion, therefore, the evidence was irrelevant, and I rejected the application, It is clear that if a person obtains possession of the goods of another, who has been illegally deprived of the same and disposes of the goods, whether for his own benefit, or that of any other person, he would be liable in tort for conversion. In this particular case the defendants were entitled to obtain possession of the car under their leave and license, but only for a limited purpose. They, however, exceeded the limit, and by depriving the plaintiff of his property in the car by selling the same, they became liable to him for damages. The plaintiff, in my opinion, is not entitled to recover the full value of the car, but is entitled to be compensated according to the actual damage he has sustained.

22. The measure of damages in a case of conversion was considered by the House of Lords in *Livingstone v. Eawyards Coal Company* (1880) 5 App. Cas. 25 and *Earl Cairns L. C.* observes at p. 32 that the question in ascertaining the damages is "what may fairly be said to have been the value of the coal to the person from whose property it was taken at the time it was taken." That was, no doubt, a case in which the owner had to be compensated when his property was

innocently destroyed, and the Courts have made a distinction between that which is done innocently by error and that which is done by fraud. The defendants were wrong in selling off the said car, but I cannot under the facts and circumstances of the case go so far as to say that there was any fraud on their part. The actual damage, therefore, that the plaintiff has sustained is the value of the car to him at the date of conversion, that is, December 11, 1924, and in the absence of any evidence of such value on the part of the plaintiff, the best evidence under the circumstances of the case would be the sale proceeds of the car which realized Rs. 3,200. As the sale was wrongful, the defendants are not entitled to the costs of the sale, and the plaintiff would, therefore, be entitled to recover the sum of Rs. 3,200 less the amount of instalments payable by him and less interest thereon, as and by way of damages.

23. Decree for the plaintiff for Rs. 3,200 and Rs. 184-5-0 less Rs. 1,590 and less, interest on Rs. 1,590 at six per cent, per annum from October 2, to December 11, 1924. Costs and interest on judgment at six per cent, per annum till payment.