

1890.
September 4.

CAVE & CO. v. CLAY.

D. C., Kandy, 11,854.

*Contract to hire piano—Payment by instalments—Hire and purchase agreement—
Right of hirer to recover piano from third party—The sale of Goods
Ordinance, 1896.*

An agreement in the following terms :

" I, A. J. Hardie, hereby engage on hire from Messrs. H. W. Cave & Co., for a period of two years, an Oriental Model Pianoforte, No. 4,128, at Rs. 16.50 per month, which sum I agree to pay monthly in advance from date hereof in Colombo to the said Messrs. H. W. Cave & Co. And I further agree, in case of any payment being unpaid at the expiration of fifteen days after it is due, to return and deliver up possession of the said pianoforte in good order and condition, ordinary wear and tear excepted, to Messrs. H. W. Cave & Co., or their order, at Colombo, and to pay all hire due up to the date of such return on demand. Messrs. H. W. Cave & Co. agree on payment of the said sum of Rs. 396 on the due dates as set out in the agreement to relinquish all right and title to the said pianoforte in favour of A. J. Hardie,"—

Held, this is an agreement to hire the piano only, not to buy it.

Therefore, the dominion of the piano never vested in Hardie, and section 24 of the Ordinance No. 11 of 1896 does not apply to such a case.

THE facts of the case are these:—On the 4th December, 1895, one Hardie entered into the following agreement with Messrs. H. W. Cave & Co., the plaintiffs, in respect of a piano:—

" I hereby engage on hire from Messrs. H. W. Cave & Co., for
" a period of two years, an Oriental Model Pianoforte, No. 4,128,
" at Rs. 16.50 per month, which sum I agree to pay monthly in
" advance from date hereof in Colombo to the said Messrs. H. W.
" Cave & Co. And I further agree, in case of any payment being
" unpaid at the expiration of fifteen days after it is due, to return
" and deliver up possession of the said pianoforte in good order
" and condition, ordinary wear and tear excepted, to Messrs.
" H. W. Cave & Co., or their order, at Colombo, and to pay all
" hire due up to the date of such return on demand.

" A. J. HARDIE."

" Messrs. H. W. Cave & Co. agree on payment of the said sum of
" Rs. 396 on the due dates as set out in the agreement to relinquish
" all right and title to the said pianoforte in favour of A. J.
" Hardie.

" H. W. CAVE & Co."

After twelve instalments had been paid, Mrs. Hardie sold the instrument to the defendant, who was now sued for the return of it.

1899.
 September 4.

The issues argued in the Court below were, whether the contract disclosed an agreement to buy or to hire; and if Mr. Hardie bought the piano, did Mrs. Hardie pass a good title to defendant?

The District Judge found that the agreement was one to buy, but that Mrs. Hardie not being a mercantile agent within the meaning of the Ordinance No. 11 of 1896, section 24, could not sell it to defendant; and that plaintiff was entitled to recover it from him. The following was the judgment of the Court below:—

“ Mr. Fernando, for plaintiffs, relied on *Helby v. Matthews*, “ *L. R. Ap. Cas. 1895, p. 471*, in support of his contention that the “ agreement is one to hire. The contract contains a stipulation “ enabling the owner to put an end to the agreement and re-take “ possession of the piano in certain events, but there is no “ stipulation enabling the hirer to terminate the agreement by “ delivering up the instrument to the owner. In the absence of “ this provision, on which the decision of the House of Lords in “ *Helby v. Matthews* appears to have turned, I hold on the “ authority of *Lee v. Butler*, *L. R. 2, Q. B. 318*, and *Hull Rope “ Company v. Adams*, *44 W. R. 108*, that the agreement is one to “ buy. I now feel somewhat embarrassed by Mr. Fernando’s “ statement that, if the agreement is one to buy, the plaintiffs “ are out of Court. I do not think they are. It appears to me “ that something more has to be considered before I determine “ whether the plaintiffs’ action fails.

“ First, did the defendant acquire title by his purchase? If “ this movable property belonged to Hardie, the sale by his wife “ did not convey right to it. She was not the owner, and could “ not give a title. I have nothing on which I can sustain the “ sale as made by her as her husband’s agent in a case of neces- “ sity. The sale to defendant is not covered by section 24 (2) of “ the Ordinance No. 11 of 1896, Mrs. Hardie not being a ‘ mer- “ cantile agent ’ within the meaning of sub-section 3. Next, the “ defendant not having title, are the plaintiffs entitled to recover “ the piano? I think they are.

“ The defendant should deliver the piano to the plaintiffs.”

The defendant appealed.

Van Langenberg, for appellant.

Wendt, for respondents.

Cur. adv. vult.

4th September, 1899. WITHERS, J.—

The right of the plaintiffs to vindicate this piano ultimately depends on the view which ought to be taken of Mr. Hardie’s contract with the plaintiffs. Did Mr. Hardie agree to buy that

1899.
 September 4.
 WITHERS, J.

piano? If he did, then, having regard to the provisions of the 24th section of the Sale of Goods Ordinance of 1896, the only question would be, did he authorize his wife to sell the piano and did the defendant receive it in good faith without knowledge of any lien or other rights in respect of the piano. It is clear to my mind that Mr. Hardie did not agree to buy the piano. We must construe this contract according to our Common Law. Every line of the agreement signed by Hardie shows that he agreed to hire the piano and not to buy it. That being so, the *dominium* of this piano never vested in Hardie. The only right he acquired was the right to use the piano and to retain it so long as he paid the hire as and when stipulated. As a matter of fact he broke that stipulation, and the plaintiffs could at any time have compelled him to restore the piano. He could confer no better right than he had at the time his wife disposed of the piano.

Judgment must be affirmed.

BROWNE, A.J.—I agree.

