

**NILABDEEN
v.
FAROOK**

COURT OF APPEAL
L. H. DE ALWIS, J. AND MOONEMALLE, J.
C.A. 367/80(F)
D.C. COLOMBO 1665/S.
DECEMBER 5 AND 6, 1983.

Res Judicata—Order as to possession made in criminal proceedings—Whether binding on a civil court in subsequent proceedings for declaration of title.

Sale of Goods Ordinance, Sections 2, 18 and 19—Contract of sale—Whether ‘Sale’ or ‘Agreement to Sell’—Remedies available for breach of agreement to sell.

The plaintiff agreed “to give” his lorry to the defendant for a sum of Rs. 57,500/- . Of this amount the defendant paid Rs. 17,500/- on the date of the agreement and received possession of the lorry. The balance was to be settled by “financing” the lorry. In proceedings in the Magistrate’s Court in connection with this transaction the lorry was ordered to be handed over to the defendant and the Supreme Court affirmed the defendant’s right to possession on the ground that the lorry had been sold to him. The plaintiff then sought to vindicate title to the lorry or in the alternative the payment of the balance Rs. 40,000/- with interest.

Held

- (1) An order regarding possession made in criminal proceedings does not operate as res judicata in respect of the question of title arising in a subsequent civil action.
- (2) The terms of the contract and all the circumstances point to the contract being an agreement to sell and not a sale. Property in the lorry remained with the plaintiff and he was entitled to both remedies sought by him.

Cases referred to

- (1) *Nilabdeen v. Silva* 78 NLR 454
- (2) *Perera v. Ratnadasa S.C.* 66/80, S.C. Minutes of 8.4.1981.
- (3) *Hollington v. Hawthorn & Co. Ltd.*, (1943) 2 AER 35.
- (4) *Goody v. Adams Press Ltd.* (1966) 3 AER 369.
- (5) *Jayasuriya v. Warnakulasuriya* 61 NLR 189.
- (6) *Silva v. Kanapathipillai* 14 CLW 41.
- (7) *Viking Tours Ltd. v. The Finance Company Ltd. & another* (1981) 1 SLR 116.

APPEAL from a judgement of the District Court of Colombo.

S. M. Mahenthiran for plaintiff-appellant.

Nimal Senanayake, S.A. with *Miss S. M. Senaratne* and *K. Gunaratne* for defendant-respondent.

January 20, 1984.

L. H. DE ALWIS, J.

This appeal comes up for re-hearing as a result of Ranasinghe, J., who heard the argument with me on an earlier occasion being elevated to the Supreme Court, before judgment was delivered. Mr. Ranganathan Q.C. who appeared for the appellant has also since died and Mr. Mahenthiran now appears for the appellant.

The Plaintiff-appellant instituted this action against the Defendant-respondent for, *inter alia*, a declaration that he is the owner of motor lorry 24 Sri 6388 ; for an order for the delivery of possession of the said lorry to him ; for damages in a sum of Rs. 48,000/- together with continuing damages at Rs. 2,000/- a month until the lorry is returned to him, or, in the alternative to the above reliefs, for judgment in a sum of Rs. 40,000/- together with interest at 30% per annum from 1st July 1974 till payment in full.

The plaintiff was the owner of the said lorry and averred that on 31.5.74 he entered into an agreement with the defendant to sell the lorry to him for the price of Rs. 57,500/-. On that day the defendant paid him a sum of Rs. 17,500/- and the plaintiff delivered possession of the lorry to him. According to the plaintiff, the sale was to be completed only after the payment of the balance sum of Rs. 40,000/-, obtained from a Finance Company.

The defendant however failed and neglected to pay the balance sum of money to the plaintiff within a reasonable time. In or about August 1974 the lorry met with a serious accident while in the custody of the defendant who fraudulently attempted to make a claim in the plaintiff's name from the Insurance Corporation of Sri Lanka but was prevented from doing so by the plaintiff. In or about November or December 1974 the defendant dishonestly and fraudulently committed criminal conversion of the lorry by using it as his own in breach of the conditions of the agreement to sell. On 5.10.75 the plaintiff took the lorry into his custody on the pretext of hiring it and produced it at the Colombo Frauds Bureau and made a complaint of criminal misappropriation of it against the defendant. The Police produced the lorry in the Magistrate's Court of Colombo and the learned Magistrate made order on 2.12.75 under section 102 of the Administration of Justice Law No. 44 of 1973 (A.J.L.) then in force, handing over the lorry to the defendant. The plaintiff made an application to the Supreme Court to revise the order of the Magistrate but the Supreme Court dismissed the application on 14.9.76 and affirmed the order of the Magistrate. The plaintiff thereafter filed the present action in the District Court of Colombo for relief.

The defendant's case is that on 31.5.74 the plaintiff sold and delivered the said lorry to him on his payment of Rs. 17,500/- and represented to him that he would arrange for finance for the payment of the balance sum of Rs. 40,000/- through a Finance Company. The plaintiff however was unable to make the arrangements for finance and to transfer the vehicle to the defendant because he did not have the certificate of registration in respect of the vehicle. The certificate in fact was in the custody of a Magistrate's Court in connection with some alleged offence. The defendant claims that on the agreement entered into in May 1974, property in the lorry passed to him and he was entitled to possess and use it as his own. He prayed that the plaintiff's action be dismissed. The defendant denied that there was any obligation on his part to pay the balance sum of Rs. 40,000/- within a reasonable time from 31.5.74 and the plaintiff's failure to produce the certificate of registration and arrange for finance for the lorry prevented him from paying the balance sum due on the lorry. The

defendant further pleaded that the appellant took wrongful custody of the lorry on 5.10.75, causing him loss and damage and claimed in reconvention a sum of Rs. 94,250/- as at 17.12.76, that is from 5.10.75, together with interest at 30% per annum from 5.10.75 upto the date of the plaint and legal interest on the aggregate sum thereon till payment in full, and further damages at Rs. 6,500/- per month from 17.12.76, until possession of the vehicle is restored to him, in good and serviceable condition, failing which he prayed for further damages in a sum of Rs. 115,000/-, being the value of the lorry.

The 17th of December 1976 is the date on which a settlement was arrived at in Court by the parties, on an application made by the plaintiff for an interim injunction against the defendant, the terms of which were that the defendant was to have possession of the lorry on his depositing Rs. 2,000/- per month from 17.1.77. In the event of his default, the plaintiff was entitled to possess the said vehicle on depositing Rs. 2,000/- to the credit of the case. The defendant defaulted and possession of the lorry was handed over to the plaintiff on the aforesaid terms. The order was made on 9.1.78 directing the defendant to hand over possession of the vehicle to the plaintiff.

The case went to trial on several issues and the learned District Judge on 30.7.80 dismissed the plaintiff's action and gave judgment for the defendant in a sum of Rs. 94,250/- together with legal interest and costs and further damages at Rs. 6,500/- per month until the lorry is handed over to the defendant in good condition. In the alternative, the plaintiff was directed to pay a sum of Rs. 115,000/-, less depreciation of 10% per annum from 1.1.78. On the same day that the Judge delivered his judgment, he made another Order that in the event of appeal, the lorry should be kept at Rowlands Garage, or any other reputed garage, and until such arrangements are made, the lorry should be kept in the custody of the District Court. This order was varied by the Supreme Court in revision, on 14.8.80, and custody of the lorry was ordered to be delivered to the defendant on his furnishing security in Rs. 25,000/- in cash or by Bank guarantee, or by deed, for a sum of Rs. 50,000/-.

The contract entered into between the plaintiff and the defendant on 31.5.74 is embodied in two documents, P1 signed by the plaintiff, and P2 signed by the defendant. The translation of the documents reads as follows :

P1- "I, N. M. Nilabdeen, residing at No. 158, Layards Broadway, Colombo 14, hereby agree to give the lorry No. 24 Sri 6388 to M. S. M. Farook for a sum of Rs. 57,000/- and receive a sum of Rs. 17,500/-. I agree to get the balance Rs. 40,000/- later after the lorry is financed. The financed amount and balance I agree to take later and on this day I hand over the lorry— Sgd. N. H. Nilabdeen".

P2- "I, M. S. M. Farook, residing at 85, Messenger Street, Colombo, having agreed with M. H. M. Nilabdeen residing at 158, Layards Broadway, that the price of lorry No. 24 Sri 6388 is Rs. 57,500/-, do pay Rs. 17,500/ today 31.5.74 and receive the above vehicle from M. H. Nilabdeen today 31.5.74 (Friday) undertaking to pay the balance sum of Rs. 40,000/- on the date of financing after setting off the financed amount and pay the balance money by financing on the financing date—Sgd. M. S. M. Farook."

Learned Counsel for the appellant contended that the documents P1 and P2 constituted an agreement to sell the lorry, whereunder the property in the lorry was to pass to the defendant only when he paid the balance sum of Rs. 40,000/- of the purchase price after obtaining finance from a Finance Company. The defendant neglected to pay the balance within a reasonable period of time and on his fraudulent conversion of the lorry in November or December 1974 to his own use, in breach of the conditions of the agreement, the plaintiff was entitled to recover the lorry from him and ask for a declaration that he is the owner of the said lorry and for damages in a sum of Rs. 48,000/-, and continuing damages at Rs. 2,000/- a month from date thereof until the lorry is restored to him, on his returning the sum of Rs. 17,500/- paid to him as an advance by the defendant. In the alternative, he submitted that the defendant was liable to pay the plaintiff the balance sum of Rs. 40,000/- at 30% interest from 1.7.74 under the contract.

Mr. Senanayake, learned Senior Attorney for the defendant contended that the contract was an outright sale and that the property in the lorry passed to the defendant on 31.5.74, although he had still to pay a balance of Rs. 40,000/. He further submitted that the contract had not been rescinded but was subsisting and the rights of the parties arising out of any alleged breach of the contract must be considered in accordance with the terms of the contract and the remedies provided by the Sale of Goods Ordinance. Since the plaintiff was not in a position to furnish the certificate of registration of the vehicle to enable the defendant to obtain finance on the vehicle, the defendant's inability to pay the balance of the purchase price cannot be considered wrongful so as to entitle the plaintiff to retake possession of the vehicle or to sue for the balance, especially as no specific time had been fixed in the contract for the payment of the balance. It was also not open to the plaintiff to ignore the contract altogether, and to institute an action to vindicate title to the vehicle and ask for its recovery and damages.

The plaintiff took the lorry into his custody on 5.10.75 and produced it at the Frauds Bureau on a complaint of criminal misappropriation against the defendant. The Police took the view that it was a civil dispute between the parties in regard to the lorry and produced it before the Magistrate's Court of Colombo for disposal in terms of section 102 of the Administration of Justice Law No. 44 of 1973 (A. J. L.) which was then in force. The Magistrate after inquiry ordered the lorry to be handed over to the defendant and the plaintiff moved the then Supreme Court to revise the order. The Supreme Court dismissed the application, on the basis that the defendant was the person entitled to possession of the vehicle, within the meaning of section 102 of the A. J. L. and held that the lorry had been sold to the defendant and title to it had passed to him under section 18 of the Sale of Goods Ordinance. *Nilabdeen v. Silva* (1). The first question that arises for consideration now is whether the decision in that case operates as res judicata in this action in regard to both possession and title to the lorry. The present Supreme Court dealing with this case, in the unreported case of *Perera v. Ratnadasa* (2) held that it was authority only on the question of possession under section 102 of the A. J. L. as that was the main issue involved in the case. Sharvananda J. who wrote the judgment, was of the view that the observations in that case in

regard to passing of property in terms of section 18 of the Sale of Goods Ordinance are obiter dicta, the correctness of which is open to question. I am in respectful agreement with Sharvananda J's view that that case is authority only for the proposition that the defendant was the person entitled to possession in terms of section 102 of the A. J. L. and not in regard to the passing of title in the lorry.

Learned Counsel for the appellant contended that even the decision in regard to possession in that case, is not binding on this Court. An order made under section 102 of the A. J. L. is an order made in criminal proceedings and it is settled law that a decision in a Criminal Court is not binding on a Civil Court. *Hollington v. Hawthorn & Co., Ltd.* (3), *Goody v. Adhams Press Ltd.* (4). A Criminal Court is not the forum for settling Civil disputes under section 419 of the old Criminal Procedure Code, which corresponds to section 102 of the A. J. L. *Jayasooriya v. Warnakulasuriya* (5) *Silva v. Kanapathipillai* (6) *Viking Tours Ltd. v. The Finance Co. Ltd. and Another* (7). I am therefore of the view that Nilabdeen's case does not operate as res judicata also on the question of title to the lorry in the present case.

The next question is whether the contract entered in P1 and P2 is an agreement to sell subject to the condition that the balance be paid, or a sale. Mr. Senanayake S. A. for the respondent contended that the contract was an outright sale and property in the lorry was transferred to the defendant on 31.5.74 and that it was not open to the plaintiff to bring an action to vindicate his title to the vehicle and for its recovery and damages. If there had been any violation of the terms of the contract relief must be sought under the contract and the Sale of Goods Ordinance. Indeed he contended that this question of passing of property in the lorry was irrelevant to the question.

The plaintiff's position is that on the violation of the terms of the agreement to sell by the defendant failing to pay the balance sum of Rs. 40,000/-, he continued to remain the owner of the lorry and was entitled to institute the action on two causes of action, one, for a declaration of title to the lorry, and the other, in the alternative, on the breach of the contract, in respect of the failure to pay the balance sum of Rs. 40,000/-.

Section 2 (1) of the Sale of Goods Ordinance (Cap 84) defines a contract of Sale of Goods both as a contract whereby the seller transfers or agrees to transfer the property in the goods to the buyer for a money consideration called the price. A 'seller' is defined in section 59 (1) as a person who sells or agrees to sell goods and a 'buyer' as a person who buys or agrees to buy goods. Section 2 (3) provides that where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a 'sale', but where the transfer of the property in the goods is to take place at a future time, or subject to some condition thereafter to be fulfilled, the contract is called an "agreement to sell".

Section 18 of the Sale of Goods Ordinance provides that :—

(1) where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

(2) for the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case.

The rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer are set out in section 19, and are only applicable, unless a different intention appears under the earlier section 18.

In my view, according to the terms of the contract in P1 and P2 the intention of the parties was that the property in the lorry was to pass to the defendant on the payment of the balance sum of Rs. 40,000/- though no specified date was fixed for it. The reasons for my conclusion will be given by me when comparing this case with a similar unreported case of the Supreme Court in No. 66/80, S.C. Minutes of 8.4.81. I am of the view that the present contract is only an agreement to sell the lorry and that since title has not passed to the defendant, the plaintiff is entitled to seek one of two remedies, that is, either to institute an action to vindicate his title to the lorry and for its recovery with damages or, in the alternative to sue upon the breach of the contract for the non payment of the balance sum of Rs. 40,000/-, both of which he has done in this action.

In the unreported case of the Supreme Court referred to, the facts are almost identical with those of the present case and bear comparison. In that case too, the parties had entered into a contract on two documents as in the present case, for the sale of a lorry. That case too was a declaratory action, the only difference being that it was the buyer who instituted this action for a declaration that he was the owner of the lorry and for consequential reliefs. In that case the contract consisted of two documents P1 and D2 given by the seller of the lorry and the buyer respectively. In P1 the owner of the lorry stated that he received an advance of Rs. 16,000/- on 1.4.74 from the buyer on the "promise of selling" him the lorry at a price of Rs. 36,000/- and was agreeable to receiving the balance Rs. 20,000/- before 21.4.74 by financing the lorry. The buyer in D2 certified that he had taken delivery of the lorry that day and had paid an advance of Rs. 16,000/- to the seller. He also stated that the seller would thereafter not be responsible for any damage caused to the lorry or by the lorry and that he would take action to raise the balance sum of Rs. 20,000/- due to the seller before 21.4.74 from a Finance Company. The balance was not paid and about a year later the seller took forcible possession of the lorry and the buyer filed an action against him for a declaration that he was the owner of the lorry on the basis that title to it had passed to him on its sale.

Sharvananda, J., with whom His Lordship, the Chief Justice and Wanasundera, J., agreed, said that the two documents recorded an agreement to sell rather than a sale and that the plaintiff had failed to establish that he had become the owner of the vehicle in question. The documents P1 and D2 disclosed a clear intention that the property in the lorry was not to pass to the buyer until the purchase was completed by payment of the balance purchase price. In that case no doubt there were two factors which led the Court to the conclusion that it was an agreement to sell and not a sale. They were the phrases "promise of selling" and that the seller "will not be responsible for any damage caused to the lorry or for any damage caused by the lorry". Sharvananda J., was of the view that this assurance on the part of the buyer, the plaintiff, was explicable only on the basis that title to the lorry continued to be in the defendant, the seller. In the present case, the words "agree to give" appearing in the document P1 is equivalent to the words "promise of selling" occurring in P1 in the unreported case. The

absence of the additional condition regarding the seller's responsibility for any damage caused to the lorry does not affect the nature of the present contract, in view of the other circumstances that make it out as an agreement to sell.

The defendant has made certain statements in the course of his evidence which indicate that property in the lorry had not passed to him and that he still recognised the plaintiff as the owner of the lorry. The defendant has referred to the plaintiff as the proprietor of the lorry when the latter took him to a Finance Company to obtain finance. He further said that the procedure for obtaining finance was for the plaintiff to transfer the lorry to the Finance Company and for the latter company then to hire it to him on a hire-purchase agreement under which he would have to pay the finance obtained, in instalments, and on the final payment being made the lorry would be transferred by the Finance Company to him.

The Motor Traffic Act (Cap. 203) requires the new owner of a vehicle to have himself registered as the owner, on a transfer of the motor vehicle to him, by perfecting certain prescribed forms. The owner has also to obtain a revenue licence and a certificate of insurance in order to use the vehicle. In this case, and in the unreported case, the buyer had failed to comply with the provisions of section 12 and the connected sections of the Motor Traffic Act, and Sharvananda J., in the unreported case took the view that omissions of this nature could not be reconciled with the buyer's claim of ownership of the lorry.

In the present case too the plaintiff could not in any event have transferred the property in the lorry to the defendant, because the certificate of registration was in the custody of a Magistrate's Court in connection with some violation of the law although it was said to have been misplaced or lost. All these circumstances point to the contract being an agreement to sell and not a sale. The plaintiff's first cause of action for a declaratory decree and consequential relief must succeed.

Mr. Senanayake's next submission was that the contract of sale still subsists and the seller's rights flow from it, in the event of a breach. The possession of the lorry was voluntarily delivered, by the plaintiff to the defendant and the defendant's possession therefore cannot be said to be unlawful. But the plaintiff alleges that it became unlawful when the defendant started to use the lorry as his

own without paying the balance. No specific date was fixed for the payment of the balance sum of Rs. 40,000/- in the contract, but it was to be paid on finance being arranged. The plaintiff states that the financing was to be arranged by the defendant while the defendant says that the plaintiff undertook to do it. But there is on record, the evidence of the defendant that he had to make the arrangements for financing the lorry through a Finance Company and also that he undertook to pay any difference between the amount obtained from the Finance Company and the balance due, out of his own pocket. He says he could not finance the lorry because the plaintiff did not have the certificate of registration, without which no finance company would lend money on the lorry. Counsel for the defendant submits that the defendant's failure to pay the balance was not unlawful because of these circumstances. It is true that no time limit was fixed for the payment of the balance but payment must be made within a reasonable time of the contract. The defendant had the use of the lorry for at least one and a half years before its seizure by the plaintiff on 5.10.75 and he would have had ample opportunity to earn sufficient income from it to pay back the full balance, even without the aid of a Finance Company, considering that, on his own showing, he was earning about Rs. 6,500/- per month by hiring the lorry to Messrs. Walker & Greig. Moreover the defendant succeeded in having the certificate of registration altered to his name by the Registrar of Motor Vehicles on his producing a certified copy of the Supreme Court judgment dated 14.9.76 affirming the Magistrate's Order of 2.12.75 that he was the person entitled to the lorry. Then, at least, on the strength of his certificate of registration, he could have obtained the necessary finance on his own, to pay the plaintiff the balance sum of Rs. 40,000/-, which he did not do. In the circumstances, his failure to repay the balance sum of Rs. 40,000/- within a reasonable period of time, amounts to a wrongful neglect or refusal to pay. The plaintiff therefore had the alternative remedy under the contract, to sue for the balance price due. That is what the plaintiff has done on the alternative cause of action pleaded in the amended plaint.

The learned District Judge has erred in taking the view that the plaintiff is not entitled to the balance sum of Rs. 40,000/-, because he attributed the defendant's failure to obtain finance, to the omission of the plaintiff to produce the certificate of registration of the lorry, and has answered issue 5 in the negative. But whether

or not the certificate of registration was produced, the defendant was obliged under the agreement to pay the balance sum of Rs. 40,000/-. Financing was one of the methods adopted for obtaining the balance money, but it was not the only way in which the money could have been obtained. In fact the respondent admitted in evidence that he was prepared to pay the difference if he was unable to obtain the full amount of the balance by financing the lorry and as pointed out earlier, he had subsequently the financial capacity to pay the balance even without the aid of a Finance Company. His failure to pay the balance of the purchase price within a reasonable period of time is therefore wrongful and issue 5 must be answered in the affirmative. The plaintiff's alternative claim for the balance sum of Rs. 40,000/- with interest at 30% from 1.7.74 till filing of action and thereafter with legal interest till payment in full is also entitled to succeed.

The defendant has claimed in reconvention a sum of Rs .94,250/-, as at 17.12.76 together with interest at 30% from 5.10.75 upto the date of plaint and further damages at Rs. 6,500/-, per month from 17.12.76 until possession of the lorry is restored to him, on account of the appellant retaking possession of the lorry on 5.10.75. The date 17.12.76 is the day on which, by settlement in Court, the defendant was allowed to take possession of the lorry on depositing a sum of Rs. 2,000/-, per month. But as was pointed out earlier the contract was only an agreement to sell where the property in the lorry, remained with the plaintiff, and the defendant forfeited, by his failure to pay the balance, the right to the lawful possession of it. His claim in reconvention must therefore fail.

The judgment of the learned District Judge is set aside and judgment is entered for the appellant in terms of paragraphs (a), (b) and (c) of the prayer to the amended plaint. The respondent is entitled to set off the sum of Rs. 17,500/- paid by him on P1 and the money deposited by him in court, against the damages payable by him.

The appeal is allowed with costs. In view of the decision in the main appeal, Revision Application No. 1018/80 does not arise for consideration.

MOONAMALLE, J.—I agree.

Appeal allowed with costs.