

JAYASENA PERERA

v.

RATNADASA

SUPREME COURT
SAMARAKOON, C. J., SHARVANANDA, J.,
AND WANASUNDERA, J.
S. C. APPEAL NO. 66/80
C. A. APPEAL NO. 209/79(F)
D. C. COLOMBO CASE NO. C/1192/M
MARCH 9, 1981

Contract – Ownership of lorry – Contract of sale – Agreement to sell – Sale of Goods Ordinance s. 2(3)18, 19, 50 and 57 – Difference between “sale” and “agreement to sell” – Motor Traffic Act s. 12, 13 and 14.

Property (in the lorry) passes on sale at the time when the parties intend it shall. The intention of the parties can be ascertained regard being paid to the terms of the contract, the conduct of the parties and the circumstances of the case. When there was only a promise to sell, though possession was given to the prospective buyer on payment of a part of the agreed price with the reservation that the seller is absolved of all responsibility for damage caused by the lorry, the intention is that property in the lorry should not pass until the full purchase price was paid. There was here only an agreement to sell rather than a sale. The delivery of possession is not conclusive.

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”. An “agreement to sell” becomes a sale when the time lapses, or conditions are fulfilled subject to which the property in the goods is to be transferred. An “agreement to sell” is a contract pure and simple, whereas a “sale” is a contract plus a conveyance.

In a sale the thing which is the subject of the contract becomes the property of the buyer the moment the contract is concluded and without regard to the fact whether the goods be delivered to the buyer or remain in the possession of the seller, whereas in the agreement to sell, the property is to pass at a future time or subject to the fulfilment of some condition and the goods remain the property of the seller till the contract is executed; and he can dispose of them. On a sale, if the seller fails to deliver the goods, the buyer has not only a personal remedy against the seller, but also has the usual proprietary remedies in respect of the goods, such as an action for conversion. Where an agreement to sell is broken by the seller, the buyer has only a personal remedy against the seller. By an agreement to sell a mere *jus in personam* is created, by a sale a *jus in rem* is transferred.

If there was a sale of the lorry, the statutory provisions of the Motor Traffic Act s. 12, 13 and 14 should have been complied with.

Case referred to

(1) *Nilabdeen v. G. W. Silva* (1976) 78 NLR 454

APPEAL from judgment of the Court of Appeal.

Walter Jayawardena Q.C. with Nimal Senanayake, Kithsiri Gunaratne and Miss S. Senarathne for the defendant-appellant.

R. Manikkavasagar for the plaintiff-respondent.

Cur. adv. vult.

April 8, 1981

SHARVANANDA, J.

Claiming to be the owner of motor lorry No. 22 Sri 3593, the plaintiff instituted this action against the defendant for a declaration that he is the owner of the motor lorry and for consequential reliefs.

The plaintiff pleaded that the defendant on 1.4.74 sold and delivered to him the motor lorry No. 22 Sri 3593 belonging to the defendant for a sum of Rs. 36,000/- and that he paid a sum of Rs. 16,000/- as part purchase price of the said lorry. He stated that the defendant represented to him that he had misplaced the registration book of the lorry and that he would hand over the registration book to him on or before 21.4.74. He further pleaded that it was agreed between them that on the defendant handing over the registration book and signing the necessary transfer forms, he, the plaintiff, would finance the lorry through a Finance Company and pay the balance sum of Rs. 20,000/- to the defendant. According to the plaintiff, after the purchase he had had the lorry repaired and had his name painted on the body of the lorry and had used the lorry for his business; though the defendant had promised to hand over the registration book to him on 21.4.74, he had never handed over the book to him. On 18.8.75, he had, at the request of the defendant, brought the lorry to Colombo to get the registration book and to have the lorry valued, but when the lorry was so brought, the defendant had forcibly taken possession of the said lorry from him. The plaintiff's case is that title to the said lorry had passed to him; the contract of sale of the lorry has been completed and that he is presently the owner of the said lorry even though he had still not paid the balance Rs. 20,000/- of the purchase price.

The defendant denied that he had sold the lorry to the plaintiff on 1.4.74. According to him, on that date the parties had only entered into a written agreement to sell the lorry and he had accepted the sum of Rs. 16,000/- not as part of the purchase price, but on the terms set out in the said agreement and he handed over possession of the lorry in terms of the agreement to sell. The defendant admitted that he took possession of the lorry

on 18.8.75 as the plaintiff had violated the terms of the agreement to sell.

After trial, the District Judge held that the plaintiff was the owner of the motor lorry and awarded him damages in a sum of Rs. 1,500/- per month from 18th August 1975 until possession of the said lorry was restored to him and that the balance sum of Rs. 20,000/- of the purchase price of the lorry could be deducted from the damages payable to the plaintiff. This judgment was affirmed in appeal by the Court of Appeal.

The defendant has, with the leave of the Court of Appeal, preferred this appeal to this Court.

The plaintiff framed this action on the basis that the defendant had sold and delivered the lorry No. 22 Sri 3593 to him on 1.4.74 and that he had become thereby the owner of the said lorry.

The basic question in the case is: was there a sale of the lorry by the defendant to the plaintiff on 1.4.74, or was there merely an agreement by the defendant to sell and transfer the lorry to the plaintiff on his paying the balance purchase price ?

The determination of the above question depends on the proper construction of the written agreement entered into between the parties on 1.4.74. The agreement which is in Sinhala is in two parts, both on the same side of one sheet of paper, each part defining the obligations of the respective party. To ascertain the intention of the parties, both parts have to be read together, and the agreement as a whole must be looked at. The first part P1 signed by the defendant reads as follows:
(English Translation)

"I D. J. Perera of Talahena, Malabe, hereby solemnly state that I have received an advance of Rs. 16,000/- on 1.4.74 from R. A. Ratnadasa of Malwalawatte, Veyangoda, on the promise of selling him the Lorry (Morris) No. 22 Sri 3593 owned by me, at the price of Rupees Thirty-six Thousand (Rs.36,000/-) and that the lorry is not assigned or mortgaged to an individual or an institution against a loan and I certify that I am agreeable to receive the balance Rupees Twenty Thousand (Rs. 20,000/-) due to me in respect of the lorry before 21.4.74 by financing the lorry."

The second part D2 signed by the plaintiff reads as follows:

(English Translation)

"I, R. A. Ratnadasa of Malwalawatte, Veyangoda, certify that I have taken delivery today, 1.4.74, of Morris lorry No. 22 Sri 3593 of D. J. Perera, Talahena, Malabe, on payment of Rupees Sixteen Thousand (Rs. 16,000/-) as an advance and have taken over all responsibilities for the lorry and I should state clearly that hereafter Mr. D. J. Perera will not be responsible for any damages caused to the lorry or for any damages caused by the lorry and I will take action to raise the balance payment of Rs. 20,000/- due to Mr. D. J. Perera before 21.4.74 from a Finance Company."

The trial Judge has found that possession of the lorry was given to the plaintiff on 1.4.74 and that he had thereafter had the lorry repaired and had painted his name on the body of the lorry and has used the lorry for his business. He also found that the defendant had misrepresented to the plaintiff that he had misplaced the registration book, when, in fact, the registration book was at that time in the custody of the Magistrate's Court of Maho in M.C. Maho Case No. 28999 and was released to the defendant only on 23.10.74 and that the defendant was not in a position to produce the registration book before 21.4.74 as promised by him. He has also accepted the evidence that it was not possible to obtain finance on a motor vehicle without the registration book being handed over to the Finance Company. The record in M.C. Maho 28999 shows that on 16th March 1974 the lorry No.22 Sri 3593 was produced in the Magistrate's Court in connexion with a complaint of transporting timber without a permit and was released to the defendant on 20th March 1974 on his furnishing security in a sum of Rs. 5,000/- and undertaking to produce the lorry when required. The significance of this undertaking and of the registration book being in the custody of Court till 23.10.74 has been overlooked by the trial Judge. Had the defendant transferred the lorry to the plaintiff on 1.4.74, he would have run the risk of being unable to keep his undertaking to Court.

The decisive question is: what was the effect of the agreement P1 and D2? If one looks at the Sale of Goods Ordinance (Cap. 84), the material section is section 18, which states the fundamental rule that the property passes at the time when the parties intended it shall.

Section 18 (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 intended 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.

In section 19 there are certain specific rules which are to apply for ascertaining the intention of parties. But section 19 does not apply to the facts of this case, because section 19 can only apply according to its terms, unless a different intention appears. That refers back to section 18, and, as I construe the agreement between the parties, a different intention does appear. In my judgment, the terms of the contract, the conduct of the parties and the circumstances of the case, all manifest an intention that the property in the lorry shall not pass until the purchase is completed by payment of the balance purchase price.

It is to be borne in mind that at the time of the transaction, the plaintiff was a stranger to the defendant and the latter had no security for the payment of the balance sum of Rs. 20,000/- if he transferred the lorry to the plaintiff.

By P1 the defendant acknowledges receipt of the advance of Rs. 16,000/- and promises to sell to the plaintiff the lorry at the price of Rs. 36,000/-. The defendant has not stated therein that he has sold the lorry for Rs. 36,000/- to the plaintiff and received a part-payment of Rs. 16,000/-. By this assurance set out in D2, the plaintiff absolves the defendant of all responsibility for any damage caused by the lorry of which he had taken delivery that day. This assurance on the part of the plaintiff is explicable only on the basis that title to the lorry continued to be in the defendant and the defendant was concerned with potential liability that stems from his ownership of the vehicle for any damage caused by the lorry.

In my view the parties have, in terms, expressed the intention that the property in the lorry should not pass until the full purchase price was paid. The writing consisting of P1 and D2 records an agreement to sell, rather than a sale. It is a matter of significance that the plaintiff, in his list of documents annexed to his plaint under section 383 of the Administration of Justice Law, describes the above document as "agreement to sell lorry bearing registered No. 22 Sri 3593" and not as "sale agreement".

Great reliance was placed by Counsel for the plaintiff-respondent upon the fact that possession of the lorry was given by the defendant to the plaintiff on 1.4.74. Though delivery of possession is a relevant factor in determining the intention of parties, it is not conclusive. The totality of the circumstances in which delivery of the goods was made has to be considered.

According to the Sale of Goods Ordinance, unless the context or the subject-matter otherwise requires, "contract of sale" includes agreements to sell as well as "sales"; "buyer" means a person who buys or agrees to buy goods; and "seller" means a person who sells or agrees to sell goods (section 59(1)). 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 2(3)). An "agreement to sell" becomes a sale when the time lapses, or conditions are fulfilled subject to which the property in the goods is to be transferred (section 2(4)). An "agreement to sell" is a contract pure and simple; whereas a "sale" is a contract plus a conveyance. In a sale the thing which is the subject of the contract becomes the property of the buyer the moment the contract is concluded and without regard to the fact whether the goods be delivered to the buyer or remain in the possession of the seller; whereas in the agreement to sell, the property is to pass at a future time or subject to the fulfilment of some condition and the goods remain the property of the seller till the contract is executed and he can dispose of them. On a sale, if the seller fails to deliver the goods, the buyer has not only a personal remedy against the seller (sections 50(1) and 51), but also has the usual proprietary remedies in respect of the goods, such as an action for conversion. Where an agreement to sell is broken by the seller, the buyer has only a personal remedy against the seller (section 51). By an agreement to sell, a mere *jus in personam* is created; by a sale a *jus in rem* is transferred.

The Motor Traffic Act (Cap. 203) contains certain provisions spelling the obligations of parties when change of possession consequent on a change of ownership takes place. The relevant provisions of the Motor Traffic Act are sections 12(3), 13 and 14.

Section 12(3) provides that on a change of possession of a lorry upon a voluntary transfer made by a registered owner, the registered owner shall within 14 days after such change of

possession forward to the Registrar a statement in the prescribed form together with the revenue licence for the motor lorry and shall deliver to the new owner the certificate of registration relating to the lorry or a duplicate thereof.

Section 13 provides that "every application for the registration of a new owner upon any change of possession of any motor vehicle shall be made in the prescribed form and shall be signed by the person claiming to be entitled to be regarded as the owner of the motor vehicle."

Section 14 enacts that "no person shall be registered as a new owner of a motor vehicle unless the application for registration is accompanied by a certificate of registration or a duplicate thereof relating to the motor vehicle".

If, as claimed by the plaintiff, there had been a transfer of the lorry to him on 1.4.74 and he had become the new owner of the lorry from that date, he should have complied with the statutory provisions of the Motor Traffic Act referred to above. However, the plaintiff never made any application to have himself registered as new owner, and the defendant as registered owner of the lorry did not take any steps required by section 12(3). The defendant's conduct is consistent with the position that he did not transfer the lorry to the plaintiff.

These circumstances militate against the plaintiff's contention that he was the owner of the motor vehicle.

It would appear that in April 1975 the defendant had gone along with the plaintiff to the Alliance Finance Co. Ltd. to assist the plaintiff to obtain finance on hire-purchase. The proposal form D2 has been signed by the plaintiff as 'proposer', and the defendant has signed as 'guarantor'. The defendant has been described therein as "owner of lorry No. 22 Sri 3593". The above entry in the document confirms the contention of the defendant that both parties regarded the defendant as the owner of the said lorry, even as late as 22nd April 1975 when the plaintiff was seeking to obtain finance on hire-purchase. The evidence discloses that the proposal failed as the plaintiff was unable to find another guarantor.

It is to be further noted that the plaintiff at no time sought, on the basis of his alleged ownership of the vehicle, to obtain the revenue licence or insurance policy in his name. He had not applied for the revenue licence for the year 1975, nor had he

sought to take out insurance on the vehicle. Until it was taken possession of by the defendant on 18.8.75, the plaintiff had, in breach of the law, been running the vehicle without a revenue licence for the year 1975 and without a policy of insurance in relation to the use of the said vehicle. These omissions on the part of the plaintiff cannot be reconciled with his claim of ownership of the lorry in question.

Reliance was placed by the plaintiff on the case of *Nilabdeen v. G. W. Silva*⁽¹⁾ where on similar facts the claimant succeeded. The main question involved in that case was, who was "the person entitled to possession" for the purpose of an order under section 102 of the Administration of Justice Law. The Court quite properly held that the person who had come into possession of the vehicle on a document similar to P1 was lawfully in possession of the vehicle. The observations in the judgment on the aspect of 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.

For the reasons set out above, I am of the view that the plaintiff had not established that he had become the owner of the vehicle in question by the transaction of 1.4.74 between him and the defendant. The basis of the plaintiff's claim of ownership of the vehicle fails and his action has to be dismissed.

I allow the appeal and set aside the judgment of the District Court and of the Court of Appeal and dismiss the plaintiff's action with costs. The defendant-appellant will be entitled to costs in the District Court and to costs of appeal to the Court of Appeal and to this Court.

SAMARAKOON, C.J.

I agree

WANASUNDERA, J.

I agree

Appeal allowed