1975 *Present :* **Wijesundera, J., Vythialingam, J., and Gunasekera, J.**

K. S. L. J. FERNANDO, Appellant, *and* S. A. JAWARD, Respondent

S. C. 163/69—D. C. Matale 1813/MR

Hire Purchase Agreement—Clause providing for owner to re-take possession from hirer—Validity of such clause—Whether contrary to public policy—English and Roman Dutch Law principles governing Agreement.

A hire-purchase agreement entered into between the plaintiff (hirer) and the defendant (owner) in respect of a motor vehicle contained a clause which read as follows :—" Upon the Hiring being determined under the last preceding clause :—(1) The Hirer shall forthwith deliver the said vehicle to the Owners at its Registered Office or to such other persons or at such other place as the Owners may direct and on his failure so to do leave liberty and licence is hereby given to the Owners, their Agents, representatives and servants or any person duly authorized by them, to enter upon any premises ..... where the vehicle may be or is believed to be and take possession of the same without being liable to any suit or other proceeding by the Hirer or any person claiming under him ..... "

Held, that the aforesaid clause is valid and is not contrary to public policy nor to the principles of the Roman Dutch Law and English Law.

"I am then of the view that the creditor (i.e. the defendant) is entitled to seize the vehicle after due notice by using only reasonable force as is necessary and that clause 9 is valid."

APPEAL from a judgement of the District Court of Matale.

S. K. Sangakkara, for Plaintiff-Appellant.

Bimal Rajapakse, for Defendant-Respondent.

Cur. adv. vult.

March 24, 1975. WIJESUNDERA, J.—

The plaintiff instituted this action against the defendant to recover a sum of Rs. 3,091 being the aggregate of the payments made and amounts incurred in repairs to motor vehicle No. EL 147 which he had purchased from the defendant. He also claimed a sum of Rs. 10 per day as continuing damages until payment of the above sums.

The plaintiff purchased on 30th September, 1959 motor vehicle No. EL 147 from the defendant for a sum of Rs. 2,500. He alleged that out of this sum, he paid a sum of Rs. 500 as an advance and a further sum of Rs. 300 in October, 1959, and the balance he undertook to pay in monthly instalments of Rs. 183.33. The plaintiff further alleged that he had paid the defendant further sums aggregating to Rs. 2,350 and that he spent a sum of Rs. 741 on repairs to the motor evhicle. The plaintiff's complaint is that the defendant on the 27th August, 1961 unlawfully and maliciously took forcible possession of the motor vehicle and consequently he claims the sums he paid to the defendant and the monies he had spent on the repairs to the vehicle. The defendant stated that he let the motor vehicle to the plaintiff on a Hire Purchase Agreement subject to the terms and conditions set out in the Agreement. As the plaintiff defaulted in the payment of the instalments he gave notice of it to the plaintiff and, as he lawfully might, took possession of the vehicle. The learned District Judge found that the plaintiff had entered into an Agreement with the defendant and on that Agreement the plaintiff was in default in paying the instalments and, therefore, the defendant lawfully seized the vehicle on the 21st of August, 1961 as he was entitled to do. Consequently he dismissed the plaintiff's action with costs. The plaintiff appealed from that order and on the 29th August, 1967, the case was sent back to the District Court for the limited purpose of enabling the plaintiff to raise issues and to lead evidence on the following matters, namely, whether the Agreement providing for the defendant to retake possession of the vehicle was valid and whether the defendant took forcible possession of the vehicle and if so did he use more force than was necessary.

At this fresh trial there was evidence that the agents of the defendant threatened the occupants of the vehicle with iron rods when it was parked in Trincomalee Street, Matale. "No actual

force was used ". The occupants got down and the vehicle was removed by the agents of the defendant. The learned District Judge at the re-trial answered the issue " Did the defendant take forcible possession of the said vehicle on 27th August, 1961 " in the negative, held that the Agreement was valid and dismissed the plaintiff's action with costs. From that order the plaintiff appeals and complains that Clause 9 of the Agreement is illegal.

Clause 9 of the Agreement reads :— " Upon the Hiring being determined under the last preceding clause :— (1) The Hirer shall forthwith deliver the said vehicle to the owners at its Registered Office or to such other persons or at such other place as the owners may direct and on his failure so to do leave liberty and licence is hereby given to the Owners, their Agents, representatives, and servants or any person duly authorised by them to enter upon any premises, building or place where the vehicle may be or is believed to be and take possession of the same without being liable to any suit or other proceeding by the Hirer or any person claiming under him and upon such failure the Hirer shall be liable to pay to the Owners as agreed and liquidated damages and not by way of penalty a sum equivalent to the monthly hiring rentals herein provided for each month or part of a month commencing from seven days after the date of such determination until receipt of the vehicle by the Owners. Provided, however, that in addition to any such sums the Hirer shall be liable for and pay to the Owners any loss or damage to the vehicle (fair wear and tear excepted) suffered or arising between the date of such determination and the date of the seizure of the vehicle by the Owners. Upon the return to or recovery by the Owners of the vehicle the Owners shall be entitled to have the entry of the Hirer as registered Owner under the provisions of any Law, Ordinance, Rule or Regulation for the time being in force removed and vacated and to cause itself to be registered as owners under such provisions without (as the Hirer hereby agrees) any references to the Hirer and notwithstanding any claim or objection by the Hirer to the contrary ".

Under this Agreement the defendant is the owner of the vehicle. That is the evidence of the defendant. It is registered in his name as owner. The plaintiff is the hirer until the entire sum agreed upon has been paid by the plaintiff to the defendant when the plaintiff is entitled to have the car registered in his name. The repayment of the money is further secured by a third person standing guarantor. The clause under consideration enables the owner to seize the vehicle on failure to pay as agreed and after due notice. This type of transaction is of recent development and certainly during this century. It is then futile to find a parallel in the Roman Dutch Law and its treatment is bound to be scanty as Howard, C.J. pointed out in *de Silva v. Kuruppu 42 N. L. R. 539 at 544.*

Then the only way of examining the validity of this clause is to ascertain whether there is in the Agreement or in the clause anything contrary to the accepted principles of the Common Law. The transaction beween the parties has characteristics of a mortgage as well as a contract of letting and hiring. In section 7 (4) and section 9 (5) of the Motor Traffic Act this is referred to as "let under a Hire Purchase Agreement". It is further a transaction relating to a movable and not to an immovable. Consequently the authorities however scanty relating to immovables be it in connection with letting and hiring or with a mortgage, will not be of much assistance. What has been overlooked or what one tends to overlook is that in this entire transaction *the defendant is the owner of the vehicle.* The plaintiff had agreed that in the case of non-payment of the instalments due on the loan the defendant shall be entitled to seize it. So the authority for the seizure is the Agreement between the parties. The finding of the District Judge is that no force was used in taking possession. The conclusion then in my mind is inescapable that the defendant was seizing his own property and the seizure being in terms of the Agreement was not unlawful.

The complaint is that the Agreement, particularly Clause 9, is invalid. It was submitted that it is contrary to the principles of Common Law. In considering what the Common Law is it must be remembered that the Common Law includes not only the Roman Dutch Law but portions of the English Law as well. The Common Law of this country had not remained static. *Kodeswaran vs. A.G.*., 72 *N.L.R.* 337. It is capable of growth and grows to keep pace with modern requirements. Although there is no statute governing Hire Purchase Agreements or transactions these have been recognized in the Statute Book. There is pointed reference in Sections 7 (4) and 9 (5), for instance, in the Motor Traffic Act, Vol. VII, Legislative Enactments Cap. 203 to such agreements, e.g. where the owner under a Hire Purchase Agreement is required to have his name registered as owner. The Hire Purchase Agreements that have been in force in this country ever since the motor vehicle was introduced are agreements containing provisions like Clause 9 of this Agreement. That is common knowledge. Almost all the cases from *42 N. L. R. 539, de Silva v. Kuruppu* that have come up for consideration have considered such clauses. The Legislature must have been aware of it. Hence to my mind there is in the legislature recognition of this type of agreement though it has not directly legislated on it.

Such agreements are a necessity and countless people have transacted on the basis that such agreements are valid. Such an agreement is valid under the English Law, vide *Karunapala v. de Silva, 77 NLR at 342,* where most of the authorities are

examined. There have been many concepts of English Law absorbed into our law and this is one such ." An agreement by which a debt is payable by instalments may contain a stipulation, as most Hire Purchase Agreements do, whereby upon default in payment of one instalment, the entire obligation is treated as discharged. A Hire Purchase Agreement may thus entitle the creditor to retake possession of the entire subject matter upon default in respect of a single instalment ". Weeramantry, Law of Contracts, prevailing in Sri Lanka, Vol II, Sec. 690 p. 666. For the view that a creditor can retake possession of the subject matter, the learned author relies on Halsbury 3rd Edition, Vol. 19 p. 540, 545. So that he seems to be of the view that the English Law on the subject is prevalent in this country. It seems too late in the day to deny recognition to these agreements so as to keep the law of the Netherlands of the 18th century in its pristine purity in this country.

Another objection advanced to Clause 9 is that it is contrary to Public Policy because it allows the defendant to take the law into his own hands in seizing the vehicle. It may be argued that there can be a breach of the Penal Law. If the hirer (ie. the debtor or plaintiff in the case) does not consent—in this case he did not—to the taking, has the defendant or the creditor or his agents committed theft ? To constitute theft there must be a dishonest taking. " A person does an act dishonestly when he does it with the intention of causing wrongful loss to a person or wrongful gain to.... " Section 22 of the Penal Code. Here loss has been caused to the plaintiff but it was not wrongful because he agreed to it. Even if the defendant gained but it was not wrongful as under the Agreements he was entitled to it. He is the owner. Hence no theft was committed. In this clause the plaintiff has agreed and consented to the defendant or his agents entering the land (presumbly of the plaintiff) for the purpose of seizing the vehicle. So that even if the creditor or his agents entered the land of the debtor to seize the vehicle no offence is committed because the debtor had given permission to do so. Then the argument that it was against Public Policy fails.

I will now examine whether such a clause is contrary to the principles of Roman Dutch Law. Let me start from the premises stated in *Osry v. Hersch Loubser & Co. Ltd. 1922 SALR CPD 531* by Kotze J.P. viz that an agreement for sale, by private execution, of movables delivered to a creditor by a debtor is valid in law. Such an arrangement as Kotze J.P. remarked has the added advantage of avoiding unnecessary litigation. The situation contemplated in that case was where the debtor was the owner of the movable. If then the parties have agreed, where the movable that has been pledged is still with the debtor, that the

creditor shall be entitled to take possession of it, two situations can arise. One is where the debtor willingly surrenders it for sale in satisfaction of the debt when attempting to take possession. The creditor has a right to sell it as the debtor has given it to the creditor. Clause 9 covers it—it is in accord with the principle of Osry's case—and I can see no reason why that is invalid. Second is where the debtor does not consent to the seizure and reasonable force or threats have to be used. I am in agreement with the conclusion arrived at by Howard, C.J. (Soertsz J. agreeing) in *de Silva vs Kuruppu, 42 NLR 539* and in *Karunapala vs de Silva* 77 NLR 337 by Udalagama, J. The creditor in this case is seizing his own property. In those two cases all the relevant authorities have been considered and it is unnecessary for me to repeat them. Having examined the authorities in the Roman Dutch Law in *de Silva v. Kuruppu* Howard C. J., at p. 546 stated : " The validity of a clause allowing the owner to retake possession cannot be challenged ".

In *Almeida vs de Zoysa, 68 NLR 517* the provisions in that agreement did not entitle the creditor to retake possession. Even in that case although Tambiah, J. thought the case of *de Silva vs. Kuruppu* should be reconsidered Alles, J. who was associated with him, at p. 524 said that where there is an agreement to retake possession that right can be exercised subject to the exercise of reasonable force and after notice. Tambiah, J. thought the earlier case should be reviewed because in the Roman Dutch Law the remedy against an overholding tenant is to sue for damages. But with respect, the answer to this appears to be that a Hire Purchase Agreement is strictly not a contract of letting and hiring and as stated earlier it is impossible to find a parallel or anything near it in the early law or any opinion from the learned writers.

I am then of the view that the creditor (i.e. the defendant) is entitled to seize the vehicle after due notice by using only reasonable force as is necessary and that Clause 9 is valid. Hence the defendant took possession of the vehicle as he was lawfully entitled to and consequently the findings of the District Judge are affirmed and the appeal is dismissed with costs.

VYTHIALINGAM, J.—I agree.

GUNASEKERA, J.—I agree.

Appeal dismissed.