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Present: Drieberg J. and Jayewardene A.J.

SWAMINATHAN *v.* KARUNARATNE *et al.*

42—D. C. Colombo, 22,398.

Motor bus—Contract of sale—Agreement to pay by monthly instalment—Vendor's right to take back bus on failure of instalment—Discretionary right—Damages.

Where an agreement for the sale of a motor bus provided *inter alia* that the seller should have the right to resume possession of the bus on failure of the buyer to pay any of the instalments of the purchase price,—

Held, that the right to resume possession was discretionary, and failure to do so did not debar the seller from maintaining an action for the recovery of the purchase money.

A party to a contract is not bound to make speculative efforts to reduce damages.

A PPEAL from a judgment of the District Judge of Colombo.

The facts appear from the judgment.

H. H. Bartholomeusz (with *R. C. Fonseka*), for plaintiff, appellant.

H. V. Perera, for 1st defendant, respondent.

June 20, 1928. JAYEWARDENE A.J.—

By agreement No. 143 dated May 20, 1926, the plaintiff agreed to sell and handed over to the defendants a Brockway motor bus No. C 5618 for the price of Rs. 5,500. A sum of Rs. 500 was paid on the date of the agreement, the balance was to be paid in monthly instalments of Rs. 500 each. It was agreed, if the defendants failed to keep the bus in good running order or to pay all or any of the monthly instalments, that it shall be lawful for the plaintiff to take back possession of the bus at once without any notice to the defendants wherever it be found and to sell it by public auction in payment or part-payment of the price. The defendants paid the instalments due up to August and a sum of Rs. 200 out of the September instalment. The plaintiff instituted this action on January 24, 1927, on the footing that the October, November, December, and January (1927) instalments and the Rs. 300 out of the September instalment, or in all Rs. 2,300, were due, and asking that the bus be sold according to the terms of the agreement. The 1st defendant filed answer pleading that in September, 1926, he

requested the plaintiff to take back the bus and terminate the agreement by forfeiting the sum of Rs. 2,200 already paid, or to sell the said bus by public auction in terms of the agreement, but that the plaintiff had failed to do so. The main issues tried were whether the defendant tendered the bus to the plaintiff in September, 1926, or thereabouts; whether the plaintiff wrongly refused to take delivery; and whether the plaintiff was bound to accept it even if the defendant tendered the bus in September.

The agreement states that if the defendant failed to pay any of the monthly instalments, it shall be lawful for the party of the first part (that is, the plaintiff) to take back possession of the bus. The words "it shall be lawful" are simply permissive, but where a power is deposited with a public officer for the purpose of being used for the benefit of persons who are specially pointed out, and with regard to whom a definition is supplied by the Legislature of the conditions upon which they are entitled to call for its exercise, that power ought to be exercised, and the Court will require it to be exercised. (*Julius v. Bishop of Oxford*.¹)

It can hardly be contended that on this private agreement it was obligatory or imperative on the plaintiff to resume possession of the bus on the failure to pay the first instalment. I am of opinion that the power was discretionary.

The plaintiff was therefore not bound to take the bus in September, and the fourth issue must be answered in his favour. The correspondence however shows that the defendant did not offer to return the bus in terms of the agreement. In his letter D 1 dated October 25, 1926, the 1st defendant wished the plaintiff to take back the bus and release him of the burden, or else to reduce the instalment by half, and he ends by asking for some sort of concession. In his Proctor's letter D 4 dated November 16, 1926, the plaintiff is requested to agree to one of three proposals—(1) to allow the defendant to pay monthly instalments of Rs. 250, (2) to retake possession of the bus and forfeit the sum of Rs. 2,200 already paid by defendant, or (3) to consent to the sale of the bus by public auction.

Nothing is said as to any deficiency by the sale of the bus, or as to the value of the bus, which was probably not worth Rs. 3,300 at the time. The plaintiff was not bound to take back the bus or to consent to a sale by public auction on those terms. It cannot, therefore, be said that the plaintiff wrongfully refused to take delivery of the bus, and the second issue must also be answered in the plaintiff's favour.

It was contended that the defendant was in a position to sell the bus to one Simian, and that the plaintiff should have enabled the defendant to do so and thus minimize his loss. Simian states that

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he was willing to pay Rs. 2,800 for the bus in about January or February, 1927. The action was instituted on January 24, 1927. A party to a contract is not bound to make speculative attempts to reduce the damages, nor would he be justified in doing so. The onus of showing that the damages could be minimized is on the party asserting it. (*Bank of China v. American Trading Co.*¹ and *Michael v. Hart.*²)

The defendant has failed to show that the plaintiff could have done anything to mitigate the damages. On the contrary, the defendant had taken the bus to the Southern Province and left it there in a disabled condition. On March 17, 1927, the bus was at the garage of one Carolishamy at the Weligama junction and the defendant was unable to bring it to Colombo—according to the letter D 8 of 1st defendant's Proctor; the plaintiff's statement in his plaint that he has not been able to see it at all after May 20, 1926, is probably true.

In my opinion the appeal succeeds. The plaintiff is not entitled to judgment for the instalments that fell due after action filed. Let judgment be entered for the plaintiff as prayed, with the modification that the sum payable by the defendant to the plaintiff will be Rs. 2,600, and not Rs. 3,600 as stated in paragraphs (a) and (e) of the prayer. The plaintiff is entitled to costs in both Courts.

DRIEBERG J.—I agree.

Appeal allowed.

¹ (1894) A. C. 264, 274.

² (1902) 1 K. B. 482 C. A.