1970 *Present :* **H. N. G. Fernando, C.J., and Tennekoon, J.**

MERCANTILE CREDIT LTD., Appellant, *and* B. H. SILVA and 2 others, Respondents

S. C. 20/66 (F)—D. C. Colombo, 53113/M

Hire-purchase agreement—Action instituted by owner—Defence by hirer that he did not understand the contents of the memorandum of agreement—Burden of proof—Proof of ownership of article let —Default by hirer in payment of monthly rentals—Right of owner to re-take possession of article let—Liability of the guarantor.

In an action upon a hire-purchase agreement the defence of *non est factum,* that the contents of the memorandum of agreement were not read and explained to the hirer, is usually taken in conjunction with the plea that the hirer was induced to sign a document by fraud or duress. Alternatively, the defence may be based on mistake, namely misapprehension as to the nature and substance of the transaction.

An averment made by the hirer that he did not understand the contents of the memorandum of agreement is a question of fact which may be determined by the Court upon the evidence led.

The ownership of the article when it was let is not negatived by the fact that the owner, although he had bought it earlier from a third party, had not paid the purchase price fully at the time of the hire-purchase agreement.

When there is a valid agreement of hire-purchase, and the hirer is in default in payment of the monthly rentals, the owner is in law entitled to re-take possession of the article let and to dispose of it as he pleases.

When the hire-purchase agreement contains a clause stating that the guarantor renounces the benefits to which sureties are entitled, the guarantor and the hirer are jointly and severally liable to the owner. In such a case the guarantor, if he does not give evidence, is presumed to have understood the meaning of the declaration which he signed.

APPEAL from a judgment of the District Court, Colombo.

H. W. Jayewardene, Q.C., with *A. N. U. Jayewardena* and *Neville de Alwis,* for the plaintiff-appellant.

C. Ranganathan, Q.C., with *Lakshman Kadirgamar, L. Bartlett* and *C. Ganesh,* for the 1st defendant-respondent.

Cur. adv. vult.

June 20, 1970. H. N. G. FERNANDO, C.J.—

The plaintiff in this action sued the 1st defendant for the enforcement of a hire-purchase Agreement which was signed by the 1st defendant on 14th April 1960. The Agreement itself is in the usual form and contains recitals that it is a Memorandum of

1*—A00409 2,808 (7/73)

Agreement for Hire with option for " the Hirer " (the defendant) to purchase a " Taos 26 Mechanised Fishing Boat " from " the Owners " (the plaintiff).

The defences to the action which arose upon the pleadings of the 1st defendant are apparent from the issues which were framed on his behalf at the trial :—

(2) (*a*) Did the 1st defendant read and/or understand the contents of the memorandum of agreement referred to in paragraph 3 of the amended answer ?

(*b*) If issue 2 (*a*) is answered in favour of the 1st defendant is the said memorandum of agreement null and void and of no force or effect in law ?

(3) (*a*) Was the plaintiff the absolute owner of the fishing boat at the date of the said agreement ?

(*b*) If issue 3 (*a*) is answered in the negative was the plaintiff entitled in law to re-take possession of the said boat and/or to sell the said boat ?

(4) In any event is the plaintiff entitled in law in terms of the said memorandum of agreement to re-take possession of the said boat ?

The learned trial Judge has answered these issues in favour of the 1st defendant, and he accordingly dismissed the plaintiff's action. The present appeal by the plaintiff is against that dismissal.

The finding of fact of the learned trial Judge on issue No. (2) was that the contents of the Hire Purchase Agreement were not read and explained to the 1st defendant, and that he was unaware of its terms. On this basis the Judge held that the defence of *non est factum* was established.

This defence is usually taken in conjunction with the plea that a party was induced to sign a document by fraud or duress ; but no such plea was taken in the instant case. Alternatively, the defence may be based on mistake, namely misapprehension as to the nature and substance of the transaction (Pollock on Contracts, 13th Edition, p. 383). But neither in the issue nor in the pleadings was there involved any suggestion of misapprehension, i.e., of a mistaken belief that the 1st defendant was signing a document which was not a hire-purchase agreement.

The equivalent in the Roman-Dutch law is the plea of *iustus error*. The term explicitly carries the connotation of mistake or misapprehension, and the plea is not available in the present case for the reason which has just been stated.

The 1st defendant did however state in evidence *at the trial* that he acted under a misapprehension, in that he thought he was signing a mortgage and not an agreement of hire-purchase. This evidence could have been accepted and acted upon by the Court only if in fact the 1st defendant was the owner of the fishing boat at the time when he signed the Agreement. The question whether the 1st defendant succeeded in establishing that fact or was entitled to give evidence of that fact will be dealt with in my consideration of issue No. (3).

In his consideration of issue No. (3), the learned trial judge reached two findings of fact. The first of these was that the plaintiff had not purchased the boat on or before 14th April 1960, and the second that title to the boat passed to the 1st defendant and not to the plaintiff. In examining the correctness of these findings it is necessary to consider the history of the transaction which led to the signing of the Agreement.

The 1st defendant's eivdence was that he wanted to start a fishing business and had been to four yards where boats were manufactured and had ascertained that the cost of a boat of the type which he desired to obtain was Rs. 17,000. Thereafter he visited the office of the plaintiff-company where he inquired from one Mr. Beddewela, the business Manager of the plaintiff-company, whether the Company could give him a loan to buy a boat ; Mr. Beddewela had replied that if Mr. Jeganathan, a business man in Trincomalee, would recommend a loan it would be granted up to an amount of 2/3 of the value of the boat. The 1st defendant on 20th February 1960 went to Messrs Taos Ltd., a Firm of boat builders, and placed an order for a boat which was then being constructed at the Trincomalee ship-yard, paying a sum of Rs. 4,500 as an advance payment. He obtained from Taos Ltd. a receipt (1D2) in the following terms :—

> "Received from B. Hector Silva Esq., of 28, 3rd Cross Street, Trincomalee the sum of Rupees Four Thousand five hundred only being part payment for Boat T 172.
> Rs. 4,500. Sgd. ....."

In April the 1st defendant learned that the boat was ready for sale in the Trincomalee Ship-yard, and he came to Colombo and on the morning of 14th April 1960 went to the plaintiff's office with a letter from Mr. Jeganathan. Mr. Beddewela then asked the 1st defendant "to go to Taos and get the accounts". The 1st defendant went to Taos Ltd. and brought the accounts, and Beddewela then informed him that the Company would pay Rs. 10,500 and asked him to deposit the balance at Taos. He then paid Rs. 1,638.62 to Taos Ltd., who gave him the receipt 1D3.

After being questioned concerning the matters I have now mentioned, the 1st defendant was examined with regard to the documents which he signed on 14th April. According to him the memorandum of Agreement was signed by him and a guarantor during the afternoon of April 14 in the presence of Mr. Beddewela and a clerk. Counsel then showed him the proposal Form 1D1 which the 1st defendant said he had signed on the same day. This proposal form he said was given to him by Beddewela to be taken to Taos Ltd. in order to obtain their signature.

The 1st defendant's evidence concerning the signing of the proposal form is not clear, but there was nothing in the evidence to counter the probability that in ordinary course the proposal form was filled up and signed both by the 1st defendant and by Taos Ltd. before and as a condition precedent to the signing of the Hire Purchase Agreement.

According to the particulars in the Agreement, the cash price of the boat is stated to be Rs. 16,129 and hiring and other charges to be Rs. 1,576.12. The total sum of Rs. 17,705.12 was to be paid by means of an initial payment of Rs. 5,629 on 14th April, and the balance to be paid in 18 monthly rentals of Rs. 670 per month. What the 1st defendant actually paid to Taos on that day was only Rs. 1,638 which fell short of the Rs. 5,629 by a sum of Rs. 3,991. It was assumed on all sides at the trial that when this payment was made to Taos Ltd., credit was given to the 1st defendant by Taos for the previous payment of Rs. 4,500 made by him on 20th February. (Although there is no explanation why he was given credit only for a sum of Rs. 3,991 it must be taken that the assumption was correct.)

In regard both to the Proposal Form and the Agreement itself the 1st defendant's position in evidence was that although he signed these forms, he neither read nor understood their conditions, nor were the conditions explained to him in Sinhalese. His position at the trial was that (presumably because of what had been said to him by Beddewela in February) he thought that the plaintiff was giving him a loan, and that what he signed was a mortgage of the boat and not an agreement to take it on hire from the plaintiff.

In deciding that the title to the boat was in the 1st defendant and that accordingly he thought he was signing a mortgage, the learned trial Judge has accepted the evidence which I have summarised above. The Judge placed much reliance on the fact that the first receipt of Rs. 4,500 was in the name of the 1st defendant, that when the second payment was made to Taos Ltd. on 14th April 1960 the receipt was again in his name, and that the plaintiff did not produce any document to show that he was the owner of the boat.

Mr. Jayewardene for the plaintiff made two main submissions regarding the finding that the 1st defendant was the owner of the boat at the time when the Agreement was signed, the first submission being that the claim of the 1st defendant that he was the owner of the boat was not put forward either in the pleadings or in the issues framed at the trial. In paragraph 3 of his answer the 1st defendant's position only was that he did not understand the contents of the agreement which he signed. Then in paragraph 4 he admitted that a Taos Mechanised fishing boat was financed by the plaintiff, and that he paid *to the plaintiff* a sum of Rs. 5,629 on 14th April 1960 and thereafter several sums *for and on account* of the said fishing boat. I cannot but agree that in this paragraph of his answer the defendant admitted that he had made payments *to the plaintiff* in terms of the Hire Purchase Agreement, firstly of the initial payment of Rs. 5,629 for which the Agreement provides, and secondly, of the rentals payable under the Agreement for the hire of the boat. If, as he thus admitted, he paid the initial sum of Rs. 5,629 *to the plaintiff*, and thereafter commenced to pay the balance cost of the boat *to the plaintiff*, it is at the least difficult to appreciate his attitude that he thought he was buying a boat from Taos Ltd.

In paragraph 5 of the answer, the first defendant firstly averred that the plaintiff had no right in law to seize the boat. No ground was here mentioned for this averment, except the ground that the seizure took place during the pendency of the action. The defendant further averred that the agreement was contrary to public policy and/or to law and that the agreement was determined without due notice. The other matters referred to in the 1st defendant's answer related to the value of the boat and to the propriety of the circumstances in which the plaintiff sold the boat after seizure. Again, it is impossible to find in any of the averments which followed paragraph 4 of the answer any implication of a position that the defendant had been the owner of the boat.

The relevant issues framed for the 1st defendant have already been reproduced in this judgment. Even if it could have been proper for the 1st defendant to frame issues which did not properly arise upon the pleadings, I much doubt whether issue No. (3) could reasonably convey to the plaintiff any impression of an intention to put forward a case that the defendant was the owner of the boat and that his only intention had been to mortgage his boat to the plaintiff.

The trial commenced with the leading of evidence on behalf of the plaintiff, and the principal witness for the plaintiff was Beddewela. A great part of the lengthy examination of Beddewela related to the circumstances in which the Hire Purchase

Agreement was signed by the 1st defendant, that is to say, to matters relevant to the second issue whether the defendant understood the contents of the Agreement. There were also questions directed to the point whether the plaintiff had become the owner of the boat on 14th April 1960. This point (with which I will presently deal) could have been of importance as a matter of law in view of English decisions holding that there cannot be a valid Hire Purchase Agreement in respect of an article not owned by the bailor at the time of the hire. But there was literally no question put to Beddewela which even suggested the possibility that the plaintiff had represented to the 1st defendant that he would be or was being given a loan on the security of a boat. A careful reading of the cross-examination of Beddewela shows that neither the word " loan " nor the word " mortgage " was even once uttered by cross-examining Counsel. It thus appears that even 1st defendant's Counsel was not aware, until his client gave evidence, of the version that the client thought he was getting a loan on the security of his boat.

In these circumstances, although there was open for decision by the Court on issue No. (3) the question whether the plaintiff was the owner of the boat at the time of the agreement, that is to say, whether title had then passed from Taos Ltd. to the plaintiff, there was nothing in the pleadings or in the issues, or in the record of the cross-examination of the plaintiff's witness, which required the plaintiff to meet a case that the 1st defendant owned the boat and intended to mortgage it as security for a loan. I hold that it was not open for the 1st defendant to set up such a case, of which the plaintiff had no warning whatsoever until the late stage when the 1st defendant gave evidence. The corresponding finding of the trial Judge cannot therefore be sustained. This disposes also of the possibility of a finding for the 1st defendant on issue No. (2).

Mr. Jayewardene's second submission was that in any event the evidence did not justify the finding that the 1st defendant became the owner of the boat. What is implied in the finding is that Taos Ltd. delivered the boat to the 1st defendant as the purchaser thereof. An inference that such was the position no doubt arose from the fact that he had placed an order for a boat and made the advance payment of Rs. 4,500 for it in February 1960, and from the fact that even the receipt given by Taos Ltd. on 14th April was in his name. But these are not the only matters relevant to the question whether in fact there was a completed transaction of sale between Taos Ltd. and the 1st defendant. Taos Ltd. was a signatory to the proposed form, and the particulars in that form concerning the 1st defendant were filled in by a Taos employee at the Taos office. In that form the 1st defendant is

described as "the hirer", and it is made perfectly clear that to the knowledge of Taos Ltd., the 1st defendant desired to take the boat on hire from the plaintiff. Again, Taos Ltd. was a party as guarantor to the Agreement itself, which clearly refers to the plaintiff as "the owners" and to the 1st defendant as "hirer". Taos Ltd. delivered the boat to the 1st defendant only because the plaintiff issued a delivery order in the name of the 1st defendant; that order required Taos to collect Rs. 6,113.62 before delivery, an amount which represented the total of Rs. 5,629 (being the initial payment payable to the plaintiff under the Agreement, plus Rs. 484.12 being insurance charges, plus an additional charge of 50 cents also referred to in the Agreement. In his answer, the 1st defendant clearly stated that he paid the sum of Rs. 5,629 *to the plaintiff* on 14th April 1960. Moreover, there was no evidence to contradict the statement of the plaintiff's witness that it is normal practice for the dealer to collect the initial payment on behalf of the party letting an article on hire-purchase. Having recovered this payment from the 1st defendant by appropriating an earlier payment in its hands and taking cash for the balance, Taos Ltd. informed the plaintiff of the delivery of the boat and sent its invoice for the balance due to itself on the sale price. This balance was paid by the plaintiff to Taos Ltd. before the end of April.

In these circumstances, it is manifest that Taos Ltd. intended that ownership of the boat should vest in the plaintiff, and it would have been absurd for Taos to contend subsequently that the boat was sold to the 1st defendant as purchaser. When the 1st defendant undertook the burden of proving as a fact that Taos Ltd. sold the boat to him, that burden was no different from and no lighter than it would be if Taos Ltd. itself sought to prove the same fact; Taos Ltd. filled up the proposal form on behalf of the 1st defendant. The position could have been different only if the 1st defendant claimed that the Agreement was a sham, and Taos Ltd. had deceived him by purporting to sell the boat to the plaintiff, when in reality the true intention was that Taos would sell the boat to him. Indeed it appears that the 1st defendant's advisers did at one stage consider such a claim. Leave of the Court was obtained on 21st August 1963 to amend his answer "to include an averment of fraud between the plaintiff and Taos Ltd. in regard to the sale of the boat." But no such averment was made in the amended answer, nor did the 1st defendant say in evidence that Taos had deceived him.

In fairness to the witness Beddewela, it must be said that the disbelief of his evidence that he did explain the nature of the transaction to the 1st defendant was quite unjustified. In the absence of any allegation of fraud or deceit on his part, Beddewela's statement that he explained this to be a hire-purchase

transaction was perfectly credible. He knew that the 1st defendant did not understand English, and every conversation which he had regarding this matter with the 1st defendant must necessarily have been in Sinhala. If he did not intend to be deceitful (no one says that he did), it was normal and natural for him to explain that the plaintiff would buy the boat from Taos and let it on hire-purchase to the 1st defendant. Even if he only used the English expression "hire-purchase", there is no evidence to suggest that the defendant was unaware of the nature of the transaction, which is quite commonly entered into by people who do not speak the English language. The 1st defendant received several letters from the plaintiff which referred to the "Hire Purchase Agreement", to "hiring rentals" and to himself as "the hirer", and he signed replies in which the first two of these expressions occur. These replies, according to the 1st defendant, were written on his behalf by some other person. But this agent admitted in these replies that the transaction was one of hire-purchase and it was very nearly absurd for the 1st defendant to claim belatedly that he was unaware of the content and meaning of the replies which he signed. The plaintiff was in my opinion entitled to a positive finding that the 1st defendant did know the nature of the transaction into which he entered.

I must hold for these reasons that the finding that title to the boat passed from Taos Ltd. to the 1st defendant is unsupported by the evidence.

The learned trial Judge has also held that the plaintiff had no title to the boat on 14th April 1960 when the Agreement was signed. This finding was independent of the question whether title then passed to the 1st defendant, and depended on the fact that the balance of the purchase price was paid by the plaintiff to Taos Ltd. only on 25th April. Indeed, it appears that issue No. (3) was framed originally for the purpose of raising this very matter, and not the question of the 1st defendant's title.

In certain English cases such as *Karflex v. Poole*[1] (1933, A. E. R. 46) it has been held that a hire-purchase agreement is conditional upon the party letting an article being in fact the owner of the article at the time of the letting. But in the instant case, the circumstance that the plaintiff paid the balance of the purchase price only two weeks after the date of the hiring had not the effect that title to the boat remained in Taos Ltd. until that payment was made. The learned Judge fell into a surprising error, in thinking that title to goods delivered by a vendor under

[1] *1933, A. E. R. 46.*

a contract of sale cannot pass to the purchaser until payment is made ; on his reasoning, the bread which I consume today will become my bread only when I pay the baker's bill next month. There was obviously in this case a sale to the plaintiff on credit, on his implied promise to pay the balance of the purchase price.

On no ground could issue No. (4) have been answered in favour of the 1st defendant. There having been a valid Agreement of hire-purchase, and default on the part of the 1st defendant in payment of the monthly rentals, the plaintiff was in law entitled to re-take possession of its property, the boat, and to dispose of it as the plaintiff pleased. The 1st defendant's counter-claim should therefore have been dismissed.

For the reasons now stated, the judgment and decree of the District Court are set aside. Decree will be entered for the plaintiff in the sum prayed for in the plaint, less a sum of Rs. 700 paid after the institution of this action, i.e. Rs. 7,922.28, and for costs in both Courts.

JUNE 23, 1970.—

After the delivery on 20th June 1970 of judgment in this appeal it was brought to my notice that the judgment omitted to deal with the liability of the 2nd defendant, who signed the hire purchase agreement as guarantor. The learned District Judge held that the 2nd defendant will not be liable to the plaintiff, because there was no default on the part of the 1st defendant. This ground is however not available to the 2nd defendant, because of my finding in the judgment already delivered that the 1st defendant is liable under his contract.

The 2nd defendant also pleaded in his answer that he did not know that he was expressly renouncing the benefits to which sureties are entitled, and if this plea is to succeed, there cannot be recourse against the 2nd defendant except if recourse against the 1st defendant does not satisfy the plaintiff's claim. The learned district judge does not reach a finding on this plea, but the context on which he cites from the judgment in *Wijeyewardene v. Jayawardene*[1], 19 N. L. R. 449, indicates that he might have been inclined to uphold this plea. In that case de Sampayo J. referred to an argument that a surety must be presumed to have known the effect of his declaration in a bond, as the Notary who drew up the Bond must be taken to explain these things, and then observed " this even if it happened would not satisfy the condition which seems to require that the surety should actually understand the matter and make a declaration to that effect ".

[1] *19 N. L. R. 449.*

The Agreement in the instant case contains the following declaration :—

> " The Guarantor hereby renounces the rights to claim that the Hirer should be excussed in the first instance and all other benefits to which sureties are by law entitled, it being agreed that he is liable, in all respects under this Agreement, to the same extent and in the same manner as the Hirer including the liability to be sued before recourse is had to the Hirer. "

But there is no declaration in the Agreement to the effect that the 2nd defendant *actually understood* the nature of the right which he purported to renounce. To that extent the Agreement does not appear to satisfy the test laid down by de Sampayo J. Nevertheless the same Judge, only a short while after the previous decision, considered the terms of a guarantee in a hire-purchase contract (*Singer Sewing Machine Co. v. Silva*[1] 5 C. W. R. 205). Having referred to the full discussion of the subject in the earlier decision, de Sampayo J. in the later case pointed out that the contract contained a clause by which the defendant agrees " that the owners are at liberty to sue at their option either the hirer or guarantor jointly or severally for their dues ", and he proceeded to hold that this was an express and specific renunciation of the *beneficium ordinis seu excussionis.*

It seems to me that the later decision distinguished the earlier case of *Wijeyewardena v. Jayawardena.* In the earlier case there was no clause in the bond corresponding to that which was contained in the hire-purchase agreement in the *Singer Sewing Machine Co. case.* In the instant case, the 2nd defendant did not give evidence, and there was no ground upon which to counter the natural inference that he understood the meaning of the declaration which he signed. Moreover, the renunciation clause is in clearer terms than the clause in the *Singer Sewing Machine Co. case.* As at present advised therefore, I think we should apply the later decision of de Sampayo J.

Accordingly the decree in this appeal will order the payment of the decreed sum jointly and severally by the 1st and 2nd defendants. The present judgment will be supplementary to that delivered on 20th June, 1970.

TENNEKOON, J.—I agree.

Appeal allowed.

[1] *5 C. W. R. 205.*