1953 *Present :* **Gratiaen J. and Weerasooriya J.**

D. WARNAKULASOORIYA, Appellant, *and* TRANSPORT & GENERAL FINANCE CO., LTD., Respondent

S. C. 105—D. C. Colombo, 18,213 M

Contract—Illegality—Effect as between the parties—Hire-purchase—Ownership of goods—Is it a material factor ?

A transfer of property made in pursuance of an unlawful agreement cannot be upset merely on the ground of illegality.

Quaere, whether a condition precedent to a hire-purchase agreement is that the person who lets goods on hire should be the lawful owner of such goods at the time the agreement is entered into.

APPEAL from a judgment of the District Court, Colombo.

E. B. Wikramanayake, Q.C., with *N. Nadarasa* and *S. Canagarayar*, for the second defendant appellant.—The plaintiff was at no stage the owner of the motor car. The evidence was that the first defendant " was buying the car through the plaintiff company ". It was the first defendant who bought the car from Rajapakse. It is, besides, an implied condition of every hire-purchase agreement that the person who lets the thing on hire is the owner—*Karflex v. Poole*[1]. That case was decided before the English Hire-Purchase Act of 1938. Nor could the plaintiff company become owner of the vehicle in view of section 3 (1) of the Defence (Motor Cars) (Special Provisions) Regulations, 1943, which prohibited any person from " purchasing or otherwise acquiring " any registered motor car without a permit, and a person who contravenes these regulations was guilty of an offence punishable under regulation 52 of the Defence (Miscellaneous) Regulations. The plaintiffs represented they were the lawful owners which they were not and could not be. P1 refers to the plaintiff company as the " owners " and expressly provides in art. 11, "The vehicle being the property of the owners shall not be subject to any lien, &c." A contract founded on an illegal transaction will not be enforced. The claim here is for the hire and the return of the car. *Boissevain v. Weil*[2]. The 2nd defendant is only a guarantor and is discharged if the creditor fails to acquire and preserve his rights against the debtor. *Wessels on Contract, paras. 4361, 4363.*

H. V. Perera, Q.C., with *P. Navaratnarajah* and *G. D. C. Weerasinghe*, for the plaintiff respondent.—P1, the hire-purchase agreement, is not governed by the English law. It is not a simple contract of sale of goods. It is also a hire and as such is governed by the Roman-Dutch law. The transaction as a whole falls to be governed by the Roman-Dutch law. Under that law, a person other than the owner can hire goods. There is no warranty that the seller is the owner of the goods—Diemont's

[1] *(1933) 2 K.B. 251.*

[2] *(1950) 1 All E.R. 728 at 734.*

2——J. N. B 30492-1,592 (10/53)

Law of Hire-Purchase in South Africa, p. 54. Even under an illegal contract property in the goods may pass—*Benjamin on Sale, 8th edn., p. 494 ; The American Restatement of the Law of Contract, Vol. 2, section 580.* For the nature of the contract of hire-purchase in English law see *Scammell v. Ouston*[1].

Counsel also cited *Scarfe v. Morgan*[2] and *Benjamin on Sale, p. 498.*

E. B. Wikramanayake, Q.C., in reply.—The prohibition applies to all claims connected with or directly founded on the prohibited transaction—*Mackeurtan on Sale of Goods in South Africa, p. 123.*

Cur. adv. vult.

August 31, 1953. GRATIAEN J.—

The plaintiff Company had, in terms of a hire-purchase agreement dated 24th April, 1946, let on hire to the first defendant a second-hand motor car, granting him at the same time the option of purchasing the vehicle provided that he duly complied with the conditions of the agreement. The appellant guaranteed the performance by the first defendant of his obligations under the agreement, and in doing so waived certain privileges to which a guarantor would normally be entitled. Contemporaneously with the signing of the agreement, the first defendant took delivery of the vehicle as hirer.

The motor car previously belonged to a man named Rajapakse, and the first defendant had been anxious to purchase it, but did not possess the necessary funds to do so. He accordingly approached the plaintiff Company, which is a finance corporation, and it was in these circumstances that the Company purchased the vehicle from Rajapakse. As between the parties to the hire-purchase agreement dated 24th April, 1946, the transaction was " a contract of hiring coupled with a conditional contract or undertaking to sell "—*Helby v. Matthews*[3]. As Lord Wright explained in *Scammel v. Ouston*[4], " the property in the chattel does not pass while the agreement is current, but the hirer merely gets the use of it ", and, in the event of his due compliance with the various terms of the agreement, he has the option (which he is under no obligation, however, to exercise) to buy the chattel on payment of a sum ascertained by reference to the relevant terms of the agreement. The grant of this option constitutes " a binding offer to sell which remains open during the stipulated period ", and it is not unless and until the offer is accepted before the period has elapsed that a binding contract of sale is concluded between the parties—*Van Pletsen v. Henning*[5].

The first defendant defaulted in the payment of hire after a few months. In addition, he sold it to a third party, taking dishonest advantage of the fact that he alone, as the " person entitled to the possession of " the vehicle had been registered as its " owner " under the Motor Car Ordinance, No. 45 of 1938, which was in force at the relevant time. In the meantime,

[1] *(1941) A.C. 271.*
[2] *(1838) 4 M. & W. 270 at 281.*
[3] *(1895) A.C. 471.*
[4] *(1941) A.C. 271.*
[5] *(1913) S.A.A.D. 82 at 98.*

the Company had given due notice terminating the agreement, and eventually sued both defendants (*a*) for arrears of hire, (*b*) for the return of the vehicle or in the alternative for damages. After trial the learned District Judge entered judgment against both defendants for arrears of hire and damages, amounting in the aggregate to a sum of Rs. 1,319·85.

The appellant disputes his liability as guarantor under the agreement sued on for the following reasons :—

(1) that, upon a true construction of the document, there was an express as well as an implied condition that the Company was its owner at the time when the transaction was entered into—*Karflex v. Poole*[1] ; and

(2) that, although the Company had purported to purchase the vehicle from Rajapakse, that transaction was an illegal contract which had taken place in contravention of the Defence (Motor Cars) (Special Provisions) Regulations, 1943, which were then in force ; in consequence, Rajapakse continued to be the lawful owner at and after the hire-purchase agreement was entered into, so that the Company had no right to give the first defendant an option to purchase it.

It will be convenient in the first instance to discuss the validity of the second ground of appeal to which I have referred, because, if that fails, there is no need to decide the interesting question whether the principle of English Law laid down in *Karflex v. Poole* (supra) (and subsequently prescribed by statute) applies to hire-purchase agreements entered into in Ceylon.

The Defence Regulations in question were without doubt in operation at the time when the Company purchased the vehicle from Rajapakse in order to place it at the first defendant's disposal under the terms of the hire-purchase agreement sued on. Section 3 (1) expressly prohibited any person from " purchasing or otherwise acquiring " any registered motor car except under the authority of a permit issued to him by the proper authority. Similarly, section 4 prohibited the sale of a registered motor car to any person except upon the surrender by him of the permit contemplated in section 3 (1).

The Company had admittedly obtained no permit in its own favour for the purchase of the vehicle at the relevant time. On the other hand, the first defendant, for whose benefit the purchase had in fact been made, did possess such a permit which was duly surrendered before the vehicle was handed over by Rajapakse. The Regulations were introduced to ensure an equitable distribution of motor cars under war conditions, and it might well have been argued in criminal proceedings that a " purchase " by a hire-purchase finance Company, *not for its own use but for use by a permit-holder*, did not contravene the spirit of the Regulations. I am content, however, to assume for the purpose of my decision that the purchase, as between the Company and Rajapakse, was illegal. But does it follow that the transaction was for that reason void in the sense that, after Rajapakse had parted with the vehicle which he had purported to sell, he nevertheless retained legal ownership of it so as to

[1] *(1933) 2 K.B. 251.*

disentitle the Company from selling it to the first defendant if and when he exercised the option granted to him in terms of the hire-purchase agreement ?

" The general principle of our law is that a Court will not come to the assistance of either party where the object of the obligation is unlawful or immoral . . . If money is paid or if something is delivered, under an illegal or immoral contract, it cannot as a rule be recovered back ".—*Wessels : Contract* Vol. 1, para. 665. If, therefore, performance of the allegedly illegal contract between the Company and Rajapakse had not been complete, neither party could have sued the other for the enforcement of an unfulfilled obligation under it, as none of the exceptions specified by *Wessels* (paras. 666–681) would have applied. But we are here concerned with a transaction in which both parties had fulfilled their obligations, so that *there was nothing left to be performed which required the aid of a Court of Justice for its enforcement.* The English Law is to the same effect. " If there has been a completely executed transfer of property made in pursuance of an unlawful agreement . . . the transfer cannot be upset merely on the ground of illegality "—*Cheshire & Fifoot : Contracts* (1st Edn.) p. 240. The position would have been different if, for instance, Rajapakse had been induced by misrepresentation to sell the car to the Company.

The decision in *Elder v. Kelly*[1] illustrates the effect of an illegal, but concluded, contract of sale in contravention of the Sunday Observance Act, 1667, of England. " What I understand to have happened " said Bray J., " was that the purchaser came to the shop, asked for some milk, paid for it, and took it away. In my opinion that transaction clearly operated to pass the property in the milk from the seller to the purchaser, *and it was to that extent an effective sale* ". Similarly, the contract of sale between Rajapakse and the Company was completed by delivery and payment, and, notwithstanding the imputation of illegality, ownership of the vehicle passed to the Company before the hire-purchase agreement sued on was entered into with the defendants and the appellant. In the result, the appellant's defence fails *in limine*, and the applicability of the principle laid down in *Karflex v. Poole* (supra) to hire-purchase agreements in Ceylon does not call for a final decision in this case.

I would dismiss the appeal with costs. With regard to the Company's cross-objection in which it contends that the sum awarded under the decree should be increased, Mr. Perera has conceded that this issue, affecting as it does the obligations of the first defendant as well, could only be raised upon a properly constituted appeal to which both the hirer and the guarantor were made parties. The cross-objections must therefore be rejected, but without costs.

WEERASOORIYA J.—I agree.

Appeal dismissed.

Cross-objections rejected.

[1] *(1919) 2 K.B. 179.*