*Present* : **Dalton A.C.J. and Koch J.**

MATHER *v.* SOMASUNDERAM *et al.*

*66—D. C. Jaffna, 27,105.*

*Hire purchase agreement—Agreement to pay monthly rent—Initial deposit—Termination of agreement—Action for recovery of arrears—Claim to set off deposit.*

**Under a hire-purchase agreement the owner of a motor car hired it in consideration of an initial deposit of a certain sum and an undertaking by the hirer to pay a monthly hire for a period of 24 months. The agreement further provided that if the hirer failed to pay the hire for**

any month on the due date, the owner could, without any prejudice to his right to recover arrears of hire and damages, terminate the hiring and retake possession of the car, and that in that event the hirer should not on any ground whatever be entitled to any allowance, credit, return, or set off for payment of hire previously made. Owing to the default of the hirer in paying the monthly instalments the owner terminated the agreement.

Held, (in an action by the owner to recover instalments of rent due under the agreement) that the hirer was not entitled to set off the deposit against the claim.

APPEAL from a judgment of the District Judge of Jaffna.

*H. V. Perera* (with him *Kumarasingham*), for defendants, appellant.

*L. A. Rajapakse* (with him *H. W. Tambiah*), for plaintiff, respondent.

*Cur. adv. vult.*

July 9, 1936. KOCH J.—

The plaintiff sued the defendants on an agreement P 1 of September 28, 1929, alleging that a sum of Rs. 932 was paid him in monthly instalments under the said agreement and that a sum of Rs. 2,922.60, with interest at 9 per cent. per annum, was due and owing to him. By this agreement the plaintiff agreed to let to the first defendant a Pontiac Tourer Car in consideration of an "initial deposit" by the first defendant of Rs. 1,072.50 and an undertaking on the part of the latter to pay to the plaintiff a hire of Rs. 155.40 on October 28, 1929, and regularly on the 28th day of each and every successive month for a period of 24 months. The agreement further provided that if the first defendant failed to pay hire for any month on the due date, the plaintiff without any prejudice to his right to recover arrears of hire and damages could terminate the hiring and retake possession of the car, and also that in the event of the hiring being terminated the first defendant should not on any ground whatsoever be entitled to any allowance, credit, return, or set off for payment of hire previously made.

It would therefore follow that if this so called "initial deposit" of Rs. 1,072.50 can be regarded as an advance hire-deposit, the first defendant will not be entitled to credit in that sum in the event of the hiring being terminated by the plaintiff as the result of a default on the part of the first defendant.

There happened to be a clause in the typed form of this agreement, viz., 2 (*a*), which runs thus :—

> "That the hirer may at any time during the hire terminate the hiring by delivering to the owners at Jaffna at his own expense the said . . . . in through good order and condition."

Before P 1 was signed, however, that clause was deleted, the effect of which deletion apparently was to prevent the hirer himself from terminating the contract. P 1 further provided that at any time during the hire the first defendant could become the purchaser of the aforesaid car on payment in cash of the "endorsed price", viz., Rs. 4,802.10, provided he was not in default in regard to the regular payments of hire due under the agreement. This was followed by a clause that if such a purchase was effected credit will be given for *all payments of rent previously made* under this agreement.

The second and third defendants who are the appellants in this case signed the agreement as guarantors. It is argued by Mr. H. V. Perera who appeared for them that they were therefore entitled to advance every argument in their defence which the first defendant could rightly advance in favour of his own defence. I shall assume that this contention is correct and will decide this appeal on that footing.

The learned District Judge gave judgment for the plaintiff for the sum of Rs. 777 without giving the defendants credit for the "initial deposit" of Rs. 1,072.50, which was in plaintiff's hands. He also dismissed the defendant's claim in reconvention for Rs. 500 based on an alleged wrongful conversion of the car by reason of a seizure effected by the plaintiff. The District Judge further reserved to the plaintiff the right to make a further claim in a subsequent action for hires that may have accrued to him beyond the period for which he had already claimed in his plaint. Mr. Perera does not dispute the correctness of the finding of the learned District Judge in regard to the sum of Rs. 777 or to the dismissal of the first defendant's claim in reconvention or to the right of the plaintiff to file another action for balance rent. But what he strongly contends is that the defendants should have been given credit for the sum of Rs. 1,072.50 on the ground that that sum was merely a deposit and had to be returned in the event of the hiring being determined before the completion of the 24 months, whatever may have been the reason for such determination ; especially so as the agreement (P 1) did not specially provide for the forfeiture of that sum.

I regret I am unable to accede to this argument. The respective rights of the parties to this agreement have to be determined according to its terms. In my opinion there is sufficient in the terms of this agreement to indicate that this so called "initial deposit" was nothing more than the payment of a lump hire in advance. I say so because clauses 2 (b) and 2 (c) run respectively as follows :—

> "2 (b) That the hirer may at any time during the hire become the purchaser of the said car by payment in cash to the owners at Jaffna of the herein endorsed price provided the payments of all hire due at such time have been regularly and duly made." (The endorsed price is Rs. 4,802.10.)
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> "2 (c) That if such purchase be effected credit will be given for all payments of rent previously made under this agreement."

It is clear that the plaintiff was not going to part with his car unless he received in all the sum of Rs. 4,802.10 which has been fixed as the "price" of the car. It is equally clear that the first defendant was not going to become the purchaser of the car if he had to pay more than the endorsed value of the car, viz., Rs. 4,802.10. If then under clause 2 (c), in the event of a purchase having been effected only the instalments payments of rent had to be taken into consideration (excluding the "initial deposit") for the purpose of giving credit to the first defendant, the first defendant would not only be paying to the plaintiff the value of the car, viz., Rs. 4,802.10 but also the further sum of Rs. 1,072.50 already in the hands of the plaintiff. Surely this could not possibly have been within the contemplation of the parties.

I therefore feel that although the expression "initial deposit" was used to describe the advance the first defendant had made to the plaintiff that advance was paid to him not by way of mere deposit but on account of hire in advance. For, such a construction would permit the hirer to be given credit in a sum equivalent to this so called "initial deposit" in the event of the hirer effecting a purchase at any time either during the pendency of the 24 months or at their determination.

Mr. H. V. Perera in support of his argument cited the case of *Belsize Motor Supply Co. v. Cox*[1] and claimed that the decision arrived at in that case was exactly in point, and that his position in the present case was even stronger because in the *Belsize* case the sum received in advance by the owners was described as received on account of hire in advance while in the present case the sum is described as an "initial deposit".

The holding in the *Belsize* case was that "if the hirer had both paid the hire in advance and all the 24 instalments he would have paid up the full amount required to purchase the cab in question, but the hire paid in advance would have been paid as deposit on account of purchase money in advance". The judgment proceeded to state that the document relied on in that case on the face of it gave the hirer an option to purchase at any time by paying up the difference between the price of the cab and the sum already paid and that that option could be exercised when the hirer had paid the 24th instalment, when he could also if he so desired decline to proceed with the purchase and could claim a return of the sum paid in advance although it was described as hire. I must confess and I say so respectfully that I do find some difficulty in understanding that judgment but I am of opinion that that decision will hardly apply to the facts of the present case, for that decision was based on the footing that every single one of the 24 instalments had been paid up whereas in the present case the hirer has actually been in default in regard to the payment of several instalments at the date the car was seized. Further, there is provision in P 1 (*vide* clause 1 (*f*) that in the case of such default the owner could terminate the hiring and retake possession of the car, and also in 1 (*g*) that in such an event the hirer shall not on any ground whatsoever be entitled to any allowance, credit, return, or set off for payments of hire previously made.

Mr. Perera described the contract P 1 as a hire purchase agreement which included an obligation on the part of the owner to sell in the event of the hirer exercising his option to buy. This may be correctly so but such option can only be exercised according to clause 2 (b) if the hirer pays to the owner the full "endorsed price" of the car, viz., Rs. 4,802.10 which has not been done in this case.

I therefore am of opinion that the learned District Judge was right in not allowing the defendants credit in the sum of Rs. 1,072.50, the sum paid in advance. The appeal will therefore be dismissed with costs.

DALTON A.C.J.—I agree.

*Appeal dismissed.*

[1] *(1914) 1. K. B. 244.*