1927.

Present: Fisher C.J. and Garvin J.

WALKER, SONS & CO. *v.* HAMEED ALLY

326—D. C. Colombo, 18,684.

Hire-purchase agreement—Option to purchase—Failure to pay instalments—Action to recover car.

Where a person who obtained a motor car on a hiring agreement, with an option of purchase, was sued for the recovery of the car and the arrears of rent due,—

Held, that it was competent to the Court to make order for the payment of the amount due on the judgment by instalments.

Held, further, that the failure of the owner to exercise his right of terminating the contract, as soon as the hirer fell into arrears did not affect his right to recover possession of the car.

THE plaintiffs sued the defendant for the recovery of a motor car and of rent due for hiring it. The defendant filed no answer to the claim. Later he made an affidavit in which he admitted the plaintiffs' claim and offered to pay the claim by instalments. The agreement upon which the car was hired, dated May 28, 1925, after reciting that the defendant, therein called the hirer, had paid Rs. 1,000 on the date of signature, provides, *inter alia*, (1) that the hirer shall pay a monthly rent for the motor car let to him by the plaintiffs, therein called the owners, ...

(4) That if the hirer does not duly perform the agreement and fails to pay rent in any month on its due date, the owners shall be entitled to terminate the agreement and re-take possession of the car without prejudice to their right to recover arrears of rent and damages for breach of the agreement. It was further provided that the hirer should have an option of purchase subject to certain conditions . . . . .

The learned District Judge held that as the plaintiffs did not terminate the agreement and take possession of the car as soon as the defendant fell into arrear, they lost their right to recover possession of the car. In pursuance of the judgment a decree was entered ordering the defendant to pay certain sums to the plaintiffs by instalments.

Garvin, for plaintiffs, appellant.

January 28, 1927. FISHER C.J.—

This case comes before us under somewhat peculiar circumstances as regards procedure. On December 19, 1925, the plaintiffs-appellants sued the defendant-respondent for the return of a

motor car and the payment of rent due for hiring it. The defendant-respondent filed no answer to the claim, but on June 14, 1926, made an affidavit in which he admitted the plaintiffs' claim, and in which, after describing his financial condition, he offered to pay the plaintiffs' claim by instalments. On July 15 an application was made by the respondent to be allowed to pay by instalments and evidence as to his means was given by him. It appears also from the judgment that on a discussion of the matter respondents Counsel urged that the plaintiffs' claim went too far. On July 9, 1926, the learned Judge gave what was in form a judgment on the whole action, and in pursuance of the judgment a decree was entered ordering the respondent to pay certain sums to the plaintiffs by instalments. No reference was made to the motor car, which presumably, if this judgment is to be allowed to stand, is to remain the property of the respondent.

I think that strictly speaking, and more especially in view of the respondent's admission in his affidavit, it was not open to the learned Judge to entertain on this application any question other than the question whether the respondent should be allowed to pay off the judgment debt by instalments, and if so, what the amount and intervals of payments should be.

As, however, the appeal has been argued on another basis, I think it as well under the circumstances that we should deal with the important point which has been raised, namely, that the judgment of the learned Judge ignores the due and proper construction of the agreement upon which the action is based and upon which the rights of the parties depend.

The agreement dated May 28, 1925, after reciting that the respondent, therein called "the hirer," had paid Rs. 1,000 on the date of signature, provides that the hirer shall, *inter alia*, (1) pay a monthly rent for the motor car let to him by the appellants, therein called "the owners"; (2) allow representatives of the owners at all times to inspect the car; (3) keep the car in his possession and not remove it without the appellants' consent; (4) that if the hirer does not duly perform the agreement and fails to pay rent in any month on its due date the owners shall be entitled to terminate the agreement and re-take possession of the car without prejudice to their right to recover arrears of rent and damages for breach of the agreement. It was further provided that the hirer should have an option of purchase subject to his observing certain conditions.

It is clear that the agreement was one which passed no property in the car to the hirer. It was simply a hiring agreement with an option of purchase. See in this connection the case of *Brooks v. Beirnstein.*[1]

[1] *L. R. (1909) 1 K. B. 98.*

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Under these circumstances the position of the appellants seems to be clear. It has never been contended that the respondent exercised, or was in a position to exercise, the option of purchase. There has been nothing which can be construed as an abandonment by the appellants of any right they have under the contract so far as this case is concerned. The learned Judge has held that inasmuch as the appellants did not terminate the hiring and retake possession of the car as they might have done as soon as the respondent fell into arrear, they lost their right to take possession of the car, and this, notwithstanding clause " H " of the contract, by which it was agreed that if the respondent failed, as he did, to pay regularly, the whole transaction should be treated as on hire without any option of purchase. The car, therefore, remained the property of the appellants, and the respondent remained liable for the rent.

It may seem, as it did seem to the learned Judge, hard on the respondent that he should find himself bound by a contract into which he has expressly entered the claim in respect of which he has expressly admitted. But even if that is so, I cannot find any room for relieving him from the liability which he took upon himself, improvident though he may have been.

I think, therefore, that he is liable as the appellants claim. The judgment of the learned Judge must be reversed and judgment entered for the appellants for Rs. 3,420.74, and for an order on the respondent to deliver the motor car to the appellants within two months from the date of his judgment or to pay a further sum of Rs. 2,500.

The order that the respondent should pay the costs of the suit will stand. He must also pay the costs of this appeal.

We think that all money payments under this judgment should be payable by monthly instalments of Rs. 250. The first payment to be made on February 26, 1927.

GARVIN J.—I agree.

Set aside.