IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

Senkadagala Finance Co. Ltd.,
12, Kotugodella Veediya,
Kandy.

Case No. CA 473/96(F) **DEFENDANT-APPELLANT**

D.C. Bandarawela Case No. 1266/M **Vs.**

W.R.A.M.D.R. Karunasena,
179/1, Medakotuwara Watta,
Welimada.

PLAINTIFF-RESPONDENT

Before: M.M.A. Gaffoor J.

Janak De Silva J.

Counsel: Faiz Musthapha P.C. with Thushani Machado for Defendant-Appellant

Sudarshani Coorey for Plaintiff-Respondent

Written Submissions tendered on:

Defendant-Appellant on 21st October 2011 and 19th January 2018

Plaintiff-Respondent on 6th January 2014 and 29th December 2017

Argued on: 27th November2017

Decided on: 28th February 2018

Janak De Silva J.

The Plaintiff-Respondent (Plaintiff) filed this action against the Defendant-Appellant (Defendant) claiming that the Defendant had unlawfully seized vehicle bearing no. 41 ඉ 5720 (Vehicle) which the Plaintiff possessed in terms of a hire purchase agreement no. H.P. 2340/90 (Agreement)(ඵ1.1) entered into between the parties. He further stated that the said unlawful

seizure was done while the Agreement was subsisting without his consent and in violation of clause 13 of the Agreement and section 20 of the Consumer Credit Act No. 29 of 1982 (Act) although he had by then paid more than 75% of the hire purchase price. The Plaintiff claimed that after the unlawful seizure, the Defendant had sold the Vehicle to a third party and that consequently the Plaintiff had suffered damages of Rs. 7,00,000/= and prayed for judgement in the said sum.

The Defendant claimed that the Plaintiff had breached the Agreement by selling the Vehicle to one R. Dayasena without the consent of the Defendant and that therefore the Defendant had the right in terms of the Agreement and the Act to repossess the Vehicle. The Defendant counter claimed in a sum of Rs. 137,484/38 as arrears of the hire purchase price.

The learned District Judge of Bandarawela held that the Defendant had seized the Vehicle without recourse to an action and without lawfully terminating the Agreement even though by the time of the seizure the Plaintiff had paid more than 75% of the hire purchase price. A sum of Rs. 5,50,000/= was awarded as damages to the Plaintiff. Hence this appeal by the Defendant.

The learned President's Counsel for the Defendant submitted that the Plaintiff had breached the Agreement by selling the Vehicle to one R. Dayasena without the consent of the Defendant and therefore the Defendant had the right in terms of the Agreement and the Act to repossess the Vehicle. He submitted that even where more than 75% of the hire purchase price has been paid, section 20 of the Act is not engaged as the Vehicle was repossessed from a third party and not from the possession of the hirer(Defendant). It is an interesting argument to consider. However, that issue does not arise for consideration in view of my conclusions on whether the Agreement was duly terminated prior to seizure of the Vehicle.

The parties also made lengthy submissions on whether the Agreement continued despite several purported terminations by the Defendant when the Defendant continued to accept the hire paid by the Plaintiff. Here again, I am of the view that this issue need not be considered, in view of my conclusions on whether the Agreement was duly terminated prior to seizure of the Vehicle.

There was no dispute between the parties that the Defendant had re-possessed the Vehicle. It was also admitted that by the time the Vehicle was seized the Plaintiff had paid more than 75% of the hire purchase price. However, there is no direct evidence as to the exact date on which the vehicle was repossessed. The Defendant by letter dated 9.7.1993 (එ7.57) informed the Plaintiff that they have repossessed the Vehicle. Hence at least by 9.7.1993 the Vehicle had been seized.

There are only two provisions in the Agreement dealing with the right of the Owner (Plaintiff) to re-possess the Vehicle. These are set out in clauses 13 (b) and (c) of the Agreement (එ7.1) which reads as follows:

"13. **Where the hire under the Agreement is terminated** then the Owner shall be entitled

(b) to re-possess subject to the provisions of Section 16, 20 and 21 of the said Act and subject to any contract to the contrary the Vehicle whose seventy five per centum of hire purchase price has not been paid;

(c) subject to the provisions of Section 20 and Section 21 of the said Act to recover possession of the Vehicle by action in Court."(emphasis added)

These provisions are substantially similar to the provisions in sections 19(b) and 19(c) of the Act. Both these provisions clearly apply only where the Agreement has been duly terminated. It is in this context that the learned District Judge held that that the Defendant had seized the Vehicle without recourse to an action and without lawfully terminating the Agreement even though by the time of the seizure the Plaintiff had paid more than 75% of the hire purchase price. The question then is whether there was a valid termination of the Agreement before 9.7.1993. The Agreement and the Act is breached if the Vehicle was repossessed without lawfully terminating the Agreement.

Clause 12 of the Agreement elucidates the right of the Owner (Defendant) to terminate the Agreement. It deals with two situations.

Clause 12(1) deals with the situation where the hirer defaults more than once in the payment of hire. This clause is substantially the same as section 18(1) of the Act. It reads as follows:

> "12. (1) In case the Hirer makes more than one default in the payment of hire as provided in this agreement then subject to the provisions of the said Act and after giving the Hirer notice in writing of not less than:
>
> (a) one week in case where the hire is payable at weekly or lesser intervals; and
>
> (b) two weeks in any other case
>
> the Owners shall be entitled to terminate the hire under the Agreement by giving the Hirer notice of termination in writing.
>
> Provided that if the Hirer pays or tenders to the Owners the hire in arrear together with such interest thereon as may be payable under the terms of this Agreement before the expiry of the said period of one week or two weeks as the case may be the Owner shall not be entitled to terminate the hire under the Agreement."

In *L.B. Finance Ltd. v. Weligamage and Others*[1] the Supreme Court held that section 18(1) of the Act requires two notices to be given. The first notice is one that is required to be given when the hirer makes more than one default. The subsequent sentence in section 18(1) of the Act refers to the content of the said notice. The hirer is informed of a two-week period within which he is expected to pay the amount overdue. The second notice is the notice of termination which is the culmination of the process of termination of the hire purchase agreement. Hence there must be two notices and the hirer must be given the full period specified in the sub-section. The failure to do so will result in the notice been invalid. None can contract outside the provisions of the Act.[2]

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[1] (2011) 2 Sri.L.R. 182

[2] *Raymond Fernando v. Bank of Ceylon* (2000) 1 Sri.L.R. 12

The Plaintiff strived to establish that the requirements in section 18(1) of the Act and clause 12(1) of the Agreement were fulfilled by documents marked පැ.51, පැ.52, පැ.53 and පැ.54. I will consider each of these documents to ascertain whether they do so.

පැ.51 is a letter dated 6.11.1990 sent by the Defendant to the Plaintiff. It states that unless within three (3) days from the date of letter arrears of the hire is paid the hire will terminate in terms of clauses 13 and 14 of the Agreement. This notice has no validity in law as it fails to comply with the two weeks' notice period stipulated in both clause 12(1) of the Agreement and 18(1) of the Act. පැ.52 is a letter dated 24.12.1991 whereby the Plaintiff informs the Defendant that the Agreement is terminated for non-payment of the hire. Hence පැ.52 is a notice of termination. But it has been sent without first sending a valid notice as required by clause 12(1) of the Agreement and 18(1) of the Act. Accordingly, පැ.52 has no force in law. This is the letter that was referred to as due notice in letter marked පැ.58 dated 22.7.1993 sent by the attorney-at-law for the Defendant to the Plaintiff.

පැ.53 is a letter dated 5.10.1992 sent by the Defendant to the Plaintiff. It states that unless within three (3) days from the date of letter arrears of the hire is paid the hire will terminate in terms of clauses 13 and 14 of the Agreement. This notice has no validity in law as it fails to comply with the two weeks' notice period stipulated in both clause 12(1) of the Agreement and 18(1) of the Act. පැ.54 is a letter dated 2.12.1992 sent by the Defendant to the Plaintiff. It states that unless within three (3) days from the date of letter arrears of the hire is paid the hire will terminate in terms of clauses 13 and 14 of the Agreement. This notice has no force in law as it fails to comply with the two weeks' notice period stipulated in both clause 12(1) of the Agreement and 18(1) of the Act.

Accordingly, the Defendant has failed to establish that the Agreement was duly terminated upon the failure of the Plaintiff to pay the hire in terms of the Agreement.

The Defendant also took up the position that the Plaintiff had sold the Vehicle to one R. Dayasena without the consent of the Defendant and that therefore the Defendant had the right in terms of the Agreement and the Act to repossess the Vehicle. Clause 4(o) of the Agreement imposes a duty on the Hirer(Plaintiff) not to sell the Vehicle. Where the Hirer(Plaintiff) breaches this obligation, it is clause 12(2) of the Agreement and Section 18(2) of the Act that applies. Clause 12(2) of the Agreement reads as follows:

"12(2). If the Hirer:-

(a) does any act with regard to the Vehicle to which this Agreement relates which is inconsistent with any of the terms of this Agreement;

(b) breaks any express condition of this Agreement the Owners shall be entitled to terminate the hire under this Agreement by giving the Hirer not less than thirty days' notice in writing specifying the particular breach of act which entitled the Owners to terminate the hire under the Agreement.

Provided however that in any case where the breach or act specified in the notice is capable of being remedied by the Hirer it shall be the duty of the Owners to require the Hirer by such notice to remedy the breach or act complained of before the expiry of the said period of thirty days and if the Hirer remedies the breach complained of before the expiry of the said period of thirty days the Owners shall not be entitled to terminate the hire under the Agreement."

The question that arises is whether clause 12(2) of the Agreement and Section 18(2) of the Act requires two notices like in clause 12(1) of the Agreement and section 18(1) of the Act. Section 18(1) of the Act uses the words "නොඅඩු ලියවිල්ලකින් වූ දැන්වීමක් කුලියට ගන්නාට දීමෙන් **පසු** අවසන් කිරීම පිළිබඳ ලියවිල්ලකින් වූ දැන්වීම" "(emphasis added)(the English version is "**after** giving the hirer notice in writing .....the owner shall be entitled to terminate the agreement by giving the hirer notice of termination in writing") ")(emphasis added). Clearly this contemplates two notices as interpreted by the Supreme Court in *L.B. Finance Ltd. v. Weligamage and*

Others[3]. However, the wording in section 18(2) of the Act is different. Unlike section 18(1) It does not refer to a "notice of termination". The wording is "දින තිහකට නොඅඩු ලියවිල්ලකින් වූ දැන්වීමක් කුලියට ගන්නාට දීමෙන් ගිවිසුම අවසන් කිරීමට ඔහුට..."(English version is "owner shall be entitled to terminate the agreement **by** giving the hirer not less than thirty days' notice in writing...")(emphasis added). Unlike section 18(1) it does not use the word "පසු". The English version of section 18(2) uses the word "by" whereas section 18(1) uses the word "after". In these circumstances, I am of the view that section 18(2) requires only one notice.

The learned District Judge appears to conclude that the Plaintiff had in fact sold the Vehicle to one R. Dayasena without the consent of the Defendant. However, even in that situation the Defendant should have given the Hirer not less than thirty days' notice in writing specifying the particular breach or act which entitled the Owners to terminate the hire under the Agreement. There is no evidence of such a notice and thus the Defendant has failed to establish that clause 12(2) of the Agreement and Section 18(2) of the Act was complied with prior to seizure of the Vehicle.

In view of these facts, I am of the view that the learned District Judge was correct in concluding that the Defendant had seized the Vehicle without lawfully terminating the Agreement.

The Defendant has in the written submissions sought to argue that the Plaintiff had repudiated the Agreement by selling the Vehicle to one R. Dayasena and that therefore the Defendant had the right to repossess the Vehicle.

Repudiation may occur either expressly, as where a party states in so many words that he will not discharge the obligations he has undertaken, or impliedly, as where by his own act a party disables himself from performance or makes it impossible for the other party to render performance.[4]Where one party repudiates a contract, the other party has two options. One is to accept the repudiation and sue for damages immediately or the other is not to accept the repudiation and consider the contract as still subsisting. Where the innocent party elects to

[3] (2011) 2 Sri.L.R. 182
[4] Weeramantry; *Law of Contracts*; Vol. 2 page 879

accept the repudiation and treat the contract as cancelled, such election has been held to be effective only if communicated to the party in breach.[5]

These are some of the general principles of the law of contract governing repudiation. When parties contract party autonomy empowers them to give effect to these general principles according to their intentions. The legislature has also at times incorporated these general principles with or without modifications. That is what is to be garnered when one considers Clause 4(o) of the Agreement, which imposes a duty on the Hirer(Plaintiff) to not sell the Vehicle with clause 12(2) of the Agreement and section 18(2) of the Act. There can indeed be repudiation where the Hirer(Plaintiff) sold the Vehicle to a third party. However, an unaccepted repudiation is a thing writ in water.[6] Clause 12(2) of the Agreement and section 18(2) of the Act sets out how such a repudiation should be accepted if the Owner(Defendant) wishes to do so. Defendant should have given the Plaintiff not less than thirty days' notice in writing specifying the particular breach or act which entitled the Owners to terminate the hire under the Agreement. The Defendant has failed to do so. In these circumstances, it is the Defendant who has breached the Agreement. In *Raymond Fernando v. Bank of Ceylon*[7] the Supreme Court held that the hire purchase agreement had not been duly terminated in terms of section 18 of the Act as the required two weeks' notice was not given.

For the foregoing reasons, I see no reason to interfere with the judgment of the learned District Judge of Bandarawela dated 4th June 1996 and dismiss the appeal with costs.

Judge of the Court of Appeal

M.M.A. Gaffoor J.

I agree.

Judge of the Court of Appeal

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[5] Ibid. page 881
[6] Per Asquith L.J. in *Howard v. Pickford Tool Co. Ltd.* (1951) 1 K.B. 417 at p. 421
[7] (2000) 1 Sri.L.R. 12