FAILURE OF CONSIDERATION : AN APPRAISAL OF *ROWLAND* V. *DIVALL*

AN ATTEMPT has been made in this comment to analyze the criticism of the rule of *Rowland* v. *Divall*[1] and to reaffirm its correctness, as also to point out how its application in *Butterworth* v. *Kings Motors Ltd.*[2] has resulted in miscarriage of justice.

Analysis of the rule

In *Rowland*[3] the plaintiff, a buyer, purchased a car from the defendant and after having used it, was compelled to surrender it to the true owner, for want of title on the part of seller. The court rightly held that there was a total failure of consideration. In the opinion of Bankes LJ "the plaintiff was entitled to recover the whole of the purchase money, and was not limited to his remedy in damages". While agreeing with this viewpoint, Atkin LJ observed:

> [T]he buyer has not received any part of that which he contracted to receive—namely, the property and right to possession—and, that being so, there has been a total failure of consideration.[4]

In *Margolin* v. *Wright Pty. Ltd.*,[5] Hudson J followed the rule laid down in *Rowland*, in which subsequent to purchase of a car by the plaintiff, it was seized by Commonwealth authorities for contravention of the Customs Act by a previous owner. It was held that the plaintiff was entitled to rescind the contract and recover his consideration money. Divesting of title related back to the date of contravention of the rule of Customs Act.

Atiyah, while criticizing the judgement in *Rowland* observes as follows:

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1. (1923) 2 K B. 500. The rule in the case is that where the buyer has to surrender the goods to the true owner for want of title in them on the part of the seller, he (buyer) is entitled to the return of whole price. The seller is not entitled to withhold any part of the consideration money as depreciation value on the ground that the buyer used and enjoyed the possession of goods between the period of delivery to him and his return to the true owner. The reason is that the seller, after having committed the breach of condition as to title, cannot take advantage of his own wrong.
2. (1954) 2 All E. R. 694.
3. *Supra* note 1.
4. *Id.* at 507.
5. (1959) Arg. L.R. 988.

> It is indeed possible to imagine circumstances, by no means unrealistic which are far more extreme than those in the above cases. For example, suppose that A buys a crate of whisky from B. Suppose further, that after consuming the whisky, A discovers that it never belonged to B but that B had bought it in good faith from a thief. Is it to be said that A can recover the full purchase price on the ground that there has been a total failure of consineration?[6]

It is submitted that the passage from the learned author is open to question on the following ground:

The author compares durable goods with consumable ones. The facts and circumstances of the case warrant that the author's comparison should relate only to durable goods. The courts of law must do justice according to the facts and circumstances of a particular case. If the seller sells goods, he takes money in exchange for passing of property in goods to the buyer. If he could not pass that, he must pay back what he has received in lieu of that. Suppose, the seller is asked to return the purchase price to the buyer after deducting any amout commensurate to the benefit received by him (buyer) then what is he to do with the true owner taking proceedings against him for conversion and damages sustained? In other words, if the buyer has used the goods of the true owner, naturally he should be liable to him and him only for the reason that it may encourage dishonesty and lethargy on the part of the seller. It is not for the seller to seek deduction for the use of those goods. If anyone is entitled for damages, it is the true owner only. Hence, one wonders as to how the learned author pleads for payment to the seller of a sum, after deducting it from the price of the motor car for benefit so derived. In so far as the buyer and seller are concerned, there is a total failure of consideration. This disposes of the argument of another learned author—Friedman, who remarks:

> Suffice it to say here that the approach of the Court of Appeal in *Rowland* v. *Divall* leads to great difficulty. It might have been better if the court had either adopted the view that the delivery of goods, and not transfer of property was the consideration for the payment of the price, or had refused the plaintiff a remedy on the basis of failure of consideration, permitting a remedy only on footing that what was involved was the breach of a condition, implied by statute under Section 12.[7]

The court had taken a comprehensive view of the whole situation, the right to property is closely linked with the right to possession. If there is

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6. See P.S. Atiyah, *The Sale of Goods* 46 (4th ed. 1974).
7. See Friedman, G.H.L., *Sale of Goods* 98 (1966).

no right to property, the right to possession is likely to be disturbed by the true owner. The former amounts to condition and the later amounts to warranty. So their Lordships have rightly held that because of the breach of the above rights, there was a total failure of consideration.

Now we shall further examine the example of a consumable item like whisky given by Atiyah. Suppose the whisky has been consumed by the buyer and later on if he discovers that it was stolen and the true owner demands the whisky which he cannot return to him, he will instead of returning the whisky like the car as in *Rowland* pay the price for it for conversion under the law of torts. In that case he will recover the price from the seller to whom he had made the payment. There will be no chance for anyone to unjustly enrich himself at the expense of the other. Under these circumstances, the buyer returning the money to the true owner may have to face a practical difficulty, *i.e.*, he may not be able to trace his seller for realising the price of goods. It is open to the purchaser to recover it from the thief, if he can do so. If he cannot, such person has more reason to blame himself than anybody else because he had better chances of ascertaining the honesty of his transferor. In view of the above, the argument of Atiyah holds no ground when he says:

> The object of a contract of sale is surely to transfer to the buyer the use and enjoyment of the goods free from any adverse third party claims. If the buyer has such use and enjoyment and no third party claim is made against him it is submitted that it is quite unrealistic to talk of a total failure of consideration.[8]

The learned author accepts that the object of sale is to transfer the use and enjoyment of goods without any adverse claim from any one. It may be pointed out that it is only a warranty. The main object, and a basic one, is to transfer property in goods. If that is not achieved, consideration will fail. If the true owner does not demand damages for such use and enjoyment, how can the seller claim it? On the same ground, the recommendation of the Law Reform Committee[9] is not correct when it recommends that in *Rowland* situation, the buyer should not be allowed to claim the return of whole price.

Butterworth v. *Kings Motors Ltd.*

The application of the rule in *Rowland*[10] to *Butterworth*[11] has led to very strange results, where the plaintiff, apart from paying nothing for using the

8. *Supra* note 6 at 47.
9. 1966 Cmnd. 2958, para 36.
10. *Supra* note 1.
11. *Supra* note 2. The facts of the case are as follows: A, a lady had purchased a car

car for eleven and a half months, was held entitled to receive £475 as damages for breach of warranty from the defendant.

It may be noted that the plaintiff purchased the goods under an ordinary contract of sale, as distinct from a hire-purchase transaction. The plaintiff was the fourth person to purchase under the successive line of purchasers. Had the court applied the rule of Sale of Goods Act 1930, the plaintiff would not have succeeded in repudiating the contract and receiving damages. Thus, injustice was caused to the defendant.

Pearson J is convinced all along that there was no trick, larceny, bad faith or deceit involved anywhere in the case. Then, if the plaintiff seeks equity, he must do equity. That is, if he wants a return of his money, at a time when all the instalments have been paid and he is undisturbed in his possession and there is no fear of the car being taken away out of his possession. he must be asked to compensate the defendants for using the car for so long. It is really surprising that his Lordship has solely relied[12] upon the arguments and observations of Bankes LJ and Atkin LJ in *Rowland.* Atkin LJ has observed in that case that the full consideration was liable to be returned to the plaintiff because he was deprived of both possession and property and that there was total failure of consideration.[13]

But the disparities betwen the facts and circumstances of *Rowland* and the case under comment are so glaring that there is no question of following the rule of the former in the latter. The differences between the two are as follows:

(1) In *Butterworth* the hirer made the payment of the balance instalments to the original owner within one week of the receipt of his notice by the plaintiff to surrender the car, but in *Rowland* the seller had never made any offer to make the full payment of the car to its true owner.

(2) In the former case, the hirer had purchased the car from the true owner and therefore her title was only defective[14] due to the non-payment

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under a hire purchase agreement and sold it to B, B to C and it was subsequently purchased by the defendants who sold it to the plaintiff. A had sold the car under an erroneous belief that she was entitled to do so. However, the original owners on receiving the information, that the car was under the possession of the plaintiff, notified him and asked him to surrender it. A, immediately on receipt of this notice and information deposited the balance instalments with the original owners and thus complete ownership of the car was vested with her. However, when the plaintiff after use of almost one year got this information he lost no time in repudiating the contract and thus recovering full contract price plus £ 475 as damages apart from the benefit which he derived by using and enjoying the car.

12. *Id.* at 700.

13. *Supra* note 4.

14. In every hire purchase agreement, there is an element of bailment, coupled with conditional sale. See *Instalment Supply Ltd.* v. *S.T.O., Ahmedabad,* A.I.R. 1974 S.C. 1105.

of certain instalments; but in the latter case, there was no title in the car at all with original seller as it was a stolen car.

(3) In the former case the threat, or apprehension, to surrender the car to the original owner had ceased after the hirer had promptly deposited the balance instalments to him; but in the latter case, the car had to be surrendered under compulsion to the true owner.

(4) In the former case, both the original buyer and seller, had acquired right under the contract; but in the latter, the original seller was a thief without any right or title in the goods. Therefore, he could confer none on any subsequent buyer.

(5) Under the Sale of Goods Act, a person purchasing the goods in good faith from a person who, having agreed to buy them had obtained their possession with the consent of the true owner and subsequently sold them, confers a good title upon the subsequent bona fide purchaser for value.[15] However, this rule does not apply to a person buying from a thief[16] in good faith as it happened in the latter case.

(6) In the latter case, the car was bought originally from a thief who could not confer any title upon the buyer. As a result thereof, it had to be surrendered to the true owner. As possession and property both had gone, there was a total failure of consideration; but in the former case, the consideration did not fail at all because the plaintiff had used the car for about one year and there was no apprehension even of remote type about the loss of possession of the car, after the hirer had deposited the balance instalments.

(7) In the latter case, the vendee of stolen car did not surrender the same with any ulterior motive of gain but in the former case, the plaintiff found it convenient to shirk off his liability as a buyer because he found it in his interest to seek the return of his consideration money rather than pay any charges for using and enjoying the possession thereof.

While discussing the differences between the two cases, we have observed that under certain circumstances, the seller confers a better title upon the bona fide buyer for value than what he has. Although the case under comment related to a hire purchase agreement, the ruling was based upon *Rowland* which is purely based on Sale of Goods Act. Under the provisions of this Act, the defendant was totally protected in his right and had acquired a better title than what his transferor had and conferred the same upon the plaintiff. Therefore, there was no question of the plaintiff repudiating the contract. After having accepted the goods, he had lost his right to reject.[17]

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15. *Lee* v. *Butler*, (1893) 2 Q.B. 318. Also refer to section 25(2) of Sale of Goods Act 1893 and section 30(2) of Sale of Goods Act 1930

16. *Lee* v. *Bayes*, (1856) 18 C.B. 599.

17. Section 11(1)(C) read with section 35 of the Sale of Goods Act 1893.

The court should not have aided the plaintiff who had no moral or legal justification to avoid the contract after using and enjoying the possession of the car for such a long time. The sincerity and bona fides of the hirer could not be questioned in the matter due to the fact that immediately after she discovered her mistake, she deposited the unpaid instalments in a lump-sum. Thus, the plaintiff was saved of all botherations. Then what was there for grumbling and avoiding his contractual obligations? How can it be said that there was a total failure of consideration? Section 25 (2) of the Act of 1893 contains an equitable rule which is meant to protect the interest of a bona fide buyer at the cost of the real owner. Thus no harm is involved in refusing to enforce the claim of a plaintiff under *Butterworth* in a situation where no one is a sufferer in the real sense. But the cunning and shrewd plaintiff wants to thrive at the expense of the defendant, by taking advantage of some loophole or technical defect in law. Even if we consider the legal aspect under the Hire Purchase Act, the courts have allowed the interested buyers from the hirers to deposit the balance instalments where their interests were at stake.[18] One may note that when the court does not penalise the hirer for his default in terms of contract and for breach of condition as to title and breach of warranty as to quiet possession, then it cannot object to a mere technical breach of condition when there was in fact breach of none.

In *Butterworth* the true owner had sold the car under the hire purchase agreement. His rights were enforceable against all the parties under the provisions of Hire Purchase Act. Therefore, it was open to the true owner to seek the return of his own goods from the plaintiffs. But it was not open to the plaintiff to repudiate his contract for no equitable and genuine reasons when the true owner did not compel him to return the car.

As an alternative to the action suggested above, the doctrine of *quantum meruit*[19] could be applied to this case. Under the doctrine, the plaintiff was bound to compensate the defendant for the depreciation in the value of the car which took place during the period of use and enjoyment.

It is suggested that a provision should be inserted in the Sale of Goods Act to cover a situation like the one which arose in *Butterworth*. It is quite equitable not to grant relief to the buyer evading his responsibilities for nothing. The provision will neither be against the public policy, nor will it go against the spirit of the Hire Purchase Act, in so far as the rights of the owner remain intact. Only the subsequent buyer from the hirer will

18. *Belsize Motor Supply Co. Ltd.* v. *Cox*, (1914) 1 K.B. 244; *Whitley* v. *Hilt*, (1918) 2 K.B. 808; *Wicham Holdings Ltd* v. *Brooke House Motor Ltd.*, (1967) 1 W.L R. 295.

19. It literally means as much as he has earned A claim on *quantum meruit* arises when work has been done and accepted under a void contract believed to be valid, *Craven Ellis* v. *Canons Ltd.*, (1936) 2 K.B. 403.

not be able to take the benefit of the provisions of Hire Purchse Act if his purchase is not covered by that Act.

The laws should be applied and administered so as to render justice and redress grievances. The courts must, in order to meet this end strive hard to interpret the law in such a manner that one may not be able to make a mockery of his contractual obligations. Where the laws ase harsh, the equity must step in to mitigate their rigour. Mere niceties of legalities, unaccompanied with business ethics and with utter disregard to the human nature (to err is human) is liable to lead the parties to grave injustice and hardship, resulting from inequitable legal decisions.

Conclusion and suggestion

The decision in *Rowland* is based upon twin equitable rules, *viz*, one who seeks equity must come with clean hands and, one should not be enriched at the expense of another. Only the true owner could claim damages arising out of free use and enjoyment of the car and not the seller. In cases like the one in *Butterworth* if the courts handle it in the light of suggestions offered above, it is submitted, no injustice will take place.

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