APPELLATE CIVIL.

Before Sir Murray Coutts Trotter, Kt., *Chief Justice and Mr. Justice Anantakrishna Ayyar.*

THE AUTO SUPPLY Co., LTD. (PLAINTIFF), APPELLANT, 1929, March 15.

v.

V. RAGHUNATHA CHETTY (DEFENDANT), RESPONDENT.*

Hire-purchase agreement—Motor bus delivered under—Hirer to pay initially by way of hire without demand a certain sum and subsequently instalments of smaller sum—Hirer to hold vehicle as bailee till whole amount paid—Owner to be entitled to terminate contract and recover vehicle in case of default in instalment—Breach by hirer—If hirer entitled to return of balance of initial payment after deducting a month's hire on basis of subsequent payments.

A motor bus was delivered under a hire-purchase agreement, containing the following amongst other terms :—

(*a*) The hirer shall pay at Madras by way of hire without demand the sum of Rs. 1,140 and thereafter a sum of Rs. 226 on the twelfth day of every calendar month beginning with the month next after the date herein until eleven monthly instalments have been made, unless he shall have terminated this agreement as hereinafter provided.

(*b*) The hirer acknowledges that he holds the vehicle as a bailee of the owner and shall not have any property or interest as purchaser therein until he shall have exercised his option of purchase as herein provided, and shall have paid the whole amount due under this agreement.

(*c*) The owners may terminate the contract of hiring and forthwith recover possession of the vehicle, if any monthly hire is in arrear and left unpaid for seven days after the date fixed for its payment.

The hirer committed default in the payment of the monthly instalments, and the owner terminated the hiring and claimed delivery of the bus with payment of arrears then accrued.

* Original Side Appeal No. 1 of 1929.

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Held, that the initial payment of Rs. 1,140 was not by way of advance of rent but only the first instalment of rent, and that the hirer, on the termination of the agreement, was not entitled to the return of the balance of that sum after the appropriation out of it by the owner of Rs. 226 as being rent for the first month.

Helby v. *Mathews*, [1895] A.C., 471, followed.

Per ANANTAKRISHNA AYYAR, J.—Even if the initial payment be regarded as a premium for granting the hire, the hirer who broke the contract was not entitled to its return.

ON APPEAL from the judgment of Mr. Justice BEASLEY, dated 24th day of October 1928, passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C.S. No. 316 of 1928.

The facts necessary for this report appear in the Judgment.

Nugent Grant for appellant.—The only point to be argued is as to the character of the initial payment, whether it is an advance of hire or hire for the first month, in other words, in the event of a breach of the agreement by the hirer, and the consequent termination of the agreement, the hirer is entitled to a return of the balance of the initial payment after deducting Rs. 226 as and for the first month's hire. There is now no dispute as to whether the agreement is one of hire-purchase or sale. The learned trial Judge has found that it is the former. "By way of hire" used in the agreement excludes the operation of those English and Indian decisions which deal specifically with "advance hire." The initial payment is fixed at a considerably higher figure than the rate of the subsequent payments so as to provide against the contingency of the vehicle being thrown back on the hands of the owner after a month or so when the value of the car would have depreciated. The rate of subsequent payments would undoubtedly have been higher but for the substantial initial payment. *Helby* v. *Mathews*(1) recognizes these circumstances and is a strong authority in my favour. See also *Brooks* v. *Beirnstein*(2).

G. Krishnaswami Ayyar for respondent.—To construe the contract as contended for on the other side would work a great

(1) [1895] A.C., 471. (2) [1903] 1 K. B., 98.

hardship on the hirer. The initial payment would on that construction become a penalty and the Court ought to relieve against it. In *Helby* v. *Mathews*(1) the initial payment was a very small sum. In *Brooks* v. *Beirnstein*(2) there was a clear provision that the first payment was in no case returnable.

JUDGMENT.

COUTTS TROTTER, C.J.

COUTTS TROTTER, C.J.—This case turns on the construction of an agreement, dated the 12th of September 1927, which is commonly called a hire-purchase agreement. By that agreement, the plaintiffs, the Auto Supply Company, Limited, delivered a Morris motor bus of which they were the owners to the first defendant who hired it under the terms of the agreement. The terms were these :—

By clause (3), the hirer was to pay by way of hire without demand a sum of Rs. 1,140 on delivery, and thereafter a sum of Rs. 226 on the 12th day of every month, beginning with the month next after the date of the agreement, until eleven monthly instalments had been made, unless in the interim he should have terminated the agreement.

Then, by clause (4), in the event of all the stipulated monthly hire being duly and punctually paid, the vehicle was at the hirer's option to become his absolute property but he had a further option to buy the vehicle outright at any time during the currency of the agreement by paying the balance of all the hire stipulated under the agreement. By clause (2) the hirer was to pay the owners a sum of Re. 1 as consideration for the option to purchase given to him. It was also provided that the owners might terminate the contract of hiring and forthwith recover possession of the vehicle in certain events, one of which was that the hire for any given

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month was in arrear and left unpaid for seven days after the date fixed for its payment (clause 4 (*a*)). That is the event which happened. No monthly instalments were paid for March, April, May and June 1928, the total amount due to the owners in respect of those months being Rs. 904. On the 30th June 1928, the plaintiff company terminated the hire and called for delivery of the bus to them with payment of the arrears then accrued. This was not done and the plaintiff filed the present suit for possession of the bus or, in lieu of that, Rs. 2,500, its estimated value at the time, for the arrears of hire, i.e., Rs. 904 and for damages for wrongful detention from the date of demand, i.e., 30th June 1928.

The learned Judge has held that the agreement before us was a hire-purchase agreement which I take to mean that it was a hiring with an option of purchase to the hirer on the fulfilment of the stipulated conditions and was not a sale which would pass the property in the bus to the hirer with stipulated retardation of payment of the purchase price by monthly instalments. It has not been questioned by either side that the learned Judge was right in so finding and that takes us out of the ambit of the decision in *Lee* v. *Butler*(1), and the position is that which is dealt with in the leading case of *Helby* v. *Mathews*(2). The learned Judge has decided that on the termination of the hiring the plaintiff owners were not entitled to retain the Rs. 1,140 paid as an advance under the agreement but only to Rs. 226 corresponding to the ordinary monthly instalments for the balance of the duration of the hiring. This seems to me to be adding a term to the contract which is not there. No doubt it was in the contemplation of the

(1) [1893] 2 Q.B., 318. (2) [1895] A.C., 471.

draftsman of the agreement that the sum of Rs. 1,140 was something more than what it is described as being, namely, the first month's hire, and that for the protection of both parties. Every one knows that a new motor vehicle after it has been on the road for even a month is depreciated in the market by something like 50 per cent, and I make no doubt but that the object of this clause is to prevent the hirer turning a new into a second hand car, depreciate it 50 per cent, and then put it on the hands of the owners in that condition. It is quite true that there is no express clause in this contract that on the termination of the agreement either by return of the vehicle by the hirer or by breach of the conditions of the agreement by him, he shall forfeit all he has already paid including the initial sum of Rs. 1,140, but it appears to me that it is a necessary implication of the contract and I so hold. The learned Judge thinks that this is a case of hardship for the defendant, the hirer. Were his decision to be upheld, it seems to me that it would be an intolerable hardship on the owners. They hand over a new car, it can be thrown back on their hands at the end of a month on payment of the small sum of Rs. 226, leaving in their hands a car depreciated 50 per cent in its value. Indeed, if the sum of Rs. 1,140 is not to be treated as hire at all, I do not see why it should not be open to the hirer to return the car one day before the end of the first month and have had a month less one day to use the car for nothing. It is quite true, as I have already said, that there is no express provision in this agreement that, when the agreement is terminated by the choice of the hirer or by his default, all sums paid by him up to date are to be retained by the owners without giving credit to him for a farthing. But it seems to me that it is a necessary implication of this agreement that such

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sums should be irrecoverable by the hirer and that we should not be justified in treating the initial payment of Rs. 1,140 as in any event returnable to him on the termination of the hiring. There is no question here of any misleading of the hirer; he signed the agreement with his eyes open and in many ways it was an exceedingly favourable agreement to him in that he could at his own choice put an end to the hiring whenever he was so minded. But I think it must be a necessary implication that he was not entitled to get back anything which he had paid under the terms of the agreement. I have no doubt that the initial payment was made a heavy one with the express purpose of acting as a deterrent to hirers throwing back road-depreciated cars on the hands of the owners within a few months of the commencement of the hiring. On the best view I can form of this case, I feel constrained to differ from the conclusion of the learned Judge and to allow this appeal with costs.

ANANTAKRISHNA AYYAR, J.

ANANTAKRISHNA AYYAR, J.—As I have the misfortune to differ from the learned trial Judge in this case, and as the case raises a question of importance relating to the incidents of hire-purchase agreement, I feel bound to express in my own words the reasons for my decision. The plaintiff in the original suit, Auto Supply Co., Ltd., is the appellant before us. In pursuance of an agreement, dated the 12th of September 1927, the plaintiff delivered a Morris motor bus to the first defendant (the second defendant stood surety for the first defendant). Under the terms and conditions contained in the said agreement, the first defendant paid a sum of Re. 1, in consideration of the option to purchase given to him under clause 2 of the agreement; and under clause 3 he paid in September 1927, a sum of Rs. 1,140 to the plaintiff; he also paid to the plaintiff by way of hire

Rs. 226 in each of the months after September 1927. The first defendant committed default in the payment of the monthly instalments due for the months of March, April, May and June 1928; i.e., on the 12th of June 1928, there was due by the defendant to the plaintiff a sum of Rs. 904. On the 30th of June 1928 the plaintiff company exercised its right under the agreement and terminated the hiring and called upon the defendant to deliver the motor bus to the plaintiff and to pay the arrears due. The defendant not having done so, the plaintiff filed the suit for possession of the motor bus, or in lieu of it Rs. 2,500 its present value, for the arrears of hire Rs. 904, and also for damages for wrongful detention from the 1st July 1928 until delivery of the bus to the plaintiff. The learned Judge decreed the suit in plaintiff's favour, but held that out of Rs. 1,140 paid by the defendant to the plaintiff in September 1927, the plaintiff was entitled to retain only Rs. 226, as for hire for the first month and that credit must be given by the plaintiff to the defendant for the balance (Rs. 1,140 minus 226 or Rs. 914). It is against this portion of the decision of the learned Judge that the plaintiff company has preferred this appeal.

The first question to be considered is, what is the exact legal nature of the agreement between the parties. It is necessary to distinguish between (1) contracts to buy and pay by instalments, and (2) contracts to hire, the hirer having an option to return goods, with a provision that on payment of certain number of instalments the article should belong absolutely to the hirer. In a contract of sale for a price payable by instalments, the purchaser has no option of terminating the contract and returning the chattel,—whereas, in a contract of hire-purchase, the hirer has such an option. In the case of a hire-purchase contract, the hirer has got an option to

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purchase, which he may exercise or not, according to his sweet will and pleasure; but in the case of a contract of sale, the purchaser has become the owner of the chattel, but the price is by agreement payable by instalments. This distinction has been well pointed out in the judgment of the House of Lords in the case of *Helby* v. *Mathews*(1). The learned trial Judge in the case before us held that the agreement in question was a hire-purchase agreement. That finding is not disputed before us by either of the parties. The question then is, whether the learned Judge's direction that the plaintiff should give credit to the defendant for the difference between Rs. 1,140 paid in September 1927 and Rs. 226, is correct. Now turning to the terms of the agreement between the parties, I find that clause 2 of the agreement provides that "on the signing of the agreement, the hirer (the defendant) shall pay the owners (the plaintiff) a sum of Re. 1 in consideration of the option to purchase given to the hirer hereunder and the said sum shall become the absolute property of the owners." Clause 3 is important: "The hirer shall pay at Madras by way of hire without demand the sum of Rs. 1,140 and thereafter a sum of Rs. 226 on the 12th day of every calendar month beginning with the month next after the date herein, until 11 monthly instalments have been made, unless he shall have terminated this agreement as hereinafter provided. The hirer acknowledges that he holds the vehicle as a bailee of the owner and shall not have any property or interest as purchaser therein until he shall have exercised his option of purchase as hereinbefore provided and shall have paid the whole amount due on this agreement." "The owners may terminate the contract of hiring and forthwith

(1) [1895] A.C., 471.

recover possession of the vehicle if any monthly hire is in arrear and left unpaid for seven days after the date fixed for its payment." It is admitted that the defendant committed default in payment of the amounts due for the month of March and the subsequent months. The question is whether on the true construction of the agreement the defendant is entitled to credit for the sum of Rs. 914. If on a proper construction of the contract the defendant is not entitled to the same, then the defendant's contention must be overruled, and no question of any "hardship" to him would, in my view, arise. The parties dealt at arms length and there is no question of the bargain pressing hard on one, and not on the other. For the considerations recited in the agreement and moving from one party, the other party has undertaken to do something. It is admitted that the defendant is not entitled to the return of any of the instalments paid from October 1927 to February 1928; but it is contended that the defendant is entitled to the return of Rs. 914 out of the amount of Rs. 1,140 paid by the defendant to the plaintiff on the date of the agreement when the bus was delivered to the defendant. Is there any reason for making any distinction between the payment made in September 1927 and the other payments made subsequently? The agreement speaks of all these payments as payments made "*by way of hire.*" The amount of hire payable by the defendant to the plaintiff has been fixed by the parties; that which is payable in September 1927 has been fixed by them at Rs. 1,140 and that which is payable on the 12th of each of the succeeding 11 months has been fixed by them at Rs. 226. As it is admitted that it is the defendant who broke the contract, *prima facie* he is not entitled to recover any amounts paid by him to the plaintiff. If this amount of Rs. 1,140 be treated as "*hire*", it is clear

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that it is hire paid by the defendant for the use of the bus, and it stands on the same footing as the subsequent instalments paid by him; and as he had the use of the bus for the period, the defendant is not entitled to the return of any portion of the hire paid by him. The learned Judge says that the plaintiff is not entitled to retain Rs. 1,140, treating the same to have been paid "as advance of rent" on entering into the agreement; the agreement does not mention this sum as "an advance of rent." My attention has not been drawn to any evidence, or provision in the document, that the sum of Rs. 1,140 was paid as "*advance*" of rent. If once it is proved or admitted that it is "an advance of rent," then quite different considerations would apply. But, as already mentioned, there is no evidence to support the finding that the amount in question was paid as advance of rent. If parties treated it as "advance of rent," then naturally one should expect the agreement to contain specific provision as to how this advance of rent was to be dealt with subsequently, whether the same should be returned to the hirer or whether the same should be taken towards the rent due for some particular instalments. The agreement in question does not make any such provision. Further, there is no warrant in the case for the view that the hire (rent) due for September 1927 was only Rs. 226. The agreement only states that the hirer shall pay by way of hire the sum of Rs. 226 on the 12th day of every succeeding month after September 1927 until 11 monthly instalments have been made, unless in the meantime he shall have terminated the agreement. The provision, as I understand it, is not that the parties have agreed that the proper rent for each month is Rs. 226, but they have made a consolidated provision that the hirer shall pay by way of hire a sum of Rs. 1,140 at the time of the

delivery of the bus to the defendant and also pay a sum of Rs. 226 on the 12th day of 11 subsequent months. The essential difference is this. According to the defendant's view, Rs. 226 would represent the rent of a new motor bus for the first month of its user, and the same would be the proper rent for each of the 11 months following. If so, the defendant could have the use of a new motor bus for one month by paying Rs. 226 and he could at the end of the period return the same without being under any further liability to the plaintiff. Again, if defendant's view be upheld, he could return the bus just one day before the expiry of the first month without being liable to pay any amount as rent. Obviously no owner of a new motor bus would agree to let the same on such terms. The obvious intention of the parties should therefore be taken to be that the first instalment of rent to be paid was to be Rs. 1,140 and that payable for each of the other instalments was to be Rs. 226. There is nothing wrong in the parties agreeing to different amounts to be paid as rent for different periods. The reasonable view to be taken of the agreement is, in my opinion, that the defendant paid Rs. 1,140 as the first instalment of rent, and agreed to pay 11 further subsequent instalments of Rs. 226 each on the 12th of every succeeding month, so long as the agreement continued to be in force. But for the fact that the initial payment made by the defendant was a comparatively large amount, the amount due for each of the subsequent instalments would have been much more than Rs. 226, in other words, in fixing the amount of the subsequent instalments, the parties had due regard to the amount of initial payment made by the defendant to the plaintiff. If the amount to which the plaintiff would be absolutely entitled in case of breach of the agreement by the defendant was to be only Rs. 226, that is, only a portion

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of the initial payment, then, it stands to reason, as was contended before us, on behalf of the appellant, that the amount of the subsequent instalments would have been fixed at a very much higher figure than Rs. 226. I am therefore of opinion that the amount of Rs. 1,140 in question should not be taken as an "advance of rent" in the ordinary acceptation of the expression, but that it was the first instalment of rent agreed to be paid by the defendant to the plaintiff for the use of the bus, and that it stands on the same footing as the payments made in respect of the instalments from October to February, and that the defendant is not entitled to a refund of any portion of the same.

If, on the other hand, payment of this amount of Rs. 1,140 should not be treated as payment of rent, it should in my view be taken as a *premium* taken by the owner—the plaintiff—with a view to grant the lease to the defendant. If it should be taken as a premium to grant a lease, then the lease having been granted, the defendant is not entitled to have any portion of the said amount returned to him. The same should be taken to have been paid for the plaintiff's executing and granting the lease; and the defendant enjoyed the benefit of the same when he got the lease. This view receives support from the decision of MUTHUSWAMI AYYAR and BEST, JJ., in *Kammavan Nambiar* v. *Chindan Nambiar*(1). The plaintiff—the landlord—sued to eject the defendant—the tenant—on the ground that the defendant allowed the rent to fall into arrears, and that the landlord was entitled to recover possession on the footing of forfeiture of the lease. It appeared that the defendant had paid the plaintiff a consideration (premium) for the grant of the lease. The lower Courts held that the plaintiff was not

(1) (1894) I.L.R., 18 Mad., 32.

entitled to recover possession before he returned the consideration (premium). The learned Judges of the High Court observed as follows :—

"We do not agree with the Judge that if the clause for forfeiture of the perpetual lease is enforceable, the plaintiff is only entitled to a decree on refund of the consideration paid by the tenant at the time of obtaining the lease. Exhibit A contains no provision for such repayment, and an obligation to refund cannot be inferred from the clause for forfeiture . . . In the case of a lease, the consideration paid for it is exhausted by the grant of the lease, and the tenant's forfeiture of the lease cannot operate to convert the original consideration into a debt."

The High Court held that the plaintiff was entitled to recover possession without returning any portion of the consideration (premium) paid for the grant of the lease. In my view, the principle of that decision would apply to the case before me, in case it is taken that the initial payment made by the defendant in this case should be taken to be in the nature of *premium* for the grant of the lease.

Thus, whether the amount in question be treated, as I am inclined to take it, as the first instalment of rent fixed by the parties to be paid by the defendant for the use of the bus (the amount of the subsequent instalments being fixed having regard to the amount fixed as the (first) initial instalment), or whether the said amount be taken as "premium" paid to the lessor by the lessee for the grant of the lease, in either view the defendant who broke the contract is not entitled to the return of the same. It was suggested that such a construction of the contract works to the great advantage of the one party (the plaintiff) but works hardship on the other (the defendant). The rights of the parties have to be worked out according to the terms of the contract which they entered into with their eyes open ;

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each got under the contract what he bargained for, and there is no question of fraud or mistake. In this case, it seems to me that no question of "hardship" is before the Court for consideration. Further, the judgment of Lord MACNAGHTEN at page 482 of *Helby* v. *Mathews*(1), mentions considerations which would seem to show that there is no question of hardship in such a case at all. His Lordship observed:

> "The advantages are not all on one side. If the object of desire loses its attractions on closer acquaintance—if faults are developed or defects discovered—if a coveted treasure is becoming a burthen and an encumbrance, it is something, surely, to know that the transaction may be closed at once without further liability and without the payment of any forfeit. If these agreements are objectionable on public grounds, it is for Parliament to interfere. It is not for the Court to put a forced or strained construction on a written document or to import a meaning which the parties never dreamed of because it may not wholly approve of transactions of the sort."

The learned advocate for the respondent drew our attention to the circumstance that in *Helby* v. *Mathews*(1) the amount of the initial payment was only 10*s.* 6*d.*, and that the amount of each of the succeeding instalments was also only 10*s.* 6*d.* But, in my view, that does not make any real difference. The subject-matter of hire in Helby's case was a pianoforte; whereas the subject-matter of the agreement before us is, as already mentioned, a new motor-bus; and one can well understand the effect of the first few months' use on the respective chattel concerned, on which will depend the amount of the initial payment of hire. It was also argued on behalf of the respondent that in the case of *Brooks* v. *Beirnstein*(2) there was a specific provision that the hirer was in no case to be entitled to any credit

(1) [1895] A.C., 471. (2) [1909] 1 K.B., 98.

for the amount paid for option or for the said rent or part thereof, except at purchase of the said furniture under the provisions of the agreement. But that circumstance also does not, in my view, make any difference, for the reasons mentioned by me already. In Brook's case, the hirer paid £1 on the signing of the agreement, £14 at the time of the delivery of the furniture and £20 before the 29th of June 1907, in all making £35. He had also paid rent at £7 per month for the subsequent months but got in arrear and owed £51 for rent unpaid. The owners, in exercise of the power given to them by the agreement, retook possession of the goods and claimed the arrears of rent £51 without giving credit to any portion of £35 paid by the hirer. As mentioned by BIGHAM, J., "But in truth the hirer has enjoyed the use of the furniture which was the consideration for the rent, and I can see no reason why he should not be liable to pay the arrears claimed."

Our attention has not been drawn to any Indian case on the point. For the reasons mentioned by me, I am not able to make any distinction between the sum of Rs. 226 paid on various occasions by the defendant, and the sum of Rs. 1,140, the initial payment made by him. If the former represent hire or rent, I think that the latter also should be taken to have the same legal characteristic. There is no evidence to show that the rent for September 1927 was fixed as at something less than Rs. 1,140; I do not feel justified in fixing the proper rent for the first month (September 1927) at Rs. 226, nor am I able to find any evidence or any indication to support the argument that the amount of Rs. 1,140 should be taken as payment of "advance of rent." If, however, the said amount be taken to represent "premium" (consideration) paid for the grant of

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the lease, then the lease having been granted and the defendant having admittedly had possession and enjoyment of the bus for some months, the consideration, that is, the premium paid, has become exhausted by the grant of the lease, and in that view also the defendant is not entitled to the return of the same or any portion thereof. The agreement in question is one of hire purchase and the parties having dealt with each other at arms' length, and each had what he bargained for, no question of hardship arises, in my view of the case. In a case of this nature, it is with great reluctance that I have had to differ from the decision of the learned Judge. But, for the reasons given by me above, I think that the direction in the decree that the defendant should be given credit for the sum of Rs. 914 is not correct, and that the appeal should be allowed with costs.

Attorneys for appellant.—Short, Bewes & Co.

B.C.S.