shall be the person to declare the highest bidder to be the purchaser.

In *Afazuddin's* case the sale was not in this Court but in a Court in Pegu District. But in our opinion the same considerations would apply in both cases. There is no rule in the Burma Courts Manual corresponding to Rule 259 of the High Court Rules and Orders. But it is clear from the rules laid down in paragraphs 219 to 222 of the Manual, that the necessity of a declaration as to the highest bidder by the presiding Judge is not contemplated as part of the procedure of a sale. We must therefore dissent from the decision in *Afazuddin's* case.

For the reasons already given, we set aside the the order appealed from and confirm the sale.

The appellant is entitled to costs of this appeal and also in the trial Court, advocate's fee ten gold mohurs in this Court.

APPELLATE CIVIL.

Before Mr. Justice Brown.

MAUNG BA OH

v.

THE MOTOR HOUSE COMPANY, LTD.*

1929

Mar. 26.

Hire-purchase agreement—Object of such agreement—Clause enabling owner to seize property—Stipulation that amount to be credited to hirer not to exceed balance due, a penalty—Relief against penalty—Contract Act (IX of 1872), s. 74.

A hire-purchase agreement relating to a motor truck provided for payment in nine monthly instalments. The hirer could become the owner of the truck on payment in full of the instalments and a rupee extra. On failure on the part of the hirer to pay any instalment as it became due, the owner was entitled to seize the truck and credit its value as against the amount due but

* Special Civil First Appeal No. 128 of 1928 from the judgment of the Small Cause Court of Rangoon in Civil Regular No. 6659 of 1927.

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subject to a condition that the owner, in no case would credit the hirer with more than the amount still due on the contract.

Held, that the agreement though in form is one of hire, its object is to provide for a contract of sale in which security to the seller is provided for due payment of the purchase price.

Held, that the clause of the agreement which enabled the owner to seize the truck and keep it without making any payment to the hirer even though the value of the truck may be very greatly in excess of the amount due under the agreement, was a stipulation by way of penalty which the Court can relieve against under the provisions of s. 74 of the Contract Act.

Musa Mia v. *M. Dorabjee*, 5 L.B.R. 201; *Singer Manufacturing Company* v. *Elahi Khan*, U.B.R. (1892-96) Vol. 2, 291—*referred to*.

Dantra for the appellant.

Dhar for the respondent.

BROWN, J.—In April 1926 the appellant Maung Ba Oh entered into a contract with the defendant-company for the purchase by him of a Graham Brothers' Motor Truck for the sum of Rs. 3,850. The truck was delivered to the appellant on the 30th of April on his paying Rs. 1,000 as a first instalment towards the price. At the same time he wrote a letter to the defendant-company agreeing to pay the balance within three months by instalments. On the 7th of June 1926 Maung Ba Oh paid the defendant-company a further sum of Rs. 800. He claims that he made another payment of Rs. 165 at the close of June but this payment is not admitted. No other payment was made before October. On the 12th of October the respondent-company wrote to the appellant pointing out that payments were overdue and saying that unless payments were made by the 20th legal action for the recovery of what was due would have to be taken. On the 28th of October the appellant went to the Motor House Company and talked to them about the matter. He had Rs. 127 with him and he paid that sum towards the amount due. The next day he again visited the office of the Company and on

that day he signed a hire purchase agreement with reference to the truck. The document is filed as Exhibit K. It is an ordinary hire purchase agreement in which the Motor House Company are described as the owners of the truck and the appellant is described as the hirer. A total sum of Rs. 2,143 was to be paid in nine months in instalments of Rs. 238 on the 29th day of each month beginning on the 29th of November. On failure on the part of Maung Ba Oh to pay any instalment as it became due, the respondents were entitled to seize the car and credit its value as against the amount due but subject to a condition that in no case should they credit the appellant with more than the amount still due on the contract. Since that date the appellant has paid one instalment of Rs. 238 only and in the month of February 1927 the defendant-company seized the truck. They subsequently sold it to one Binjraj for Rs. 2,750. The appellant filed a suit against the Motor House Company in which he claimed that they had no right to seize the car. He stated that the value of the car when seized was Rs. 3,500 and that at that time there was a sum of Rs. 1,520 only due from him towards the purchase money. He asked for a decree for the difference between these two sums, Rs. 1,980. The defendant-company denied that they were in any way liable to the plaintiff. They pleaded that under the agreement Exhibit K they were entitled to seize the car and that the plaintiff was not entitled to claim anything from them. The trial Judge dismissed the plaintiff's suit and the plaintiff has now appealed.

The document Exhibit K, as I have said, is an ordinary one of hire purchase agreement. The plaintiff however pleads that when he signed it he did not understand what he was signing. It was represented to him by the defendant-company that he was

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merely signing an agreement to pay the balance of the purchase money due on the car by monthly instalments of Rs. 200.

It is admitted that the appellant made two visits to the office of the Motor House Company, one on the 28th of October and one on the 29th. The plaintiff says that his visit on the 29th was not made in order to come to terms about the car but merely in order to have something done to the carburettor. Whilst he was there the document (Exhibit K) was given to him without the blanks being filled in and at the defendant's request he signed it.

He has called two witnesses to support his version of what occurred, Maung Than Sein and his motor driver Maung Tha Byaw. Than Sein says that at the time he was reading a document which was blank, and whilst he was doing so the plaintiff came in. He gave the document up to a "bo", presumably the Manager of the Company or one of the Assistants, and the "bo" gave it to the plaintiff who thereupon signed it. Tha Byaw says he saw the "bo" hand a paper to the plaintiff and the plaintiff write on it. But he admits that he was some distance off. The trial Judge has not accepted this evidence and it does not seem to me to be very convincing.

It is extremely unlikely that the appellant, a business man, would blindly sign a document of this sort. Mr. Bertie, the Manager of the Motor House Company and Mr. Morley, his Assistant, both say that the terms of the document were explained to the appellant before he signed it, and that the blanks in it were filled up. I agree with the learned trial Judge that it is extremely unlikely that the Motor House Company would in the circumstances have agreed not to take any further action for the recovery of what was due on the car in return for

the plaintiff's merely signing an agreement to pay what he was already bound to pay. It is *primâ facie* unlikely that the appellant would have signed a blank document and I think that the evidence of Mr. Bertie and Mr. Morley that the document was not blank when it was signed may be accepted.

Two alterations have been made in the document. In the first clause the period of hire was first of all written down as 12 months; this was subsequently altered to 9, and the date for the payment of instalment was first of all entered as the 15th of each month, but this figure was subsequently altered to the 29th. Mr. Morley says that both these alterations were made before the agreement was accepted by Mr. Bertie. Mr. Bertie says the alterations from 12 to 9 were not then made. The trial Judge has accepted Mr. Morley's statement on this point. The total sum due on the document was shown as Rs. 2,143 and the monthly instalment shown as Rs. 238. These figures were clearly entered in the first instance. Nine times Rs. 238 amounts to Rs. 2,142 and it is clear therefore that the document originally contemplated a period of 9 months, and, whenever the alteration to 9 months was made, it clearly represents the original intention of the parties. I am of opinion that the document (Exhibit K) was signed by the plaintiff of his own free will, that he must be presumed to have understood what he was signing and that it does represent the terms of the contract agreed on between the parties.

As regards the amounts which have been already paid towards the price of the car, I also agree with the finding of the trial Judge. The plaintiff claims to have paid the sum of Rs. 165. The defendant says that this payment was made not towards the price of the car but towards the insurance premium

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thereon. The plaintiff admits that Rs. 165 was paid towards insurance and he has failed to prove that he made more than one payment of that amount. The amount that was due therefore under the original contract at the time of the execution of Exhibit K was the sum of Rs. 3,850 less the three instalments of Rs. 1,000, Rs. 800 and Rs. 127, or a total of Rs. 1,927. The defendant says that the Rs. 220 was by consent added to this sum to represent interest. The interest would work out at a somewhat high rate but not at a rate unusually high for such agreements. Between the purchase and the Exhibit K the plaintiff claims that he spent Rs. 557 in having a body made for the car. That he did spend some money for this has been proved, but I agree with the trial Judge that he has not proved that the value of the truck was increased by the whole amount of the money he spent on this body.

If the terms of the contract, Exhibit K, are to be enforced in their entirety, then it seems to me that the suit was rightly dismissed. But the question remains whether the terms of the contract should be enforced in full.

Exhibit K is headed "Memorandum of Agreement between Messrs. The Motor House Co. Ltd., called the owners and Maung Ba Oh, called the Hirer".

Clause 1 of the agreement reads :—"The owners agree to let, and the hirer agrees to hire a truck and accessories as described on the back hereof for the term of 9 months, for the sum of Rs. 2,143 payable down and the balance in monthly instalments of Rs. 238 on the 29th day of each month at Rangoon, the first instalment to be paid on the 29th day of November next 1926."

Clause 2, amongst other things, recites that "it is agreed that the truck shall remain the property of

the owners until and unless the hirer exercises the option" contained in Clause 9.

Clause 3 reads :—"Should the hirer make default in any monthly payment as agreed, or commit any breach of any provision of this agreement or should he die or have a Receiver Order made against him or make any arrangement or composition with his creditors, or should the said truck be seized under execution or legal process, the whole sum then remaining unpaid of the full amount of Rs. 2,143 shall become due and payable forthwith, and the owners shall have the right at any time to retake possession of the said truck and accessories, and to credit the account of the hirer (as against the balance of the said full amount) with an amount representing the fair market value of the machine and accessories in their then condition, but such amount shall not be greater than the whole sum then owing by the hirer to the owner."

Clause 6 says :—"The hirer shall be at liberty at any time during the continuance of the agreement to return the said truck and accessories to the owners, carriage paid, and upon the same being safely received by the owners, they shall be credited to the hirer's account in the same manner and with the same effect as is provided in paragraph 3 hereof provided that the owners shall not be compelled to allow for the said truck and accessories a greater sum than the balance of the whole sum owing by the hirer to the owners. It is the intention of this agreement that on the determination of the hiring under this clause the hirer shall at once pay the balance of the full amount named in clause 1, less an allowance for the fair market value as aforesaid."

And the agreement concludes with Clause 9 :—"It is further agreed that if and when the full amount

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firstly above named shall have been paid to the owners, the hirer shall have the option of purchasing the said truck and accessories for the sum of one rupee, but no such option shall arise in case of termination of hiring under Clauses 3 or 6 hereof."

The construction of a hire purchase agreement with reference to a sewing machine was discussed in the case of *Musa Mia* alias *Maung Musa* v. *Mr. Dorabjee* (1); and also in the Upper Burma case of *Singer Manufacturing Company* v. *Elahi Khan* (2). In each of those two cases the claim made was for hire long after the period when if the amount payable had been paid on the dates due, the machine would have become the property of the hirer. The two cases are not, therefore, analogous to the present case. But, in the Upper Burma case, it was held that the circumstances of the case appeared to bring it within the intended application of section 74 of the Contract Act and, I think the same view may be taken as regards the present case.

Section 74 of the Contract Act provides, "When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named, or, as the case may be, the penalty stipulated for."

Now the agreement in the present case is on the face of it an agreement to hire with an option of purchase, but, as pointed out in the Upper Burma case of *Singer Manufacturing Company*, at page 294, "In construing a contract it is, of course, the duty of

(1) (1910) 5 L.B.R. 201. (2) U.B.R. (1892-96) Vol. 2, 291.

the Courts to look not merely at the surface and form, but also into the heart of the matter and to ascertain its true meaning and the actual intention of the parties."

Although the agreement is in form one of hire the object of the parties in drawing up the agreement was to enter into a contract for sale providing at the same time security to the seller for due payment of the purchase price.

Clause 9 provides that on the whole Rs. 2,142 being paid the hirer shall be entitled to purchase it on paying another one rupee; that is to say, he would become the purchaser for Rs. 2,143. In Clause 1 the hirer undertakes to pay the instalments of Rs. 238 a month on the 29th of each month. Clause 3, under which the defendant-company has acted in this case, contains the penalty for failure to carry out this promise of paying the instalments as they fall due. Under that Clause the owners can seize the car and keep it without making any payment to the plaintiff even though the value of the car may be very greatly in excess of the amount due under the agreement. It seems to me that this is clearly a stipulation by way of penalty, and, further, that it is a stipulation which if strictly enforced might have the most inequitable results.

Mr. Bertie, the Manager of the Motor House Company admits that if a party had to pay Rs. 4,000 under a hire purchase agreement and only Rs. 5 was left unpaid, strictly speaking, they could seize the car and make any profit they liked over it; that is to say, in such circumstances the would-be purchaser who had paid practically the whole value of the car would merely have had the use of it as a hirer for a period of months. If both parties to the agreement, Exhibit K, performed their part of the contract, the agreement

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would be fair enough. But the penalty provided in case of default by the purchaser is clearly in the highest decree inequitable. In my opinion, the provisions of Clause 3 amount to a stipulation by way of penalty which the Courts can and ought to relieve against under the provisions of section 74 of the Contract Act.

The sum of Rs. 2,143 shown in Exhibit K is not the amount actually due at time the agreement was drawn up, but in view of the failure of the plaintiff to make payment under the original contract the defendant-company could fairly claim interest on their money, and I am not satisfied that in the amount fixed, Rs. 2,143, the rate of interest allowed is so unreasonably high as to be exorbitant. But having allowed this sum it is not necessary to allow anything further for interest as in calculating this amount interest was clearly allowed for up to the expiry of the nine months. Of this sum of Rs. 2,143, Rs. 238 has been paid leaving a balance of Rs. 1,905. The respondent-company has sold the truck for Rs. 2,750 so that they have obtained Rs. 845 more than was due to them for the truck. The sale took place on the 5th of March, several months before the instalments under agreement were due. As far as interest is concerned, the defendant-company was therefore amply compensated by fixing the value of the car in the agreement at Rs. 2,143, I think, they might reasonably claim something above this for costs incurred in getting the car back and selling it. But Rs. 45 should be a sufficient allowance for this, I am of opinion that the part of Clause 3 of the agreement which says that "the amount to the credit of the hirer shall not be greater than the whole sum then owing by the hirer" should not be enforced and that the defendant-company may be reasonably

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compensated for the breach by the plaintiff of his agreement, by allowing them the money they have received for the truck, less the sum of Rs. 800. On points of fact the defendant-company have been successful in both Courts and the greater part of the cost of litigation should be borne by the plaintiff.

I set aside the decree of the trial Court and pass a decree for the payment by the defendants to the plaintiff of Rs. 800. The plaintiff will pay the defendants half their costs in both Courts.

APPELLATE CIVIL.

Before Sir Guy Rutledge, Kt., K.C., Chief Justice and Mr. Justice Brown.

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Mar. 27.

AH KWE
v.
THE MUNICIPAL COMMITTEE OF THATON.*

Municipal license—Sale by auction—Permission to carry on business for a term—Grant of license set aside by Commissioner on account of irregularities of auction—Repurchase by original licensee at a higher price—Suit for damages by licensee against Municipality for breach of contract—Cause of auction—No guarantee as to validity of license—No breach of conditions of License by Municipality.

By a license document appellant was licensed by the Municipal Committee of Thaton to carry on business as a pawnbroker for three years subject to certain conditions. Appellant purchased the license at an auction held by the Committee. Subsequently the Commissioner under the powers given him by the Burma Municipal Act set aside the grant of the license as fourteen days' notice of auction was not given according to the bye-laws. The Committee then resold the license which the appellant purchased for a much larger sum than before. He sued the Committee for damages for breach of contract in the District Court and obtained as damages the difference between the two bids.

Held, that the Committee never broke any terms of their contract. They could not and did not guarantee that the licensee would be secured in the quiet enjoyment of the license. The legal action of the Commissioner was no breach of contract on the part of the Committee. Hence the appellant was not entitled to any damages.

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* Civil First Appeal No. 195 of 1928 from the judgment of the District Court of Thaton in Civil Regular No. 13 of 1926.