(1967) 09 CAL CK 0001

Calcutta High Court

Case No: Suit No. 2188 of 1965

Tirtharaj Pandey		APPELLANT
	Vs	
Amar Credit Corpn. and Others		RESPONDENT

Date of Decision: Sept. 28, 1967

Acts Referred:

- Contract Act, 1872 - Section 13, 18, 18(2), 2, 74
- Evidence Act, 1872 - Section 82, 92

Citation: 72 CWN 243

Hon'ble Judges: Bijayesh Mukherji, J

Bench: Single Bench

Advocate: S. Tibriwall and Tambe, for the Appellant; S.B. Mukherjee and P.K. Mullick for defendants 1 and 2, for the Respondent

Judgement

Bijayesh Mukherji, J.
This litigation is all over a second-hand motor-car, the particulars of which, not in the realm of controversy, are set out below :

Maker''s name--Hindusthan :

Ambassador.

Year of manufacture--1961.

Engine number--OE-22683.

Chassis number--111-22587.

Registered number--WBB-923.

The plaint, by its first paragraph, and the written statement of the two answering defendants, by its paragraph 1(i), record just so, save a venial error in the plaint about the year of manufacture, 1960 instead of 1961. The plaintiff is one: Tirtharaj

Pandey of 1 Shib Thakur Lane. The defendants are four: 1. Amar Credit Corporation, a firm, (for short, "the firm" hereafter, as gar as possible), 2. Nandalal Poddar alias Nandu Poddar, 3. Khemchand, all of 85)1 Monohar Dass Street, and 4. Jhabarmal Agarwalla of 154 Cotton Street, as described in the cause-title of the plaint.

2. To put it tersely, the case, the plaintiff comes to Court with, is:

On August 19, 1963, I agreed to buy, and the firm agreed to sell, the aforesaid motor-car for Rs. 17,651--Rs. 14,000 "being the net price" plus Rs. 3,651 "representing the interest, all costs and expenses for payment by instalments" of Rs. C46 a month after an initial payment of Rs. 2,148. Pursuant to such agreement, I paid Rs. 2,148 on August 19, 1963. and took delivery of the motor-car upon execution of an agreement in English in a printed form: paragraphs 2 and 3 of the plaint. [The agreement of August 19, 1963, provides for 24 monthly instalments--the first one for Rs. 645 and the rest for Rs. 646 a month.]

3. Of the four defendants, only the first two--the firm and Nandalal Poddar --answer the suit. The remaining two do not. Indeed, the fourth defendant (Jhabarmal Agarwalla), no more than a guarantor for payment of the residue, need not. perhaps, be impleaded as he has been only for adjudication of the suit in his presence, and not for any relief against him : paragraphs 3 and 14 of the plaint.

4. The answering defendants admit there having been a transaction on August 19, 1963, by and between the parties, but maintain that nothing like any agreement to buy and sell the motor-car, as contended for, it was. A plain hire-purchase agreement had on that date has been distorted and elevated by the plaintiff to the height of an agreement to buy and sell: paragraphs 1 and 3 of the written statement,

5. This, indeed, is at the bottom of the whole controversy. The transaction of August 19, 1963, being admitted, the true nature of the transaction will fall for determination: an agreement to buy and sell, followed by sale on credit, as contended for by the plaintiff, or a hire-purchase agreement simpliciter, as contended for by the answering defendants.

6. Not that there are no other matters in controversy. There are, such as

(i) the point of the written agreement of August 19, 1963, in English, having been explained to the plaintiff and Jhabarmal, the 4th defendant and the guarantor, ignorant of English both, the plaint, by its 3rd paragraph, aver-ring, it was not, and the written statement, by its 4th paragraph, averring, it was, and that too by no less a person than Tarachand Jalan himself, a partner of the firm;

(ii) the question of payments made towards the residue due. the plaint, by its 5th paragraph, averring, by September 22, 1965, Rs. 14,437 was paid, leaving a balance of Rs. 3,214, and the written statement, by its 6th and 4th paragraph, averring a total due of Rs. 7,530 outstanding, inclusive of all expenses incurred, after a credit of

the initial payment of Rs. 2,148 plus Rs. 9,689 for the first 15 monthly instalments of hire, the first one for Rs. 645 and the rest for Rs. 646 a month; and

(iii) whether or no the motor-car was "stealthily" lifted on September 25, 1965, at 1-30 p.m., by the defendants numbering 2 and 3, Nandalal and Khemchand, "from the lawful custody and possession of the plaintiff" at Kalakar Street, the plaint, by its 6th paragraph, averring. it was. and the written statement, by its 7th paragraph. denying stealth, as also putting forward Khemchand, defendant No. 3, as the authorized person to take possession of the motorcar.

7. Such being the pleadings, the issues struck at the trial are :

1. What was the nature of the transaction by and between the parties, namely, the plaintiff and the defendants 1 and 4, on or about August 19, 1963, as averred in paragraphs 2 and 3 of the plaint ?

2. Was the agreement dated August 19, 1963, explained to the plaintiff and the defendant No. 4 by Tarachand Jalan, a partner of the defendant No. 1, as averred in paragraph 4 of the written statement ?

3. Did the plaintiff default in payment of monthly instalments -- If so, by how many ?

4. Could the defendants 1 to 3 take possession of the car in controversy here as they did on September 25, 1965 ?

5. Was the car in controversy thereafter in wrongful possession of the said defendants ?

6. What sum is now due and payable by the plaintiff to the defendant No. 1?

7. What reliefs, if any, is the plaintiff to ?

8. The plaintiff examines himself and none else. The answering defendants examine Tarachand Jalan, a partner, and none else. This is all the oral evidence led at and during the trial. What the documentary evidence is like will unfold itself, as the judgment proceeds.

(The judgment then discusses the evidence, as also the averments in the plaint and continues :)

24. * * * * * *

Such averments, proclaiming, clear and loud, Tritharaj''s "desire to exercise his option of purchase" on 13 Sept. ''65, and exercise, in fact, of "his option to purchase the car" by 27 September ''65, are true to his knowledge, as the verification by him at the foot of the plaint records. Where goes then purchase on credit right on 19 August ''63 Were it so, why express subsequently your desire to exercise an option of purchase -- Or why exercise such option at a later-date ?

24A. Still to argue that such illuminating admissions in the plaint do not illumine the case of a hire-purchase is to argue the unarguable. And the basis of such argument is a recent decision of the Supreme Court in (1) Basant Singh v. Janki Singh, AIR 1667 SC 341. where the admission by J. S. and K. S. in a previous plaint signed and verified by them about the death of R.S. in 1939 was reckoned against them qua defendants in a later suit, the evidence there not proving that such admission was The High Court had rejected such admission on the ground that the whole of the averment in the earlier plaint containing such admission was not admitted by adversary m the later suit. The Supreme Court disapproves of such reasoning and points out that the whole of the earlier plaint was in evidence without any objection from such adversary and that it was open to the Court to pick and I am asked to do just that. But is here for me to pick and choose except the admissions in the plaint in this very suit -- not in another -- strengthened so much the more by the plaintiff Tritharaj''s further admissions in his sworn testimony just noticed, making conclusive what is not conclusive, to start with ?

25. To sum up, the admitted signature of Tirtharaj in the agreement of 19 I it 63, -- and, in particular, the one just below the endorsement in Hindi : Uporkt Shartaen Sun Samajh Kar Kia --, the correspondence before suit, and the averments paragraphs 4 and C of the plaint, make it probable, to put it mildly, that Tirtharaj knew well enough the character of the transaction having been a hire-purchase agreement with an option to purchase the car. And so could he know, cause Tarachand had told him so -- a very probable inference to draw upon the whole of the matters before me. But can I go further than this and hold that "each and every term of the agreement" of 19 August ''63, in English language, was explained to Tritharaj, who admittedly. knows no English, as Tara-i says it was : qq. 18 and 19 -- Indeed, Mr. Mukherjee, appearing for the firm and Nandalal, the first two defendants relies on the very considerations catalogued above, and invites me to hold so. Mr. Tibriwall, appearing for Tirthraj, the plaintiff, submits, how the recorded evidence reveals facts and circumstances which are in the nature of a revelation and that I should have, therefore, no difficulty in coming to an opposite conclusion, notwithstanding what goes before, touchring the admitted signatures of Tirtharaj in the the correspondence on his behalf and his plaint.

26. ** ** **

Worse still, when Tirtharaj, faced with the delivery receipt of 19 August 1963 over his signature, the defendants'' document No. 2 at page 25 of the brief of documents, exhibit B, says that he does not remember when he signed it what was the occasion for signing it. (not straight-forward evidence again), he is asked once more if he had signed any document when he took de-livery of the vehicle, and the answers he returns are nearly a rehash of the answers he gave in chief : that they got him sign many papers put in front of him on 19 August ''63 when they got him sign the agreement too : qq. 230 and 231, as also qq. 223-229, on cross-examination, along

with qq. 105-116 in chief. Still no cross-examination, though such answers serve as a reminder of the necessity of just that : cross-examination, and though Tarachand, cool and crafty, as I size him to be, is then at his counsel''s elbow instructing him : qq. 415, 416, 418, as also 417. In the circumstances, absence of cross-examination on an important matter as this may very well be taken as an ac-acceptance of the truth of the matter itself : (2) Browne v. Dunn, (1893) 6 Reports 67 at p. 70, (3) A.E.G. Carapiet Vs. A.Y. Derderian, , and case of that class.

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28. In sum, upon the whole of the evidence, I find as facts --

A. Tirtharaj''s evidence that the Hindi endorsement was not there in the agreement. when he had signed it, does not appear to be true.

B. His further evidence that not a single term of the agreement was explained to him does not appear to be true either.

C. Tarachand''s evidence that each and every term of the agreement was explained by him to Tirtharaj appears to be patently untrue.

D. It looks very probable that all that was explained by Tarachand to Tirtharaj was that his was a hire-purchase agreement with an option to purchase the car in the end. Nothing else Tirtharaj, who knows not English, was told of the agreement in English language.

29. The findings of fact, I have just tabulated, go to show that the evidence of both : Tirtharaj and Tarachand : I have accepted in part and rejected in part. But 80 I am entitled to do as a (sic) of facts. That indeed is elementary. Still if any authority is needed, it is there, to cite only one : (4) Sukha and Others Vs. The State of Rajasthan, , holding just so.

* * * * * *

31. What is the effect at law of the finding I have just come to : that out of so many clauses in the agreement, in English language, all that was explained to Tirtharaj, who knows no English, was that his was a hire-purchase agreement with only an option of purchase -- I should notice, how-ever, the form of the agreement first -- not all the clauses and sub-clauses printed in miniscule characters, but only those which tell, in the context of this litigation, telling indeed effectively a purchase agreement simpliciter from a credit-sale agreement. Here are they :

A. Clause 1 under the caption : Conditions forming part of the agreement : provides inter alia that Tirtharaj, the hirer, may terminate the hiring at any time during the continuance of the agreement. He was, therefore, under no obligation to buy the car, just as Brewster was not under any obligation to buy the piano of Helby in that celebrated case of (5) Helby v. Matthews, 1895 AC 471, a case which Mr. Mukherjee refers to as the locus classicus on the subject. To notice this little is to notice too that

a clause as this cannot be assimilated to another celebrated case, going the other way, on its own facts :

(6) Lee v. Butler, (1893) 2 QB 318, where Mrs. Lloyd, the so-called hirer, was bound absolutely to make payment of the instalments as the rent for the hire or use of certain furniture which, upon such payment, was to be her sole and absolute property. It was not for her to put an end to the agreement and to return the furniture; it was for her to buy and to pay the instalments with a view to making the buying (she had agreed to go in for) complete. She was "a person having agreed to buy goods" within the meaning of section 9 of the Factors Act, 1889 (52 and 53 Vict. c. 45). She was, therefore, a person who had bound herself by agreement to buy. Herein lies the test to distinguish a hire-purchase agreement from a credit-sale judgment. Mrs. Lloyd''s was an absolution to pay the instalments, from which there could be no going back : an obligation which could have been enforced by action. Ergo, no mere hirer was she; she was a purchaser on credit. No such obligation was Brewster''s or Tirtharaj''s. Both could terminate the hiring any time, Brewster by delivering up the piano to Helby, and Tirtharaj by delivering up the motor-car to the firm. Ergo, no purchaser either could be; a hirer each was.

B. Clause 4 ibid, read with the preliminary recital (numbered I) that goes before, makes it a case of "bailment coupled with an option to buy, as in Helby v. Matthews", (supra), to quote from Cheshire and Fifoot in their magnum opus : Law of Contract, 6th edition. page 181. By clause 4, read with the preliminary recital No. 1, Tirtharaj, the hirer, acknowledges that he holds the motor-car "as trust property" of the owners" (the firm) "and shall not have any proprietary interest whatsoever as purchaser therein until he shall have exercised his option of purchase" on payment of a nominal sum of Re. 1 in consideration of such option, on execution of this agreement, and that too until he "shall have paid the whole amount due under this agreement." It is, therefore, plain that the firm has obtained a hire-purchase agreement from Tirtharaj under which Tirtharaj becomes the owner of the motor-car on payment of all the 24 instalments of the stipulated hire and exercising his option to purchase the car on payment of the nominal price of Rs. 1 : just the test laid down by the Supreme Court in (7) K.L. Johar and Co. Vs. The Deputy Commercial Tax Officer, Coimbatore III, , and reiterated in (8) Sundaram Finance Ltd. Vs. State of Kerala and Another, . Indeed, in re-cording the test as I have done above, I have done no more than borrowed the language of Shah, J. (who speaks for the majority of the Court) with a little adaptation to fit the facts here. See paragraph 23 at page 1185 of the report : AIR 1966 SC, 215 and page of the report : (1966 (II) SCA).

C. Clause 5 confers on the owners, the firm, the right to terminate the contract of hiring and to take possession of the car forthwith, with or without notice to Tirtharaj, the hirer, on the happening of certain specified ''events'' one of which is the hire being suffered by the hirer to remain in arrears. Enumeration of 10 such "events" exhausted, clause 5 concludes:

"Any such termination shall be without prejudice to any claims the owners may have in respect of any terms or conditions of this agreement and it is further agreed if the hiring is determined by the owners or the hirer in manner herein provided all hire (including proportionate hire for month) up to the date of such determination and damages for breach of this agreement shall be paid by the hirer, to the owners, and no payment, credit or allowance in respect payments previously made shall be made or allowed to the hirer."

I have reason to mark what I have just quoted for italics. More of which hereafter in paragraph 43 infra.

32. No more of the agreement''s numerous clauses need be noticed now. Because what have been noticed already appears to be sufficient to bring home the fact that, in form, it is a hundred per cent hire-purchase agreement. But, no matter what the form is, it is for the Court look through and behind the document and to get at the reality, with a view to determining the true nature of the transaction, unless prohibited by statute. See the judgment of Shah, J. in the case of Sundaram Finance Limited (Supra) and that of Lord Esher, M.R. in (9) Maden v. Thomas & Company, (1891) 1 QB 230, at page 234. Far from prohibiting such a probe, the sixth proviso to section 82 of the Evidence Act, 1 of 1872, calls upon the Court to do just so, by permitting proof of any fact which shows in what manner the language of a document is related to existing facts. And the Courts have not been slow either to avail this proviso in order to unmask the reality of the transaction, though this has not been an easy task always, which was presumably responsible for a judicial chagrin. years ago:

"That is one of the provisos which is the despair of the Judge and the joy of the lawyers." : (10) Ganpatrao Appaji Jagtap v. Bapu Tukaram, AIR 1920 Bom. 143 - an observation which, I ventured to point out, with the greatest respect, in (11) Buddhu Sau v. Mangal Sau, (1966) 70 CWN 982, does not necessarily fit all cases. Indeed, in Buddhu Sau''s case, I found the proviso doing duty another way, and saw in it "the despair of the greedy and the joy of the needy." Be that as it may, out of a crowd of decisions which cluster round the subject, say, from (12) Balkishen v. hegge, (1899) 27 IA 58 : 4 CWN 153 , to (13) P.L. Bapuswami Vs. N. Pattay Gounder, , Mr. Tibriwall (14) AIR 1925 75 (Privy Council) , where. what, to all outward appearance, was an absolute sale of certain shares was found, on scrutiny, to be a mortgage, the shares only serving as security, because of the extrinsic evidence furnished by the surrounding circumstances. the most prominent of which were (i) the amount paid by the transferee having had no relation to the market price of the shares and (ii) recognition of the transferor''s claim to dividends, in spite of the transfer.

33. That, no doubt, is settled law. But the difficulty for Tirtharaj is that such law does not reach the case in hand. Indeed, none of the considerations his counsel urges upon me make the agreement of 19 August 63, in substance, a credit-sale agreement with only a veneer of hire-purchase.

(The judgment then deals with such considerations seriatim and proceeds :)

Tirtharaj, no doubt, said : ''You are to finance the purchase.'' But, that simpliciter will not make it a credit-sale in substance. Because Tarachand replied : ''Here are our terms -- the usual terms'' -- meaning, in the context, hire-purchase, and suggesting too clearly enough : ''Take them as they are or leave them''. What Tarachand calls "usual terms is nothing but the Standard printed form I see before me in the shape of the agreement of August 19, 1963, exhibit 1. And about such Standard form, Cheshire and Fifoot have something to say -- which is as illuminating as interesting:

"In the complex structure of cur-rent society ''the device (of a series of Standard forms) bas become prevalent end pervasive. The French, though not the English, lawyers have a name for it.

''The term contrat d''adhesion is employed to denote the type of contract of which the conditions are fixed by one of the parties in advance and are open to acceptance by any one. The contract, which frequently contains many conditions, is presented for acceptance an is not open to discussion.''

The only choice left to the individual is to accept or decline the transaction in toto. The documents are a prendre ou a laisser, to take or to leave." page 24, Law of Contract, 6th edition.

Whether or no there can be, at law, a contract between the dominating and the dominated. between one with plenty of money, dictating his terms, and the other destitute of sufficient money, submitting to such dictation, in fine, between one in a position of vantage and the other in a position of beggary, is another matter. I am not on that now. What I am on is the existence, upon facts established by evidence. of a hire-purchase agreement or a credit-sale agreement. And I conclude that, even without more. Tarachand''s evidence (just analysed), upon which so much nee is placed, does not indicate a credit-sale agreement, in substance. Even without more, it indicates instead a hire-purchase agreement.

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Then, to make a point of the entire amount of Rs. 17,651 debited to Tirtharaj as an indicium of nothing but a credit-sale -- and this is what Mr. Tibriwall does -- is to delude oneself into the belief that the transaction this litigation evinces is a case of simple hire only -- a case of ordinary simple bailments of bygone days. Had it been so, Mr. Tibriwall would have been right. The firm would then debit -- if it other-wise could -- only the rent for the month due. But the transaction is not a hire. It is much more than a hire. It is a hire-purchase. Necessarily, therefore, this modern class of bailment, as distinguished from the ancient class, in it not only the element of bailment, but also the element of sale. The clement of sale, because ever since the leading case of Helby v. Matthews, (supra), the hire-purchase agreement, the like of which I see before me : the agreement of 1
August ''63, is not a true contract of

sale, but an option of sale. Ergo, it is a contract between the firm, on the hand, and Tirtharaj, on the other, giving in part an option of sale and conferring in part a bailment. In observing so, I am doing no more than copying the reasoning, and even the language, in the judgment of Goddard, C.J., (then Goddard, J.) in the (15) Karflex case : Karflex Limited v. Poole, (1933) 2 KB 251 : 1933 All. ER 46, the very case Mr. Tibriwall cites. Once that is so, the concept of two prices emerges, as it must. One is a cash price, and the other is a hire-purchase price. Take the case of (16) Overstone Limited v. Shipway, (1962) 1 All. ER 52, a case Mr. Mukherjee cites in another context -- the context of is-4 and 5. There, the twofold price of the motor-car let on hire-purchase was :

Just so here :	Cash price		₹365 ₹452 13 s.
	Hire-purchase price	..	Rs. 14,000 Rs. 17,651
	Cash price		
	Hire-purchase price		

The entry in the firm''s cash-book, ext. H/1, which Mr. Tibriwall banks so much, records just that too.

Say, Tarachand bas boldly said out: Yes, it is interest. Or Nandalal has said so on oath. So what? Sure enough, a hire-purchase organization, be it the firm or anybody else, is not a charitable institution. It is there to earn a profit. Whether the profit is much too much or not, coming on the edge of a penal law, when regarded as matter. The question I am on now is the question of "the true intention of the parties entering into the hire-purchase agreement", to quote from Shah, J, in the Sundaram Finance Limited''s case, (supra), So, the charging of an interest by a hire-purchase organization, not a charitable institution, has nothing in it to negate a hire-purchase. Indeed, in calculating you have to calculate "the interest rate implicit in the hire-purchase charges" : per Holroyd Pearce, L.J., in the Shipway case : (supra). Scratch a hire-purchase agreement, strip it of its orotund trappings, and what comes out is the difference between the hire-purchase price and the cash price, no matter by what name what you call this difference : credit charges, interest or the like.

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(iii) It is said that only a true owner of the car can let it out on hire-purchase. I agree. That indeed is common sense. On hire or hire-purchase I can let out only a chattel which I own. If I do not own it, it is not for me to let it out on hire; nor is it for me to confer on the hirer, for consideration, the option of purchase, the very of the

hire-purchase agreement, which I am not in a position to give.

Such is the case of Karflex Limited who purchased a car from King and let it out on hire-purchase to one Poole. It transpired later that the true owner of the car was Lincoln Wagon Company, King, who had got the car fraudulently and by dishonest means. Result : Karflex Limited failed to recover any damage, though Poole had not paid a single instalment after the initial de(sic) of ₹95, which sum again he counter-claimed and recovered. But what, if a person who was not, in fact, the owner, but who honestly believed he was the owner of the property let out on hire-purchase -- Goddard, C.J. (then Goddard, J.) kept the point open in the Karflex case on 14 March 33, only to be faced and closed by Finnemore, J. some sixteen years later, on 2 March 49 in (17) Warman v. Southern Counties Car Finance Corporation Limited, (1949) 2 KB 576, a case Mr. Mukherjee refers me to. There also the letter-vendor''s title was defective : non-existent really. They had purchased the controversial car in complete good faith from a third party who was swindled to buy, it, in complete good faith again, from an individual who had taken it only on hire-purchase from its the London Finance Corporation, but who did not pay any money after the initial deposit. Worse, he purported to sell it instead to the said third party, the letter-vendor corporation''s immediate vendor. Placed in such a predicament and called upon to answer an action by the hirer for refund of the money paid and damages, the modest claim the letter-vendor corporation put forward was : ''At the worst against us, you did have the use of the car for months. Pray, make allowance in the damage for the reasonable charge of hiring the car for that long.'' Even this little was not granted, complete good faith, on the part of all throughout, not-withstanding. The reasons why it could not be granted by Finnemore, J. are :
A. A hire-purchase agreement is, in law, an agreement in two parts :

(i) an agreement to rent a particular chattel, the hiring of which the hirer need not continue a day longer than is his pleasure, and

((ii) the option of purchase by the hirer, it being common knowledge and common sense too that when people enter into a hire-purchase agreement, they do so not so much for the purpose of hiring, but for the purpose of purchasing, by such modern method of bailment and element of sale on deferred payments, culminating in an option to purchase and then purchase by exercising the option agreed to and paid for.

B That being so, if at any stage, the option to purchase goes, the whole value of the agreement to the hirer has gone with it. Not a mere hirer, but much more, namely, a hire-purchaser, be has been looking forward, by the very terms of the agreement, to the acquisition by him of the right to purchase car; that is the whole basis of the agreement, the very foundation of it. The latter-vendor having no right himself to the car cannot convey to the hirer a right he has not, and a right which flows from

such right to purchase it. So, the whole basis of the agreement, the very foundation of it, goes and the agreement crumbles. Ergo, no a sort of quantum meruit--and this is what the letter-vendor''s modest claim comes to -- is permissible either.

C. Another way of looking at this interesting point is in the form of an illustration:

A purports to hire a car to B and in delivers to B a car which belonged to himself but to C, and to which he had no right whatever in law. During the currency of the agreement C, the true owner, intervenes and asserts his right to the car. Given all this, B not pay A the hiring charges. A has then to frame a case against B saying : " I claim money out of hiring charges from B for C''s car to which, I confess, I have no right'' -- a case which has only to be made in order to be rejected by any court which would sureby not direct B to pay A money for the use of somebody else''s car.

I, therefore, accept the contention on behalf of Tirtharaj that only a true owner of the car can let it out on hire-purchase. But when, in its wake, the contention is that the firm is not the true owner of the car in controversy here at or about the relevant date (19 August 63) and therefore singularly incompetent to let it out on hire-purchase to Tirtharaj, with respect, I must demur. As Mr. Mullick, in absence of his leader, Mr. Mukhejee, pertinently points out, by the very first paragraph of his plaint, Tirtharaj admits:

"Prior to 19th August 1963, the defendant No. 1 (whom I have been calling the firm) was the owner of a Second Hand ''Ambassador'' Motor Car of the manufacture of the year 1960 bearing Engine No. OE 22683, Chasis No. 111-22587 and the Police Registration No. WBB-923" -- just the car in controversy here. And still the firm''s ownership will be denied. Then, what is sought to be established on behalf of Tiratharaj at the trial is not defect in the firm''s title, but a credit-sale (instead of a hire-purchase) from the firm, recognizing and admitting thereby that the firm''s title to the car is there. See paragraph 2 of Tirtharaj''s plaint. Sure enough not a case of a credit-sale from one who has no title to the car and. therefore, no right to sell it on credit. In that case, Tirtharaj would be arguing against himself.

In the glare of the plaint''s admissions which tell, no less in view of the very case sought to be made out at the trial: a credit-sale from the firm, it is idle to comment on the absence of papers in support of the sale of the car by R. S. Agarwalla to the firm or non-examination of the said Agarwalla. And what material car, I need when I have before me (i) the blue book, ext. C, recording the transfer of ownership of the car by R. S. Agarwalla to Tirthraj with a rider Tirtharaj''s name is there subject to the hire-purchase agreement with the firm. (it) the hire-purchase agreement itself of 19 August 63, ext. 1, proclaiming the firm to be the owner and Tirtharaj to be the hire-purchaser, (iii) the entry in the firm''s cash-book, ext. H/1, recording payment of Rs. 14,000, the value of the car, to Agarwalla and thereby corroborating Tarachand''s evidence that his firm had purchased the car from Agarwalla. (qq. 375, 382, 383 etc.), and (iv) the telling admissions in the plaint itself admitting the firm to be the owner

-- Nothing more need be said on a point which has been raised in vain and from which it is impossible to spell out a credit-sale, save that the obvious shade of difference between a hundred per cent registered owner, without any rider about a hire-purchase agreement, and a registered owner, with a rider to that end, (as here), emphasized by Mr. Tibriwall, appears to be neither here nor there. As Tarachand explains, this is how the motor vehicles department records such transactions, and that is perhaps the reason why the car was not transferred in the name of the firm as registered owner, unburdened with a rider : qq. 666 and This is the best a lad of his type can say. Indeed, the very entry in the blue book, recording the name of Tirathraj, and then adding : under HP agreement with the firm, only admits the firms'' ownership of the car.

True it is, in the Sundaram case, (supra), the majority view finds a loan in substance and, therefore, sees in the promissory note what is considered a security for repayment of the said loan, whereas the minority view holds the transaction to be a hire-purchase in which the promissory note is merged, the note having no separate existence to sustain an action founded upon it. It goes without saying that I must govern myself by the majority view. But it is there only to be seen that clear marks of a loan are there in two out of the nine documents gone into by and between the financier and the customer : one is an undiluted application by the customer to the financier for loan on security of the motor vehicle, and another is a letter by the customer to the address of the financier, saying :--Pray pay to the dealer the amount you are advancing to me.'' Nothing like any such clear mark do I see in the case in hand, enabling me to hold in favour of a credit-sale. So, the notes of hand and hundis here cannot be tuned that way: as a security for the credit given by the firm to Tirtharaj in the transaction of a credit-sale; the more so, as the agreement in the Sundaram case does not, and the agreement before me does, provide for exercise of an option to purchase the car on payment of a nominal sum of money ? a feature which has a force all its own in telling a hire-purchase agreement simpliciter from a loan and the like, a feature which Shah, J.. delivering the judgment of the majority, emphasizes in the manner following :
"It is also to be noted that the agreement does not contemplate exercise of an option on payment of a nominal sum of money as to be found in other hire-purchase agreements."

"In this form (the form of a hire-purchase), goods are purchased by the financier from the dealer, and the financier obtains a hire-purchase agreement from the customer under which the latter becomes the owner of the goods on payment of all the instalments of the stipulated hire and exercising his option to purchase the goods on payment of a nominal price. The decision of this Court in K.L. Johar and Co. Vs. The Deputy Commercial Tax Officer, Coimbatore III, dealt with a transaction of this character."

The trend of the above two passages appears to be, if I may say so, with great respect and greater humility, that if the hire-purchase agreement in the Sundaram case had contained an ''option'' clause, as the agreement before me does, there would not have been then the divergence of views; there would have been instead a single concurrent judgment or separate judgments with concurrent views. If I am right in having ventured to think so, I find myself in a singularly fortunate position in that the view I am taking of the hire-purchase agreement in hand can enlist the powerful support and approval of both the judgments--majority and minority--in the Sundaram case, (supra).

That apart, the last passage I have quoted above from the majority judgment assimilates itself so nicely to the hire-purchase agreement I am dealing with. The motor-car, WBB 923, is purchased by the firm, the financier, from Agarwalla, the dealer. Purchase over, the firm, the financier, does get a hire-purchase agreement, ext. 1, from Tirtharaj, the customer. By virtue of such agreement, Tirtharaj becomes the owner of the car on payment of

1.	Rs.	2,148	cash down on 19 Aug.	
2.	Rs.	15,503	the date of agreement, all the 24 monthly instalments of stipulated hire, Rs. 645 for the first month and Rs. 646 a month for the remaining 23 months.	
Total :	Rs.	17,651		
plus 3.	Re.	1	in consideration of the option to purchase, and exercising such option.	

In the circumstances, to find a credit-sale becomes impossible.

(vi) Paradoxical though it may seem, upon the very stipulation for payment by Tirtharaj to the firm of a sum of Re. 1. in consideration of the option to purchase, rests the last contention in infavour of a credit-sale. The contention is this: ''Look to clause 1(a) of the hire-purchase agreement, ext. 1, which the

bears :

On execution of this Agreement the Hirer shall pay to the Owners a sum of Re. 1, in consideration of the option to purchase given to Hirer by term No. (c)

So, immediately on execution of the agreement, my option of purchase has been exercised. Ergo, mine is a credit-sale.'' A contention as this appears to me to be factually wrong and legally unsound. Factually wrong, because there is not even a soupscon of evidence that Tirtharaj exercised his option to purchase the car immediately on execution of the agreement on 19 Aug. 63. On the contrary, the correspondence and the plaint reviewed reveal:

A. Even on 13 Sept. 65 he was anxious to exercise his option of purchase.

B. By 27 September 65 he exercised his option to purchase.

Legally unsound, because to look to clause 1 (a) alone and to blink the rest of the relevant clauses is just the way in which a document cannot be read without coming on the edge of a universally accepted rule of interpretation. Clause 1 (a) refers to, and goes with. clause 1(c) which provides for payment by the hirer, not only of Rs. 17,651 tabulated above, but also of other sums pay-able under the agreement. Re. 1 in consideration of the option is one such sum. But when ? Immediately on execution of the agreement on 19 Aug. ? No; condition No. 21, the last one, answers the question. a little indirectly though, by providing this: ''the hirer pays all the monthly instalments, but is so obtuse-headed that he does not exercise his option to purchase; worse, he retains the car. What happens then ? By a fiction the hiring continues--the hiring shall be deemed to continue, as the wording of condition 21 is. And the hirer goes on paying Rs. 646 a month to the owner.'' Thus, payment of the nominal sum of Re. 1 in consideration of the option to purchase the car is provided for, not immediately on execution of the agreement, but on termination thereof. "on the expiry of the date of payment of last monthly instalment of hire", to quote from condition 21 again. A harmonious construction of the relevant provisions of the hire-purchase agreement, ext. 1, can, therefore, lead to one and only one conclusion: that the expression "On execution of this agreement" in clause 1 (a) should be read to mean "After execution of this agreement". In plain English "on" means "just after". In the context here, it means a little more: "after". Thus, no credit-sale can be discernible this way too.

34. This exhausts all I have been asked to consider in order to find a credit sale which remains as far as ever--rendered still more far by two paramount considerations I have been asked to reekon in support of a finding that it is a plain hire-purchase agreement that is seen here. One, Tirtharaj''s was the right to terminate the hiring, by returning the car to the firm, any time between 19 Aug. 63 and Sept. 65 during which the agreement was to run: condition 1. Indeed, he was not bound to keep the car for a single day or a single hour, adopting a little the speech of Lord Macnaghten in Helby v. Mathews, (supra). To call this a sale is to strain that word to the breaking point and, indeed, to break it to pieces. Two, a necessary corollary to the ''option'' clause is that the firm and Tirtharaj were not mutually bound to see the sale through ?the firm to sell the car and Tirtharaj to buy it. Far from a sale. there was not even an agreement to sell or buy. The firm had not,

in fact, sold the car ever. All it said to Tirtharaj by such agreement comes to this: ''Here are the terms and conditions. Obey them. If you do. take it I shall sell the car to you; otherwise not.'' Call this a sale? "It is in law nothing more than a binding offer to sell", to quote from the speech of Lord Watson in Helby v. Matthews again. The distinction between an offer to sell, on one hand, and sale or an agreement to sell, on the other, is fundamental and needs no emphasis.

35. It appears, therefore, to be clear that the agreement taken as a whole, even when viewed in the light of facts showing in what manner its language is related to existing facts, cannot be regarded as a credit-sale in substance. It is what it purports to be: a plain hire-purchase agreement.

36. So I hold, after a full consideration of the authorities (not yet reviewed) cited by Mr. Tibriwall in support of his contention of the transaction having been a credit-sale. How idle has this citation been will be clear from the barest outline of such cases which I proceed to review one by one:

1. (18) Damodar Valley Corporation Vs. State of Bihar and Others, , lays down two tests:

A. A binding obligation on the hirer to purchase ? If yes, it is a contract of purchase on a system of defer-red payments.

B. A right reserved to the hirer to return "the goods ? If there is, then clearly no contract of sale is seen.

The same old tests again. Test A is the test in Lee v. Butler, (supra). Test B is the test in Helby v. Matthews, Mr. Tibriwall will go by Test A. I go by Test B. I have stated why. To state it at the risk of repetition, condition 1 of the agreement in hand, ext. 1, confers on Tirtharaj, the hirer, the right to terminate the hiring any time during the currency of the said agreement by re-turning the car to the firm.

2. (19) Felston Tile Company Limited v. Winget, (1936) 3 All. ER 473, is a case where the contract was formed by correspondence. More, such correspondence excluded warranty or condition implied by law. A hire-purchase agreement followed, providing --

"This agreement embodies the en-tire agreement as to the hiring of the machinery."

The machine proved unsatisfactory. And the plaintiffs brought an action for breach of warranty. The trial judge held, correspondence formed no part of the contract, and gave judgment for the plaintiffs. The Court of Appeal held, it did, and gave judgment against them. The ratio, therefore, is : ''Look at the main object and intent of the contract and limit the general words used'' ? a rehash of what Lord Herschell, L.C., laid down in (20) Glynn v. Margeston and Company, (1893) AC 351. What are the general words the use of which I am to limit here, even though no correspondence has formed the contract before me ? I find none. Then, what is the main object and

intent of the contract here ? Hire-purchase, hire-purchase and hire-purchase. An irrelevant citation doing no duty by the agreement in hand.

3. (21) Ali Sheikh v. Imam Ali Sarkar, AIR 1917 Cal 565, finds a Kot Kobala, by the tenants, who are debtors too, in favour of the landlord who is their creditor as well, to be a Kobala, a complete alienation, in substance, because of the tenants-cum-debtors having applied to the landlord to get the name of the creditor landlord''s son mutated as a tenant and having his name entered just so. Thus, all you see here is the ''substance'' test -- a test I have gone by, only to find a plain hire-purchase agreement.

4. (22) Bepin Krishna Ray and Others Vs. Jogeshwar Ray and Others, , rules, amongst other things, that oral evidence can be given of the negotiations antecedent to the execution of an instrument, showing what was intended to be offered and accepted was different from what was by mistake actually described in the instrument : just a tact which shows in what manner the language of the instrument is related to an existing fact, within the meaning of the sixth proviso to section 92 of the Evidence Act. No mistake do I see in the case in hand. More, antecedent talks or negotiations, such as evidence discloses here, have been duly taken into account. But ultimately what came out was a hire-purchase agreement, pure and simple, as has been my endeavour to show in the foregoing lines. Both parties agreed to just that : a hire-purchase agreement, which Tirathraj was owning in his correspondence before the suit and even in his plaint. So, another idle citation do I see here, if I may say so. with respect.

5. (23) Shyamsunder Bubna Vs. Manindra Nath Ghose and Another, , reveals. amongst others, two criteria, which are much the most important in placing a hire-purchase agreement : (i) the payment of a nominal price of Re. 1 in consideration of "the hirer''s option to purchase the car, and (ii) the right of the hirer. to return the car any time during the currency of the agreement and thereby to terminate the agreement. Still, Banerjee, J. whose decision it is, sees in the agreement a financing transaction only and not a hire-purchase one Why? For certain telling facts which show in what manner the language of the agreement is related to existing facts. Proviso 6 to section 92 of the Evidence Act again. Such facts are --

I

A special allocation of a Fiat car was made by the State Government in favour of the defendant Manindra in replacement of an old taxi cab of his. Manindra could get no more than Rs. 5,000 by sale of his old cab. But it was far short of the price of the new one, which was allotted to him, and which he was directed to acquire from Auto Distributors Limited within 60 days : a time limit which was fast running out, Mahindra''s finances remaining in the slough of despond as before. That led him to approach Shyamsunder Bubna, the plaintiff, running a firm of money-lenders and

financiers, for a loan of the amount in deficit.

II

The plaintiff Shyamsundar there-upon resorted to the device of a standard form with that sort of an usual ultimatum to the defendant Manindra : ''Take it. as it is, or leave it'', just the type Cheshire and Fifoot comment on at page 24 of the Law of Contract, 6th edition. No wonder, in such a fix, Manindra yielded. And the hire-purchase agreement of that litigation came into being. But when ? On 10 December 63. That is a date to be remembered for a proper apprehension of the Bubna case.

III

On 12 December 63, just two days after the execution of the hire-purchase agreement, Shyamsunder paid to Auto Distributors Limited. Rs. 13,970 to-wards the price of the car, for which a receipt was granted, acknowledging such payment against the Fiat car concerned, and that too from Shyamsunder : account Manindra Nath Ghose.

** ** **

Such then is the outline of facts, on the basis of which Banerjee, J. holds :

A. The plaintiff was never the owner of the car and had nothing to hire out.

B. The real intention of the plain-tiff in obtaining the hire-purchase agreement was to secure the return of the loan advanced to the defendant Manindra.

C. Ergo, in pith and substance, the transaction is merely a financing transaction.

It is impossible to translate the ratio of this decision to the case in hand. Here, the firm became the owner of the car first by purchase from Agarwalla and then let it out to Tirtharaj. That apart, Bubna having done little in obtaining the car save making payment to Auto Distributors Limited, and having not even seen the car in question, cannot perhaps be made much of, so artificial is a hire-purchase transaction of today. "The extent to which economic reality has..... been divorced from legal mechanics (Law of Contract by Cheshire and Fifoot, 6th edition, p. 180)" is there only to be seen. Harman, L.J. exposes it in (24) Yeoman Credit Limited v. Apps, (1961) 2 All.E.R. 281 at page 291 :

"The difficulty and the artificiality about hire-purchase cases arise from the fact that the member of the public involved imagines himself to be buying the article by instalment from the dealer, whereas he is in law the hirer of the article from a finance company with whom he has been brought willy-nilly into contact, of whom he knows nothing and which, on its part, has never seen the goods which are the subject-matter of the hire."

Again, in (25) Bridge v. Campbell Discount Company Limited, (1962) 1 All ER 385 at page 398, Lord Denning considers such a transaction "in effect, though not in law, a mortgage of goods", sees it "in its native simplicity, by stripping off the legal trappings in which a transaction as this is dressed, with a view to jumping the law of the land, and concludes:

"In the result, the finance house buys a car it has never seen, and lets it to a hirer it has never met, and the dealer seemingly drops out."

Be that as it may, in view of all that goes before, Mr. Tibriwall tries in vain to assimilate the Bubna case to the case in hand, there being the broadest distinction between the two, nothing to say again of the glaring admission by Tirtharaj, before the suit and at the suit by the plaint, of there having been a hire-purchase agreement and of a case of a credit-sale (as distinguished from a financing transaction) sought to be made out at the trial.

37. Thus, it is seen that the cases reviewed in the preceding paragraph cannot tilt the scale in favour of Tirtharaj. I owe it to Mr. Mukherjee to mention (26) AIR 1938 18 (Nagpur) , still another case he cites, in support of the agreement in hand having been a hire-purchase one. Here also, upon a review of authorities ''English and Indian'', (some of which I have discussed above), the test laid down is the same, the test I have gone by : ''If the hirer can terminate the hiring by delivering up the chattel to the owner, it is neither a purchase nor an agreement to purchase; it is a hire-purchase, the hirer being no more than a bailee with an option to purchase''. I, therefore, reiterate my conclusion that the hire-purchase agreement, ext. 1, I see before me, read as a whole and fairly, and that too in the light of all surrounding facts and circumstances as appear upon the whole of the evidence, is what it purports to be : a hire-purchase agreement, and not a credit-sale. But the question I have posed in paragraph 32 ante remains, and has now to be faced. The question is : When out of so many clauses in the agreement, in English language. all that was explained to Tirtharaj, who knows no English, was that his was a hire-purchase agreement with an option of purchase, as I have found as a fact, what is its effect at law ? To Mr. Mukherjee, the effect is nil. It cannot, says he, do any harm to the answering defendants. It cannot, because the contention is : ''Once the signatures of Tirtharaj to the agreement have been proved, and what is more here, admitted, it is wholly immaterial that the document has not even been explained to him at all.'' In support of such contention, reliance has been placed on the following passage from the Law of Contract by Cheshire and Fifoot, 2nd edition, at page 92 :
" (In an ordinary case,) where an action is brought on a written agreement which is signed by the defendant, the agreement is proved by proving his signature, and, in the absence of fraud, it is wholly immaterial that he has not read the agreement and does not know its contents."

This passage, in turn, has been taken from the judgment of Mellish, L.J. in (27) Parker v. The South Eastern Railway : Gabell v. The South Eastern Railway, (1877) 2 CPD 416, at page 421, save that the portion within square brackets in the excerpt, I have quoted above, has been omitted in Cheshire''s book. What the Court of Appeal (of which Mellish, L.J. was a member (was called upon to decide there was the liability of the railway company for the loss of bags deposited by Parker and Gabell in a cloak-room at the company''s railway station on payment of 2d. by each to the clerk who issued to each a paper ticket, on one side of which was written ? "See back", and on the other side of which was notified that the company would not be responsible for any package exceeding the value of £ 10. A printed notice to the same effect was hung up in the cloak-room as well. But Parker claimed £24 10s. for his bag lost by the negligence of the company''s servants, and Gabell claimed £50 16s., each claim have thus exceeded £10. It is hardly necessary, for the purpose of the case in hand, to notice the shades of difference the separate judgments of the Lords Justices in this case reveal. Suffice it to say that their Lordships directed a new trial, because of a mis-direction by the trial judge who, with a view to guiding the jury in answering the question of fact, left to them the question : ''Was the plaintiff, under the circumstances, under any obligation, in the exercise of reasonable and proper caution, to read or make himself aware of the condition (upon which the bag was deposited) ?'' The real question to be left to the jury, their Lordships held, was : ''Did the railway company do what was reasonably sufficient to give the plaintiff notice of the condition?''

38. Such then is the case, a "ticket" case, as it is called, where the passage relied upon occurs. I must bow to this authority, in so far it lays down broadly, in this passage, the principle, distinguishing a "ticket" case from an ordinary case of a written agreement, duly signed. But, sure enough, his Lordship. had not in mind, as I have here, a written agreement in English, signed by a party in Hindi, a party who is ignorant of English. That this is so becomes manifest from his Lordship''s observations at page 423, even touching a "ticket" case:

"The railway company, as it seems to me, must be entitled to make some assumptions respecting the person who deposits luggage with them : I think they are entitled to assume that he can read, and that he understands the English language, and that he pays such attention to what he is about as may be reasonably expected from a person in such a transaction as that of depositing luggage in a cloak-room."

A fortiori you can make assumptions respecting a person who enters into a written agreement and subscribes his signature to in all solemnity. But you cannot do so when the written agreement, in English language, is signed, in Hindi, by a party, ignorant of English, a party to whom the whole of the agreement is not explained -- a description which fits Tirtharaj nicely enough. An English-knowing party, lending his signature to the agreement, does not read it at his peril. So, it becomes wholly

immaterial that he has not read it and does not know its contents. Why does he sign then? He has made his bed and must lie on it. But say that of a party who knows not English and signs, in Hindi, an agreement, in English language, without the whole of the agreement being explained to him ? I am afraid that cannot be said. Because, to say so will be to say that even a blind man''s signature to an agreement is enough. it being wholly immaterial whether or no he has read it (as if he can) and knows its contents, (as if he can know that much unless helped by another gifted with sight and otherwise competent) -- a clear reduction ad dbsurdum. For an agreement in English, what is an executant thereof, ignorant of English, but a blind man ? Nor is the agreement before me anything like a railway receipt or a bill of lading where the terms of the contract must be taken as accepted, no matter whether they are explained or not. To quote Mellish, L.J. again :

.....in my opinion such a person (one without the least knowledge of what a bill of lading was) must bear the consequences of his own exceptional ignorance, it being plainly impossible that business could be carried on if every person who delivers a bill of leading had to stop to explain what a bill of landing was."

39. On such consideration alone, to go by the authority of the passage in Parker''s case, (supra), will be to mis-read it and to misapply it here. But this is not the only consideration. Eng-land is England. And India is India. The rule here, that law throws around a pardanashin woman (England knows not) a cloak of protection, applies equally to an illiterate male. the reason of the rule being there. And the reason of the rule is lack of understanding and appreciation on the part of the illiterate about what he is going in for. What is Tirtharaj but an illiterate, so far as English is concerned ? He. therefore, needs protection. As Banerjee, J. observes in (28) Banku Behari Mukherjee v. Amulya Chandra Ghosh. (1961) 66 CWN 254 at page 260 :

"The lack of understanding, due to illiteracy. (of a male as much as a female), makes such a protection eminently reasonable."

Hence, I must have to be satisfied that the whole of the agreement was understood by Tirtharaj and is really his mental act as its execution, evidenced by his signatures, is his physical act. I am not satisfied so. I have stated why : a complicated document, the whole of it was not explained to him,

40. Again, the agreement having been in English language, and it. Being admitted that Tirtharaj knows no English, the onus lies upon the answering defendants, as it lay upon Upper Was-saw, faced with a reference to arbitration in English and the fact that his adversary, the Omnahene, knew no English, in (29) AIR 1937 274 (Privy Council) , to establish that the whole of the document had in fact been properly explained and interpreted so as to make Tirtharaj understand at least its real import and important detail too. That was not been established, as I have found. So regarded, the passage in Parker''s case, (supra), upon which the answering defendants rely. can do no duty here.

41. Once the passage in Parker''s case has been got out of the way, what what remains is a simple question, on the line of section 13 of the Contract Act, 10 of 1872. The question is : ''Have the firm and Tirtharaj agreed upon the same thing in the same sense ?'' The answer is, in view of what I have found as facts : ''The firm agreed upon the hire-purchase document as a whole, having an assortment of so many terms and conditions; whereas Tirtharaj agreed upon a hire-purchase with an option to purchase, without knowing anything else about the assortment of so many terms and conditions.'' To one like Tirtharaj it could mean only this : ''I shall pay the hire month by month, and after I have so paid the last instalment, I shall exercise my option and become the owner.'' More than this he was not told by Tarachand. as I have found upon the whole of the evidence. More than this he could not. therefore, get to know either. That little is the greatest common factor upon which the firm and Tirtharaj have agreed. That little also gives a clue to the sameness of the sense in which they have agreed. They have, therefore, consented to that and that only. And the area of the contract created by such mutual consent is circumscribed within that periphery, not beyond, no matter what else the written document may contain.

42. Judged so, clause 5 of the agreement''s conditions, the last paragraph of which has been reproduced in paragraph 32 : C ante, be worked out. Say, Tirtharaj has paid all the monthly instalments except the very last in the series : the 24th one. Which means, he has paid Rs. 17,005, and has not paid Rs. 646 by the first day of the 24th month in breach of the agreement. Clause 5 goes into action. The firm re-possesses the car, and Tirtharaj pays the forfeit of Rs. 17,005, all because of the mandate of clause 5, though the paltry sum he had then to pay, and could not, was no more than the last instalment of Rs. 646 plus Re. 1 for the option. One answer -- and so obvious an answer at the first blush -- to such enormity will be : ''Well, here is a con-entered into freely and voluntarily. It shall, therefore, be held sacred and shall be enforced too by a court of justice.'' Another answer will be -- ''Why this sort of a maudlin sympathy for the hirer Tirtharaj -- What is he but a mere bailee ? So, it is only right that he pays the forfeit of Rs. 17,005, for having the use of the car for 23 months at the agreed rate of Rs. 646 a month for 22 months and Rs. 645 for the first month, the car then going back to the owner, the firm, in terms of the agreement.'' I have a riposte on the legal plane for such answers. And I say what I have got to, when, I deal with the question of penalty, endeavouring to t out that a court of justice. which enforces such a contract, leading to such a shocking result, even on the foot of the existing law, empty of the type of the salutary legislation England has : the Hire-Purchase Act, 1938 and its amending Acts of 1954 and 1964, will soon degenerate itself into a court of injustice. See paragraph 67 et seq. infra. For the present, my answer is : ''Clause 5 is no part of the contract. Tirtharaj did never agree upon it. Indeed, he could not, told as he was not of this by Tarachand''. To section 13 of the Contract Act again :

"Two or more persons are said to consent when they agree upon the same thing in the same sense."

The firm agreed upon clause 5. Tir. tharaj did not. Thus, the sameness of the thing agreed upon is not simply there; nor necessarily the sameness of the sense. So, the mutuality of consent to clause 5 is lacking. Ergo, is lacking too the creation of a contract to that ex-tent, the firm meaning one thing (the whole of the agreement, with all its clauses, including clause 5) and Tirtharaj meaning something else a blind hire-purchase with an option to purchase and without any idea of its so many terms and clauses). Nor can it be said upon evidence that Tirtharaj so conducted himself as to lead the firm to believe that there was a contract with all its terms in action, barring perhaps those relating to charges for repair and insurance he was made to pay after the agreement.

43. There is still another way of looking at the problem. But before I notice what it is, it is as well that the question of fraud and of non est factum be cleared up first. The passage I have quoted from the judgment of Mellish, L.J., in the Parker''s case, (paragraph 38 ante), even if it be regarded as a good law in a case of the type before me -- not a ''ticket'' case, not a case resting on a bill of lading, nor a case on a railway receipt -- makes "the absence of fraud" a condition precedent to the application of the law laid down there. I accept Mr. Mukherjee''s contention that no fraud is seen here. I need not, there-fore, enter into what he refers me to : that part of Scrutton, L.J.''s judgment in ((30) L''Estrange v. F. Graucob Limited, (1934) All ER (Reprint) 16, where his Lordship strongly objects to deal with allegations of fraud where fraud is not expressly pleaded. I accept too Mr. Mukherjee''s contention that the plea of non est factum does not avail Tirtharaj here, for the simple reason that I see, upon evidence, no misrepresentation by Tarachand to Tirtharaj as to the nature and character of the document, ext. 1. On the contrary, I have found that Tarachand did tell Tirtharaj at least this : ''here is a hire-purchase agreement with an option for you to purchase'' : paragraphs 26 and 29 ante, where I have summed up my findings. The contents of the document, in English, Tarachand did not post Tirtharaj with : Tirtharaj who knows no English. Such has been my finding. That being so, it will be a profitless task to noice in detail the cases cited on the point by counsel for both the parties. Only this may be said. Mr. Mukherjee cites --

1. (31) Howatson v. Webb, (1907) 1 Ch. 537, where the misrepresentation was as to the contents of the deed, and not as to the character and class of the deed, with the result that the plea of non est factum failed in an otherwise hard case -- a view which was affirmed by the court of appeal : (32) Howatson v. V/ebb, (1908) 1 Ch. 1. a case presumably overlooked at the bar;

2. (33) Blay v. Pollard and Morris, (1930) All ER (Reprint) 609, another had case, where two youngmen. Pollard and Morris. dissolved their none too going partnership by an oral agreement. (by which Morris was liable for future rent only), followed by a written agreement, drawn up by Pollard''s father, a solicitor, by which

Morris was made liable for past rent as well -- a written agreement which Morris, totally unversed in business, made a pretence of reading, without making head or tail of it, but which he could not run away from, because he knew the character of the deed : an agreement for dissolution of the partnership, precluding thereby the plea of non est facutm in his favour; and

3. The L''Estrange''s case, (supra), where the plaintiff was held bound by her signed written contract, by which implied warranty was excluded, though she had not read it, Maugham, L.J., pointing out that one of the two possibilities of fleeing such a contract was to prove that the document, though signed by the plaintiff, was signed in circumstances which made it not her act : non est jactum, the other possibility being misrepresentation (which I deal with in the next paragraph 45 et seq.).

Mr. Tibriwall cites--

1. (34) Abdul Hasan Vs. Mt. Wajih-un-nissa and Others, , which goes another way -- the way of the 3rd proviso to section 92 of the Evidence Act -- and holds that a sale deed, signed and executed, was of no effect, because the condition precedent (to such execution) of clearing up a previous mortgage debt, as was the separate oral agreement, was not met; and

2. (35) Appanna Vs. Jami Venkatappadu and Others, , strikes down a deed of gift by Appanna to whom it was represented by her matemal uncle, turned into husband, and by his brother, that all she was executing was a power of attorney, whereupon she signed the deed believing that it was a power of attorney : a misrepresentation indeed as to the character and class of the deed, making it truly a case of non est factum.

44. Another way of looking at the matter, hinted in the preceding paragraph, is this : here is Tirtharaj, who knows no English, completely at the mercy of Tarachand, who knows English, signing in Hindi the agreement in English. It is clearly, therefore, the duty of such a one, Tarachand, to ex-plain each and every term of the agreement to Tirtharaj, as indeed Tarachand claims he does, but in vain, because I find it impossible to believe him. I, therefore, see breach of duty on the part of Tarachand. But, I acquit him of any intent to deceive. If the thing goes on smoothly, in terms of the agreement, Tarachand does not deceive Tirtharaj. But what happens if it does not ? Take the illustration I have taken in paragraph 43 ante. Tarachand does get an ad-vantage of securing Rs. 17,005 and also the car, though the car was to be Tirtharaj''s for payment of only Rs. 647 more inclusive of the ''option'' fee of Re. 1. That is to the prejudice of Tirtharaj to that extent. Had he been told of clause 5, he might have gone in for the agreement or he might not have. If he had entered into the agreement in spite of his having been told so, here would have been an end of the matter. He would have been bound by the agreement of his choice, unless law could come to his rescue in some other way. (More of which in paragraph 67 et seq, Infra). But if he had not, and said : ''No; I am not going in for an agreement so

heavily loaded in your favour; my real intention is to buy the car, but if perchance I fail to pay the last instalment, I lose all the money and the car too. That I shall not put up with,'' the matter would have ended there too, and the agreement would not have been made. Here then lies misrepresentation within the meaning of section 18(2) of the Contract Act ? a species of misrepresentation by silence, where Tarachand owes a duty to Tirtharaj to speak, explaining each and every term of the contract. The general rule, no doubt, is that mere silence does not constitute misrepresentation. But here I see far more than mere silence. I see silence distorting a positive representation by Tarachand to Tirtharaj : "Here you are with an option to purchase in a hire-purchase agreement", nothing but a fragment of what is contained in the agreement, leaving so many things un-said, and degrading the little that is said into a half truth, always so dangerous and misleading, and therefore, only a synonym for misrepresentation. When you are dealing with one, who knows no English, and getting him sign in Hindi a document in English, it is common sense and common honesty too that you are in duty bound to explain the whole of the document to him. You do not do this little at your peril. The result will then be that only that little you have said will bind the other (here Tirtharaj) and that ordinarily the rest of the terms and conditions will not, vitiated as they are by this sort of misrepresentation.

45. Then, the definition of misrepresentation in section 18 of the Contract Act is not a hard and fast definition. The words this section opens with are--

"Misrepresentation" means and includes.''

Thus, if the definition uses the word "means", "in indicium of a hard and fast definition", it uses too the word "includes"-- equally an indicium of not a hard and fast definition. Take the case of (36) In re, Agricultural Holdings (England) Act 1883 v. Gough v. Gough, (1891) 2 QB 665, where Lord Esher, MR. considered the definition of "landlord" a hard and fast definition because of the word "means" only and because of the absence of the word "includes" as well. So, what I have relied upon, in the para. graph that goes before, does constitute misrepresentation all the more.

46. Now, again to the passage from the judgment in 1877 of Mellish, L.J. in the Parker case reproduced in paragraph 38 supra, and so strongly relied on by Mr. Mukherjee. Some 57 years later, Serutton, L.J.. enlarged the ambit of the passage by adding "misrepresentation" to "fraud" used by Mellish, L.J.:

"When a document containing contractual terms is signed, then, in the absence of fraud, or, I will add, misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not.": the L, Estrange case, (1934) All. ER. Rep. 16 at p. 19.

In the same case, Maugham, L.J., as noticed in paragraph 44 ante, referred to two possibilities of ridding oneself of such a contract: non est factum and misrepresentation. To quote his Lordship on the point:

"Another possibility is that the plaintiff might have been induced to sign the document by misrepresentation." : p. 20 ibid.

In the L''Estrange case, such possibility came to little, evidence lacking; in the in hand, such possibility comes to much, evidence existing.

47. Thus, from whatever angle, the passage relied upon may be examined, it appears to be a barren citation, not helping matters forward for the answering defendants. If it is said, though it has not been said, that there is no issue using the word "misrepresentation", the word having not been used in the plaint even, it merits more than one answer. First, there is no magic in the word "misrepresentation." In the context of facts here, misrepresentation is inherent in in the two issues I am on now. the burden of one of which (issue No. 2) is whether or no the agreement, in English language, has been explained to Tirtharaj, who knows no English, the burden of the other (issue No. 1) being the true nature of the transaction of 19 Aug. 63 by and between the parties. Take the second issue. To find such issue in favour of the plaintiff Tirtharaj is to find misrepresentation, with undoubted repercussion on the first. To find such issue against him is to find absence of misrepresentation, with no repercussion on that. Secondly, the parties, litigating before me, have gone to trial knowing well enough that one of the real questions between them is the question of the agreement, in English language, having been explained or not to Tirtharaj, ignorant of English, and that absence of such explanation means presence of misrepresentation, whereas the factum of explanation means the opposite : absence of misrepresentation. They have led evidence accordingly and invited the Court to draw a conclusion one way or the other, no manner of any objection having been taken any time to deal with the case without an issue specifying the very word "misrepresentation." So, nothing can hinge on such a consideration : absence of an issue with the word "misrepresentation" in it. Absence of an issue simpliciter, it has been held, can-not vitiate a trial, other things being there. From the crowd of decisions which cluster round the subject. I refer only to a few which remain in my memory : (37) Mussumat Mitna v. Syud Fuel Rub, (1870) 13 MIA 573, a case where the decision survived, though the whole of the suit was tried and dismissed without settling a single issue; (38) Rani Chandra Kunwar v. Narpat Singh, (1907) 34 IA 27, where both parties went to trial on the question of adoption, taken at the trial, without any pleading and issue to that end; (39) Nagubai Ammal and Others Vs. B. Shama Rao and Others, , where the sale having been hit by lis pendens was neither pleaded nor made an issue necessarily, but the defendant went to trial with the full knowledge that that was at issue, in fact; and (40) Bhagwati Prasad Vs. Shri Chandramaul, , where the importance of pleadings, to which the parties are to confine themselves, is emphasized, but two tests are laid down too, permitting relaxation of the formal requirement of pleadings :

(i) Was the matter in substance in issue even by implication ?

(ii) Did the parties have opportunity to lead evidence about it ?

tests which have been more than satisfied in the case in hand. Indeed, no relaxation from pleadings is here. To aver in a plaint that the basic document in English was not explained to me, though I know no English, -- and that is the averment in the 3rd para-graph of the plaint here -- is to plead, to put it on a low side, misrepresentation.

48. The position being so, the rule laid down by Viscount Dunedin in (41) AIR 1930 57 (Privy Council) :

"No amount of evidence can be looked into upon a plea which was never put forward,"

does not apply here. Even so, as pointed out by Venkatarama Ayyar, J. in the Nagubai Amal''s case, (supra), "that rule (of Viscount Dunedin) has no application to a case where parties go to trial with knowledge that a particular question is in issue, though no specific issue has been framed thereon, and adduce evidence relating thereto" -- just what has been the case before me and a little more too : the counsel for both parties addressing me on this.

49. In view of all that goes before, I find the two issues under discussion as under :

Issue No. 1 -- Ex facie the nature of the transaction of 19 August 63 is a hire-purchase agreement.

Issue No. 2 -- No; the agreement of 19 August 63 in English was not explained to the plaintiff Tirtharaj, who knows no English, save that all he was told that his was a hire-purchase with an option to purchase, resulting thereby in misrepresentation which enables the said Tirtharaj to avoid the rest of almost all the terms of the agreement.

50. I now turn to issues 4 and 5 on repossession of the car by the firm on 25 Sept. 65. Let me first find and record what, upon evidence, appears to have happened in fact.

51. That the car was in fact repossessed by the firm on 25 September 65 is admitted. But how ? The whole of the evidence, into the detail of which I need not enter, completely satisfies me that Tirtharaj did not voluntarily give up possession of the car and that one Khemchand, the 3rd defendant to this suit, also some sort of a hood- to lum and a car-lifter by profession too, as it seems, aided and abetted by Nandalal, the 2nd defendant, stealthily removed the car by playing a trick upon Tirtharaj''s driver, for which Khemchand was paid a handsome sum of Rs. 433 in all, though originally it was agreed that he would be paid a little more : Rs. 450. See, among others, qq. 461-510, 524-526, 572-594 to Tarachand and qq. 136-164 and 254 to Tirtharaj. Let not what is loosely regarded as hearsay, supposed to be lurking in such evidence, be made much of. There is a clear distinction between the factum of

a statement and the truth thereof. The former does not give rise to hearsay. The latter does. Such is the law pronounced by the Judicial Committee in (42) Subramaniam v. Public Prosecutor, (1956) 1 WLR 965 at p. 970. On top of that, Nandalal and Khemchand, against whom evidence is led alleging chicanery and worse, are parties to the suit, Nandalal being moreover one who has filed a joint written statement with the firm. Still none of these two pledge their oaths even to deny the serious allegations against them. So, the factum of statements Tirtharaj''s driver made to his master, not hearsay, cannot degenerate into hearsay when the truth thereof is at issue, for, the best persons to deny he truth are Nandalal and Khemchand who, in spite of being parties, and one icing an appearing party, deliberately avoid the witness-box. Then, everything apart, the fact remains that the are disappeared from the custody of Tirathraj on 25 September 65, to appear again, on the strength of a search-warrant, from the garage of Nandalal (sic)q. 161 to 164 to Tirtharaj). The conclusion is, therefore, obvious. Appearances are so much in favour of the version, the plaintiff Tirtharaj comes court with, being true, whatever allowance be made for what Tirtharaj''s ever (not found in Calcutta and, therefore, not examined) told his master

52. Now, if clause 5 of the conditions were part of the hire-purchase agreement, ext. 1, I could have done little to restore the car to Tirtharaj, however much I might condemn the highhanded act, on the part of the firm, its partners and its hired car-lifter, in retaking the car in the manner they presumably did. I need not cite authorities, though there are many. Because the principle is clear. The principle is that when, in terms of the agreement, the firm be-comes the rightful owner entitled to get the car back, on default by the hirer (as here), and the hirer becomes bereft of any right to continue possession of the car, it will be nothing short of preposterous for a court to restore the possession thereof to a rightless one (as Tirtharaj is) in a litigation of this type. A preposterous act of a party cannot be followed by a preposterous act on the part of the court.

53. Even on the assumption I have been proceeding : that clause 5 forms part of the contract, which it does not, the authorities cited at the bar seem to carry, by and large, the parties no further, the fact found by me being what it is lifting the car by deceit.

54. Mr. Mukherjee cites --

1. Halsbury''s Laws of England, 3rd edition, Volume 19, article 882 at pages 545-546, where the passage bears inter alia :

"If the owner exercises his right to resume possession on default in payment, equity will not release the hirer from the effect of his default, even if nearly all the instalments have been paid..... the provision not being in the nature of a penalty."

--

but, how the owner will exercise his right to resume possession, being laid down in article 891, at page 550 ibid, (to which Mr. Tibriwall rightly draws my attention) :

"..... the owner may, if the hirer refuses to give possession..... bring an action for trover or detinue against him." --

which, of course, the firm has not done, but resorted to trickery instead;

2. (43) Brooks v. Beirnstein, (1909) 1 KB 98, where Brooks, the hirer, broke the hire, whereupon the furnishing company which had let out the furniture to Brooks by the month, seized the furniture by force, as it was entitled to do, by virtue of clause1(e) of the agreement, providing :

"That if the hirer does not duly perform and observe this agreement the owners, their servants and agents may retake possession of the said furniture..... by force or otherwise." --

nothing like which you will find in clause 5 of the agreement in hand;

3. (44) North Central Wagon and Finance Company v. Graham, (1950) 1 All. ER 780, where the court of appeal held, reversing the trial judge, that upon any breach by the hirer, (the hirer, a man called Cole, having sold the motor-car, let out, through an auctioneer), the owners had a right to retake possession without giving any notice to the hirer, though clause 7 in the agreement provided : "the owners may terminate the hiring" on the hirer breaking the agreement, the ratio, therefore, coming to that only : retaking possession without notice of termination -- not retaking by stealth (as here) or by force;

4. The Shipway case, (supra), where the defendant hirer found the car hired "worth very much less than its price", paid no further instalment beyond the initial payment of ₹73, wrote a letter to the plaintiff company saying what to him the car was like, and was visited by the plaintiff company''s representative, a Mr. Piercy, who had had with the defendant a conversation, the upshot of which was that he took the car away, the company thereby reposessing the car under the agreement, -- facts which have only to be stated in order to be convinced about the absence of stealth, so conspicuous in the case in hand;

5. (45) Enayatullah Khan Vs. Jalan Trading Co. and Another, , which turns on its own facts, where is disbelieved the fact of the subsequent oral agreement set up by the defendant hirer, by virtue of which adjustment of the sale proceeds of the car, after seizure, towards the balance of the instalment money due, and refund of the balance left, was claimed, it being thus no authority for the proposition contended for : law blinks or even approves seizure of the chattel by stealth or force; and

6. (46) AIR 1934 151 (Nagpur) , where the typewriter let out on hire was disposed of, in defiance of the agreement, and recovered from a third person in the due process of law as the result of a criminal prosecution launched, thus neither stealth nor

illegal force being there for the recovery, and it being, therefore, impossible to spell out, from the general observations in the judgment : "no matter whether it (the typewriter) was handed over by the hirer or recovered otherwise", that the mode of recovery by stealth or by force unknown to law had had the judicial approval.

55. Mr. Tibriwall cites --

1. the Manikckand case, (supra), which reveals that the defendant hirer returned the truck to the plaintiff owner, in a disordered condition though, this being thus no authority on the question

I am on now;

2. (47) Lavender v. Betts, (1942) 2 All. ER 72, where it is held that in spite of the ancient doctrine of the common law, by which the remedy of self-help is available to a landlord, it is not for him to retake possession from a statutory tenant, of all persons, by the eccentric method -- and so harsh a method at that -- of gaining admission into the premises, with permission instead of by force, and then coming away, after taking the doors off, the windows off, and even the roof off, which put together, reprehensible though by any standard, falls short of taking possession,--a case, so interesting to read, but so irrelevant too, in the context here, Tirtharaj, sure enough, being not a statutory bailee, if such a creature exists;

3. (48) Dhian Singh Sobha Singh and Another Vs. The Union of India (UOI), , which deals with a case of plain bailment only, not bailment with an element of sale as a hire-purchase agreement is, and lays down the law at page 280, para-graph 24, that a bailor in the event of the non-delivery of the goods by the bailee on a demand made by him is en-titled at his election to sue the bailee either for wrongful conversion of the goods or wrongful detention thereof -- a proposition which, without more, negates the right to resort to force or stealth, a right which is contended for on behalf of the firm; and

4. (49) Bishan Das and Others Vs. The State of Punjab and Others, , the ratio of which appears to be that a person who bona fide puts up constructions on land be-longing to others (including the Government of the country) with their permission would not be a trespasser, and that if the Government would be anxious either to resume that land or to remove the constructions, it must do so by appropriate legal proceedings, not by an executive fiat -- a proposition, self-evident, if I may say so, but the relevance of which to the case in hand seems to be so remote.

56. If I have reviewed all these authorities, summarily though, it is only to keep my record straight, noticing all that has been addressed to me. But, in reality, they appear to be neither here nor there, in view of my finding under the first two issues that clauses 5 forms no part of the hire-purchase agreement and is successfully avoided too by Tri-three for Tarachand''s misrepresentation. Such being my finding, both the issues, I am on now, must be found in favour of the plaintiff Tirtharaj --

issue No. 4, meriting a negative answer and issue No. 5 a positive one.

57-64. (The judgment then enters into facts touching payments, and finds:)

* * *

65. In sum, I accept Tirtharaj''s version, reject Tarachand''s and find the two issues, I am on now, as under :

Issue No. 3 : Yes; by 5 monthly instalments less Rs. 16.

Issue No. 6 : Rs. 3,214 (4 monthly instalments of Rs. 646 plus Rs. 630).

66. The last issue, the general issue on reliefs, is now reached. The narrow limits to which the written contract has shrunk, no less misrepresentation, disentitle the firm to the car, in addition to Rs. 14,347 which it has received already, as I have just found. There seems to be yet another reason why the conclusion should be so. The reason is this : reckoning penalty as the genus, section 74 provides -- one species there-of is the sum named in the contract as the amount to be paid when the contract is broken; and another species is any other stipulation the contract contains by way penalty.

67. The first species does not bulk large here and at this stage. The second species does. Take once more the illustration I have taken in paragraph 43 ante. Say, Tirtharaj has paid Rs. 17,005 that is, all of the monthly instalments put together but the last, and has, there-fore, not paid the last monthly instalment of Rs. 646 plus the ''option'' fee of Re. 1. And he will be punished -- in plain English, penalty means punishment -- by paying the forfeit of Rs. 17,005, and also by losing the car, which he was out to purchase on deferred payments. This, I venture to think, is penalty : the second species provided for in section 74.

68. Leave the illustration aside. Come to realities, as found by me. Tirtharaj has paid Rs. 14, 437. Which means. he has not paid Rs. 3,214. To put it in another way, he has paid more than 4 5ths of the hire-purchase price of the car, and has failed to pay less than one-fifth thereof. And law will say to him : ''It does not matter. You pay the forfeit of both -- the heavy sum of Rs. 14.000 odd you have paid and also the car'' Fortunately, law does not appear to be so wooden as that. I proceed to state why.

69. The sanctity of a contract is no doubt there. That, I concede is law. All the same, no sacrosanctity attaches to it. Section 74, by the second species of penalty, relieves just that : a penalty, in spite of the sanctity of the contract. That is no less law either.

70. Mr. Mukherjee, refers me to a j passage from Halsbury''s Laws of England, volume 19, 3rd edition, article 882, at page 546, where the right of the owner to resume possession, on default in payment by the hirer (as here), is emphasised, "the provision not being in the nature of a penalty." This observation touching penalty is based upon, as foot note (t) at the same page indicates, (50) Sterne v. Beek, (1863) 1 De Gex, Jones and Smith Reports 593. But that case is miles away from the sort of

penalty I am going by. There, a debtor, whose debt was payable by instalments, defaulted in payment of one instalment. The creditor, however, agreed to give the debtor time, by instalments again, but upon a deed, providing that, upon default in payment of any instalment, the whole sum then due, with interest, should become payable at once. On such facts, even the first species of penalty, provided for by section 74, is not attracted; and the second species, I am going by, is still less. So, the passage Mr. Mukherjee relies upon cannot negate the type of penalty I see here.

71. Another way of stalling penalty is said to be the aspect of bailment inherent in a hire-purchase transaction of this type. In the Karflex case, (supra), the interest of Karflex Limited, who had purchased the car from one King and let it out on hire-purchase to Poole, clashed with the interest of Lincoln Wagon Company, the true owner, King, a sham owner, having got the car dishonestly. In the context of such facts, the Earl of Halsbury, K. C. contended on behalf of the appellant that Karflex Limited was the bailor and Poole the bailee, and that the suit by Karflex, Limited against Poole could not fail, because it was not or Poole to disown his bailor''s title. The contention concluded :

".....if the court takes a contrary view (contrary to the old doctrine that a bailee is estopped from denying his bailor''s title) they are not only entrenching upon that well-known doctrine, but also on the classical decision by Lord Coke in (51) Coggs v. Bernard" (1703) 92 ER 107.

Goddard, J. (as he then was) repelled the contention in the manner following, which, if I may say so, with profound respect, cannot be bettered :

"It does not seem to me by any means to follow that the doctrines which were applied to ordinary simple bailments in by-gone days apply to this modern class of bailment which has in it, not only the element of bailment, but also the element of sale, because.....since the Treading case of Helby v. Matthews and others, (supra), the hire-purchase agreement, as drawn at present, is not a true contract of sale but an option of sale. Therefore, it is a contract between the parties partly giving an option of sale and partly conferring a bailment, and I think one has only to consider that for a moment to see how fallacious it would be to try to fuse that with the hard and fast rule with regard to bailment which were laid down before any contract of hire-purchase was contemplated."

72. With the greatest respect, I adopt this, and say : in 1967, faced with a hire-purchase agreement, a mixture of bailment and option of sale, you cannot apply the more than 300-year old doctrine of simple bailment "evolved some where about the year 1602." Even a judicial personage must move with the times. Were that not so, law will become "antiquated strait-jacket and then dead-letter." Worse still, "the judicial hand would stiffen in mortmain if it had not part in the work of creation", to quote what Bhagwati, J. quoted in (52) Lalbhai Dalpatbhai and Co. Vs. Chittaranjan Chandulal Pandya, . First and last, it completely beats me why, with a

view to warding off penalty, the doctrine of bailment will apply to a transaction which is not bailment simpliciter, but which is instead bailment with an element of sale.

73. This brings me face to face with realities to which neither preconceived notions nor set formulas can blind me, or, may I add, should blind any-body. Do you or I enter into a hire-purchase agreement only for the purpose of hiring ? The answer cannot be in doubt. We do not. Truth to tail, we run into it for the purpose of purchasing, an agreement to buy though it may not be, at law. Had it been hiring and hiring only, the monthly instalments would have undoubtedly been less than what they are in a hire purchase agreement. They are higher, because the owner is making you or me pay the price of an option to purchase -- quite an understandable concept : not a purchase, not a sale, not an agreement to purchase or sell either, but an option of purchase you or I have, and a binding offer to Sell by the other, who is bound to sell, if you or I have done our part under the agreement. Is the letter -- one who lets on hire only -- bound to do so -- He is not, no binding offer to sell he has made, even if you or I pay the hire for years and years. That is bailment; and do apply the law of bailment there. What is here is not that bailment; it is bailment with an element of sale, the two together making an organic change, as it were, a new concept, between which and penalty the law of pure bailment cannot stand.

74. The way I am going, making the option to purchase a purchasable right, and resulting in a price higher than that in a simple bailment, was re-cognized even in Helby v. Matthews. Said Lord Herschell:

"I think it very likely that both parties thought it would probably end in a purchase, but this is far from showing that it was an agreement to buy. The monthly payments were no doubt somewhat higher than they would have been if the agreement had contained no such provision." --

the provision being a provision for an option to purchase : the provision laying down that on payment of all instalments, the piano "shall become the sole and absolute property of the hirer (Brewster)." Fourteen years later, Walton, J. in the Brooks case, (1909) 1 KB 98, observed :

"The monthly payments here were payments of hire, though as Lord Herschell pointed out, the amount of these payments was probably larger than it would have been if the hiring had not been accompanied with the option of purchase."

Still 40 years later, in the Warman case, (supra), Finnemore, J. spoke of a hire-purchase agreement as an agreement in two parts. One part of it is undoubtedly an agreement to rent a particular chattel for a certain length of time -- an agreement which the hirer may terminate, if he does not wish to buy the chattel. Now, to the second part, in the words of Finnemore. J. :

"On the other hand, the essential part of the agreement is that the hirer has the option of purchase, and it is common knowledge -- and I suppose, common sense -- that when people enter into a hire-purchase agreement, they enter into it not so much for the purpose of hiring, but for the purpose of purchasing, by a certain method, by what is, in effect, deferred payments, and that is done by this special kind of agreement known as a hire-purchase agreement, the whole object of which is to acquire the option to purchase the chattel when certain payments have been made."

To equate a hire-purchase agreement with bailment only, so that penalty may be got out of the way, is to ignore "the essential part of the agreement that the hirer has the option of purchase", to defy common knowledge, pointing out that people go in for such an agreement, not so much for hiring, as for purchasing, and to set at naught the whole object which actuates such a transaction : the object of acquiring the option to purchase, followed by purchase.

75. I, therefore, see here penalty,. not in a sum of money, but in the stipulation itself, enabling the firm to get both the car and the sum of Rs. 14,000 odd received so far from Tirtharaj. And I shall not enforce it.

76. Damages Tirtharaj will have, but not at all at the exorbitant rate claimed. In assessing damages, it behaves me to consider that hire-purchase agreements have been running all these years in a manner in which the firm and Tarachand would like them to run. I have approached the matter in a way, the soundness of which is yet to be tested. This is one consideration. Another is : I view, with the gravest displeasure, the high-handed act on the part of the firm in stealing the car from Thirthaja''s custody. For all this, I award Tirtharaj a token sum of Rs. 1,000 as damages. That should how-ever be taken away from Rs. 3,214 which Tirtharaj still owes the firm. The firm will, therefore, get from Tirtharaj Rs. 2,214.

77. In the result, there must be judgment for the plaintiff Tirtharaj Pandey in terms of prayers (a) and (b) only of the plaint, provided that the said plaintiff do pay Rs. 2,214 to the first defendant, Amar Credit Corporation, by 20 November 67, deposit in court to the credit of the same firm by that date being deemed as payment to the firm, in terms of this directive. Should the plaintiff herein fail, the suit shall be deemed as having been dismissed with costs, save that the plaintiff Tirtharaj gets a credit of Rs. 1,000, I have awarded him as damages, towards the total hire-purchase price, in any event.

78. Default in payment I reckon against Tirtharaj in considering the question of costs. I consider too the conduct of Tarachand in having not explained the hire-purchase agreement to Tirtharaj, as he was in duty bound to do. I consider still more the manner of seizing the car by riding rough-shod over the law of the land, the law being : "if your adversary does not return the chattel which you consider you are en-titled to possession of, sue him for detention and the like; you cannot take

the law in your hands." Having done so, I direct, each party do pay and bear its costs save as stated in paragraph 78 ante.

79. So soon as Rs. 2,214 is paid by Tirtharaj to the firm, Amar Credit Corporation, inside of 20 November 67, the receiver shall make over possession of the car to him, whereupon he shall be discharged.

80. The rule I go by is to grant a stay, for a reasonable time, of the decree following the judgment I pronounce, so that the party aggrieved by my decision may carry the litigation on appeal. But here I shall not go that way. I shall not, because, then, whoever wins, the car, lying idle all these months will lose all its utility and will cease to be a car, degenerating itself into a lumber instead. I, therefore, refuse to grant a stay.

81. Certified for two counsel.

82. In 1895, Lord McNaughton said In the Helby case:

"If these agreements are objection-able on public grounds it is for parliament to interfere."

The British Parliament did interfere in 1938, followed by further interference in 1954 and 1964. Our Parliament is about to interfere too, though not a day too soon, as will be evident from Bill No. 57 of 1967, "a Bill to amend the law relating to the hire-purchase of goods," published in the Gazette of India extraordinary dated 9 June 67, Part II, Section 2, page 431. In the context of this suit, it will be of academic interest to notice what its provisions are. So, I do not notice them either. Suffice it for me to say that, on the existing law, as I take it to be, it is possible for me to give relief to the hirer and to relieve penalty too. I have done no more. I express my indebtedness to the bar for the assistance rendered.