SUNDARAM FINANCE LTD.

v.

STATE OF KERALA AND ANOTHER

November 30, 1965

[K. SUBBA RAO, J. C. SHAH AND S. M. SIKRI, JJ.]

Sales-tax—Hire-purchase agreements—Motor vehicles purchased with loans taken from financiers—Financier whether liable to sales-tax as having effected 'sale' through hire-purchase agreement—Travancore-Cochin General Sales-tax Act 11 of 1125 M.E., s. 2(j), Explanation (1).

The appellants were a limited company with their registered office at Madras. The Company carried on the business of financing purchases of motor vehicles on the security of those vehicles. A customer desirous of purchasing a motor vehicle but unable to pay the price to the dealer would make part payment to the dealer and then approach the appellants for a loan. The appellants would advance the loan to the customer on the strength of nine documents executed by the customer one of which was a 'sale letter' purporting to sell the vehicle to the appellants on the date of the loan; another was a promissory-note agreeing to pay the difference between the price of the vehicle and the amount paid by the customer to the dealer and interest thereon at the stipulated rate. Another of these documents was the hire-purchase agreement itself; in cl. 6 it recited that on the customer paying the entire amount due under the second schedule to the agreement the vehicle would become the sole and absolute property of the customer. On September 28, 1958 the Sales-tax Officer, Ernakulam, issued a notice calling upon the appellants to file returns of their turnover from sales in the course of business and to secure registration as dealers under the Travancore-Cochin General Sales-tax Act 11 of 1125 M.E. and to furnish details of the transactions of sale with parties in the State of Kerala in the year 1955-56, 1956-57 and 1957-58. Later another notice was issued for the years 1958-59 and 1959-60. The appellants contended that they were not liable to pay Sales-tax on their financing transactions as they were financiers and did not enter into any transactions of sale of goods with parties within the State of Kerala and that they were not 'dealers' under the Act. The Sales-tax Officer however held that they were dealers and that the hire-purchase transactions entered into by them resulted in sales which were liable to sales-tax. According to the Sales-tax authorities between the date on which the customer agreed to purchase a vehicle and the date on which he became full owner without any encumbrance three sale transactions were interposed—a sale by the dealer of the vehicle to the customer; a sale by the customer to the appellants under the 'sale letter'; and a sale by virtue of cl. 6 of the hire-purchase agreement—while the second transaction was not liable to tax, the first and third were. The appellants filed petition in the High Court praying for writ of *certiorari* and prohibition against the Sales-tax Officer. The High Court rejected these petitions. With certificate under Art. 133(1)(a) of the Constitution the appellants came to this Court.

HELD : *Per* Shah and Sikri, JJ. (i) The true effect of a transaction may be determined from the terms of the agreement considered in the light of the surrounding circumstances. In each case the Court has, unless prohibited by statute, power to go behind the documents and to determine the nature of the transaction, whatever may be the form of the documents. An owner of goods who purports to convey absolutely

A or acknowledges to have conveyed goods and subsequently purports to hire them under a hire-purchase agreement is not estopped from proving that the real bargain was intended to be a loan on the security of the goods. [841 C]

(ii) A hire-purchase agreement is a complex transaction. The owner under a hire-purchase agreement enters into a transaction of hiring out goods on the terms and conditions set out in the agreement, and the B option to purchase exercisable by the customer on payment of all the instalments of hire arises when the instalments are paid and not before. In such a hire-purchase agreement there is no agreement to buy goods; the hirer being under no legal obligation to buy, has an option either to return the goods or to become its owner by payment in full of the stipulated hire and the price for exercising the option. This class of hire-purchase agreements must be distinguished from transactions in which the customer is the owner of the goods and with a view to finance his C purchase he enters into an arrangement which is in the form of a hire-purchase agreement with the financier, but in substance evidences a loan transaction subject to a hiring agreement under which the lender is given the licence to seize the goods. [841 G-842 B]

(iii) The appellants were financiers; they were not dealing in motor vehicles. The motor vehicles purchased by the customer was registered in the name of the customer and remained at all material times so regis- D tered in his name. In the letter taken from the customer under which he agreed to keep the vehicle insured, it was expressly recited that the vehicle had been given on security for the loan advanced by the appellants. As a security for repayment of the loan, the customers executed a promissory note for the amount paid by the appellants to the dealer of the vehicle. The so-called 'sale-letter' was a formal document which was not made effective by registering the vehicle in the name of the appellants and even the insurance of the vehicle had to be effected E as if the customer was the owner. The appellants' right to seize the vehicle was merely a licence to ensure compliance with the terms of the hire-purchase agreement. The customer remained *qua* the world at large the owner, and remained in possession, and on condition of performing the convenants had a right to continue to remain in possession. The right of the appellants may be extinguished by payment of the amount due to them under the terms of the hire-purchase agreement even before the F date fixed for payment. The agreements undoubtedly contained several onerous covenants but they were all intended to secure to the appellants recovery of the amounts advanced. The intention of the appellants in obtaining hire-purchase and allied agreements was to secure the return of loans advanced to their customers. The transactions were merely financial transactions. [844 C-H]

As there was no sale no sales-tax could be levied on the transactions as decided by this Court in *Gannon Dunkerley & Co.*

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State of Madras v. *Gannon Dunkerley & Co.*, [1959] S.C.R. 379, *Re Watson Ex Parte Official Receiver in Bankruptcy*, (1890), 25 Q.B.D. 27, *Mass* v. *Pepper*, (1905) A.C. 102 and *Polsky* v. *S. And A. Services*, [1951] 1 All E.R. 185, referred to.

K. L. Johar & Co. v. *Deputy Commercial Tax Officer*, A.I.R. (1965) S.C. 1082, distinguished.

H

Per Subba Rao, J. (i) There was no question in the present case of going behind the documents executed by the parties to determine their true intentions. The transactions in question were in accordance with mercantile usage. Both the financiers and the customers entered with

eyes open into transactions of hire-purchase. Their intention was expressed in clear terms. They could have executed hypothecation bonds but they did not, and entered instead into hire-purchase transactions. There was no reason to camouflage the real nature of the transactions. None was suggested. They were therefore bound by the terms of the agreement. [833 A-B]

(ii) Neither the fact that the agreements were entered into because the customers had no funds to purchase the motor car nor the circumstance that part of the consideration was already paid to the dealer affects the nature of the transaction. The fact that the customer executed a promissory note for the money advanced by the financier does not affect the question for that was merged in the hire-purchase transaction. If the said terms were not carried out the customers could not claim any rights under the agreements and the financier continued to be the owner freed from any obligation created under the agreements. Could the financier thereafter return the promissory note? He could not. The transactions purported to be hire-purchase agreements and they must be treated as such as the common intention of the parties was to enter into such transactions. A deeper study of the transactions showed that the dealer and the financier were closely connected Companies and for their own reasons they had split up the business of hire-purchase between them. In effect and in substance, the dealer without receiving the whole money put the customers in possession of the cars under the hire-purchase agreements. [833 H; 834 C]

(iii) If the transactions were hire-purchase agreements in terms of the judgment of this Court in *M/s. K. L. Johar & Co.* when all the terms of the agreements were satisfied and the option was exercised, sales took place in the goods which till then had been hired. Having thus fructified into sales the transactions were liable to sales-tax. [831 B; 834 B]

M/s. K. L. Johar & Co. v. *The Deputy Commerical Tax Officer, Coimbatore III,* [1965] 2 S.C.R., 112 relied on.

CIVIL APPELLATE JURISDICTION : Civil Appeals Nos. 673 and 677 of 1964.

Appeals from the judgment dated December 5, 1963 of the Kerala High Court in Original Petition Nos. 1153, 1012, 1880, 1885 and 1886 of 1962.

A. V. Viswanatha Sastri and *R. Ganapathy Iyer,* for appellant.

P. Govinda Menon and *M. R. K. Pillai,* for respondent No. 1.

SUBBA RAO, J. delivered a dissenting Opinion. The Judgment of SHAH and SIKRI, JJ. was delivered by Shah, J.

Subba Rao, J. I regret my inability to agree. The facts of the case and the arguments of learned counsel have been fully stated by my learned brother, Shah, J., and I need not recapitulate them here.

The short question is whether the hire-purchase agreements entered into by the appellant with its customers are transactions

A of sale of goods or are only documents securing the return of the loans advanced by it to its customers.

It is common case that the said documents *ex facie* purported to be hire-purchase agreements and if that was their real character, in terms of the judgment of this Court in *Messrs. K. L. Johar & Co.* v. *The Deputy Commercial Tax Officer, Coimbatore III*(1), when all the terms of the agreements were satisfied and the option was exercised, sales take place in the goods which till then had been hired. The contention, therefore, was that in executing the documents the common intention of the parties was that they should be documents securing the loans and that the form of hire-purchase agreement was adopted to achieve that purpose.

At the outset the nature of hire-purchase agreements may be briefly noticed. Hire-purchase agreements have come to stay as part of the social service in the commercial world. It enables persons of ordinary means to buy the necessities of life which the modern scientific advancement offers. Under that system one can buy a car, a refrigerator, furniture, cooking apparatus, and as a matter of fact any article of utility. It enables the hirer to own the article of his choice by paying on easy instalments, and the dealer to provide it for him for profit without any risk to himself. It has become a common and familiar instrument of mercantile social service. Simonds, J., in *Transport and General Credit Corporation Ltd.* v. *Morgan*(2) said :

> "It must be remembered that hire-purchase agreements now play a very large part in the commercial and social life of the community, and the financing of those hire-purchase agreements is an enormous business, both in the city of London and elsewhere. It appears to me that the financiers and the dealers co-operate in the common venture of making feasible the whole business of hire-purchase agreements, which is now, for good or for evil, a necessary part of our social life. To regard one party to that common venture, which is now a recognized mercantile service, as carrying on the business of a money-lender is, as I have said before, an abuse of language."

What is true of England is, to a lesser degree, true of India, particularly in the big cities of India.

Now, let us see how this system was evolved. At first the said transaction took place directly between a dealer and his

(1) [1965] 2 S.C.R. 112. (2) [1939] 2 All E.R. 17, 28.

customer : the dealer wanted to sell his goods and the buyer was not in a position to pay the entire sale price of the goods in one lump sum. The parties, therefore, entered into hire-purchase agreement whereunder the dealer continued to be the owner till the entire consideration was paid by the customer in terms of the agreement and till he had exercised his option to buy the goods covered by the said agreement. But the dealer was not always financially sound enough to wait till such time as all the instalments would be paid. The second stage in the evolution in the hire-purchase system was when a financier intervened between the dealer and the customer. The financier used to purchase goods from the dealer and then to enter into an agreement with the customer. At that stage the financier became the owner and the customer became the hirer till such time as he carried out the terms of the agreement. A further variation of the transaction was that the customer purchased the goods by paying the entire consideration to the dealer with the help of the financier; he then sold the goods to the financier and entered into an agreement of hire-purchase with him. In this type of transaction, the dealer went out of the picture altogether : the financier took the place of the dealer and the customer continued to be the hirer. Some times, as the present case illustrates, the customer might find some money but could not provide the whole consideration. In that event also, the transaction could be put through in the aforesaid manner either with the dealer or the financier, as the case may be.

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The object of the hire-purchase system was to help to finance the customer in order that he might purchase the property. Though that was the object, the transaction took the form of hire-purchase agreement. The main feature of the agreement, apart from small variations, was that the dealer or the financier continued to be the owner till the terms of the agreement were fully complied with by the customer and the option to purchase the same was exercised by him. If the terms were not complied with, the dealer or the financier, as the case may be, could terminate the agreement and take back the goods. In such a transaction, the common intention of the dealer, the financier and the customer was that the transaction should take the form of a hire-purchase agreement which would become a sale on the compliance of the terms of that agreement. No doubt the financing operation could have taken the form of a mortgage or pledge, but the parties, for their mutual benefit and convenience, entered into a hire-purchase transaction.

F G H

A In the absence of any fraud or undue influence, the question resolves itself into a simple question of intention. The transactions were in accordance with the mercantile usage. Both the financier and the customers with open eyes entered into the transactions of hire-purchase. Their intention was expressed in clear terms. They could have executed hypothecation bonds, but they B did not, and instead entered into hire-purchase transactions. There was no reason to camouflage the real nature of the transactions. None was suggested. They were, therefore, bound by the terms of the agreements.

The subtle distinction sought to be made between the tran- C sactions in question and other transactions are out of place : little clues have no bearing, as there was no attempt to camouflage the real nature of the transactions. It may be that the consideration was not the full value, but nothing prevented the owners from selling their cars for a smaller price, for they expected to get them back on their returning the amount in terms of the agreements. D The circumstance that there was no express term for reconveying is not material, for the term that on the compliance of the terms of the agreement the hirer would become the owner would serve the same purpose.

The whole fallacy of the argument lies in the attempt to equate E such commercial transactions with ordinary sales of property and agreements to evade statutory provisions. It is true that in India there are reports replete with decisions where courts attempted to find out the real intention of the parties when documents were executed to hide their real intention. There are also decisions, both in India and in England, where courts applied various tests F to find out the real intention of a document when it was executed to evade certain statutory provisions. These decisions have no bearing in the context of a hire-purchase agreement entered into in the course of business. All the parties knew the nature of the transaction and accepted the terms embodied thereunder.

In the present case the transactions were admittedly hire- G purchase agreements. The financier purchased the cars for the amounts required to be paid to the dealer and entered into specific hire-purchase agreements with the customers. They contained all the usual terms that are found in a hire-purchase agreement. Neither the fact that the agreements were entered into because the customers had no funds to purchase the motor-cars nor the cir- H cumstance that part of the consideration was already paid to the dealer affects the nature of the transaction. The fact that the customer executed a promissory note for the money advanced by

the financier does not affect the question, for that was merged in the hire-purchase transaction. If the said terms were not carried out, the customers could not claim any rights under the agreements and the financier continued to be the owner freed from any obligation created under the agreements. Can the financier thereafter enforce the promissory note? I think he cannot. As I have stated earlier, the transactions purported to be hire-purchase agreements and they must be treated as such, as the common intention of the parties was to enter into such transactions. A deeper scrutiny of the transactions shows that the dealer and the financier were closely connected companies and for their own reasons they have split up the business of hire-purchase between them. In effect and in substance, the dealer without receiving the whole money put the customers in possession of the cars under the hire-purchase agreements.

For the aforesaid reasons, I hold that if the agreements had fructified into sales, they were liable to sales-tax. The High Court, in my view, gave a correct answer to the question propounded for its opinion.

In the result, the appeals fail and are dismissed with costs.

Shah, J. On September 29, 1958 the Sales Tax Officer, 1st Circle, Ernakulam, issued a notice calling upon the appellants to file returns of their turnover from sales in the course of business and to secure registration as dealers under the Travancore-Cochin General Sales Tax Act 11 of 1125 M.E. and to furnish details of the transactions of sale with parties in the State of Kerala in the years 1955-56, 1956-57 & 1957-58. A similar notice was issued by the Sales Tax Officer on March 3, 1962 in respect of the transactions within the State for the years 1958-59 and 1959-60. The appellants contended that they were not liable to be assessed under the Act. They contended that they were mere financiers and that they did not enter into any transactions of sale of goods with parties within the State of Kerala and that they were not "dealers" within the meaning of the Act. The Sales Tax Officer by orders dated March 25, 1962 and July 6, 1962 held that the transactions between the appellants and certain parties within the State of Kerala were sales within the meaning of the Act and the appellants were dealers liable to be assessed under the Act. The Sales Tax Officer accordingly reiterated his demand upon the appellants to file returns of their turnover in respect of sales for the five years in question along with details of all transactions in the State and "to produce evidence to prove the correctness and completeness of their returns".

A The appellants then moved the High Court of Kerala under Art. 226 of the Constitution for writs of *certiorari* quashing the proceedings of the Sales Tax Officer and for writs of prohibition restraining that Officer from taking further proceedings against the appellants under his orders dated March 25, 1962 and July 6, 1962. The High Court of Kerala rejected these petitions upholding the view of the Sales Tax Officer that on the transactions between the appellants and their customers sales tax was payable under the Travancore-Cochin General Sales Tax Act. With certificate granted by the High Court under Art. 133(1)(a) of the Constitution, these appeals are preferred.

C The appellants are a company incorporated under the Indian Companies Act, 1913, and have their registered office in Madras. The Company carries on business of financing purchases of motor vehicles on the security of those vehicles. The manner in which these transactions were effected is briefly this. A customer desirous of purchasing a motor-vehicle, but unable to pay the price D to the dealer, agrees to purchase the vehicle and makes part payment of the price to the dealer. He then approaches the appellants and requests that a loan be advanced to him. On the appellants' agreeing to grant a loan, the customer executes nine documents—(1) an application requesting the appellants to grant a loan of a stated amount on the *security* of the motor-vehicle; (2) E a "sale letter" reciting that the customer had on the date of the application for loan sold to the appellants the motor-vehicle; (3) a bill which recites that for the amount mentioned in the "sale letter" and received in full, the customer has sold to the appellants the vehicle belonging to the customer; (4) a receipt for the amount of the bill describing it as the value of the vehicle sold to the F appellants; (5) an agreement called the hire-purchase agreement under which the appellants agree to let out to the customer and the customer agrees to take on hire the motor-vehicle for a specified term subject to determination on conditions mentioned therein; (6) a promissory-note agreeing to pay the difference between the price of the vehicle and the amount paid by the customer to G the dealer, and interest thereon at the stipulated rate; (7) a letter from the customer requesting the appellants to pay to the dealer the amount agreed to be advanced to him; (8) a letter addressed to the appellants agreeing and undertaking to keep the vehicle, on the security of which the loan was granted, insured against "comprehensive risks"; and (9) a letter addressed to the Motor Vehicles H Authorities intimating that the motor-vehicle "is the subject of hire-purchase agreement between" the customer "as owner" and the appellants, and requesting the Authorities to "make a note of the

hire-purchase agreement" in the registration certificate standing in the name of the customer. The scheme for financing the purchase of the vehicle is therefore that the customer purchases the vehicle from the dealer directly and gets it registered in his name. At his request the appellants agree to advance the balance of the price remaining to be paid, and pay it to the dealer on the customer's executing a promissory-note for repayment of the amount, a hire-purchase agreement and other related documents. On repayment of the amount stipulated to be paid, the vehicle becomes the sole and absolute property of the customer.

The relevant terms of the hire-purchase agreement may now be set out. In the preamble of the agreement, it is recited that the agreement is between the appellants to be described as "the owners" the customer to be described as "the Hirer" and "the Guarantor", who guarantees due performance and observance by the customer of all the clauses and covenants of the agreement and agrees to pay on demand any monies due or which may become payable to the owners under the agreement either by way of hire expenses or damages, repairs, replacements or other supplies. By the first clause it is recited that the owners (the appellants) will let and the hirer (the customer) will take on hire the motor vehicle for a specified number of calendar months subject to determination as mentioned in the agreement. Clause 2 sets out the conditions of hiring. Thereby the customer agrees to pay rent to the appellants punctually; to take proper care of the vehicle and keep it in good condition and to keep it insured for its full value; to pay all rents, rates, taxes payable by him in respect of the premises where the vehicle shall for the time being be garaged and all licence fees, insurance premium and other duties payable in respect of the said vehicle; to keep the vehicle in his sole custody and possession; and to permit the appellants to inspect the vehicle at all reasonable times during the hiring; not to cause, permit, allow or suffer any person to acquire any lien on the vehicle; not to cause, permit or allow or suffer the vehicle to become liable to distress, execution or any other process levied or issued against the customer; and not to assign, sell, pledge, charge, underlet, lend or otherwise part with the possession, custody or beneficial interest in the vehicle of the customer therein under the agreement without the consent of the owners. By cl. 3 all monies payable to the customer by any insurer for loss or damage to the motor-vehicle are assigned to the owners. Clause 4 sets out the conditions in which the agreement is to stand determined without any notice to the customer. Those conditions are :

A (a) failure to pay any of the hiring instalments within the stipulated time;

(b) customer becoming insolvent or compounding with his creditors;

(c) customer pledging or selling or attempting to pledge or sell or otherwise alienate or transfer the vehicle;

B

(d) customer suffering any act or thing whereby or in consequence of which the vehicle may be distrained, seized or taken in execution under legal process;

C (e) customer breaking or failing to perform or observe any conditions.

On the determination of the agreement all the instalments previously paid by the customer stand forfeited to the owners who shall thereupon be entitled to sieze the vehicle and to sue for all the instalments due and for damages for breach of the agreement. D Under cl. 5 the customer has the option at any time to determine the agreement by delivering up the vehicle at his own cost to the owners, and by cl. 6 on the customer paying the entire amounts due under the second schedule, the vehicle becomes the sole and absolute property of the customer. By cl. 7 it is provided that if E the appellants seize the vehicle and take possession of it under cl. 4, or if the customer returns it under cl. 5, the customer shall remain liable to the appellants for arrears of the amount of hire up to the date of such seizure or return. Under cl. 8 it is agreed that the customer shall maintain registration of the vehicle in his own name, provided that the customer shall transfer the registra- F tion in the name of the appellants whenever required to do so by them, and especially when the customer commits a breach of any of the conditions of the agreement.

According to the sales-tax authorities, between the date on which the customer agreed to purchase a vehicle and the date on which he became full owner of the vehicle without any encum- G brance, three sale transactions were interposed : a sale by the dealer to the customer; a sale by the customer to the appellants under the "sale letter" referred to earlier; and a sale by virtue of cl. 6 of the hire-purchase agreement. It is common ground that the first transaction is taxable under the appropriate Sales Tax Act. On behalf of the State of Kerala it is conceded that the H second transaction is not taxable, but it is so because the customer is ordinarily not a dealer within the meaning of the Act, but they contend that inasmuch as under that transaction the appellants

become transferees of the rights of the customer in the vehicle under the sale letter, when by the operation of cl. 6 of the hire-purchase agreement the rights of the appellants are extinguished, there results a sale in favour of the customer which is taxable under the Act. We are in this case concerned with the exigibility to tax of what the State of Kerala contends is a sale resulting from the payment of all the instalments under the hire-purchase agreement.

The appellants submit that execution of a "sale letter" by the customer acknowledging sale of the vehicle to them does not create in them any right of ownership, the "sale letter" being merely one of a set of documents under which arrangement for granting a loan and for ensuring repayment of the money advanced by the appellant's is made. The appellants say that they do not become owners of the vehicle under the "sale letter", that the true effect of the transaction on the execution of the nine documents is to hypothecate the vehicle in favour of the appellants, that the vehicle continues to remain of the ownership of the customer, and that under cl. 6 of the hire-purchase agreement there is extinction of encumbrance and not a transfer of title which may be called a sale taxable under the Travancore-Cochin General Tax Act.

The Travancore-Cochin General Sales Tax Act 11 of 1125 M.E. was brought into force in May 1950. The State authorities had, it is conceded, no power to enact a statute for levying tax on a transaction which does not conform to the definition of 'sale' within the meaning of the Indian Sale of Goods Act : *State of Madras* v. *Gannon Dunkerley & Co. (Madras) Ltd.*(1) The Travancore-Cochin General Sales Tax Act by s. 2(j) defines 'sale' as follows :

> " 'sale' with all its grammatical variations and cognate expressions means every transfer of the property in goods by one person to another in the course of trade or business for cash or for deferred payment or other valuable consideration and includes also a transfer of property in goods involved in the execution of a works contract, but does not include a mortgage, hypothecation, charge or pledge;
>
> Explanation (1).—A transfer of goods on the hire-purchase or other instalment system of payment shall, notwithstanding the fact that the seller retains the title in the goods as security for payment of the price, be deemed to be a sale.

(1) [1959] S.C.R. 379.

A Explanation (2).— . . . ."

It is in the light of this definition that the liability to tax of the transactions resulting from cl. 6 of the agreement falls to be determined. If, by the operation of cl. 6, title to the vehicle is, under an existing contract to sell, transferred to the customer for a price,
B the transaction is a sale, and is taxable.

The appellants are financiers and their business is to advance loans on favourable terms on the security of vehicles. This is effected by obtaining a promissory-note for repayment of the amount advanced, and a hire-purchase agreement which provides a mechanism for recovery of the amount. It is true that a "sale
C letter" is obtained from the customer, but the consideration for the sale letter is only the balance remaining payable to the dealer, after giving credit against the price of the vehicle the amount paid by the customer. The application for a loan, and the letter addressed to the appellants undertaking to insure the vehicle ex-
D pressly mention that a loan is asked for and granted on the *security* of the motor-vehicle under the hire-purchase agreement. It is the customer who insures the vehicle, and in the books of the Motor Vehicle Authorities he remains, with the consent of the appellants, owner of the vehicle. Undue importance to the acknowledgment of sale in the "sale letter" and the recital of sale
E in the bill and in the receipt cannot therefore be attached. These documents—"sale letter", bill and receipt—must be read with the application for granting a loan on the security of the vehicle, the letter in which the customer requests the appellants to pay the balance of the price remaining to be paid by him to the dealer, the promissory-note executed by him for that amount, the under-
F taking to insure the vehicle, and intimation to the Motor Vehicles Authorities to make note of the hire-purchase agreement.

The hire-purchase agreement executed by the customer undoubtedly contains several onerous covenants. The customer has to pay all rents, rates, taxes and other outgoings regularly, to take proper care of the vehicle, to get it insured, to keep it fully
G repaired, and not to assign, sell, pledge, charge, underlet, lend or otherwise to create any lien thereon. The hire-purchase agreement is liable to be determined if any of the eventualities mentioned in cl. 4 of the agreement happens and the appellants have the right to seize the vehicle. These covenants are only material
H in considering the true intention of the parties entering into the hire-purchase agreement, it is irrelevant that in a given case these covenants may not be enforced by a Court in a dispute arising between the appellants and the customer, or relief may be granted

on the ground that they contain penal clauses. In considering the true intention of the parties, the terms of cl. 6 of the hire-purchase agreement are important: it is stipulated thereby that "Upon the Hirer (customer) paying the entire amount due under Second Schedule herein, the said vehicle shall become the sole and absolute property of the Hirer." The intention clearly disclosed thereby is that on payment of the amount due at any time after the hire-purchase agreement, the vehicle would be free from encumbrance. 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 is to be found in other hire-purchase agreements. Execution of the promissory-note, the hire-purchase agreement and the other documents, in our judgment, indicate that it was the intention of the parties not to transfer any interest in the vehicle by the customer to the appellants: it was intended to give security by hypothecating the vehicle in favour of the appellants and for ensuring repayment of the loan advanced that the customer submitted to the various onerous conditions of the hire-purchase agreement.

A hire-purchase agreement is normally one under which an owner hires goods to another party called the hirer and further agrees that the hirer shall have an option to purchase the chattel when he has paid a certain sum, or when the hire-rental payments have reached the hire-purchase price stipulated in the agreement. But there are variations when a financier is interposed between the owner of the goods and the customer. The agreement, ignoring variations of detail, broadly takes one or the other of two forms: (1) when the owner is unwilling to look to the purchaser of goods to recover the balance of the price, and the financier who pays the balance undertakes the recovery. In this form, 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 & Company* v. *Deputy Commercial Tax Officer*(1) dealt with a transaction of this character. (2) In the other form of transactions, goods are purchased by the customer, who in consideration of executing a hire-purchase agreement and allied documents remains in possession of the goods, subject to liability to pay the amount paid by the financier on his behalf to the owner or dealer, and the financier

(1) [1965] 2 S.C.R. 112.

A obtains a hire-purchase agreement which gives him a licence to seize the goods in the event of failure by the customer to abide by the conditions of the hire-purchase agreement.

The true effect of a transaction may be determined from the terms of the agreement considered in the light of the surrounding B circumstances. In each case, the Court has, unless prohibited by statute, power to go behind the documents and to determine the nature of the transaction, whatever may be the form of the documents. An owner of goods who purports absolutely to convey or acknowledges to have conveyed goods and subsequently purports C to hire them under a hire-purchase agreement is not estopped from proving that the real bargain was a loan on the security of the goods. If there is a *bona fide* and completed sale of goods, evidenced by documents, anterior to and independent of a subsequent and distinct hiring to the vendor, the transaction may not be regarded as a loan transaction, even though the reason for D which it was entered into was to raise money. If the real transaction is a loan of money secured by a right of seizure of the goods, the property ostensibly passes under the documents embodying the transaction, but subject to the terms of the hiring agreement, which become part of the buyer's title, and confer a licence to seize. When a person desiring to purchase goods E and not having sufficient money on hand borrows the amount needed from a third person and pays it over to the vendor, the transaction between the customer and the lender will unquestionably be a loan transaction. The real character of the transaction would not be altered if the lender himself is the owner of the goods and the owner accepts the promise of the purchaser to F pay the price or the balance remaining due against delivery of goods. But a hire-purchase agreement is a more complex transaction. The owner under the hire-purchase agreement enters into a transaction of hiring out goods on the terms and conditions set out in the agreement, and the option to purchase exercisable by the customer on payment of all the instalments of hire arises G when the instalments are paid and not before. In such a hire-purchase agreement there is no agreement to buy goods; the hirer being under no legal obligation to buy, has an option either to return the goods or to become its owner by payment in full of the stipulated hire and the price for exercising the option. This class of hire-purchase agreements must H be distinguished from transactions in which the customer is the owner of the goods and with a view to finance his purchase he enters into an arrangement which is in the form of a hire-purchase

agreement with the financier, but in substance evidences a loan transaction, subject to a hiring agreement under which the lender is given the licence to seize the goods.

A few illustrative cases decided by the courts in England, which do not import complications arising from the Bills of Sale Act, 1878 and the Hire Purchase Act, 1938, may be briefly noticed. In *Re Watson, Ex Parte Official Receiver in Bankruptcy*(1) it was held that in adjudging the true nature of a transaction purporting to be a sale of personal chattels, followed by a hiring and purchase agreements, whereby the vendor agreed to hire the chattels from the purchaser and to pay quarterly sums for such hire, until a certain amount was paid, when the chattels were to become again the property of the vendor, and power was given to the purchaser to take possession of the chattels on default of payment, the form of the transaction cannot be given undue importance. The Court held that no sale or hiring of the chattel was intended, the object in truth being to create a security for a loan of money to the supposed vendor from the supposed purchaser. The transaction was therefore one of loan. Lord Esher, M. R., observed at p. 37 :

> ". . . . . when the transaction is in truth merely a loan transaction, and the lender is to be repaid his loan and to have a security upon the goods, it will be unavailing to cloak the reality of the transaction by a sham purchase and hiring. It will be a question of fact in each case whether there is a real purchase and sale complete before the hiring agreement. If there be such a purchase and sale in fact and afterwards the goods are hired, the case is not within the Bills of Sale Act. The document itself must be looked at as part of the evidence; but it is only part, and the Court must look at the other facts, and ascertain the actual truth of the case."

In *Mass* v. *Pepper*(2) one M entered into a contract with a wine merchant under which the latter was to provide £2,000 for purchasing the furniture of a hotel which was agreed to be purchased by M. The wine merchant paid £2,000 to the vendor who gave a receipt for that sum as part of a purchase money of the furniture. M then executed a hire-purchase agreement in favour of the wine merchant and the wine merchant let the furniture to M to be paid for by instalments and the furniture not to become property of M till all the instalments were paid. It was

(1) [1890] 25 Q.B.D. 27. (2) [1905] A.C. 102.

A held by the House of Lords that the circumstances showed that the transaction was merely colourable and was a loan on the security of the hire-purchase agreement.

In *Polsky* v. *S. and A. Services*[1] the plaintiff purchased a motor-car and gave a cheque for the price. Being unable to make B arrangement for the cheque, he entered into a transaction with the defendants who carried on the business of financing the purchase of motor-cars. Though the plaintiff had purchased the motor-car, and merely sought a loan, the transaction between him and the defendants was carried out by means of documents used by the defendants when financing purchase of motor-cars, and C they purported to buy the motor-car from the plaintiff and to let it out to him under a hire-purchase agreement. The plaintiff then brought an action for a declaration claiming that hire-purchase agreement was void under the Bills of Sale Act, 1882. Lord Goddard, C.J., in upholding the claim of the plaintiff observed at p. 188 :

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> "A considerable number of cases were cited..... on the point which may, I think, be conveniently divided into two lines of authority. There is on the one hand, the class of cases, of which *Yorkshire Railway Wagon Co.* v. *Maclure*—(1882) Ch. D. 309—and E *British Railway Traffic & Electric Co.* v. *Kahn*—(1921) W.N. 52—are good examples, where the transaction in question has been held to be a genuine sale followed by a hire-purchase agreement, and, therefore, unaffected by the Bills of Sale Acts, and, on the other hand, there is the class, which includes *Re Watson, Ex p. Official* F *Receiver in Bankruptcy*—(1890) 25 Q.B.D. 27—and *Madell* v. *Thomas & Co.*—(1891) 1 Q.B. 230—where the court has held, on facts not very dissimilar from those in the present case, that the real transaction was one of loan, and, therefore, it was avoided by reason of the Acts. There is no doubt, I think, as to the G deciding principle. The Court has to determine whether the transaction in question is a genuine sale by the original owner of the chattel to the person who is finding the money and a genuine re-letting by the latter to the original owner on hire-purchase terms, or whether the transaction, though taking that form, is nothing more H than a loan of money on the security of the goods. ..... The Court is not to look merely at the

(1) [1951] 1 All E.R. 185.

documents. It must discover what the real transaction was. As Lord Esher, M.R., said [(1891) 1 Q.B. 234] in *Madell* v. *Thomas & Co.* :

> "..... the court is to look through or behind the documents, and to get at the reality; and, if in reality the documents are only given as a security for money, then they are bills of sale." "

In the light of these principles the true nature of the transactions of the appellants may now be stated. The appellants are carrying on the business of financiers : they are not dealing in motor-vehicles. The motor-vehicle purchased by the customer is registered in the name of the customer and remains at all material times so registered in his name. In the letter taken from the customer under which the latter agrees to keep the vehicle insured, it is expressly recited that the vehicle has been given as security for the loan advanced by the appellants. As a security for repayment of the loan, the customer executes a promissory-note for the amount paid by the appellants to the dealer of the vehicle. The so-called "sale letter" is a formal document which is not made effective by registering the vehicle in the name of the appellants and even the insurance of the vehicle has to be effected as if the customer is the owner. Their right to seize the vehicle is merely a licence to ensure compliance with the terms of the hire-purchase agreement. The customer remains *qua* the world at large the owner and remains in possession, and on condition of performing the covenants has a right to continue to remain in possession. The right of the appellants may be extinguished by payment of the amount due to them under the terms of the hire-purchase agreement even before the dates fixed for payment. The agreement undoubtedly contains several onerous covenants, but they are all intended to secure to the appellants recovery of the amount advanced. We are accordingly of the view that the intention of the appellants in obtaining the hire-purchase and the allied agreements was to secure the return of loans advanced to their customers, and no real sale of the vehicle was intended by the customer to the appellants. The transactions were merely financing transactions. The appeals will therefore be allowed with costs in this Court and the High Court. One hearing fee.

ORDER

In accordance with the opinion of the majority the appeals are allowed with costs in this Court and the High Court. One hearing fee.