

**JAG DEO**

v.

**RAM NARAYAN**

[COURT OF APPEAL, 1971 (Gould V.P., Marsack J.A., Tompkins J.A.)  
24th August, 7th September]

Civil Jurisdiction

*Contract—illegality—agreement to sell motor vehicle—subject to existing Bill of Sale—vehicle registered in name of original grantor—no transfer of registration or of insurance policy—vehicle used by purchaser—no evidence of terms of insurance policy—whether on facts the agreement for sale tainted with illegality—meaning of “new owner” in section 19(1) (a) of Traffic Ordinance—Traffic Ordinance (Cap. 152) ss.2, 19(1) (a) (b), 19(2), 19(3), 19(5), 19(6), 19(8)—Motor Vehicles (Insurance) Ordinance (Cap. 153) s.4(1)—Sale of Goods Ordinance (Cap. 206) s.20(1).*

The respondent owned a motor vehicle subject to a Bill of Sale in favour of Suva Motors Ltd. for £980 repayable by monthly instalments but requiring also payment of £225 on the 30th November 1963. On the 4th June, 1965, by a contract partly written and partly oral the appellant agreed to sell the motor vehicle to the respondent, who was given possession and commenced using the vehicle as a taxi. He paid a deposit and made payments on account of the instalments due to Suva Motors Ltd. under the Bill of Sale but neither the registration of the car (which was in the name of the appellant) nor the insurance policy was transferred to the respondent.

The sum of £225 abovementioned had not been paid to Suva Motors Ltd. on the due date and this fact was overlooked by the appellant and

Traffic Ordinance (Cap. 152) Section 19 subsections (2), (3), (5), (6), (8).

(2) The last preceding subsection shall not apply to a change of possession consequent on a contract of hiring where the period of hiring does not exceed six months, or where the registered owner continues to employ and pay the driver of the vehicle.

(3) Application for registration of a new owner may be made before the actual transfer of the motor vehicle; but the registration of a new owner shall not be effective until the old motor vehicle licence has been surrendered to the licensing authority and transferred to the new owner or a new license issued to him.

(5) Subsection (1) and (3) of this section shall not apply to any change of possession of a motor vehicle which occurs by reason of the vehicle being lawfully seized under a hire purchase agreement of bill of sale, but in such event the following provisions shall apply:—

(a) the registered owner or his representative shall, within seven days of the seizure deliver the motor vehicle licence to the person who has seized the motor vehicle, and inform the licensing authority in writing of the change of possession;

(b) such person shall within seven days of receiving the motor vehicle licence apply to the licensing authority to be registered as the owner thereof in place of the registered owner, and shall on payment of the prescribed fee be registered accordingly.

(6) On the application of the new owner and the payment by him of the prescribed fee, the licensing authority shall make the necessary alterations to the motor vehicle licence and shall deliver the amended licence to the new registered owner.

(8) The person in whose name a motor vehicle is registered shall, unless the contrary be proved be deemed to be the owner of such motor vehicle.

**A** Suva Motors Ltd. at the time of sale agreement. In October, 1965, the vehicle was re-possessed by Suva Motors Ltd. for non-payment of this sum and was sold.

In the Supreme Court the respondent obtained judgment for the sums paid by him as money had and received by the appellant to the use of the respondent less an allowance for the use of the vehicle. It was contended on appeal that the contract between the appellant and the respondent was illegal and unenforceable as being in contravention of section 19(1) of the Traffic Ordinance and of section 4(1) of the Motor Vehicles (Insurance) Ordinance. The former section prohibits the use of a motor vehicle which has been transferred by the registered owner unless the new owner is registered as the owner thereof. The latter section prohibits the use of a motor vehicle unless there is in force in relation to that use a third party insurance policy.

**B** **C** *Held:* 1. (*Per Gould V.P. and Marsack J.A.*) (a) A "new owner" within the meaning of section 19(1) (a) of the Traffic Ordinance is (subject to specified exceptions) any person to whom full possession is transferred.

(b) The agreement between the appellant and the respondent contemplated such a change of possession.

**D** (c) The original term of the contract must have been that the registration would be transferred and a new Bill of Sale given and when this could not be proceeded with both parties accepted the risk of being penalised for offences under section 19 but there was never a term of the contract that the vehicle should be used in any particular way or for a purpose in breach of the law.

**E** (d) The argument based on illegality in relation to the Traffic Ordinance therefore failed.

2. (*Per Gould V.P. and Marsack J.A.*) There was no evidence of the contents of the existing insurance policy and a finding of illegality under section 4(1) of the Motor Vehicles (Insurance) Ordinance could not be based on an assumption of those terms.

**F** 3. (*Per Tompkins J.A.*) (a) The contract to purchase the vehicle included a provision that the registered ownership was not to be transferred to the respondent, nor was there to be any transfer of the insurance or new policy until the respondent had paid off the purchase money.

(b) The question whether a transfer of ownership was made by the agreement depended on the intention of the parties and it was clear that they did not intend the ownership to be transferred until the whole of the purchase money had been paid.

**G** (c) By section 2 of the Traffic Ordinance "owner" includes a person in apparent possession of a vehicle under a Bill of Sale but it could not be said that the respondent was in apparent possession under the Bill of Sale.

**H** (d) The ownership of the vehicle not having been transferred to the respondent the appellant's duty to register a transfer of ownership had not arisen.

(e) The argument based on illegality in relation to the Traffic Ordinance therefore failed.

4. (*Per Tompkins J.A.*) (a) The presumption of law is in favour of the legality of a contract.

(b) There was no evidence that the vehicle had been used in contravention of section 4 of the Motor Vehicles (Insurance) Ordinance.

(c) The respondent did not hold the vehicle as owner and while he was the registered owner the appellant remained liable to keep on foot the insurance.

(d) The argument based on illegality under this Ordinance therefore also failed.

5. (*Per curiam*) The failure of the respondent's consideration having been only partial he was left with a claim for breach of contract, the measure of his loss being the amount paid by him on account of the purchase less a reasonable sum for his use and enjoyment of the vehicle.

Cases referred to :

*St. John Shipping Corporation v. Joseph Rank Ltd.* [1957] 1 Q.B. 267; [1956] 3 All E.R. 683.

*Le Bagge v. Buses Ltd.* [1958] N.Z.L.R. 630.

*Latchman v. Ajudhya Prasad* (1960) 7 F.L.R. 90.

Appeal against a judgment of the Supreme Court allowing a claim for money had and received.

S. M. Koya for the appellant.

K. C. Ramrakha and H. M. Patel for the respondent.

The facts are set out in the judgment of Tompkins J.A.

7th September 1971

The following judgments were read :

TOMKINS J.A. :

This is an appeal against a judgment in favour of the Respondent (Plaintiff in the Court below) for £425.13.4 against the appellant (Defendant in the Court below) in an action for damages for breach of contract in the following circumstances. The appellant was the owner, subject to a Bill of Sale given by him to Suva Motors Limited, of a Chrysler Valiant Saloon, registered number H903. He had bought this car for £1,180.0.0 on 17th September, 1963 and £980.0.0 of the purchase price had been secured by Bill of Sale. This sum was payable by monthly instalments of principal and interest of £38.0.0. However, clause 21 of the Bill of Sale provided that the appellant would pay £225.0.0 on account of the amount owing on 30th November, 1963. On 4th June, 1965, the appellant and the respondent entered into a contract as follows :—

“ *Exhibit 4*

AIRPORT TAXIS

DIAL 4139	Modern Cars & Reliable Drivers
NADI AIRPORT	MAIN GATE, NADI AIRPORT,
	FIJI. 4th June, 1965.

I Jag Deo s/o Barnarsi Singh owner of Valiant Chrysler Car Reg. No. H.903 have received Two Hundred (£200) in cash and balance of One Hundred (£100) as the deposit for the car. Where as the full purchase price of the car is £800.

(Sgd.) Jag Deo

J.D.

(Sgd.) Krishna Pillay

”

**A** The written agreement, however, did not contain all the terms of the contract, some of which were implied and some verbally agreed upon. I will deal with these additional terms later on. Possession of the car was given to the respondent immediately and he commenced using the car as a taxi. He had paid to the appellant a deposit of £200.0.0 in cash. During the course of the 4½ months he was in possession of the car he made the following payments to Suva Motors in reduction of the Bill of Sale :—

<b>B</b>	On 30th June, 1965	£ 40. 0. 0
	On 2nd July, 1965	100. 0. 0
	On 3rd August, 1965	38. 0. 0
	On 1st September, 1965	38. 0. 0
	On 30th September, 1965	38. 0. 0
<b>C</b>	Total	<u>£254. 0. 0</u>

**D** The appellant had not paid to Suva Motors the £225 payable on 30th November, 1963 under the Bill of Sale. The non-payment of this sum had been overlooked both by the Bill of Sale holder and by the appellant when he agreed to sell the car on 4th June, 1965. However, Suva Motors demanded payment of this sum on 6th October, 1965, and when it was not paid as demanded, it repossessed the car on 22nd October, 1965, and later sold it, thereby depriving the defendant of possession or of the opportunity to pay off the balance then owing at the agreed rate of £38.0.0 per calendar month principal and interest. The respondent then sued the defendant, claiming general damages £200.0.0 as well as the sums paid by him on account of the purchase price or for spare parts totalling £515.13.4 and also for loss of earnings. The learned Judge of the Supreme Court gave judgment on 21st March, 1969 against the appellant for £425.13.4 and costs made up as follows :—

<b>E</b>	Payments made by respondent	£515. 13. 4
	Less allowance for use of vehicle	90. 0. 0
<b>F</b>	Balance	<u>£425. 13. 4</u>

The appellant appeals against the whole of this Judgment claiming —

1. That the contract was illegal and unenforceable on 2 grounds :—

**G** (a) that it contravened S. 19(i) of the Traffic Ordinance, Cap. 152.  
(b) that it contravened S. 4(i) of the Motor Vehicles (Insurance) Ordinance Cap. 153.

2. That the payments made by the respondent were not recoverable either as money "had and received" or otherwise.

**H** It is first necessary to try to spell out from the written documents and from the evidence what the terms of the contract were. It seems to me that these may be summarised as follows :—

1. The price was £800.0.0 with a deposit of £200.0.0 and a further deposit of £100.0.0 payable in terms of a post-dated cheque; the balance was payable by instalments of £38.0.0 per calendar month:

2. the sale was subject to the Bill of Sale to Suva Motors Ltd. on which there was then £680.1.10 owing; A
3. It was agreed that the respondent would not become the owner of the car or entitled to have it registered in his name until he had paid the full purchase price of £800.0.0 and that the insurance policy would not be transferred to the respondent until then;
4. It was in an implied term of the contract that the appellant would give a good title to the car free of encumbrances as soon as the full purchase price of £800.0.0 was paid by the respondent. B
5. That the Respondent would pay £38.0.0 per calendar month to Suva Motors Limited in reduction of the amount due under the Bill of Sale;
6. Possession of the car was immediately given to the Respondent and he refused possession up to the time of the seizure. C

The registered owner, the Appellant, did not transfer the car into the name of the Respondent; nor was the insurance policy transferred or a new policy taken out.

Although the Respondent said in evidence that he was the owner, the learned Judge made the following finding:— “The Plaintiff has shown in evidence that he does not understand the difference between a transfer to himself of possession of the vehicle (which is what took place) and a transfer of ownership. It is apparent that the ownership of the vehicle did not pass to the Plaintiff. The Plaintiff is under a general misapprehension about this. The question of registering transfer of ownership was only to arise when the Bill of Sale was discharged.” D

I now proceed to consider the principles applicable to the defence of illegality. *Chitty on Contracts* 23rd Edn. Vol. 1 806 says “Illegality may affect a contract in at least the following ways : E

1. If a contract cannot be performed in accordance with its terms without a breach of the criminal law, statutory or otherwise, the contract is unenforceable for illegality; F
2. The court will deny its assistance to a party who entered into a contract in order to effect some illegal purpose, whether that purpose is illegal at common law or by statute . . . .;
3. The court may deny its assistance to a party who when he entered into a contract, intended to perform it in an illegal manner. G

I do not think that this contract itself, or the sale of the equity in a motor car, is forbidden by any statutory or other law, so that this contract is not affected by (1) above; nor do I think that this contract was entered into in order to effect any illegal purpose. If there is any illegality here it must be under (3) above, on the basis that the parties, by a verbal term of the contract, intended to perform it in an illegal manner, that is to say, by not registering any transfer of ownership or by not taking out or transferring the insurance. In *St. John Shipping Corporation v. Joseph Rank Limited* [1956] 3 All E.R. 683, it was held that shipowners H



A were entitled to recover freight because the loading of the ship so as to submerge the load line was an infringement of the law that was not contemplated by the contract . . . . and which accordingly did not render the contract unenforceable for illegality.

B Devlin J. said at 687 F "There are two general principles. The first is that a contract which is entered into with the object of committing an illegal act is unenforceable. The application of this principle depends on proof of the intent, at the time the contract was made, to break the law; if the intent is mutual the contract is not enforceable at all, and, if unilateral, it is unenforceable at the suit of the party who is proved to have it . . . . The second principle is that the court will not enforce a contract which is expressly or impliedly prohibited by statute". This case was applied in New Zealand in *Le Bagge v. Buses Ltd.* [1958] N.Z.L.R. 630. Cleary J., in giving the judgment of the Court of Appeal, said at C 646 line 49: "This was not a contract the object of which was to do something prohibited by the regulation, as would be the case if there were a contract for the employment of a driver which, by its terms, required the employee to act in breach of the regulation. The breach of the regulation occurred only in the performance of the contract, but illegality in performance does not necessarily make a contract unenforceable by the party who has broken the law. *St. John Shipping Corporation v. Joseph Bank Limited* (Supra); applying the test enunciated in that case, it is not possible, in our opinion, to consider the transport licensing regulations as impliedly prohibiting contracts of cartage which are valid in their formation but are so performed as to contravene some provision of the regulation . . . . We therefore think that the Appellant's cause of action was free from, and unaffected by, any illegality arising from the fact that the deceased in the performance of the contract infringed the regulation."

E In *Latchman v. Ajudhya Prasad* 7 Fiji L.R. 90 Adams J. said at 94:— "I have no doubt that there was a breach of the Traffic Ordinance in carrying on the business without a subsisting licence authorising it to be carried on by the person or persons who, in fact, did so, and am clearly of the opinion that both parties to the contract intended, when the contract was entered into, that it should be performed in a manner constituting a breach of the Ordinance . . . . . where illegal performance is intended, it does not matter that the formal agreement may be innocent on its face."

F Applying these principles to the present case I think I am bound to hold that the contract to purchase this car did include a provision that the registered ownership was not to be transferred to the Respondent until he had paid off the purchase money nor was there to be any transfer of insurance or new policy taken out until then. Consequently, if those terms of the contract involved a breach of the law this contract would be tainted with illegality.

G Accordingly, I now turn to consider whether this is so or not. The Traffic Ordinance (1965) Cap. 152 provides in S. 19(1) as follows:—

H "19.(1) (a) No motor vehicle the ownership of which has been transferred by the registered owner shall be used on a road for more than seven days after the date of such transfer unless the new owner is registered as the owner thereof

- (b) Upon the transfer of ownership of a motor vehicle, the registered owner thereof shall within seven days from the date of such transfer inform the licensing authority of the area in which the vehicle is registered in writing of the name and address of the new owner, and the date of change of ownership of the motor vehicle.

A

Section 2 of the Ordinance says 'owner' or in relation to a vehicle which is the subject of a hiring agreement or a hire purchase agreement or a Bill of Sale, includes a person in possession of the vehicle under that agreement or in apparent possession of the vehicle under that Bill of Sale. The question is whether the Respondent is an owner either at common law or within the above extended definition. The contract here was subject to the Bill of Sale; the legal ownership of the car was in the nolder of the Bill of Sale, Suva Motors Limited; but the appellant was the registered owner. All the Appellant could transfer was the right of redemption or equity in this car. The question of whether transfer of ownership was made by the Appellant agreeing to sell the car to the Respondent depends, in the case of a sale of goods, on the intention of the parties. See *Sale of Goods Ordinance* Cap. 206 s. 20(1). It seems clear here, I think, that the parties did not intend the ownership of the vehicle to be transferred to the Respondent until the whole of the purchase money was paid. The evidence also shows that Suva Motors Limited would not agree to transfer the registered ownership of the car while monies were owing under the Bill of Sale. Certainly they never consented to the transfer of ownership to the Respondent. I do not think, therefore, that it can be said that the Respondent was in apparent possession of the vehicle *under* the Bill of Sale. The result of these conclusions is, in my view, and with the greatest respect, that the learned Judge was right in holding that the ownership of this car had not been transferred to the Respondent. Until this was done the Appellant's duty to register a transfer of ownership to the Respondent had not arisen.

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Accordingly I think that the Appellant's submission that the contract was illegal as contravening the terms of s. 19(1) fails.

The second submission as to illegality is under s.4 of the Motor Vehicles (Insurance) Ordinance Cap. 153. The following are its terms:—

F

"4.(1) Subject to the provisions of the next succeeding section, no person shall use, or cause or permit any other person to use, a motor vehicle unless there is in force in relation to the use of that motor vehicle by such person or other person as the case may be such a policy of insurance in respect of third party risks as complies with the provisions of this Ordinance."

G

The question here is whether the contract provided for the use of a vehicle which did not have in force any third party insurance, in compliance with the Ordinance. The Appellant submits that if the Insurance Company which had insured the Appellant, knew that he had sold the vehicle to a third person it would refuse to be bound by its policy. I am not satisfied that under the provisions of the Motor Vehicle (Insurance) Ordinance an Insurance Company could refuse, so far as third party's risks are concerned, to be bound by its policy because the registered owner had agreed to sell a car on the terms of this contract. There is certainly no evidence that this car was used in contravention of s.4.

H

A I do not think the courts should be astute to discover illegality. Devlin J. said in *St. Johns Shipping Corporation* case at 690G "A court should not hold that any contract or class of contract is prohibited by statute unless there is a clear implication, or necessary inference, . . . . that the statute so intended."

B The Respondent was not holding the car as owner, as has been stated above, and the Appellant remained liable at all times, while he was the registered owner of the car, to keep on foot the insurance. I think therefore that the Appellant's second submission as to illegality also fails.

C I now proceed to consider the third submission that the Respondent was not entitled to recover the payments he had made as 'money had and received'. The Respondent claims that there was a partial failure of consideration. He bases this submission upon the term in the agreement that the Appellant contracted to give him a good title to the car as soon as he had paid the purchase money. He submits that because the Appellant did not pay the £225 payable on 20th November, 1963, he was in breach of the contract and had put it out of his power to give a good title to the car. The Respondent further submits that he complied with every term of his contract by paying the monthly instalments to Suva Motors Limited. I think it is clear that there has been a partial failure of consideration in that, although the Respondent has had the use and possession of the car, he has paid monies towards its purchase which, through the aforesaid breach of the Appellant, he has lost. However, I think it is also clear that when the failure of consideration has been only partial he is left to a claim for breach of contract. What therefore is the loss suffered by him by reason of the breach of contract. I think that a reasonable measure of his loss is the amount paid by him on account of the purchase of the car less a reasonable sum for his use and enjoyment of it from 4th June, 1965, until 22nd October, 1965, when Suva Motors seized and sold it. This is a period of approximately 4½ months.

F The learned trial Judge has fixed a sum of £90 as being a reasonable amount to allow to the appellant under this head. Appellant has not questioned this allowance and we see no reason to interfere with it. On this basis the Respondent would be entitled to:—

Amount paid by him (including a deposit of £200. 0. 0)	£454. 0. 0
Allowance for use and possession of car	90. 0. 0
	<hr/>
	£364. 0. 0

G The learned Judge in the court below also allowed him £32. 13. 4 for spare parts purchased and £29. 0. 0 for a gear box. I do not think, however, that he is entitled to any sums for repairs and maintenance of the car during the period he had it. Consequently, I would dismiss the appeal but would vary the judgment by reducing it to an amount of £364 or \$728. I would also order the appellant, who has substantially failed in his appeal, to pay the costs of the appeal.

GOULD V.P. :

I have had the advantage of reading the judgment of Tompkins J.A and I need not state the facts or repeat the authorities he has quoted on



the subject of illegality. I propose merely to state my view upon the defence of illegality as applied to the facts of the case and urged on this appeal.

Section 19 of the Traffic Ordinance (Cap. 152) makes a clear distinction between a registered owner and an owner. By subsection 8 the registered owner is deemed to be the owner until the contrary is proved, which presupposes that ownership and registered ownership may sometimes be in different persons. Subsection (5) indicates that it is expected that the mortgagor under a Bill of Sale will be the registered owner, though presumably the mortgagee is the real or legal owner. Section 19(1) (a) contemplates ownership being transferred by a registered owner to an owner — although under section 19(1) (b) the duty lies upon the registered owner to inform the licensing authority of the change of ownership, it is for the new owner (under subsection 6) to apply to have his name substituted on the vehicle licence.

The question arises, when does a person become the “new owner”. If a motor vehicle is made the subject of an agreement for sale for a price payable by ten instalments over two years with a provision that the property shall pass after payment of five instalments, is the purchaser in the meantime, though not a new owner at common law, a new owner for the purpose of the Ordinance? If he is, then he may not use the vehicle for more than seven days unless he becomes the registered owner. Presumably as the licence is not a document of title any further than is provided by section 19(8), it would be possible to transfer the licence, making the purchaser the registered owner though not the real owner, but difficulty would be encountered if the vehicle were subject to a Bill of Sale, the holder of which was not a consenting party.

As a matter of construction of the section there are some indications that subsection (1) (a) is intended to include a change of possession. Subsection (2) provides that subsection (1) shall not apply to a change of possession under certain contracts of hiring or if the registered owner employs and pays the driver. As far as hiring contracts are concerned, the definition of “owner” in section 2 makes it clear that hirers are regarded as owners and sections 19(2) creates some exceptions. The need specifically to except mere drivers is quite a strong indication that change of possession is what is contemplated by subsection (1) (a). Subsection (5) is also framed to exclude certain changes of possession from the operation of subsections (1) and (3). It is perhaps permissible in the circumstances to look at the side note to the section, which is “change of possession.”

From these indications I would conclude that a “new owner” within section 19(1) (a) is any person to whom full possession is transferred subject to the exceptions specified later in the section, whatever difficulties this may impose upon parties who may wish to draw their agreements otherwise.

Looking at the agreement now under consideration from this point of view, there is no doubt that it contemplated a change of possession within the meaning of section 19(1) as I understand it. There is nothing illegal about that. As I read the evidence, the original term of the contract must have been that registration would be transferred and a new Bill

- A of Sale given by the respondent to Suva Motors Limited. The parties went to see Mr. Ah Sam and Mr. Pickering for that purpose, but for reasons somewhat obscure, that was not proceeded with. Whether the £225.0.0 unpaid instalment was then the cause of the difficulty does not appear. Whether the other statement of the respondent in evidence, that the registration was to remain in the appellant's name, really should be construed as meaning the parties made a variation of the terms of the contract to include this new term I very much doubt. Rather the
- B probabilities point to a mere acquiescence in a state of affairs forced upon them by the situation under the Bill of Sale. Both parties accepted the risk of being penalised for offences under section 19, but I do not accept that there was ever a term of the contract that the vehicle was to be used in any particular way, or for a purpose in breach of the law. If anything was actually said between the parties as to leaving the registration in the name of the appellant after it was found nothing could
- C be done about the Bill of Sale, it was more likely to have been a statement as to future conduct than a term of the contract, and in any event would in my opinion be severable — something which, in a phrase used in the authorities, could be "blue pencilled" without in any way altering the scope of the agreement, which in essence, was for the sale of a motor vehicle.
- D For these reasons I reject the argument based on illegality in relation to the Traffic Ordinance. As to that based on the Motor Vehicles (Third Party Insurance) Ordinance I reject it also, without considering other possible answers, simply on the ground that no evidence was given of the contents of the existing third party insurance policy and I am not prepared to base a finding of illegality upon an assumption as to those terms.
- E As to the remaining matters I agree with the judgment of Tompkins J. A. and with his opinion that the judgment in the Supreme Court should be reduced from £425. 13. 4 (\$851.34) and costs to £364 (\$728) and costs.
- F All members of the Court being of the same opinion the appeal is dismissed, except to the extent of the reduction of the amount of the judgment in the Supreme Court above-mentioned. The appellant will pay the costs of the appeal.

MARSACK J.A. :

I agree with the judgment of the learned Vice President.

*Appeal dismissed; subject to reduction in amount of judgment.*