Karnataka High Court M/S Shriram Transport Finance Co. ... vs Shri R. Khaishiulla Khan And ... on 18 December, 1992 Equivalent citations: 1993 (1) KarLJ 62 Author: Hiremath Bench: D Hiremath, L S Reddy JUDGMENT Hiremath, J. 1. In both these petitions under S. 482 of the Criminal P.C. the common question is when there is a hire-purchase agreement in respect of a motor vehicle, and when the motor vehicle is seized by the financier in enforcement of the clause in the agreement giving right to the financier to seize the vehicle and on the complaint being filed by the hirer alleging theft of the same and the motor vehicle having been seized by the Police and produced before a criminal Court whether it is the financier or the hirer who is entitled to the interim custody of the vehicle under Section 451, Cr.P.C. 2. Cr.P. No. 110/92 arises out of the order of the Xth Additional Chief Metropolitan Magistrate, Bangalore City in P.C.R. 157/91 and Cr. No. 563/91. The complainant-respondent-1 ('respondent' hereafter) entered into hire-purchase agreement with the petitioner Shriram Transport Finance Company Limited ('financier' hereafter) in respect of goods vehicle No. CAM 8786 and the petitioner advanced Rs. 2,00,000/- with a stipulation that the same shall be repaid in 42 instalments. The agreement is dated 14-6-1990. The respondent came in possession of the vehicle and in the Registration Certificate his name came to be entered as the registered owner. By 7-10-1991 the respondent was highly irregular in payment of instalment amounts, defaults were committed by him and therefore in exercise of its right to seize the vehicle under the agreement the financier seized it on 7-10-91. Soon thereafter an intimation came to be given to the hirer-respondent on 9-10-1991. The respondent however filed a private complaint in the aforesaid Magistrate Court alleging theft of the vehicle by someone on 9-10-1991. The learned Magistrate referred the same under Section 156(3), Cr.P.C. to the Assistant Commissioner of Police, Ulsoor, for investigation and report. On 11-10-91 the respondent-complainant filed an application under Sections 451 and 457, Cr.P.C. praying for interim custody of the vehicle which was seized by the Police in pursuance of the case registered for the offence alleged. Cr. No. 563/91 came to be registered under S. 379, I.P.C. by the Inspector of the Ulsoor Police Station and the vehicle was seized on 10-10-1991 and reported to the Court that it was found parked in the compound of the MICRON Engineering Works at Mattikere on M.E.S. Road and permission was also sought from the Court to keep the same with the Police during investigation. A rival claim was also made by the present petitioner-hirer that because the respondent had committed default in payment of the instalments due, the vehicle was seized and therefore it was the financier who was entitled to the possession of the vehicle. The trial Court by its impugned order dated 2-11-91 found that the respondent is entitled to the possession of the vehicle under Section 457, Cr.P.C. That order is challenged in this petition. 3. In Cr.P. No. 447/92 the position is otherwise. In a similar situation the Court of the VIIIth Additional Chief Metropolitan Magistrate, Bangalore City, by its order dated 28-1-91 taking a contrary view directed the vehicle to be given to the custody of the financier and this order was challenged before the Court of the Principal City Sessions Judge, Bangalore by the hirer by a revision petition and the learned Sessions Judge by his order

dated 13-1-92 upheld the order of the trial Magistrate and dismissed the revision. Lorry number AAA 9720 was the subject-matter of hire-purchase agreement in that case and the allegation of the hirer was that the same was stolen by the financier-2nd respondent in the revision petition. 4. When both the petitions, one by the financier and the other by the hirer came before the learned single Judge on 12-10-1992 Shivappa J. referred them to a Division Bench of this Court under Section 9 of the Karnataka High Court Act in view of the conflicting decisions as to the person who is entitled to the interim custody of a motor vehicle in the situation obtaining in these two cases. Particular reference was made to the decisions of this Court reported in ILR (1978) 2 Kant 1384 : (1978 Cri LJ 1546) and ILR (1986) 2 Kant 3349 : (1987 Cri LJ 868). The learned Judge found that the question whether the registered owner or the financier is entitled for the custody of the vehicle requires to be decided by a Division Bench. This is how the two petitions are being disposed of by this common order. 5. The question no doubt is of public importance as such cases do come before the Courts of Magistrates quite frequently. The hire-purchase agreement is bailment with an element of sale and is not bailment simpliciter. Under Section 148 of the Contract Act bailment is defined as the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the persons delivering them. Whether a particular contract is a contract of hire or hire-purchase, the test laid down by the Supreme Court in the case of Damodar Valley Corporation v. State of Bihar, is as follows : (1) Whether there is a binding obligation on the hirer to purchase the goods; (2) Whether there is a right reserved to the hirer to return the goods at any time during the subsistence of the contract. If such a right is reserved, then there is no contract of sale. After a hire-purchase agreement has been entered into, both the owner and the hirer possess two sets of rights each. In the owner are vested his rights under the contract and the right of reversion in the goods subject to the agreement. In the hirer are vested two rights, namely, the benefit of hiring, i.e. the bailment part of the contract and the option of purchase. In the case of Sundaram Finance Ltd. v. State of Kerala, , the same concept was elaborated by pointing out that 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. In such an agreement there is no agreement to buy goods; the hirer being under no 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 agreement must be distinguished from transaction in which the customer is the owner of the goods and with a view to finance his purchase he enters into an agreement which is in the form of a hire-purchase agreement with the financier, but in substance evidences a loan transaction, subject to hiring agreement under which the lender is given the licence to seize the goods. The question before their Lordships in that case was whether the hire-purchase agreements entered

into by Sundaram Finance Ltd. with its customers are transactions of sale of goods or of only documents securing the return of loans advanced by it to its customers. The conclusion reached was that the intention of the financier in obtaining the hire-purchase and the allied agreements was to secure the return of the loans advanced to their customers and no real sale of the vehicle was intended by the customers to the appellants Sundaram Finance Ltd. The transactions therefore were merely financing transactions. Though the case came up before the Supreme Court under the Sales Tax Act the conclusions reached therein give the clear nature of the transaction of hire-purchase agreement. In an earlier decision in the case of K. L. Johar & Co. v. Deputy Commercial Officer, , the Supreme Court observed that the distinguishing feature of the hire-purchase agreement is that the property does not pass when the agreement is made but only passes when the option is finally exercised after complying with all the terms of the agreement. The essence of sale is that the property is transferred from the seller to the buyer for a price, whether paid at once or paid later in instalments. On the other hand, the hire-purchase agreement as its very name implies, has two aspects. There is first an aspect of bailment of the goods subjected to the hire-purchase agreement, and there is next an element of sale which fructifies when the option to purchase, which is usually a term of hire-purchase agreements, is exercised by the intending purchaser. Therefore the intending purchaser is known as the hirer so long as the option to purchase is not exercised, and the essence of a hire-purchase agreement properly so-called is that the property in the goods does not pass at the time of the agreement but remains in the intending seller, and only passes later when the option is exercised by the intending purchaser. That was also under the Sales Tax Act to determine whether the liability of the hirer exists to pay sales tax under the Sales Tax Act. A Division Bench of this Court in the case of T.T.V. Co-operative Bank Ltd. v. H. C. Shyamala, ILR 1991 Kant 4226 had occasion to consider the provisions of Section 176 of the Contract Act and Section 70 of the Karnataka Co-operative Societies Act, 1959. The first respondent in the appeal before this Court and the appellant-Bank had entered into an agreement of hypothecation in respect of a stage carriage vehicle bearing No. MYT 5292. That vehicle was hypothecated to the appellant-Bank for security of repayment of the loan. A promissory note was also executed for a sum of Rs. 1,45,000. The 1st respondent committed default. In spite of several notices issued by the Bank no payment was forthcoming and as per the terms of Clause 5 of the agreement of hypothecation and the appellant-Bank seized the vehicle. This Court found that in such a situation there was no need at all on the part of the Bank to raise a dispute under Section 70 of the Karnataka Co-operative Societies Act owing to the non-payment of the instalments stipulated. The promissory note was only by way of collateral and the right of the Bank to seize the vehicle and sell the same was clearly recognised under the terms of the agreement. Referring to such a right given to the Bank under the terms of the agreement the Division Bench observed as follows : “In the Hypothecation Deed Clauses 5 and 10 categorically stipulate the right of the creditor to seize the vehicle and sell the same. Therefore, these are all matters governed by contracts and having recourse to

these clauses by way of enforcement of contractual obligation to Bank seizes the vehicle. It is difficult to accept that a dispute ought to have been raised under Section 70 in relation to default. On the contrary, it is the first respondent who should establish that she had fulfilled her contractual obligation." These decisions of the Supreme Court and of this Court affirm that the contractual obligations having been recognised should be honoured and cannot be ignored and in fact under Section 176 of the Contract Act by agreement of the parties rights stipulated have been recognised. It also emerges that the property in goods does not pass to the hirer until all the conditions imposed on him under the hire-purchase agreement are fulfilled, including the payment of the entire amount advanced under the agreement. We now proceed to consider the right of the financier to seize the property for acquisition of which amount has been advanced. 6. Section 2(30) of the Motor Vehicles Act, 1988 defines the "owner" of a motor vehicle to mean a person in whose name a motor vehicle stands registered, and where such person is a minor, the guardian of such minor, and in relation to a motor vehicle which is the subject of a hire-purchase agreement, or an agreement of lease or an agreement of hypothecation, the person in possession of the vehicle under that agreement. This definition of the "owner" of a motor vehicle is for the purposes of the Motor Vehicles Act and does not necessarily mean an absolute owner of the vehicle. Sections 39 and 41 of the Act of 1988 correspond to Ss. 22 and 24 of the Act of 1939. Under Section 39 no person shall drive any motor vehicle and no owner of a motor vehicle shall cause or permit the vehicle to be driven in any public place or in any other place unless the vehicle is registered in accordance with Chapter IV and the certificate of registration of the vehicle has not been suspended or cancelled and the vehicle carries a registration mark displayed in the prescribed manner, provided that nothing in the section shall apply to a motor vehicle in possession of a dealer subject to such conditions as may be prescribed by the Central Government. Section 41 deals with the registration and how it should be effected. The proviso to sub-section (1) of S. 41 states that where a motor vehicle is jointly owned by more persons than one, the application shall be made by one of them on behalf of all the owners and such applicant shall be deemed to be the owner of the motor vehicle for the purposes of the Act. It thus follows that a registered owner for the purpose of the Act need not necessarily be the absolute owner of the vehicle. This is how sub-section (30) of Section 2 clearly indicates how the person in possession of the vehicle under the fire-purchase agreement is deemed to be the owner of the vehicle for the purpose of the Act. It thus follow that even though the hirer has not acquired absolute ownership over the vehicle by fulfilling all the conditions stipulated in the agreement still he is a registered owner by virtue of the second part in Section 2(30) of the Act. The distinction of the extent of ownership between the hirer and the financier can be gauged by the liability of the owner of the vehicle under Section 100-A of the Motor Vehicles Act in a fatal accident case. In the case of Ariyamma v. Narasimhiah, AIR 1972 Mys 73, a Division Bench of this Court referring to the decision of the Supreme Court in the case of K. L. Johar and Co., , and other decisions ruled that under the hire-purchase agreement the hirer cannot be held liable to

pay the compensation awarded as until he fulfils the terms of such agreement the ownership does not pass to him. A later decision of this Court in the case of Jagdeesan v. State, ILR 1978 (2) Kant 1384 : (1978 Cri LJ 1546) is directly on the point. The learned single Judge ruled that in view of the provisions in Ss. 22 and 24 of the Motor Vehicles Act of 1939 for all practical purposes, a person who is shown as the registered owner in the certificate of registration is the owner of the vehicle. But Section 2(19) of the Act makes out an exception by widening the meaning of the word "owner" to the effect that a person who is in possession of the concerned vehicle which is the subject of hire-purchase agreement is also the owner for the purposes of the Act. Therefore, a person who is in possession of the vehicle, which is a subject of a hire-purchase agreement can submit an application as per Section 24 of the Act and get his name entered as the registered owner in the certificate of registration. As we have already pointed out Section 24 corresponds to Section 41 of the present Act and as the learned Judge put it the definition of the word "owner" has only been extended to include a person in possession of a vehicle under the hire-purchase agreement. It therefore follows that simply because there is registration certificate in the name of a hirer who is in possession of the vehicle in pursuance of such an agreement it does not follow that he has become the absolute owner having all the proprietary rights therein. 7. It thus becomes apparently clear that if at all the hirer is recognised as an owner to obtain registration certificate in respect of a vehicle which is a subject of hire-purchase agreement it is only to facilitate him to obtain fitness certificate, get the vehicle insured, road permit etc. under the relevant provisions of the Motor Vehicles Act to enable him to run it on the roads without any let or hindrance. The absolute ownership of the vehicle does not pass to him until all the conditions in the agreement are fulfilled or he opts to purchase the vehicle. It would be a fallacy to equate the hirer with an absolute owner having proprietary rights in the vehicle. In the case before Nesargi, J. (supra) one C. X. George had entered into hire-purchase agreement with the petitioner-financier, the petitioner having purchased the vehicle from the dealer on behalf of George, the hirer, who was the intending purchaser from the petitioner on paying certain initial amount. The balance of the amount was to be paid to the dealer by the petitioner. The said balance amount was made returnable to the petitioner by way of instalments. On full payment of instalments the hirer was to become the absolute owner of the vehicle. One of the clauses entitled the financier to seize the vehicle if the hirer defaulted to pay the instalments. Thus the vehicle came to be registered in the name of the hirer and he was in possession of the same. The hirer defaulted to pay instalments and consequently the petitioner secured possession of the vehicle by seizure. On a complaint of theft of the vehicle made by the hirer the Police seized it from the possession of the petitioner and produced it before the Court. The Magistrate had directed that the vehicle be given to the possession of the widow of the hirer. Having discussed the relevant provisions and some of the decisions referred to above, the learned Judge summed up as follows : "It is undisputed that the vehicle was seized from the possession of the petitioner. When it is seen that they are the owners and they were entitled

to possession even from C. X. George consequent upon certain defaults being committed, and it is further found that the police seized the vehicle from their custody, the Magistrate, ought to have, while exercising his powers under S. 457 of the Cr.P.C. directed the vehicle to be returned to the possession of the petitioner." The facts of the two cases before us are similar to those in this case of Jagadeesan. In the case of M/s. Kothari & Co. v. State of Karnataka, 1985 (1) Kar LJ 320. P. A. Kulkarni, J. on the facts of the case before him pointed out that the hire-purchase agreement and the evidence of one of the partners of the petitioner-firm in one of the revision petitions showed that the lorry in question was the subject-matter of hire-purchase agreement entered into by the registered owner Rahim with the revision petitioner M/s. Kothari & Co. and therefore the legal owner would be M/s. Kothari & Co. Though the case before Kulkarni, J. related to confiscation of the vehicle which was the subject of the hire-purchase agreement the principle stated by him is the same as stated by Nesargi, J. The view taken by the learned single Judges of this Court in the cases coming up before them is the same, namely, that it would be the financier who would be entitled to the possession of the vehicle when the same is the subject of hire-purchase agreement. They are in the case of R. Krishna Reddy v. K. V. Sampath Kumar and another in Cr.R.P. No. 269/87 decided on 12/13-8-87, in the case of Sharda Finance Corporation v. Anwar Sharief in Cr.R.P. No. 543/90 decided on 1-2-1991 and Cr.P. No. 1503/88 between M/s. Canara Bank and J. Uddhawachar decided on 1-3-1991. 8. In the case relating to Cr.P. No. 110/92 the learned Magistrate applied the principle of "who would be the best person to make use of the vehicle pending conclusion of enquiry and trial" applied in the case of Kariyappa v. Sreekantaiah (1980 (1) Kar LJ 332) : (1980 Cri LJ 422) by M. S. Patil, J. The learned Judge referring to the decisions in the cases of T. C. Gopalan Nair v. Kelu reported in (1973 (1) Mys LJ 420) : (1974 Cri LJ 210) and Hanamanthappa Kantnalli v. Shivalingappa (1977 (2) Kar LJ 129) reasoned thus to apply the principle. "While making an order for interim custody of a motor vehicle, what the criminal court has to keep in view is, who would be the best person to make use of the vehicle pending conclusion of the enquiry and trial, because if a mechanically propelled vehicle is kept idle for a long time, not only there are chances of its being spoiled, but the person who is deprived of the possession of the vehicle is deprived of the possession of the vehicle is likely to be put to great loss, either by theft or otherwise. Under the Motor Vehicles Act, a registration certificate is essential before the vehicle is used on the road. Therefore, the person in whose favour the certificate of registration is issued or stands, ordinarily and obviously, is the proper person for the interim custody of the vehicle seized and produced in the criminal court. The Legislature has amended the Motor Vehicles Act, making it obligatory both on the transferor and transferee of vehicle to get no objection certificate from the registering authority and making it obligatory on the transferring authority to obtain a police report about the vehicle. In view of these amendments, merely because a person claimed have purchased and produces a photostat copy of the alleged agreement of sale and the vehicle was seized from his possession, is no ground to entrust the custody of the vehicle to him." The

petitioner Kariyappa was admittedly the registered owner of the vehicle and he sought interim custody of the same when it was seized and produced before the Magistrate's Court on Mandya complaint of theft made by the Motor Vehicles Inspector of the R.T.O.'s Office, alleging that when the same was detained by him for non-payment of tax and left in the custody of the watchman Gurumallaiah of the R.T.O.'s Office some one had stolen it away. The same was seized by the Sub-Inspector of Police investigating the case from the premises of certain Pressing Components (India) Pvt. Ltd., Mysore and detained in Police custody. While Kariyappa claimed its custody on the ground that he was a registered owner, the respondent Sreekantaiah set up an agreement of sale said to have been entered into with Kariyappa and claimed interim custody for himself. He had produced a photostat copy of the agreement of sale dated 30-7-79 written on a stamp paper purporting to be executed and signed by the previous owner. Kariyappa the admitted registered owner while denying any knowledge about the agreement of sale of the vehicle alternatively contended that the agreement did not confer any ownership of the vehicle to the purchaser Sreekantaiah. In the peculiar circumstances and on the facts of the case the learned Judge observed that merely because the vehicle was seized from the possession of the 1st respondent it would not be proper criterion for entrustment of the interim custody of the vehicle to him (Sreekantaiah) pending conclusion of enquiry or trial. The criminal Court while making an order of interim custody under Section 451, Cr.P.C. has to enquire first of all whether the person who claims for the interim custody of the vehicle seized, is a registered owner entitled to use the vehicle as required under the provisions of the Motor Vehicles Act. If he is such a person, then ordinarily, he is a right and correct person to whom the custody of the vehicle has to be entrusted. Kariyappa had denied execution of any such agreement in favour of Sreekantaiah and he was the registered owner. Therefore the dispute before the learned Judge was between a registered owner and a person claiming under an agreement of sale which required to be proved an perhaps he had no registration certificate in respect of the vehicle. Thus in this case of Kariyappa the rights and obligations of parties to a hire-purchase agreement were not for consideration. In the case of M/s. Mangharam and Sons v. R. C. Morzaria, there was dispute between the 1st respondent with whom the petitioner-owner of the vehicle had left the vehicle for repairs and without settling his bills to the tune of Rs. 70,000/- the petitioner had removed the lorry depriving him of his lien over it. The learned Magistrate had given the custody of the vehicle to the 1st respondent from whose possession the vehicle was removed. The learned Judge found that the possibility of some one other than the registered owner being in possession or custody of the vehicle with the consent of the registered owner or under an agreement entered into with him cannot be ruled out and therefore when it was an admitted case that the vehicle was in possession of the garage owner for the purposes of repairs he must be deemed to have been in lawful possession so as to be entitled to interim custody. It can however be pointed out from the facts of the case that according to the learned Judge even a person without having a registration certificate could also be entrusted with the interim custody of the vehicle depending on the facts of

a particular case. 9. The decisions referred to by the learned Magistrate do not lay down that it is the hirer who is entitled to interim custody of the vehicle where the same is subject to hire-purchase agreement. Though the decision in the case of Jagadeesan ILR 1978 (2) Kar 1384 : (1978 Cri LJ 1546) was brought to his notice and perhaps the learned Magistrate was convinced that the decision rendered by the learned Judge in that case reflects the correct approach to cases of this nature the learned Magistrate entertained doubt with regard to the very seizure of the vehicle from the possession of the hirer as the investigation did not reveal it. In refusing to deliver to vehicle to the custody of the financier the learned Magistrate to overcome the decision in Jagadeesan's case reasoned as follows : "The said decision clearly enunciates that as between the hirer who is registered owner and the financier who is the absolute owner, the latter is entitle to possession of the vehicle under S. 457, Cr.P.C. In that case financier secured possession of the vehicle on default of the hirer to pay the instalment and it was the case where the vehicle was seized from the financier's custody. In the instant case the facts are distinguishable in as much as rival claimant does not make out a clear case of securing possession of the vehicle on default by hirer. Further more the investigation does not reveal seziure of the vehicle from the rival claimant's custody. It is also of significance to notice that the decisions of our High Court relied on by the learned Counsel for claimant are later ones and have direct bearing on the facts of the present case." To gain support for this view he referred pointedly to the decision of M. S. Patil, J. in the case of Kariyappa v. Sreekantaiah 1980 (1) Kar LJ 332 : (1980 Cri LJ 422) to which we have adverted to above at length. Though in some of the decisions referred to above by the learned Magistrate interim custody was delivered to the registered owner it was on the peculiar facts of each of those cases. The position would not be the same when the vehicle is the subject of hire-purchase agreement as even the real owner would be entitled to apply for registration. Section 2(19) of the old Act and Section 2(30) of the present Act as observed by Nesargi, J. only makes out an exception by widening the meaning of the word "owner" to the effect that a person who is in possession of the concerned vehicle which is the subject of hire-purchase agreement is also the owner for the purposes of the Act. 10. The solemn agreements entered into by the parties under which rights and obligations are created cannot be brushed aside simply because Section 2(30) of the Act widens the meaning of the word "owner" to include the person in possession of a vehicle under the hire-purchase agreement. If the hirer in possession of the vehicle has agreed that the financier or the owner would be at liberty to seize the vehicle whenever defaults are committed by him it becomes the obligation of the hirer to honour his commitment and pay the instalments as stipulated without committing any defaults. Having come in actual possession of the vehicle in pursuance of such agreement and the financier reposes confidence in him and entrusts the vehicle to his possession to run it and make earnings and the hirer taking advantage of the position in which he is placed by virtue of the agreement makes out a case of financier committing theft when he seizes the vehicle under the hire-purchase agreement in fact commits betrayal of the trust reposed in him by the

financier or the real owner. It has become the modus operandi of the hirers, as we come across such instances frequently, to commit defaults either wilfully or otherwise, scuttle the rights of the financiers to seize the vehicle under the agreement by filing complaints of theft, take possession of the vehicle through Court relying on registration certificates and drive the financiers or absolute owners to Civil Courts to recover the money advanced to the hirers. Such a course of open breach of solemn agreements cannot be encouraged by Courts but the Courts on the contrary should give effect to such agreements voluntarily entered into. In our view therefore the learned Magistrate in the case giving rise to Criminal Petition No. 110/92 was wrong in entrusting custody of the vehicle to the hirer-respondent. By the time this Criminal Petition came up for hearing we have on record 'B' report filed by the Investigating Officer relying on the hire-purchase agreement between the parties. However we would like to make it clear that whenever claim and counter-claim in cases of this nature are made it is the duty of the financier to prima facie establish before the criminal Courts that there was in fact such a hire-purchase agreement, that the hirer committed default or defaults in payment of instalments stipulated and that in exercise of the right given to the financier under the agreement the vehicle was seized, to enable the financier to get an order in his favour from the criminal Court. It also becomes the duty of the criminal Court to prima facie satisfy itself on the rights and obligations of the parties to such an agreement. 11. The respondent-hirer complained to the jurisdictional Magistrate's Court that some one had committed theft of the vehicle in question. The financier intimated that it was he who had seized the vehicle in the exercise of his right to seize it on the hirer committing default in payment of instalments. Presently in both the cases that the financier seized the vehicle does not appear to be in controversy and it is how 'B' final report came to be filed by the Investigating Officer in the case concerning Cr.P. No. 110/92. In order to take congnizance of the case there must be material to show that the person who took possession of the vehicle or seized the vehicle committed "theft" of it constituting an offence under the provisions of the Penal Code. "Theft" is defined under S. 378, IPC as follows : "Whoever, intending to take dishonestly any movable property out of the possession of any person without that person's consent, moves that property in order to such taking, is said to commit theft." The word "dishonestly" is defined under S. 24 of the Penal Code thus : "Whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person, is said to do that thing"dishonestly"." Against "wrongful gain" under S. 23 of the Code is defined as the gain by unlawful means of property to which the person gaining is not legally entitled. "Wrongful loss" is the loss by unlawful means of property to which the person losing it is legally entitled. "Gaining wrongfully" and "Losing wrongfully" are defined under the same Section 23 as follows : "A person is said to gain wrongfully when such person retains wrongfully, as well as when such person acquires wrongfully. A person is said to lose wrongfully when such person is wrongfully kept out of any property, as well as when such person is wrongfully deprived of property." If we consider the act of seizure by the financier in accordance with the terms of the hire-purchase

agreement it becomes abundantly clear that means rea is totally absent in the person seizing the vehicle and as by mutual agreement the right has been given to the financier to seize the vehicle it does not amount to taking possession of the vehicle "dishonestly", because such an act does not fall under the category of cases in which the person seizing gains possession wrongfully nor the hirer loses possession wrongfully so as to make such act of seizure an offence falling under S. 379, IPC. In other words the financier would be entitled to possession of the vehicle under the agreement on the happening of an event stipulated in the agreement. Application of this yardstick is necessary to determine whether the seizure by the financier was with an intention to cause wrongful loss to the hirer and wrongful gain to himself. The hirer by his conduct in cases of this nature becomes disentitled to the possession of the vehicle. We however add that the same course need not be adopted by criminal Courts in all cases where the rival claims are by the hirer or by the financier irrespective of the facts of a particular case. In rendering this decision we have taken into consideration only cases where the vehicle is seized by a financier on the hirer committing default in payment of instalments stipulated. In cases where such is not the situation, who is entitled to possession shall be decided by the Courts keeping in view facts of each case and the basis of the claim made. For the reasons aforesaid we allow Criminal Petition No. 110/92, set aside the order of the learned Magistrate impugned and direct delivery of the vehicle to the custody of the financier-petitioner. Criminal Petition No. 447/92 however is dismissed as the trial Court was justified in directing custody of the vehicle to be given to the financier in that case. 12. Order accordingly.